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STATE OF NEBRASKA EX REL. MICHAEL T. HILGERS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, AND LEE POLIKOV, SARPY COUNTY ATTORNEY, RELATORS, V. DEMETRIA HERMAN, SPECIAL DEPUTY SARPY COUNTY ATTORNEY, RESPONDENT.

___ N.W.3d ___

Filed November 20, 2026. No. S-26-694.

1. **Prosecuting Attorneys: Appeal and Error.** A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.
2. **Judgments: Appeal and Error.** The abuse of discretion standard of review recognizes there is a range of rationally available rulings that can be supported by the facts and governing law in a particular case.
3. ____: ____. When an appellate court reviews a trial court's ruling for an abuse of discretion, it is considering whether the ruling exceeded the bounds of permissible choice, given the evidence presented and the applicable law.
4. **Prosecuting Attorneys: Statutes.** County attorneys' offices are statutorily required to represent the interests of the State in criminal, civil, and juvenile proceedings.
5. **Words and Phrases.** The use of the word "shall" in Neb. Rev. Stat. § 23-1202 (Reissue 2022) indicates a mandatory directive inconsistent with the idea of discretion.
6. **Statutes.** Statutes pertaining to the same subject matter should be construed together as if they were one law, giving effect to every provision and refraining from reading into them words that are not there.
7. **Conflict of Interest: Words and Phrases.** A conflict of interest exists when a defense attorney is placed in a situation inherently conducive to divided loyalties.

8. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes situations where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client, where it becomes a lawyer's duty on behalf of one client to contend for that which the lawyer's duty to another client would require him or her to oppose, or where fulfilling a lawyers duty to the client may be to the detriment of the attorney's personal interest.
9. **Prosecuting Attorneys: Conflict of Interest.** The purpose of Neb. Rev. Stat. § 23-1205 (Reissue 2022) is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interests.
10. **Trial: Judges: Words and Phrases.** An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.
11. **Prosecuting Attorneys: Witnesses: Conflict of Interest.** The advocate-witness rule discourages combining roles of advocate and witness in the same proceeding, recognizing the two different roles could give rise to conflicts of interest.
12. **Trial: Prosecuting Attorneys: Witnesses.** A court will not allow defense counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case.
13. **Trial: Attorneys at Law: Witnesses: Evidence.** A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.
14. **Trial: Attorneys at Law: Witnesses: Evidence: Proof.** A party seeking to call opposing counsel must prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.
15. **Prosecuting Attorneys: Witnesses: Conflict of Interest.** Conflicts of interest that arise from the advocate-witness rule are generally not imputed to other members of the law office.
16. **Constitutional Law: Statutes: Prosecuting Attorneys: Conflict of Interest.** Because of the unique constitutional and statutory duties of a county attorney's office, the entire county attorney's office will be disqualified due to a conflict of one of its attorneys only in the rarest of situations.
17. **Prosecuting Attorneys.** When an individual prosecutor is disqualified, generally a different prosecutor in the same office may be appointed,

absent some unusual circumstance warranting disqualification of the entire office.

18. **Public Officers and Employees: Public Policy.** The de facto doctrine validates, on grounds of public policy and prevention of failure of public justice, the acts of officials who function under color of law.
19. **Prosecuting Attorneys: Courts.** The authority of someone who is appointed as a special prosecutor ends at the point in time when a court makes a legal ruling that the appointment was invalid and orders as a matter of law that the individual's authority is terminated.

Original action. Judgment of ouster.

Michael T. Hilgers, Attorney General, Lee K. Polikov, Sarpy County Attorney, Cody S. Barnett, and Andrea Gosnold-Parker for relators.

No appearance for respondent.

FUNKE, C.J., CASSEL, STACY, PAPIK, FREUDENBERG, BERGEVIN, and VAUGHN, JJ.

FREUDENBERG, J.

INTRODUCTION

This is an original action for quo warranto challenging the district court's sua sponte appointment of a special prosecutor from the Attorney General's office to replace the Sarpy County Attorney's office in a criminal prosecution, after defense counsel alleged, for the first time in district court, that the deputy county attorney had engaged in ex parte communications with the county court judge during a pause in preliminary hearings. After the case was bound over to the district court, the deputy county attorney was no longer assigned to the case. During a hearing scheduled in district court for the defendant's plea in bar and motion to quash the information, defense counsel explained she wished to have the deputy county attorney testify to create a record for appeal or future litigation. The district court appointed the special prosecutor based on a conflict with the Sarpy County Attorney's office and the appearance of impropriety

stemming from allegations of improper conduct by the deputy county attorney. Subsequently, defense counsel did not call the deputy county attorney to testify, and the court found that a motion to quash defense counsel's subpoena of the deputy county attorney was moot.

