

Nebraska Ethics Advisory Opinion for Lawyers
No. 93-2

A DEPUTY PUBLIC DEFENDER MAY ACCEPT EMPLOYMENT AS A DEPUTY COUNTY ATTORNEY IN THE SAME COUNTY IF THE FOLLOWING PRECAUTIONS ARE TAKEN:

(1) ALL CASES PENDING AT THE TIME OF THE TRANSITION IN WHICH THE ATTORNEY WAS SUBSTANTIALLY INVOLVED AS A DEPUTY PUBLIC DEFENDER MUST BE EXAMINED BY THE COUNTY ATTORNEY TO ASSURE THAT THE ATTORNEY NEITHER PROVIDED PREJUDICIAL INFORMATION RELATING TO THE PENDING CASE NOR PERSONALLY ASSISTED IN ANY CAPACITY IN THE PROSECUTION OF THE CASE. AFTER A DETERMINATION THAT SUCH HAS NOT OCCURRED, THE CASES MUST ALSO BE EXAMINED TO DETERMINE WHETHER RECUSAL OF THE COUNTY ATTORNEY'S OFFICE APPEARS REASONABLY NECESSARY TO INSURE THE FAIRNESS OR APPEARANCE OF FAIRNESS OF TRIAL OR THE ORDERLY AND PROPER ADMINISTRATION OF JUSTICE OR TO PRESERVE THE INTEGRITY OF THE FACT-FINDING PROCESS OR PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM. IF THE COUNTY ATTORNEY'S OFFICE DETERMINES THAT RECUSAL IS APPROPRIATE, THE CASE(S) MUST BE TRANSFERRED BY THE COUNTY ATTORNEY'S OFFICE TO RETAINED OUTSIDE COUNSEL, UNTIL THEY ARE COMPLETED.

(2) A "CHINESE WALL" OR "CONE OF SILENCE" MUST BE ERECTED AS TO ALL OTHER CASES IN WHICH THE DEFENDANT, JUVENILE OR OTHER PERSON WHOSE INTERESTS ARE ADVERSE TO THOSE OF THE STATE'S, WAS REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE AGAINST THE COUNTY ATTORNEY'S OFFICE AT THE TIME OF TRANSITION.

(3) IN THE FUTURE, THE ATTORNEY MUST DECLINE TO PARTICIPATE ON THE STATE'S BEHALF IN A CASE INVOLVING THE PROSECUTION OF A FORMER

CLIENT IF THE CASE APPEARS TO BE SUBSTANTIALLY SIMILAR TO THE MATTER IN WHICH THE ATTORNEY PREVIOUSLY SERVED AS COUNSEL.

FACTS

An attorney is considering moving from his current position as Deputy Public Defender to a position in the County Attorney's office. His duties in the County Attorney's office would include representing the State in child support collection actions, paternity actions, arraignments, conduct Coroner duties and be on call to assist local law enforcement agencies with probable cause questions and other related warrant issues and, after six months, he would develop a small caseload of misdemeanor prosecutions. While Deputy Public Defender the attorney represented clients charged with misdemeanors and Class IV felonies, clients with pending paternity actions, mental commitment hearings and juveniles and parents of juveniles facing hearings under Sections 43-247(3)(a) and (b) of the Nebraska statutes. He has approximately 110 pending cases spread throughout all phases of the trial process.

APPLICABLE CODE PROVISIONS

DR 9-101(B) - A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

DR 5-105(D) - If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

PREVIOUS NEBRASKA OPINIONS

Informal Opinion dated July 14, 1986:

In this opinion, the Committee decided that the Attorney General's office was, in total, disqualified from representing the State when one member of the office had

established an attorney-client relationship with a party who subsequently filed a lawsuit against the State based upon employment discrimination. However, the Committee noted the diversity of case law and ethical opinions on the subject of the applicability of conflict rules to governmental attorneys, and then decided that "[w]e choose a middle ground, not automatically disqualifying the entire office vicariously, but resting heavily on the admittedly subjective tests of Canon 9 (i.e. "A lawyer should avoid even the appearance of impropriety). " The Committee mentioned the possibility of erecting "a wall of silence to screen the particular Assistant AG who dealt with her from discussion of the case with colleagues, either as to facts or strategies, " but did not decide its appropriateness in that situation.

Information Opinion dated April 14, 1988:

The Committee approved of a County Attorney's hiring of a former attorney from Legal Services who had handled juvenile court matters, representing both the parents and the children and domestic relation cases. This approval was based upon the "growing reluctance to apply strict imputed disqualification rules and the meticulous precautions which you [the County Attorney] have outlined to protect the interests of present and former clients, and also the fact that the former employer has no objection to your proposal..." Thus, when a former client of the new lawyer is prosecuted or otherwise involved in the lawyer's area of responsibility, a "chinese wall" or "cone of silence" should be established, consisting of precautions necessary to place the new lawyer in departments isolated from her previous areas of responsibility, cautioning the other lawyers that the new lawyer is not to be

consulted with or in any other way involved or exposed in or to such matter, with particular emphasis placed on matters handled by the former employer of the lawyer. In addition, lawyers from outside of the County Attorney's office should be retained if the six pending matters in which the new lawyer was involved for her previous employer and in which the County Attorney's office is adversarial to her representation, are not disposed of before the new lawyer's employment with the County Attorney begins.

