

# NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

## NO. 20-02

A Nebraska lawyer may recommend that his clients pay another lawyer to represent a third-party as long as sections 3-501.0(e), 3-501.6 (a)-(b), 3-501.7, 3-501.8 (f), 3-505.4 (c) and § 3-501.0(e) are complied with. Attorneys must insure there are no conflicts of interest, must have obtained informed consent, keep client confidentialities and ensure their professional judgment is not impacted by the presence of interested third-party payors.

### **I. Questions Presented**

May a person/entity or group of defendants who are parties to pending litigation in a district court lawsuit brought by a plaintiff who is a trustee of a trust recommend a list of attorneys and pay for the non-party trust beneficiaries' legal services needed to bring a county court action to remove the trustee?

### **II. Summary of Opinion**

The Nebraska Advisory Committee is authorized only to advise lawyers, not litigants. A lawyer may accept payment from a third-party including the described litigant so long as the attorney conforms with the Rules of Professional Conduct. This would demand that the attorney determine that there is no concern with interference as to that attorney's independent professional judgment and that there is no concurrent conflict of interest.

The attorney must obtain written informed consent from the trust beneficiaries of the trust as to the fact of the payments and the identity of the third-party payer. The attorney must also follow the rules of confidentiality set out in Rule § 3-501.6 and remain loyal only to the beneficiaries and not to the third-party payer.

### **III. Statement of Facts**

A trustee of a trust has brought two separate district court lawsuits against certain defendants. The lawsuits relate to a real estate transaction where the trustee alleges negligence in distributing funds and asserts an action to quiet title to property.

A majority of the beneficiaries of the trust have expressly stated to the trustee they would either like the trustee removed or would like the trustee to resolve or dismiss the district court lawsuits as they believe the district court lawsuits are unnecessary and are depleting the trust assets; assets to which they are the residuary beneficiaries. The beneficiaries are not parties to the district court lawsuits. The trustee refuses to resolve or dismiss the district court lawsuits. The trustee is an attorney licensed in the state of Nebraska but is not a beneficiary of the trust.

The trust beneficiaries do not, on their own or together, have the resources to take action to have the trustee removed. The defendants in the district court lawsuits would like to fund the beneficiaries' action to remove the trustee from his position. Any such removal may benefit the defendants, particularly if a newly appointed trustee dismisses or settles the district court lawsuits. As a part of the proposed arrangement, the defendants would like to condition the funding on the beneficiaries selecting an attorney from a list of disinterested attorneys the defendants recommend. The defendants feel this is important and this process would ensure that the beneficiaries are hiring an experienced attorney in the field that is able to efficiently represent the beneficiaries in their objectives.

#### **IV. Applicable Rules of Professional Conduct**

##### **A. § 3-508.4 Misconduct.**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

##### **B. § 3-501.8 (f). Conflict of interest; current clients; specific rules.**

(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 [11] Lawyers are frequently asked to represent a client when 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 lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal service for another).

##### **C. § 3-505.4 (c). Professional independence of a lawyer.**

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Comment [2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

**D. § 3-501.6 (a)-(b). 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 client from committing a crime or to prevent a 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.

**E. § 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.

(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.

**F. § 3-501.0(e) Terminology**

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

**V. Discussion**

The question presented to the committee asks what a defendant in a lawsuit can do in regards to the payment of fees for another lawsuit. However, the Nebraska Advisory Committee is tasked with giving ethics advice to lawyers. See, Neb. Ct. R., Discipline Procedures for Lawyers, §3-305(D)(1) (Advisory Committee has discretion to “render to member [of the Nebraska State Bar Association] upon his or her written request an advisory opinion or an interpretation of the Nebraska Rules of Professional Conduct regarding anticipatory conduct on the part of the member.”). The Committee does not advise litigants. To the extent the question presented can be framed as whether the lawyer representing the litigants can recommend the hiring of another lawyer, the Committee believes §3-508.4 applies. “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” As long as the lawyer representing the defendants in the lawsuit brought by the trustee does not induce another lawyer to violate the ethics rules, the defendants’ lawyer has not committed an ethics violation.