BACKGROUND

A criminal complaint against Delmar Alexander Rodriguez Morales was filed in the county court for Sarpy County alleging first degree sexual assault of a child under 12 years of age. Peter Pirsch, a deputy Sarpy County Attorney, was the prosecutor assigned to the preliminary hearing. The preliminary hearing was held before the county court judge, who found probable cause to bind the matter over to the district court for Sarpy County, where an information was filed on June 2, 2026. Defense counsel did not raise in county court any issue of ex parte communications, courtroom procedures, or otherwise question if the county attorney's office had a conflict of interest or had committed misconduct in relation to the preliminary hearing.

Once the matter was bound over to the district court, the county court judge no longer presided over the matter, which was assigned to a district court judge who presided over the case from that point forward. Further, a different deputy Sarpy County Attorney became the prosecutor for the district court file. Pirsch did not participate as a prosecutor in any of the proceedings in district court.

Plea in Abatement and Motion to Quash Information

Defense counsel filed in the district court a plea in abatement challenging the sufficiency of the evidence at the preliminary hearing. Defense counsel also filed a motion to quash the information. Neither motion alleged unconstitutional courtroom procedures or that Pirsch had committed any misconduct, engaged in any improper ex parte communications, or had a conflict of interest.

June 22, 2026, Allegations of Ex Parte Communications

Defense counsel raised Pirsch's alleged ex parte communications for the first time at a hearing in the district court on June 22, 2026, in which Rodriguez Morales' plea in abatement and motion to quash the information were scheduled to be heard. Before proceeding with her argument on the motions, defense counsel told the court she "would also like to make a record regarding the probable cause hearing . . . for appeal for future litigation." When the court pointed out that the probable cause hearing was already on the record, defense counsel said she had "concerns about other issues," which she described as "ex parte communications" and "the procedures for the probable cause hearing in county court." The district court questioned how that would be done, and defense counsel indicated she would need to call Pirsch as a witness. The hearing was continued to July 6, so that defense counsel would have time to subpoena Pirsch.

July 6, 2026, Hearing Appointment of Special Prosecutor

Defense counsel subpoenaed Pirsch to testify on Rodriguez Morales' behalf at the July 6, 2026, hearing. The county attorney's office moved to quash the subpoena on the grounds that (1) it was beyond the scope of the allegations of the motion to quash, (2) defense counsel had presented no extrinsic evidence to show any ex parte communication of any kind, and (3) defense counsel was inappropriately using the subpoena power to collaterally attack prosecutors and prejudice the ability of the State to perform its statutory duties.

At the July 6, 2026, hearing, Pirsch was not called to testify and none of the pending motions were addressed. Instead, the district court raised, sua sponte, whether the allegations warranted the appointment of a special prosecutor.

The Sarpy County Attorney's office objected to appointment of a special prosecutor because no extrinsic evidence

had been offered to support defense counsel's allegations. It argued that appointment of a special prosecutor was not only unnecessary, but "it would make the role of the prosecuting office incredibly difficult if every time an attorney didn't like an outcome," they could "conflict[]" the office out of the matter by general allegations of ex parte communications.

Defense counsel was in favor of appointment of a special prosecutor, "[n]ot only because of the allegations of misconduct, but also irregularities in the process." She elaborated on these irregularities: "[f]rom drafting of the arrest affidavit to who signs the arrest affidavit to who holds the preliminary hearing to how the county handles preliminary hearings, and so on and so forth," and she emphasized she was "raising constitutional irregularities here." She said, "[T]here is enough here, because . . . Pirsch is an officer of the court, as am I, so there's enough here that if I raise an irregularity, there should be some credence to what I'm trying to say to the Court." She confirmed for the court that Rodriguez Morales was "okay with the additional delays" stemming from appointing a special prosecutor.

