Nebraska Ethics Advisory Opinion for Lawyers
No. 07-04

AN ATTORNEY MAY UNDERTAKE EMPLOYMENT AS A STAFF ATTORNEY FOR THE STANDING CHAPTER 13 BANKRUPTCY TRUSTEE IF THE ATTORNEY IS PROPERLY SCREENED FROM ALL CASES INVOLVING THE ATTORNEY'S FORMER CLIENTS AND THE CLIENTS OF THE ATTORNEY'S FORMER LAW FIRM

QUESTION PRESENTED

Whether an attorney employed in a bankruptcy practice firm that files Chapter 13 bankruptcy petitions may accept employment as an attorney for the Standing Chapter 13 Trustee for the District of Nebraska.

FACTS

The appointed Standing Chapter 13 Bankruptcy Trustee is a quasi public hearing officer and "an instrumentality of the federal government." The Trustee is responsible for receiving payments from debtors and disbursing those payments to creditors pursuant to the debtors' plans, the claims process and the United States Bankruptcy Code. The Bankruptcy Code obligates the Chapter 13 Trustee to provide debtors assistance, other than legal counseling, in performance of their plans. The Trustee does not represent creditors, but does monitor debtors' compliance with various aspects of the Bankruptcy Code, and may file Objections to Confirmation, Motions to Dismiss, or take other actions deemed necessary. Due to the need to hire staff attorneys who are knowledgeable about Chapter 13 practice, the pool of qualified candidates typically will consist almost exclusively of attorneys who have experience with bankruptcy court practice.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not 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, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(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).

(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.

RULE 1.7 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.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that

person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client:

(1) whose interests are materially adverse to the current client; and

(2) about whom the support person has acquired confidential information that is material to the matter, unless the former client gives informed consent, confirmed in writing.

(e) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under Rule 1.9(d), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

(1) the former client gives informed consent, confirmed in writing, or

(2) the support person is screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the support person and the firm have a legal duty to protect.

(f) For purposes of Rules 1.9(d) and (e), a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.

RULE 1.0 TERMINOLOGY

(k) "Screened" denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these Rules or other law.

DISCUSSION

Because the position is for a staff attorney for, "an instrumentality of the federal government," it appears that the situation would be governed by the provisions of Rule 1.11, which addresses special conflicts of interest for former and current government officials and employees. The only portion of that Rule that applies to situations in which attorneys move from private practice to a position as a public official or employee, is subparagraph (d). That provision contains three requirements: (1) the attorney must comply with Rules 1.7 and 1.9; (2) the attorney must not participate in a matter in which he or she participated personally and substantially while in private practice without the consent of the appropriate governmental agencies; and (3) the attorney must not negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which he or she is participating personally and substantially.

Obviously, this situation does not involve the last of the forgoing requirements. Thus, the issue is whether screening the attorney in question from all cases which involve the attorney's former clients or clients of his or her former law firm, would suffice to meet the remaining two requirements.

The committee has not previously addressed this precise issue in any of its opinions. A number of formal opinions have addressed the issues of conflicts and screening in a variety of other contexts. (See e.g. Formal Opinions 73-14, 93-2 and 94-4). However, those opinions predated the adoption of the Nebraska Rules of Professional

Conduct in 2005 (the "Rules"), and were thus based upon the Code of Professional Responsibility (the "Code"), which differed in several important respects from the Rules.

Rule 1.7 prohibits representation that involves a concurrent conflict of interest. A concurrent conflict of interest would not exist under paragraph (a)(1) of the Rule due to the fact that you would be the attorney's only client. Thus, the attorney would be representing no other clients whose interests could be directly adverse to the Trustee.

