

Nebraska Ethics Advisory Opinion for Lawyers
No. 73-15

A LAWYER WHO HAS REPRESENTED A HUSBAND IN CONNECTION WITH HIS ATTEMPT TO SECURE A DISSOLUTION OF HIS MARRIAGE AND CUSTODY OF HIS CHILDREN IS DISQUALIFIED TO DEFEND THE WIFE AGAINST A CHARGE OF MANSLAUGHTER, WHEREIN IT IS CLAIMED THAT SHE KILLED HER HUSBAND IN AN ATTEMPT TO REGAIN CUSTODY OF THE CHILDREN FROM THE HUSBAND.

CODE AND DISCIPLINARY RULES APPLICABLE

DR 4-101(B) A lawyer shall not knowingly:

(1) Reveal a confidence or a secret of his client.

EC 4-6: The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.

DR 5-101(B): A lawyer shall not accept employment... if he knows or is obvious that he or a lawyer in his firm ought to be called as a witness

DR 5-105(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

EC 9-6: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession...to strive to avoid not only professional impropriety but also the appearance of impropriety.

DISCUSSION

The inquirer was hired and paid by a husband to prepare a petition for dissolution of the marriage and for custody

of the children. The petition was never filed. The wife had left the children in the informal custody of her parents, and the attorney advised the husband that the grandparents had no right to deprive him of the children. Accordingly, the husband went to the grandparents' home and took custody of the children; whereupon, the wife visited the husband's home and he was killed by gunshot, allegedly inflicted by the wife. Subsequently, the wife asked the same attorney to defend her in the manslaughter case. The attorney represented the wife at the bond setting but now inquires whether he may defend her against the felony charge. It is clear that the felony charge arose out of the exact issue concerning which the attorney was representing the husband. A total defense of the wife might well inquire into the husband's attitude and state of mind, and might involve the attorney as a witness on many points including the deceased's state of mind, attitude, possible intention to commit some illegal act in connection with the custody issue, etc. At any rate, the lawyer's duties to the husband regarding confidences did not terminate upon death of the client-husband. The appearance of impropriety is obvious. If the wife is convicted, both the public and she might claim that her fate was sealed because the attorney really represented the deceased husband. If the wife is acquitted, both the public and she might feel that her acquittal was at least partly the result of some confidential or inside information which the attorney had acquired from the husband. On the grounds of appearances alone, the attorney should decline the tendered employment by the wife.