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March 8, 1979

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ATTORNEY GENERAL OPINION NO. 79- 25

The Honorable William Novak
State Representative, 70th District
House of Representatives
State Capitol
Topeka, Kansas

Re: Counties and County Officers--County
Attorney--Simultaneous Employment as
City Attorney

Synopsis: The office of county attorney and city attorney are not incompatible as a matter of law. However, should a situation develop where an attorney holding both offices is confronted by a conflict of interest in representing both municipalities, such offices would be incompatible, and the attorney would be precluded as a matter of law from serving simultaneously in both positions.

* * *

Dear Representative Novak:

You inquire whether a county attorney also may serve as a city attorney within the same county. Your question is occasioned by the appointment of the Dickinson County Attorney as city attorney for the City of Herington, a city of the third class.

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In considering your request, we have found no express statutory or constitutional prohibition against a county attorney serving simultaneously as a city attorney. However, the question arises whether serving in these two public offices contravenes the common law prohibition against the holding of incompatible offices. As expressed by one commentator,

"[t]he rule in Kansas is that one person may hold two offices at the same time unless the offices are incompatible. (Abry v. Gray, 58 Kan. 148). All dual office holding is not prohibited, only the holding of incompatible offices. This rule has been embedded in the common law since early times; its declared purpose is to assure that a public officer will give his undivided loyalty in the discharge of his duties." Bien, Incompatibility of Offices, Kansas Government Journal, Vol. LVI, No. 10 (Oct., 1970), p. 420.

In Dyche v. Davis, 92 Kan. 971 (1914), the Kansas Supreme Court stated the rule as follows:

"Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices." Id. at 977.

Applying the foregoing rule to the question presented here requires an examination of the duties imposed upon the respective offices. Duties of county attorneys are generally prescribed by K.S.A. 19-702 et seq. Essentially, the county attorney has the responsibility to prosecute or defend all suits, civil or criminal, in which the state or county is a party or has some interest, and to give opinions and advice to the county commissioners and other county officers relating to county business.

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There are no similar provisions setting forth the basic duties of attorneys for cities of the third class, who are appointed pursuant to K.S.A. 15-204 or 15-1601. However, the city attorney has the general duty to advise and represent the city as the city may ordain to be in its best interest.

Does the performance of duties as county attorney in some way interfere with the performance of duties as city attorney? We have found no case in Kansas or elsewhere which clearly answers the question. Previous Attorneys General have ruled that there is not necessarily a conflict between the two offices, but one such opinion in 1958 found that "if it should develop that an incompatibility exists it would be our opinion that [a county attorney] could not hold the two positions." Opinions of the Attorney General, Vol. I, p. 63 (1958).

In 1973, the Attorney General, citing the above-mentioned 1958 opinion, stated:

"It is impossible, however, for us to conclude without more information that, as a matter of law, an attorney serving in both positions is free of any conflict of interest. In these periods of increasing intergovernmental cooperation, a city, often the county seat, and the county may often have contractual relationships which would render it difficult for one attorney to represent both parties in negotiation and disputes. This must, of course, be determined with reference to facts concerning which we have insufficient information." Opinions of the Attorney General, Vol. VIII, p. 350 (1973).

While these two prior opinions declined to find that the offices of city and county attorney are incompatible as a matter of law, they did recognize that this proposition also involves ethical considerations. While it is not the province of this office to evaluate or render commentary or opinions on the ethical conduct of any member of a profession, in this instance we find that

a review of pertinent ethical standards is appropriate, since conduct that would render these two offices incompatible is predicated on a conflict of interest in the representation of both governmental bodies.

By rule of the Kansas Supreme Court, the ethical canons and corresponding disciplinary rules established by the American Bar Association (ABA) in the Code of Professional Responsibility are to govern the conduct of members of the Kansas bar. Rules of the Supreme Court, Rule No. 501, 224 Kan. civ. et seq. Canon 5 commands that "[a] lawyer should exercise independent professional judgment on behalf of a client." 224 Kan. at cxiii. Disciplinary Rule (DR) 5-105 requires a lawyer to refuse to accept or continue employment "if the exercise of his professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client" [DR 5-105(A), (B), 224 Kan. at cxiv.], unless "it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-105(C), 224 Kan. at cxiv.

