

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS  
NO. 23-02**

**I. Questions Presented**

May a lawyer associated with a firm represent a client before a state agency led by an elected official who is also associated with that firm, so long as the official recuses himself or herself from matters involving that lawyer's representation.

May a lawyer of the firm represent a client before a commission to which another licensed member of the firm is an appointed commissioner so long as the commissioner recuses himself or herself from matters involving that lawyer's representation?

Are all members of a firm disqualified under the Rules of Professional Conduct from representing clients before the state agency or the commission led by the official or the commissioner?

**II. Summary of Opinion**

A lawyer may represent a client before a state agency led by an official who is also associated with that firm. If so, however, the official must recuse himself or herself from any direct involvement with the matter before the agency if it would materially limit the interests of the client, and the official must have no access to information regarding the matter and no direct or indirect interest from the firm regarding the matter. A lawyer may also represent a client before a governing commission on which a commissioner is a member associated with that lawyer's firm. If so, however, the commissioner must recuse himself or herself from any direct involvement with the matter before the commission if it would materially limit the interests of the client, and the commissioner must have no access to information regarding the matter and no direct or indirect financial benefit from the firm regarding the matter.

But the lawyer may not represent a client before the agency or the commission if the official or commissioner is unable to recuse himself or herself due to the required duties of the role to which the official or commissioner has been appointed. The lawyer also may not represent a client before the agency or the commission if such representation states or implies an improper influence on the agency or commission, regardless of whether recusal is available or not. Often, recusal itself will address the appearance of impropriety to a degree that representation is possible, but not always.

**III. Statement of Facts**

A Nebraska lawyer (the "Lawyer") has requested an advisory opinion regarding the ability to represent clients before State agencies (the "Agency") and board or commission (the "Commission") when an associated attorney with the same law firm (the "Firm") is the appointed head of the State agency (the "Official") or appointed as a member of the board or commission (the "Commissioner").

The Lawyer has provided that the Official and Commissioner has retained an “of-counsel” relationship with the Firm and the Official and Commissioner has a compensation arrangement with Firm providing the Official and Commissioner not greater than \$1 per year from the Firm. The Lawyer has also provided that the Official and Commissioner is not involved in day-to-day operations of the Firm, and that the Official and Commissioner’s compensation is not affected in any way by work of the Firm. Finally, the Lawyer has provided that the Official and Commissioner does not represent the Agency or the Commission legally as the Agency or Commission’s attorney.

Based on that factual description, it is assumed for purposes of this opinion that the Official and Commissioner’s “of counsel” relationship is publically known and visible to current and potential clients of the Firm, even though the financial relationship with the Firm is not generally known to the public. It is also assumed for purposes of this opinion that the Official and Commissioner has access to client information and materials of the Firm, even if the Official and Commissioner does not engage in day-to-day operations of the Firm.

#### **IV. Applicable Rules of Professional Conduct**

##### **Neb. Ct. R. of Prof. Cond. § 3-501.0(c). 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.”

##### **Neb. Ct. R. of Prof. Cond. § 3-501.7(a). 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 averse 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.”

##### **Neb. Ct. R. of Prof. Cond. § 3-501.10(a). 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.”

##### **Neb. Ct. R. of Prof. Cond. § 3-501.11(d). Special conflicts of interest for former and current government officers and employees.**

“(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).”

**Neb. Ct. R. of Prof. Cond. § 3-501.08(k). Conflicts of interest; current clients; specific rules.**

“(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.”

**Neb. Ct. R. of Prof. Cond. § 3-508.4(e). Misconduct.**

“It is professional misconduct for a lawyer to: . . . (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”

**V. Discussion**

There are four issues arising from the questions presented in this Opinion. First, to establish a global foundation for analysis, the Opinion examines whether the Lawyer is associated with the Official and Commissioner in the same Firm. A conflict is imputed to the Lawyer and the Firm only if the Official and Commissioner is associated with the Firm. Second, after concluding the Official and Commissioner is likely associated with the Firm, the second issue of the Opinion is whether a concurrent conflict of interest exists if the Lawyer or Firm represents clients before the Agency or Commission. After concluding there is a concurrent conflict of interest, the third issue of the Opinion is whether the conflict can be addressed with recusal of the Official and Commissioner. Finally, fourth, after determining that the conflict generally does not prevent the Lawyer or Firm from representing clients before the Agency or Commission if recusal occurs, the Opinion concludes with the circumstances or situation in which the conflict might specifically prevent the Lawyer or Firm from representing clients before the Agency or Commission.

