

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 10-06**

**A LAWYER REPRESENTING A GOVERNMENT AGENCY MAY ADVISE THE AGENCY REGARDING ITS STATUTORY DUTIES OR OBLIGATIONS RELATING TO THIRD PARTIES PROVIDED THE LAWYER DOES NOT VIOLATE THE RULES WITH RESPECT TO CONFIDENTIALITY OF INFORMATION, CONFLICTS OF INTEREST AND THE ATTORNEY'S DUTIES TO FORMER CLIENTS.**

**STATEMENT OF FACTS**

A lawyer currently in the employment of an agency of the state of Nebraska formerly represented private clients challenging provisions of law related to areas within the jurisdiction of the agency. The state of Nebraska has entered into various compacts with other states to address various disputes between the states. The lawyer in this matter, prior to his employment with the state of Nebraska, represented private clients in multiple cases challenging the funding mechanism to assist the state of Nebraska in complying with the compacts. Additionally, prior to his work for the agency, the lawyer, on behalf of private clients, petitioned the agency for an interpretation of statutory provision relating to specific duties of the agency. Since joining the agency as counsel, the lawyer has been screened from involvement with respect to the matters in which he previously represented the private clients.

**QUESTION PRESENTED**

Whether a government lawyer, having previously represented private clients on matters before the agency for whom the lawyer now works, is prohibited from advising the agency on matters involving the same statutory duties or other legal obligations of the agency that were the subject of the prior matters in which the lawyer represented the private clients.

**APPLICABLE RULES OF PROFESSIONAL CONDUCT**

The Nebraska Rules of Professional Conduct which are addressed in this opinion are as follows:

**3-501.6 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.

### **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.

### **3-501.9 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.

### **3-501.11 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.

### **3-501.0 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**

In reviewing the situations involving a lawyer currently representing a public agency to determine when the lawyer's prior representation of private client might interfere with the lawyer's ability to represent the public agency, there are few authorities that have addressed the issue. There is a recognized need not to interfere with the government's "legitimate need to attract qualified lawyers as well as to maintain high ethical standards." Nebraska Rules of Professional Conduct §3-501.11, *Special Conflicts of Interest for Former and Current Government Officers and Employees*, Comment 4.

Interestingly, it is the government which must give its consent to the work of an attorney now in its employment when participating in a "matter in which the lawyer participated personally and substantially while in private practice[.]" Nebraska Rules of Professional Conduct §3-501.11(d)(2)(i). See §3-501.11(d)(1). As Rule 1.11(d)(2) indicates, lawyers must adhere to the rules of conflict of interest to current clients and its duties to former clients when going to work for a public agency. And, as always, the lawyer must protect the confidential information of a client, whether current or former, in all of its actions. See Nebraska Rules of Professional Conduct §3-501.6, *Confidentiality of Information*. Keeping these guiding principals in mind, the rules of conduct governing restrictions on the work of government lawyers are limited to matters involving specific parties. See §3-501.11, Comment 4.

The inquiry addressed herein is similar to the issues addressed in Nebraska Ethics Advisory Opinion of Lawyers No. 08-01 wherein it was stated the "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." See also, Avery v. State, 93 Ark.App. 112, 128,





217, S.W.3d 162, 171 (2005), holding that a prosecuting attorney involvement in a matter was not improper “because it did not involve the use of information relating to the prior representative and did not involve the same or substantially related matter as the prior representation [by the attorney.]” Following the reasoning of these authorities, the present situation of a lawyer working for a government agency being concerned with barriers to his or her work on behalf of the agency as a result of prior private practice representations need be primarily concerned with whether the work of the agency lawyer involves the same or substantially related matters.

The terminology of the phrase “the same or substantially related matters” is not defined in Nebraska’s version of the rules of governing professional conduct. Most of the authorities addressing the terminology generally do so in light of Rule 1.11(a) or other rules found in the model rules or a jurisdiction’s specific version thereof. Yet, there would seem to be no reason not to apply the reasoning in those discussions with respect to Nebraska’s Rule §3-501.11(d)(2). As noted in In re Sofaer, 728 A.2d 625 (D.Col. 1999) “the term [matter] seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties.” Id. at 642. The examples of such matters noted by the Sofaer court include the “same lawsuit or litigation,” “the same issue or fact involving the same parties and the same situation or conduct.” Id. at 643.

In comparing work as a government employee in “drafting, enforcing or interpreting government or agency procedures, regulations or laws,” the work was not seen as the same “matter” as subsequent work for a private client involving “the same regulations, procedures, or points of law[.]” Id. The same would seem to be true if the lawyer’s actions were reversed, that is the lawyer represented the agency subsequent to the lawyer’s work in private practice in the same areas of law. Another court has concurred, finding that “[a] government attorney has more latitude, and is barred from representing a client only “in a matter in which the lawyer participated personally and substantially while in private practice[.]” United States v. Titus, 2009 WL 1675081 (E.D. Va. 2009). In these situations, the lawyer is not seen as working in the same or substantially related matter. When the matters are distinctly different, there is no ethical restraint on the lawyers activities for the new client. “A lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.” Nebraska Rules of Professional Conduct §3-501.9, *Duties to Former Clients*, Comment 2.

In the present matter, the lawyer is “screened” from the actual cases in which he or she previously participated in during the lawyer’s time in private practice. Screening is sufficient. The lawyer’s prior involvement in the matters is not to be imputed to other lawyers working for the government agency. State v. Kinkennon, 275 Neb. 570, 747 N.W.2d 437 (2008). What constitutes “effective screening procedures” is dependent upon the circumstances of each case,” Id. at 578, 747 N.W.2d at 445, and the screening procedures in the present inquiry are not addressed herein.



## CONCLUSION

When a lawyer moves from private practice to representing the public's interests, he or she can bring an expertise that is essential to good government. All lawyers must review their present representations to be sure as to not be in a position that conflicts with the interests of other clients or may involve the use of confidential information gained in the course of representing prior clients. When those types of situations arise, the lawyer must seek the consent of the appropriate parties. However, the general representation of a governmental agency which involves the interpretation of laws or regulations which may have been previously challenged by the lawyer on behalf of a private client is not improper as long as the lawyer has the consent of the governmental agency involved. Rule 1.11(d) provides the necessary flexibility to allow the lawyer to use the expertise previously gained while in private practice.

