Nebraska Ethics Advisory Opinion for Lawyers
No. 08-01

(This Opinion amends Formal Opinion 06-01, in part)

AN ATTORNEY RELATED BY MARRIAGE TO A COUNTY ATTORNEY MAY NOT REPRESENT CRIMINAL DEFENDANTS BECAUSE "EACH AFFECTED CLIENT" MUST GIVE INFORMED CONSENT, CONFIRMED IN WRITING AND THERE IS NO MEANS FOR THE COUNTY ATTORNEY TO OBTAIN SUCH INFORMED CONSENT FROM THE STATE.

IT IS IMPROPER FOR AN ATTORNEY ASSOCIATED WITH A PART-TIME COUNTY ATTORNEY TO REPRESENT A DEFENDANT IN A CRIMINAL CASE INVOLVING A VIOLATION OF THE CRIMINAL STATUTES OF THE STATE OF NEBRASKA.

AN ATTORNEY LEAVING PRIVATE PRACTICE TO SERVE AS A COUNTY ATTORNEY OR DEPUTY COUNTY ATTORNEY CANNOT PARTICIPATE IN A MATTER IN WHICH HE OR SHE PERSONALLY AND SUBSTANTIALLY PARTICIPATED WHILE IN PRIVATE PRACTICE, UNLESS THE APPROPRIATE GOVERNMENT AGENCY AND THE FORMER CLIENT BOTH GIVE INFORMED CONSENT, CONFIRMED IN WRITING. THIS CONFLICT IS NOT AUTOMATICALLY IMPUTED TO OTHERS IN THE COUNTY ATTORNEY'S OFFICE.

A COUNTY ATTORNEY MAY NOT REPRESENT CLIENTS IN FAMILY LAW MATTERS INVOLVING THE SUPPORT OF A MINOR CHILD.

AN ATTORNEY ASSOCIATED WITH A COUNTY ATTORNEY MAY REPRESENT A CLIENT IN A FAMILY LAW ACTION INVOLVING THE SUPPORT OF A MINOR CHILD UNDER CERTAIN CIRCUMSTANCES.

A COUNTY ATTORNEY OR ANY ATTORNEY ASSOCIATED WITH A COUNTY ATTORNEY MAY NOT HANDLE A PRIVATE PROBATE MATTER IN THE COUNTY IN WHICH THE COUNTY ATTORNEY SERVES UNLESS THE COUNTY HAS MADE ARRANGEMENTS FOR ALTERNATE LEGAL REPRESENTATION FOR PURPOSES OF INHERITANCE TAX DETERMINATIONS.

A COUNTY ATTORNEY LEAVING OFFICE TO GO INTO PRIVATE PRACTICE CANNOT PARTICIPATE IN A MATTER IN WHICH HE OR SHE PERSONALLY AND SUBSTANTIALLY PARTICIPATED WHILE ACTING AS A PROSECUTOR, THIS CONFLICT IS IMPUTED TO THE ATTORNEY'S FIRM UNLESS THE FIRM APPROPRIATELY SCREENS THE FORMER PROSECUTOR, AND NOTIIFIES THE COUNTY ATTORNEY'S OFFICE OF THE CONFLICT.

QUESTIONS PRESENTED

1. Whether other members of a part-time county attorney's firm, including the spouse of the county attorney, would be able to represent criminal defendants in any county in Nebraska.

2. Whether a conflict of interest arises:

   (a) in a juvenile case where a newly elected county attorney was the previously appointed guardian ad litem, or

   (b) in a criminal case where there is an enhanceable offense and the current county attorney was the defense attorney on the prior prosecution.

3. Whether a part-time county attorney, or other members of his or her firm, are restricted in accepting family law cases, probate cases, or guardian ad litem appointments either in the county where the county attorney serves or other Nebraska counties.

4. Whether a former county attorney may associate with a private practice firm that represents criminal defendants in the same county.

5. Whether a former county attorney may represent a defendant after he formerly represented the state against a co-defendant at a bond hearing and the co-defendant is expected to testify against the defendant.

6. Whether a former county attorney may represent a defendant after he formerly represented the state against the same defendant at a bond hearing.

