PROPOSED RULES OF PRACTICE FOR GUARDIANS AD LITEM FOR JUVENILES

Nebraska Supreme Court Commission on Children in the Courts
August 25, 2006

I. PURPOSE

The purpose of these Rules of Practice is to ensure that the best interests and the legal interests of juveniles involved in dependency and abuse/neglect proceedings initiated under the Nebraska Juvenile Code are effectively represented by their court-appointed guardians ad litem. These rules are also promulgated to insure that the best interests of juveniles involved in delinquency, status offense, or other proceedings initiated under the Nebraska Juvenile Code are effectively protected when a guardian ad litem is appointed by the court for such juveniles.

Comment

It is important to clarify at the outset that these Rules apply only to guardians ad litem for juveniles involved in juvenile court proceedings. In juvenile proceedings, guardians ad litem are also appointed to represent incompetent adults or "any party as deemed necessary or desirable by the court."[1] An attorney is typically appointed to represent the legal interests of the juvenile in proceedings brought under §43-247(1),(2), (3)(b) and (4). Therefore, when the court appoints a guardian ad litem for a juvenile in a proceeding brought under §43-247(1),(2), (3)(b) or (4), a guardian ad litem who has been appointed for such juvenile will not also serve as attorney for the legal interests of the juvenile.

These Rules of Practice do not apply to guardians ad litem appointed to represent juveniles and incompetent adults in district court domestic relations or county court probate proceedings.

II. APPOINTMENT

A. In accordance with the Nebraska Juvenile Code, only a lawyer duly licensed by the Supreme Court of Nebraska may be appointed to serve as guardian ad litem for a juvenile.

B. The judicial appointment of a lawyer to serve as a guardian ad litem is personal to that lawyer, regardless of his or her affiliation with a law firm, partnership, coalition of attorneys, or any other entity. Except for clerical and administrative functions, the duties within the appointment of a

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1 Neb. Rev. Stat. §43-292.01 (2004)

guardian ad litem are not normally delegable to another person or lawyer, or to other members of the guardian ad litem's law firm, partnership, coalition of attorneys, or other entity with which the guardian ad litem is affiliated.[2]

C. Any lawyer who serves as a guardian ad litem must fulfill the training requirements described in Rule VII below.

Comment

[I-B] *The duties of a guardian ad litem are not normally delegable to another person because the appointment of a guardian ad litem is personal to the attorney who will serve in that capacity. Even where the juvenile is situated at a great geographical distance from the guardian ad litem, to have another person act in lieu of the guardian ad litem in order to meet with the juvenile would not suffice to discharge the guardian ad litem's duty of "consultation" with the juvenile, for several reasons. 1) any person who seeks to act in lieu of the guardian ad litem must be an attorney at law, as required by Nebraska law; 2), such attorney would have no have no legal authority to meet with the juvenile without express authorization from the court to conduct such a meeting with the juvenile, 3) in order to effectively interview or consult with the juvenile, the attorney would have to be familiar with the history and the issues of the case, and possibly to review or become privy to information contained in confidential records, raising issues of ethics and confidentiality; 4) effective consultation does not involve only interviewing the juvenile but in certain situations, also providing legal advice and direction to the juvenile regarding the case.*

Furthermore, there are other statutory duties and authorities imposed upon a guardian ad litem (e.g., investigation of facts and relevant information, interviews with pertinent persons or resources, preparing written reports, making recommendations, exercising attorney functions) as well as the need for the guardian ad litem to establish a relationship with the juvenile, all of which militate against the notion that the essential duties of the and authorities of the appointment can be delegated to another person or attorney.

[2] The proposed language, while recommended by the sub-committee, nevertheless conflicts with the model proposed to the Commission and Supreme Court in the Minority Report. Consequently, should the Court adopt the model proposed in the Minority Report, this standard would not be included in final proposed Rules of Practice for GALs.

III. ROLE OF THE GUARDIAN AD LITEM[34]

A. Nebraska law (§43-272) authorizes a guardian ad litem in juvenile proceedings to fulfill a "dual role," with respect to the juvenile, that is, to serve as:

1. An advocate for the juvenile who is deemed as the parent of the juvenile and charged with a duty to investigate facts and circumstances, determine what is in the juvenile's best interests, report to the court and make recommendations as to the juvenile's best interest, and to take all necessary steps to protect and advance the juvenile's best interests; and

2. As legal counsel for the juvenile.

B. Where a lawyer has already been appointed to represent the legal interests of the juvenile, for example in a delinquency case, another lawyer who is appointed to serve as a guardian ad litem for such juvenile does not serve in the "dual role," but shall function only in a single role of as guardian ad litem for the juvenile concerning the juvenile's best interests, and shall be bound by all of the duties and shall have all of the authorities of a guardian ad litem, with the exception of acting as legal counsel for the juvenile.

C. Accordingly, the following shall apply:

1. In serving as advocate for the juvenile to protect his or her best interests, the guardian ad litem shall make an independent determination as to the juvenile's best interests, considering all available information and resources. The guardian ad litem's determination as to best interests is not required to be consistent with any preferences expressed by the juvenile.

