NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 15-04

Questions Presented

A) May an Attorney enter directly into a contract for fees as a Guardian ad Litem with a County Board, bypassing the administrative Court Orders for Court Ordered payment, when that County Attorney's office files the original petition and represents a separate party in the case? The County Attorney's office represents the County in the contract negotiations with Attorneys who will appear as Guardians ad Litem as well.

B) If yes to question 1, What, if any, information and in what detail can a Court appointed Guardian ad Litem provide to the County and general public in such a flat fee contractual arrangement about specific cases? If the answer is none for a specific case, may information be provided in aggregate form so as to no allow the identification of a specific child or a specific case except that which is already public record?

Summary of Opinion

1) An Attorney may enter directly into a contract for fees as a Guardian ad Litem with a County Board, bypassing the administrative Court Orders for Court Ordered payment, when that County Attorney's office files the original petition and represents a separate party in the case unless there is a "significant risk" that the attorney's representation would be materially limited by the attorney's personal interest in maintaining the contractual arrangement and therefore in violation of §3-501.7(a)(2). Whether a particular attorney's representation would violate §3-501.7(a)(2) will vary on a case-by-case basis and will be dependent on the particular financial impact of the contractual agreement on the particular attorney.

2) In the event that the attorney does have a conflict of interest, that conflict may not be waived because, under Neb. Rev. Stat. §43-272 (2), an attorney appointed to perform guardian ad litem services is appointed both to represent the juvenile and the juvenile's "interests" and the juvenile's "interests" is not capable of providing informed consent necessary to waive the conflict of interest.

3) Assuming that §3-501.7(a)(2) does not bar representation, an attorney appointed to perform guardian ad litem services must nevertheless obtain informed consent from the client to perform the representation because the attorney is to be compensated by someone other than the client. See, §3-501.8(f)(1). This is true regardless of whether the third-party payor is the court, another governmental entity, or anyone other than the client. In the event that the client is incapable of providing informed consent contemplated under §3-501.8(f)(1), the representation is impliedly authorized and §3-501.8(f)(1) would not serve as a bar to the representation.

4) An attorney appointed to perform guardian ad litem services may submit itemized billing statements but must limit the detail provided in the itemization so as to prevent the disclosure of any confidential or other information what would negatively impact the client. While the level of detail permissible will inevitably differ on a case-by-case basis, the importance depends on the particular client and the nature of the representation and not on the person or entity receiving the information.

STATEMENT OF FACTS

Abuse and neglect cases brought in the interest of a child under Neb. Rev. Rev. §43-247 (3) (a) are typically filed by the State of Nebraska through the County Attorney with applicable jurisdiction. When such a petition is filed, the child, or children as the case may be, is guaranteed legal representation. Specifically, Neb. Rev. Stat. §43-272 (2) (e) states that "the court, on its own motion or upon application of a party to the proceedings, shall appoint a guardian ad litem for the juvenile . . . in any proceeding pursuant to the provisions of subdivision (3) (a) of section 43-247." In other words, the appointment of a Guardian Ad Litem is automatic in any juvenile abuse or neglect proceeding.

Guidelines for Guardians ad Litem have been adopted by the Nebraska Supreme Court (insert footnote with the link) https://supremecourt.nebraska.gov/miscellaneous-rules/5177/guidelines-guardians-ad-litem-juveniles-juvenile-court-proceedings. Under Neb. Rev. Stat. §43-272 (3), a Guardian Ad Litem appointed in abuse and neglect proceedings must be an attorney and serves both as counsel for herself in support of the juvenile's interests and counsel for the juvenile personally unless a need arises for separate counsel to represent the juvenile personally.

