

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 22-01

A DEPUTY COUNTY ATTORNEY OR PART-TIME COUNTY ATTORNEY MAY NOT REPRESENT A DEFENDANT IN A CRIMINAL CASE INVOLVING A VIOLATION OF THE CRIMINAL STATUTES OF THE STATE OF NEBRASKA, HOWEVER, ATTORNEYS WHO ARE ASSOCIATED IN A FIRM WITH A PART-TIME COUNTY ATTORNEY MAY ETHICALLY DO SO IF OTHER CONDITIONS ARE MET

A PART-TIME COUNTY ATTORNEY MAY NOT REPRESENT CLIENTS IN FAMILY LAW MATTERS INVOLVING THE SUPPORT OF A MINOR CHILD

A PART-TIME COUNTY ATTORNEY MAY NOT HANDLE A PRIVATE PROBATE MATTER IN THE COUNTY IN WHICH THE COUNTY ATTORNEY SERVES UNLESS THE COUNTY HAS MADE ARRANGEMENTS FOR ALTERNATE LEGAL REPRESENTATION FOR PURPOSES OF INHERITANCE TAX DETERMINATIONS

QUESTIONS PRESENTED

1. May a deputy county attorney or a part-time county attorney represent a defendant in a criminal case alleging a violation of Nebraska law, in matters pending in other counties?
2. May a part-time deputy county attorney represent clients in family law cases involving the support of a child?

3. May a part-time deputy county attorney represent private clients in probate matters involving inheritance tax determinations within the county they serve?

FACTS

A series of questions have been posed to the Committee, whether the amendments to Nebraska Rules of Professional Conduct (particularly the addition of [§3-501.7\(c\)](#), and corresponding Comment 36, both adopted on January 16th, 2019) should cause the prior Ethics Advisory Opinions [75-8](#) and [08-01](#) to be modified or rescinded as it pertains to the questions presented.

APPLICIBLE RULES OF PROFESSIONAL CONDUCT

[RULE 1.7](#) CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraphs (b) and (c), 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.

(c) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer associated in a firm with another lawyer who is serving as a county attorney in a county where the county attorney is not required to devote his or her full time to the legal work of the county may represent a client with adverse interests to the State of Nebraska in a matter or other proceeding before a tribunal in a separate county 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 matter or other proceeding before a tribunal;

(4) the affected client, or if the affected client is a minor, his or her parent or guardian, gives informed consent, confirmed in writing, subject to the following restrictions:

(i) for appointment of a guardian ad litem pursuant to [Neb. Rev. Stat. § 43-272\(2\)](#), the juvenile court, on behalf of the juvenile, shall provide provisional informed consent upon the guardian ad litem's appointment, and, at the time of the first appearance, the juvenile court shall determine whether the provisional informed consent is appropriate, upon consultation with the parties. For appointment of counsel under [§ 43-272\(1\)\(a\)](#), the parent or guardian of the juvenile shall provide written informed consent; and

(ii) the State of Nebraska shall not be required to provide informed consent; and

(5) the member of the lawyer's firm who serves as county attorney:

(i) is timely screened from any participation in the matter;

(ii) is apportioned no part of the fee therefrom; and

(6) the lawyer representing the affected client provides prompt written notice to the tribunal before which the matter is pending.

Comment 36 to Rule 1.7 provides:

Special Considerations for County Attorneys in Small Counties

[36] [Rule 1.7\(c\)](#) is designed to address the problem faced by county attorneys and lawyers who associate in private practice with county attorneys in rural Nebraska counties. The State has a strong interest in ensuring that attorneys remain willing to serve in the role of county attorney, and Rule 1.7(c) seeks to avoid situations where attorneys avoid serving in such role due to conflicts of interest that would

otherwise be imputed to attorneys associated in private practice with the county attorney. This rule provides factors that must be taken into consideration by the attorney associated with the county attorney before undertaking representation of a client with interests adverse to the State, and the Rule provides for safeguards in such situations, including informed consent, screening, and notification to the tribunal. This rule is intended to promote the long-term viability of the practice of law in rural areas of the State, without eviscerating traditional conflict of interest principles expressed elsewhere throughout these Rules.

RULE 1.9(c) DUTIES TO FORMER CLIENTS

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

(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.

RULE 1.0 TERMINOLOGY

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(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.

DISCUSSION

1. Deputy or Part-Time County Attorney Representing Clients Charged with a Violation of Nebraska Law

The first issue to be addressed is whether a deputy county attorney or part-time county attorney may represent a criminal defendant who is charged with a violation of Nebraska law in a different county, given the amendments to [Rule 1.7](#). (Note that instead of "part-time," the language employed by Rule 1.7(c) is "[a] lawyer who is serving as a county attorney in a county where the county attorney is not required to devote his or her full time to the

legal work of the county.” “Part-time” will be used as a substitute in this discussion for brevity).

