

# NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 15-03

## STATEMENT OF FACTS

A lawyer employed as a Deputy County Attorney elected to run for the position of Public Defender of the same county. The lawyer's duties with the County Attorney's office included representing the State in the prosecution of misdemeanor and felony offenses, performing coroner duties, and being on call to assist local law enforcement agencies with questions relating to warrants and probable cause, handling mental health commitment hearings, and representing the State of Nebraska in juvenile matters. As the Public Defender, the lawyer would be responsible for representing clients charged with misdemeanors and felonies, handling mental health commitment hearings and potentially representing juveniles and the parents of juveniles. The office of the Public Defender consists of the Public Defender, a deputy, and a legal secretary.

## QUESTIONS PRESENTED

### I.

Whether a County Attorney may accept employment in the office of the Public Defender of the same county and, if so, what safeguards must be in place to avoid a conflict of interest in the representation of clients.

### II.

Whether a lawyer, as Public Defender, represent clients in new cases that the lawyer has prosecuted in cases prior to leaving the County Attorney's office.

## APPLICABLE CASE LAW, RULES, AND COMMENTS

Section 3-501.11 of the Nebraska Rules of Professional Conduct states:

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(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.

Comment 4 to §3-501.11 provides:

This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are

necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

Comment 5 to §3-501.11 provides:

When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

Section 3-501.10 of the Nebraska Rules of Professional Conduct states:

- (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.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
  - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment 7 to §3-501.10 provides, in part “[u]nder Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.”

Section 3-501.9 of the Nebraska Rules of Professional Conduct states:

- (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.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; 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.

(d) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client:

(1) whose interests are materially adverse to the current client; and

(2) about whom the support person has acquired confidential information that is material to the matter, unless the former client gives informed consent, confirmed in writing

(e) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under Rule 1.9(d), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

(1) the former client gives informed consent, confirmed in writing, or

(2) the support person is screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the support person and the firm have a legal duty to protect.

(f) For purposes of Rules 1.9(d) and (e), a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.

Comment 2 to §3-501.9 provides, in part, “a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.”

Comment 3 to §3-501.9 provides, in part, that “[m]atters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.”

Comment 7 to §3-501.9 provides “[i]ndependent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and paragraph (c).”

Section 3-501.7 of the Nebraska Rules of Professional Conduct states:

(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.

Section 3-501.6 of the Nebraska Rules of Professional Conduct states:

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

In *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008), defendant appealed the district court's decision denying his motion for appointment of a special prosecutor based on an alleged conflict of interest. Kinkennon claimed the conflict arose when another attorney left the firm where his court-appointed defense counsel worked and then began employment with the county attorney's office as a deputy county attorney. Kinkennon claimed that to avoid the "appearance of impropriety" the conflict of interest should be imputed to the other prosecutors in the office, thus disqualifying the entire county attorney's office for that county.



The Nebraska Supreme Court acknowledged that most courts have adopted a less stringent rule, and “[u]nder 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. If impropriety is found, however, the court will require recusal of the entire office.” *Id.* The Court did not adopt the per se rule of disqualification. The Court recognized that they endorsed a more flexible rule by adopting Nebraska Rules of Professional Conduct, Rule 1.11(d). The Court went further to say 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 see justice, not profits.” *Id.* “The per se rule would result in the unnecessary disqualification of prosecutors where the risk of a breach of confidentiality is slight, thus needlessly interfering with the prosecutor’s performance of his or her constitutional and statutory duties. Furthermore, a per se rule would unnecessarily limit mobility in the legal profession and inhibit the ability of prosecuting attorney’s offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.” *Id.*

“When the disqualified attorney is effectively screened from any participation in the prosecution of the defendant, the prosecutor’s office may, in general, proceed with the prosecution.” *Id.* “Whether the apparent conflict of interest justifies the disqualification of other members of the office is a matter committed to the discretion of the trial court. In exercising that discretion, the court should consider all of the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breaching any of the privileged communications. A flexible, fact-specific analysis will enable a trial court to protect a criminal defendant from the due process concerns at issue, while at the same time avoiding unnecessary disqualifications of government attorneys. Whether the State has established an effective screening procedure will obviously be part of that analysis.”

“At a minimum, the disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the matter. Similarly, the other lawyers in the office who are involved with the matter should be informed that the screening is in place and that they are not to discuss the matter with the disqualified lawyer. Depending on the circumstances, additional screening procedures may be appropriate. These procedures may include a written undertaking by the screened lawyer to avoid any communication with other lawyers in the office and contact with files

or other materials relating to the matter, notice and instructions to all relevant governmental office personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and the other government personnel.” *Id.*

In *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013), defendant’s trial counsel sought to withdraw from his case because he accepted a position with the county attorney’s office in the felony division. Defendant’s newly appointed counsel believed that he should file a motion to disqualify the county attorney’s office in light of the prior defense counsel’s new employment with that office. However, defendant advised the court that he waived his opportunity or right to pursue that conflict issue. On appeal, defendant assigned as error the district court’s allowance of his prior defense counsel to withdraw and allowing him to waive the conflict of interest.

The court acknowledged that his defense counsel’s new employment at the county attorney’s office did create a conflict of interest, and the attorney was incompetent to represent defendant due to his new employment. As a result, the trial court did not abuse its discretion in allowing him to withdraw as defendant’s trial counsel.