Pursuant to Neb. Rev. Stat. § 23-1205 (Reissue 2022), the district court appointed the Attorney General's office as special prosecutor. It explained at the hearing that there were allegations of improper conduct that created an appearance of impropriety. In its written order, the court explained it had "*sua sponte* raised the issue of a potential conflict with the Sarpy County Attorney's [o]ffice." Following the order, Demetria Herman, an assistant attorney general, entered her appearance for the State as special prosecutor.

July 27, 2026, Denial of Motion to Reconsider

The hearing on Rodriguez Morales' plea in abatement and motion to quash, as well as on the Sarpy County Attorney office's motion to quash the subpoena, was postponed to July 27, 2026. The Sarpy County Attorney's office moved

to reconsider the appointment of the special prosecutor. Pirsch was again subpoenaed to testify. The Sarpy County Attorney's office again moved to quash the subpoena. Only the motion to reconsider and the motion to quash the subpoena were taken up at the July 27 hearing.

The Sarpy County Attorney's office asserted that the district court's sua sponte determination of a conflict of interest was premature and without supporting evidence, permitting defense counsel to engage in "'prosecutor shopping.'" It pointed out there was no evidence of any ex parte communication, nor factual allegations that Pirsch and the county court judge spoke about substantive issues related to the case, nor allegations that Pirsch had a personal conflict of interest. Further, the Sarpy County Attorney's office pointed out that if the alleged communication was to ask on defense counsel's behalf to move the order of the cases for probable cause hearings, then defense counsel had notice of the communication. And Pirsch had no control over the procedures of the county courtroom.

The Sarpy County Attorney's office argued that the court's order "implies that wrongdoing occurred on the part of certain prosecutors within the Sarpy County Attorney's [o]ffice, finding a mere allegation of impropriety as factual without allowing due process to the Sarpy County Attorney's office to defend against such allegation." Even assuming an ex parte communication occurred, the remedy should have been recusal of the judge, rather than removal of the prosecutor's office. Also, Pirsch could not be compelled by the defense to be a witness where there are other viable methods available to Rodriguez Morales for the introduction of evidence. Finally, even assuming Pirsch must be a witness or otherwise had a conflict of interest, the Sarpy County Attorney's office argued Pirsch could be screened so disqualification of the entire office was inappropriate. The office described defense counsel's subpoena of Pirsch as, at best, a "fishing expedition."

Defense counsel argued the district court did not abuse its discretion in appointing the special prosecutor because

"[m]isconduct stems from . . . Pirsch's ex parte communications or alleged unilateral communication with the county court judge . . . ." She then pointed to the alleged lack of the underlying support for the probable cause determination and "constitutional irregularities" at the hearing. Defense counsel elaborated that the "constitutional irregularities" involved defense counsel's limited access to the courtroom and the resultant need for Pirsch to convey to the county court judge defense counsel's "emergency motion." Defense counsel explained she was "expected to perform her duties from inside the enclosed glass holding cell designated for inmates" and "was prevented from physically accessing the courtroom or making an emergency motion to the court." At the same time, "prosecutors [were] allowed full and unfettered access to the court." Defense counsel asserted that her "communications to the court [were] filtered through the county attorney[,] as was undersigned counsel's emergency motion which was ignored," and that this "defies all notions of fairness and impartiality of the judiciary." She supported her complaint with evidence of a sign outside the courtroom that read:

> ATTENTION DEFENDANTS & COUNSEL
> If you are here for a preliminary hearing, please have a seat. Due to limited seating in the courtroom, we ask that only the County Attorney have a seat at counsel table. When your case is called, please go to defense table to address your case.

Defense counsel argued she was "raising not just an ex parte communication, but misconduct in general"; "[i]t's about how things are being handled" in Sarpy County, and she was calling into question "the procedures and protocol" and "the impartiality of the judiciary." Defense counsel said Pirsch was a necessary witness because "I can't testify as to the facts of the case. The only other person that would know the facts of the case is . . . Pirsch . . . ." Defense counsel believed that, because of the appearance of impropriety, she did not need to provide "actual proof of ex parte communications."

