

Nebraska Ethics Advisory Opinion for Lawyers  
No. 72-7

NEITHER IMPROPRIETY NOR THE APPEARANCE OF IMPROPRIETY ARISES WHERE A PART TIME COUNTY ATTORNEY REPRESENTS THE ESTATE AND NEXT OF KIN OF A REGULAR CLIENT, KILLED IN AN AUTOMOBILE ACCIDENT, WHERE HE DID NOT PARTICIPATE IN THE INVESTIGATION OR REPORT OF THE DEATH, AS COUNTY ATTORNEY, AND WHERE THE POSSIBILITY FOR PROSECUTION CANNOT ARISE AND WHERE THE ATTORNEY, REPRESENTING THE OPPOSING PARTY, DOES NOT OBJECT TO SUCH REPRESENTATION BY THE COUNTY ATTORNEY.

CODE PROVISIONS INTERPRETED:

Canon 9: A lawyer should avoid even the appearance of professional impropriety.

QUESTION PRESENTED

Upon the facts stated, is a part time county attorney ethically prohibited from representing the probate of the estate and the next of kin of a regular client, killed in an automobile accident, where he did not participate in the investigation or report of the deaths and where the possibility for criminal prosecution cannot arise and where opposing counsel raise no objection to such representation on his part?

FACTUAL SITUATION

All people involved in an automobile accident, including the drivers of the motor vehicle, were killed. The county attorney was not available to make the investigation. The entire investigation was made by the sheriff and the highway patrol. The sheriff acted as coroner and made his report, as such. The county attorney did not participate in any manner, except that, upon the advice of the coroner's physician, he authorized an autopsy to be performed upon one of the victims. Because of the

death of all parties involved, no criminal prosecution could be instituted against anyone involved in the accident. The driver of one of the automobiles was a regular client of the county attorney. Opposing counsel do not object to his representation of the decedent's next of kin or the probate of his estate.

## DISCUSSION

Generally, a county attorney is prohibited from probating the estate of a decedent or representing his next of kin in a death action where he investigated the death or where a criminal prosecution would lie. This is because of Section 23-1206 of the Revised Statutes of Nebraska (Re-issue of 1970), which provides, as follows, to-wit:

"No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business which it shall be his official duty to attend; nor shall he act or be concerned, as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend, or depending upon the same state of facts, investigated by him, while acting as county coroner."

However, in this case, the part time county attorney was not available to make the investigation. It was made by the sheriff and by the highway patrol and the sheriff signed the coroner's report. He simply authorized an autopsy after it was recommended by the coroner's physician. Otherwise, he performed no duties in this connection; nor was any prosecution possible or imminent, since all parties involved were killed. One of the drivers was a regular client of the decedent; hence, there could be no charge of solicitation of legal work in this case.

The Supreme Court decisions reported under this

statute indicate that the purpose of this section was to make certain that a county attorney should not be influenced by private interests and to protect the public by making certain that the duties of the county attorney are not influenced by private interest. There is no indication here that the county attorney refrained from making the investigation so as to make himself eligible for this legal work. In *Thompson vs Thompson*, 151 Nebraska 11, 36 N.W. (2nd) 648, which is a most interesting case, the Court found no impropriety in a county attorney participating in that case, so long as opposing counsel raised no objection, and the Court did not indicate that there was any impropriety in this regard. In fact, in *Jordan vs State*, 101 Nebraska 430, 163, N.W. 801, the Court deemed it proper for an attorney to withdraw from a prosecution, so as to make himself eligible to probate the estate; no impropriety was implied in that case, either. Hence, it is not readily apparent where there could be any impropriety in the matter before the Committee.

The question arises, however, assuming that there is no impropriety involved, is there an appearance of impropriety manifesting itself in this precise factual situation? If so, this could offend against Canon 9 which states that a lawyer should avoid even the appearance of professional impropriety. Any contention to this effect in the matter before the Committee, would not be convincing, especially since opposing counsel does not object to the county attorney's representation in civil proceedings arising from this automobile accident. Nothing has been found, indicating that, under this particular factual situation, there would be any indication whatever of either impropriety or the appearance of impropriety.

#### CONCLUSION

On the facts stated, the part-time County Attorney is not ethically disqualified to represent the estate and the next of kin of his late client.

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