Formal Opinion [78-5](#) concluded that a county attorney or deputy county attorney could not ethically represent a criminal defendant in a case involving a violation of the criminal statutes of the State of Nebraska. The analysis begins with [Neb. Rev. Stat. § 23-1201](#), which sets forth the statutory duties of a county attorney “to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested.” This led to the conclusion that, “A county attorney, therefore, has three clients; the county, the state, and the public. His [or her] first duty is to them and it takes precedence over all other commitments to which a county attorney may become engaged either at the time or subsequently thereto.”

Formal Opinion 78-5 also found that these same rules must apply to a deputy county attorney, who “having all of the power and authority of the county attorney as far as prosecutions are concerned, should also stand in the shoes of the county attorney where ethical considerations are involved.”

In short, because a county attorney (or deputy) has a statutory duty to act on behalf of the State in criminal or civil matters where the State is an interested party, representation of a criminal defendant charged with violation of Nebraska criminal statutes would constitute a concurrent conflict of interest, in violation of [Rule 1.7\(a\)](#) (the

representation of one client will be directly adverse to another client). Since the county attorney or deputy have a statutory duty to act on behalf of the State of Nebraska, not just the county where they serve, representation of a criminal defendant even outside of the county where the county attorney or deputy serves remains a concurrent conflict of interest and is disallowed.

The inquiries posed to the Advisory Committee have questioned whether the 2019 addition of subsection (c) to [Rule 1.7](#), and the corresponding comment 36, require a renewed analysis of this issue as it pertains to a part-time county attorney or a deputy county attorney. Rule 1.7(c) provides, in part:

“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), **a lawyer associated in a firm with another lawyer who is serving as a county attorney** in a county where the county attorney is not required to devote his or her full time to the legal work of the county **may represent a client with adverse interests to the State of Nebraska in a matter or other proceeding before a tribunal in a separate county** if:...”
(emphasis added)

A close reading of subsection (c) of Rule 1.7 indicates that, if a part-time county attorney is associated with a firm, then a *different* attorney in the firm (a non-county attorney) may represent a criminal defendant in a matter before a tribunal in a separate county, as long as several conditions are met.

Subsection (c), however, does not go as far as to allow a part-time county attorney to represent criminal defendants in other counties. This is evident when considering subsection (c)(5) of Rule 1.7 which requires that “the member of the lawyer’s firm who serves as county attorney: (i) is timely screened from any participation in the matter; [and] (ii) is apportioned no part of the fee therefrom.” By its own terms, the rule requires that the part-time county attorney completely distance themselves from a case where other attorneys in the firm are representing a client who has adverse interests to the State. Therefore, the rule amendment cannot be read to allow a part-time county attorney to represent such clients themselves.

Comment 36 to Rule 1.7 also supports this interpretation of subsection (c), stating, “This rule provides factors that must be taken into consideration **by the attorney associated with the county attorney** before undertaking representation of a client with interests adverse to the State.” (Emphasis added). The Comment explains that the rule amendment seeks to avoid situations where an attorney serving as a part-time county attorney automatically imputes a conflict “that would otherwise be imputed to attorneys associated in private practice with the county attorney” when representing clients with adverse interests to the State. However, the rule change cannot be read to waive or remove a part-time county attorney’s ethical conflict in these scenarios by allowing a part-time county attorney to be involved in the representation of a client charged with violating the laws of Nebraska pending in other counties. In actuality, if other attorneys in the firm were handling such a case, the rule requires the part-time county

attorney to be completely distanced from the matter by timely screening from participation and by receiving no fee therefrom.

That being said, the addition of subsection (c) to [Rule 1.7](#) clearly requires an amendment to prior Formal Opinions [75-8](#) and [08-01](#), insofar as those Opinions concluded it would be improper for an attorney associated in a firm with a part-time county attorney to represent a defendant in a criminal case involving the State of Nebraska. The 2019 amendment to [Rule 1.7](#) now allows for an attorney associated with a county attorney to represent clients with adverse interests to the State as long as a number of conditions are met. At the outset, the threshold conditions include: (a) the county attorney with whom the attorney is associated must not be required to devote his or her full time to the legal work of the county which they serve; (b) the matter must be before a tribunal in a separate county than where the part-time county attorney serves; and, (c) there must not be a concurrent conflict of interest set forth in Rule 1.7(a).