FACTS

The Committee has received several requests regarding possible conflicts of interest involving county attorneys. This opinion will attempt to address those concerns, based on the following facts: (a) a partner of a small law firm considers running for a position of county attorney in a small rural county where the other members of his firm include his wife; (b) a newly elected county attorney questions under what circumstances there may be a conflict of interest with respect to former clients; (c) a part-time county attorney is concerned with conflicts caused by the private practice of the county attorney or his or her partners in family law, probate and guardian ad litem representation; (d) a current county attorney is leaving government practice to work for a private firm who represents criminal defendants currently being prosecuted by the county; and (e) a former county attorney wishes to represent defendants in cases in which he had some involvement as a prosecutor.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;
>
> (2) to secure legal advice about the lawyer's compliance with these Rules;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (4) to comply with other law or a court order.

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.

Comment 11 to Rule 1.7 provides:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

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.

RULE 1.10(d)

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

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 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 appropriate government agency.

RULE 1.0 TERMINOLOGY

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct.

(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

Rule 1.10(d) of the Rules of Professional Conduct provides that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Rule 1.11 provides that *former* government lawyers are subject to Rule 1.9(c) in addition to Rule 1.11. Rule 1.9(c) sets forth a general prohibition against (1) using information to the disadvantage of a former client, and (2) revealing information gained during the representation of the former client. Rule 1.11 provides that *current* government lawyers are subject to Rules 1.7 and 1.9 (in addition to Rule 1.11). Rule 1.7, 1.9 and 1.11 are set forth above.

1. Criminal Representation by Other Firm Members:

The first issue to be addressed is whether the spouse or other member of a part-time county attorney's firm may represent criminal defendants. Because this issue involves a current county attorney, Rules 1.7, 1.9 and 1.11 apply. In prior ethical opinions, this committee has considered that criminal defendants are guaranteed the right to counsel under the Sixth Amendment of the United States Constitution. *See* Formal Opinion 06-5. This right to counsel for criminal defendants includes the right to be represented by an attorney who is free of any possible conflicts of interest. *Id., see also*, *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

A. Spouses

With respect to a spouse representing criminal defendants, prior opinions of the Advisory Committee have addressed this issue based on the former Nebraska Code of Professional Responsibility. Specifically, in Formal Opinion 78-9 the committee stated:

> It is not per se unethical for an attorney to represent defendants in criminal cases in a county in which a close relative of the attorney, such as a brother, sister, father or spouse, is the county attorney, whether or not the matter may be prosecuted by a deputy county attorney.

78-9 suggests that lawyers should "carefully examine the circumstances in each case before accepting employment, should make a full disclosure to the client, and should refrain from accepting any such employment if there is any suggestion or possibility of disqualification." Further, in Formal Opinion No. 86-5, the committee concluded that attorneys who are married or closely related were required to make full disclosure to their respective clients and obtain the consent of the clients to the representation.

This subject is addressed by Rule 1.7 of the Nebraska Rules of Professional Conduct. Rule 1.7(a)(2) prohibits an attorney from representing a client if there is "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person, or by a personal interest of the lawyer." However, notwithstanding the existence of a concurrent conflict of interest, Rule 1.7(b) allows a lawyer to 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.

In Formal Opinion 06-12, this committee stated that there is no "bright line" rule whether or not a lawyer can represent a client when an adverse party in the same matter is being represented by a relative by blood or marriage. Rather, an attorney must first determine whether his professional judgment would be affected by his own personal interest. If the attorney determines it will not be, then the attorney must obtain informed consent, confirmed in writing. When informing the client of the relationship, the potential client should be adequately advised of the material risks of and available alternatives to the proposed representation. Under Rule 1.0, "informed consent" requires that the attorney provide adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct. *See also*, Formal Opinion 86-5. Comment 11 to Rule 1.7 provides that Lawyer A related to Lawyer B ordinarily may not represent a client in a matter where Lawyer B is representing another party, unless *each* client gives informed consent.

The ABA/BNA Lawyer's Manual on Professional Conduct addresses "Lawyer Relatives" and provides: "While client consent allows for adversarial representations between private lawyers related by blood or marriage, client consent is often considered ineffective when one of the spouses works for a government agency" (51:1301). The Manual cites Arizona Ethics Opinion 82-15 (1982) for the proposition that a prosecutor who represents the public cannot obtain consent in any meaningful manner, and direct representation of adverse interests by related lawyers is not generally permitted. However, the Manual also cites Pennsylvania Ethics Opinion 86-2 (1986) which held that consent of the state may be granted by the government employer of one of the spouses upon consideration of the facts (51:1306).

