

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 25-01

QUESTIONS PRESENTED

When the Lancaster County Board employs its Chief Administrative Officer (“CAO”) as additional counsel to represent the County in civil matters pursuant to Neb. Rev. Stat. § 23-1203, and an employee of the County (“Employee”) obtains advice on a matter from the CAO, then later requests an opinion and advice on the same matter from the County Attorney also pursuant to Section 23-1203, may the CAO prevent the Employee from communicating with the County Attorney regarding the matter by declining consent, as contemplated by Neb. R. Prof. C. 4.2?

ANSWER

The CAO’s consent or declination of consent has no effect on the Employee’s communications with the County Attorney regarding the matter. Neb. R. Prof. C. § 3-504.2 allows the County Attorney to communicate with the Employee as those communications are authorized by law.

FACTS

Lancaster County is governed by a Board of County Commissioners (“Board”). The County has an elected county attorney (“County Attorney”). The County Board also employs additional counsel in civil matters including the Chief Administrative Officer (“CAO”).

Based on the facts presented to the Committee, the Employee communicated with the CAO regarding certain action taken by the Employee within the course and scope of the Employee’s employment which could expose the County to liability. The communications related not only to the law, but also moral, economic, social, and political factors.

Following the communication with the CAO, the Employee requested an opinion and advice from the County Attorney on the same matter.

Before discussing further, the Committee assumes the CAO is in a continuing relationship with the Board regarding civil matters for the Board. The Committee further assumes this continuing relationship extends to the particular Employee on a continuing basis; providing the opinion to the Employee is not the entire scope of the CAO's representation in this matter or in other matters. The scope of the CAO's representation does not end when the opinion is provided. As such, the Committee addresses this Opinion under § 3-504.2 (see below), with the assumption the CAO and the Employee are in a continuing attorney-client relationship at the time the County Attorney is solicited. The Committee does not intend this Opinion to address situations in which the scope of the previous attorney-client relationship has ended, because the Committee understands that clients have a right to choose counsel of their choice, even if for the purpose of gathering a second opinion after the first relationship has ended.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

§ 3-501.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

§ 3-502.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

§ 3-504.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

DISCUSSION

Neb. R. Prof. C. § 3-504.2 controls the communications at issue in the question presented to the Committee. Rule 4.2 prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. (Neb. R. Prof. C. § 3-504.2). Rule 4.2 lists two exceptions, (1) “unless the lawyer has the consent of the other lawyer” or (2) “is authorized to do so by law or court order.” We must first determine whether the Employee is “represented” by the CAO, and must next determine whether either exclusion applies.

1. Is the Employee “represented” by the CAO?

According to the facts presented to the Committee, the Employee communicated with the CAO regarding certain action taken by the Employee within the course and scope of the Employee’s employment with the County which could expose the County to liability.

The County Board has adopted a Class Description for the CAO. See Board of County Commissioners of the County of Lancaster, Nebraska, Minutes, May 19, 2020, https://www.lancaster.ne.gov/AgendaCenter/View-File/Minutes/_05192020-1090. Pursuant to the Class Description for the CAO, one example of work performed by the CAO is to “Provide legal counsel to the County and County Board, draft legal documents and pleadings on behalf of the County and the County Board and interpret and give advice regarding the law to the County and County Board.” *Id.* Based on this description, the CAO represents Lancaster County and/or the Board.

Because the County and/or the Board is not an individual, but an organization, Neb. R. Prof. C. § 1.13(g) permits the CAO to also represent County employees so long as the employees’ interests are not adverse to the County and/or the Board. (Neb. R. Prof. C. § 3-501.13(g)). Pursuant to Rule 1.13(g), “A lawyer representing an organization may also represent any of its directors, officers, **employees**, members, shareholders or other constituents.” (Neb. R. Prof. C. § 3-501.13(g)) (emphasis added). The CAO communicated with the Employee regarding certain action taken by the Employee within the course and scope of the Employee’s employment which could expose the County to liability, relating not only to the law, but also moral, economic, social, and political factors. Pursuant to the Class Description of the Lancaster County CEO and Model Rule 1.13(g), based on the facts presented, the CAO represented the Employee as to the matter upon which the Employee requested the CAO’s opinion, as the CAO was permitted to do. Thus, Rule 4.2 applies to other attorneys’ subsequent communications with the Employee.