In regard to the waiver of the conflict of interest, the court reiterated that in *State v. Kinkennon*, the Court had rejected a per se rule requiring disqualification of a prosecuting office when a conflict of interest with the defendant arises. “We held that the ultimate goal of maintaining both public and individual confidence in the integrity of our judicial system can be served without resorting to such a broad and inflexible rule. A per se rule would unnecessarily limit mobility in the legal profession and inhibit the ability of prosecuting attorney’s offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.” *Id.* Furthermore, “[b]ecause recusal is not a per se rule in this instance, [the Supreme Court held] that a defendant can waive a conflict of interest that would disqualify the prosecuting office.” *Id.*

## DISCUSSION

### I.

In reviewing applicable caselaw, Rules of Professional Conduct and Comments, there does not appear to be any restriction preventing a Deputy County Attorney from accepting employment as the Public Defender in the same county. In fact, the Nebraska Rules of Professional Conduct in regard to special conflicts of interest for former and current government officers and employees, §3-501.11, Comment 4 provides that “[t]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially.”

In the event of a lawyer transferring employment from the County Attorney’s office to the Public Defender’s office, or vice versa, that attorney would have a conflict and would be prohibited from participating in any matters in which the attorney participated personally and substantially in their former employment, unless the government agency and the former client would provide written consent. It appears unlikely that such consent would be provided by the parties. However, although the attorney transferring employment would not be able to participate in the defense of the client that the attorney previously participated personally and substantially in prosecuting, there is no per se rule requiring the disqualification of the entire Public Defender’s office. Nebraska Rules of Professional Conduct §3-501.10, Comment 7 states “[u]nder Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or *in another government agency*, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.” Similarly, Comment 2 of §3-501.11 of the Nebraska Rules of Professional Conduct states “[b]ecause 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.”

In *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008), the Nebraska Supreme Court, in determining whether a conflict of interest justifies the disqualification of other members of the government office, provided that the facts and circumstances should be considered to determine whether the prosecutorial function could be carried out impartially

and without breaching any of the privileged communications. It should also be determined whether an effective screening procedure had been established. The Court provided that “[a]t a minimum, the disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the matter. Similarly, the other lawyers in the office who are involved with the matter should be informed that the screening is in place and that they are not to discuss the matter with the disqualified lawyer. Depending on the circumstances, additional screening procedures may be appropriate. These procedures may include a written undertaking by the screened lawyer to avoid any communication with other lawyers in the office and contact with files or other materials relating to the matter, notice and instructions to all relevant governmental office personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and the other government personnel.” *Id.*

Based upon the Nebraska Rules of Professional Conduct and the aforesaid caselaw, it is the opinion of the committee that there is no restriction preventing a Deputy County Attorney from accepting employment as the County Public Defender in the same county, and any conflict that may arise for the attorney transferring employment is not automatically imputed to other government attorneys in the office. The isolation of the conflicted attorney from any participation in or discussion of the matters for which the attorney is disqualified can prevent the entire office from being disqualified. If impropriety is found, however, recusal of the entire office would be required. To the extent that Opinion 94-4 creates a per se rule of disqualification of the government office the attorney transfers to, it would be contrary to the current Rules of Professional Conduct and Comments and recent Nebraska caselaw. Therefore, those provisions of Opinion 94-4 are hereby rescinded.

## II.

In regard to new cases in the future and the attorney’s ability to represent clients as the Public Defender that the attorney previously prosecuted, it must be determined if the new matter is the same or substantially related to the matter the lawyer formerly represented the client on. The attorney has a continuing obligation to not “use information relating to the representation to the disadvantage of the former client except as [the Rules of Professional Conduct] would permit or require with respect to a client, or when the information has become generally known; or reveal information relating to the representation except as these Rules would permit or require with respect to a client.” Nebraska Rules of Professional Conduct §3-501.9(c)(1) and (2). The lawyer further has the obligation to

maintain the confidentiality of information pursuant to Nebraska Rules of Professional Conduct §3-501.6.

Comment 3 to §3-501.9 provides that “[m]atters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” “[K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.”

Comment 2 to §3-501.9 of the Nebraska Rules of Professional Conduct provides that “[t]he scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction.” “[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. *Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.*” (Emphasis added).

If the matters are not related, the attorney must determine, in accordance with §3-501.7, whether there is a significant risk that the representation of the client the public defender previously prosecuted will be materially limited by a personal interest of the lawyer (i.e. dislike of the client due to prior prosecution, etc.). If it is determined that the representation is materially limited by a personal interest of the lawyer, the lawyer must determine that he/she reasonably believes he/she can provide competent and diligent representation to the affected client and that the representation is not prohibited by law. The lawyer must discuss the situation with the client and obtain the client’s consent to the representation, confirmed in writing. If the client declines to sign the waiver or the attorney determines she cannot provide competent and diligent representation to the client, then the attorney must be screened from the case and have another attorney in the office handle the case or have an attorney outside the Public Defendant’s office appointed to represent the client.

## **CONCLUSION**

It is the opinion of the committee that there is not a per se conflict of interest in representing clients as the Public Defender that the lawyer formerly prosecuted in the prior employment as deputy county attorney. Consideration must be given to whether the new matter is substantially related to the prior matter and whether the attorney would have knowledge of facts gained in the prior employment that are relevant to the matter in question to preclude such representation. It must also be determined if the attorney's representation of the client would be materially limited by the personal interest of the attorney when the matters are not related. As previously discussed, if a conflict does exist, it could be waived by written consent of the government agency and/or the former client, and the remainder of the office may not be disqualified as a result of the conflict the one attorney has with the representation.