When pressed by the court for more particulars, defense counsel elaborated that, on the day of the probable cause hearing in the county court, she told Pirsch she "wanted to get in as soon as I possibly could," because she "needed to leave because I had an emergency with one of my children." Pirsch told her that he would "contact or e-mail the Judge and see if we can see where he's at." She then observed Pirsch go speak to the judge but could not hear what was said because she had been removed by another county attorney from the courtroom. She surmised Pirsch was talking to the judge about her client. She also surmised, based on Pirsch's informing her thereafter that Rodriguez Morales' preliminary hearing would be last, that they were not speaking about her scheduling request. Closely tied to defense counsel's allegations was her complaint that she was not allowed to be in the courtroom while waiting for Rodriguez Morales' preliminary hearing and was unable to approach the judge herself to ask about moving up the hearing. She apparently was allowed to be present during the preliminary hearing itself, and the county court did eventually move up Rodriguez Morales' preliminary hearing to accommodate defense counsel's request.

Following defense counsel's detailed unsworn description of events, the district court inquired whether defense counsel herself might also be a necessary witness for her claims pertaining to the preliminary hearing in county court, since she would be the only person able to rebut certain assertions by Pirsch about what took place. Defense counsel responded that she believed Rodriguez Morales' "right to an attorney of his choice would go above becoming a necessary witness."

The court denied the Sarpy County Attorney's office's motion to reconsider its appointment of the special prosecutor. The remaining motions were continued to August 7, 2026, to allow the court to discuss with the Counsel for Discipline of the Nebraska Supreme Court defense counsel's potential conflict of interest if Pirsch were called to testify.

August 7, 2026, Motion to Quash Subpoena Dismissed as Moot

At the August 7, 2026, hearing, defense counsel did not call any witnesses to testify. She submitted into evidence the transcription of the probable cause hearing. Since Pirsch was not called as a witness, the court found the Sarpy County Attorney's office's motion to quash the subpoena was moot. The motion to quash the information and the plea in abatement were taken under advisement, and the parties were given time to submit briefs. Defense counsel's briefing on those motions did not raise any allegations pertaining to Pirsch or the procedures of the county court for Sarpy County.

Original Quo Warranto Action

We granted the application of the State of Nebraska, through elected officials—Michael Hilgers, Attorney General, and Lee Polikov, Sarpy County Attorney (together referred to as "Relators")—for leave to commence an original action for a writ of quo warranto.[1] Relators challenge Herman's right to exercise the office of Sarpy County Attorney. They seek her removal as special prosecutor in the State's case against Rodriguez Morales. Relators argue that there was insufficient evidence to warrant the appointment of a special prosecutor for a conflict of interest as set forth in § 23-1205.

STANDARD OF REVIEW

In a quo warranto action, the burden of proof rests on the party asserting a right to the office for which the party has been ousted.[2]

ANALYSIS

[1-3] The question presented in this original action is whether the Attorney General's office, and specifically, the assigned assistant attorney general appointed by the district

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[1] See Neb. Rev. Stat. §§ 25-21,122 and 24-204 (Reissue 2016).

[2] *State ex rel. Condon v. Braaten*, 320 Neb. 214, 26 N.W.3d 532 (2025).

court, is unlawfully holding or exercising the public office of the Sarpy County Attorney. The answer depends upon whether the district court validly exercised its authority by appointing a special prosecutor for the State's case against Rodriguez Morales, thereby preventing the Sarpy County Attorney's office from performing its statutory duty to represent the State in criminal actions within its jurisdiction. A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.[3] The abuse of discretion standard of review recognizes there is a range of rationally available rulings that can be supported by the facts and governing law in a particular case.[4] Thus, when an appellate court reviews a trial court's ruling for an abuse of discretion, it is considering whether the ruling exceeded the bounds of permissible choice, given the evidence presented and the applicable law.[5] We hold that the district court abused its discretion by appointing a special prosecutor pursuant to § 23-1205, over the Sarpy County Attorney office's objection, when there was no evidence presented at all, let alone that supported a disqualifying conflict of interest.

[4,5] The Sarpy County Attorney's office, as with all other county attorneys' offices, is statutorily required to represent the interests of the State in criminal, civil, and juvenile proceedings.[6] As relevant here, § 23-1202 requires that "[e]ach county attorney shall appear on behalf of the state before any magistrate, and prosecute all complaints made in behalf of the state of which any magistrate shall have jurisdiction . . . ." The use of the word "shall" in § 23-1202 indicates a mandatory directive inconsistent with the idea of discretion.[7]

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[3] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

[4] See *State v. Damore*, 320 Neb. 914, 31 N.W.3d 604 (2026).

