

Nebraska Ethics Advisory Opinion for Lawyers
No. 81-7

A COUNTY ATTORNEY, DEPUTY COUNTY ATTORNEY, OR MEMBER OF THEIR FIRM CANNOT ETHICALLY REPRESENT A PRIVATE CLIENT IN AN ACTION UNDER THE STATE TORT CLAIMS ACT AGAINST THE STATE OF NEBRASKA, THE DEPARTMENT OF HEALTH, ITS AGENTS, OR EMPLOYEES FOR DAMAGES ARISING OUT OF THE NEGLIGENCE OF SAID AGENTS OR EMPLOYEES.

QUESTION PRESENTED

Can a County Attorney, a deputy county attorney, or their firm, represent a private client in a negligence action against the State of Nebraska, and its Department of Health for damages sustained by the private client arising out of the negligence of the agents and employees of the Department of Health?

FACTS

A client purchased breeding cows at a livestock auction market, brought them home, and kept them isolated from the rest of his breeding herd for a period of 30 days. Approximately four months after he purchased the cattle, he was notified by the State of Nebraska officials that they might be Bangs infected. This possibility had been discovered by the State of Nebraska officials several months earlier, but they failed to follow up, and if they had done so, would have notified the client within the 30 days that he had kept the purchased breeding cows isolated from his remaining herd of their possibility of infection, thus preventing spread of the disease. The client now faces the possibility of having to liquidate his entire herd because he is under quarantine and economically he cannot operate under the conditions which are imposed.

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;

Sections 54-1331 through 54-1347 provides for control of cattle brucellosis, also described as Bangs. Said sections provide for the quarantine and branding and sale of infected animals. Section 54-1345 provides:

"Any person violating any of the provisions of Sections 54-1331 to 54-1347 for which a specific penalty is not otherwise provided shall be deemed guilty of a class III misdemeanor."

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..."

There exists the possibility of the need of a potential prosecution in the event that the client would violate the Bangs' control statutes. Obviously, the County Attorney who is representing the same clients in a private matter, that he might need to prosecute, would be hard pressed to make an independent decision on behalf of the State of Nebraska.

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)."

Section 81-8209, et seq., provides for the filing of a tort claim against the State of Nebraska. 81-8212 provides:

"...and it shall be the duty of the attorney general to cause a complete investigation to be made of all such claims...."

Section 81-8214-provides, in part:

"Suit shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, then in the district

court of Lancaster County."

Reference is again made to Section 23-1201 which provides that the county attorney:

" ... 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 apparent from the examination of the aforesaid 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 laws of the State of Nebraska, and may even possibly be called upon by the Attorney General to participate in the defense of tort claim actions against the State in the very county which the County Attorney represents. It is obvious under the circumstances that under the existing law there is a conflict of interest between the private client of the County Attorney and the State of Nebraska which the County Attorney has a statutory duty to represent. The State is his primary client and he cannot represent a private client against the State of Nebraska on a claim assertable under the Nebraska Tort Claims Act. See [Opinion No. 76-13](#) relating to the impropriety of suit by a County Attorney on behalf of a private client against the Board of Education Lands and Funds for return of lease money.

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