**1. Imputation of Conflict**

Under the facts presented, it is important to first establish how or why the Official and Commissioner’s non-attorney duties present a conflict of interest that is imputed to the Lawyer and the Firm.

Under Rule 501.11(d), “a lawyer currently serving as a public officer or employee is subject to rules 1.7 and 1.9.”<sup>1</sup> Rules 1.7 and 1.9 are conflict of interest rules under the Nebraska

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<sup>1</sup> Neb. Ct. R. of Prof. Cond. § 3-501.11(d).

Rules of Professional Conduct. Thus, the Nebraska Rules of Professional Conduct expressly provide that a lawyer serving as a public officer is subject to the conflict of interest rules,<sup>2</sup> even if the lawyer is not providing legal advice or counsel in his or her role as a public officer. The comments of Rule 501.11 support this conclusion. For instance, comment [4] of Rule 501.11 states that “[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*.”<sup>3</sup> Note that the comment addresses the lawyer’s “professional functions,” which is a broad term encompassing more than just responsibilities to clients.

Rule 1.7 accordingly provides that a lawyer cannot provide representation if it involves a concurrent conflict of interest, and a concurrent conflict exists (in addition to a direct conflict of interest) if “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.”<sup>4</sup>

Rule 1.10 then provides that “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 Rule 1.7.”<sup>5</sup> In other words, the professional duties of the Official or Commissioner are imputed to the Lawyer and the Firm as if the Lawyer or Firm were appointed as the agency official or the commissioner. Rule 1.10, however, requires that lawyers must be associated in a firm. Rule 1.0 does not define what “associated” means, but Rule 1.0(c) does define a “Firm” or “law firm” to mean a “lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law.”<sup>6</sup> That is not an entirely detailed definition, but the comments of Rule 1.0 further provide that whether lawyers constitute a “firm” is fact specific, stating that key factors include whether the lawyers present themselves to the public in a way that suggests they are associated in a firm together and whether the lawyers have mutual access to client information.<sup>7</sup>

Here, the facts assume that the Official and Commissioner is known to the public to be associated with the Lawyer and Firm as an “of-counsel” and the facts assume that the Official and Commissioner has access to the Firm’s client information in that role. Thus, based on those two facts and the reading of the comments of Rule 1.0, this Opinion concludes that conflict imputation under 1.10 applies to the Official and Commissioner, due to the nature of the Official and Commissioner’s of-counsel role. The fact there is very little financial benefit to the Official and Commissioner from the Firm is of little consequence, as the public views the Official and Commissioner as being associated with the Firm and the Official and Commissioner has access to the client information through the Firm.

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<sup>2</sup> Rule 1.7 relates to concurrent conflicts of interest with current clients. Rule 1.9 relates to conflicts of interest with former clients and does not apply to the facts and questions presented by this Opinion.

<sup>3</sup> Neb. Ct. R. of Prof. Cond. § 3-501.11(d) cmt. [4] (emphasis added).

<sup>4</sup> *Id.* § 3-501.7(a)(2).

<sup>5</sup> *Id.* § 3-501.10(a).

<sup>6</sup> *Id.* § 3-501.0(c).

<sup>7</sup> *Id.* § 3-501.0 cmt. [2].

Further analysis is therefore needed for the questions presented, for the imputation under Rule 1.10 applies to the Official and Commissioner.

## 2. Concurrent Conflict of Interest

The second issue is whether a conflict of interest exists due to the Official and Commissioner's non-legal professional responsibilities to the Agency or Commission. As stated above, the following two Rules of Professional Conduct guide this issue:

First, under Rule 501.11(d), "a lawyer currently serving as a public officer or employee is subject to rules 1.7 and 1.9."<sup>8</sup> Rule 1.11(d) expressly provides that a lawyer serving as a public officer is subject to the conflict of interest rules even if the lawyer is not providing legal advice or counsel in his or her role as a public officer. Comments to the Rule discussed above further support that conclusion. Thus, the concurrent conflict of interest rule applies to the Official and Commission.

