

Nebraska Ethics Advisory Opinion for Lawyers  
No. 82-2

AN ATTORNEY MAY NOT ETHICALLY PARTICIPATE IN THE OPERATION OR MANAGEMENT OF AN AGENCY WHICH SOLICITS ACCOUNTS FOR COLLECTION WHEN HE WILL BE RETAINED BY THE AGENCY TO COLLECT THOSE ACCOUNTS; AND, IF THE ATTORNEY ALSO IS A PART-TIME COUNTY ATTORNEY, ADDITIONAL ETHICAL CONSIDERATIONS INVOLVING A CONFLICT OF INTEREST MAY BE INVOLVED.

QUESTION PRESENTED

May an attorney represent and participate in the operation of a collection agency business licensed pursuant to § 81-8,166, Reissue Revised Statutes of Nebraska, under the following facts and circumstances.

1. The attorney is also the part-time county attorney for the county in which such collection agency is located and conducts its principle business activities.
2. The collection agency office is located in the same building as the attorney's office, from which attorney's office the county attorney's office is also maintained.
3. The collection agency is a Nebraska corporation whose corporate name does not include any portion of the attorney's name.
4. The attorney's participation in such collection agency business would be limited to the following:
  - (a) No corporate stock ownership. All shares of stock of such corporation would be owned by the attorney's spouse.
  - (b) The attorney's only direct participation in the business would be as an executive officer of the corporation whose

duties would pertain only to internal operations of the corporation.

(c) All managerial responsibilities of the corporation would be executed by the attorney's spouse as corporate president and manager.

(d) The attorney would not be a licensed solicitor of such collection agency business. All solicitations of accounts for collection would be conducted by the attorney's spouse or other third parties.

5. The attorney would bring lawsuits on behalf of the collection agency against debtors, and would represent the collection agency as otherwise be necessary.

#### DISCUSSION

The Committee is of the opinion that unethical solicitation is involved in the situation presented.

In Opinion #465 of the Committee on Professional Ethics, New York State Bar Association - April 21, 1977, the question presented was whether a lawyer might be a director of a corporation established to solicit and purchase assignments of judgments at a discount, when his law firm would be retained to collect the judgments. The response of the New York Committee was that the proposed arrangement would be improper. The Committee stated:

The ethics of our profession require that a lawyer who is engaged in another occupation not use that occupation as a cloak for improper solicitation or as a means of obtaining employment for his legal services. N.Y. State 206 (1970). Ethically, it makes no difference whether such solicitation is by the lawyer personally or through a corporation of which he is a director. N.Y. County 324 (1934).

Consistent with the foregoing authorities, in N.Y. State 423 (1975), we held that it would be improper for a professional legal corporation to merge with a corporate collection agency, quoting ABA 225 (1941) as follows:

We are of the opinion that a practicing lawyer cannot participate in the collection activities or the management of an agency which solicits the collection of claims. If a lawyer is to participate in such activities he must withdraw from the practice of law, and refrain from holding himself out as a lawyer.

As authority for its conclusion the New York Committee referred to DR 2-103 of the Code of Professional Responsibility (Code). It provides in part:

C. 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.

For the above reasons, it appears to this Committee that an attorney may not ethically participate in the operation or management of an agency which solicits accounts for collection, when he will be retained to collect those accounts.

Additionally, if the attorney is a part-time county attorney, his participation in the operation or management of such an agency, or representation of such an agency in its collection activities, presents a possible conflict of interest situation, which if not actual, has associated with it the appearances of impropriety.

Cannon 9 of the Code, as adopted by the Nebraska Supreme Court, states that a lawyer should avoid "even the appearance of professional impropriety." Dr 9-101 states in part:

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(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employ

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

DR 5-105 provides in part,

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation or another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

. . . .

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

In the present situation, the county attorney, or members of his office, are responsible for the

prosecution of persons issuing insufficient fund checks. If the county attorney initiates suit or other collection procedures on behalf of the collection agency against a debtor, the debtor may believe an implied threat of criminal prosecution exists when sued by the county attorney, if an insufficient fund check is involved. In essence, in such situations the public may not be able to differentiate the attorney's role as a county attorney from his role as a debt collector; and, even if the county attorney is not actually involved in the prosecution of the debtor, the appearance of professional impropriety would appear to be present.

Moreover, this conflict of interest problem may be compounded by the fact that a creditor may ask the County Attorney's office to prosecute an individual for writing an insufficient fund check issued to the creditor, after collection efforts by the agency have failed. In this situation the county attorney, in effect, would be turning over an insufficient fund check to himself /herself for possible prosecution.

For the additional reasons above, apart from the issue of solicitation, this Committee is of the opinion that it would be improper for a part-time county attorney, or a member of his/her staff, to participate in the operation, management or collection activities of an agency that solicits accounts for collection.