With respect to obtaining a waiver of a conflict of interest from a government agency, this committee has previously stated that in Nebraska a public entity cannot give consent or waive a conflict of interest. *See*, Formal Opinion 04-1, *citing*, *State ex rel. Nebraska State Bar Association v. Douglas*, 227 Neb. 1, 58, 416 N.W.2d 515 (1987) and *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80, 92, 84 N.W.2d 136 (1957). (*But see, Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000) (distinguishing *Douglas* and *Richards* for the proposition that under certain circumstances a public entity is capable of consent to mutual representation). We note that Formal Opinion 04-1 and the cases cited therein interpret provisions under the

former Nebraska Code of Professional Responsibility. Additionally, 04-1 responded to an attorney's request concerning prohibitions against representing the State of Nebraska and not other public entities such as counties, municipalities, etc. Rule 1.11 of the current Nebraska Rules of Professional Conduct specifically provides a provision for a government entity to give consent. See, Illinois Ethics Opinion 95-5 (1995) (a government entity is capable of furnishing consent); *Granholm v. Michigan Public Service Comm'n*, 243 Mich. App. 487, 2000 WL 1824520 (Mich Ct. App. 2000) (attorney general may seek consent to oppose public agency while also representing it); and Alaska Ethics Opinion 99-2 (1999) (a municipality can consent to conflict of interest). Thus, with one exception, it 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). As noted in earlier opinions, the county attorney really has three clients: the county, the state and the public. *See, e.g*. Formal Opinion 04-1.

Based upon the language contained in Rules 1.7 and 1.11 of the Nebraska Rules of Professional Conduct, the committee is of the opinion that there may be circumstances where married attorneys may properly represent opposing parties. In that event, Rule 1.7(b) requires both attorneys to disclose the concurrent conflict and obtain written informed consent from "each affected client." However, a spouse of a county attorney is prohibited from representing an adversarial party in an action where the state is also a party because there is no procedure for waiving a conflict of interest on behalf of the state - one of the "affected clients."

It should be noted that any restriction on spouses does not necessarily extend to partners or associates of spouses, See Rule 1.10(a).

B. Attorneys Associated with a Part-Time County Attorney.

A conflict of interest exists when other attorneys practicing with a part-time county attorney consider representation of criminal defendants. In Formal Opinion 75-8, interpreting the former Nebraska Code of Professional Responsibility, this committee stated that it was improper for a county attorney, a deputy county attorney, or a partner or associate of either, to represent a defendant in a criminal case involving a violation of the criminal statutes of the state of Nebraska.

This imputed disqualification was based upon the fact that neither a county attorney nor a city attorney, with the duty to prosecute violations of city ordinances or state statutes, may ethically represent persons accused of criminal offenses in any courts. *See*, Formal Opinion 186 (1938), Formal Opinion 72-13 (1972), and Formal Opinion 4-01. This prohibition arises because a county attorney is statutorily required to "prosecute or defend, on behalf of the state and county, all suits, applications, or

motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested." Neb. Rev. Stat. § 23-1201.

Pursuant to Rule 1.7(b)(3), some conflicts are not subject to waiver. Consent to representation is not an option if the representation involves the assertion of a claim by one client against another client. Clearly, an attorney associated with a county attorney could not represent criminal defendants in the county in which the county attorney serves or in any other county. As indicated earlier in this opinion, the county attorney really has three clients, one of them being the state. Thus, representation of criminal defendants in any action where the state is a party is prohibited. This is true for both the county attorney and attorneys associated in private practice with a county attorney. As stated in Formal Opinion 75-8, "Having accepted the benefits and emoluments of public office, either directly or indirectly, the burdens and forbearance must likewise be assumed."

