

Nebraska Ethics Advisory Opinion for Lawyers  
No. 75-7

IT IS IMPROPER FOR A FORMER ASSISTANT CITY PROSECUTOR OF A MUNICIPALITY TO REPRESENT A CLIENT WHO WAS ARRESTED FOR INTOXICATION AND RESISTING ARREST DURING THE TIME THE ATTORNEY WAS SERVING AS SUCH PUBLIC OFFICIAL, EITHER IN THE RESULTING CRIMINAL PROCEEDINGS IN THE MUNICIPAL COURT OR IN CIVIL RIGHTS LITIGATION IN FEDERAL COURT INVOLVING THE INCIDENT.

FACTS

From December 1974 until March 1975, the inquiring attorney was assistant City Prosecutor of a municipality. In February 1975 a prospective client of said lawyer was arrested and charged with intoxication and resisting arrest in the Municipal Court. He has asked the inquiring attorney to represent him both in the criminal proceedings in Municipal Court, and in possible civil rights litigation in Federal Court.

QUESTIONS PRESENTED

1. May the lawyer represent the accused in criminal proceedings in the Municipal Court?
2. May the lawyer represent the accused in civil rights litigation in Federal Court?

CODE PROVISIONS INVOLVED

Canon 9 A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

EC 9-3. "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

DR 9-101. Avoiding Even the Appearance of Impropriety.

"B. A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

#### DISCUSSION

The inquiry does not state that the assistant City Prosecutor had "substantial responsibility" for handling in Municipal Court the prosecution of the prospective client for intoxication and resisting arrest. It is clear, however, that the lawyer was employed by the municipality and was actively serving on the staff of the City Prosecutor in February 1975 when the alleged offenses were committed. He did not terminate his employment as a prosecutor until March 1975.

In these circumstances, we may assume that facts about the arrest including police reports, tests and other pertinent information were available to the assistant prosecutor. It is not important whether or not he actually examined this information. Prior to the adoption of the Code of Professional Responsibility, lawyers were governed by the Canons of Professional Ethics of the American Bar Association. The old Canon 6 concerned conflicting interests and provided in part:

"It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Canon 9 of the new Code of Professional Responsibility admonishes that a lawyer should avoid even the appearance of professional impropriety.

It seems to us that from December 1974 until March 1975 the assistant prosecutor was required to represent

the municipality which employed him and to decline professional employment by any person charged with a criminal offense in the Municipal Court of said city during that period. Even if the assistant prosecutor lacked personal knowledge of the complaint filed here, he owed a duty to his employer which will not permit him to represent an adverse party. Were the inquiring lawyer to accept employment either to represent the accused in the Municipal Court prosecution or in Federal Court civil rights litigation, there would be an appearance of impropriety. We therefore believe that the prospective employment of the inquiring attorney by the accused person should be declined.

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