Second, as discussed above, Rule 1.7—the concurrent conflict of interest rule—states that a concurrent conflict exists (in addition to a direct conflict of interest) if "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."<sup>9</sup> Here, under the facts, the Official or Commissioner does not have responsibilities to multiple current clients, as the Agency or Commission is not a "client". Similarly, the Official or Commissioner does not have responsibilities to a former client, as the client of the Firm is a current client. The Official or Commissioner, however, does have duties to a third person that apply under these facts, and he or she may have personal interests involved as well. Professional duties surely exist towards the Agency and the Commission, and those duties cannot materially limit the Firm's representation of the client before the Agency or Commission. Comment [9] of Rule 1.7 supports this position, as it states that a lawyer's duties may be materially limited by the lawyer's "responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director."<sup>10</sup> Duties of the Official or Commissioner for the Agency or Commissioner are akin to the duties of trustee, executor, or corporate director.

Thus, where the Official and Commissioner's duties will materially limit the representation of the client, the Lawyer and Firm may not represent the client before the Agency or Commission. In most situations, it is likely that the Official or Commissioner's duties do not address or affect the Firm's client, so there is likely not conflict to address. However, should the Official or Commissioner's duties involve the client's interests, it is difficult to imagine the waiver of a conflict under the facts presented, as the representation before the Agency or Commission will usually involve the assertion of a claim (some enforcement matter or some type of "ask" before the Agency or Commission) by or to the Agency or Commission in the same proceeding before the Agency or Commission.<sup>11</sup> Thus, waiver under Rule 1.7(b) would be an unlikely scenario to avoid the concurrent conflict of interest, if the Official or Commissioner

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<sup>8</sup> *Id.* § 3-501.11(d).

<sup>9</sup> *Id.* § 3-501.7(a)(2).

<sup>10</sup> *Id.* § 3-501.7 cmt. [9].

<sup>11</sup> *See id.* § 3-501.7(b)(3).

believes his or her duties to the Agency or Commission materially limits the Firm's representation of the client before the Agency or Commission.

### **3. Recusal of the Official or Commissioner**

As stated above, where the Official and Commissioner's duties will not materially limit the representation of the client, the Lawyer and Firm may represent the client before the Agency or Commission (subject to discussion below). Where the Official and Commissioner's duties will materially limit the representation of the client, the Lawyer and Firm may not represent the client before the Agency or Commission unless a waiver occurs. Waiver of conflict may theoretically be possible, but given the facts it is unlikely the client would not be directly involved with some type of claim assertion by or to the Agency or Commission.

But, should the Official and Commissioner recuse himself or herself from the matter entirely, then the duties to the third party (Agency or Commission) and the personal interests of the Official and Commissioner would not limit representation, because the Official and Commissioner would no longer have a duty to perform or fulfill in the matter. Presumably, another person in the Agency would fill the Official's duties if possible, or the remaining members of the Commission would rule on the matter.

The Official and Commissioner could likewise not involve himself or herself on behalf of the client before the Agency or Commission, and the Official or Commissioner should be restricted from access to all client information regarding the matter.

For that reason, the Advisory Committee believes the Nebraska Ethics Advisory Opinion for Lawyers No. 07-02 ("Opinion No. 07-02") is well-stated and represents good policy that can be applied to this Opinion. Opinion No. 07-02 was limited to a lawyer's duties on a city council, but its analysis applies to other forms of public office as well. As stated in Opinion No. 07-02, applying Rule 1.7 and Rule 1.10(a) strictly to prevent representation would be inconsistent with the comments adopted (or, rather, comments decidedly not adopted) by the Nebraska Rules of Professional Responsibility for Rule 1.11 (i.e., as discussed in Opinion No. 07-02, Nebraska has not adopted a comment that expressly prohibits representation before such an agency, commission, or board). Applying Rule 1.7 and Rule 1.10(a) strictly to prevent representation would also not address the effect of recusal, as recusal would actually remove the Firm's imputed duties to the third-party Agency or Commission.

An analysis of personal interest conflicts in the Rules of Professional Responsibility further supports this conclusion. Rule 1.10(a) states that personal interest conflicts are not imputed to the associated lawyers.<sup>12</sup> But, Rule 1.8 enumerates various types of personal interest conflicts associated with clients, and it states that all but one of them are imputed to the associated lawyers, notwithstanding Rule 1.10.<sup>13</sup> None of the enumerated personal interest conflicts, however, address personal interests related to an Agency or Commission. If the Rules of Professional Responsibility wanted to directly impute this conflict to the Official or Commissioner's duties to the Agency or Commission, the Rules could have enumerated this

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<sup>12</sup> *Id.* § 3-501.10(a).

