

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-1**

[Note: This opinion was originally issued by the Committee on January 6, 2006. The Committee has now determined that this opinion should be published as a Formal Opinion.]

MAY AN ATTORNEY WHO ACCEPTS APPOINTMENTS AS GUARDIAN AD LITEM IN ONE COUNTY ALSO ACT AT THE SAME TIME AS PART TIME DEPUTY COUNTY ATTORNEY IN ANOTHER COUNTY IN NEBRASKA?

RESTATEMENT OF FACTS

An attorney is in private practice of law in Scottsbluff, Nebraska and as part of his practice accepts appointments as Guardian ad Litem. Recently he was asked by the Kimball County Attorney to work with him as part time Deputy County Attorney in Kimball County. The question is whether there is any ethical prohibition from doing both kinds of legal work at the same time. For purposes of this opinion the Committee presumed that none of the Guardian ad Litem work is in Kimball County, and that none of the Deputy County Attorney work would be in Scottsbluff County.

[The Committee pointed out in the unpublished opinion that the Supreme Court of Nebraska adopted the Nebraska Rules of Professional Conduct ("Rules") effective September 1, 2005, replacing and superseding the Code of Professional Responsibility ("Code") in place before that date. All precedent of this Committee is based upon the Code and there are differences between the Code and the Rules. The Committee cautioned that it is advisory only, and that requesting lawyers should confer the Rules to answer questions concerning their issues.]

APPLICABLE CODE AND RULES PROVISIONS

CANON 5 A lawyer should exercise independent professional judgment on behalf of a client.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment.

(A) Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

CANON 9 A lawyer should avoid even the appearance of professional impropriety.

EC 9-1. Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-2. Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform a client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, the lawyer's duty to clients or to the public should never be subordinate merely because the full discharge of his or her obligation may be misunderstood or may tend to subject the lawyer or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his or her conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-6. Every lawyer owes a solemn duty to uphold the integrity and honor of his or her profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his or her fellow lawyers in supporting the organized bar through the devoting of the lawyer's time, efforts, and financial support as his or her professional standing and ability reasonably permit; to conduct himself or herself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

DR 9-101 Avoiding Even the Appearance of Impropriety.

(B) A lawyer shall not accept private employment in a matter in which the lawyer had substantial responsibility while he or she was a public employee.

(C) A lawyer shall not state or imply that he or she is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

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 1.10 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 1.14 Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

RULE 3.8 Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel,

employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

DISCUSSION

In an Informal opinion of this committee (628) dated September 26, 1990, the committee was asked whether lawyer A, who served as Guardian ad Litem in cases in the juvenile court of County X, may continue to serve or accept new appointments when lawyer B in the same firm was recently appointed County Attorney of County Y. The committee referred to the Code, DR 5-105 and Canon 9 as well as several others of its informal and formal opinions. DR 5-105 dealt with questions of impairment of independent judgment of the attorney, and Canon 9 dealt with the appearance of impropriety. Opinion 72-13 for example determined that a city or village attorney whose duties included prosecuting violations of ordinances and statutes may not properly represent anyone charged with a crime in any court, on the theory that this would create an appearance of impropriety. But Opinion 72-14 noted that 72-13 only applied to voluntary representation and not where the attorney in question was appointed by a court to represent one charged with such violation. Then, Opinion 74-2 supplemented 72-13 by allowing the representation if an order of a court where the criminal case was pending approved the employment even though he or one of his partners might also be serving as city attorney. These opinions were modified in Opinion 78-3 stating that in counties where there are other attorneys qualified to represent criminally accused persons, a deputy county attorney may not ethically undertake such representation, either voluntarily or by court appointment.

Formal Opinion 75-8 stated that it is improper for a county attorney . . . or a partner or associate, to represent a defendant in a criminal case involving violation of the criminal statutes of the State. It took a strong and unequivocal stance that covers situations which not only cross county lines but also involve partners or associates of the county attorney.

In Informal Opinion 628, the September 1990 opinion, the committee noted that some distinctions may exist between a lawyer representing criminal defendants and representation as a guardian ad litem, but there do not readily appear to be meaningful distinctions that would enable the committee to overturn Formal Opinions no 78-3 and 75-8, or create further exceptions thereto. Accordingly, the committee opined that Lawyer A should not continue to function as guardian ad litem in current matters or undertake new appointments unless the appointing court makes a finding that the appointment be continued on the basis that obtaining replacement guardian would place an unreasonable burden upon the court and the juvenile involved and that no impropriety will result from the continued participation as guardian.

