

Nebraska Ethics Advisory Opinion for Lawyers
No. 87-5

IT IS UNETHICAL FOR A COUNTY ATTORNEY, WHILE ACTING UNDER HIS OR HER STATUTORY DUTIES, TO BRING AN ACTION TO ESTABLISH THE PATERNITY OF CHILDREN BORN OUT OF WEDLOCK AND TO SUBSEQUENTLY REPRESENT EITHER PARENT IN A DISPUTE OVER THE CUSTODY OF THE MINOR CHILDREN.

FACTS

Nebraska Revised Statutes Section 43-512.03(4) (Cum Supp. 1987), requires a county attorney or authorized attorney to "establish paternity and collect child support on behalf of children born out of wedlock." A county attorney, in discharging his duties under the above-quoted statute, has been confronted with the situation in which the putative father admits paternity and counter-petitions for custody of the minor child. When this occurs, the District Court has taken the position that the county attorney must represent the mother in the custody dispute.

QUESTION PRESENTED

May the county attorney ethically represent either parent in a dispute over custody of minor children born out of wedlock in view of the fact that he is required by statute to establish paternity?

DISCUSSION

The Committee is of the opinion that the county attorney may never ethically represent either parent in any proceeding involving custody of a minor child unless the county board has adopted a general policy permitting its county attorney to represent parties to a custody dispute and agreeing to engage, at the expense of the county, a special prosecutor to handle any nonsupport actions that may thereafter arise. The

Committee has previously considered the issue of county attorneys representing parties to a divorce action involving minor children in Advisory Opinions [71-2](#), [74-1](#), [74-12](#), and [76-15](#). The Committee's summaries of these opinions read as follows:

[71-2](#). A law firm of which a county attorney is a member may not ethically represent clients in divorce cases involving minor children.

[74-1](#). Amendment to Opinion No. [71-2](#). A county attorney or a law firm of which he is a member may not ethically represent clients in divorce actions involving minor children unless the county board of such county has adopted by Resolution a general policy permitting its county attorney to represent parties to a divorce action involving minor children and agreeing to engage at the expense of the county a special prosecutor to handle any nonsupport prosecutions subsequently arising out of such divorce action. In any such case, the county attorney is precluded from prosecuting a criminal action against one of the parties to the divorce proceeding for failure to pay child support, and the prosecution must be handled by an independent special prosecutor duly appointed by the county board.

[74-12](#). The prohibition against a county attorney embodied in Advisory Opinion No. [71-2](#) (as amended by Advisory Opinion No. [74-1](#)) does not extend to divorce actions involving minor children in counties other than that in which he is the county attorney.

[76-15](#). A county attorney who, prior to becoming such, had represented a wife in a divorce action resulting in a decree requiring child support from the husband, should not institute criminal charges against the husband for nonsupport, but should arrange for the county board to employ a special prosecutor to prosecute the nonsupport action.

While the foregoing Advisory Opinions deal with divorce actions, the Committee recognizes that the underlying basis for the prohibition set out in those opinions remains the same in the situation presented for this

Opinion. In both instances, the county attorney's statutory duty to enforce child support orders constitutes a conflict of interest with the interests of one or both of the parents. Under the particular statute involved in this situation, the county attorney is directed to proceed "on behalf of children born out of wedlock." In doing so, the county attorney is acting on behalf of the State which is, in turn, concerned with the best interests of the child. The representation by the county attorney of either parent in a custody dispute arising out of a paternity action brought by the county attorney might very well conflict with the best interests of the child. A potential conflict also arises on the issue of child support between the county attorney's duty to enforce support decrees and the representation of a parent against whom such a decree might issue and be enforced.

The Code of Professional Responsibility requires a lawyer to exercise independent judgment on behalf of a client in Canon 5. EC 5-1 states that 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." DR 5-105(A) provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

Under the DR 5-105(C), a lawyer may represent multiple clients if it is obvious that he or she can adequately represent the interest of each, with consent of each client after full disclosure. The Committee is of the opinion that the disclosure and consent provisions of DR 5-105(C) do not apply to this situation because of the minor child's inability to consent to multiple representation.

This situation is also affected by DR 4-101 which requires the preservation of confidences and secrets of a client; DR 7-104 which prohibits communicating with one of an adverse interest; and DR 7-105 which prohibits a lawyer from presenting or threatening to present criminal charges in order to obtain an advantage in a civil matter. Under DR 5-105(D), if a lawyer is required to decline employment or withdraw, no partner or associate or any other lawyer affiliated with the attorney or his or her firm may accept or continue such employment.

Other bar association ethics committees have dealt with situations similar to the one presented here. In its Opinions E-83-17 and E-83-18, the Wisconsin Committee on Professional Ethics said that a lawyer who represents the state in a paternity action may also represent the mother in a paternity action since the interests of the state and the mother are substantially the same. However, the Wisconsin Committee further stated that a lawyer is prohibited from subsequently bringing a child support action against the mother where he has represented the state and the mother in a paternity action. The Iowa State Bar Association Committee on Professional Ethics and Conduct stated in its Opinion 84-5, that a part time county criminal prosecutor may represent an indigent client in a divorce proceeding where there is another assistant county attorney responsible solely for child support recovery and the lawyer's government offices and staffs are geographically separate. In its informal Opinion No. 81-8, the Ohio State Bar Association would allow multiple representation of the state and a parent by the county attorney, as would the Kansas Bar Association in its Opinion No. 83-7. However, this Committee rejects the notion that the county attorney can represent without conflict the interest of the state and the interest of either parent once custody becomes an issue.

CONCLUSION

It is unethical for a county attorney, while acting under his or her statutory duties, to bring an action to

establish the paternity of children born out of wedlock and to subsequently represent either parent in a dispute over the custody of the minor children. Should a dispute arise over custody during paternity proceedings, each party should retain counsel other than the County Attorney to deal with custody issues.

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