As previously noted, §43-272 (2) (e) requires the court to appoint an attorney as Guardian Ad Litem for child who is subject to abuse and neglect proceedings under Neb. Rev. Stat. §43-247 (3) (a). An Attorney appointed to represent a child pursuant to a 43-247(3)(a) petition generally seeks payment pursuant to the local court rules governing the payment of court-appointed attorneys. Generally, the local rules require that the attorney submit a motion with an itemized bill for service and time spent. The Court then reviews the motion and itemization and orders the applicable county to pay the attorney in accordance with that county's predetermined hourly rate for court appointed legal services. The court could set the motion for hearing and order the attorney to provide evidence in support of the bill. The county, through its attorney, could then contest payment if it so desired.

In Douglas County, Nebraska, the Douglas County Board of Commissioners has contracted with at least four different entities or groups of attorneys to provide Guardian Ad Litem services on a flat fee basis as opposed to the hourly rate typically provided in court appointed cases. The County Board of Commissioners cannot require judges to appoint those particular attorneys to serve as Guardian Ad Litem in any particular case, but the contracted attorneys do receive appointments on a consistent basis and bill the county in accordance with their contracted flat fee agreement as opposed to submitting claims for reimbursement on an hourly rate. In negotiations regarding the contracts between the Douglas County Board of Commissioners and the attorneys performing Guardian Ad Litem services, a deputy Douglas County Attorney reviews the

contracts and advises the Douglas County Board of Commissioners on all matters related to the contracts, including whether to enter such contracts on behalf of Douglas County.

The Douglas County Attorney represents the State in each 43-247(3) (a) case filed in Douglas County unless the circumstances warrant the appointment of a special prosecutor. Therefore, the Guardian ad Litem and the Douglas County Attorney represent separate parties in each abuse and neglect case, which may or may not be harmonious to one another. It should be noted that in some circumstances, the child represented in a 43-247(3) (a) case may also have a filing against him or her directly, not in a protective status, by the County Attorney for a delinquency or status offense. In those circumstances, the Guardian ad Litem oftentimes serves the same role in the delinquency or status case as well as the proceeding regarding abuse and neglect.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

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

> **§ 3-501.7. 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.

(emphases added).

Comment 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).

Comment 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.

(emphasis added).

§ 3-501.8. Conflict of interest; current clients; specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

. . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Comment 3. The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

Comment 11. Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Comment 12. Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

§3-501.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer’s compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Comment 1. This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior

representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Comment 2. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Comment 4. Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

DISCUSSION

A) May an Attorney enter directly into a contract for fees with a County Board, bypassing the administrative Court Orders for Court Ordered payment, when that County's County Attorney files the original petition and represents a separate party in the case? The County Attorney's office represents the County in the contract negotiations as well.

There are two fundamental considerations at issue with respect to the question presented. First, is it a conflict of interest for an attorney who has entered into a contractual arrangement with the County Board to serve as Guardian Ad Litem in abuse and neglect cases under either Neb. R. Prof. C. §3-501.7 or §3-501.8. Second, if such a conflict does exist, may the attorney nevertheless continue with the representation provided that the client—whomever that may be—provides informed, written consent.

Because the County Attorney's Office negotiates the relevant contracts with potential attorneys, the underlying question is whether there is a "significant risk" that lawyers who have entered into a flat fee contractual arrangement to perform Guardian Ad Litem services will be materially limited in their ability to appropriately represent their client(s) based on the lawyer's personal interest in fulfilling the contract in a manner that is satisfactory to the County Attorney's Office? Specifically, because the Douglas County Attorney's office is a party to virtually all abuse and neglect proceedings filed in Douglas County, and also advises the County Board as to the specific persons and/or entities with whom to award Guardian Ad Litem contracts and on what terms, the concern exists that a lawyer performing Guardian Ad Litem services under such a contract would—either consciously or subconsciously—seek to appease the County Attorney in a way that may conflict with the interests of the client(s) in order to

ensure the renewal of the contractual arrangement thus constituting a conflict of interest under §3-501.7 (a) (2). Second, in the event that there is a "significant risk" that the lawyer's representation would be materially limited by his personal interest in maintaining a contractual relationship with the Douglas County Board, the question then becomes whether the lawyer can represent the client irrespective of the conflict so long as the client provides informed consent to the representation irrespective of the conflict.

