

Nebraska Ethics Advisory Opinion for Lawyers
No. 12-02

A LAWYER, WHO IS ELECTED TO A COUNTY BOARD, WHICH HAS, AS ONE OF ITS DUTIES TO ACT EACH YEAR UPON THE BUDGET PRESENTED BY THE COUNTY ATTORNEY, SHOULD NOT HANDLE CRIMINAL CASES, NEGOTIATING AND DEFENDING THEM AGAINST THE COUNTY ATTORNEY NOR ANY MEMBER OF HIS OR HER STAFF. NOR SHOULD ANY MEMBER OF HIS OR HER FIRM HANDLE CRIMINAL CASES AGAINST THE COUNTY ATTORNEY OR ANY MEMBER OF HIS OR HER STAFF. THIS WOULD NOT PROHIBIT THAT LAW FIRM AGAINST HANDLING CRIMINAL CASES IN OTHER JURISDICTIONS.

FACTS

An attorney seeks election to serve as a part-time County Commissioner for one of the counties in Nebraska. This attorney and his firm handle criminal cases in the county in which he seeks election as well as other counties. This attorney is also the public defender in an adjoining county. The County Commissioners have budgetary authority over the County Attorney's office, and each year must act upon the County Attorney's budget.

QUESTIONS PRESENTED

1. Does ethics Advisory Opinion No. 75-4 still control?
2. How does election to the County Board affect other members of a law firm?
3. Are there any potential remedies to disqualification which may exist?
4. How extensive is any disqualification?

APPLICABLE RULES OF PROFESSIONAL CONDUCT

§ 3-501.11. 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 Rule 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally or substantially while in private practice or 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...

(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.

§ 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, 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.

§ 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...

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

DISCUSSION

As the Advisory Committee noted Advisory Opinion No. 75-4:

The trial of a criminal case is expensive to the county and the taxpayers. Lots of money would be saved if attorneys for persons accused of crimes would plead them guilty or bargain for dismissal of more serious crimes by offering to plead to a lesser crime. The lawyer commissioner... situation may very well impair his independent professional judgment either consciously or unconsciously... Full disclosure to both the client, the other commissioners, and the county attorneys still leaves open the question of whether the public (in this case the county) can give consent... We therefore conclude that a lawyer who is one of the county board, should not practice in that county.

Nebraska has since adopted the Rules of Professional Conduct. Therefore, the applicability of the above has been questioned as the prior opinion was decided under the Code of Professional Responsibility. To his credit, the inquirer has sought to avoid any potential ethical problems before they could have arisen.

The relevant ethical rule is as follows:

§ 3-501.11. 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 Rule 1.7 and 1.9; and
- (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally or substantially while in private practice or 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...

Under the Rules, a similar disqualification would exist as under the previous Code. Nebraska Ethics Advisory Opinion for Lawyers No. 08-01, refers to consent by the county

saying:

(I)t is at least theoretically possible in Nebraska to obtain a waiver from a public entity or governmental agency. To the extent there is a mechanism which allows a public entity to waive a conflict of interest, an attorney may seek to obtain such a waiver. However, there is currently no such mechanism for an attorney who represents the State of Nebraska (as opposed to an attorney who represents other governmental entities).

Thus, under the current Rules, the disqualification still exists.

A more difficult situation exists with the other members of the firm. The relevant ethical provision is as follows:

Under § 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...

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

However, (d) above does not specifically refer to lawyers who are current **public officials** as opposed to current or former government **lawyers**. § 3-501.11 (b) refers to conflicts concerning law firms and **former public officers or employees**. The remaining conclusion by the above gaps would be that under § 3-501.10, none of the lawyers in the firm can knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7. As consent is not possible, there is no remedy. The disqualification extends to all members in that firm for that county, but not to criminal representation in any other county, unless no additional factual situations which are not stated here could occur.

CONCLUSION

Ethics Advisory Opinion No. 75-4 does not still control, as the Rules have changed, but the underlying reasons and conclusion remain sound. The disqualification from criminal cases for the County Board member would extend to other members of the law firm. There are no remedies for this disqualification as there is no mechanism for consent. The disqualification extends for the county in question, but not for other counties.