

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
No. 12-12**

A LAWYER IS NOT PROHIBITED BY THE RULES OF PROFESSIONAL CONDUCT FROM SIMULTANEOUSLY SERVING AS PART-TIME COUNTY ATTORNEY OF ONE NEBRASKA COUNTY AND AS CHAIR OF A MENTAL HEALTH BOARD OF ANOTHER NEBRASKA COUNTY.

QUESTION PRESENTED

WHICH RULES OF PROFESSIONAL CONDUCT APPLY TO A LAWYER WHO SERVES AS AN ELECTED PART-TIME COUNTY ATTORNEY IN ONE COUNTY, AND AT THE SAME TIME SERVES AS AN APPOINTED CHAIR OF THE MENTAL HEALTH BOARD IN ANOTHER COUNTY?

FACTS

A lawyer asks whether he is disqualified by conflict of interest rules or any other rule of professional conduct from serving as the elected part-time county attorney in one Nebraska County, and at the same time serving as the appointed chair of the mental health board of another county.

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 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.

§ 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....

§ 3-503.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of

important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [Rule 3.6](#) or this Rule.

DISCUSSION

Nebraska counties with smaller populations may be served by part-time county attorneys. *Neb. Rev. Stat. §23-1206.01*. These attorneys are not expected to devote full-time attention to the duties of the office. Whether full time or part time, county attorneys are 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(2)*. The attorney requesting this opinion is a part-time county attorney. He asks whether any rule of professional conduct prohibits him from simultaneously serving as chairman of the mental health board of a different county.

Mental health boards are created under the Mental Health Commitment Act, *Neb. Rev. Stat. §§ 71-901 to 71-963*. The boards comprise three members, one of whom must be an attorney, all appointed by the presiding judge of the judicial district that the board serves. *Neb. Rev. Stat. §71-915(1)*. The attorney member of the mental health board serves as its chair. *Neb. Rev. Stat. §71-915(2)*. Board actions are decided by majority vote. *Neb. Rev. Stat. §71-915(3)*.

Proceedings before the mental health board alleging that a person is mentally ill and dangerous are initiated by petition of the county attorney. *Neb. Rev. Stat. §71-921*. The county attorney also petitions the mental health board in cases alleging that a person is a dangerous sex offender. *Neb. Rev. Stat. §71-1205*. These cases are brought “in the interest of” the person who is the subject of the petition. *Neb. Rev. Stat. §§71-922(3); 71-1206(3)*. In either case, the board conducts hearings and rules upon the merits of the petition. *Neb. Rev. Stat. §§71-925; 71-1209*. At these hearings, the county attorney presents evidence in support of the petition, and the state has the burden to prove the allegations by clear and convincing evidence. *Neb. Rev. Stat. §§71-925(1); 71-1209(1)*.

This background makes it clear that an attorney serving as county attorney acts as an advocate representing the state when he presents cases before a mental health board. If the same attorney acts as the appointed chair of

a mental health board, he is no longer an advocate representing the State of Nebraska, but instead, he is a fact finder performing an adjudicative function on behalf of a state government entity.

In either situation, therefore, it could be said that the attorney acts on behalf of the state. If he has a client, it resembles an organization, not an individual. Comment [9] to rule 501.13 (regarding a lawyer's duty to an entity such as a corporation distinct from its officers and directors) makes this observation: "The duty defined in this Rule applies to government organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." But no matter the difficulty of identifying exactly who or what the client may be, it is clear that there is no concurrent conflict if the county attorney performs these different functions because in each instance, he acts on behalf of the State of Nebraska. Rule 501.7 is therefore not applicable to the facts presented to this committee.

Nothing in rule 503.8 speaks to the issue raised by this request. And there is no other provision of the Rules that would impede a part-time county attorney from also accepting appointment as a member of a mental health board serving a county in which he does not serve as county attorney.

Just as a judge may not act as prosecutor of a defendant brought before him, so a county attorney could not prosecute a petition to a mental health board of which he is chairperson. This would not, however, prevent him from carrying out the functions of prosecutor and board member in cases in different counties that do not involve the same subject individuals.

CONCLUSION

A lawyer is not prohibited by the Rules of Professional Conduct from simultaneously serving as the part-time county attorney of one Nebraska county and as the chair of the mental health board of another Nebraska county.