A) Application of 3-501.7

As a preliminary matter, it is important to note that the Committee has not been provided with information regarding the financial impact of the Guardian Ad Litem contracts on the particular attorneys who have entered into them. This is potentially relevant information in that the financial impact of the contract on the particular attorney and, in turn, the financial significance of the contract on the attorney, is important in determining whether or not a "significant risk" exists that the lawyer's representation of the client would be limited by the lawyer's own personal interest in insuring that the contractual relationship remains in place. *See Neb. R. 3-501.7 (a) (2).*

In Opinion 13-05, this Committee encountered a somewhat similar issue. In that case, the attorney requesting guidance was a civilian attorney for the United States Army. One of the duties of the attorney was to defend the Army in appeals filed by civilian employees from "adverse actions" against their employment. One particular "adverse action" was a uniform furlough of 11 days that was implemented as a cost-saving measure and impacted all civilian employees, including the attorney at issue. Like in the present matter, the Committee was not presented with evidence regarding the particular financial impact on the attorney as a result of the furlough. Nevertheless, the Committee surmised that the 11-day furlough likely represented an impact of thousands of dollars to the attorney personally and, accordingly, it was substantially likely that the attorney's personal financial interest in the outcome of the furlough-related litigation would materially limit the attorney's ability to represent the client, the United States Army, and thus constituted a conflict of interest under §3-501.7 (a) (2). Because the Army had provided written, informed consent to the potential conflict, however, the Committee determined that the attorney could nevertheless represent the Army in furlough-related proceedings provided that the attorney reasonably believed that he or she would be able to provide competent and diligent representation irrespective of the conflict. *See* §3-501.7 (b) (1).

In the present matter, the Committee is once again faced with a scenario in which it lacks facts which may be critical to determining whether a conflict of interest exists under §3-501.7 (a) (2). For instance, if an applicable contract to perform Guardian Ad Litem services represents an extremely small portion of an attorney's income, then it is perhaps reasonable to assume that there is not a "significant risk" that the attorney's representation would be materially limited by the lawyer's personal interest in the contractual arrangement. Conversely, however, if the contract represents the vast majority of an attorney's income, a "significant risk" would exist that the attorney's representation would be materially limited by the lawyer's personal incentive in insuring that the contract would be renewed and, in turn, the attorney may either consciously or subconsciously tailor his representation in a manner that would facilitate a continuing relationship with the County Attorney who negotiates contracts on behalf of the County Board. It is relatively common for the State and Guardian Ad Litem to favor opposing positions in juvenile neglect proceedings. For instance, while the State may believe the right course may be

to seek the termination of parental rights, the Guardian Ad Litem, charged with performing her own investigation and who likely forges a relationship not only with the juvenile but also with the parent(s), may favor continued efforts at reunification and oppose the State's motion to terminate parental rights.

Ultimately, whether or not a "significant risk" exists that a lawyer under contract to perform Guardian Ad Litem services would be materially limited in his ability to represent his client because of the lawyer's personal incentive to maintain a contractual arrangement with the county is a question of degree that is dependent on the impact of the contract on the particular attorney and will need to be evaluated by each attorney on a case-by-case basis.

Assuming *arguendo* that the lawyer's representation would run afoul of §3-501.7 (a) (2), the next question to consider is whether the conflict of interest under this scenario may be waived should the client provide informed consent to the representation. Specifically, even if a conflict of interest exists under §3-501.7 (a) (2), an attorney may nevertheless continue with the representation provided that the attorney reasonably believes she will be able to provide competent and diligent representation irrespective of the conflict; the representation is not prohibited by law; the representation does not involve the direct assertion of a claim by one client against another; and the client provides written, informed consent to the representation. §3-501.7 (b) (1-4) (emphasis added). In the scenario at issue, the Committee believes that, should a conflict of interest exist under either §3-501.7 or §3-501.8, the attorney would not be able to obtain the written, informed consent necessary to perform the representation even if the other criteria set forth in §3-501.7 (b) are met. Specifically, the very purpose of the appointment of a Guardian Ad Litem is to provide legal representation and advocacy for juveniles who have been subject to alleged abuse and neglect and who are incapable of appropriately managing their affairs if for no other reason than their youthful age. While conceivable that a minor may nevertheless be able to provide written, informed consent to representation irrespective of a lawyer's conflict of interest, this Committee has previously characterized this as an "unlikely event" and noted that most minors are not in a position to supply the necessary informed consent. *See* 08-01, 15-02.

