

Nebraska Ethics Advisory Opinion for Lawyers
No. 01-1

THE OPINION OF THE ADVISORY COMMITTEE HAS BEEN REQUESTED CONCERNING THE ETHICAL CONSIDERATIONS OF A COUNTY ATTORNEY PROHIBITING COMMUNICATION BETWEEN DEFENSE COUNSEL AND LAW ENFORCEMENT PERSONNEL WHO HAVE INVESTIGATED THE MATTER IN WHICH THE DEFENSE COUNSEL'S CLIENT HAS BEEN ACCUSED.

RESTATEMENT OF FACTS

A lawyer acting as defense counsel for an individual accused of a crime has been advised by the county attorney prosecuting the case that defense counsel may not communicate or cause another to communicate with law enforcement officers who investigated the matter because doing so constitutes communication with a person the lawyer knows to be represented by the county attorney unless prior consent is given by the prosecutor.

STATEMENT OF ISSUES

Whether defense counsel for an accused may communicate with law enforcement personnel investigating the matter without the consent of the prosecutor.

STATEMENT OF APPLICABLE CANONS, ETHICAL CONSIDERATIONS AND DISCIPLINARY RULES RELIED ON

Canon 7. A lawyer should represent a client zealously within the bounds of the law.

DR 7-103. Performing the Duty of Public Prosecutor or Other Government Lawyer.

. . . .

(2) A public prosecutor or other government lawyer

in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he or she has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

DR 7-104. Communicating with One of Adverse Interest

(1) During the course of his or her representation of a client a lawyer shall not:

...Communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer in that matter unless he or she has the prior consent of the lawyer representing such other person or is authorized by law to do so.

EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, . . . With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilty of the accused, mitigate the degree of the offense, or reduce the punishment. . . .

EC 7-18. The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his or her client with a person the lawyer knows to be represented in the matter by a lawyer, unless pursuant to a law or rule of court or unless he or she has the consent of the lawyer for that person. If one is not represented by counsel, a

lawyer representing another may have to deal directly with the unrepresented person; . . .

DISCUSSION

The office of the county attorney in the state of Nebraska is provided for by statute. Neb. Rev. Stat. § 23-1201 states that a county attorney acts on behalf of the state and the county. We find nothing in the Nebraska statutes or case law which states or holds that law enforcement officers are the clients or are represented by a county attorney.

We next consider DR 7-104(A)(1) and attempt to draw an analogy from our prior opinions concerning civil litigation. In our [Opinion 91-3](#), we dealt with the question of whether plaintiff's counsel may interview present and former employees of a defendant corporation without the consent of the corporation's counsel. We determined that plaintiff's counsel could not do so if the employees were officers or management employees of the defendant corporation or if the employees had authority to bind the corporation in a legal sense. Other present and former employees were determined not to be covered by the prohibition and therefore could be interviewed concerning facts to which they were witness with the admonishment to the plaintiff's lawyer that he or she should identify him or herself as an attorney for the plaintiff and identify the litigation so that the individual sought to be interviewed would clearly understand the plaintiff lawyer's role. Likewise, in [Opinion 94-5](#), we held that former employees of a corporate party may be interviewed by adverse counsel without consent of the corporation's counsel if the former employees are not individually represented. While these opinions are not determinative in the question presented, a law enforcement officer could be compared to an employee who does not have the authority to bind the corporation. We find no state ethics opinions or cases that deal with our issue in this context.

We then turn our attention to DR 7-103(B). It would seem obvious that under this disciplinary rule, a

prosecutor could not take unilateral action that denies defense counsel the opportunity to adequately prepare his client's defense. The Sixth Amendment overtones here are obvious.

An argument can be made that a county attorney's denial of the request on the part of defense counsel to interview a law enforcement officer could result in the complete denial of pretrial contact with that witness. The initial reaction to a denial by the county attorney would be for the defense counsel to take the deposition of the witness pursuant to a subpoena. In this connection, we find that Nebraska statutes only permit such a deposition in the context of a felony or Class W misdemeanor prosecution, Neb. Rev. Stat. § 29-1917. Thus the denial by the county attorney would effectively prohibit any pretrial contact with the witness in other cases.

In this same vein, there are multiple cases holding that a prosecutor should refrain from impeding access to witnesses including instructing witnesses not to speak with defense counsel or defense investigators and that it is improper for a prosecutor to interfere with defense counsel's access to or communication with witnesses. *U.S. vs. Hyatt*, 565 Fed. 2d 229 (2d Cir. 1977); *Gregory v. U.S.*, 369 Fed. 2d 185 (D.C. Cir. 1956); and *Gilbert v. State*, 547 So. 2d 246 (Fla. Dist. Ct. App. 1989). Washington State Bar Association 88-2 states that a prosecutor may not discourage or obstruct witnesses from consenting to defense interviews or encourage witnesses not to be interviewed unless the prosecutor is present. To the same effect is State Bar of Wisconsin Opinion E-86-7.

A recent opinion issued by the Virginia State Bar, Opinion 1741, stated that a prosecutor may advise a state witness that the witness may be contacted by investigators working for the defense and may identify the investigators by name. The prosecutor may tell the witnesses that they have the right to speak or not to speak with the investigator working for the defendant. The prosecutor may not, however, warn about certain questionable tactics the prosecutor believes the

investigators might employ or otherwise impliedly encourage a witness to withhold information from the defense.

These authorities together with EC 7-13 lead us to conclude that a prosecutor may not prohibit defense counsel from interviewing law enforcement personnel investigating the case.

CONCLUSION

We conclude that it is unethical for a prosecutor to deny defense counsel access to law enforcement officers who are witnesses to or who investigated matters which are the basis for the charges against the defense counsel's client.

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