After communicating with the CAO, the Employee then requested an opinion and advice from the County Attorney on the same matter. According to the facts presented, the County

Attorney knew the Employee communicated with the CAO, and the general nature of those communications (i.e., the law as well as moral, economic, social, and political factors).

Under these facts, Rule 4.2 would prohibit the County Attorney from communicating with the Employee unless one of the exceptions to Rule 4.2 applies.

2. The County Attorney Could Communicate with the Employee with the CAO's Consent

Under the first exception to Rule 4.2, the County Attorney could communicate with the Employee with the CAO's consent. The question presented to the Committee is whether the CAO could *withhold* consent for the Employee to communicate with the County Attorney. Rule 4.2 is silent as to whether and under what circumstances an attorney may withhold consent for a client to communicate with another attorney. However, the opinion of the Committee is that the CAO's consent or declination of consent has no effect on the Employee's communications with the County Attorney regarding the matter, because the second exception set forth in Rule 4.2, that the communication is authorized by law, applies.

3. The County Attorney Could Communicate with the Employee if Authorized by Law or Court Order

Under the second exception to Rule 4.2, the County Attorney could communicate with the Employee if authorized by law or court order.

The County Attorney is authorized to communicate with "the board of county commissioners and other civil officers of their respective counties" by law. The authorization comes from Neb. Rev. Stat. § 23-1203, which provides:

The county attorney **shall** without fee or reward give opinions and advice to the **board of county commissioners and other civil officers of their respective counties**, when

requested so to do by such board or officers, **upon all matters in which the state or county is interested**, or relating to the duty of the board or officers in which the state or county may have an interest; *Provided*, in all counties of this state the county board may employ such additional counsel in civil matters as it may deem necessary. Such attorney or attorneys shall counsel the board or county officers on such civil matters as the board may lay before him or them, and shall prosecute or defend, on behalf of the county or any of its officers, such civil actions or proceedings as the interests of the county may in their judgment require, and shall receive such reasonable compensation in each case as the board and such counsel may agree upon.

(emphasis added). The County Attorney is statutorily required to give “opinions and advice” to “civil officers” when requested on “all matters in which the state or county is interested.” A county is interested in a matter when the matter “could expose the county to liability.” *Guenzel-Handlos v. Cnty of Lancaster*, 265 Neb. 125, 130, 655 N.W.2d 384, 388 (2003). According to the facts presented, the Employee’s actions could potentially expose the county to liability. Thus, the County Attorney is authorized by law, specifically, Neb. Rev. Stat. § 23-1203, to give opinions and advice to Civil Officers, including the Employee, on the matter.

Based on the information provided to the Committee, the Employee is a “civil officer” as contemplated by Neb. Rev. Stat. § 23-1203. It should be noted that not all county employees are “civil officers” or “county officers.” “Civil officer” or “county officer” is not defined by Neb. Rev. Stat. § 23-1203. In determining the meaning of “civil officer” or “county officer,” we look to other sections of Chapter 23 of the Nebraska Revised Statutes and Nebraska law. See *Farmers Coop. v. Nebraska*, 296 Neb. 347, 354, 893 N.W.2d 728, 735 (2017) (“In discerning the meaning of a statute, a court determines and gives effect to the purpose and intent of the Legislature as

ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense”); *Mahnke v. State*, 276 Neb. 57, 64, 751 N.W.2d 635, 642 (2008) (“We construe all statutes relating to the same subject as parts of a homogeneous system and later statutes as supplementary to preceding enactments. Statutes relating to the same subject...in pari materia, and we construe them together.”). While other statutes do not specifically define “county officer” or “civil officer,” they indicate a “county officer” or “civil officer” is elected (Nebraska Const. Art. IX, § 4), can be removed (Neb. Rev. Stat. § 23-2001-23-2009), and earn a salary set by statute. (Neb. Rev. Stat. 23-1101-23-1118). The statutes distinguish officers from clerks, assistants, or deputies (*See* Neb. Rev. Stat. 23-111 (clerks and assistants); Neb. Rev. Stat. 23-1114 (deputies)). Chapter 23 enumerates the following county officers: county clerk (Neb. Rev. Stat. § 23-1301-1313); comptroller (Neb. Rev. Stat. § 23-1401-23-1407); register of deeds (Neb. Rev. Stat. § 23-1501-1528); treasurer (Neb. Rev. Stat. § 23-1601-23-1616); sheriff (Neb. Rev. Stat. § 23-1701-23-1737); coroner (Neb. Rev. Stat. § 23-1801-1832); surveyor (Neb. Rev. Stat. § 23-1901-1913); engineer (Neb. Rev. Stat. § 23-1901-1913); assessor (Neb. Rev. Stat. § 23-3201-3211); school administrator (Neb. Rev. Stat. § 23-3301-3313); public defender (Neb. Rev. Stat. § 23-3401-3408); and auditor (Neb. Rev. Stat. § 23-3701).¹