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[3] See Appendix A for proposed changes to Rule 1.7 (Conflict of Interest) of the Nebraska Rules of Professional Conduct to accommodate potential conflicts created by the dual role for the guardian ad litem in juvenile court proceedings.

[4] This proposed section, while recommended by the sub-committee nevertheless conflicts with the model proposed to the Commission and Supreme Court in the Minority Report. Consequently, should the Court adopt the model proposed in the Minority Report, the wording of this standard would need to be altered to conform to the model ultimately selected by the Supreme Court.

2. After making such determination, the guardian ad litem shall present to the court his or her recommendations regarding the best interests of the juvenile and shall take steps necessary to advocate and protect the best interests of the juvenile.

3. As legal counsel for the juvenile, the guardian ad litem shall be entitled to exercise and discharge all prerogatives to the same extent as a lawyer for any other party in the proceeding.

4. Where the juvenile expresses a preference which is inconsistent with the guardian ad litem's determination of what is in the best interests of the juvenile, the guardian ad litem shall assess whether there is a need to request the appointment of a separate legal counsel to represent the juvenile's legal interests in the proceeding. In making such assessment, the guardian ad litem shall consider:
   a. the juvenile's age,
   b. the juvenile's capacity,
   c. the juvenile's level of maturity,
   d. the nature of the inconsistency between the juvenile's expressed preference and the guardian ad litem's determination as to the juvenile's best interest.

5. After making such assessment, the guardian ad litem shall request the court to make a determination as to whether special reasons exist for the court to appoint separate legal counsel to represent the legal interests of the juvenile, where the guardian ad litem determines all of the following:

   a. That the juvenile's expressed preference represents the communication of a preference which is knowingly made by a juvenile of sufficient age, capacity and maturity;

   b. That the juvenile's expressed preference is of significance to any matter or issue in the case affecting the juvenile, and is within the bounds of law and reality;

   c. That the guardian ad litem believes that it would be a conflict of interest for the guardian ad litem to continue to act as legal counsel for the juvenile in light of the preference expressed by the juvenile.

6. In any situation where the guardian ad litem has been appointed to represent more than one juvenile within the same case, the guardian ad litem shall ascertain throughout the case whether the guardian ad litem's advocacy of the best interests or rights of any

one juvenile would be adverse to or conflict with the best interests or rights of any other juvenile represented by the same guardian ad litem. Where the guardian ad litem reasonably believes that to continue as guardian ad litem for all of the juveniles would be problematic in this specific regard, the guardian ad litem shall apply to the court for the appointment of a separate guardian ad litem and/or legal counsel for the juvenile(s), as the court sees fit in order to provide to assure that the interests of each juvenile involved in the case are adequately protected and represented. Where any juvenile has expressed a preference or position regarding a certain matter or issue, the guardian ad litem shall utilize the standards set forth in Rule III.C.5 above.

7. If the court exercises its statutory authority to appoint separate legal counsel to represent a juvenile for whom a guardian ad litem has been appointed, such separate legal counsel shall represent the juvenile's legal interests while the guardian ad litem shall continue to advocate and protect the juvenile's social and best interests as defined under the Nebraska Juvenile Code.

Comment

[C-4 and C-5] *Rather than require the guardian ad litem to approach the court each and every time the juvenile expresses a preference which is inconsistent with the guardian ad litem's determination of what is in the juvenile's best interest, the better course would be to have the guardian ad litem, who is by statute "deemed a parent of the juvenile," to exercise his or her independent judgment as a guardian ad litem by assessing the propriety of requesting the appointment of separate legal counsel to represent the legal interests of the juvenile. The reverse of this flies in the face of common sense, especially if the juvenile makes trivial, or frequently conflicting requests, including requests which are not grounded in fact or reality.*

IV. AUTHORITY OF THE GUARDIAN AD LITEM

A. Access To Information and the Juvenile

1. The guardian ad litem is entitled to receive all pleadings, notices, to include timely notices of change of placement, and orders of the court filed in the proceeding, and should make reasonable efforts to obtain complete copies of the same.

2. The guardian ad litem is entitled to receive copies of all case plans and court reports prepared by the Nebraska Department of Health and Human Services, the Nebraska Foster Care Review Board, any

Court Appointed Special Advocate, as well as reports, summaries, evaluations, records, letters and documents prepared by any other provider which the guardian ad litem deems relevant to the best interest or legal rights of any juvenile represented by the guardian ad litem. Where these documents are not provided as a matter of course to the guardian ad litem, they shall be provided upon the request of the guardian ad litem.

3. The guardian ad litem, standing in lieu of the parent for a protected juvenile who is the subject of a juvenile court petition[5] shall also have the same right as the juvenile's legal guardian to: 1) obtain information from all professionals and service providers, including but not limited to verbal communications and written reports, summaries, opinions, and evaluations, and information regarding the juvenile's placement; 2) to receive notice of and participate in all conferences, staffings or team meetings, and hearings relating to the juvenile's health, education, placement, or any other matter which, in the opinion of the guardian ad litem is relevant to, or which affects the best interests or legal rights of the juvenile.

4. The guardian ad litem is authorized to communicate with and respond to inquiries for information regarding the juvenile made by the Nebraska Foster Care Review Board, the Health and Human Services case manager, or CASA.

