

Nebraska Ethics Advisory Opinion for Lawyers
No. 74-5

A CITY ATTORNEY SHOULD DECLINE EMPLOYMENT IN CIVIL CASES WHERE: (1) HE WOULD BE OPPOSING THE CITY OR ANY OF ITS BOARDS, COMMITTEES, OR OFFICIALS; (2) IT CONCEIVABLY COULD BE HIS DUTY AS CITY ATTORNEY, DIRECTLY OR INDIRECTLY, TO PROSECUTE, OR (3) IT WOULD BE HIS OFFICIAL DUTY TO INVESTIGATE; BUT THAT, OTHERWISE, NO RESTRICTION SHOULD BE PLACED ON A CITY ATTORNEY TO ACCEPT PROFFERED EMPLOYMENT IN CIVIL MATTERS.

EXCEPT WHERE HIS APPOINTMENT IS MADE OR EMPLOYMENT APPROVED BY THE COURT IN A PENDING CRIMINAL ACTION, A CITY ATTORNEY IS ABSOLUTELY PROHIBITED FROM DEFENDING PARTIES FORMALLY CHARGED WITH OFFENSES IN HIS CITY OR ELSEWHERE, EXCEPT WHERE AS CITY ATTORNEY HE PROSECUTES ONLY VERY MINOR OFFENSES AND THEN ONLY IF: (1) THE DEFENDANT DOES NOT RESIDE IN THE CITY FOR WHICH HE IS CITY ATTORNEY, (2) THE CHARGES DO NOT INVOLVE HIS CITY OR ITS ORDINANCES, (3) THE CHARGES ARE BASED ON INVESTIGATIONS MADE BY LAW ENFORCEMENT OFFICERS NOT EMPLOYED BY HIS CITY, AND (4) THE CASES IN WHICH HE ACTS AS DEFENSE COUNSEL DO NOT INVOLVE THE SAME TYPES OF VIOLATIONS AS THOSE HE PROSECUTES FOR THE CITY.

DISCUSSION

A city attorney inquires to what extent he can accept civil litigation and the defense of parties charged with crime. Numerous questions were propounded, specifying varying situations. The best approach probably is to proceed from the general to the specific, i.e., from general principles and opinions previously rendered to these specific questions.

Section 17-610 of the Revised Statutes of Nebraska

prescribes the duties of a city attorney. It is not imperative that he prosecute city ordinances. Indeed, some cities appoint special attorneys to handle such prosecutions, leaving the remaining duties, enumerated in this section, to the regular city attorney. However, most Municipal Codes now require the city attorney to prosecute ordinances; and if the city attorney does so, he must also handle the appeals to the District Court. Of course, in all cases, he "shall commence, prosecute, and defend all suits and actions necessary to be commenced, prosecuted or defended on behalf of the corporation, or that may be ordered by the council or board of trustees".

CIVIL CASES

Canon 9 states that "A lawyer should avoid even the appearance of professional impropriety". Informal Opinion 1182 of the Ethics Committee of the American Bar Association states, "When explicit ethical guidance does not exist, 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," further stating that "EC 8-8 suggests that a lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are, or foreseeably may be, in conflict with his official duties", and further stating, "Certainly a lawyer cannot, consistently with the guidance given under Canon 9, accept a retainer where its acceptance will give the appearance of professional impropriety".

Wise, in his Legal Ethics (Second Edition) at pages 263-264, states that "A prosecutor may not accept private employment in connection with any matter he investigated as prosecutor", further stating that "An attorney who represented a city in connection with a bond issue should not thereafter attack the validity of the issue", and further stating that "A prosecuting attorney ' even though permitted to practice privately, may not accept a retainer from a person whom it is his duty to prosecute".

Accordingly, a city attorney should be able to accept any civil cases, except:

(1) Any action or proceeding wherein he would be opposing the city or any of its boards, committees or officials.

(2) Employment by any party where it conceivably could be his duty, as city attorney, to prosecute.

(3) Employment in any transaction where it was his official duty to investigate. See ABA Formal Opinions No. 39 and No. 135.

ABA Informal Opinion 1003 of the American Bar Association states that "It is unethical and improper for a city attorney, who is on a regular retainer fee from the city, to represent a client who files an application for a liquor license with the city council, the granting of which is opposed by the council. It is also unethical for a member of the same firm to appear before the city council in representation of private clients in applications for various licenses and other matters that might result in litigation between such persons and the city".

