

# NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

## No. 20-01

It is ethical for a licensed attorney to appear as amicus curiae at the trial court level in a civil matter provided the attorney do so must adhere to the Nebraska Rules of Professional Conduct.

### STATEMENT OF FACTS

In response to the COVID-19 pandemic, the Volunteer Lawyers Project (VLP) in partnership with Legal Aid of Nebraska and the University of Nebraska College of Law Civil Legal Clinic, began a program called the Tenant Assistance Project (TAP) whereby volunteer lawyers provide limited-scope representation to tenants facing eviction in Lancaster County. Volunteer attorneys cover shifts at the courthouse on mornings when eviction hearings are held and offer pro bono representation to tenants who appear and request assistance.

Since inception of the program in March, there have been five to six instances when these volunteer attorneys have sought leave to appear as amicus curiae (friend of the court) when the volunteer attorney, in his or her professional opinion, feels it is appropriate in the interest of justice. These volunteer attorneys present factual or legal positions aligned with tenants who are parties to eviction proceedings brought by landlords.

Examples of instances where leave was sought to appear as friend of the court to bring to the court's attention material facts or law that the voluntary attorney reasonably believed would aid the court in issuing a ruling that would comport with Nebraska Law include:

1. When the attorney was aware, from a review of the record, the tenant had not received service of the summons;
2. When the attorney was aware, from a review of the record, service had not been perfected;
3. When the attorney was aware of facts indicating the party seeking restitution of premises had no real interest in the matter and no legal right to possess the premises, and that the premises were actually owned by a third party not named in the suit;
4. When the attorney was aware a dismissal of an eviction action had been reversed by the court, and neither the court, nor the attorney for the landlord provided the tenant notice of such action taken by the court;

5. When the attorney was aware an eviction trial had been scheduled without providing proper notice to the defendant, and the court intended to proceed with the trial despite lack of notice to the tenant and despite the tenant having no opportunity to appear and defend the action; and
6. When the attorney was aware of facts indicating that the tenant had symptoms of COVID-19 and was not permitted to enter the courthouse to appear at the hearing, and the court indicated a willingness to proceed with the restitution hearing at the request of the landlord.

In response to the appearance of volunteer TAP attorneys as amicus curiae in eviction proceedings, the Nebraska State Bar Association seeks guidance regarding the circumstances in which a lawyer can advocate positions favorable to a tenant without formally representing him or her.

## **QUESTION PRESENTED**

### **I.**

Whether the Rules of Professional Conduct prohibit a licensed attorney from seeking leave to appear as amicus curiae (friend of the court) in a civil matter before a trial court.

## **APPLICABLE CASE LAW, RULES, AND COMMENTS**

Preamble: A lawyer's responsibilities.

- [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
- [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.

- [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.
- [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
- [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
- [10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
- [11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse

of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

- [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
- [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct when properly applied, serve to define that relationship.
- [17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

§ 3-501.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

§ 3-501.7. Conflict of Interest; current clients.

(a) Except as provided in paragraphs (b) and (c), 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.

§ 3-503.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

§ 3-503.4. Fairness to opposing party and counsel.

A lawyer shall not:

- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

§ 3-503.5. Impartiality and decorum of the tribunal.

(a) A lawyer shall not:

- (1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (4) engage in conduct intended to disrupt a tribunal.

§ 3-504.4. Respect for rights of third persons.

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

COMMENT

- [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. . .

§ 3-506.1. Voluntary pro bono service.

A lawyer should aspire to render pro bono legal services. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the legal services without fee or expectation of fee to:
  - (1) persons of limited means or

- (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

§ 3-506.5. Nonprofit and court-annexed limited legal services programs.

- (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
- (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

## COMMENT

- [1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.
- [2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.
- [3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.
- [4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.



[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Amicus curiae has been defined as “a non-party with an interest or expertise in a case who informs the court on a matter of law or fact. An amicus curiae is a friend of the court, one who is not a party to a case but volunteers to inform the judge on a matter of law or of fact”. *Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012)*. Leave for an attorney to appear as amicus curiae is not a matter of right in Nebraska, but is a matter left to the discretion of the court. The mention of amicus curiae or “friend of the court” is absent from the Nebraska Rules of Civil Procedure, but appears within the Nebraska Supreme Court Rules:

- i. Neb. Ct. R. App. P. § 2-109(A)(4) and 2-209(A)(4) provide that “[b]riefs of amicus curiae may not be filed without leave of the court”.
- ii. Neb. Ct. R. App. P. § 2-111 provides that “[a]n amicus curiae may, with the consent of a party, request leave to present oral argument on the side of that party within the time allowed to that party for argument”.
- iii. Neb. Ct. R. § 3-1017 provides that “[a] brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or by the request of the Supreme Court”.

