

Nebraska Ethics Advisory Opinion for Lawyers
No. 71-1

A LAW FIRM MAY ETHICALLY CONTINUE TO REPRESENT A DEFENDANT IN THE SUPREME COURT ON ERROR PROCEEDINGS BASED ON COUNTY ATTORNEY'S EXCEPTIONS NOTWITHSTANDING THE FACT THAT THE PRESENT COUNTY ATTORNEY IS A MEMBER OF THE FIRM.

CODE PROVISIONS INTERPRETED:

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 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

FACTUAL SITUATION

The client was charged with the commission of a felony. He retained the inquiring law firm to represent him. The firm filed a motion to quash the information on the ground, among others, that the statute under which the prosecution was based was unconstitutional. The trial court sustained the motion on the ground that the statute was unconstitutional and discharged the

defendant.

The then county attorney took exception to this ruling and applied for and was granted leave to docket error proceedings in the Supreme Court. Thereafter the Attorney General took over the case and filed the state's brief in the Supreme Court. Meanwhile a member of the inquiring law firm was elected county attorney and has now assumed the duties of that office.

QUESTION

The question posed is whether or not the inquiring law firm may continue to represent the client by preparing and filing a brief on his behalf and arguing the appeal before the Supreme Court.

DISCUSSION

The inquiry was prompted by the belief that a conflict of interest may exist which would require the firm to withdraw from the case. The principle which bars an attorney from representing an interest adverse to another client is most often said to be grounded upon the confidential relationship which exists between attorney and client. By imposing this disability upon the attorney confidential information that might be conveyed by either client is protected from disclosure and wrongful use. See 52 ALR 2d 1250. In the instant situation, no factual elements are present nor are any client confidences material to the issue of constitutionality involved. The issue is not one of guilt or innocence but the purely legal question of whether or not the statute in question contravenes constitutional limitations.

It would seem that this law firm has a duty and obligation to the client from whom it has received its fee for services and for whom it has presumably devoted the time and effort required to prepare, submit and argue the constitutional issue involved. To require the client at this state of the proceedings to assume the burden and expense of securing other counsel would appear to be prejudicial to his best interests. We exist

as a profession to serve our clients, not to do them a disservice unless compelling circumstances require it. The Committee finds no such compelling circumstances in this inquiry.

While not directly pertinent to the present inquiry, it is possible that the Supreme Court will sustain the exceptions and the trial court may issue its warrant for the rearrest of the defendant under the provisions of Section 29-2316 R.R.S., 1943. Should this occur we suggest that the inquiring law firm should then withdraw as counsel for the defendant and procure the appointment of a special prosecutor under the provisions of Section 23-1204.01 R.S. Supp. 1969.

CONCLUSION

This committee concludes that it will not be improper for the inquiring law firm to continue to represent the defendant in the error proceedings in the Supreme Court.

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