Even if a minor child was of sufficient capacity to provide written, informed consent to a lawyer's conflict of interest, however, the Committee believes that a conflicted attorney appointed to serve as Guardian Ad Litem pursuant to Neb. Rev. Stat. §43-272 (2) would nevertheless be prohibited from continuing with the representation because an attorney in such a scenario is appointed to represent not only the child per se but also the child's "*interests*." That is, §43-272 (2) states that the court shall appoint a Guardian Ad Litem in all abuse and neglect cases brought pursuant to Neb. Rev. Stat. §43-247 (3) (a). Section 43-272 (2) then states that, "[a] guardian ad litem shall have the duty to protect the interests of the juvenile . . ." While §43-272 (3) goes on to state that the attorney appointed to serve as Guardian Ad Litem shall also serve as counsel for the juvenile, it is clear that an attorney appointed to perform as Guardian Ad Litem is appointed not only to represent the juvenile but is also appointed to represent "the interests" of the juvenile. Thus, in order for attorney subject to a personal conflict of interest under §3-501.7 (a) (2) to serve as Guardian Ad Litem, the attorney would need to obtain written, informed consent from not only the juvenile but also "the interests" of the juvenile because both the juvenile and the juvenile's "interests" are clients and the juvenile's "interests" may not necessarily align with the interests of the juvenile personally.

As this Committee recently recognized in Opinion 15-02, there are circumstances in which it is simply impossible for an attorney to obtain written, informed consent to represent a

client irrespective of an identified conflict of interest. In the present matter, the Committee believes that while it is conceivable that a juvenile may in rare circumstances be capable of providing written, informed consent to an attorney's representation notwithstanding the attorney's personal conflict of interest under §3-501.7 (a) (2), the juvenile's "interests" would not be able to provide the same. Because an attorney appointed to serve as Guardian Ad Litem is appointed to represent both the juvenile and the juvenile's "interests," in the event that an attorney appointed to serve as Guardian Ad Litem encounters a conflict of interest under §3-501.7 (a) (2), the attorney may not perform the representation and must withdraw.

A) Application of 3-501.8

Rule 3-501.8 and, in particular, §3-501.8 (f) governs a lawyer's ethical responsibilities when someone other than the client pays for the lawyer's services. Notably, §3-501.8 (f) quite clearly prohibits a lawyer from accepting compensation from anyone other than the client absent informed consent from the client. The problem presented in light of the clear language of §3-501.8 (f) concerns primarily those situations in which a client is provided with an attorney at public expense in order to ensure the rights of the client are protected. For instance, in order to ensure a criminal defendant's Sixth Amendment rights are protected, attorneys are regularly appointed to represent persons accused of committing crimes that could result in incarceration.

Despite the fact that attorneys are routinely appointed specifically for the purpose of protecting the rights of those to whom they are appointed to represent, an appointed attorney is nevertheless bound to adhere to ethical rules governing the practice of law. With respect to §3-501.8 (f), the obvious question is whether an attorney appointed to represent a client—be it a criminal defendant, a parent in juvenile court proceedings, or the child at issue in juvenile proceedings—must obtain informed consent from the client as required under §3-501.8 (f) (1) given that the attorney is compensated by someone other than the client herself to provide the representation. The most applicable ethical advisory opinion appears to be Montana Ethics Opinion 040809 where that state's advisory committee determined that an attorney appointed by the court to represent a criminal defendant must nevertheless obtain informed consent from the client to the representation, stating:

> [i]n the case of indigent defendants relying upon court appointed public defenders, the burden is insubstantial. Indigent defendants must typically complete an indigency questionnaire and specifically request representation . . . The Committee believes a heightened understanding by defendants of the scope, terms and fees involved for the representation benefits the system overall. This is particularly the case with the indigent defendant, who often has the peculiar notion that a court appointed attorney will be somehow less likely to give their all for the client because the client isn't paying the bill. Understanding from the first office meeting that the court appointed attorney's first loyalty is to the defendant should help assuage these concerns and heighten the stability of the relationship, at least as to this point. We believe that . . . informed consent or participation may tend to re-assure the client that the lawyer who may have been selected by . . . the court has the duty of absolute loyalty to the client.

Montana Ethics Opinion 040809.

In the present matter, while the need to ensure appropriate representation for those facing serious legal predicaments is important, the language of §3-501.8 (f) (1) is clear and unambiguous and requires that an attorney compensated by someone other than the client obtain informed consent from the client and there is nothing to indicate that this obligation does not apply to those situations where the attorney is court appointed to represent the client. Moreover, while the question presented to the committee assumes the presence of a distinction between those attorneys whose fees are ordered to be paid by the court and those whose fees are paid by a third-party entity (i.e. County Board) in accordance with a flat-fee contractual arrangement, the committee does not believe that such a distinction is relevant for the purpose of §3-501.8 (f) (1). Thus, in general, if an attorney receives compensation for the representation from anyone other than the client, the attorney must obtain informed consent from the client and this is true even if the third-party is a court or other governmental entity.

The problem with the rule set forth above is when a lawyer is appointed to represent someone who, by definition, is incapable of providing informed consent. For instance, an attorney appointed as guardian ad litem of an infant child is critically important to ensure the child's best interests are represented and taken into account. That being said, the attorney would presumably be compensated for the representation by a third-party government entity and neither the child, nor the child's best interests, would be able to provide informed consent to the attorney's representation thus seemingly conflicting with the plain language of §3-501.8 (f) (1). The Committee believes that the Rules of Professional Conduct should be interpreted in a manner so as to avoid incoherent or absurd results. Accordingly, the Committee is of the opinion that §3-501.8 (f) (1) does not require informed consent from the client in circumstances where the lawyer is court-appointed to represent someone incapable of providing informed consent, as such consent is impliedly authorized. To hold otherwise would produce the absurd result of essentially precluding any lawyer from providing court-appointed representation to those incapable of providing actual informed consent thus undermining the very purpose that court-appointed attorneys, such as guardians ad litem, are intended to serve. Of course, a lawyer in such a circumstance must also be satisfied that the representation is not otherwise prohibited by either §3-501.8 (f) (2) or (3).

In sum, §3-501.8 (f) (1) does prohibit a lawyer from providing court appointed services of any nature absent informed consent from the client because the attorney is, by definition, to be compensated by someone other than client herself and this is true even if the third-party payor is a court or another governmental entity. However, to the extent that a lawyer is court-appointed to represent someone incapable of providing informed consent, such consent is impliedly authorized and the attorney is not prohibited by §3-501.8 (f) (1) from providing the representation so long as neither §3-501.8 (f) (2) or (3) otherwise prohibit the attorney from doing so.

B) If yes to question A, what, if any, information and in what detail can a Court appointed Guardian ad Litem provide to the County and general public in such a flat fee contractual arrangement about specific cases? If the answer is none for a specific case, may information be provided in aggregate form so as to no allow the identification of a specific child or a specific case except that which is already public record?

The fundamental purpose of §3-501.6 is to ensure the confidentiality of information related to an attorney's representation of a client. To that end, absent the special circumstances set forth in the rule, it prohibits the disclosure of information "relating to the representation" and that is true regardless of the particular form of the disclosure. Thus, to the extent that a billing statement would disclose "information relating to the representation," an attorney would be prohibited from disclosing the billing statement even if the purpose was to justify the attorney's fee after being court-appointed to perform the representation.