Informal Opinion dated February 1, 1989:

The Committee found that proposed employment in the Child Support Division of a County Attorney's office of a lawyer who was currently acting as counsel in 8 juvenile court cases as an adversary to the County Attorney's office (which cases have either been terminated or turned over to her partner for completion) and whose partner also had one pending criminal and six pending juvenile cases against the County Attorney's office (in none of which had the prospective lawyer-employee had any substantial involvement nor been privy to any confidential communications) was proper when there would be created "a wall or bubble around the attorney to isolate her from any present or future contact with [the County Attorney's] juvenile court staff involving any of the parties which she formerly represented [and] [i]f [a] child support case should become a problem again, it would be assigned to another attorney in your office, and the subject employee would again be isolated from any contact with or discussion of the case [and] [w]ith respect to the cases being handled by her present partner, the subject employee would again be completely isolated so that

there would be no communication with any of the criminal or juvenile staff in regard to any of these cases. "

DISCUSSION

As noted above, this Committee has previously authorized the employment by a prosecuting agency of an attorney who had represented persons who were the subject of prosecutions by that agency. This is true even when the prospective attorney/employee had active cases against the prosecuting agency immediately preceding her employment. A question has arisen as to whether the recent Nebraska case of *State ex rel. Freezer Services, Inc. v. Mullen* 235 Neb. 981, 458 N.W.2d 245 (1990), has reversed this Committee's previous approval of "chinese walls" to screen attorneys in conflict of interest situations. We do not think, that the Freezer Services case does so. That case involved private attorneys, not governmental lawyers, and even in that case, the Supreme Court noted that "such a rule [i.e. 'specific institutional mechanisms,' such as the Chinese wall ... to prevent the flow of confidences from the disqualified attorney to the rest of the firm] might be appropriate in a particular case," but the Court declined to adopt that rule in the Freezer Services case.

In the situation now under consideration, the nature and extent of the attorney's involvement in the cases handled by the public defender's office immediately preceding his prospective employment by the County Attorney's office appears to have been substantially more extensive and intensive than was present in the situations previously considered by this Committee. This raises a question as to whether it is appropriate for an attorney to leave former clients with an impression, no matter how untrue, that their former counsel, with whom they have shared their utmost confidences, has, during the course of their prosecution, become associated with the agency handling their prosecution, and potentially shared those confidences with that agency.

In situations involving the applicability of imputed

disqualification of attorneys for governmental agencies, it has generally been found that

"[w]hen the Disciplinary Rules of Canons 4 and 5 mandate the disqualification of a governmental lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4-101, DR 5-105, DR 9-101 or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant

transaction or set of transaction is prohibited by those rules." ABA Formal Opinion 342 (November 24, 1975).

Regarding prosecuting attorneys, specifically, as differentiated from governmental attorneys in general, it has been said that

"[t]he Model Code's imputed disqualification rule, DR 5-105, has been interpreted by a number of courts not to require the disqualification of entire prosecutors offices, at least in the absence of a showing of actual prejudice. ABA/BNA Lawyers Manual on Professional Conduct 51:2005.

Likewise, courts have found the following when faced with this situation:

"Imputed disqualification of the entire state's attorney's office is unnecessary when the record establishes that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charges. State v. Fitzpatrick, 464 So.2d 1185 (Fla 1985)" ABA/BNA Lawyers Manual on Professional Conduct 51:2005.

"Recusal of a district attorney or his entire office may be ordered 'when it appears reasonably necessary to insure the fairness or appearance of fairness of trial or the orderly and proper administration of justice or to preserve the integrity of the fact-finding process or public confidence in the criminal justice system.'" Younger v. Superior Court 150 Ca.Rptr. 156, 162, 86 Cal.App.3d 180, 192 (Ct.App. 1978)."

For the above reasons, we do not believe that we can make an absolute rule regarding the appropriateness of

a "chinese wall" in all situations. We believe that the county attorney's office will have to examine the cases in which the attorney was counsel of record on behalf of a defendant, juvenile or other person whose interests are adverse to those of the State's, against the County Attorney's office, or in which the attorney had any substantial involvement with that person, which are pending when the attorney becomes associated with the County Attorney's office. This examination will have to assure that the attorney has not provided prejudicial information relating to the pending criminal charge, nor has he personally assisted in any capacity in the prosecution of the charge. The County Attorney must also determine if recusal of the County Attorney's office appears reasonably necessary to insure the fairness or appearance of fairness of trial or the orderly and proper administration of justice or to preserve the integrity of the fact-finding process or public confidence in the criminal justice system. If such recusal does appear necessary, then the County Attorney should retain outside counsel to represent the interests of the State in such matters.

CONCLUSION

A Deputy Public Defender may accept employment as a Deputy County Attorney in the same county if the following precautions are taken:

- (1) All cases pending at the time of transition in which the attorney was substantially involved as a Deputy Public Defender must be examined by the County Attorney to assure that the attorney neither provided prejudicial information relating to the pending case nor personally assisted in any capacity in the prosecution of the case. After a determination that such has not occurred, the cases must also be examined to determine whether recusal of the County Attorney's office appears reasonably necessary to insure the fairness or appearance of fairness of trial or the orderly and proper administration of justice or to preserve the integrity of the fact-finding process or public confidence in the criminal justice system. If the County Attorney's office determines that recusal is appropriate, the case(s)

must be transferred by the County Attorney's office to retained outside counsel, until they are completed.

(2) A "chinese wall" or "cone of silence" must be erected as to all other cases in which the defendant, juvenile or other person whose interests are adverse to those of the State's, was represented by the Public Defender's office against the County Attorney's office at the time of transition.

(3) In the future, the attorney must decline to participate on the State's behalf in a case involving the prosecution of a former client if the case appears to be substantially similar to the matter in which the attorney previously served as counsel.

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