

Nebraska Ethics Advisory Opinion for Lawyers
No. 71-3

A COUNTY ATTORNEY WHO REPRESENTS GENERALLY A CORPORATION AND ITS CHIEF OFFICER SHOULD DISQUALIFY HIMSELF IN A CRIMINAL PROSECUTION OF A VICE PRESIDENT OF THE CORPORATION FOR THEFT OF TRADE SECRETS OF THE CORPORATION.

CODE PROVISIONS INTERPRETED:

CANON 6. A Lawyer Should Exercise Independent Professional Judgment on Behalf of Clients.

6-106 (B) "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted by Disciplinary Rule 6-106 (C)."

CANON 7. A Lawyer Has a Duty to Represent His Client with Zeal Limited Only by His Duty to Act Within the Bounds of the Law.

FACTUAL SITUATION

A County Attorney represents generally a corporation and its chief officer in a technical manufacturing field. One of the Vice Presidents of the corporation has been charged with appropriating data research files and other security files from the premises of the corporation and delivery of this material to another corporation in another city. The County Attorney has filed a criminal complaint under Section 28-548.01, .02 and .03 charging this officer under the trade secrets embezzlement or theft section of the Nebraska Commercial Code. The County Attorney has, however, stayed execution of the warrant upon objection being made to his qualification to handle the prosecution in view of his representation as above set forth. The County Attorney has stated that he has disqualified

himself from handling any civil action that might arise out of this set of facts and circumstances.

QUESTION

Is the County Attorney disqualified from proceeding with the criminal prosecution above mentioned?

DISCUSSION

If it appears that a violation of the Canons of Ethics has already occurred in a matter, this Committee will not ordinarily issue an opinion but the matter will have to proceed in the regular way through the local committee. However, inasmuch as the proposed prosecution in this matter is in a preliminary stage and no warrant has been issued for an arrest, the Committee believes that the County Attorney is entitled to an opinion of the Committee at this time as to his further actions in this matter.

The new Code of Professional Responsibility under Canon 6 quoted above in review of the Ethical Considerations bearing in this situation states in paragraph 12 that it is the duty of counsel to maintain the "independence of professional judgment" required in the discharge of his duties and that a problem in this area arises if there are interests of multiple clients. In paragraph 13 of this discussion it stated:

"He should resolve all doubts against the propriety of the representation." (p. 63)

Canon 7 above quoted in paragraph 13 of the Ethical Considerations involved therein states:

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the public prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers. such as in the

selection of cases to prosecute; (2) during trial the public prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the public prosecutor has responsibilities different from those of a lawyer in private practice; the public prosecutor should make timely disclosure to the defense of available evidence, known to him, supporting the innocence of the defendant." (p. 80)

The statements just made are supported in the footnote by A.B.A. opinions and decisions of courts including the Supreme Court of the United States.

Our Nebraska statutes make provision for the disqualification of a County Attorney where he may "be concerned" for parties other than the state or county in criminal and civil cases "depending upon the same state of facts". R.S. Neb. 1943, Reissue 1970, Sections 23-1205, 1206. Citing these statutes, the court said in *Fitzgerald v. State*, 78 Neb. 4:

"The statutes in this state are very jealous of the conduct of the members of the bar in prosecuting criminal cases. " (p. 5)

"Such counsel should observe the same care that the law requires of a sworn officer of the state to avoid violating the rights of the accused." (p. 6)

In *Ress v. Shepherd*, 84 Neb. 268, the court stated:

"The county attorney is the public prosecutor, and his office is quasi judicial. In the discharge of the functions of that office he is called upon to exercise a sound

discretion to distinguish between the guilty and the innocent, and to refrain from prosecuting those persons whose guilt is so doubtful that in his judgment justice will not be subserved by prosecutions, and there should not be anything in the way of private interest to possibly sway that judgment or to tempt him to depart from a disinterested and conscientious discharge of his duty. Wight v. Rindskopf, 43 Wis. 344." (p. 269-270)

Again in Thompson v. Thompson, 151 Neb. 110, the court says:

"The purpose of the foregoing statute is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interest." (p. 112)

The more recent decision in Stewart v. McCauley, 178 Neb. 413, contains similar language:

"Section 23-1205, R.R.S. 1943, gives the district court the authority to appoint an acting county attorney in the event of absence, sickness, or disability of the county attorney. As early as Gandy v. State, 27 Neb. 707, 43 N.W. 747, the word 'disability' was interpreted to cover situations where the county attorney by reason of prior employment disqualified himself to act in the new case. We question the right of the county attorney to appear herein to file a motion to dismiss. The purpose of sections 23-1205 and 23-1206, R.R.S. 1943, is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interests. See Ress v. Shepherd, 84 Neb. 268, 120 N.W. 1132. Section 23-1205, R.R.S. 1943, should have been invoked because of the disability of the county attorney." (p. 418-419)

See, also, *Roach v. Roach*, 174 Neb. 266, to the same effect.

Under the prior Canons of Ethics a very strict view was taken as to multiple representation of interests by prosecuting attorneys. Informal Opinion No. C-772, July 20, 1966 quoted A.B.A. Opinion No. 135 as follows:

"The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private client, involving subordination of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both."

CONCLUSION

This Committee believes that the County Attorney should disqualify himself from prosecuting the criminal case involved in this matter.

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