

Nebraska Ethics Advisory Opinion for Lawyers  
No. 72-13

A CITY OR VILLAGE ATTORNEY WHOSE DUTIES INCLUDE PROSECUTING VIOLATIONS OF ORDINANCES AND STATE STATUTES MAY NOT PROPERLY REPRESENT ANYONE CHARGED WITH A CRIME.

CANONS INTERPRETED:

Canon 6 of Canons of Professional Ethics. Adverse Influences and Conflicting Interests.

Canon 9 of Code of Professional Responsibility. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

EC 9-6. "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; \* \* \* and strive to avoid not only professional impropriety but also the appearance of impropriety."

A city attorney of a Nebraska city devotes part of his time to the duties of that office and received a monthly retainer. He inquires whether it would be appropriate for him to represent accused persons in criminal matters not investigated or handled by the police department of said city.

Canon 6 of the Canons of Professional Ethics of the American Bar Association was in effect long prior to the adoption of the Code of Professional Responsibility by said association. Canon 6 concerns adverse influence and conflicting interests, and provided, in part: "It is unprofessional to represent conflicting interests, \* \* \*".

Inquiries similar to that here involved have been treated in opinions previously issued by the Advisory Committee of the Nebraska State Bar Association. The Standing Committee on Professional Ethics of the American Bar Association has also issued both formal and informal opinions with reference to the questions here presented.

Formal Opinion No. 34 of said Standing Committee was issued in 1931. It interpreted Canon 6 of the Canons of Professional Ethics, and held that a city attorney whose duties are exclusively civil in nature may conduct the defense of a criminal case. Other opinions of said Standing Committee prohibit any city or village attorney charged with a duty of prosecuting criminal offenses from representing the accused in any criminal case.

In 1938, said Standing Committee issued Formal Opinion No. 186 wherein it overruled Formal Opinion No. 34, and held that a county attorney may not in any case represent a defendant in a criminal matter. In that opinion, this language appears:

"The county attorney should not accept employment where his duties to his private client and his public duties may conflict either directly or indirectly. Furthermore, for the county attorney charged with public duties to accept employment adverse to this public employer puts the county attorney in an unseemly situation likely to destroy public confidence in him as a public officer, and bring reproach to his profession.

"The county attorney, in our opinion, should refrain from accepting such employment, as the interest of the county of which he is an officer, are conflicting.

"In so far as Opinion 34 is in conflict with the viewed expressed, it is overruled."

On October 20, 1971, the Advisory Committee of the Nebraska State Bar Association issued an opinion in response to an inquiry by a city attorney of a Nebraska city which posed a question similar to the one with which we are here concerned. That opinion states:

"Formal Opinion 34, issued March 3, 1931, states 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, Informal Opinion 1045, released on May 15, 1968, and commended 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 violation of city housing, building, zoning and similar ordinances, may defend persons charged with crime, provided: (1) The defendants do 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 investigation by law enforcement officers not employed by the 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."

It is apparent that the inquiring city attorney here is charged with the duty of prosecuting criminal violations of city ordinances and state statutes, and for that reason he does not fall within the exceptions set forth in Informal Opinion No. 1045 of the Standing Committee.

In *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80, 84 N.W.2d 136, disciplinary proceedings were instituted against a county attorney of Nebraska county for alleged unprofessional conduct. The record disclosed that the respondent was a county attorney of a Nebraska county; that in two instances he was the attorney employed privately to represent the executor or administrator of estates in which

determination of inheritance taxes was required; that he undertook to represent both the estates and the county of which he was an officer in the determination of such taxes; and that he did not procure the appointment of a special attorney to represent the county in these matters. In defense of his conduct, the respondent adduced evidence showing that in the determination of inheritance taxes for each estate, he had fully disclosed to the county commissioners of his county the facts with respect to valuations of the properties and his representation of the fiduciary in the estates; and that the county commissioners had consented to his representing both the county and the estates. In commenting on this issue, our court said:

"It is also brought out by the evidence adduced that no one ever questioned the inheritance tax assessed; that no damage resulted therefrom; that the federal authorities used the same valued for assessing federal estate tax; and that no fraud, deceit or unscrupulous practice was involved. But for conduct to be unethical it is not necessary that some damage result therefrom because of fraud, deceit, or unscrupulous practice. As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: 'An attorney should not only avoid impropriety but should avoid the appearance of impropriety'."

In the light of the foregoing, we conclude that where a city attorney is charged with the duty of prosecuting persons accused of violating city ordinances or state statutes, he may not ethically represent persons accused of criminal offenses in any courts. To permit a city attorney to do so would create an unmistakable appearance of impropriety.

