

Nebraska Ethics Advisory Opinion for Lawyers
No. 80-3

WHILE PARTNER A IS SERVING AS AN ELECTED REPRESENTATIVE OF AN AREA TECHNICAL COLLEGE BOARD, HIS PARTNER, B, SHOULD NOT ACCEPT APPOINTMENT AS LEGAL COUNSEL FOR THE BOARD.

You have requested the opinion of our Committee concerning the following question:

Partner A is an elected representative on the area technical college board; the Board indicates a desire to change legal counsel and inquires of Partner A regarding his firm and other firms as potential legal counsel. Would it be proper for A's partner, B, to accept the appointment and serve as legal counsel for the Board?

DISCUSSION

Regarding that portion of your inquiry which states:

". . . the Board . inquires of Partner A regarding his firm . . ."

it would appear that DR 2-103, captioned Recommendation of Professional Employment, is informative. Subparagraphs A and C are as follows:

"A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

"A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner,

except that . . ."

While neither prohibition is absolute, perhaps both should be considered more cautiously in the situation you present wherein Partner A, of whom the Board's inquiry is made, is not simply an acquaintance of the inquirer but rather is a member of the inquirer's Board.

Ethical Consideration 2-4 states in part:

"Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter . . ."

Disciplinary Rule 8-101 A 2, captioned "Action as a Public Official", states:

"A lawyer who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

Whether the action of the area technical college board (on which Partner A serves) in appointing Partner B as its legal counsel is an act "in favor of himself (Partner A)" probably is arguable. Presumably, it would be desirable to Partner B to have a generous amount of legal work to do for the Board; to charge the Board adequate fees therefor; and for the Board to pay such fees fully, promptly, and without question. In all these respects, Partner A would probably have a voice in the decision of the Board and yet would share, with Partner B, in the avails thereof.

Although perhaps unlikely, it certainly is not impossible to imagine situations which might prove very difficult. In

the event of a controversy over a fee resulting from the Board's refusal to pay, would not the suit for the fee be likely to name Partner B as the plaintiff and Partner A as a defendant? And since an attorney has a lien for his compensation upon the papers of his client, not Partner B have a lien on the memoranda of Partner A?

Canon 9 states that a lawyer should avoid even the appearance of professional impropriety. Disciplinary Rule 9-101 B thereunder states:

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Although this Rule is apparently addressed to the lawyer who was a former public employee, it seems to us equally relevant to the lawyer whose partner is a present public employee.

DECISION

For the foregoing reasons, it is the opinion of The Advisory Committee that avoiding the appearance of professional impropriety would be so formidable a task that Partner B should not serve as, nor be recommended by Partner A for, legal counsel to the Board of which Partner A is an existing member.

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