

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 15-02

A NEBRASKA LAWYER SERVING AS COUNTY ATTORNEY MAY NOT ACCEPT APPOINTMENTS AS GUARDIAN AD LITEM IN A JUVENILE COURT PROCEEDING IN ANY COUNTY IN NEBRASKA. THE PROHIBITION ALSO EXTENDS TO OTHER MEMBERS OF THE LAWYER'S PRIVATE LAW PRACTICE.

HOWEVER, A NEBRASKA LAWYER SERVING AS COUNTY ATTORNEY MAY ACCEPT APPOINTMENTS AS GUARDIAN AD LITEM IN PRIVATE CIVIL CASES IN WHICH THE STATE OF NEBRASKA HAS NO INTEREST AND IS NOT A PARTY.

QUESTIONS PRESENTED:

A Nebraska lawyer requested an opinion from the Nebraska Advisory Committee on two questions. Those questions are:

1. May an attorney who has been elected as county attorney in one county accept appointments as guardian ad litem in another county in Nebraska?
2. If not, does the conflict extend to other members of the attorney's private firm?

FACTS

Members of a small private practice law firm in central Nebraska accepts appointments as guardian ad litem for minors. A member of the firm was elected, and is serving, as county attorney of a county in which the firm members currently have no guardian ad litem appointments. However, the firm currently has appointments in three neighboring counties or counties within 60 miles of where the firm has its practice.

The firm's question is whether there is any ethical prohibition for the county attorney and other members of her firm to be appointed, or to continue their current appointments, as guardian ad litem. The answer is yes, if the appointments are from a juvenile court, or a county court sitting as a juvenile court. If the appointments are in private civil cases in which the State of Nebraska has no interest and is not a party, then the answer is no.

APPLICABLE RULE AND COMMENT

Neb. Ct. R. of Prof. Cond. § 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:

(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.

COMMENT

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[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters

are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

Neb. Ct. R. of Prof. Cond. § 3-501.10. 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.

DISCUSSION

Nebraska Ethics Advisory Opinion for Lawyers No. 06-1 involved a deputy county attorney rather than the county attorney. However, the reasoning would apply here. That opinion concluded that it was possible for the deputy county attorney to accept appointments as guardian ad litem in nearby counties, depending on a specific assessment in each case for actual or potential conflicts. However, Advisory Opinion No. 06-01 was disapproved and amended in Nebraska Ethics Advisory Opinion for Lawyers No. 08-01 with the following language:

Guardian ad litem appointments arise in a variety of different circumstances including juvenile proceedings, adoption proceedings, guardianship proceedings, and divorce and custody proceedings. To the extent the appointment as guardian ad litem occurs in a juvenile case in the county in which the county attorney is bringing the juvenile action, Rule 1.7 prohibits any attorney in the firm from representing a client due to a concurrent conflict of interest. As indicated earlier in this opinion, Rule 1.7(b) allows a client to

waive a concurrent conflict of interest. However, it is not likely that a juvenile client can waive such conflict. Further, the Rule requires that informed consent be obtained by “each affected client.” In this situation, that means informed consent must be obtained from both the juvenile and the state. The committee parenthetically notes that juvenile court actions are captioned “State of Nebraska in the interest of [child’s name].” Thus, to the extent Formal Opinion 06-1 indicates otherwise, it is disapproved and amended. Because the county attorney represents the State of Nebraska, this prohibition extends to appointments in other counties as well. If the appointment as guardian ad litem occurs in a divorce, custody, probate, paternity, or adoption case in which neither the county nor the state is a party, there is no conflict of interest for the private attorney associated with the county attorney.

The potential conflict between Formal Opinion No. 06-01 and Formal Opinion No. 08-01 was noted in Nebraska Ethics Advisory Opinion for Lawyers No. 09-08. This same committee was asked in Formal Opinion No. 09-08 to answer a question whether a city attorney had a conflict in instances similar to the request that is made in this case. The committee noted that Formal Opinion No. 08-01 disapproved of Formal Opinion 06-01 insofar as 06-01 implicitly approved guardian ad litem appointments for county attorneys in juvenile courts of counties other than the county the county attorney served in. However, since Formal Opinion 09-08 involved city attorneys instead of county attorneys, and since city attorneys do not have the State of Nebraska as a client; Formal Opinion 09-08 counselled that there is no per se prohibition to city attorneys accepting appointments in juvenile court cases. Therefore, Formal Opinion No. 08-01 was distinguished on the basis that city attorneys and county attorneys are treated differently in this concurrent conflict of interest analysis.

