

**Nebraska Ethics Advisory Opinion for Lawyers
No. 07-02**

WHERE AN ATTORNEY SERVES ON A CITY COUNCIL, OTHER MEMBERS OF THAT ATTORNEY'S FIRM ARE NOT PROHIBITED BY THE RULES OF PROFESSIONAL CONDUCT FROM APPEARING BEFORE THE CITY COUNCIL ON BEHALF OF FIRM CLIENTS, AS LONG AS THE ATTORNEY COUNCIL MEMBER RECUSES HIMSELF OR HERSELF.

QUESTION PRESENTED

Where an attorney serves on a City Council, may the other members of that attorney's firm appear before the City Council on behalf of firm clients?

FACTS

A Nebraska attorney would like to run for City Council. If the attorney is elected, members of the attorney's firm intend to continue to represent firm clients before the City Council. The attorney proposes to recuse himself from any matter in which another attorney from his firm appears.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. . . .

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

DISCUSSION

The question presented was addressed under the former Nebraska Code of Professional Responsibility in Formal Opinion 75-12. That opinion provided that attorneys holding governmental positions involving legislative duties may engage in law practice subject to restrictions to include: (1) using their official position for the special advantage of themselves or their clients, (2) not representing a client in any matter that is specifically reviewable by the body of which the attorney is a member, and (3) complying with requirements relating to conflicts of interest. These restrictions also were applied to partners and associates of attorney officeholders. Consistent with former EC 8-2 which stated that lawyers serving as legislators was "highly desirable", the Committee expressed a concern that it could not adopt a position which would completely discourage lawyers from participation in government service.

Rule 1.11 of the current Nebraska Rules of Professional Responsibility and the comments to that rule generally address conduct by former and current public officers or employees who act as attorneys for a government agency. There is no specific provision similar to former EC 8-2 dealing with attorneys who serve as elected officials such as City Council members. Rule 1.11(a) does, however, include reference to lawyers serving as "public officers" which we believe includes an attorney serving as a City Council member, and further provides that lawyers currently serving as public officers are subject to Rules 1.7 and 1.9. The result is that there is no specific provision dealing with

attorneys serving on boards and councils other than the conflict of interest rules applicable to all attorneys. In addition, it is also possible that the City may have its own conflict of interest rules applicable to City Council members.

Opinions have been issued in other states to the effect that recusal from a matter is not sufficient to permit a member of an attorney's firm to appear before a public body of which the attorney is a member. See *Virginia Legal Ethics Opinion 1763* and *Michigan Bar Opinion RI-22 (1989)*. Under those opinions, an attorney could not accept representation of a client in a matter that would require an appearance before a board, or other public body, of which any member of that attorney's firm is a member. However, those opinions cited a comment under Rule 1.11 (not included in the comments to Nebraska Rule 1.11) which stated:

"This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or private client. A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public."

The Texas Commission on Professional Ethics has not taken as hard a line as Virginia and Michigan. Its *Opinion 497 (1994)* addressed a situation whereby an attorney who served as a city commissioner desired to represent criminal defendants in the city courts where city police officers participated in investigations and arrests. The Texas Commission determined that neither the attorney nor the attorney's partner could represent criminal defendants except where all parties gave appropriate consent after consultation and full disclosure.

The issue essentially then is whether Formal Opinion 75-12 continues to be good policy in Nebraska and the applicability of the restrictions outlined in Rule 1.7 and Rule 1.10 (a) to conflicts of this nature. In particular, is consent required from the client and the City for waiver of the conflict? We believe that the conclusions provided for in Formal Opinion 75-12 continue to be good policy under the current Rules of Professional Responsibility. While we understand the concerns raised in the other states cited in this Opinion, we have a different view. An attorney serving on a City Council is not acting as attorney for the City, but rather as a member of the City's governing body. Since the City is not the attorney's client, strict application of Rules 1.7 and 1.10(a) is not appropriate and recusal from matters where members of the attorney council member's firm appear is sufficient.

In issuing this opinion, we understand that there is the possibility of that public perception may be that an attorney Council Member could be seen by those not familiar with the recusal process as "exploiting public office for the advantage of the lawyer or private client". However, the issue of public perception and its political implication is

beyond the scope of this Committee's consideration. In addition, this opinion does not address applicable rules or policies of the City concerning conflicts of interest or the laws, rules and regulations enforced by the Nebraska Accountability and Disclosure Commission.

CONCLUSION

Where an attorney serves on a City Council, other members of that attorney's firm may appear before the City Council on behalf of firm clients as long as: (1) the attorney recuses himself or herself from consideration of the matter being presented so as not to use the official position for the special advantage of a client, and (2) the appearance does not violate any restrictions imposed by applicable laws, rules, regulations or policies of the City and the Nebraska Accountability and Disclosure Commission concerning conflicts of interest.