5. The guardian ad litem is authorized to make announced or unannounced visits to the juvenile at his or her home or placement, or at any location at which the juvenile may be present.

6. The court shall facilitate the guardian ad litem's authority to obtain information regarding the juvenile by including the following language in its initial order of appointment of the guardian ad litem:

"The guardian ad litem appointed herein by this Court shall have full legal authority to obtain all information which relates to the above-named juvenile.

"To that end, the guardian ad litem is hereby authorized by this Court to communicate verbally or in writing with any agency, organization, person, or institution, including but not limited to any school personnel, counselor, drug or alcohol treatment provider; or police department or other law enforcement agency; any probation, parole or corrections officer; any physician, psychiatrist, psychologist, therapist, nurse, or mental health

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[5] Neb. Rev. Stat. §§43-272.(2); 43-272.01(2)(a) (2004)

care provider; or any hospital, clinic, group home or treatment group home, or residential or mental health treatment facility or youth rehabilitation treatment center; any social worker, case manager, or social welfare agency, including the Nebraska Department of Health and Human Services and its employees and administrators; any person or agency or institution charged with supervising visitation; or any family member, guardian, foster parent, or any other person.

"The guardian ad litem is further hereby authorized to obtain from all persons, organizations, or entities, including but not limited to those described in the paragraph above, all information, including but not limited to the inspection of, and obtaining of complete copies of records, reports, summaries, evaluations, correspondence, written documents, or other information, orally or in any media form, which relate to the above-named juvenile even if such information concerns his or her parents, or any other person or any situation that the guardian ad litem deems necessary in order to properly represent the juvenile's interests."

Comment

[A-2 and A-3] *The guardian ad litem is entitled to full access to examine and obtain copies of all information, including but not limited to reports, summaries, evaluations, and documents from all providers such as physicians, therapists, psychologists, educators, agencies and their sub-contractors, etc., which, in the opinion of the guardian ad litem, relate in any manner to the juvenile or the juvenile's best interests or rights, whether or not such information is regarded as confidential. Where these documents are not provided as a matter of course to the guardian ad litem, they shall be provided upon the request of the guardian ad litem.*

[A-4] *In addition to obtaining information, the guardian ad litem is also authorized to communicate with and respond to requests for information regarding the juvenile made by other participants in the case. The Nebraska Foster Care review Board, CASA, and Health and Human Services all are charged with specific statutory duties to investigate and make recommendations to the court pertaining to the juvenile's condition, circumstance, services and placement. The guardian ad litem should cooperate with all of these agencies in providing requested information. For example, the guardian ad litem should complete questionnaires from the Foster Care Review Board or attend meetings, when possible.*

[A-5] The guardian ad litem has the right to visit the juvenile at any place where the juvenile is located, e.g., a hospital or other medical facility, the juvenile's school, daycare, parental or custodial home, placement, shelter, or other

treatment facility, as well as sites where visitation takes place between the juvenile and his or her parents.

V. DUTIES OF A GUARDIAN AD LITEM

A. Consultation With the Juvenile

1. The phrase "consultation with the juvenile" as used in the Nebraska Juvenile Code, shall mean meeting in person with the juvenile, unless prohibited or made impracticable by exceptional circumstances, as set forth in Rule V.A.4 below.

2. The guardian ad litem shall consult with the juvenile irrespective of the juvenile's age or ability to communicate, at those times and intervals as required by the Nebraska Juvenile Code[6].

3. In addition to the statutorily required intervals for consulting with the juvenile, when possible, the guardian ad litem should consult with the juvenile when:

   a. The juvenile requests that the guardian ad litem meet with him or her;

   b. The guardian ad litem has received notification of any emergency, or other significant event or change in circumstances affecting the juvenile, including a change in the juvenile's placement;

   c. Prior to any hearing at which substantive issues affecting the juvenile's best interest or legal interests are anticipated to addressed by the court.

   d. The guardian ad litem shall make every effort to see the juvenile in his or her placement at least once, with respect to each such placement.

4. Where an unreasonable geographical distance is involved between the location of the juvenile and the guardian ad litem, the guardian ad litem ***shall*** explore the possibility of obtaining from the court an advance determination that the court will arrange for the payment or

[6] Currently, the Nebraska Juvenile Code requires a guardian ad litem to consult with the juvenile within the two weeks after his or her appointment, and once every six months thereafter. Neb. Rev. Stat. §43-272.01(2)(d) (2004)

reimbursement of the guardian ad litem's reasonable expenses incurred in connection with the guardian ad litem's travel to meet with the juvenile.

5. "Exceptional circumstances" shall include but not be limited to those situations where an unreasonable geographical distance is involved between the location of the guardian ad litem and the juvenile. Where such exceptional circumstances exist, the guardian ad litem should attempt consultation with the juvenile by other reasonable means, including but not limited to telephonic means, assuming that the juvenile is of sufficient age and capacity to participate in such means of communication and there are no other barriers preventing such communication. Where consultation by telephonic means is also not feasible, the guardian ad litem should seek direction from the court as to any other acceptable method by which to accomplish such consultation with the juvenile.