[5] *Id*.

[6] Neb. Rev. Stat. §§ 23-1202 (Reissue 2022) and 43-261 (Reissue 2016).

[7] See *State v. Jackson*, 320 Neb. 609, 29 N.W.3d 232 (2026).

[6] Under § 23-1205, a special prosecutor may be appointed to replace the county attorney's office under the limited circumstances of "absence, sickness, disability, or conflict of interest of the county attorney and his or her deputies, or upon request of the county attorney for good cause." Statutes pertaining to the same subject matter should be construed together as if they were one law, giving effect to every provision[8] and refraining from reading into them words that are not there.[9] Thus, we will not read into § 23-1205 grounds for appointment of a special prosecutor that are not specifically set forth therein.

The Sarpy County Attorney's office did not request the appointment of a special prosecutor. Under the facts and arguments presented below, the only potentially applicable provision of § 23-1205 was appointment due to a "conflict of interest of the county attorney and his or her deputies."

[7-9] A conflict of interest exists when a defense attorney is placed in a situation inherently conducive to divided loyalties.[10] The phrase "conflict of interest" denotes situations where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client, where it becomes a lawyer's duty on behalf of one client to contend for that which the lawyer's duty to another client would require him or her to oppose, or where fulfilling a lawyers duty to the client may be to the detriment of the attorney's personal interest.[11] We have said that the purpose of § 23-1205 is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interests.[12]

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[8] See *Dirt Road Development v. Hirschman*, 316 Neb. 757, 7 N.W.3d 438 (2024).

[9] See *Johnson v. Village of Polk*, 319 Neb. 352, 23 N.W.3d 96 (2025).

[10] *State v. Mata*, 321 Neb. 566, 36 N.W.3d 432 (2026).

[11] See, *id.*; *State v. Malone*, 308 Neb. 929, 957 N.W.2d 892 (2021), *modified on denial of rehearing* 309 Neb. 399, 959 N.W.2d 818.

[12] *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002).

The phrase "appearance of impropriety" is not listed in § 23-1205 as a reason for appointing a special prosecutor, and in *State v. Kinkennon*,[13] we adopted the stance that "[t]he appearance of impropriety alone is simply too slender a reed on which to rest a disqualification order except in the rarest of cases."[14] An "appearance of impropriety" rests primarily on perception, rather than actual or even potential conflicts of interest.[15]

[10] For a court to disqualify a county attorney's office under § 23-1205 for a conflict of interest, there must be some reliable evidence presented to support a court's finding that there is a situation inherently conducive to divided loyalties. And at no point did defense counsel present evidence relating to her underlying claims. Whether oral or written, mere arguments and unsworn fact statements of counsel are not evidence.[16] But even setting aside the purely speculative nature of defense counsel's summation that an ex parte communication had in fact occurred, it is unclear why the district court may have believed the alleged ex parte communication between Pirsch, who was no longer the prosecutor assigned to the case, and the county court judge, who was no longer presiding, created a conflict of interest for the entire Sarpy County Attorney's office in its prosecution of Rodriguez Morales' case in district court. Our case law considering ex parte communications between judges and prosecutors focuses on whether the judges should have recused themselves[17] and

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[13] *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[14] *Id.* at 577, 747 N.W.2d at 444 (internal quotation marks omitted).

[15] See Sigrid Fry-Revere & David Bjorn Malmstrom, *More Regulation of Industry-Supported Biomedical Research: Are We Asking the Right Questions?*, 37 J.L. Med. & Ethics 420, 423 (2009).

[16] See *State v. Roundtree*, 11 Neb. App. 628, 658 N.W.2d 308 (2003).

[17] See, *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020); *State v. Thompson*, 301 Neb. 472, 919 N.W.2d 122 (2018); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Jenson*, 232 Neb. 403, 440 N.W.2d 686 (1989).

does not suggest ex parte communications create attorney conflicts of interest. An ex parte communication occurs when a judge communicates with any person concerning a pending or impending proceeding without notice to an adverse party.[18] There is no reason to believe that ex parte communication between Pirsch and the county court judge, if it occurred, was inherently conducive to divided loyalties or otherwise created for Pirsch a divided loyalty or private interest.

