Nebraska Ethics Advisory Opinion for Lawyers
No. 72-3

AN ATTORNEY WHO IS ELECTED TO THE OFFICE OF COUNTY JUDGE PURSUANT TO THE PROVISIONS OF L.B. 1032, LAWS 1972, SHOULD NOT DO INCOME TAX WORK DURING THE TIME HE HOLDS THE OFFICE OF COUNTY JUDGE.

CODE PROVISIONS INTERPRETED:

Judicial Canon 31

Judicial Canon 4

The following inquiry has been made by the Attorney General of Nebraska:

> May an attorney who is elected to the office of County Judge pursuant to the provisions of L.B. 1032, Laws 1972, do income tax work during the time he holds the office of County Judge?

Canon 31 reads as follows:

> In many states the practice of law by one holding judicial positions is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practises law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.
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> He should not practise in the court in which he is a judge, even when presided over by

> another judge, or appear therein for himself in any controversy.
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> If forbidden to practice law, he should refrain from accepting any professional employment while in office.
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> He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

Canon 4 reads as follows:

> A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

Section 14, Article V, Constitution of Nebraska, provides:

> No judge of the Supreme or district courts shall act as attorney or counselor at law in any manner whatsoever. No judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court.

Section 7-111, R.S. 1943, as amended by L.B. 1032, Section 92, Laws 1972, provides that

> No person shall be permitted to practice as an attorney in any of the courts of this state while holding the office of . . . county judge.

Neither Section 14, Article V, Constitution of Nebraska, nor Section 7-111, R.S. 1943, as amended, prohibits a

County Judge from doing income tax work. Accordingly, the resolution of this question requires a consideration of Judicial Canons 31 and 4.

The Supreme Court of Nebraska has the inherent power to define the practice of law, and it has recognized that this cannot be done with precision. In State ex rel. Nebraska State Bar Association v. Butterfield, 172 Neb. 645, for example, the court said (p. 647):

> The Supreme Court of this state has the inherent power to define and regulate the practice of law in this state . . . While an all-embracing definition of this term "practicing law" would involve great difficulty, it is generally defined as the giving of advice or rendition of any sort of service by a person, firm, or corporation when the giving of such or rendition of such service requires the use of any degree of legal knowledge or skill . . . In an ever-changing economic and social order, the "practice of law" must necessarily change, making it practically impossible to formulate an enduring definition . . .

Income tax work may, or may not, constitute the practice of law; and, indeed, the determination of this question depends upon what is done in each instance. The author of the Annotation in 9 A.L.R.2d 797, says (p. 797):

> As taxes are offspring of and do not exist apart from law, a certain minimum of legal competency is ever a necessity in grappling with tax questions. Yet, as is frequently the case elsewhere, the legal facet may be so clear that none would insist on calling a professional counselor. From this extreme of simplicity, legal problems shade off into the labyrinthine. The legal landmark of M'Cullock v. Maryland, for example, was a tax case.
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> On the factual side the inquiry may depend from a mere addition of sales slips to

> intricate problems of accountancy and valuation. Here lawyers cannot lay claim to special competency; yet somewhere between, say a conference in the assessor's office and argument to the appellate court, a member of the bar must take control.

However, in State ex rel. Nebraska State Bar Association v. Butterfield, 172 Neb. 645, the court held that the preparation of income tax returns by an attorney, during the time of his suspension, constituted the practice of law "whether or not it might under some circumstances be properly performed by others not admitted to the bar". The court said (p. 649):

> The respondent admits that he prepared deeds, mortgages, releases, and income tax returns during the period of his suspension. Admittedly respondent performed such work prior to his suspension. Some were performed in relation to real estate transactions in which he was the real estate broker, but in others he was not. It seems clear to us that the doing of such work is within the province of a lawyer to do. It is properly identified as the practice of law, whether or not it might under some circumstances be properly performed by others not admitted to the bar. An order of suspension deprives the suspended lawyer from performing any service recognized as the practice of law and which is usually performed by lawyers in the active practice of law. It is the contention of respondent that these services were performed in his capacity as a licensed real estate broker, notary public, abstracter, and loan agent. It is not necessary for us to determine in this case if and under what circumstances others might perform such services, although not admitted to the bar. A suspended lawyer, who in connection with his law office engages in other activities, is in no different position than the active lawyer who confines

> himself solely to the practice of law in determining if the suspension order was violated. Where one is generally known in a community as a lawyer, it might well be impossible to divorce two occupations closely related if the rule were otherwise. A suspended lawyer will not be heard to say that services recognized as within the practice of law were performed in some other capacity when he is called to account.

Canon 31 states that the practice of law by a judge of a court of general jurisdictions "should never be permitted"; and that if the practice of law by a judge of an inferior court is permitted, it is attended by "great delicacy" because he "must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success".

Canon 4 states that a "judge's official conduct should be free from . . . the appearance of impropriety".

L.B. 1032, Section 13, Laws 1972, fixes the compensation of County Judges at $20,000.00 annually, except in limited instances in which the compensation is fixed at $27,500.00 annually. This dispels any inference that a County Judge should be permitted to practice law because his judicial compensation is not adequate, cf. Canon 31.

CONCLUSION

1. An attorney who is elected to the office of County Judge is engaged in the practice of law if he does income tax work during his judicial term.

2. An attorney who is elected to the office of County Judge should not engage in practices which are attended by "great delicacy", whereby it may seem that he has utilized his judicial position "to further his professional success", and whereby his official conduct may not be free from the appearance of impropriety.

3. An attorney who is elected to the office of County Judge pursuant to the provisions of L.B. 1032, Laws 1972, should not do income tax work during the time he holds the office of County Judge.