

Nebraska Ethics Advisory Opinion for Lawyers
No. 90-1

UNDER THE FACTS PRESENTED, A COUNTY PUBLIC DEFENDER SHOULD NOT REPRESENT A DEFENDANT CONVICTED OF FIRST-DEGREE MURDER AND SENTENCED TO DEATH IN SEEKING TO OVERTURN THE CONVICTION AND SENTENCE IN A FEDERAL HABEAS CORPUS ACTION WHERE THE GROUNDS FOR RELIEF INVOLVE ALLEGED INEFFECTIVE ASSISTANCE OF ANOTHER LAWYER IN THE PUBLIC DEFENDER'S OFFICE WHO IS NO LONGER ASSOCIATED WITH THAT OFFICE.

FACTS

Attorney A was a county public defender and was appointed to represent a defendant who was charged with first-degree murder and ultimately given a death sentence. Attorney A's assistants were Attorneys B and C, who assisted Attorney A in the defense. After the defendant was sentenced to death, the matter was appealed to the Nebraska Supreme Court. Prior to completion of the proceedings in the Nebraska Supreme Court, Attorneys A and B withdrew as public defenders.

Attorney C was appointed by the county board to complete a reply brief and, following affirmance, prepared and filed a brief for rehearing in the Nebraska Supreme Court. Attorney C then left the public defender's office. Attorney D was appointed county public defender on the day after Attorney A withdrew. Upon denial of rehearing in the Nebraska Supreme Court, Attorney D filed a petition for writ of certiorari with the United States Supreme Court, which was denied.

Attorney D requested an opinion from the Advisory Committee as to whether he could properly represent the defendant in post-conviction relief proceedings in the state court, alleging that the defendant was denied effective assistance of counsel by Attorneys A and B when they represented the defendant through the public

defender's office. The Advisory Committee, in Opinion No. 87-6, issued an opinion stating that it would be a conflict of interest for Attorney D to represent the defendant in the post-conviction relief proceedings. Accordingly, Attorney D withdrew, and Attorney E (who is not connected with the public defender's office) was appointed to represent the defendant in the state post-conviction relief proceedings. Post-conviction relief has been denied by the Nebraska Supreme Court.

Attorney D now wishes to file a federal habeas corpus action in behalf of the defendant which would allege, inter alia, ineffective assistance of counsel by Attorneys A and B when they were formerly associated with the public defender's office.

QUESTION PRESENTED

May Attorney D, the current county public defender, seeking relief in federal habeas corpus proceedings, ethically allege that former lawyers for the county public defender's office provided ineffective assistance of counsel to the defendant at the time he was convicted and sentenced to death?

DISCUSSION

The factual situation is in essence no different from the situation which was the subject of the Committee's Opinion No. 87-6. In that opinion, the Committee noted that it would clearly be a conflict of interest for Attorney D to assert on behalf of a defendant seeking post-conviction relief that Attorney A provided ineffective assistance of counsel. The Committee determined that this conflict of interest situation is imputed to any other lawyer employed by the same public defender's office. The Committee noted that the question deals not only with actual conflicts but with the appearance of impropriety and that "a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

The prospective federal habeas corpus action is one of

several avenues that remain to the defendant in challenging his sentence. Having determined that there was an imputed conflict of interest that ethically proscribed Attorney D from representing the defendant in the state post-conviction relief proceedings, this Committee has no alternative but to continue to maintain this position in connection with any subsequent court proceedings by the defendant challenging his sentence. If a conflict does in fact exist, participation in the defendant's challenges by Attorney D at this stage of the proceedings would merely provide an additional basis to the defendant to challenge the original proceedings.

Since there is no apparent reason why the defendant could not obtain representation from the lawyer who handled the post-conviction relief proceedings or some other lawyer, Attorney D should not represent the defendant in the federal habeas corpus proceedings.

CONCLUSION

Under the facts presented, a county public defender should not represent a defendant convicted of first-degree murder and sentenced to death in seeking to overturn the conviction and sentence in a federal habeas corpus action where the grounds for relief involve alleged ineffective assistance of another lawyer in the public defender's office who is no longer associated with that office.