Also, we have held that an objection to an ex parte communication must be timely; "[o]ne cannot know of improper judicial conduct, gamble on a favorable result by remaining silent as to that conduct, and then complain that he or she guessed wrong and does not like the outcome."[19] At no point did defense counsel complain in the county court that she believed the county court judge and Pirsch had engaged in ex parte communications, which would have given Pirsch and the county court judge an opportunity to address what defense counsel had observed. Instead, defense counsel raised the alleged ex parte communication after the unfavorable outcome of the county court's determining there was probable cause to bind the case over to the district court and after the county court judge and Pirsch were no longer directly involved in the case and readily available to respond to the allegations.

[11] The district court's concern about a potential conflict of interest may have revolved around defense counsel's stated intent to call Pirsch as a witness during a pretrial hearing and the issuance of subpoenas for that purpose, which was an undisputed fact. Defense counsel emphasized that Pirsch's testimony was necessary not only to discover if Pirsch and the county court judge had engaged in ex parte communications about Rodriguez Morales, but also to provide evidence

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[18] *State v. Thomas, supra* note 17.

[19] *State v. Lotter*, 255 Neb. 456, 475, 586 N.W.2d 591, 610 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999), and *disapproved on other grounds, State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025) (internal quotation marks omitted).

of allegedly unconstitutional county court procedures for preliminary hearings. The advocate-witness rule discourages combining roles of advocate and witness in the same proceeding, recognizing the two different roles could give rise to conflicts of interest.[20]

[12-14] But we have held that a court will not allow defense counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case.[21] Thus, a court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness.[22] A party seeking to call opposing counsel must prove that counsel is a necessary witness by showing that (1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere.[23]

There was no evidence that Pirsch's proposed testimony was material and relevant to the issues being litigated or that the evidence was unobtainable elsewhere. The alleged irregularities were limited to the county court. Yet, defense counsel did not include them as grounds for the plea in abatement or motion to quash the information. Her reference to making a record "for appeal for future litigation" did little to clarify how Pirsch's testimony was material and relevant to the issues being litigated before the district court. Indeed, any

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[20] See, *State ex rel. NSBA v. Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989); Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 Law & Soc. Inquiry 87 (2003); § 39:183. See, also, 6 Robert A. Matthews, Jr., Annotated Patent Digest § 39:183 (Nov. 2026 update) (outlining policy objectives of advocate-witness rule).

[21] See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

[22] *Beller v. Crow*, 274 Neb. 603, 742 N.W.2d 230 (2007), *overruled on other grounds, Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[23] See *id*.

issues Pirsch's testimony could have shed light on seem better suited for a postconviction action. Further, defense counsel did not explain why the evidence of the alleged irregularities could not be obtained elsewhere. Certainly, defense counsel herself could have testified, and court staff could have given testimony of courtroom procedures.

Furthermore, the record reflects that any potential conflict of interest derived from calling Pirsch as a witness was rendered moot when defense counsel ultimately decided not to call Pirsch to testify.[24] For this reason, the district court ultimately ruled that the Sarpy County Attorney's office's motion to quash defense counsel's subpoena was moot. The district court's decision to appoint a special prosecutor before ruling on the motion to quash the subpoena and before knowing if Pirsch would actually be called to testify was, if nothing else, premature.

[15-17] Finally, even if Pirsch had a conflict of interest and even if any such conflict was not rendered moot when he was not called to testify, it is the general rule that conflicts of interest that arise from the advocate-witness rule are not imputed to other members of the law office.[25] More broadly, under any source of a conflict of interest, it follows that because of the unique constitutional and statutory duties of a county attorney's office, the entire county attorney's office will be disqualified due to a conflict of one of its attorneys only in the rarest of situations.[26] We have never held that a conflict of a deputy county attorney, who handled the preliminary hearing in county court but is no longer the prosecutor for the case in district court, is imputed to the other attorneys of the county attorney's office.[27] To the contrary, we have held that, so long as the disqualified attorney is effectively screened from any participation in the prosecution of the defendant, the prosecutor's

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[24] See *State v. Land*, 435 N.J. Super. 249, 88 A.3d 193 (2014).

[25] See *Shapiro, supra* note 20.

[26] See, e.g., *U.S. v. Bolden*, 353 F.3d 870 (10th Cir. 2003).

