

**Nebraska Ethics Advisory Opinion for Lawyers
No. 09-07**

A COUNTY ATTORNEY DOES NOT HAVE A CONFLICT OF INTEREST IN PARTICIPATING IN OR VOTING IN A DRUG COURT DECISION TO REMOVE A PARTICIPANT FROM A DRUG COURT PROGRAM.

STATEMENT OF FACTS

A county attorney and members of his office are participating in drug court programs. There are juvenile, family and DUI “drug courts.” As per drug court policy, the prosecutor participates in the team meetings on the participants and is present during the drug court hearings in open court. The team meets regularly to discuss each participant’s progress in the program. If the participant violates a drug court rule, sanctions may be imposed. At times, the team members vote on whether the participant should be allowed to continue in drug court or should be terminated from the drug court program and referred to the county attorney for the filing of a motion to revoke the participant’s probation. A county attorney is concerned about a potential ethical quandary created by voting to terminate a participant who will then be referred to the county attorney’s office for prosecution.

QUESTION PRESENTED

Whether a county attorney has a conflict of interest which precludes him from participating in or voting in a drug court decision to remove a participant from a drug court program.

NEBRASKA RULES OF PROFESSIONAL CONDUCT

Neb. Ct. R. Prof. Cond. § 3-501.8(b): “A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules”.

NEBRASKA DRUG COURT STATUTES

In Nebraska, the legislature has enacted NEB. REV. STAT. §§ 24-1301 and 24-1302 to address drug court programs. Section 24-1301 provides the legislative finding that drug court programs are effective in “reducing recidivism . . . and that such programs offer an accused person an alternative to traditional criminal justice or juvenile court”. The Legislature authorized such problem-solving courts and directed the Nebraska Supreme Court to promulgate court rules to establish the same.

NEBRASKA SUPREME COURT RULES

Rules for Problem-Solving and Drug Courts, § 6-1201 et seq. - These Rules became effective March 1, 2007. The rules require that all problem-solving courts be approved by the Nebraska Supreme Court. *See* § 6-1207(A) (in order to establish drug court program, approval must first be granted by Nebraska Supreme Court pursuant to §§ 6-1201 and 6-1202). In addition, Rule § 6-1207(B) requires, inter alia, that all drug courts in Nebraska adhere to the 10 Key Components as identified by the National Association of Drug Court Professionals. Those 10 Key Components can be found on the National Association of Drug Court Professionals web site at <http://www.nadcp.org/whatis/>. A review of the 10 Key Components reveals that involvement in drug courts by both prosecutors and defense attorneys is presumed. The question asked of the committee implicates Key Component #2. Key Component #2 provides: "Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights." "Performance benchmarks" for Key Component #2 include the following duties/roles for a prosecutor:

...

3. The prosecuting attorney

- a. reviews the case and determines if the defendant is eligible for the drug court program;
- b. files all necessary legal documents;
- c. participates in a coordinated strategy for responding to positive drug tests and other instances of noncompliance;
- d. agrees that a positive drug test or open court admission of drug possession or use will not result in the filing of additional drug charges based on that admission; and
- e. makes decisions regarding the participant's continued enrollment in the program based on performance in treatment rather than on legal aspects of the case, barring additional criminal behavior.

DISCUSSION

No drug court can exist in Nebraska without the prior approval of the Supreme Court. All programs must comply with the 10 Key Components as identified by the National Association of Drug Court Professionals, and these programs must have inter-local agreements with the Office of Probation delineating responsibilities of the probation office.

Drug Courts are a collaborative effort of courts, prosecutors, defense counsel, law enforcement and treatment providers. Participation is voluntary. The county attorney does not have to participate in drug court programs. The prosecutor decides, as he or she does with any

diversion program, or any plea agreement, that his office's support of a drug court program is the best solution for the state. He then sets policy to endorse the drug court approach and creates written policy that reflects the rules of the drug court program.