Given that an attorney may not disclose "information relating to the representation" in billing statements provided to third-parties, the obvious point of inquiry then becomes what is meant by the phrase "information relating to the representation" under §3-501.6. Comment 2 provides guidance in noting that the purpose of §3-501.6 is to encourage the client, "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." In other words, the purpose of §3-501.6 is to protect the client's confidential information—be it in the form of disclosures to the attorney, information obtained by the attorney during the course of the representation, or anything else which, if disclosed, could jeopardize an effective attorney-client relationship.

The Committee is of the belief that it is not well-suited to provide a blanket response in terms of what level of detail in billing statements would run afoul of §3-501.6 as this will likely vary on a case-by-case basis. Rather, the Committee believes that whether the disclosure of particular information would constitute "information relating to the representation" for the purpose of §3-501.6 turns on whether the information, if disclosed, would either chill the client's propensity to disclose truthful information in the future or would otherwise negatively impact the client in any way. The level of detail permissible on a billing itemization to the third-party compensating the attorney may very well differ on a case-by-case basis and, in certain instances, may require very general references to the type of work performed by the attorney in order to protect the client.

Finally, as previously noted in the discussion regarding §3-501.8 (f) with respect to the issue of financial compensation to the attorney, the Committee does not believe a relevant distinction exists between those instances in which a the attorney is subject to a contractual arrangement with the County Board or is appointed by the court and submits his bill directly to the court for reimbursement. In other words, neither §3-501.8 nor 3-501.6 provide special rules for circumstances in which the third-party financier of an attorney's representation comes by virtue of an appointment by a court. Thus, the Committee believes that the level of detail allowed—or not allowed—in an itemized billing statement under §3-501.6 would be dependent on the particular circumstances of the case but would be the same regardless of the particularly entity to which the attorney submits the bill.

CONCLUSION

Because the Douglas County Attorney's Office both represents the County Board and files the vast majority of juvenile cases regarding alleged abuse and neglect, an attorney's agreement to enter into a contractual arrangement with the Douglas County Board to perform guardian ad litem services in juvenile proceedings on a flat fee basis may violate §3-501.7 (a) (2)

if the amount of compensation at issue is sufficient that it would produce a "significant risk" that the attorney's representation would be materially limited by the attorney's personal interest in maintaining the contractual arrangement. Whether a particular attorney's representation would run afoul of §3-501.7 (a) (2) will vary on a case-by-case basis and is dependent on the particular financial impact of the contractual agreement on the attorney. However, in the event that the attorney does incur a conflict of interest, that conflict may not be waived because, under Neb. Rev. Stat. §43-272 (2), an attorney appointed to perform guardian ad litem services is appointed both to represent the juvenile and the juvenile's "interests" and the juvenile's "interests" is not capable of providing the informed consent necessary to waive the conflict of interest.

Assuming that §3-501.7 (a) (2) does not pose a barrier to the representation, an attorney appointed to perform guardian ad litem services must nevertheless obtain informed consent from the client to perform the representation because the attorney is to be compensated by someone other than the client. *See* §3-501.8 (f) (1). This is true regardless of whether the third-party payor is the court, another governmental entity, or anyone other than the client. However, in the event that the client to which the attorney is appointed to serve as guardian ad litem is incapable of providing the informed consent contemplated under §3-501.8 (f) (1), the representation is impliedly authorized and §3-501.8 (f) (1) would not serve as a barrier to the representation.

Finally, an attorney appointed to perform guardian ad litem services may submit itemized billing statements but must limit the detail provided in the itemization so as to prevent the disclosure of any confidential or other information that would negatively impact the client. While the level of detail permissible will inevitably differ on a case-by-case basis, the importance depends on the particular client and the nature of the representation and not on the person or entity receiving the itemization.