

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
NO. 22-02**

COUNSEL FOR THE NEBRASKA STATE PATROL ARE STATUTORILY REQUIRED TO ADVISE THE PATROL ON ALL LEGAL MATTERS, WHICH INCLUDES ADVISING EMPLOYEES WITH PRIVATE COUNSEL FOR MATTERS ARISING FROM THE SAME SET OF FACTS;

TO THE EXTENT NEBRASKA'S RULES OF PROFESSIONAL CONDUCT CONFLICT WITH THE STATUORY MANDATE TO ADVISE THE STATE PATROL ON ALL LEGAL MATTERS, THE STATUTE CONTROLS;

STATE PATROL COUNSEL MAY ADVISE AND REPRESENT STATE PATROL EMPLOYEES AS TO THEIR OFFICIAL CONDUCT, REGARDLESS OF WHETHER AN EMPLOYEE HAS PRIVATE COUNSEL FOR RELATED MATTERS;

PRIVATE COUNSEL MAY NOT DIRECT STATE PATROL COUNSEL NOT TO CONTACT STATE PATROL EMPLOYEES REGARDING THEIR OFFICIAL CONDUCT, BECAUSE STATE PATROL COUNSEL HAS INDEPENDENT LEGAL AUTHORITY TO DO SO;

STATE PATROL COUNSEL ARE NOT INHERENTLY ADVERSE TO THE PERSONAL AND PROFESSIONAL INTERESTS OF STATE PATROL EMPLOYEES FOLLOWING AN IN-CUSTODY DEATH;

THE REMOTE POSSIBILITY OF FUTURE ADVERSE EMPLOYMENT ACTION DOES NOT PRECLUDE STATE PATROL COUNSEL FROM ADVISING STATE PATROL EMPLOYEES WITH RESPECT TO THEIR OFFICIAL DUTIES; AND

STATE PATROL COUNSEL MAY ADVISE MULTIPLE AGENCY EMPLOYEES IN THE SAME MATTER, PROVIDED THERE IS NO CONFLICT OF INTEREST.

QUESTIONS PRESENTED

1. Do Nebraska statutes and the Nebraska Rules of Professional Conduct (the “Rules”) require counsel for the Nebraska State Patrol (the “Patrol”) to provide legal advice to all Patrol employees, or only those Patrol employees not represented privately?
2. In the case of a conflict between the Nebraska statute requiring Patrol counsel to advise the Patrol on all legal matters, and the Rules, which prevails?
3. May Patrol attorneys advise Patrol employees in their official capacity in relation to actions undertaken in the course and scope of their duties when the employee has private representation regarding the same conduct?
4. May private counsel direct a Patrol attorney to have no contact with a Patrol employee regarding the employee’s official duties or actions?
5. Are Patrol attorneys inherently adverse to the personal or professional interests of Patrol employees following an in-custody death, such that the Rules prevent Patrol attorneys from advising Patrol employees, even when there is unanimity of interests between the Patrol and the employee?

6. Does the remote possibility of future adverse employment action prevent a Patrol attorney from advising a Patrol employee regarding their official duties or actions?

7. May Patrol attorneys advise multiple Patrol employees in their official capacity in relation to a singular incident?

FACTS

The typical scenario involves an instance where a Patrol employee seeks legal advice from Patrol counsel. An example is in the case of an in-custody death. Pursuant to [NEB. REV. STAT. § 81-2009\(2\)](#), Patrol attorneys are to, among other things, “advise the patrol on all legal matters.” The employee then retains private counsel, often through the police union, to advise the employee in his or her private, as opposed to official, capacity, but related to the same set of facts. In some instances, Patrol counsel has been ordered by private counsel to have no contact with the employee, regardless of whether the Agency’s interest is or likely will be adverse to the employee’s.

Patrol counsel seeks guidance on navigating this situation in order that he or she violate neither the Rules nor his or her statutory duty to advise the Patrol on all legal matters.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

[RULE 1.3. Diligence](#)

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.7. Conflict of interest; current clients

- (a) Except as provided in [paragraphs \(b\) and \(c\)](#), 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.