If those conditions are met, subsection (c) of Rule 1.7 sets forth several additional requirements to be considered by the attorney who is associated with a part-time county attorney: “(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 matter or other proceeding before a tribunal; (4) the affected client, or if the affected client is a minor, his or her parent or guardian, gives informed consent,

confirmed in writing [subject to additional restrictions in guardian ad litem and juvenile matters]: (5) the member of the lawyer's firm who serves as county attorney: (i) is timely screened from any participation in the matter; [and] (ii) is apportioned no part of the fee therefrom; and (6) the lawyer representing the affected client provides prompt written notice to the tribunal before which the matter is pending.”

To the extent that Formal Opinions [78-5](#) and [08-01](#) pertain to attorneys representing clients with adverse interests to the State when the attorney is associated in a firm with a part-time county attorney, including criminal defendants, those opinions are amended accordingly to recognize the changes to [Rule 1.7](#).

2. Part-Time County Attorney Representing Clients in Family Law Matters involving Support of a Minor Child

The next question that has been posed to the Committee is whether a part-time county attorney can ethically represent clients in family law matters where child support is at issue, given the addition of subsection (c) to Rule 1.7.

In Formal Opinion [08-01](#), the Committee concluded that a part-time county attorney could not represent clients in family cases that involve the support of a child. The rationale set forth was that a part-time county attorney has access to the CHARTS system, which is a state-run database containing information to assist in nonsupport prosecutions, including (potentially) an individual's current financial information, location, prior employment and past earnings. This information is considered confidential (see 466 NAC 12.002), thus

creating a situation where a part-time county attorney, through their public office, has access to confidential government information that could be used against an adverse client as it pertains to child support. This creates a conflict under [Rule 1.11\(c\)](#) which sets forth that, “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 discussed previously, the addition of subsection (c) to [Rule 1.7](#) acts to permit attorneys who are in a firm with a part-time county attorney to represent clients with adverse interests to the State, given that a number of requirements are met. The rule does not operate to allow a part-time county attorney to also represent clients with adverse interests to the State, nor does it otherwise loosen the conflict-of-interest rules that apply to government employees found in [Rule 1.11](#).

Therefore, the conclusion arrived at in Formal Opinion [08-01](#) remains unchanged by the amendment to Rule 1.7. A part-time county attorney may not represent clients in family law matters that involve support of a minor because, through their public office, they have ready access to the CHARTS system and a wealth of confidential government information that could be used against an adverse party, in violation of Rule 1.11.

3. Part-Time County Attorney Representing Clients in Private Probate Matters

The final question before the Committee is whether a part-time county attorney may represent client in private probate matters occurring within the county that they serve. One issue that arises is that [Neb. Rev. Stat. § 77-2018.03](#) creates the statutory duty for the county attorney to represent the county and State of Nebraska in all inheritance tax determinations.

It has been the longstanding opinion of the Committee (see Formal Opinions [72-1](#), [81-6](#), and [08-01](#)) that a county attorney may represent clients in private probate matters (or inheritance tax determinations without probate) as long as the county board has first appointed a separate special county attorney to represent the interests of the county and the State of Nebraska in inheritance tax determinations. In Formal Opinion 72-1, the Committee relied on *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80 (1957) which found that that it would be improper for the county attorney to act for the private probate client if the county board failed to appoint special counsel, but noted that the county attorney would be relieved of their responsibilities to the county and State once a special county attorney was appointed.

As discussed previously, the addition of subsection (c) to [Rule 1.7](#) does not allow for a part-time county attorney to represent clients with adverse interests to the State; it allows other attorneys in the firm to potentially represent these clients. Therefore, the reasoning behind

prior Formal Opinions on this subject has not changed with the amendment of Rule 1.7. The ethical considerations that apply to a county attorney should also apply to a part-time county attorney in this scenario: A part-time county attorney may ethically represent a client with a probate or inheritance tax determination occurring within the county that they serve, as long as the county board has appointed a special county attorney for the purpose of representing the county and State for the inheritance tax determination.

CONCLUSION

It is the opinion of the Committee that neither a deputy county attorney nor a part-time county attorney may ethically represent a client who is charged with a violation of Nebraska law, even if the matter is pending in a different county. The Committee also holds the opinion that a part-time county attorney may not ethically represent a client in a family law matter that involves support of a minor child, due to the access to confidential government information that the public office provides through the CHARTS system. Finally, much like a county attorney, a part-time county attorney may ethically represent a client in a private probate matter (or inheritance tax determination without probate) occurring in the county which they serve, only if the county board appoints a special county attorney to represent the county and State for the inheritance tax determination.