Comment

[A-1] *It is crucial for the guardian ad litem to see the juvenile in his or her placement. The guardian ad litem must have the opportunity not only to communicate with the juvenile, but also to observe, inspect, and verify the juvenile's surroundings, conditions, care and treatment in his or her placement. The guardian ad litem is also authorized to see or have access to the child at any other site or location where the child may be present.*

[A-2 and A-3] *Under these Rules, Neb. Rev. Stat. §43-272.01(2)(d) represents the minimum frequency of contact expected between a guardian ad litem and a juvenile. The guardian ad litem should also consult with the juvenile at those intervals described in Rule V.A-3 above, and at any other time when, in the opinion of the guardian ad litem, such consultation is indicated by the needs of the child or the circumstances of the case.*

[A-4 through A-6] *While there could be situations when it would be reasonable to perform such consultation with the juvenile by telephonic means, face-to-face contact and communication should remain the priority for the guardian ad litem. However, face-to-face contact might not feasible where, for medical or other health reasons the juvenile cannot have any contact with outside persons, or the where the juvenile is placed at such a great geographical distance from the guardian ad litem that it is simply unreasonable to expect the guardian ad litem to conduct in-person meetings with the juvenile on a regular basis*

Where neither face-to-face nor telephonic consultation with the juvenile is feasible, the guardian ad litem should seek guidance from the appointing court as to an acceptable method which would suffice to accomplish the duty of consultation with the juvenile. Where there is such a great geographical distance between the location of the guardian ad litem and the juvenile so as to make it unreasonable for the guardian ad litem to consult in person with the juvenile on a regular basis, and consultation by telephonic means in not an option, the court may approve the use of another trained guardian ad litem who is locally available to conduct the consultation on behalf of the guardian ad litem. However, this would represent the exception and not the norm, and the court would need to approve such arrangement in advance, in light of the fact that the duties of the guardian ad litem are not delegable.

B. Inquiry and Consultation With Others

1. The guardian ad litem is required to make inquiry of the juvenile's caseworker, foster parent or legal custodian and any other person directly involved with the juvenile who may have knowledge about the case, or the development of the juvenile. The guardian ad litem should also make inquiry of any other persons who have knowledge or information relevant to the juvenile's best interests.[7] The guardian ad litem may obtain such information through the means of direct inquiry, interview or the discovery process.

2. The guardian ad litem has a duty to read and comprehend the court reports prepared by the Nebraska Department of Health and Human Services, the Nebraska Foster Care Review Board, the CASA volunteer, and from all other persons or providers assigned to the case who prepare and present such reports to the court.[8]

C. Report and Recommendations to the Court

1. The guardian ad litem has a duty to make written recommendations to the court in the form of a report regarding the temporary and permanent placement of the protected juvenile.[9] Because the guardian ad litem is also required by statute to consider any other information "as is warranted by the nature and the circumstances of the particular case,"[10] the guardian ad litem's report should include written recommendations to the court regarding any other matter that affects or would affect the best interest of the protected juvenile.

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7 Neb. Rev. Stat. §43-272.01(2)(d) (2004)

8 In re Interest of Antone C., 12 Neb. App. 152, 699 N.W.2d 69 (2003)

9 Neb. Rev. Stat. §43-272.01(2)(f) (2004)

10 Neb. Rev. Stat. §43-272.01(2)(g) (2004)

2. The guardian ad litem is required to submit a written report to the court at every dispositional hearing and review hearing.[11] The information contained in the report of the guardian ad litem should include, but is not limited to the following information:

   a. Dates of, and description of the type of contact and communication with the juvenile.

   b. Listing of documents reviewed.

   c. The guardian ad litem's concerns regarding any specific matters or problems which, in the opinion of the guardian ad litem, need special, further or other attention in order to protect or facilitate the juvenile's best interests.

   d. The guardian ad litem's assessment of and recommendations regarding the juvenile's placement in light of his or her needs and best interests.

Comment

The written report of the guardian ad litem should not be a mere restatement of the same facts and the recommendations contained in the HHS case manager's report, the CASA report, the Foster Care review Board report, or the report of any other provider. If the guardian ad litem agrees with the facts and recommendations of the reports of the case manager or other professionals, the guardian ad litem can reflect such agreement in his or her report.[12] To the extent that the guardian ad litem's independent investigation has uncovered significant material facts which do not appear in the HHS's report and which facts would support a result or recommendation by the guardian ad litem which differs from that of HHS, those facts and recommendations should be presented to the court in the guardian ad litem's report.[13]

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11 Neb. Rev. Stat. §43-272.01(2) (f) (2004)

12 In re Interest of Antone C., 12 Neb. App. 152, 699 N.W.2d 69 (2003)

13 This proposed section, while recommended by the sub-committee nevertheless conflicts with the model proposed to the Commission and Supreme Court in the Minority Report. Consequently, should the Court adopt the model proposed in the Minority Report, the wording of this standard would need to be altered to conform to the model ultimately selected by the Supreme Court.

While §43-272.01(2)(f) authorizes the guardian ad litem to complete a written checklist provided by the court, care should be taken to assure that any such checklist is adequate in terms of covering all of the areas applicable to the juvenile and allows for the guardian ad litem to set forth his or her recommendations, as well as any other concerns regarding the best interests of the juvenile.

