

## Nebraska Ethics Advisory Opinion For Lawyers

No. 11-04

**OTHER ATTORNEYS IN A STATE AGENCY'S LEGAL DEPARTMENT ARE NOT AUTOMATICALLY DISQUALIFIED FROM REPRESENTING THE AGENCY IN A HEARING BECAUSE ONE MEMBER OF THE AGENCY'S LEGAL DEPARTMENT IS ON THE BOARD OF DIRECTORS OF A PUBLIC ADVOCACY ORGANIZATION THAT HAS RETAINED COUNSEL TO REPRESENT A MEMBER OF THE PUBLIC AT THE SAME HEARING. WHILE ANY CONFLICT THE ATTORNEY BOARD MEMBER MAY HAVE IS NOT IMPUTED TO OTHER MEMBERS OF THE AGENCY'S LEGAL DEPARTMENT, ORDINARILY IT WOULD BE PRUDENT TO SCREEN SUCH LAWYERS.**

**WHENEVER A POTENTIAL CONFLICT OCCURS THE AFFECTED ATTORNEY SHOULD PROMPTLY DISCLOSE IT TO THE AGENCY SO THAT THE AGENCY CAN PROVIDE NOTICE OF, AND IMPLEMENT, ANY NECESSARY SCREENING PROCEDURES.**

**THE ATTORNEY WHO IS THE MEMBER OF THE BOARD OF THE PUBLIC ADVOCACY ORGANIZATION SHOULD BE CAREFUL NOT TO DISCLOSE TO THE ORGANIZATION ANY INFORMATION ACQUIRED FROM HIS REPRESENTATION OF THE AGENCY THAT MIGHT BE RELEVANT TO THE CASE AT ISSUE, AND MAY PROPERLY CHOOSE TO RECUSE HIMSELF FROM ANY DISCUSSIONS INVOLVING SUCH CASES.**

### QUESTIONS PRESENTED

1. Can an attorney in a state agency's legal department represent the agency in an administrative hearing when another attorney in the legal department is on the board of a public advocacy organization which is providing legal representation in that same hearing to a member of the public opposing the agency?
2. What, if any, disclosures or consents would be required for the agency's legal department to represent the agency?

### FACTS

The Nebraska Department of Health and Human Services ("DHHS") employs lawyers in its legal services unit. These lawyers represent DHHS in administrative hearings. One of the lawyers for DHHS volunteers as an officer on the Board of Directors of a public advocacy organization ("PAO") that employs lawyers who occasionally represent members of the public in administrative hearings before DHHS. As an officer of the Board, the DHHS lawyer has no authority to direct the day to day operations of the staff. Nor does he provide legal services to the public advocacy organization or its clients.

**APPLICABLE RULES OF PROFESSIONAL CONDUCT**

**Rule § 3-501.11. 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;

. . .

(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.

**COMMENT:**

. . .

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

. . .

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

**RULE § 3-501.0. TERMINOLOGY**

(k) "Screened" denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these rules or other law.

**RULE § 3-501.7. 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:

. . .

(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.

**RULE § 3-501.8. CONFLICT OF INTEREST; CURRENT CLIENTS; SPECIFIC RULES**

. . .

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

**RULE § 3-501.6. CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

**DISCUSSION**

The primary issue here is whether a DHHS lawyer's service on a Public Advocacy Organization Board presents a conflict of interest which disqualifies other DHHS lawyers from representing the agency when one of the PAO's lawyers represents a member of the public in an administrative hearing before DHHS. This is not a case where the lawyer involved is representing two clients with potentially conflicting interests. Rather, the question is whether the

attorney's position on the board of directors for the PAO creates a conflict which disqualifies other DHHS counsel.

Under the Rules of Professional Conduct, Rule § 3-501.7(a)(2) a "current conflict of interest exists if . . . 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.*" (Emphasis added). In this instance, if a potential conflict of interest exists, it is because of the DHHS attorney's responsibility to the PAO as a member of the board and his personal interest in the mission of the organization. In the instant case, however, the attorney on the board will not be representing the interests of DHHS when one of the PAO's attorneys is representing a member of the public before the agency. Furthermore, he does not act as legal counsel for the PAO and is not involved in the day to day operations of the organization's staff, including its legal counsel. There therefore appears to be no direct conflict of interest created.

