

**Nebraska Ethics Advisory Opinion for Lawyers
No. 09-08**

A PART-TIME CITY ATTORNEY, VILLAGE ATTORNEY, OR OTHER MEMBER OF HIS OR HER FIRM ARE NOT AUTOMATICALLY PROHIBITED FROM ACCEPTING GUARDIAN AD LITEM APPOINTMENTS IN JUVENILE COURT PROCEEDINGS INVOLVING ABUSE AND NEGLECT, TRUANCY OR OTHER BEHAVIORAL ISSUES AS LONG AS THERE ARE NO SPECIAL CIRCUMSTANCES GIVING RISE TO A CONFLICT OF INTEREST UNDER THE RULES OF PROFESSIONAL CONDUCT.

WHILE EACH CASE MUST BE EVALUATED ON ITS OWN FACTS, PARTICULAR CARE SHOULD BE EXERCISED WHEN THE JUVENILE PROCEEDINGS ORIGINATE WITHIN THE CITY OR VILLAGE REPRESENTED BY THE FIRM.

QUESTIONS PRESENTED

1. Whether a part-time city attorney, village attorney, or other members of his or her firm, are restricted in accepting guardian ad litem appointments when the juvenile proceeding originates *outside* the city or village represented by the firm.
2. Whether a part-time city attorney, village attorney, or other members of his or her firm, are restricted in accepting guardian ad litem appointments when the juvenile proceeding originates *within* the city or village represented by the firm.

FACTS

A law firm in outstate Nebraska is engaged in the general practice of law. It consists of four practicing attorneys, one of whom is the City Attorney for a city with a population in excess of 5,000, and another attorney in the firm is a Village Attorney for two nearby villages. The positions of City Attorney and Village Attorney are both part-time.

Neither the City Attorney nor the Village Attorney prosecutes violations of state statutes, but do prosecute violations of ordinances, none of which involve potential jail time in the event of conviction.

The duties of the City Attorney and Village Attorney do not involve prosecuting juvenile proceedings, or involve the investigation of the circumstances giving rise to the filing or prosecution of a juvenile petition.

The county courts in the area desire to appoint members of the law firm as guardians ad litem in juvenile proceedings filed in their courts. The typical case involves abuse and neglect, habitual truancy from home or school, or conduct otherwise at issue. The cases are prosecuted by the County Attorney and the complainant is usually the state. City ordinances are normally not involved in these types of cases.

Members of the law firm are willing to accept guardian ad litem appointments.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-501.7. CONFLICT OF INTEREST; CURRENT CLIENTS

- (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.

COMMENT:

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "Informed Consent" and "Confirmed in Writing," see Rule 1.0(e) and (d).

RULE § 3-501.10. 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.

* * *

- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

COMMENT:

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

RULE § 3-501.11. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

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- (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

COMMENT:

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

DISCUSSION

A concurrent conflict of interest exists under § 3-501.7(1) if "the representation of one client will be directly adverse to another client . . ." A guardian ad litem is appointed to defend the legal and social interests of the juvenile. NEB. REV. STAT. § 43-272.01. In the facts as presented, the city or village represented by members of the law firm willing to serve as guardians ad litem would not be a prosecuting entity or party to those juvenile proceedings. Therefore, we are not concerned with a direct conflict where one client would be adverse to another client in the same proceeding.

However, a concurrent conflict of interest can still exist 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 . . ." Rule § 3-501.7(2). And, as comment [1] emphasizes "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a

client." Further, if one member of a law firm is conflicted out of a representation, that conflict is imputed to other members of the same firm. Rule § 3-501.10.

A village or city attorney, by statute, has rather broad duties as legal advisor to the city council or board of trustees and the city officers, depending to some degree upon the nature of the engagement. *See, e.g.*, NEB. REV. STAT. § 17-610, § 16-319. The extent of the engagement for the city or village will need to be considered in any conflict of interest analysis. For purposes of this opinion, however, our analysis will be based upon the facts as recited above.

This Committee has previously considered this issue under the Code of Professional Responsibility ("Code"), prior to the effective date of the current Rules of Professional Conduct ("Rules"). In an informal opinion dated September 4, 1986, the Committee considered whether the member of a law firm, whose partner was an assistant city attorney, could accept juvenile court appointments as guardian ad litem for children involved in abuse and neglect cases. The city frequently investigated abuse and neglect charges against parents, and for purposes of that opinion it was assumed that the partner of the city attorney would not be opposing the city police as guardian ad litem. In concluding that a conflict would not exist the Committee stated:

We see no apparent conflict of interest, and therefore, no prohibition against your appointment as guardian ad litem for these juveniles in most cases. The usual conflict of interest rules would, of course, be applicable should some claim against the [city], or its police officials, become necessary on behalf of the protected juvenile. There may also be cases where particular facts and circumstances may indicate an appearance of professional impropriety which must be avoided under Canon 9. Generally, however, we see no violation of ethical principles, especially where you are appointed by the Court.