D. Participation in Court Proceedings

1. The guardian ad litem shall attend all hearings unless expressly excused by the court.

2. The guardian ad litem may testify.[14]

3. Where the guardian ad litem is unable or unavailable to attend a hearing due to reasons such as personal illness, emergency, involvement in another court hearing, or absence from the jurisdiction, such guardian ad litem may make proper arrangements for another attorney to attend the hearing as long as no other party objects and as long as the hearing is not anticipated to be a contested evidentiary hearing. In such a situation, the guardian ad litem does not need to be excused from attendance at the hearing.

4. The guardian ad litem shall advocate for the juvenile to be present at all court hearings as appropriate, and take steps where necessary to insure such attendance on the part of the juvenile.

Comment

[D-1 and D-2] *Where the guardian ad litem is unable to attend a hearing due to reasons such as personal illness or emergency, unavailability as the result of being out-of-town, involvement in other litigation, etc., and where a contested evidentiary hearing is not anticipated, it would be better for the guardian ad litem to arrange for another attorney to cover the hearing rather than interjecting delay into the proceedings by continuing the review or other hearing, simply because the guardian ad litem is unable to be present.*

The guardian ad litem may arrange for another attorney to attend the hearing when:
1) no other party objects, and 2) the hearing is not anticipated to be a contested hearing. The guardian ad litem should contact all parties in advance of the

[14] See Appendix A for proposed changes to Rule 3.7 (Lawyer as Witness) of the Nebraska Rules of Professional Conduct to accommodate the testimony of the guardian ad litem in juvenile court proceedings.

hearing in order to secure their consent to have a coverage attorney attend the hearing. However, this might not always be possible where the guardian ad litem's inability or unavailability to attend the hearing stems from personal illness or emergency, in which case the court could simply excuse the guardian ad litem from attending in person. Where a contested evidentiary hearing is anticipated, the better practice would be for the guardian ad litem to try to obtain a continuance of the hearing rather than arrange for a coverage attorney to attend the hearing, unless the contested issues have no impact on the best interests or rights of the juvenile.

The Rule contemplates that the guardian ad litem will make "proper arrangements" for another attorney to attend the hearing. This means that the guardian ad litem must brief the coverage attorney on all information necessary in order for the coverage attorney to adequately advance the position of the guardian ad litem at the hearing, which includes providing such attorney with a copy of the guardian ad litem's written report.

Where a guardian ad litem has arranged for a coverage attorney, the court should reflect that fact in its order, as well as the specific reason why the guardian ad litem was unable or unavailable to attend the hearing.

[D-3] *The policy of having children attend court hearings is consistent with Neb. Rev. Stat. §43-263 which requires the person having custody of the child to bring the child to court unless the court orders otherwise. Personal attendance by the child not only provides an opportunity for the court to observe the child, but gives the child an opportunity to understand and directly participate in the judicial process that affects his or her life. Older children, in particular, should be encouraged to attend court hearings. Where the juvenile expresses a preference to attend the hearing or to address the court at a hearing, the guardian ad litem should make efforts to accommodate that request in a reasonable manner.*

The guardian ad litem's duty to promote the attendance of the juvenile at court hearings does not mean that the guardian ad litem is responsible for physically transporting the juvenile to court. However, the guardian ad litem may facilitate the process of attendance by communicating with the Nebraska Department of Health and Human Services or other custodians to insure that proper arrangements have been made in order for the child to attend, or by securing an order of the court, if necessary.

The guardian ad litem should also assess those situations where it could be contrary to the best interests of the child to be present in the courtroom during certain portions of the hearing where the nature of the testimony or evidence would be inappropriate for a child to hear, or where the requirement of attendance would detrimentally interfere with the child's academic schedule or activities, or constitute a burden to the health needs of the child. In making such

determination, the guardian ad litem should consider the age, maturity level, physical, emotional or medical condition and needs of the juvenile; whether the subject matter of the hearing or any testimony or evidence to be presented at the hearing would be confusing or not likely to be comprehended by the juvenile; or be likely to have an adverse impact upon the juvenile by evoking or increasing within the juvenile feelings such as anger, anxiety, distress, fear, embarrassment, shame, guilt, or trauma; the extent to which the juvenile's attendance at the hearing would result in disadvantage to the juvenile academically or in terms of his or her employment as the result of disruption of the school-day or work-day, or of the juvenile's involvement in any other training program; and whether the value of having the juvenile attend the hearing would outweigh any inability to comprehend the proceedings, or adverse emotional impact or other disadvantage likely to be experienced by the juvenile as the result of attending the hearing.

E. Duty to Provide Quality Representation

1. Any attorney appointed by the court to serve as a guardian ad litem for a juvenile, or to provide guardian ad litem services for juveniles, is expected to provide quality representation and advocacy for the juveniles whom he or she is appointed to represent, throughout the entirety of the case.

2. To that end, a guardian ad litem should not accept workloads or caseloads that by reason of their excessive size or demands, including but not limited to factors such as the number of children represented at any given time, interfere with, or lead to the breach of the professional obligations or standards required to be met by a guardian ad litem by statute or by court rules.