- (c) Notwithstanding the existence of a concurrent conflict of interest under [paragraph \(a\)](#), a lawyer associated in a firm with another lawyer who is serving as a county attorney in a county where the county attorney is not required to devote his or her full time to the legal work of the county may represent a client with adverse interests to the State of Nebraska in a matter or other proceeding before a tribunal in a separate county 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 matter or other proceeding before a tribunal;
 - (4) the affected client, or if the affected client is a minor, his or her parent or guardian, gives informed consent, confirmed in writing, subject to the following restrictions:
 - (i) for appointment of a guardian ad litem pursuant to [NEB. REV. STAT. § 43-272\(2\)](#), the juvenile court, on behalf of the juvenile, shall provide provisional informed consent upon the guardian ad litem's appointment, and, at the time of the first appearance, the juvenile court shall determine whether the provisional informed consent is appropriate, upon consultation with the parties. For appointment of counsel under [§ 43-272\(1\)\(a\)](#),

the parent or guardian of the juvenile shall provide written informed consent; and

(ii) the State of Nebraska shall not be required to provide informed consent; and

(5) the member of the lawyer's firm who serves as county attorney:

(i) is timely screened from any participation in the matter;

(ii) is apportioned no part of the fee therefrom; and

(6) the lawyer representing the affected client provides prompt written notice to the tribunal before which the matter is pending.

RULE 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is

not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) Except as provided in [paragraph \(d\)](#), if
 - (1) despite the lawyer's efforts in accordance with [paragraph \(b\)](#) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not [Rule 1.6](#) permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) [Paragraph \(c\)](#) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to [paragraphs \(b\) or \(c\)](#), or who withdraws under circumstances that require or permit the lawyer to take action under either of

those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of [Rule 1.7](#). If the organization's consent to the dual representation is required by [Rule 1.7](#), the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[RULE 4.2. Communication with person represented by counsel.](#)

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

DISCUSSION

For purposes of clarity and conciseness, the discussion on some questions presented have been combined and reordered.

1. **Patrol counsel are statutorily required to provide representation to patrol employees, and to the extent this statute conflicts with the Rules, the statute controls.**

Patrol counsel questions whether he or she is obligated to provide legal representation to all Patrol employees, regardless of whether they have private counsel, and, if so, whether this obligation conflicts with the Rules.

The Legislature has determined the Patrol must provide counsel to advise the Patrol on “all legal matters.” This obligation is found in [NEB. REV. STAT. § 81-2009\(2\)](#):

The superintendent **shall provide not less than three agency legal counsels** stationed with the Nebraska State Patrol to assist county attorneys in the preparation of cases involving drug abuse and **to advise the patrol on all legal matters.**

(emphasis added) The Patrol is the client in this context. Because the Patrol is not an individual, but an organization, [Rule 1.13\(g\)](#) permits Patrol attorneys to also represent Patrol employees so long as the Patrol employee’s interests are not adverse to the Patrol’s:

A lawyer representing an organization **may** also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of [Rule 1.7](#). If the organization's consent to the dual representation is required by [Rule 1.7](#), the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(emphasis added). Questions arise when Patrol employees retain private counsel for advice regarding private matters arising from the same set of facts, but not related to, the Patrol employee's official duties.

The Scope of the Rules explains that the Rules are not the sole source of a lawyer's professional obligations. "The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to . . . **laws defining specific obligations of lawyers** and substantive and procedural laws in general. The Comments are sometimes used to alert lawyers to their responsibilities under such law." [Neb. R. Prof. Cond. Scope \[15\]](#). (emphasis added) Also, specific to organizational clients, "[D]uties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority." [Rule 1.13, Cmt. 9](#).

The Rules, then, contemplate that the duty of government attorneys may be set forth by statute or regulation, and, if so, [Rule 1.13](#) does not limit that authority. Because [NEB. REV. STAT. § 81-2009\(2\)](#) requires that Patrol counsel "shall" advise the Patrol on all legal matters, because [Rule 1.13\(g\)](#) provides that organization attorneys may also represent the organization's agents, and because [Rule 1.13](#) does not proscribe the legislature's authority to set forth the duties of government attorneys, the Committee is of the opinion there is no conflict between [Rule 1.13\(g\)](#) and [NEB. REV. STAT. § 81-2009\(2\)](#), but if there were, the statute would control. This conclusion is supported by the Nebraska Supreme Court's finding in *State v. Vaughan*, that, "[c]ourt rules are subservient to statutes, and in case of conflict the statute, if constitutional, prevails" *State v. Vaughan*, 227 Neb. 753, 754, 419 N.W.2d 876, 877 (1988) (citing 21 CJS *Courts* § 170 at 262-63 (1940)).