2. County Attorney Dealing with Former Clients:

Rules 1.9 and 1.11(d) apply to situations where a current government attorney is faced with possible conflicts from private practice. Read together, Rule 1.9 and 1.11(d) prohibit a county attorney from participating in a matter in which the attorney participated personally and substantially while in private practice, unless the appropriate government agency and the former client both give informed consent, confirmed in writing. In cases where a county attorney formerly represented a criminal defendant or participated personally and substantially in the case and now intends to prosecute the former client, the county attorney must obtain the written consent of both the former client and the state. Again, this is something that does not appear to be possible under the current state of the law. Thus, the county attorney would be precluded from participating in matters involving the former client. This prohibition, however, would not necessarily disqualify the entire county attorney's office. See Comment 7 to Rule 1.10: "Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice . . . former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer." Further, in the absence of any financial interest or personal bias against a defendant by the county attorney, most courts have not automatically disqualified the entire prosecutor's office when a tainted lawyer has joined it. *See e.g. State v. Camacho*, 406 S.E.2d 868 (NC Sup.Ct. 1991). Courts in other jurisdictions have considered this situation on a case-by-case basis, weighing the nature and extent of any confidential disclosure, any appearance of impropriety, the appropriateness of a screening process and the position level within the office of the personally disqualified attorney. *Grand Jury Subpoena of Ford v. U.S.*, 756 F.2d 249 (CA 2 1985). It is the opinion of the committee that a conflict for one county attorney is not automatically imputed to other government attorneys in the same office, but must be considered on a case by case basis.

With respect to situations where the newly elected county attorney was the previously appointed guardian ad litem in a juvenile case, Rule 1.9(a) provides that 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. Thus, under Rule 1.9, the only way in which a newly elected county attorney could ethically represent the state in an action in which the attorney formerly acted as guardian ad litem would be if written, informed consent was obtained from the former client. However, in the situation of representing a child, it is not likely that a minor can give such informed consent.

3. County Attorney/Firm and Family Law, Probate and Guardian Ad Litem Cases:

A. Family Law Cases:

The Advisory Committee previously addressed the issue of a county attorney or his firm representing individuals in family law cases in Formal Opinions 71-2, 74-1, 74-12, 76-15 and 87-5, all interpreting the former Nebraska Code of Professional Responsibility and summarized below:

Formal Opinion 71-2: a law firm of which a county attorney is a member may never ethically represent clients in divorce cases involving minor children.

Formal Opinion 74-1: amending 71-2, to allow a county attorney or a law firm to represent clients in divorce actions involving minor children so long as the county board has passed a resolution allowing such representation and agreeing to engage at the county's expense a special prosecutor to handle any nonsupport prosecutions arising from the case.

Formal Opinion 74-12: the prohibition found in 74-1 does not extend to divorce actions involving minor children in other counties than the one in which the county attorney serves.

Formal Opinion 76-15: a county attorney should not institute criminal charges against a husband for nonsupport where he previously represented the wife prior to becoming county attorney.

Formal Opinion 87-5: a county attorney may never ethically represent either parent in any proceeding involving custody of a minor child, including paternity, unless the county board has adopted a general policy permitting its county attorney to represent parties to a custody dispute and agreeing to engage, at the expense of the county, a special prosecutor to handle any nonsupport actions that arose thereafter.

Family law encompasses a broad spectrum of cases, including divorce, paternity, modification of prior orders and decrees, and adoption. When used in this opinion, "family law" refers only to those cases in which support for minor children is an

issue. Rule 1.10(d) directs us to Rule 1.11: "The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Thus, Rules 1.7, 1.9 and 1.11, all dealing with current county attorneys, must be examined. Prior to the promulgation of the Rules of Professional Conduct, this committee concluded that in counties where the county board had adopted a policy permitting its county attorney to represent parties in family law matters and agreeing to engage, at the expense of the county, a special prosecutor to handle any nonsupport matters arising from cases in which the county attorney has a conflict due to prior representation of a party, a county attorney or his firm could handle family law matters in private practice. This is our first opportunity to answer this same question under the new Rules.

Scenario I: An attorney in the county attorney's private practice firm *currently* represents a parent who is to receive child support. Any nonsupport action brought by the county attorney would be brought against the other parent, not this client. Rules 1.7 and 1.11(d) apply. Under Rule 1.7 there is no concurrent conflict of interest. Under Rule 1.11(d), the county attorney shall not participate in a matter in which the lawyer [or his firm] participated personally and substantially while in private practice. Under the scenario presented, it is an attorney associated in private practice with the county attorney who wishes to represent clients in family law matters. In this scenario, nothing prohibits the private firm from representing this client as no conflict of interest exists. In the event the county attorney was faced with prosecuting a nonsupport action against the adverse party while the family law case was still pending, there would be a conflict of interest *for the county attorney* since an attorney in his firm participated personally and substantially in establishing the support order. In that event, the county attorney could not prosecute the nonsupport action. The county board would need to engage a special prosecutor to handle the nonsupport matter. An attorney's representation of current family law clients, (when the attorney is associated with a part-time county attorney), is also subject to Rule 1.11(c) as discussed below.