Therefore, this county attorney that requested the opinion in this case is the attorney for the State of Nebraska in juvenile court cases within the county where the county attorney serves. The State of Nebraska is also a party to all juvenile cases in any county in the state, and that is the same entity that the county attorney represents. Even though the cases in different counties involve unrelated matters, the county attorney still has the State as a client, and has a concurrent conflict in other counties as well. Comment (6) under § 3-501.7 explains that duties of loyalty to one client, and expectations of complete devotion by another client establish the concurrent conflict of interest.

In her role as a guardian ad litem for a minor, the county attorney is appointed to “stand in lieu of a parent” and defend the legal and social interests of the juvenile. *Neb. Rev. Stat.* § 43-272.01. Also, under the best practices found in the Nebraska Supreme Court’s *Guidelines for Guardians ad Litem for Juveniles in Juvenile Court Proceedings*, a guardian ad litem has both the role as an advocate for the juvenile and acts as legal counsel for the juvenile. Thus a guardian ad litem has the traditional role as a lawyer for the minor (plus has the power to stand in lieu of a parent) in these cases. Since that very same lawyer is a lawyer for the adverse party in the juvenile court proceeding (albeit in unrelated cases); then the expectations of loyalty, feelings of betrayal, and fear of devotion limited by deference to the other client establish the concurrent conflict of interest. This principle is explained in Comment [6] to Neb. Ct. R. of Prof. Cond. § 3-501.7, quoted above in this opinion.

In a purely private case such as a guardianship, custody, adoption, paternity, or other civil case [that does not include the State as a party]; the county attorney would probably not have an adverse party as a client in any unrelated matter. Thus, the conflict would not be inferred as it is in a juvenile court case where the guardian ad litem is the lawyer for the same party that is an adverse party to the juvenile. In this regard, the committee is aware that juvenile court proceedings are not meant to have the same features of adversity that typical litigation has. However, the fact remains that there is a degree of adverse interests involved between the action of the state and members of the family that are made parties to juvenile court proceedings.

Pursuant to Neb. Ct. R. of Prof. Cond. § 3-501.7 (b), the conflict can be waived with written informed consent [as defined by Neb. Ct. R. of Prof. Cond. § 3-501.0]. However the concurrent conflict must be so waived by both parties. The county attorney cannot logically get a waiver from a minor because the county attorney is the person advocating for and acting on behalf of the minor in her role as guardian ad litem. That would have the county attorney give herself a waiver so that she could continue to take guardian ad litem appointments in neighboring counties. Also, the State of Nebraska is the other client, and the committee knows of no realistic way for the State—or the juvenile court that makes the appointment—to waive the conflict for the other party.

The rule for imputation of conflicts of interest, Neb. Ct. R. of Prof. Cond. § 3-501.10, clearly imputes the county attorney’s concurrent conflict to all other members of her firm. Therefore, the committee believes that prior advisory opinion No. 08-01 applies to this request,

and therefore the committee counsels that an attorney who is a county attorney in one county of Nebraska cannot accept appointments as guardian ad litem from a juvenile court of any other county in Nebraska. Also, the prohibition extends to other members of the county attorney's law firm as well.

However, that same advisory opinion (No. 08-01) counsels that there is no conflict of interest if the appointment as guardian ad litem comes from a case in which the State of Nebraska is not a party, so long as the guardian ad litem does not happen to represent another party in the case that appoints the guardian ad litem in an unrelated case. That is because the county attorney would not be an attorney for any party in the non-juvenile court case, and would have no duties of loyalty or devotion of effort to any party other than the minor.

CONCLUSION

The committee concludes that a Nebraska lawyer serving as county attorney may not accept appointments as guardian ad litem in a juvenile court proceeding in any county in Nebraska. The prohibition also extends to other members of the lawyer's private law practice.

The reason for the prohibition is a concurrent conflict of interest as defined by Neb. Ct. R. of Prof. Cond. § 3-501.7 (1). The reason the prohibition extends to other members of the county attorney's separate law practice is the plain language of Neb. Ct. R. of Prof. Conduct § 3-501.10.