The prosecutor represents the state in all stages of the drug court program. By agreeing to participate in the drug court program, the prosecutor is using his or her prosecutorial discretion. He or she, again, is using prosecutorial discretion when agreeing to reduce charges for an individual defendant to participate in drug court. This is really no different than entering into a plea agreement or choosing to refer to a diversion program. The prosecutor is still the representative of the state. To the extent that the goal of a drug court program is rehabilitation of the defendant, the prosecutor has determined that the state's interest is the same.

Similarly, the defendant's participation in drug court is voluntary. The defendant must clearly understand the requirements and risks of drug court participation prior to agreeing to enter the program. See Key Concept #2, Performance Benchmark 4 (defense counsel advises participant of nature and purpose of the drug court, rules governing participation, consequences of abiding or failing to abide by the rules, and how participating or not participating in drug court will affect his or her interests; explains all rights defendant will relinquish; gives advice on alternative courses of action; explains that because criminal prosecution for admitting to alcohol or other drug use in open court will not be invoked, defendant is encouraged to be truthful with the judge and treatment staff).

In most programs, the defendant agrees in writing to participate. Throughout the entire process, before, during, and after drug court, the defendant usually is represented by his own legal counsel.

The National Drug Court Institute has prepared a report for the Department of Justice entitled "Ethical Considerations for Judges and Attorneys in Drug Court". The authors of the report discussed the implications of the ABA Model Rules of Professional Conduct and Standards for Criminal Justice in the Drug Court setting. The authors specifically addressed the concern which prompted the county attorney's inquiry to this Committee.

Diligent Representation in Drug Court - Prosecutors

Criminal Justice Standard 3-3.1(f) which forbids prosecutors "to promise not to prosecute for prospective criminal activity" appears to conflict with a central feature of the prosecutor's role in drug court. The text of Drug Court Key Component #2 provides that the prosecuting attorney "agrees that a positive drug test or open court admission of drug possession or use will not result in the filing of additional drug charges based on that admission." The conflict is only apparent, not real: drug court prosecutors do not agree not to prosecute future crimes of use or possession but simply agree to a form of use immunity for information obtained through drug

court hearings or tests. Prosecutors may also, in the exercise of ordinary prosecutorial discretion, choose not to bring charges or seek convictions for offenses committed by drug court participants. They may even declare that they are inclined not to prosecute participants who commit certain types of offenses but are otherwise advancing in the recovery process. So long as prosecutors do not promise not to bring charges, but promise only not to use certain information against the participants, prosecutors do not violate Standard 3-3.1(f).

Ethical Considerations for Judges and Attorneys in Drug Court (2001), National Drug Court Institute, p. 33.

The report appropriately acknowledges that the state and the defendant can both benefit by the defendant's successful completion of the drug court program. Not all issues in the judicial system are at odds. The successful reintegration of the defendant into productive society can be a joint goal.

Where a prosecutor learns of newly committed crimes during the prosecutor's participation in drug court, the prosecutor still has the right to prosecute such crimes. Participation in drug court does not make a defendant immune from prosecution for newly discovered or newly committed crimes. This includes violations of drug court rules that result in termination in the program and referral to the county attorney's office for prosecution. The information obtained by the prosecutor through the prosecutor's participation in drug court may be subject to an agreement of use immunity, but the county attorney's participation in drug court would not bar prosecution of a motion to revoke probation.

CONCLUSION

The county attorney represents the state in drug court. The county attorney, by agreeing to participate, has decided that the interest of the state is best served by allowing the defendant to participate in drug court. The state and the defendant both benefit by participation. The county attorney does not represent the defendant. The defendant agrees, usually in writing, to participate in drug court. The participant submits to the procedures and protocols of drug court, knowing that the judge, the county attorney, the defense counsel, law enforcement and the treatment providers will share information about the defendant, and each will have input into whether the defendant successfully completes drug court. There is no ethical violation in the county attorney voting to remove a participant from the drug court, even if that results in a referral to the county attorney's office for prosecution of a motion to revoke probation. This is part of a prosecutor's role in representing the state.