Scenario II: An attorney in the county attorney's private practice firm *currently* represents a parent who is to pay support. In this situation, there is merely the potential for a nonsupport action which would be directed at a current client of the county attorney's private law firm. If that occurred, it would present a direct conflict of interest under Rule 1.7(a)(2). This conflict of interest cannot be waived. *See* Rule 1.7(b)(3). Again, there is nothing prohibiting the private firm from representing this client as no conflict of interest exists until and unless the client fails to pay support. In the event of a nonsupport action, the county attorney could not prosecute the nonsupport action. The county board would need to engage a special prosecutor to handle the nonsupport matter. An attorney's representation of current family law clients, (when the attorney is associated with a part-time county attorney), is also subject to Rule 1.11(c) as discussed below.

Scenario III: An attorney in the county attorney's private practice firm *formerly* represented a parent who receives child support. Rules 1.9 and 1.11 apply. Rule 1.9 prohibits an attorney who formerly represented a client in a matter from thereafter representing another client "in the same or a substantially related matter" where the second client's interests are materially adverse to the interests of the first client. While in some cases, prosecuting nonsupport matters would appear to benefit the former client, in other cases, a county attorney may negotiate a settlement with the non-supporting parent or make other prosecutorial decisions which adversely affect the former client's interests. Thus, informed consent must be obtained from the former client. If informed consent is not obtained, the county must engage a special prosecutor to handle the nonsupport matter. In the event an associated attorney wishes to represent the former client in future family law actions (such as modification actions), Rule 1.11(c) must be strictly followed as to screening and fee restrictions. Under no circumstances may the county attorney, acting as either a private attorney or a government attorney, represent such client.

Scenario IV: An attorney in the county attorney's private practice firm *formerly* represented a parent who pays child support. In the event the former client fails to pay child support and the case is referred to the county attorney's office for prosecution, Rules 1.9 and 1.11(d) apply. Rule 1.9 prohibits an attorney whose firm formerly represented a client in a matter from thereafter representing another client "in the same or a substantially related matter" where the second client's interests are materially adverse to the interests of the first client. This prohibits the county attorney from prosecuting the nonsupport matter unless the former client gives informed consent. If the former client does not give informed consent, the county must engage a special prosecutor to handle the nonsupport matter. In the event an associated attorney wishes to represent the former client in future family law actions (such as modification actions), Rule 1.11(c) must be strictly followed as to screening and fee restrictions. Under no circumstances may the county attorney, acting as either a private attorney or a government attorney, represent such client.

Nebraska has implemented CHARTS, a system in which county attorneys are allowed, indeed required, to access and use the information found therein in furtherance of nonsupport prosecutions. Thus, county attorneys now have access to information concerning all nonsupport defendants across the state. Where they once were essentially "screened" from cases in which there existed a conflict of interest, (because a special prosecutor would be appointed and would maintain his/her own file) they now are privy to that information. Through their public office, they have ready access to confidential information concerning nonsupport defendants. Rule 1.11(c) prohibits 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" from representing 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. Given their access to the information contained in CHARTS, a part-time county attorney may never represent a party in a family law matter involving child support. Further, a firm with which the county attorney is associated may only undertake or continue representation in such a matter if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom. See Rule 1.11(c). This applies to all of the scenarios discussed immediately above.

B. Probate Cases:

Past advisory opinions have stated that a county attorney may represent clients in probate cases where the county board has first appointed a special county attorney to represent the interests of the county and the State of Nebraska in inheritance tax determinations. *See* Formal Opinions 72-1 and 81-6.

Again, this issue is addressed by Rules 1.7, and 1.11. As an inheritance tax determination involves the assertion of a claim by one client against another client in the same litigation, it would appear that the prior procedure of having a special county attorney to represent the interests of the county and the State of Nebraska in the inheritance tax determination would still be in order.

