

**Nebraska Ethics Advisory Opinion for Lawyers
No. 04-1
(Formal Opinion 75-3 rescinded in part)**

I. DOES THE CODE OF PROFESSIONAL RESPONSIBILITY PROHIBIT AN ATTORNEY WHOSE PARTNER IS THE PART-TIME COUNTY ATTORNEY FROM REPRESENTING A CLIENT IN AN APPEAL FROM A CONDEMNATION AWARD?

II. DOES THE CODE OF PROFESSIONAL RESPONSIBILITY PROHIBIT THE SAME ATTORNEY WHO IS ALSO THE CONSERVATOR FOR A LANDOWNER WHOSE PROPERTY IS EXPECTED TO BE CONDEMNED FROM REPRESENTING SUCH LANDOWNER IN A CONDEMNATION ACTION FILED BY THE STATE?

III. DOES THE CODE OF PROFESSIONAL RESPONSIBILITY PROHIBIT THE SAME ATTORNEY FROM REPRESENTING PRIVATE LANDOWNERS IN CONDEMNATION ACTIONS FILED BY THE STATE IN OTHER COUNTIES?

RESTATEMENT OF FACTS

The State of Nebraska is in the process of rerouting a highway in the county where you practice law. In furtherance of this project, the State of Nebraska has filed a petition to condemn property of a landowner in this county. You currently represent that landowner in an appeal from the condemnation award. You are also the conservator of another landowner whose property is expected to be condemned in the next phase of the project. Additionally, you represent other landowners whose real property will be impacted during the next phase of the project. Some of this land is located in other counties.

One of your partners is the part-time county attorney for the county where you practice law.

As a matter of policy, the Nebraska Attorney General does not ask local county attorneys to handle condemnation actions for the State of Nebraska.

STATEMENT OF APPLICABLE STATUTES

NEB. REV. STAT. 23-1201 (Reissue 1997) sets forth in relevant part the duties of a County Attorney as follows:

12-1201. County Attorney; duties; services performed at request of Attorney General; additional compensation; reports.

It shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested. The county attorney may be directed by the Attorney General to represent the state in any action or matter in which the state is interested or a party.

STATEMENT OF APPLICABLE CANONS AND DISCIPLINARY RULES

CANON 8

Ethical Considerations

EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes the lawyer's acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute 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 9-3. After a lawyer leaves judicial office or other public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility prior to his or her leaving, since to accept employment would give the appearance of impropriety even if none exists.

Disciplinary Rules

DR 2-110(B)(2) Mandatory withdrawal.

(B) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, if

(2) The lawyer knows or it is obvious that his or her continued employment will result in violation of a Disciplinary Rule.

DR 5-101(A) Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment.

(A) Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's 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 the lawyer's 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 the lawyer 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 or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.

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

DR 9-101(B) Avoiding Even the Appearance of Impropriety.

(B) A lawyer shall not accept private employment in a matter in which the lawyer had substantial responsibility while he or she was a public employee.

DISCUSSION

In Advisory Opinion No. 75-3 the Nebraska Advisory Committee concluded that neither a county attorney nor his partner may properly represent a private landowner in a condemnation action filed by the State of Nebraska. This prohibition was limited to condemnation actions brought in the county in which the county attorney serves.

In Advisory Opinion No. 81-7 the Nebraska Advisory Committee responded to an inquiry as to whether a county attorney could represent a private client in a negligence action against the State of Nebraska. The Committee, in concluding that the county attorney could not represent the private client, made the following observation:

It is apparent from the examination of the aforesaid statutes that the County Attorney has a real and continuing duty to represent the State of Nebraska in all suits, civil or criminal, arising out of laws of the State of Nebraska, and may even possibly be called upon by the Attorney General to participate in the defense of tort claim actions against the State in the very county which the County Attorney represents. It is obvious under the circumstances that under the existing law there is a conflict of interest between the private client of the County Attorney and the State of Nebraska which the County Attorney has a statutory duty to represent. The State is his primary client and he cannot represent a private client against the State of Nebraska on a claim assertable under the Nebraska Tort Claims Act.

The statute referenced in 81-7 is NEB. REV. STAT. § 23-1201 which has not changed substantively since that opinion was written. Opinion 81-7 did not distinguish between actions filed in the county in which the county attorney serves and actions filed in other counties.

In a private opinion dated September 2, 1987 (Doc. Id. 2042), the Committee unequivocally stated that a county attorney may not in his private practice represent a private client in proceedings against a state agency or in which a state agency has an interest. Further, the Committee noted that NEB. REV. STAT. § 23-1201 makes it clear that a county attorney may not represent any party adversely to the State. This opinion was referenced with approval in private opinions dated July 27, 1993 (Doc. Id. 1338) and August 1, 2000 (Doc. Id. 2036).