In an earlier Informal Opinion of the committee (965) dated September 4, 1986 a partner of a city attorney asked whether he could accept appointment as guardian ad litem in juvenile cases. The city police department was the investigator on some of the juvenile cases. The committee noted that under the statute 43-272.01 (R.R.S. 1943) the GAL stood in lieu of a parent and was not appointed to prosecute or defend the parents but rather to defend and protect the legal and social interests of the juvenile, and therefore his client is the child not the parent, so the committee saw no prohibition against appointment as GAL in most cases, and pointed out that the usual conflict of interest rules would be applicable should some claim against the city or police become necessary on behalf of the juvenile, and there may be some circumstances where an appearance of impropriety must be avoided under Canon 9. The Committee referred to Formal Opinions 74-5 and 86-1 and concluded that the city attorney should be able to accept any civil cases except: (1) any action or proceeding wherein he would be opposing the city or any of its boards, committees or officials; (2) employment by any party where it conceivably could be his duty as city attorney to prosecute; or (3) employment in any transaction where it was his official duty to investigate.

Another Informal Opinion of the committee (1574) dated October 25, 1995 answered a question for an attorney in private practice who represented criminal defendants, juveniles, and served as GAL on both court appointed and private retention cases. He had been appointed special prosecutor in a criminal matter and asked whether this created a conflict of interest in the unrelated criminal and juvenile matters in which his clients and interests were adverse to the State. The committee referred to EC 5-1, EC 5-14, EC 5-21, AND DR 5-105, and Formal Opinions 74-5 and 86-1. In discussion the committee mentioned that it had not previously addressed the issue raised, but at least two other jurisdictions had concluded that a Special Prosecutor may ethically engage in criminal defense work. The committee noted that a Special Prosecutor's duties are limited to the cases in which they have been appointed in contrast to County Attorneys whose duties are specified by statute. Furthermore, the Special Prosecutor would not have access to the confidential files of the County Attorney's office or to confidential law enforcement documents or files unrelated to the matters on which they were appointed. The Committee opined that a Special Prosecutor may ethically simultaneously serve as such and as counsel in unrelated criminal and juvenile prosecutions. It was also the opinion of the committee that he may serve as GAL while acting as Special Prosecutor. The committee noted that it recognized the limited function of the Special Prosecutor appointment and the practical necessity of appointing attorneys experienced in criminal matters to serve. It cautioned, however, that if the attorney believed that his independent professional judgment on behalf of either the State as Special prosecutor, or his client when acting as defense counsel is affected, or if he feels that his loyalty to his client is affected then he must withdraw and cease representation of one or the other. It also cautioned the lawyer to be mindful of the Canon 9 message to avoid the appearance of impropriety.

Informal Opinion of the committee (2114), dated October 11, 2001 was a request by a lawyer Deputy County Attorney who asked if he could perform Guardian ad Litem work in adjoining counties. Pointing to Canon 5, DR 5-101, DR5-105, Canon 9, EC 9-1, EC 9-2, EC 9-6, DR 9-101 and Formal Opinions 74-10, 75-8, 78-3 and 94-4, the committee noted that at stake in these situations are interests of the State, County, the public at large, the court system, the law profession as a whole, the attorney, his or her firm and the individual clients involved. The committee concluded that a deputy county attorney could serve as a guardian ad litem in a county other than his or her own, with prior approval of the court, and then only if the appointment fell within the limitations of the ethical considerations, including the issue of whether there were any other lawyers available to act as guardian ad litem.

The message in these prior opinions interpreting the Code is clear. If the independent professional judgment of the attorney is affected by the dual representation he or she must resolve any questions by withdrawing and refusing further appointments or engagements of that nature. The appearance of impropriety described in Canon 9 was also a consideration.

We have no prior opinions of the Nebraska Advisory Committee to fall back on in interpreting the Rules. The comments to the Rules contain many of the same principles mentioned in the opinions interpreting the Code. Comment 1 to Rule 1.7, for example, discusses loyalty and independent judgment as essential elements in the lawyer's relationship to a client. Attorneys must remember that the Rules are authoritative but the comments are for guidance.

CONCLUSION

The duties specified by Statute as a Deputy County Attorney for Kimball County are not limited to Kimball County. N.R.S. Sec. 23-1201. It is true that most of the prosecutions will be filed and tried in Kimball County. However, a deputy county attorney may be appointed by the Attorney General to represent the State in any action or matter in which the state is interested or a party. A deputy county attorney is also required to prosecute any cases transferred to a different venue. In GAL work while it is true that most of the duties will take place in Scottsbluff County, it is conceivable

that one may have to investigate conduct in connection therewith in Kimball County. So there is at least the possibility for conflicts to arise between the two representations.

It is the opinion of the committee that under the Rules an attorney must assess each case for its potential conflicts and refuse any appointment deemed to present a conflict.

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