3. No court shall require any attorney, to accept caseloads or appointments to serve as a guardian ad litem or to provide guardian ad litem services that is likely to, in the best professional judgment of the appointed attorney, lead to the provision of representation or service that is ineffective to protect and further the interests of the juvenile, or is likely to lead to the breach of professional obligations of the guardian ad litem.

Comment

The appointment of a guardian ad litem for a juvenile is not a mere matter of form, and the guardian ad litem is expected to prepare and conduct a

competent representation and defend the juvenile's interests with as much care as though acting under a retainer.[15]

Thus individual attorneys whose practice consists largely or solely of guardian ad litem work and the Court should be vigilant regarding the number of cases to which an attorney is assigned or appointed as a guardian ad litem, as well as the number of juveniles he or she represents at any given time, keeping in mind the numerous duties that a guardian ad litem must fulfill as well as the time required to discharge those duties effectively on behalf of each juvenile represented. Where an attorney or the Court believes that any further appointments to the attorney will likely impair or lead to the ineffective representation of any juvenile on the existing or prospective caseload of any such attorney, such attorney has an affirmative obligation to decline the acceptance of such further appointments or cases. In addition, the Court has an affirmative obligation to refrain from making further appointments to that attorney until such time as the attorney and the court reasonably believe that such additional appointments or cases can be handled competently.

Because the appointment of guardians ad litem falls exclusively under the authority of judges with juvenile court jurisdiction, the judges are in the unique position to know from court administrators how many cases and children a guardian ad litem represents at any given time. The individual judges and separate juvenile courts remain free to assess what "competent representation" means and what number of cases may impinge on quality representation, thereby involving the judiciary in ensuring the best representation available for children.

Some professional groups and organizations have recommended certain limits on the number of children who should be represented by an attorney at any one time. For example, the American Bar Association, the National Association of Counsel for Children, and the U.S. Department of Health and Human Service Children's Bureau have all recommended that a full time attorney represent no more than 100 individual clients at a time, assuming a caseload that includes clients at various stages of cases, and recognizing that some clients may be part of the same sibling group. One hundred cases averages to 20 hours per case in a 2000-hour year.

VI. TERMINATION OF THE AUTHORITY OF THE GUARDIAN AD LITEM

[15] Billups v. Scott, 253 Neb. 287, 571 N.W.2d 603 (1997)

A. The authority of the guardian ad litem shall commence upon appointment by the court and shall continue in that case until such time as the court terminates its jurisdiction.

B. The guardian ad litem may voluntarily withdraw from representation in any case where the guardian ad litem files a motion to withdraw and the court, in its discretion, enters a corresponding order granting such withdrawal.

C. A guardian ad litem may be removed from a case by the court for cause, where the court finds that the guardian ad litem's performance is inadequate, or that the guardian ad litem has substantially failed to discharge duties or act to protect the best interests of the juvenile(s) for whom the guardian ad litem was appointed, or that any other factor or circumstance prevents or substantially impairs the guardian ad litem's ability to fairly and fully discharge his or her duties. In determining whether removal of the guardian ad litem is warranted in a particular case, the court shall assess the guardian ad litem's performance under the requirements and standards of practice imposed upon a guardian ad litem by both the Nebraska Juvenile Code as well as by these Rules of Practice.

Comment

Where the guardian ad litem's performance is found to be inadequate, the court can remove the guardian ad litem for cause. The Nebraska Juvenile Code and these Rules of Practice provide a "measuring stick" by which to determine whether the guardian ad litem's performance is sufficient to meet his or her duties under the appointment as well as the obligation to protect the best interests of the juvenile(s) for whom he or she has been appointed. The act of removal is based upon a finding that the deficiency in the guardian ad litem's performance is substantial and not trifling. The court is also authorized to remove the guardian ad litem for any other cause which prevents or substantially impairs the guardian ad litem's ability to fully discharge his or her duties under the appointment. For example, this could include factors such as personal illness or incapacity of the guardian ad litem, bias or prejudice on the part of the guardian ad litem resulting from personal relationship with one of the parties, or conflict of interest resulting from prior legal representations of parties or participants in the case.

VII. COMPENSATION FOR GUARDIANS AD LITEM

A. The Supreme Court shall set a statewide uniform minimum hourly rate of compensation for guardians ad litem.

B. There shall be no distinction between rates for services performed in and outside of court, and the rate shall be paid for any time the attorney spends traveling in fulfilling his/her obligations as the guardian ad litem.

C. Guardians ad litem shall be compensated for all hours reasonably necessary to provide quality legal representation as documented in fee applications submitted by the guardian ad litem.

VIII. TRAINING REQUIREMENTS FOR GUARDIANS AD LITEM

A. Commencing January 1, 2007, no person shall be appointed as a guardian ad litem without first completing six (6) hours of specialized training. Thereafter, in order to maintain eligibility to be appointed and to serve as a guardian ad litem, an attorney shall complete three (3) hours of specialized training per year.