The question then more appropriately becomes can a lawyer accept payment from an interested third-party for representation of a client. The Nebraska Court of Appeals has noted that “Neb. Ct. R. of Prof. Cond. § 3-501.8(f) provides that a lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent.” *Ross, Schroeder & George, LLC v. Artz*, 23 Neb. App. 545, 557, 875 N.W.2d 457, 467 (Neb. Ct. App. 2016). The attorney accepting payment from a third-party must follow the requirements of Neb. Ct. R. of Prof. Cond. § 3-505.4(c) (requiring an attorney to maintain their independent judgment) when accepting payment for services from a third-party. Neb. Ct. R. of Prof. Cond. § 3-501.8(f) requires: (1) the relevant beneficiaries of the trust give informed consent; (2) the beneficiaries’ attorney maintains independent professional judgment that is not influenced by the defendants as a third-party payor; and (3) client confidentiality owed to the beneficiaries is kept intact under § 3-501.6 (a)-(b).

Before beginning representation that will be funded by a third party, a lawyer should consider whether the situation creates a conflict under § 3-501.7 (Model Rule 1.7) “(a lawyer shall not represent a client if the representation involves a concurrent conflict of interest”); See, e.g., *In re Geeding*, 12 P.3d 396(Kan. 2000) (holding that a Kansas lawyer violated both Rule 1.7 and Rule 1.8(f) by accepting payments from a company that was in business of purchasing redemption rights from foreclosure defendants to represent a defendant in a foreclosure case). A conflict exists

if the circumstances involve a significant risk that the representation of the client will be materially limited by the lawyer's responsibilities to the party paying the fees. If so, the lawyer will need to comply with §§ 3-501.8 (f), 3-505.4(c) and 3-501.7(b).

A lawyer whose fees will be paid by a third-party must obtain the client's informed consent to the fee arrangement. § 3-501.8 (f). The consent must be obtained when the lawyer agrees to the arrangement, not when the fee is paid. *ABA Formal Ethics Op. 02-248*. In order for the client's consent to be “informed,” the lawyer must disclose the arrangement with the third-party payer and the lawyer must tell the client about any “material risks” of the arrangement and any “reasonably available alternatives.” See §3-501.0(e)(defining “informed consent”). See e.g., *In re Geeding*, 12 P.3d 396(Kan. 2000) (lawyer who never met personally with client to explain third-party fee arrangement and obtain consent violated Rule 1.8(f)).

Since the defendants will be interested in the outcome of the trustee removal lawsuit and will be recommending lawyers to the beneficiaries, the selected lawyer must ensure that his or her professional independence is not compromised by the representation. Under Neb. Ct. R. of Prof. Cond. § 3-505.4, “A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”

The lawyer retained for the trustee removal lawsuit must be on guard against allowing the defendants in the district court lawsuit to control the removal litigation. Section 3-501.8 (f) permits a third-party fee arrangement only if “there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.” Section 3-505.4 (c) requires that a lawyer not allow a third-party payer to “direct or regulate” his or her professional judgment. See, e.g., *In re Rumsey*, 71 P.3d 1150 (Kan. 2003) (Kansas lawyer violated Rules 1.8(f) and 5.4(c) by allowing third-party payer to veto an appeal of a custody order).

Although the defendants in the trustee’s district court suit will likely want to know what is happening with the trustee removal lawsuit, the lawyer obtained must comply with the mandates concerning confidentiality of client information in §3-501.6 (a) and (b). *ABA Formal Ethics Op. 02-248*(2002). That means that information about the representation must not be disclosed to the payer unless the lawyer obtains the client's informed consent or the particular situation fits within another exception to §3-501.6. See *Illinois Ethics Op. 00-02*, 16 Law. Man. Prof. Conduct 644 (2000) (lawyer retained by parent of adult client to obtain disability benefits may not divulge client's psychiatric report to parent).

## **VI. Conclusion**

The Nebraska State Bar Association Ethics Advisory Committee concludes that a lawyer may recommend that his clients pay another lawyer to represent a third-party as long as sections 3-501.0(e), 3-501.6 (a)-(b), 3-501.7, 3-501.8 (f), 3-505.4 (c) and § 3-501.0(e) are complied with. Attorneys must insure there are no conflicts of interest, must have obtained informed consent, keep client confidentialities and ensure their professional judgment is not impacted by the presence of interested third-party payors.