

NOTICE OF COMMENT PERIOD

On November 16, 2017, the Nebraska State Bar Association submitted proposed amendments to Neb. Ct. R. of Prof. Cond. § 3-501.7, “Conflict of interest; current clients.” On December 13, 2017, the Nebraska Supreme Court directed the proposed amendments be published for a public comment period.

The Nebraska Supreme Court invites interested persons to comment on the proposed amendments. Anyone desiring to comment on the proposed amendments should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to ashley.nolte@nebraska.gov, no later than March 1, 2018.

The full text of the proposed amendments is available below, or a hard copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

§ 3-501.7. 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 Class 1 or Class 2 county, as those terms are defined by Neb. Rev. Stat. § 23-1114.01, 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 gives informed consent, confirmed in writing, subject to the following restrictions:

(i) if the affected client has not reached the age of majority and is a party in a juvenile court proceeding, the juvenile court, on behalf of the minor child, shall provide provisional informed consent upon the attorney's appointment, confirmed in writing, and, at the time of the first appearance, the juvenile court shall determine whether the informed consent is appropriate, upon consultation with the parties; and

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

(5) the member of the lawyer's firm who serves as county attorney in a Class 1 or Class 2 county, as those terms are defined by Neb. Rev. Stat. § 23-1114.01:

(i) is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the tribunal before which the matter is pending.

COMMENT

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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.