

Nebraska Ethics Advisory Opinion for Lawyers
No. 87-6

UNDER THE FACTS PRESENTED, A COUNTY PUBLIC DEFENDER REPRESENTING A DEFENDANT CONVICTED FOR FIRST-DEGREE MURDER SHOULD NOT, FOR THE PURPOSES OF SEEKING POSTCONVICTION RELIEF ON BEHALF OF THE DEFENDANT, ALLEGE THAT THE PRIOR COUNTY PUBLIC DEFENDER AND HIS STAFF PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL EVEN THROUGH THE PRESENT PUBLIC DEFENDER WAS NEVER ASSOCIATED WITH THE PRIOR PUBLIC DEFENDER.

FACTS

Attorney A was a county public defender and was appointed to represent a defendant who was charged with first-degree murder. Attorney A's assistants were Attorneys B and C and they assisted Attorney A in undertaking the defense. The defendant was eventually sentenced to the death penalty and the matter was appealed to the State Supreme Court. Prior to completion of the proceedings in the State Supreme Court, Attorneys A and B withdrew as public defenders. Attorney C was appointed by the county board to complete a reply brief and a brief for rehearing in the State Supreme Court. Attorney C then also left the public defender's office. Attorney D was appointed the county public defender the day after Attorney A withdrew. Upon the denial of rehearing in the State Supreme Court, Attorney D filed a petition for writ of certiorari with the United States Supreme Court, which was denied.

Attorney D now wishes to file a petition for postconviction relief alleging that the defendant was denied effective assistance of counsel by the former public defender's office, namely Attorneys A and B.

QUESTION PRESENTED

May the current county public defender, seeking postconviction relief for the defendant, ethically allege that the former county public defender provided ineffective assistance of counsel to the defendant?

DISCUSSION

This situation presents a potential conflict of interest for the present county public defender arising out of his assertion on behalf of the defendant, as a basis for postconviction relief, that the former public defender and his staff provided ineffective assistance of counsel to the defendant in the trial court and appellate proceedings. In such a case, the interests of the client must be deemed superior to those of upholding the reputation of the county public defender's office. EC 5-22 and EC 5-24 caution the lawyer to maintain his professional independence regardless of whether or not he receives his compensation directly from the client. DR 5-101(A) states:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-101(B) prohibits a lawyer from accepting employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. DR 5-105(D) indicates that when a lawyer is disqualified because of a conflict of interest, the disqualification runs to any partner or associate, or any other lawyer affiliated with the attorney or his firm.

In this case, it would clearly be a conflict of interest for Attorney A to assert, on behalf of the defendant seeking postconviction relief, that he provided ineffective assistance of counsel.

The New York State Bar Association, in Opinion 533,

Lawyers Manual on Professional Conduct, 801:6104, stated as follows:

"A public defender may not represent a client in an appeal based upon ineffective assistance of trial counsel, where the trial was conducted by another lawyer in the public defender's office who has since left the office. It is a lawyer's duty to exercise professional judgment independently and zealously within the bounds of the law, solely for the client's benefit, and free of compromising influences and loyalties. Where a lawyer must attack his own competence as trial counsel, there is a personal interest that is at odds with the client's right to impartial and zealous representation, and public confidence in our justice system must suffer. If it is improper for one staff member to represent a claim in a particular matter, all are subject to the same prohibition. DRs 5-101, 5-105(D); ECs 5-1, 7-1, 9-2. (6/8/81)"

The case at hand differs from New York Opinion 533 cited above in that in this case the entire membership of the public defender's office has been changed. Nonetheless, a potential conflict of interest exists in that the reputation of the public defender's office is being impugned by the proposed allegations as to inadequacy of the previous holders of the office.

Other authorities have held that the application of the imputed disqualification rule to public defender and legal service organizations should depend upon the structure of the office. *People v. Wilkins*, 28 N.Y.2d 53, 268 N.E.2d 756 (1971); ABA Informal Opinion 1309 (1975). At least one court has rejected a per se imputed disqualification rule regarding public defenders, balancing the "remote" possibility of a conflict of interest against the fear that it would be necessary to appoint counsel with no experience in criminal matters, raising the question of competency of counsel. *State v. Robinson*, 79 Ill.2d 149, 402 N.E.2d 157 (1979). In

another case, the court applied the per se rule to a public defender's office based both on a conflict of interest and the appearance of impropriety proscribed in Canon 9. *State v. Thompson*, 132 Ill. App. 3d 335, 477 N.E.2d 532 (1985). See, generally, Annot., 18 A.L.R.4th 360 (1982) (circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel--state cases).

While the question is close, the Committee concludes that Attorney D, as the newly appointed public defender, should not handle the matter under the rule of Canon 9 that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

EC 9-1 states:

"Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession."

EC 9-2 states in part:

"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."

CONCLUSION

Under the facts presented, it is the opinion of the Committee that a county public defender representing a defendant convicted of first-degree murder should not, for the purposes of seeking postconviction relief on behalf of the defendant, allege that the prior county public defender and his staff provided ineffective assistance of counsel even though the present public defender was never associated with the prior public defender. A lawyer other than the Public Defender

should be appointed to handle the matter.

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