NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 24-03

QUESTIONS PRESENTED

1. Do Nebraska statutes, Supreme Court Rules, and/or local court rules that require court-appointed counsel to electronically file motions with the lawyer's itemized billing statements (which include an itemization of the services provided to the indigent-client) for attorney compensation violate the Nebraska Rules of Professional Conduct, specifically §3-501.6, the rule of confidentiality?

2. Does a lawyer violate the Nebraska Rules of Professional Conduct, specifically §3-501.6, the rule of confidentiality, if the lawyer electronically files itemized billing statements, but redacts or otherwise makes efforts to not include confidential information?

FACTS

A question has been posed to the Committee regarding a court-appointed attorney electronically filing an itemized statement for attorney fees and the interplay of the attorney's ethical duty to protect confidential information regarding the representation of a client.

Specifically, a Nebraska law firm has inquired whether its lawyers can electronically file an indigent client's itemized billing statement, with service to the prosecuting attorney, without violating their duty of confidentiality to the client. The Firm explains that a local court rule was recently instituted requiring court-appointed counsel to electronically file monthly itemized billing statements with

the clerk of the court in order to receive compensation for counsel's services. Said itemized billing statements are to be served to the prosecutor and the nature of the e-filing system makes the documents accessible to the public.

APPLICIBLE RULES OF PROFESSIONAL CONDUCT

Rule § 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.

DISCUSSION

1. Confidentiality in General

The concern expressed by the Firm over itemized billing statements and the interplay with client confidentiality is well placed. One need look no further than a relatively recent Texas case, Morrison v. State, 575 S.W.3d 1 (Tex. App. 2019), to observe the very real risk that an attorney's billing statements can pose to a client's interests and cause an attorney to run afoul of their ethical duties.

In Morrison, counsel was appointed to represent an indigent client on murder charges. Counsel was required by statute to submit itemized billing statements to receive compensation. Prior to trial, counsel requested payment for his services and for the services of a defense investigator by providing billing records to the trial court. The billing records were "highly detailed and disclosed confidential attorney work product and attorney-client communications." Id. at 8. The billing records were eventually filed with the clerk and then obtained by the prosecution. The State used information gleaned from the billing records to their advantage, including using the records to pursue lines of questioning with a witness at trial. The Defendant was subsequently convicted. On appeal, the court in Morrison found that defense counsel's performance in submitting the detailed statements was deficient and prejudicial to the client. The court also found that defense counsel had breached his ethical duties of confidentiality in the process.

Morrison serves as a stark reminder of an attorney's duty of confidentiality, and the real danger that results to clients when that duty is breached. Out of all the duties owed by a lawyer to their client, perhaps none is greater than the duty of confidentiality. The duty is broad and "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Neb. R. Prof. Cond. §3-5016 cmt. 3. The duty "prohibits a lawyer from revealing information relating to the representation of a client", which also entails "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." Id. cmt. 4. The duty of confidentiality is ongoing and "continues after the client-lawyer relationship has terminated." Id. cmt. 17.

The duty of confidentiality is an umbrella encompassing many related areas, including attorney-client communications, which are statutorily privileged by Neb. Rev. Stat. §27-503, and also attorney work product, defined as documents or other tangible items prepared in anticipation of litigation, and also the content of "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs." Hickman v. Taylor, 329 U.S. 495, 511 (1947). Confidentiality includes these subtopics, and more –protecting "all" information related to the representation, "whatever its source." Neb. R. Prof. Cond. §3-5016 cmt. 3

The duty of confidentiality is not absolute, however, and a limited number of limited exceptions to the duty are set forth in Rule §3-5016. Among those exceptions, subsection (b)(4), sets forth that a

lawyer may reveal information relating to the representation of a client to the extent reasonably necessary "to comply with other law or a court order".

II. Nebraska Laws and Court Orders Pertaining to Attorney Compensation for Court-Appointed Counsel

Nebraska law on the subject of compensation for court-appointed counsel in criminal cases can be found at Neb. Rev. Stat. §29-3905(D) which sets out:

> "Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment, except that if the defendant was not bound over for trial in the district court, the application shall be made in the appointing court. The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court."

In addition, Neb. Rev. Stat. §29-3906 discusses representation of indigent defendants in misdemeanor cases and adopts the same compensation procedure set out in §29-3905.

Looking to the Nebraska Supreme Court Rules of Practice and Procedure, court-appointed attorney compensation is addressed in Neb. Ct. R. §6-1407 (Uniform County Court Rules) and §6-1525 (Uniform District Court Rules), which both state:

> "Before the claim of any attorney appointed by the court is allowed in criminal and juvenile matters, **such attorney shall file with the clerk, and serve upon the county attorney, a written**

application for fees, certified to be true and correct, stating an itemization (for interim application, a general itemization) of the services provided, time expended, and expenses incurred in the case. Counsel shall also state in the application that counsel has not received and has no contract for the payment of any compensation by such defendant or anyone in the defendant's behalf, or, if counsel has received any fee or has a contract for the payment of same, shall disclose the same fully so that the proper credit may be taken on counsel's application. If a hearing is required, the time and date of hearing shall be set by the court and notice given by court order or notice of hearing." (boldtype added)

So, while Nebraska statutes use a scant description as to the process of compensation for court-appointment fees – requiring an application to the court and for the court to hear application – the Uniform Rules of Practice and Procedure adopted by the Supreme Court are much more directive, requiring the application to be filed with the clerk, served on the county attorney, and for the application include an itemized statement for services.

When it comes to the act of electronically-filing itemized billing statements, it would seem the Nebraska Supreme Court Rules have also required that practice, when the Rules are read in conjunction with each other. As discussed, Neb. Ct. R. §6-1407 and §6-1525 require the itemized statement to be "filed with the clerk". At the same time, Neb. Ct. R. §2-202 mandates that attorneys use electronic filing for all court filings, aside from some exceptions that do not include itemized billing statements. Further, the public nature of itemized statements is required by the Supreme Court Rules, as Neb. Ct. R. §2-215 sets out that "All filings in Nebraska trial or appellate

courts are public unless restricted by law, court rule, or court order". No rule specifically exempts itemized billing statements.

In summary, the rules set forth by the Nebraska Supreme Court require an attorney to file a certified application of fees along with an itemized statement setting forth services provided, time expended and expenses incurred. The application is to be electronically filed and served on the county attorney.

III. Intersection of Confidentiality and Itemized Billing Statements

Turning back to the duty of confidentiality, §3-501.6(b)(4) provides that an attorney may disclose information relevant to the representation of a client to "to comply with other law or a court order." While Nebraska law is arguably unclear on the exact process of compensation for appointed counsel, the Nebraska Supreme Court Rules speak directly to the procedure required. The Supreme Court is vested with the power to promulgate rules of practice and procedure for all courts by the Nebraska Constitution. Neb. Const. art. VI, sec. 25 (1920). Therefore, the procedures outlined by the rules can fairly be considered a "court order." Additionally, the Supreme Court Uniform Court Rules and Rules of Professional Responsibility must be reasonably read in conjunction with each other – while the duty of confidentiality applies to all information related to the representation, it is clear the Court Rules on court-appointed compensation envisioned at least a minimal amount of information be provided in order to justify an attorney's compensation.

Therefore, the Committee concludes that an attorney who electronically files an itemized billing statement concerning their representation of a court-appointed client does not, *per se*, violate the attorney's ethical duty of confidentiality, as the duty of confidentiality does allow some disclosures of information related to representation, at least to a limited extent. Ultimately, the Uniform Court Rules which set forth the procedure for compensation for an appointed-attorney create a *narrow* exception to the duty of confidentiality.

That being said, there are limits to that narrow exception, and it is critical that an attorney filing an itemized billing statement give heavy consideration to the duty of confidentiality and the client's interests. Rule §3-501.6 only "permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified" and "no greater than the lawyer reasonably believes necessary to accomplish the purpose" Neb. R. Prof. Cond. §3-501.6, cmt. 3. Therefore, it is incumbent on counsel to act competently and diligently in limiting the disclosure of information, with extreme sensitivity to the protection of the client's interests.

To be sure, the nature and extent of an attorney's task in determining what information is to be disclosed on an itemized billing statement in order to comply with the Rules, while also balancing the duty of confidentiality, will vary based on the facts of circumstances of each case. However, here some general guidelines for attorneys to consider:

(1) Information provided on the itemized statement should be minimal and general in nature

Any information provided on an itemized statement should be minimal, generalized, and disclosed only to the extent reasonably necessary to accomplish the purpose of providing an itemization of "services provided, time expended, and expenses incurred" as required by Neb. Ct. R. §6-1407 and §6-1525. Notably, the Rules authorize "a general itemization for interim applications." Id.

Certainly, itemized statements should never include any confidential communications, and should not include even a general topic of the conversation. For example, an itemized billing entry of "meeting with client to discuss alibi" should be entered as simply "meeting with client." Statements should not disclose attorney work product – that is, mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. In Levy v. Senate of Pa., 94 A.3d 436 (Pa. Commw. Ct. 2014), the Pennsylvania Supreme Court examined the issue of whether attorney billing statements were protected as attorney work product. The court found that a listing of the generic nature of services performed was proper for disclosure. The court's findings on the matter may serve as a rough guide for attorneys filing itemized statements:

> "[D]escriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege. In contrast, an entry that generically states that counsel made a telephone call for a specific amount of time

> to the client is not information protected by the attorney-client privilege but, instead, is subject to disclosure […] Although the general descriptions such as drafting a memo, making [a] telephone call, performing research, observing a trial, reflect work performed, without further detail they do not reveal an attorney's 'mental impressions, theories, notes, strategies, research and the like.' Disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy. They simply explain the generic nature of the service performed and justify the charges for legal services rendered. Where, as here, the taxpayers are footing the bill for the legal services, they are entitled to know the general nature of the services provided for the fees charged…" Id. at 373-74.

In addition to the areas of confidential communications and work product, attorneys must be mindful about "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." Neb. R. Prof. Cond. §3-501.6, cmt. 12. Even further, attorneys must consider whether the generalized and sanitized itemized statement still exposes the overall strategy of the defense in a manner that will disadvantage the client.

Ultimately, counsel must be extremely cautious that the itemized statement not reveal information detrimental to the client or jeopardize a client's right to a fair trial. Counsel should be mindful that the itemized statement might not only be studied by the prosecuting authority, but also members of the press and the public at large.

(2) Attorneys should employ competent methods and procedures to ensure itemized statements do not harm the client's interests

Each attorney has a duty to provide competent representation. Neb. R. Prof. Cond. §3-501.1. This duty continues when it comes to itemized billing statements. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Id., cmt. 5. Attorneys should employ reasonable methods and safeguards to ensure that itemized statements do not contain information that may damage a client's case or risk their right to a fair trial.

What methods and procedures are necessary will vary given the nature and complexity of the case. In many cases, an attorney's careful review of the statement to ensure no confidential communications, work product, or strategy are present may be enough. If an attorney has concerns or questions about whether the contents of the itemized statement are potentially adverse to the interests of the client, the attorney should first consider reviewing the itemized statement directly with the client. As required by the rule of attorney-client communication, "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued…" Neb. R. Prof. Cond. §3-501.4, cmt. 5. The public nature of the itemized statement should be explained to the client and the proposed statement should be discussed in that light, to help determine the best course of action prior to filing the statement.

(3) Attorneys should take all protective measures necessary to ensure itemized statements do not harm the client's interests

In some cases, keeping the itemized statement generalized will not be enough. The statement may still reveal an overall trial strategy, exploration of defenses, or otherwise give some advantage to opposing counsel. The Rules command that "[i]f the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." Neb. R. Prof. Cond. §3-501.6, cmt 12.

