

Nebraska Ethics Advisory Opinion for Lawyers
No. 87-3

WHEN A LAWYER IS APPOINTED BY A COURT OR REQUESTED BY A BAR ASSOCIATION TO UNDERTAKE REPRESENTATION OF A PERSON UNABLE TO OBTAIN COUNSEL, WHETHER FOR FINANCIAL OR OTHER REASONS, THE LAWYER SHOULD NOT SEEK TO BE EXCUSED FROM UNDERTAKING THE REPRESENTATION EXCEPT FOR COMPELLING REASONS.

QUESTION PRESENTED

Does an ethical obligation exist for a member of the Bar to accept an indigent's criminal defense when appointed by the Court?

DISCUSSION

Canon 2 of the Code of Professional Responsibility (Code), as adopted by the Nebraska Supreme Court, provides: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

EC 2-25 of the Code states:

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay

reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for their profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

And EC 2-29 of the Code states:

When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceedings, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

The foregoing are Ethical Considerations. There is no disciplinary rule in Nebraska which treats the question. Substantive law, however, does require a lawyer to accept a court appointment to represent an indigent defendant. See, inter alia, U.S. v. Dillon, 346 F.2d 633 (9th Cir. 1965). In that case the court stated that representation of an indigent pursuant to a court order without a fee "is a condition under which lawyers are licensed to practice as officers of the court An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no

compensation under court order."

The exceptions (compelling reasons) which would justify declining appointment to represent an indigent in a criminal defense matter or a person unable to obtain counsel are as follows:

1. The appointment would involve the lawyer in an impermissible conflict of interest, would involve a risk of improper use of information relating to the representation, or similar ethical dilemma.

2. A lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. EC 2-30. This "intensity of his personal feeling" should be distinguished from mere "repugnance of the subject matter of the proceedings, the identity or position of the person involved in the case, or the belief of the lawyer that the defendant in a criminal proceeding is guilty," which reasons do not constitute sufficient compelling reasons to decline the representation.

3. The lawyer is not competent to handle the case. EC 2-30.

4. Acceptance would impose an unreasonable financial hardship on the lawyer. Whether a financial burden is "unreasonable" will depend on the facts of each individual case. A minor loss of income or compensation less than what would be received from a paying client generally would not constitute an unreasonable financial burden, which would justify declining the appointment.

CONCLUSION

The question presented only inquires about acceptance of an indigent's criminal defense when appointed by a Court. The Committee's response is broader, and adopts the language of EC 2-29 that there is an ethical obligation for a lawyer "appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, and the lawyer should not seek to be excused from undertaking the representation except for compelling reasons."

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