C. Guardian Ad Litem Appointments:

Guardian ad litem appointments arise in a variety of different circumstances including juvenile proceedings, adoption proceedings, guardianship proceedings, and divorce and custody proceedings. To the extent the appointment as guardian ad litem occurs in a juvenile case in the county in which the county attorney is bringing the juvenile action, Rule 1.7 prohibits any attorney in the firm from representing a client due to a concurrent conflict of interest. As indicated earlier in this opinion, Rule 1.7(b) allows a client to waive a concurrent conflict of interest. However, it is not likely that a juvenile client can waive such conflict. Further, the Rule requires that informed consent be obtained by "each affected client." In this situation, that means informed consent must be obtained from both the juvenile and the state. The committee parenthetically notes that juvenile court actions are captioned "State of Nebraska in the interest of [child's name]." Thus, to the extent Formal Opinion 06-1 indicates otherwise, it is disapproved and amended. Because the county attorney represents the State of Nebraska, this prohibition extends to appointments in other counties as well.

If the appointment as guardian ad litem occurs in a divorce, custody, probate, paternity, or adoption case in which neither the county nor the state is a party, there is no conflict of interest for the private attorney associated with the county attorney.

4. County Attorney Leaving Office for Private Practice:

With respect to a county attorney leaving government office to enter either a solo

private practice or a private practice with a firm representing criminal defendants, Rule 1.11 of the Nebraska Rules of Professional Conduct is applicable. Under Rule 1.11(a)(2), a lawyer shall not 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. Once again, there is currently no mechanism for such waivers by the state. Further, pursuant to Rule 1.11(b), when the former county attorney has participated personally or substantially in a case, the conflict is imputed to other members in the firm and no lawyer in a firm associated with the former government attorney may undertake representation 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 [screening] provisions of this rule.

Article No. 195 “Successive Government, Private Employment” in the ABA/BNA Lawyer’s Manual on Professional Conduct suggests that appropriate factors to be considered in screening include:

a. the size of and structural divisions within the law firm,

b. the likelihood of contact between the tainted attorney and the attorneys handling the subsequent matter,

c. rules to prevent the new attorney from access to relevant files and other pertinent information, and

d. a policy that prevents the attorney from sharing in the fees derived from the litigation.

To avoid imputed disqualification to the firm, a tainted lawyer must be segregated from the information so as to prevent the intentional or inadvertent spread of prior client confidences. “[S]creened” is defined under Rule 1.0 as “[T]he 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.” In circumstances where a former county attorney wishes to represent criminal defendants, the attorney shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Attorneys who formerly represented the state in bond hearings, preliminary hearings, or cases which form the basis for enhancing a later sentence, their participation in such matters allowed them access to the state’s entire file on the defendant (the future client). The committee concludes that such

participation is “personal and substantial.” Thus, the attorney is prohibited from representing the criminal defendant in those situations.

CONCLUSION

A spouse of a county attorney may not represent a criminal defendant since the Rules require written, informed consent from “each affected client” and the county attorney is unable to obtain such consent on behalf of the state.

An attorney associated with a part-time county attorney may not represent criminal defendants in cases involving a violation of the criminal statutes of the State of Nebraska.

When an attorney has left private practice to serve as a county attorney, the attorney must determine to what extent the representation of a former client conflicts with the interests of his new position. In such circumstances, the attorney must take into consideration Rules 1.9 and 1.11 to protect the interests of the former client.

A current county attorney may not represent clients in family law matters involving child support due to his ongoing access to privileged information concerning nonsupport defendants.

An attorney associated in private practice with a county attorney may represent clients in family law matters involving child support, as long as the county has passed a resolution allowing such representation and agreeing to retain a special prosecutor to handle any nonsupport prosecutions that should arise from such cases and the firm adheres to the screening and fee restrictions found in Rule 1.11(c).

In probate matters, as long as the county has made arrangements for alternate legal representation for purposes of inheritance tax determinations, it is acceptable for a county attorney or anyone associated in private practice with a county attorney to handle private probate matters in that county.

For guardian ad litem appointments, it would depend upon the specific context of the appointment. If the state were a party to the matter, such as in juvenile actions, it would be a conflict for members of the county attorney’s firm to accept the appointment.

With respect to a county attorney leaving government practice to go into private practice, the attorney shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. When a lawyer is disqualified due to personal and substantial participation as a public officer, another attorney in the firm may undertake representation as long as a proper screening process is established and written notice is promptly given to the county attorney’s office to enable it to ascertain the firm’s compliance with Rule 1.11(b).

*(*Note - Juvenile court actions are captioned "State of Nebraska in the interest of [child's name]." To the extent Formal Opinion 06-1 indicates otherwise, it is disapproved and amended.*)