Certain Ethical Considerations (EC), described as "aspirational" objectives and set forth in the Code of Professional Responsibility (see ABA Code of Professional Responsibility and Code of Judicial Conduct, Preliminary Statement, August, 1977), are relevant to this question. (The Kansas Supreme Court has approved these statements "in principle . . . so far as they are not in conflict with the statutory or case law of this jurisdiction." 224 Kan. civ.) EC 5-14 states: "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. . . ." Also, EC-515 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. . . ."

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If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client. . . ." ABA Code of Professional Responsibility and Code of Judicial Conduct (August, 1977), p. 25.

In a case applying Canon 5 (then Canon 6), Wilson v. Wahl, 182 Kan. 532 (1958), the Kansas Supreme Court held that a private attorney who had prepared damage claim statements against the city of Lyons for tenants of a building destroyed by fire could not thereafter represent the city in defense of damage actions filed by those tenants. The attorney contended that he had not been retained to prosecute any claim or action on behalf of the tenants, but merely to assist them, without compensation, in the preparation of claim statements. The Court held this to be a conflict of interest. In support of that holding, the Court stated:

"When confronted with such a situation, and doubt exists in the mind of an attorney as to the proper course to follow, the doubt always should be resolved in favor of not accepting the employment. An attorney should avoid not only situations where a conflict of interest is actually indicated, but also those in which a conflict is likely to develop." (Emphasis added.) Id. at 539.

In our judgment, though, the Court's concern with conflicts that are "likely to develop" indicates that the Court has decried something more than the possibility of a conflict of duties. The language of DR 5-105, supra, is parallel; dual representation should be declined or discontinued "if the exercise of . . . professional judgment in behalf of a client will be or is likely to be adversely affected by . . . representation of another client." (Emphasis added.) DR 5-105 (A), (B), supra.

However, in a later case (which did not cite the Wilson case), the Court stated:

"[W]e think it imperative, if the legal profession is to attain the public respect to which it legitimately aspires, that attorneys act with the greatest circumspection in the representation of multiple clients where there exists a possibility that their interests may conflict or be at cross purposes." (Emphasis added.) Stump v. Flint, 195 Kan. 2, 11 (1965).

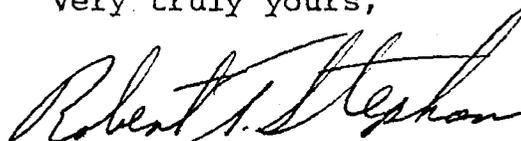
The Wilson and Stump cases both involve duties of private attorneys, and in each case the Court acknowledged that the choice to represent clients with potentially differing interests remains with the attorney, upon full disclosure and consent by the clients.

It should be noted that the ABA's Committee on Ethics and Professional Responsibility has taken the position, in an informal opinion with respect to the contractual agreements of two municipalities represented by the same attorney, that so long as the attorney makes full disclosure of potential conflict problems and both municipalities consent to the dual representation, the attorney may represent both in the preparation and execution of the contracts. The Committee noted, however, that "[t]here may be instances where because of local politics or other factors, it would not be proper for the attorney to represent both the municipalities." (Emphasis added.) ABA Committee on Ethics and Professional Responsibility, Opinions, No. 518.

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Based on the foregoing considerations, it is our opinion that the offices of county attorney and city attorney are not incompatible as a matter of law. We find nothing inherent in the simultaneous holding of these two positions that ipso facto creates a conflict of interest; nor do we find that the pertinent standards of ethical conduct proscribe such dual representation, absent any such conflict of interest. We believe it appropriate, however, to reiterate the caveat issued in prior opinions of this office that, should a situation develop where a person holding both offices cannot maintain undivided loyalty to both governing bodies, i.e., the performance of the duties of one office interferes with the performance of the duties of the other, the offices would be incompatible, and a person cannot serve simultaneously in both positions. An attorney holding both offices must be alert to those instances where a conflict of interest is likely to develop and exercise sound professional judgment in determining the propriety of continued representation of both local governments.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk