

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS  
NO. 24-02**

**QUESTIONS PRESENTED**

1. Whether a conflict of interest arises when an attorney continues to represent a client in a personal injury lawsuit while the attorney and client are co-Defendants in a separate lawsuit arising out of the litigation of the personal injury lawsuit. **Yes, this creates a concurrent conflict of interest.**
  
2. Whether the conflict of interest arising out of the attorney's continued representation of Plaintiff in the underlying personal injury lawsuit is waivable. **On these specific and narrow facts, yes.**

**FACTS**

A personal injury attorney (the "Attorney") took on representation of an individual (the "Plaintiff") injured in a pedestrian vs. automobile accident (the "First Lawsuit"). The First Lawsuit involved multiple Defendants. On the eve of trial, counsel for all three Defendants filed an offer to confess judgment in the amount of \$75,000.

Language at the beginning of the offer to confess judgment stated the offer was being made only by Defendant 1. Language at the end of the offer, however, stated the offer was being made by all Defendants. Attorney, on Plaintiff's behalf, filed an acceptance of the offer to confess judgment, *but only as to Defendant 1*. Defendants then collectively filed a motion to alter or amend the judgment on the contention that the offer to confess judgment was intended to be made

on behalf of all Defendants. The District Court granted that motion and Plaintiff, though Attorney, appealed.

While appeal was pending, defense counsel sent two checks totaling \$75,000 to Attorney. Attorney questioned defense counsel as to why the checks had been sent given the pending appeal and advised they would be accepted *only* as to Defendant 1. The checks were accepted and deposited into Attorney's trust account. From there, Attorney paid a subrogation lien with a healthcare insurer, reimbursed himself for litigation expenses and out of pocket costs, and delivered the balance to Plaintiff. Attorney received no portion of the \$75,000.00 as an attorney fee.

The Nebraska Court of Appeals subsequently vacated the District Court's Order, concluding there had been no meeting of the minds as to the scope of the offer to confess judgment.

On remand, Defendants filed a motion seeking to require Attorney and Plaintiff to return the \$75,000. The District Court granted that motion, and Plaintiff, through Attorney, again appealed. The Nebraska Supreme Court again reversed the District Court finding Defendants could not raise the issue of the return of the funds within the First Lawsuit. The First Lawsuit remains pending as of this writing. Attorney still represents Plaintiff in the First Lawsuit. Attorney's representation of Plaintiff in the First Lawsuit is not on a contingent fee, and Attorney has not and will not ask Plaintiff for further payment as an attorney fee, except for reimbursement for out-of-pocket expenses.

Following the second remand of the First Lawsuit, Defendant 1 and its insurer filed suit in District Court against Plaintiff and Attorney (the "Second Lawsuit"). The Second Lawsuit is styled in equity and seeks to hold Plaintiff and Attorney jointly and severally

liable for return of the \$75,000. Accordingly, Attorney could be ordered to pay back money already distributed to Plaintiff.

Plaintiff has signed a written waiver consenting to Attorney's continued representation of Plaintiff in the First Lawsuit. The waiver acknowledges that Attorney and Plaintiff could be ordered to repay the \$75,000 and that their liability could be joint and several. The waiver does not address whether Attorney or Plaintiff could seek contribution or indemnity from one another if a judgment were rendered against them. As a practical matter, however, Attorney has indicated he has no intention of seeking to recover from Plaintiff if he were ordered to pay more than he received from the \$75,000 payment.

Plaintiff has retained separate counsel in the Second Lawsuit. If a judgment is rendered against Plaintiff and Attorney in the Second Lawsuit, it is likely Plaintiff is judgment proof, creating a circumstance in which Attorney may be liable for amounts that would be owed in the normal course by Plaintiff.

Attorney reasonably believes withdrawal from the First Lawsuit will create a substantial hardship for Plaintiff because Plaintiff likely could not find another attorney to represent Plaintiff on a contingent basis and because Plaintiff does not have the means to pay an hourly fee.

## **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

### **Rule 1.7 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.

**Rule 1.16 Declining or terminating representation**

- (a) Except as stated in [paragraph \(c\)](#), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;

- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) the lawyer is discharged.
- (b) Except as stated in [paragraph \(c\)](#), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (7) other good cause for withdrawal exists.

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

## DISCUSSION

### 1. **ATTORNEY'S CONTINUED REPRESENTATION OF PLAINTIFF IN THE FIRST LAWSUIT PRESENTS A CONCURRENT CONFLICT OF INTERSET.**

The pertinent section of Rule 1.7 is (a)(2), which provides:

**1.2** 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:

( . . . )

- (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.**

The question, then, is whether there is a significant risk that Attorney's representation of Plaintiff in the First Lawsuit will be materially limited by Attorney's status as a Co-Defendant in the Second Lawsuit. The Committee's opinion is that there is.

While it is commendable Attorney has agreed not to seek additional fees for representation of Plaintiff in the First Lawsuit, this does not alleviate the risk of attorney's representation being limited by his status as a Co-Defendant in a separate matter with his otherwise judgment-proof client.

On the one hand, the interests of Plaintiff and Attorney in the Second Lawsuit appear to be aligned. Attorney and Plaintiff took the position in the First Lawsuit that Defendant 1 sent payment despite a pending appeal and thus settled that claim. They are both, then, of the mind that Defendant 1 is not entitled to any recovery in the Second Lawsuit. The issue in that case arises, however, if a judgment is entered against both Defendants.

The more important question is how the Second Lawsuit affects Attorney's judgment and representation of Plaintiff in the First Lawsuit. It is easy to imagine a situation where Attorney's advice regarding acceptance of a settlement offer, for instance, may be colored by his knowledge that Plaintiff is otherwise judgment-proof as it relates to the Second Lawsuit. There is risk that Attorney might advise Plaintiff to reject an otherwise reasonable offer because it would be insufficient to cover Plaintiff's share of the liability in the Second Lawsuit. Comment 8 to Rule 1.7 provides, "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."

Attorney has stated he has no intention of seeking contribution or indemnity from Plaintiff if he were to repay more than his share of a joint and several judgment. Regardless, however, it would be difficult for attorney to divorce his own financial interest from his ability to “consider, recommend or carry out an appropriate course of action” for Plaintiff. Given these facts, the Committee is of the opinion that Attorney’s continued representation of Plaintiff in the First Lawsuit presents a concurrent conflict of interest.

The next question, then, is whether this concurrent conflict is of the variety which can be waived.

**2. ATTORNEY’S CONFLICT OF INTEREST IS WAIVABLE ON THESE SPECIFIC FACTS.**

Pursuant to Rule 1.7(b), a concurrent conflict of interest may be waived by the client if four conditions are satisfied. Those are:

- (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.

The “and” following subparagraph (3) suggests that all four of the conditions set forth in subsection (b) must be met for a concurrent conflict of interest to be waivable.

Conditions 2 – 4 are satisfied here. The Committee is aware of no Nebraska statute or case law prohibiting Attorney’s continued representation of Plaintiff in the First Lawsuit. Next, Comment 23 makes clear, “Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients’ consent.” It is clear Attorney does not represent both Plaintiff and Defendants in the First Lawsuit, so this condition is satisfied. Finally, client has given informed consent in writing.

Whether Attorney’s conflict may be waived, then, turns on condition number one. More specifically, the question is whether it is reasonable for Attorney to believe he may provide competent and diligent representation. Competence and diligence are governed by Rules 1.1 and 1.3, respectively.

Taking those rules out of turn, Rule 1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.” Again, the Committee is presented with no facts to suggest Attorney will be unable to act with reasonable diligence or promptness in representing Plaintiff in the First Lawsuit. He has, to this point, taken appropriate steps to protect deadlines and prosecute Plaintiff’s case.

Pursuant to Rule 1.1, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation, and judgment reasonably necessary for the representation.” On the facts presented, the Committee is aware of nothing to suggest Attorney does not possess the requisite knowledge, skill, thoroughness, preparation, or judgment to try a personal injury case. If that were the case, a violation of the Rules would have occurred at the outset. The Comments to Rule 1.1 unfortunately shed no light on whether the “judgment” reasonably

necessary for the representation means the attorney's judgment in general or considering these specific facts. The fairest reading of Rule 1.1 and the Comments thereto, however, suggest only that amount of knowledge, skill, thoroughness, preparation, and judgment required in the ordinary course would be all that Attorney must possess.

Adding to the complexity of the situation, and mitigating in favor of allowing Attorney's continued representation, is Attorney's belief that Plaintiff will be hard-pressed to find replacement counsel. Pursuant to Rule 1.16(b)(1), an attorney "may" withdraw if withdrawal can be accomplished without material adverse effect on the client. Requiring client to proceed *pro se* at trial would create a material adverse effect. Further, even if Plaintiff were able to retain replacement counsel at this stage of the proceedings, Plaintiff may be disadvantaged by replacement counsel's lack of familiarity with the case or ability to become familiar before trial. Of course, this must be balanced against subsection (a)(1) of Rule 1.16, mandating withdrawal if continued representation would result in a violation of the Nebraska Rules of Professional Conduct.

On balance, the fairest reading of the Rules and Comments is that this conflict may be waived by a client's written, informed consent.

### **CONCLUSION**

The question presented here is unusual and difficult. It is therefore with some unease that the Committee finds that while continued representation of Plaintiff in the First Lawsuit creates a concurrent conflict of interest, Attorney may ethically continue to represent Plaintiff in that case if Plaintiff provides informed consent in writing.