In situations where counsel believes that an itemized statement will disclose information that could be harmful to client's interests, but that the disclosure is necessary to comply with the Rules on appointed-attorney compensation, the attorney should take action to redact or seal the itemized statement.

If possible, an attorney should first redact information which is harmful to the client from an itemized billing statement. Authority to do so comes from Neb. Ct. R. §2-210 which states that, "[p]rotected information in court records governed by any statute or court rule…shall not be included in any public filing." The attorney's argument is that they must file the itemized statement to comply with the rules on compensation, however protected and confidential information will be revealed in doing so, and therefore said information should be redacted. The itemized statement should be filed "in

redacted form" and attorneys are advised that filing an unredacted version would be a waiver of any confidentiality or protections. Id. After filing a redacted itemized statement, an attorney would wait to determine if the filing is accepted with the redactions. If not, the attorney could set the matter for further hearing to justify why the redactions are necessary.

However, if redactions are not enough, or "if the filing is unable to be understood with the redacted information" the attorney must seek permission to file the itemized statement under seal. Neb. S. Ct. R. §2-210(B). To do so, an attorney must file a motion to seal, that "contains a description of the document or information sought to be sealed and the rationale for sealing such document or information" Neb. S. Ct. R. §2-210(C). If a court order authorizes sealing of the statement, the itemized statement should then be filed along with a confidential cover page. Id.

Attorneys should be ready to seek other protections if redacting or sealing is denied or insufficient relief for the client. For example, counsel could consider seeking permission from the court to submit their itemized billing statements after the case and appeal period has ended – thus limiting the danger the that the contents of the itemized statement could damage a client's case or interfere with a client's right to a fair trial.

(4) If an attorney receives an adverse ruling against their efforts to take protective steps, they should consider an appeal

If an attorney's efforts to take protective measures against the disclosures present on the itemized statement are thwarted, the attorney should consider appealing the ruling. This should start with a discussion with the client. "In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4 [regarding attorney-client communication]. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order." Neb. R. Prof. Cond. §3-501.6, cmt 11.

(5) Attorneys are encouraged to keep more detailed notes about client representation and billing

While entries on the itemized billing statement should be general and with as minimal detail necessary to accomplish the task of providing an accounting of "services provided, time expended, and expenses incurred," attorneys are encouraged to keep more detailed notes of the representation and billing as their attorney work product. While general descriptions are appropriate for an itemized statement, there may be other scenarios where more detailed information is appropriate and necessary to be disclosed. For example, in a scenario where the veracity of an attorney's itemized statement is challenged, §3-501.6(3) would allow more detailed information to be disclosed and used to establish a defense or to respond "in any proceeding concerning the lawyer's representation of the client." More detailed billing

information may be helpful to an attorney and more appropriate to disclose in this scenario.

CONCLUSION

The Committee concludes that Nebraska statutes, Nebraska Supreme Court rules, and/or local court rules that require a court-appointed attorney to electronically file itemized billing statements to receive compensation do not violate an attorney's ethical duty of confidentiality. However, attorneys are cautioned to provide competent representation to their clients when filing an itemized statement – always mindful of the dangers that itemized billing statements can present, and always acting in a manner to protect the client. Attorneys should comply with the Supreme Court Rules by providing general information on itemized billing statements, never listing confidential communications or attorney work product, and avoiding revealing information that can give an insight to case strategy or overall harm the client's interests. Attorneys should develop methods and procedures to ensure itemized statements do not contain information harmful to their client, including reviewing the statement with the client if the attorney finds it necessary. If information must be revealed on an itemized statement that the attorney feels is necessary to comply with the rules on compensation, but ultimately could be harmful to the client, the attorney should take all necessary steps to protect the information from disclosure, including filing the itemized statement with redactions, filing a motion to seal, and appealing adverse rulings when denied. Ultimately, the onus is on the attorney to file itemized statements that do not reveal

information related to the representation more than what is necessary to comply with the Supreme Court rules on attorney compensation. In doing so, attorneys should work to protect the client's interests at all costs.