Although amicus curiae participation is most often observed in the form of an amicus brief at the appellate level, the Nebraska Supreme Court has acknowledged the right of counsel to appear as friend of the court, subject to the reasonable discretion of the trial judge. *Anglin v. City of Omaha*, 140 Neb. 147, 151, 299 N.W. 353, 355 (1941); *see also, Stewart v. Herten*, 125 Neb. 210, 212, 249 N.W. 552, 553 (1933) (“it would seem obvious that ‘One may as amicus curiae, suggest the action of the court in any matter in which the court may proceed of its own motion’”) quoting 2 C. J. 1323; 3 B C.J.S. Amicus Curiae § 12 (“generally, the extent of amicus participation is a matter within the sound discretion of the trial court”).

The appearance of amicus curiae at the trial level in the Nebraska federal court is more prevalent. “The extent, if any, to which an amicus curiae should be permitted to participate in a pending action is solely within the broad discretion of the district court”. *COR Clearing, LLC v. Calissio Res. Grp. Inc.*, No. 8:15 CV 317, 2015 U.S. Dist. LEXIS 149025, 2015 WL 6604010, at \*1 (D. Neb. Oct. 29, 2015) (quoting *Waste Mgmt. of Pa., Inc. v. City*

*of York*, 162 F. R. D. 34, 36 (M. D. Pa. 1995). “No statute, rule, or controlling case defines a Federal District Court’s power to grant or deny leave to file an amicus brief”. *Id.* (citing *United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 2007 U.S. Dist. LEXIS 18297 at \*21 (F. D. Tex. 2007)). In deciding whether to admit or deny the presence of an amicus curiae, factors that the district court should consider include whether the information offered through the amicus brief is timely and useful or otherwise necessary and also whether the individual or organization seeking to file the amicus brief is an advocate for one of the parties. *COR Clearing LLC*, 215 U.S. Dist. LEXIS 149025, 2015 WL 6604010, at \*2 (citing *CR Club v. Fed. Emergency Mgmt. Agency*, No. CIV. A. H-07-0608, 2007 U.S. Dist. LEXIS 84230, 2007 WL 3472851, at \*2 (S.D. Tex. Nov. 14, 2007)). The *COR Clearing LLC* decision acknowledges “[d]istrict courts throughout the country are split as ‘to the extent to which district courts are willing to permit the participation of an amicus who acts primarily as an advocate for one party’”. *Id.* (collecting cases and discussing various courts’ holdings and rationales).

“Participation of amicus curiae is normally appropriate when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” 4 *Am. Jur. 2d Amicus Curiae* § 3 (see *Hard Drive Productions, Inc. v. Does 1-1*, 495, 892 F. Supp. 2d 334(D. D. C. 2012) (see also *In re Halo Wireless, Inc.*, 684 F. 3d 581 (5th Cir. 2012) (citing *Ryan v. CFTC*, 125 F. 3d 1062 (7th Cir. 1997))). Ultimately, the decision whether to grant leave to appear as amicus is within the court’s discretion.

## DISCUSSION

In reviewing applicable case law, Rules of Professional Conduct and Comments, there does not appear to be any restriction preventing a licensed attorney from seeking leave to appear as amicus curiae in civil matters before a trial court. The Nebraska Rules of Professional Conduct in the Preamble provide that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice”. In addition to being a representative of clients, the attorneys practicing in the State of Nebraska have responsibilities as an officer of the legal system and a public citizen. The Preamble further provides “[a]s 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.” Paragraphs 7, 8, 10, 12 and 13 provide that a lawyer has professional responsibilities, and as a member of the legal profession, are self governing and require the attorney to take action, when appropriate, to improve the law and the legal profession.

The Rules of Professional Conduct provide in Section 3-501.3, that when representing a client, a lawyer shall act with reasonable diligence and promptness in representing a client. The Rules further encourage participation in pro bono legal services to persons with limited means. Section 3-506.6 provides that a lawyer, who provides services under the auspices of a program sponsored by a nonprofit organization or court, without the expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to the rules of conflict of interest in Rule 1.7 and 1.9(a). Comment 1 provides, in part, “[i]n these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established...” A lawyer may not appear as amicus if doing so would be adverse to another client of that lawyer.

The Committee does not distinguish between the appearance of amicus curiae at the trial court level or as amicus at the appellate court level. Based upon the Nebraska Rules of Professional Conduct and the aforesaid case law, it is the opinion of the Committee that there is no restriction preventing a licensed attorney to seek leave to appear as amicus curiae in civil matters before a trial court. The ultimate decision regarding whether to grant such leave is left to the discretion of the trial court and is outside the scope of this opinion. This opinion is limited to the conclusion that it is ethical for a licensed attorney to appear as amicus curiae at the trial court level in a civil matter, including in circumstances described above. In doing so, the attorney must adhere to the Nebraska Rules of Professional Conduct.