The Opinion of the Committee comports with its opinion in Nebraska Ethics Advisory Opinion for Lawyers No. 22-02, which considered a somewhat similar question. In that Opinion, the facts presented to the Committee involved Nebraska State Patrol (“Patrol”) employees who sought legal advice from Patrol counsel, then retained private counsel to represent them in their

¹ County employees who do not meet the aforementioned qualifications are likely not “county officers” or “civil officers” as contemplated by Nebraska law. The Committee’s opinion does not apply to a case where the Employee is *not* a “county officer” or “civil officer.”

private capacity, related to the same facts. In some instances, private counsel ordered Patrol counsel to have no contact with the Patrol employees regardless of whether the agency's interest was, or likely was to become, adverse to the Patrol. As the Committee explained in Opinion 22-02:

The Legislature has determined the Patrol must provide counsel to advise the Patrol on "all legal matters." This obligation is found in Neb. Rev. Stat. § 81-2009(2):

The superintendent shall provide not less than three agency legal counsels stationed with the Nebraska State Patrol to assist county attorneys in the preparation of cases involving drug abuse and to advise the patrol on all legal matters...

The Patrol is the client in this context. Because the Patrol is not an individual, but an organization, Rule 1.13(g) permits Patrol attorneys to also represent Patrol employees so long as the Patrol employee's interests are not adverse to the Patrol's.

Id. Further, Opinion 22-02 recognized:

A Patrol employee's acts or omissions in the course and scope of the employee's duties may be attributed to the Patrol. In other words, when a Patrol employee takes official action, for many legal purposes the Patrol is the actor instead of the employee in his or her personal capacity.

Id. With respect to Neb. R. of Prof. C. § 3-501.13, Opinion 22-02 concluded:

Because Neb. Rev. Stat. § 81-2009(2) requires that Patrol counsel "shall" advise the Patrol on all legal matters, because Rule 1.13(g) provides that organization attorneys may also represent the organization's agents, and because Rule 1.13 does not proscribe the legislature's authority to set forth the duties of government attorneys, the Committee is of the opinion there is no conflict between Rule 1.13(g) and Neb. Rev. Stat. § 81-2009(2), but

if there were, the statute would control. This conclusion is supported by the Nebraska Supreme Court's finding in *State v. Vaughan*, that, "[c]ourt rules are subservient to statutes, and in case of conflict the statute, if constitutional, prevails . . ." . *State v. Vaughan*, 227 Neb. 753, 754, 419 N.W.2d 876, 877 (1988) (citing 21 CJS Courts § 170 at 262-63 (1940)). *Id.* at 3163. Finally, with respect to Neb. Ct. R. of Prof. Cond. § 3-504.2, Opinion 22-02 concluded: [T]he Committee is of the opinion that Neb. Rev. Stat. § 81-2009(2) does not inherently conflict with Rule 4.2. It is not contrary to Rule 4.2 for Patrol counsel to contact and advise a Patrol employee about his or her official duties or actions, even if private counsel directs they do not. Rule 4.2 permits with a represented person if the attorney is "authorized to do so by law." The requisite authority in this case comes from Neb. Rev. Stat. § 81-2009(2). This is true provided Patrol counsel's inquiry is limited to advising the employee about his or her conduct in the course and scope of his or her official duties, because Rule 4.2 prohibits communication about the subject matter of the representation for which the employee has hired private counsel, which would be to advise the Patrol employee only in his or her personal capacity.

Id. As the Committee determined in relation to Neb. Rev. Stat. § 81-2009(2) in Opinion 22-02, the Committee determines that Neb. Rev. Stat. § 23-1203 provides the requisite authority for communications between the Employee and County Attorney in this case, notwithstanding the CAO's consent or declination of consent.

CONCLUSION

The CAO's consent or declination of consent has no effect on the Employee's communications with the County Attorney regarding the matter. Neb. R. Prof. C. 4.2 allows the

County Attorney to communicate with the Employee, as those communications are authorized by law.