

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
NO. 13-01**

WHETHER OR NOT A NEBRASKA ATTORNEY MAY WITHHOLD A PORTION OF WORKERS COMPENSATION PROCEEDS IN ORDER TO HONOR A “LIEN” ON BEHALF OF A THIRD-PARTY WHO HAS ADVANCED FUNDS TO THE CLIENT IS DEPENDENT ON AN INTERPRETATION OF NEB. REV. STAT. §48-149. HOWEVER, IF THE WITHHOLDING OF PROCEEDS DOES VIOLATE §48-149, A LAWYER MAY NOT ETHICALLY HONOR THE “LIEN.”

STATEMENT OF FACTS

A Nebraska attorney who represents an injured worker in a pending workers compensation proceeding has requested an opinion regarding whether honoring a potential agreement between the client and a third-party “lawsuit funding company” would violate the Nebraska Rules of Professional Conduct. Specifically, the attorney has indicated that the client was severely injured during the course of his employment and has been unable to return to work. As a result, the client has suffered significant financial hardship and has sought the assistance of a third-party “lawsuit funding company” who would provide advance funding to the client in anticipation of receiving a portion of the client’s forthcoming workers compensation benefits.

A representative of the potential lender approached the attorney and inquired whether the attorney would agree to withhold from the client a portion of potential proceeds payable to the client if the client and lender were able to reach an agreement as to the amount. The attorney expressed concern that such an agreement would violate the general prohibition on the assignment, attachment, or garnishment of workers compensation benefits

found in Neb. Rev. Stat. §48-149 and sought assistance from the advisory committee as to whether agreeing to withhold the funds would constitute an ethical violation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

The following rules of professional conduct are instructive with respect to the question presented:

Preamble to Nebraska Rules of Professional Conduct, Paragraph 5:

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Preamble to Nebraska Rules of Professional Conduct, Paragraph 6:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that

knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Preamble to Nebraska Rules of Professional Conduct, Paragraph 9:

The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the

lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

§3-501.2: Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (b), (c), (d), (e), and (f), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Comment 1: Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

DISCUSSION

At the outset of this discussion, it must first be noted that the nature of this request primarily turns on an interpretation of Neb. Rev. Stat. §48-149—specifically, whether the statute prohibits an attorney from withholding workers compensation benefits from the client as part of a contract between the client and a third-party lender. The committee is of the opinion that this question essentially calls for a legal interpretation which is outside of the scope of the committee's stated function. While the inability to provide guidance as to the applicability of the statute may not result in a thoroughly satisfactory opinion to the requesting attorney, this opinion will nevertheless attempt to provide guidance to the requesting attorney by assuming *arguendo* that §48-149 does prohibit an attorney from withholding workers compensation proceeds from the client under the circumstances provided and discussing what the attorney's ethical responsibilities would therefore entail.

The committee is of the opinion that, if §48-149 does prohibit an attorney from withholding workers compensation proceeds from a client in order to ensure payment to a third-party lender, then the lawyer must refrain from doing so even if the client desires the lawyer to do so and even if the lawyer believes the arrangement to be in the client's best interests. That is, a fundamental underpinning of the Nebraska Rules of Professional Conduct is that a lawyer must at all times conduct himself, and his representation of the client, within the confines of the law. For example, Paragraph five (5) of the

Preamble to the Nebraska Rules of Professional Conduct states that, “[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.” Similarly, in Paragraph nine (9), the Preamble discusses the fundamental ethical principle that a lawyer’s representation must, “zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law . . .” (Emphasis added). Finally, Rule 3-501.2, and its associated Comment 1, specifies that a lawyer’s duty to the client is restrained by “the limits imposed by law and the lawyer's professional obligations.”

In light of the foregoing, the requesting attorney in this instance must at all times conduct himself within the confines of the law even if the client requests him to do otherwise and even if the lawyer reasonably believes that client would benefit from the potential contractual arrangement. To the extent that Neb. Rev. Stat. §48-149 prohibits an attorney from withholding workers compensation benefits from her client, then the attorney must not do so irrespective of any agreement that may have been contemplated between the client and a third-party lender. Again, however, this opinion is not to be construed as an interpretation of §48-149 and its effect on the particular factual scenario at issue.

CONCLUSION

Much of this request turns on the question of whether Neb. Rev. Stat. §48-149 prohibits an attorney from withholding workers compensation

proceeds from the client as part of a contractual obligation entered into between the client and a third-party “lawsuit funding company.” While the Committee cannot take a position on the applicability of the statute to the circumstances at hand, it is clear that the lawyer must at all times conduct his representation within the confines of the law. Accordingly, if §48-149 prohibits the lawyer from withholding workers compensation benefits from the client under the particular scenario at hand, then the lawyer must not do so even if the client desires the lawyer to do so and even if the lawyer believes that the proposed contractual agreement would be in the best interests of the client.