The Committee also referred the requesting counsel to its prior Formal Opinion No. 74-5 as supplemented by Opinion No. 86-1, in giving the following guidance:

The Committee, in that opinion, summarizes its position as to civil matters (which we deem your appointment to be) as follows: "Accordingly, a city attorney should be able to accept any civil cases, except:

- (i) Any action or proceeding wherein he would be opposing the city or any of its boards, committees or officials.
- (ii) Employment by any party where it conceivably could be his duty, as city attorney, to prosecute.
- (iii) Employment in any transaction where it was his official duty to investigate. . . ."

In Formal Opinion No. 06-1, the Committee considered whether an attorney who accepts appointments as guardian ad litem in one county may also act, at the same time, as a deputy

county attorney in another Nebraska county. The opinion was written at a time when the Nebraska Rules of Professional Conduct had just replaced and superseded the Code of Professional Responsibility. Therefore, the opinion was based primarily upon prior opinions relying on the Code as authority. In that opinion the Committee specifically recognized that, while most of a county attorney's duties involve prosecutions in the county he represents, a deputy county attorney could be appointed by the attorney general to represent the state "in any action or matter in which the state is interested or a party." Therefore, a county attorney or his deputy could be called upon to represent the state in any county, including any county in which he accepted an appointment as guardian ad litem. As a result, the possibility of a conflict of interest still existed and each appointment must be evaluated on a case by case basis.

More recently, Formal Opinion No. 08-01 disapproved of Formal Opinion 06-01 insofar as it implicitly approved guardian ad litem appointments for county attorneys in juvenile court actions where the action was brought in the name of the State of Nebraska, "[b]ecause the county attorney represents the State of Nebraska, [and] this prohibition extends to appointments in other counties as well." The Committee stated that "Rule 1.7 prohibits any attorney in the firm from representing a client due to a concurrent conflict of interest", and further observed that "it is not likely that a juvenile client can waive such conflict." This amendment to the holding in 06-01 does not apply here to a village or city attorney.

Based upon the foregoing, the facts as recited to the Committee do not present a conflict of interest which would prevent a part-time city attorney, or village attorney, or members of his firm from accepting a guardian ad litem appointment in a juvenile court proceeding either within or outside the city or village represented. Obviously, if the appointment relates to a matter originating within the city the likelihood of potential conflicts of interest are much greater. For example, if the matter was investigated by the city or village police there are a variety of scenarios which could lead to a conflict between the guardian ad litem and the city attorney's duty to the city and its citizens. Likewise, if a matter at issue involves the interpretation or enforcement of a city ordinance the danger of a potential conflict of interest exists.

Because an evaluation of potential conflicts is fact dependent, under the Rules the Committee cannot give a broad opinion that covers all circumstances. But as a matter of general guidance, we believe the criteria discussed in our prior opinions, as quoted above, is a useful starting point to assess the likelihood of a potential conflict of interest. More particularly, a city attorney or member of his firm should be able to accept a guardian ad litem appointment in juvenile court involving a civil matter in the nature of those discussed above, unless (1) he or she would be opposing the city, any of its officials, or their official interests; (2) some aspect of the proceeding could conceivably lead to a need for the city attorney's involvement as a city prosecutor or legal advisor; or, (3) the matter under consideration could give rise to the city attorney's official duty to investigate on behalf of the city.

As comment [1] to Rule 1.7 suggests, a lawyer should be careful to avoid any representation which could affect, or be perceived to affect, his or her "loyalty and independent judgment . . . in the lawyer's relationship to the client."

CONCLUSION

A part-time city attorney, village attorney, or other member of his or her firm is not automatically prohibited from accepting guardian ad litem appointments in juvenile court proceedings involving abuse and neglect, truancy or other behavioral issues as long as there are no special circumstances giving rise to a conflict of interest under the Rules of Professional Conduct.

While each case must be evaluated on its own facts, particular care should be exercised when the juvenile proceedings originate within the city or village represented by the firm. While not a sole criteria, the factors discussed above should serve as a useful guide in assessing whether a potential conflict of interest exists.