

Nebraska Ethics Advisory Opinion for Lawyers
No. 93-1

IT IS ETHICALLY IMPROPER FOR AN ATTORNEY TO REPRESENT A DEPUTY COUNTY ATTORNEY IN A DISSOLUTION OF MARRIAGE CASE AND, AT THE SAME TIME, CONTINUE AS GUARDIAN AD LITEM IN JUVENILE COURT PROCEEDINGS IN WHICH THE DEPUTY COUNTY ATTORNEY/CLIENT REPRESENTS THE INTERESTS OF THE STATE.

FACTS

An attorney represents, as guardian ad litem, numerous children in County Court in neglect and abuse cases. The Deputy County Attorney who usually represents the State in such matters has retained the attorney to represent her in the dissolution of her marriage. The attorney asks whether his representation of the above-referenced Deputy County Attorney creates a conflict of interest in the on-going Juvenile court cases in which he is the guardian ad litem and the Deputy County Attorney/client acts as the prosecutor.

APPLICABLE CODE PROVISIONS

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(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 different 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 of 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).

(C) In the situations covered by DR 1-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on such representation on the exercise of his independent professional judgment on behalf of each.

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-19. A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty.

Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

DISCUSSION

The duties of a guardian ad litem are set forth by statute. Neb. Rev. Stat. § 43-272 (2) (Reissue 1988) states in pertinent part:

A guardian ad litem shall have the duty to protect the interests of the juvenile for whom he or she has been appointed guardian, and shall be deemed a parent of the juvenile as to those proceedings with respect to which his or her guardianship extends.

In addition, Neb. Rev. Stat. § 43-272.01(2) (1992 Cum.Supp.) provides, in pertinent part:

The guardian ad litem:

(a) Is appointed to stand in lieu of a parent for a protected juvenile who is the subject of a juvenile court petition, shall be present at all hearings before the court in such matter unless expressly excused by the court, and may enter into such stipulations and agreements concerning adjudication and disposition deemed by him or her to be in the juvenile's best interests;

(b) Is not appointed to defend the parents or other custodian of the protected juvenile but shall defend the legal and social interests of such juvenile. Social interests shall be defined generally as the usual and reasonable expectations of society for the appropriate parental custody and protection and quality of life for juveniles without regard to the socioeconomic status of the parents or other custodians of the juvenile.

The Committee recognizes that oftentimes the position

of a guardian ad litem in neglect and abuse cases is consistent with the interests of the State. Nonetheless, the guardian ad litem has a duty to exercise independent professional judgment. The interests of the child and the State in such cases are potentially adverse.

Other jurisdictions have rendered published opinions concluding that an attorney may represent another attorney while opposing that attorney in pending litigation only in limited circumstances. One condition that must be satisfied in such representations is that the client in the affected litigation must receive full disclosure. The client must then consent to the dual representation and waive any conflict of interest. New York Opinion 579; 901:6101 ABA/BNA Law. Man. Prof. Conduct; Nassau County Opinion 88-2, 901:6261 ABA/BNA Law. Man. Prof. Conduct; Philadelphia Opinion 86-45, 901:7503 ABA/BNA Law. Man. Prof. Conduct.

As guardian ad litem you are deemed to be a parent of the juvenile for purposes of the proceeding. You do not have a "client" in the traditional sense. It is the opinion of the Committee that a waiver of a conflict of interest in such circumstances is not possible.

CONCLUSION

It is ethically improper for an attorney to represent a Deputy County Attorney in a dissolution of marriage case and, at the same time, continue as guardian ad litem in Juvenile Court proceedings in which the Deputy County Attorney/client represents the interests of the State.