

Nebraska Ethics Advisory Opinion for Lawyers
No. 81-8

A COUNTY ATTORNEY, DEPUTY COUNTY ATTORNEY, OR MEMBER OF THEIR FIRM CANNOT ETHICALLY REPRESENT A PRIVATE CLIENT IN A LICENSE SUSPENSION OR REVOCATION PROCEEDING BEFORE THE NEBRASKA LIQUOR CONTROL COMMISSION.

QUESTION PRESENTED

Can a county attorney, deputy county attorney, or their firm, represent a private client, a liquor licensee, in a license suspension or revocation proceeding before the Nebraska Liquor Control Commission?

DISCUSSION

The duties of a county attorney are statutory. Section 23-1201 provides in part:

"...It shall be the duty of the county attorney to prosecute or defend, on behalf of the State and county, all suits, applications, or motions, civil or criminal, arising under the laws of the State in which the State or the county is a party or interested;..."

EC5-14 provides:

"Maintaining the independence of professional judgment required of the lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."

EC5-15 provides:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation ..."

The Nebraska Liquor Control Commission was created pursuant to the Nebraska Liquor Control Act, 53-101, et seq.

Section 53-117 provides:

"The commission shall have the following powers, functions and duties: ... (2) ...; and all such rules and regulations shall be absolutely binding upon all licensees and enforceable by the commission through the power of suspension or cancellation of licenses ... ; (3) to call upon other administrative departments of the state, county and municipal governments, county sheriffs, city police departments, village marshalls, peace officers, and upon prosecuting officers for such information and assistance as it may deem necessary in the performance of its duties; ...(7) to hear and determine appeals from orders of a local governing body in accordance with provisions of this act as hereinafter set forth;..."

Section 53-128 provides:

"Whenever any retail licensee shall have been convicted by any court of a violation of any of the provisions of this act, he may, in addition to the penalties for such offense, incur a forfeiture of his license and all

money that had been paid therefor. The local governing body may thereupon conditionally revoke his license subject to final order in the commission, or the commission may revoke his license in an original proceeding brought before it for that purpose, as the case may be."

Section 53-1,115 provides:

"Any final order or action of a local governing body of a county, city, or village, revoking or refusing to revoke a retail license ... may, ... be appealed from by the holder of a retail license, ... to the commission."

This Committee takes "judicial notice" of the fact that an assistant attorney general has been appointed to represent the Liquor Commission.

DR5-105 provides:

"Refusing to accept or continue employment if the interest of another client may impair the independent professional judgment of the lawyer.

A. A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of his 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 DR5-105(C) (exception not applicable)."

. . . .

D. If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no

partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

Section 53-1,104 provides:

"Any person who shall violate any of the provisions of sections 53-141 to 53-147 shall be guilty of a Class II misdemeanor and, in case of a beer licensee, his license shall be revoked. If any beer licensee shall willfully violate the regulations duly issued and promulgated by the commission or any lawful ordinance of the local governing body, the commission may, after proper hearing, revoke the beer license. In case any beer licensee is convicted of a violation of the terms of this act, the court shall immediately declare his license revoked and notify the local governing body and the commission accordingly. Any beer licensee who shall sell or permit the sale of any alcoholic liquors not authorized under the terms of his license on his premises or in connection with his business or otherwise, shall be guilty of a Class I misdemeanor. The licensee shall also forfeit his license."

It is quite obvious from the foregoing statutes that the State is "interested" in the license revocation procedure. Section 23-1201 relating to the duties of the county attorney provides:

"...He may be directed by the attorney general to represent the state in any action or matter in which the state is interested or a party...."

It is quite apparent from the examination of the above statutes that the county attorney has a real and continuing duty to represent the State of Nebraska in all suits, civil or criminal, arising out of the laws of the State of Nebraska, and may even possibly be called upon by the attorney general to participate in some

manner in a liquor license revocation proceeding emanating from the very county which the county attorney represents. Even the Liquor Commission is authorized pursuant to 53-117, to call upon prosecuting officers for such information and assistance as it may deem necessary in the performance of its duties. It is obvious, under the circumstances, that under existing law, there is a direct conflict of interest between a private client of the county attorney in a liquor license revocation hearing before the Commission which may call upon the county attorney for assistance. The State is his primary client and he cannot represent a private client against the interests of the State of Nebraska, or any of its agencies.

The submitted question did not include specific information relating to the reason for the revocation hearing or the type of license held by the licensee. But the distinction between licenses issued by the State would not provide any relief from the existence of the conflicting interests on the part of a county attorney, his associates, etc. in view of the very extensive responsibilities imposed upon him by the above cited statutes.

"A county attorney, therefore, has three clients; the county, the state, and the public. His first duty is to them, and it takes precedence over all other commitments to which a county attorney may become engaged, either at the time or subsequently thereto." [Opinion No. 75-8](#).

A waiver of the disqualification could not be the subject of consent on behalf of the public, where there is no one to consent, and where there is no statutory authority for any such consent.

In this instance, there is a real conflict of interest between the state and the client of the county attorney and his firm, which cannot be ignored or waived.

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