B. The Nebraska Supreme Court shall assume responsibility for providing specialized training for guardians ad litem, at no or nominal cost, which shall take place at various intervals throughout the year and at various locations throughout the State. The Nebraska Supreme Court, through its office of Judicial Branch Education, shall be responsible for the development of the specific curriculum for the training of guardians ad litem in the State of Nebraska. The Commission recommends that the office of Judicial Branch Education shall develop the specific curriculum with consultation from qualified experts, groups, or organizations, including but not limited to the American Bar Association Center on Children and Law, the National Council of Juvenile and Family Court Judges, and the Child Welfare League of America with any potential costs of this consultation paid by the Nebraska Court Improvement Project. This office, under the authority of the Supreme Court, shall provide training that ensures statewide uniformity. The Supreme Court shall provide the initial six-hour training in each judicial district prior to the time that this Rule goes into effect. The training should be provided by a core group of presenters to ensure statewide uniformity. (see Appendix A for an illustration of the proposed training agenda). Responsibility for payment of the costs of the training itself shall be assumed by the Supreme Court through the Court Improvement Project. Travel and meal costs shall not be provided by the Court. An overview of the initial GAL training shall be provided to all judges with juvenile court jurisdiction at the 2006 annual fall meeting.

After the initial year of this Rule's implementation, the office of Judicial Branch Education shall arrange and provide training at no or nominal cost which shall take place at various intervals throughout the year and at various locations throughout the State. These trainings should include the six-hour basic training

for new guardians ad litem as well as three-hour advanced trainings for guardians ad litem who have completed the six-hour training.

The office of Judicial Branch Education shall also assume responsibility for providing notice regarding scheduled training sessions. The Nebraska Supreme Court shall maintain a list of attorneys who are current in their required guardian ad litem training and shall make such list available to all judges with juvenile court jurisdiction.

The specialized training sessions shall provide training, information and education regarding the role, duties and responsibilities of a guardian ad litem, that should include but are not limited to following areas:

1. Overview of the Juvenile Court System;

2. Statutory duties and authority of a guardian ad litem, including performance standards adopted by the Nebraska Supreme Court;
   a. Requirements of guardian ad litem report.
   b. Nuts and bolts of preparing a guardian ad litem report.

3. Issues which impact or impair the functioning of families, including but not limited to:

a. Dynamics of child abuse and neglect;
b. Substance abuse issues and domestic violence issues;
c. Physical and mental health issues;
d. Educational issues;
e. Visitation issues.

4. Training in the techniques of gathering of relevant information and resources:
   a. Interviewing skills, regarding both children and adults;
   b. How to obtain and interpret reports from other professionals and providers;
   c. Inquiry into appropriateness of juvenile's placement.

5. Psychological aspects of children, including child development issues and suggestibility of children;

6. Family preservation and permanency planning;
   a. Bonding, attachment, and effects of separation and loss;
   b. Developmental considerations in family preservation, visitation, and permanency planning, with particular emphasis on the needs and vulnerabilities of children age 0-5.

7. Cultural, ethnic diversity and gender issues;

8. Relevant state and federal statutes and case law;

9. Indian Child Welfare Act;

10. Legal advocacy, mediation, and negotiation skills.

Appendix A

PROPOSED CHANGES TO NEBRASKA RULES OF PROFESSIONAL CONDUCT

PROPOSED CHANGES ARE HIGHLIGHTED IN ITALICS

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1-7 or Rule 1.9.

(c) Where a lawyer has been appointed as a guardian ad litem for a juvenile in proceedings brought under the Nebraska Juvenile Code, the guardian ad litem may testify as a witness at any hearing in the case if any of the issues to which the testimony relates are contested.

COMMENT

[1] Combining the role of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A Witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraph (a)(1) through (a)(3), and *in paragraph (c).* Paragraph (a)(1), recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph

(a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action on which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9, and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

[6] Paragraph (c) recognizes an exception for an attorney who is appointed to serve as a guardian ad litem for juveniles in dependency or neglect-abuse proceedings brought under the Nebraska Juvenile Code. By statute, such an attorney is charged with a duty to fulfill two roles, namely, to discharge the traditional duties of a guardian ad litem (e.g., investigate the condition of his or her ward, submit written reports to the court, and to make recommendations as to the where the best interest of the juvenile lies), and to serve as legal counsel for the child (e.g.,file motions, present evidence and witnesses, cross-examine witnesses at all evidentiary hearings, initiate proceedings to terminate parental rights, and to file appeals).[16]

Because the role of a guardian ad litem appointed for a minor child in domestic relations or custody matters brought in the district court or in other tribunals is not coextensive with that of an attorney for the child, the exception of paragraph (c) applies only to lawyers who are appointed to serve as guardians ad litem in dependency or neglect-abuse proceedings brought under

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[16] *See Neb. Rev. Stat. §§43-272; 43-272.01; 43-2,106.01.(2)(b) (2004)*

the pertinent provisions of the Nebraska Juvenile Code. This is in keeping with the fact that under the Nebraska Juvenile Code, the guardian ad litem is given broader powers than the guardian ad litem for a minor child in domestic relations, custody, or other proceedings in any other court.

Unlike ordinary civil litigation, cases brought under the Nebraska Juvenile Code do not culminate in a single trial, per se, but consist of several discrete phases, each of which is characterized by an evidentiary hearing directed at the specific issues characterizing that particular phase of the case. Whether any given hearing will be uncontested or adversarial, will vary.