In Ethics Opinion KBA E-421 issued in March 2003, the Kentucky Bar Association was asked to reconsider a 1981 opinion in which it had concluded that Commonwealth attorneys could not represent private landowners in condemnation actions filed by the State of Kentucky. Commonwealth attorneys in Kentucky serve the same functions as county attorneys in Nebraska. The Kentucky Bar Association declined to move away from the earlier opinion and concluded, again, that neither a part-time Commonwealth Attorney, nor a member of his or her firm, may represent a landowner in a condemnation action filed by the State. This prohibition applies to all such condemnation actions, not just actions filed in the county in which the Commonwealth attorney serves. On this point, the ethics committee stated that the Commonwealth attorney's client is the Commonwealth, and that the position taken by a landowner in a condemnation action is directly adverse to the Commonwealth. Thus, the committee concluded it was a conflict of interest for the Commonwealth attorney to represent private clients against the Commonwealth.

In Ethics Opinion 75-33, the ethics committee for the Florida State Bar determined that a law firm could simultaneously represent both a private landowner in a condemnation action against a municipality, and the municipality in matters related to labor relations. Both the private client and the municipality (through the mayor and city council) agreed to the dual representation after disclosure. This opinion was based upon Florida's government-in-the-sunshine laws which require that the firm give advance public disclosure of the dual representation and obtain consent from the municipality prior to accepting employment. Nebraska does not have similar laws and a

public entity in Nebraska cannot give consent or waive a conflict of interest. See State ex rel. Nebraska State Bar Association v. Douglas, 227 Neb. 1, 58, 416 N.W.2d 515 (1987). See also, State ex rel. Nebraska State Bar Association v. Richards, 165 Neb. 80, 92, 84 N.W.2d 136, 145 (1957).

In Formal Opinion 75-8, the Nebraska Advisory Committee stated:

It will be seen from the foregoing duties prescribed by statute devolving upon a county attorney, that he represents not only the county and the state in criminal matters, but that he also represents both the county and the state in civil matters, in which the state or the county is a party or interested. A county attorney, therefore, has three clients; the county, the state, and the public. His first duty is to them and it takes precedence over all other commitments to which a county attorney may become engaged either at the time or subsequently thereto. The prohibition against the representation of conflicting interests as defined in Canon No. 6, applies not only to the practicing attorney who is county attorney, but likewise to all members of his firm.

From a review of the above authorities and references, it appears that the Committee has never moved away from the conclusions reached in Formal Opinion 75-3. This is consistent with other states which have considered the precise issue at hand under statutory schemes similar to Nebraska's. The ethical underpinning of the prohibition against representing a private landowner in a condemnation action filed by the State of Nebraska is grounded in DR5-105 concerning conflicts of interest. As a part-time county attorney, your partner has three clients: the county, the state, and the public. As such, it would be unethical for him to represent private landowners in condemnation actions filed by the State. This prohibition is imputed to all other attorneys in the firm.

In Formal Opinion 75-3, this Committee concluded, without elaboration, that a part-time county attorney could represent landowners in condemnation actions filed in counties other than the one in which he serves. A review of subsequent published and private opinions issued by the Committee reveals, however, that the Committee has uniformly extended the prohibition set forth in 75-3 to civil and criminal actions filed in other counties when the State is a party to the suit. In a private opinion dated December 23, 1991 (Doc. Id. 1165), the Committee concluded that a part-time county attorney could represent a private client in an adjoining county in a child support matter that did not involve either the State or the County where the attorney had prosecutorial responsibility. In a private opinion issued November 5, 2001, the Committee concluded that it would be unethical for a part-time county attorney or the members of his firm to represent either criminal defendants or child support obligors in neighboring counties where the State is interested in or is a party to the action. To the extent Formal Opinion 75-3 implies that a county attorney may represent landowners in other counties in condemnation actions filed by the State, it is rescinded.

CONCLUSION

Based upon the foregoing, the specific questions you posed to the Committee are answered as follows:

- I. Your firm is prohibited from representing a client in an appeal from a condemnation award.
- II. Although your representation as conservator for a landowner is not directly affected by this opinion, you may not represent him in any future condemnation action which might be filed by the State of Nebraska.
- III. Your firm is prohibited from representing private landowners in condemnation actions filed by

the State in other counties.

As stated earlier in this opinion, Formal Opinion 75-3 is rescinded to the extent it implies that a county attorney may represent private landowners in other counties in condemnation actions filed by the State of Nebraska.

November 6, 2003

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