[27] See *State v. Kinkennon, supra* note 13.

office may, in general, proceed with the prosecution.[28] This is in line with the general rule in other jurisdictions that when an individual prosecutor is disqualified, a different prosecutor in the same office may be appointed, absent some unusual circumstance warranting disqualification of the entire office.[29] There was no evidence presented below to suggest an unusual circumstance that warranted disqualification of the entire Sarpy County Attorney's office.

The district court's power to appoint, sua sponte, a special prosecutor is narrowly circumscribed by statute. There was no evidence supporting a finding of a conflict of interest, let alone one that could be imputed to the entire Sarpy County Attorney's office. There was no evidence presented at all. No testimony, affidavits, or exhibits were received into evidence at the pretrial hearings. There was merely defense counsel's unsworn factual allegations, speculation, and argument. Without any evidence that could support a conflict of interest, the district court abused its discretion in disqualifying the Sarpy County Attorney's office and appointing a special prosecutor. We enter a judgment ousting the Attorney General's office as special prosecutor.

We note that neither party has argued that any acts performed by the special prosecutor until this judgment of ouster are invalid. Thus, we do not decide this question. However, we observe that in other cases, it has been held that the acts of a de jure officer appointed as de facto special prosecutor are valid.[30] In this original action, the Attorney General is not

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[28] *Id*.

[29] 6 Wayne R. LaFave et al., Criminal Procedure § 22.5(a) (5th ed. 2025).

[30] See, *United States v. Lindsley*, 148 F.2d 22 (7th Cir. 1945); *Ex parte Johnson*, 15 Neb. 512, 19 N.W. 594 (1884); *State v. Breeze*, 873 P.2d 627 (Alaska App. 1994); *Bagnell v. State*, 413 N.E.2d 1072 (Ind. App. 1980); *People v. Davis*, 86 Mich. App. 514, 272 N.W.2d 707 (1978); 46 C.J. *Officers* § 366 (1928). See, also, *McDowell v. United States*, 159 U.S. 596, 16 S. Ct. 111, 40 L. Ed. 271 (1895); *State, ex rel. Gossett, v. O'Grady*, 137 Neb. 824, 291 N.W. 497 (1940).

asserting or disclaiming the power, prerogative, or duty to prosecute a criminal offense under the authority of Neb. Rev. Stat. §§ 84-204 (Reissue 2024) or 84-205 (Supp. 2025). Here, the ouster of the assistant attorney general flows not from any lack of authority of the Attorney General, but, rather, from the district court's disqualification, without any supporting evidence, of the Sarpy County Attorney and all of his deputies and assistants.

[18,19] The de facto doctrine validates, on grounds of public policy and prevention of failure of public justice, the acts of officials who function under color of law.[31] As one court pointed out:

> [M]aking all of a special prosecutor's actions void ab initio when an appointment order has failed to comply with the special prosecutor statute would carry the potential for grave mischief. If that were the law, a defendant who was being criminally prosecuted by a special prosecutor could potentially wait until after a judgment of conviction had been entered and then obtain a ruling from the trial court (or even an appellate court) that the conviction was invalid because the special prosecutor's actions in filing the criminal complaint and trying the case were legal nullities. Such a rule could undo convictions that were otherwise valid in all respects simply because the appointing judge failed to ensure that the appointment process and order complied with the special prosecutor statute. Where there are no other bases for overturning what a special prosecutor has done, including obtaining a criminal conviction, and no personal rights of the defendant have been violated, justice would be thwarted by allowing a defendant to undo otherwise valid prosecutorial actions.[32]

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[31] See, e.g., *State v. Breeze, supra* note 30.

[32] *State v. Peterson*, 365 Wis. 2d 351, 362-63, 875 N.W.2d 49, 54 (2015).

Thus, it has been held that the authority of someone who is appointed as a special prosecutor ends at the point in time when a court makes a legal ruling that the appointment was invalid and orders as a matter of law that the individual's authority is terminated.[33] Further, courts do not invalidate the prior proceedings where no prejudice is shown.[34]

CONCLUSION

The Relators' quo warranto action is granted. The Sarpy County Attorney's office is not disqualified and the Attorney General's office, specifically Herman, through no fault of her own, is ousted from the office of special prosecutor in the criminal prosecution of Rodriguez Morales.

JUDGMENT OF OUSTER.

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[33] *State v. Peterson, supra* note 32.

[34] See, e.g., *People v. Moretti*, 415 Ill. 398, 114 N.E.2d 337 (1953).