In almost every case, a guardian ad litem is a potential witness. However, the potential for the dual role of a guardian ad litem to give rise to a conflict of interest is likely to remain purely theoretical, unless the guardian ad litem is to testify as a witness at a hearing in the case.

Even though the testimony of the guardian ad litem may fall within the exceptions of Rule 3.7 (a)(1),(2), or (3), the guardian ad litem has a continuing duty to exercise vigilance and to take all necessary steps to insure that the act of testifying does not give rise to a conflict of interest. This duty may include requesting the court to exercise its discretion under §43-272(3) to appoint separate legal counsel for the guardian ad litem, for the juvenile, or for both, as may be appropriate under the circumstances. For further discussion, see the section below entitled, "Conflict of Interest".

Conflict of Interest

[7] In determining if it is permissible to act as advocate in trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1:7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b)

for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 and Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

[8] Where an attorney is appointed to serve as a guardian ad litem for a juvenile in the context of dependency or neglect-abuse cases brought under the Nebraska Juvenile Code, the attorney should exercise vigilance regarding those situations where the anticipated testimony of the guardian ad litem may give rise to a conflict of interest by reason of the dual role of the guardian ad litem. Where the guardian ad litem reasonably believes that under the specific facts or circumstances of the case, the guardian ad litem's testimony would be adverse to the legal rights of any juvenile for whom the guardian ad litem has been appointed in a particular case, the guardian ad litem should apply to the court for the appointment of separate legal counsel to represent the juvenile, the guardian ad litem, or both under the court's authority to make such appointment. In assessing situations in which the guardian ad litem's testimony may give rise to a conflict of interest, the guidelines of Rule 1.7, Comment #36 should be followed.

Thus, where it is anticipated that the guardian ad litem will testify in his or her capacity as guardian ad litem, and the testimony does not relate to an uncontested issue, or to services or fees, and the guardian ad litem also intends to exercise attorney functions at the same hearing, the guardian ad litem can avoid the apparent ethical implications arising from acting as legal counsel and witness at the same proceeding by requesting the court to appoint separate legal counsel to represent the guardian ad litem, the juvenile, or both, as may be indicated by the situation.[17]

[17] *Neb. Rev. Stat. §43-272(3) (2004); In re Interest of J.K., 265 Neb. 253, 656 N.W.2d 253 (2003)*

RULE 1.7 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.

(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.

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing', see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or

more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent; Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e.,

that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients, whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in

serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close fami1y relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

(13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation - is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation, or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m», such representation may be precluded by paragraph (b)(l).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the

advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances, it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters arid one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases, the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing,

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22J Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test

of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to' the subject of the representation. In any, case, advance consent cannot be effective if the circumstances that 'materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf

of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(l) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a 1awyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(l) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include tile duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship

between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with tile possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Gel1tr31CY, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privileges 1does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset

of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(b)

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal

advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might be protected by the attorney-client privilege and that conflict of interest considerations might require the 1awyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter

Guardian ad Litem in Juvenile Court Proceedings

[36] A lawyer who is appointed to serve as a guardian ad litem for a juvenile in dependency or neglect-abuse proceedings brought under the Nebraska Juvenile Code, is statutorily authorized to discharge a dual role, functioning as both the guardian ad litem for the juvenile and as legal counsel for the juvenile. It is possible that in certain cases or in certain situations a conflict of interest could arise in connection with the dual role of the guardian ad litem. Where such a conflict of interest arises, or is reasonably anticipated to arise, the lawyer is not necessarily required to withdraw from the case, but should apply to the court for a determination as to whether special reasons exist to authorize the court to appoint separate legal counsel for the juvenile, for the guardian ad litem, or for both, as may be needed.[18]

[37] The guardian ad litem should exercise vigilance regarding specific situations where the dual role may give rise to a conflict of interest. These situations include, but are not limited to the following:

a) Where a juvenile of sufficient age and maturity has expressed or communicated to the guardian ad litem a preference which is relevant to his or her health, safety or welfare, which preference materially differs from, or is adverse to the position taken by the guardian ad litem regarding the juvenile's best interests;

b) Where the guardian ad litem has been appointed to represent more than one juvenile within the same or interrelated cases, and there is a material or significant difference in the needs, or desires or best interest or legal rights of any juvenile such that in order to effectively advocate for any one juvenile, the guardian ad litem would have to advocate a position which

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[18] *See Neb. Rev. Stat. §43-272(3) (2004); In re Interest of J.K., 265 Neb. 253, 656 N.W.2d 253 (2003)*

conflicts with the best interest or legal rights of any other juvenile represented by the same guardian ad litem;

c) Where a juvenile of sufficient age and maturity signifies to the guardian ad litem, or to the court, that the juvenile desires to disclose specific information to the guardian ad litem for purposes of the juvenile's legal representation by the guardian ad litem, but the juvenile intends such disclosure to be protected by the attorney-client privilege.

[38] The dual role of the guardian ad litem is authorized by statute only in those proceedings brought under the Nebraska Juvenile Code, and does not apply to a guardian ad litem appointed for minor children or divorce, probate or in any other proceeding or court.