Potentially, a concurrent conflict of interest could arise under paragraph (a)(2) of Rule 1.7 if there was a significant risk that representation of the Standing Chapter 13 Trustee would be materially limited by the attorney's responsibilities to former clients. However, screening the attorney from all cases involving former clients or clients of his or her former law firm, would appear to adequately address the potential for such a conflict. By relieving the attorney of all responsibility for those cases, and assigning them entirely to another staff attorney, you would enable the attorney to fulfill the attorney's responsibility to former clients without adversely affecting the quality of representation that the Trustee receives. In that respect the outcome under the Rules is different from the result that was previously reached under the Code. In State of Nebraska, ex rel. FirsTier Bank, N.A. Omaha v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993), the Court adopted a "bright line" rule that imputed disqualification of one attorney or support person to all associated attorneys based upon the provisions of Canon 9 of the Code that prohibited, "even the appearance of impropriety." On the basis of that holding, this committee, in Formal Opinion 94.4, concluded that a "Chinese wall" or "cone of silence" was insufficient to avoid the appearance of impropriety and thus could not be used to avoid imputed disqualification. That opinion went on to explicitly state that no exception existed for government lawyers or law offices.

The continued validity of that conclusion was called into question by the holding of the Court of Appeals in In Re Interest of Brittany S., 12 Neb. App. 208, 670 N.W.2d 465 (2003). In that case a father appealed the decision of the Separate Juvenile Court of Douglas County to terminate his parental rights to his daughter. Among the grounds for his appeal was a claim that the Juvenile Court had erred in denying his request for a special prosecutor due to the fact that one of the deputies then employed in the County Attorney's Office had previously served as a guardian ad litem for the daughter, and in that capacity had initiated an action and obtained a judgment against the father. In rejecting that claim the Court stated:

> Even if a conflict of interest existed, this conflict would not be imputed on the entire Douglas County Attorney's Office. It does not appear that the Nebraska Supreme Court has addressed the issue of whether a disqualification of one government attorney is imputed on the entire disqualified government attorney's office. However, other states that have addressed this issue have not imputed a

disqualification to the entire government office.

Id. at 220, 670 N.W.2d at 474. Citing United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981); ABA Comm. on Prof. Ethics Formal Op. 342 (1975); and several subsequent state cases, the Court concluded:

> In the instant case, the record reflects that Brittany's former GAL's only participation was her involvement as Brittany's former GAL. There is no evidence that suggests Brittany's former GAL was involved in the case after becoming employed with the Douglas County Attorney's Office or that she was not effectively screened from any direct or indirect participation after beginning her employment with the Douglas County Attorney's Office. As such, this court now finds that even if a conflict of interest did exist, such a conflict would not be imputed to the entire Douglas County Attorney's Office.

Id. at 220, 670 N.W.2d at 474.

The position enunciated by the Court of Appeals in Brittany S. is explicitly stated in the Rules. Specifically, comment [7] to Rule 1.10 states, "Where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer."

The rationale for that position is explained, at least in part, in the following excerpt from Comment [4] to Rule 1.11:

> This Rule represents a balancing of interests. . . . [T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. . . . The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues
> on which the lawyer worked, serves a similar function.

In light of the foregoing considerations, the committee believes that screening the staff attorney from cases involving former clients and clients of his or her former firm will enable the attorney to comply with the provisions of Rule 1.7 regarding concurrent conflicts of interest.

Likewise, the committee believes that screening the attorney from cases involving former clients and clients of his or her former firm will enable him to comply with the provisions of Rule 1.9 regarding duties to former clients. Generally, Rule 1.9 prohibits an attorney: (1) from representing a party in a matter in which he or she has previously represented another party with materially adverse interests; (2) from representing a party in a matter in which another party with materially adverse interests is represented by the attorney's former firm, and about whom the attorney had acquired protected information while with the former firm; and (3) from using or disclosing information regarding the representation of a former client or client of a former firm. All of those obligations will be fulfilled if the attorney is properly screened from cases involving former clients and clients of his or her former firm. The Committee believes that in order for the screening process to be effective, however, it should incorporate all of the elements outlined in Comments 9 and 10 to Rule 1.0. As stated therein:

> [9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer regarding the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.
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> [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Because such a screening procedure would enable the attorney to comply with the requirements of Rule 1.9, the attorney would, by necessity, also comply with the requirement of Rule 1.11(d)(2) that he or she not participate in a matter in which he or she participated personally and substantially while in private practice.

CONCLUSION

It is the opinion of the Committee that under the provisions of the Nebraska Rules of Professional Conduct an attorney may undertake employment as a staff attorney for the Standing Chapter 13 Bankruptcy Trustee if the attorney is properly screened from all cases involving former clients and the clients of his or her former law firm.