However, even if his role on the board of directors, and his duty to its mission creates a potential conflict of interest for him in his role as counsel for DHHS, this conflict is not imputed to the other members of the DHHS legal staff. The Rules of Professional Conduct make it clear that any such conflict of interest in a government setting is not imputed to other government counsel for the same agency. Rule § 3-501.11 addresses this issue specifically for government officers and employees. Under Subsection (d)(2) the DHHS attorney personally would be prohibited from participating as a lawyer for the agency in a matter in which he had personally and substantially been involved in his non-governmental capacity, unless the government agency gave its informed consent. That is not the case here, since the attorney will not participate in the hearing in question. Moreover, § 3-501.11 does not impute any such conflict to other government lawyers as made clear by comment [2] to that rule which states:

"Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."

The Nebraska Supreme Court has given special recognition to this rule in the case of State v. Kinkennon, 275 Neb. 570, 747 N.W.2d 437 (2008). In the Kinkennon case error was raised on appeal in the conviction of the defendant because a member of the County Attorney's Office, who was not involved in prosecuting the case, had previously been employed as an associate attorney by the firm representing the defendant, during the representation by that firm of the defendant. Because of this alleged conflict of interest, the defendant on appeal argued that a special prosecutor should have been appointed to handle the prosecution of the case.

In upholding the lower court's refusal to name a special prosecutor the Nebraska Supreme Court stated in deciding not to adopt a per se disqualification rule affecting all members of the prosecutor's office:

"[T]he overwhelming majority of courts to have considered this issue have rejected this type of per se rule. Instead, most courts have adopted a less stringent rule, pursuant to which the trial court evaluates the circumstances of a particular case and then determines whether disqualification of the entire office is appropriate. Under this approach, courts consider, among other things, whether the attorney divulged any confidential information to other prosecutors or participated in some way in the prosecution of the defendant. The prosecuting office need not be disqualified from prosecuting the defendant if the attorney who had a prior relationship with the defendant is effectively isolated from any participation or discussion of matters concerning which the attorney is disqualified."

275 Neb at 576.

The court then went on to recognize that "we recently endorsed a more flexible rule by adopting the Nebraska Rules of Professional Conduct." The court then quoted from the official Comment 2 to Rule 1.11, which we have quoted above, and added that "[t]his rule recognizes the distinction between lawyers engaged in the private practice of law, who have common financial interests, and lawyers in a prosecutor's office, who have a public duty to seek justice, not profits." 275 Neb. at 577. Absent some unusual circumstances where unfairness or impropriety might be so great that it would affect confidence in the judicial system, the court noted that effective screening would be sufficient.

Comment 2 to § 3-501.11 does recognize that when a potential conflict exists, while that conflict would not be imputed to other government counsel, "ordinarily it will be prudent to screen such lawyers." Section 3-501.0(k) defines what is meant by "screened" as follows:

"'Screened' denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these rules or other law."

Comment [7] of § 3-501.11 further admonishes that "[n]otice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent."

The Rules of Professional Conduct prohibit a lawyer from revealing confidential information involving the representation of a client without informed consent. In the instant case, DHHS counsel should not only be screened from other DHHS counsel in connection with the representation at issue, but he should be careful not to disclose to the PAO any information he may have learned as counsel for DHHS that might be relevant to the case at issue. In that regard, the Committee believes it would be prudent for DHHS counsel to recuse himself from any

discussions that may come before the board of the PAO relating specifically to cases the organization's counsel may be handling before DHHS.

## **CONCLUSION**

Other attorneys in a state agency's legal department are not automatically disqualified from representing the agency in a hearing because one member of the agency's legal department is on the Board of Directors of a public advocacy organization that has retained counsel to represent a member of the public at the same hearing. While any conflict the attorney board member may have is not imputed to other members of the agency's legal department, ordinarily it would be prudent to screen such lawyers.

Whenever a potential conflict occurs the affected attorney should promptly disclose it to the agency so that the agency can provide notice of, and implement, any necessary screening procedures.

The attorney who is the member of the board of the public advocacy organization should be careful not to disclose to the organization any information acquired from his representation of the agency that might be relevant to the case at issue, and may properly choose to recuse himself from any discussions involving such cases.