Also, it has been well established that if the city attorney is barred from participating, this prohibition, likewise, extends to his law partners and associates. See ABA Informal Opinion 1182 and ABA Formal Opinion No. 33.

CRIMINAL CASES

The extent to which a city attorney may go in the defense of criminal cases, both in his own city and elsewhere, has been extensively discussed by the Advisory Committee. ABA Formal Opinion No. 34, released in 1931, held that a city attorney whose duties were exclusively civil in nature could conduct the defense of a criminal case. However, ABA Formal Opinion No. 186 seemed to have overruled this permission, indicating that, to accept employment adverse to this public employer, puts the official in an unseemly situation likely to destroy public confidence in

him as a public officer and bring reproach on the profession, and stating, "Insofar as Opinion No. 34 is in conflict with the views herein expressed, it is overruled". Further discussion may be found in 41 Nebr. Law Rev. 243; 42 Nebr. Law Rev. 306; 39 Nebr. Law Rev. 254. However, the Advisory Committee in an opinion, dated May 24, 1966, stated that the employment of a lawyer by a city or village to handle civil matters ONLY, will disqualify that lawyer from defending persons under the statutes of the state or ordinances village other than the city or village employing the lawyer in question. It was suggested that the contract of employment specifically provide that the lawyer is not appointed as city attorney or village attorney, but is merely employed to handle such civil matters as may be determined and agreed upon by the parties.

ABA Formal Opinion No. 34, issued on March 3, 1931, also established that a city attorney may defend a person charged with a crime, only if (1) His duties and his assistant's duties do not include the prosecution in ANY court of offenders against municipal ordinances or criminal statutes, and (2) If he is not required to defend the accused in any court in which a city official performs the duties of judge or magistrate. However, ABA Informal Opinion No. 1045, released on May 15, 1968, and commented upon in the April, 1969, issue of the American Bar Journal at page 350, states that the prohibition extends to ALL criminal cases, whether the particular case is within the scope of his prosecution duties or not. But a city attorney, who acts as prosecutor, ONLY FOR MINOR OFFENSES, such as parking tickets and violations of city housing, building, zoning and similar ordinances, may defend persons charged with crimes, PROVIDED: (1) The defendants do not reside in the city for which he is the city attorney; (2) The charges do not involve his city or its ordinances; (3) The charges are based on investigation by law enforcement officers NOT employed by his city; and (4) The cases in which he acts as defense counsel, do not involve the same types of violations as those he prosecutes for the city. The comment continues: "If these conditions are present, there would be no conflict of interests. since the city attorney would not be in a

position where it would be his duty to contend on behalf of one client, what his obligation to the other client, would require him to oppose". Of course, this language contradicts the holding in ABA Formal Opinion 186. However, since the Informal Opinion is of comparative recent vintage, it is believed that it represents the latest findings and holdings of the ABA Ethics Committee. It is further believed that this is as far as a city attorney may go.

Because of the dearth of available defense counsel in the outlying regions of Nebraska, the Advisory Committee found itself in a dilemma, resulting in the issuance of its Formal Opinion [No. 74-2](#), providing for an order of the court, wherein the case is pending, when anyone has been charged with a crime.

Thus, it is apparent that the Advisory Committee has dealt only with the situations where the party had been CHARGED and the case was PENDING, nothing having been stated with reference to the period of time between the client first seeking advice until he is formally charged in Court.

When the client approaches the city attorney, the latter does not know until he is interviewed, whether or not a criminal action or charge is in the offing and, therefore, he should not be prohibited from discussing the matter with the possible client until he hears enough to convince himself that he is disqualified for one reason or other, to represent him at which time, he should do one or the other of two things: (1) Decline employment; or (2) Contact the judge for his approval. Normally, this presents no problem, since it usually is apparent which judge is involved. In the outlying areas of Nebraska, in particular, it now would be the County Judge, and if there be more than one in the District, the approval of any one of them would suffice, since the approval is made by the COURT.

It is believed that all of the questions propounded have been answered, either directly or indirectly, or, at least, to the extent that it is possible to do so at this time. Armed with the foregoing exposition of principles and

opinions, already enunciated, and with the employment and application of sound judgment and common sense as well as an ethical lawyer's sense of what is right or wrong, it is believed that no grave departure from the application of ethical principles and conduct should occur or ensue in any given case.

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