<sup>13</sup> *Id.* § 3-501.8(k).

personal conflict expressly. The Rules did not do so. Thus, although the analysis of personal interest conflicts does not remove the need to address the Official or Commissioner's duties to the third party Agency or Commission under Rule 1.7(a)(2), it provides support for the approach of the Committee toward the questions presented.

#### **4. Recusal not Possible or Ineffective**

Finally, although recusal may eliminate a conflict where the Official and Commissioner's duties will materially limit the representation of the client, there are times where recusal is not possible. For instance, if the duties must be exercised by the Official or the Commissioner and no one else, then the Official or Commissioner has accepted the responsibility of exercising those duties. That responsibility cannot and should not be delegated. If the duties cannot be delegated—such as when a substitute decision maker or agency employee will not suffice—then the Firm cannot represent adverse interests of the client before the Agency or Commission. Or, if the duties are of a continuing nature and cannot be delegated by one-time recusal, then the Official or Commission's recusal would be ineffective. Nebraska Ethics Advisory Opinion for Lawyers No. 12-02 (“Opinion No. 12-02”) illustrates this possibility. There, Opinion No. 12-02 discussed the conflict between a lawyer serving as a county commissioner and also representing (either personally or as an associated member of a firm) criminal defendants in that county. County commissioners always hold financial duties and obligations to their counties. They pass budgets, amend budgets, set levies, approve claims, monitor financial performance within budgets, etc. The ever-present financial responsibilities of the county commissioner is not subject to a one-time recusal. In contrast, lengthy criminal matters can be expensive and costly to counties if taken to trial, and they may materially limit the lawyer's ability to represent his or her client to the extent needed, because the lawyer may be pressured or compelled by those duties to settle or plea a charge when trial for the client would be the better representation. Thus, as illustrated in Opinion No. 12-02, in some instances recusal may not be a possible way to remove the Official or Commissioner's duties to the Agency or Commission.

Moreover, there may be situations in which the Official or Commissioner's duties do not materially limit the Firm's representation, but rather, they materially advance the Firm's representation. This could be the case even if recusal should occur, as subordinates or other commissioners of the Official or Commission may be expressly or impliedly influenced by the Official or Commissioner's association with the Firm. That situation would not present a conflict under Rule 1.7, as the Agency or Commission is not a client, but that situation would implicate Rule 8.4. Rule 8.4 provides that a lawyer shall not “state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”<sup>14</sup> If the parties involved believe an appearance of impropriety may exist if the Firm represents the client before the Agency or Commission, or that implied, inappropriate political pressure may be placed on the Agency or Commission due to the Firm's representation, the Committee believes the letter and intent of the Rules of Professional Conduct would be best served by the Firm declining representation before the Agency or Commission. The Committee advises caution in such matters so that the public business of the state and the profession avoid the appearance of impropriety or political pressure.

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<sup>14</sup> *Id.* § 3-508.4(e).

## **VI. Conclusion**

The Lawyer may represent a client before a state Agency led by an Official associated with the Lawyer's Firm. If so, however, the Official must recuse himself or herself from any direct involvement with the matter before the Agency if the Official's duties to the Agency would materially limit the interests of the client, and the Official must have no access to information regarding the matter and no direct or indirect interest from the Firm regarding the matter. The Lawyer may also represent a client before a Commission on which an associated lawyer serves as a Commissioner. If so, however, the Commissioner must recuse himself or herself from any direct involvement with the matter before the Commission if the Commissioner's duties to the Commission would materially limit the interests of the client, and the Commissioner must have no access to information regarding the matter and no direct or indirect financial benefit from the Firm regarding the matter.

But, the Lawyer or Firm may not represent a client before the Agency or the Commission if the Official or Commissioner is unable to recuse himself or herself due to the required duties of the role to which the Official or Commissioner has been appointed. The Lawyer or Firm also may not represent a client before the Agency or the Commission if such representation states or implies in improper influence on the Agency or Commission, regardless of whether recusal is available or not. Often, recusal itself will address the appearance of impropriety to such a degree that representation is possible, but not always. Caution is advised in such situations.