

Nebraska Ethics Advisory Opinion for Lawyers
No. 96-2

A LAWYER WHO IS ASSOCIATED WITH A LAWYER SERVING ON A STATE-WIDE COMMISSION CHARGED WITH THE DUTY TO RECEIVE, INVESTIGATE AND SCREEN CHARGES, MAKE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ENTER ORDERS MAY NOT APPEAR AND REPRESENT CLIENTS BEFORE THE COMMISSION REGARDLESS OF WHETHER OR NOT THE ATTORNEY/COMMISSIONER PARTICIPATES IN THE DETERMINATION OF THAT PARTICULAR CASE.

FACTS

The Committee has received a request for an opinion concerning conflict of interest situations involving lawyers serving as commissioners on a state-wide commission. The commission is organized and operates pursuant to statute and is comprised of seven individual commissioners appointed by the Governor. The commission is empowered to receive charges, investigate, screen, make findings of fact, conclusions of law and enter orders in conformity to Nebraska statutes.

Lawyer "A" serves as a commissioner and is also affiliated with a law firm. On two prior occasions, one or more lawyers associated with the law firm of Lawyer "A" have represented clients in matters before the commission where either the Executive Director or the commission itself made determinations. In each instance, Lawyer "A" would abstain from voting. There is presently pending before the commission a matter set for determination by its Executive Director in which the party involved is represented by a lawyer who is associated in some manner with the firm of Lawyer "A". Lawyer "A" has indicated that "the lawyer involved is in an office sharing arrangement with her firm". While we have not been provided with specific information concerning the office sharing arrangement, it does appear that the lawyer involved in representing a client before the commission appears in the letterhead of the

firm with which Lawyer "A" is associated.

QUESTIONS PRESENTED

1. May the lawyer associated with the firm of "A" represent clients in matters pending before the commission while "A" is serving as a commissioner?
2. What are the responsibilities of Lawyer "A" as a member of the commission under the Code of Professional Responsibility governing her conduct as a lawyer in Nebraska?
3. What are the responsibilities of other lawyer members of the commission under the Code of Professional Responsibility?

DISCUSSION

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client.

Disciplinary Rule 5-101 (A) states:

Except with the consent of his or her client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interest.

Disciplinary Rule 5-105 states:

(A) A lawyer shall decline proffered employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

(B) A lawyer shall not continue

multiple employment if the exercise of his or her independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his or her independent professional judgment on behalf of each.

In *State ex rel. NSBA vs. Douglas*, 227 Neb. 1, 416 NW2d 515 (1987) at page 58, the Nebraska Supreme Court held that the provisions of DR 5-105 (C) are not available to public officers. Similarly, a public body such as the commission lacks the power to consent.

It is axiomatic that where conflicting interests or multiple clients exist, one side of a controversy may not be represented by one lawyer associated with a firm while the other side is represented by a lawyer from the same firm, unless the consent mechanism prescribed in DR 5-105 (C) is available and utilized. It is not available in this scenario.

Ethical Consideration 5-14 states:

Maintaining the independence of professional judgment required of a lawyer precludes the lawyer's acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, or

otherwise discordant.

Ethical Consideration 5-15 provides inter alia:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she accepts or continues the employment. The lawyer should resolve all doubts against the propriety of the representation....

The facts indicate that the Executive Director of the commission is often assigned responsibility for making determinations involving complaints that are filed with the commission. The Executive Director is hired to serve at will by action of the commissioners. The commissioners also fix the compensation of the Executive Director and oversee his/her performance while in office.

On occasions the Executive Director will make determinations and, on other occasions, the commissioners themselves, acting as a body, will make decisions either as the result of a hearing or on recommendations provided to them by the Executive Director. Complaints are often screened and diverted from the commission by the Executive Director if he or she determines that there is not reasonable cause to believe that the charge is true. Under these circumstances, there is an obvious conflict of interest between a lawyer representing a party involved in a proceeding before the commission and a commissioner/associate serving on the commission while the matter is pending before the commission. This conflict exists regardless of whether or not the individual commissioner participates in the hearing process before the commission.

Canon 9 requires a lawyer to avoid "even the appearance of professional impropriety."

Disciplinary Rule 9-10 (B) states that:

A lawyer shall not accept private employment in a matter in which the lawyer had substantial responsibility while he or she was a public employee.

Ethical Consideration 9-1 states:

Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

Ethical Consideration 9-1 states:

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform a client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, the lawyer's duty to clients or to the public should never be subordinate merely because the full discharge of his or her obligations may be misunderstood or may tend to subject the lawyer or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his or her conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Ethical Consideration 9-3 states:

After a lawyer leaves judicial office or other public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility prior to his or her leaving, since to accept employment would give the appearance of impropriety even if none exists. (Emphasis supplied).

Matters handled by the commission are often highly sensitive, adversary, and its records and proceedings are clothed with a certain level of confidentiality. The screening process, by which the Executive Director is required to make determinations of "reasonable cause", involves subjective determinations on the part of the Executive Director and the reviewing commissioners that are not readily susceptible to oversight or meaningful review on appeal. It is therefore extremely important that all proceedings before the commission be conducted in a climate of complete fairness and objectivity, undiminished in any measure by even a hint of impropriety.

It is necessary to review Advisory opinions [75-13](#) and [89-2](#). Advisory Opinion [75-13](#) holds that the sharing of offices by lawyers precludes one of those who shares with another from accepting a case which the other cannot ethically accept. Opinion [89-2](#) permits representation of divergent interests where an office sharing arrangement is present, if the following conditions are met:

1. There shall be no common access to the case files;
2. There shall be no common access to any computerized data relating to the case;
3. No secretary shall be allowed to work on the same case for both parties;
4. All common employees shall be informed of the adverse representation and the extreme sensitivity to the maintenance of confidentiality; and

5. Each client shall give his/her consent to the adverse representation after full disclosure of all facts relating to the common practice area.

While we do not have substantial details available for our opinion, we do note that the lawyer involved in representing the client before the commission is listed on the letterhead of Lawyer "A"'s law firm. In addition, there is no way that a public body such as the commission may consent to the adverse representation while "A" is sitting as a commissioner. This ethical conflict exists regardless of whether "A" recuses herself in the determination involving the client.

This Committee does not decide questions of law and is not authorized to render opinions on matters that involve the subject matter of the Accountability and Disclosure Commission. As a lawyer, sitting as a commissioner, Lawyer "A" would, as a minimum, be required to provide a thorough and accurate account of the relationship between Lawyer "A", her law firm, and the lawyer representing the client before the commission. However, questions concerning the propriety of her actions as a commissioner are matters to be determined by the Accountability and Disclosure Commission.

Lawyer members of the commission are governed by the Rules of the commission and the Accountability and Disclosure Commission. Their duties as lawyer-commissioners are also governed by DR 1-103(A) which requires that they report knowledge of a violation of DR 1-102 to the authority empowered to act upon a violation. Lawyer members should also make a reasonable effort to deny the lawyer from "A"'s firm the ability to represent clients before the commission while "A" is serving as a commissioner.

CONCLUSION

A lawyer who is associated with a lawyer serving on a statewide commission charged with the duty to receive, investigate and screen charges, make findings of fact,

conclusions of law and enter orders may not appear and represent clients before the commission regardless of whether or not the attorney/commissioner participates in the determination of that particular case.

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