And, because the statute mandates that Patrol counsel “shall” advise the Patrol on all legal matters, the Committee is of the opinion that unless Patrol counsel becomes aware of a current or possible conflict of interest between the Patrol and a Patrol employee, Patrol counsel not only should, but must, advise Patrol employees regarding actions or omissions carried out in the course of their official duties. This is not contrary to the Rules, but in accordance with their requirement to provide diligent and zealous representation of their client, in this case, the Patrol. *See* [Rule 1.3 and Cmt. 1](#) (“A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client’s behalf.”) Failure to do so could have adverse consequences for the Patrol, which may be responsible for the conduct of its agents acting in the course and scope of their official duties. As set forth below, this is regardless of whether Patrol employees have retained private counsel for matters unrelated to their official functions.

2. Patrol counsel are not prohibited from advising Patrol employees in their official capacity in relation to actions undertaken in the course and scope of the employee’s duties when the employee has private counsel, and private counsel should not direct Patrol counsel to have no contact with them.

“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” [Rule 4.2](#). As discussed above, Patrol counsel and private

counsel may both represent the same client with respect to the same set of facts, but in different capacities.

A Patrol employee's acts or omissions in the course and scope of the employee's duties may be attributed to the Patrol. In other words, when a Patrol employee takes official action, for many legal purposes the Patrol is the actor instead of the employee in his or her personal capacity. Private counsel may advise the employee about private matters involving the same facts. A common example includes the possibility of an adverse employment action involving the Patrol.

Again, the Committee is of the opinion that [NEB. REV. STAT. § 81-2009\(2\)](#) does not inherently conflict with [Rule 4.2](#). It is not contrary to [Rule 4.2](#) for Patrol counsel to contact and advise a Patrol employee about his or her official duties or actions, even if private counsel directs they do not. [Rule 4.2](#) permits communication with a represented person if the attorney is "authorized to do so by law." The requisite authority in this case comes from [NEB. REV. STAT. § 81-2009\(2\)](#). This is true provided Patrol counsel's inquiry is limited to advising the employee about his or her conduct in the course and scope of his or her official duties, because [Rule 4.2](#) prohibits communication about the subject matter of the representation for which the employee has hired private counsel, which would be to advise the Patrol employee only in his or her personal capacity.

3. The interests of Patrol employees are not inherently adverse to the Patrol's interest, and the remote possibility of a future adverse employment action does not change this.

[Rule 1.13\(g\)](#) provides, "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constitutes, subject to the provisions of [Rule 1.7](#)." [Rule 1.7](#), then, prohibits, with certain exceptions, representation

of a client when there is a concurrent conflict of interest. A concurrent conflict of interest means the representation of one client is either directly adverse to another or 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. [Rule 1.7\(a\)](#). The comments elaborate:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

[Rule 1.13, cmts. 10 & 11.](#)

The Rules recognize an organization's interests may be, but are no *per se*, adverse to its agent's interests. By making concurrent representation of an organization and its agents subject to [Rule 1.7](#), the Rules allow an attorney to determine whether he or she may

represent both the organization and its agent with respect to the agent's actions or omissions on behalf of the organization. Assuming the representation of the Agency is neither directly adverse to the employee nor carrying significant risk limiting the attorney's responsibilities to one or both clients, there is no conflict, and hence no inherent adversity. The "remote possibility" of an adverse employment action does not change this conclusion.

4. Agency attorneys may advise multiple Agency employees in their official capacity in relation to a singular incident.

Again, Patrol counsel's client will always be the Patrol. [Rule 1.13](#) allows Patrol counsel to also advise Patrol employees regarding their official duties. The language of the rule itself is in the plural, "A lawyer representing an organization may also represent **any of its directors, officers, employees, members, shareholders or other constitutions.**" [Rule 1.13\(g\)](#) (emphasis added). Provided Patrol counsel makes clear that Patrol counsel's client is the Patrol and provides the appropriate disclosures to the employee as set forth in [Rule 1.13\(f\)](#), the Committee does not believe the Rules prohibit Patrol counsel from advising multiple Patrol employees about their official actions with respect to the same incident.

CONCLUSION

Patrol employees have a statutory duty to advise the Patrol on all legal matters. This duty supplements Patrol counsel's professional obligations as set forth in the Rules. The Committee does not believe in this situation the Rules conflict with Patrol counsel's statutory duties. The Rules permit Patrol counsel to advise Patrol employees on all legal matters, which includes advising employees about their official duties. This is true regardless of whether the employee has private counsel to

represent the employee in his or her private capacity. Moreover, it is not improper for Patrol counsel to continue to advise Patrol employees about their official actions when private counsel is retained, because they are permitted by law to do so. Moreover, Patrol counsel are not inherently adverse to Patrol employees and the remote or unlikely possibility of a future employment action does not change this conclusion. If Patrol counsel becomes aware of an actual or significantly likely conflict of interest, Patrol counsel should cease representation of the employee.

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