



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 836 (2/25/10)

**TOPIC:** Dual representation of Guardian and incapacitated person in a proceeding to terminate the guardianship.

**DIGEST:** Lawyer who previously represented incapacitated Client in connection with the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian in a proceeding to terminate the guardianship, provided (a) Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients, and (b) Lawyer obtains informed consent from each client, confirmed in writing.

**RULES:** 1.0(e); 1.0(j); 1.7; 1.14

**COMMENTS:** Comment 28 to Rule 1.7

**QUESTION**

[1.] May Lawyer, who previously represented an incapacitated Client in connection with the appointment of a Guardian for Client, later represent both Client and Guardian in a proceeding to terminate the Guardianship?

**OPINION**

[2.] Lawyer represented an incapacitated Client in connection with the appointment of a Guardian for Client. At that time, Guardian (one of Client's adult children) was appointed with Client's consent. Some time later, Client, Guardian, and Client's other adult children all agreed that the guardianship should be terminated. The reasons for terminating the guardianship are twofold: (1) Client has been living independently and no longer needs a Guardian, and (2) Guardian is planning to move across the country.

[3.] Client and Guardian have asked Lawyer to represent them both in a proceeding to discharge the Guardian. We will assume that the court wishes both Client and Guardian to be represented and approves of this dual representation.

[4.] There is always the possibility that a conflict of interest will arise between a guardian and the incapacitated person who is or will be the subject of the guardianship. While such conflicts might be more likely to arise at the inception of guardianship proceedings, they might also occur in connection with the termination of the guardianship. For example, it might be that the guardian seeks to escape the responsibilities of the guardianship even though the incapacitated person would be better served by continuing it. Here, the fact that the Guardian wishes to terminate the guardianship in anticipation of moving across country raises this possibility.

[5.] The proposed dual representation of Guardian and Client in a proceeding to terminate the guardianship must be analyzed under Rule 1.7 of the New York Rules of Professional Conduct, adopted effective April 1, 2009. Rule 1.7 provides:

#### RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(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.

[6.] The proposed dual representation will involve Lawyer in representing differing interests because a person who has been found to be incapacitated in the

past presumably needs a guardian until proven otherwise, while the Guardian here wishes to be relieved of his guardianship responsibilities. The differing interests create a conflict under Rule 1.7(a)(1). Therefore, the conflict must be analyzed under Rule 1.7(b)(1)-(3) to determine whether it is consentable (*i.e.*, waivable).

[7.] It appears at present that the parties are aligned in interest and agree that the guardianship should be terminated, so any serious clash of interests between Client and Guardian is merely a future possibility. Therefore, unless other factors or circumstances of which we are unaware suggest a different conclusion, we think Lawyer may reasonably believe that he will be able to provide competent and diligent representation to both parties (Client and Guardian) in this matter. In particular, the belief appears reasonable because this representation does not occur in an adversarial setting and the whole matter will be under the supervision of the court.

[8.] If Lawyer, based on an appropriate investigation, reasonably believes that he can provide competent and diligent representation to both clients, then Rule 1.7(b)(1) does not prohibit the dual representation. Moreover, because the proposed dual representation is not prohibited by law and will not involve the lawyer in asserting a claim by either client against the other, neither Rule 1.7(b)(2) nor Rule 1.7(b)(3) prohibits the dual representation. Provided Lawyer meets the standards set forth in Rule 1.7(b)(1)-(3), the conflict is consentable.<sup>1</sup>

[9.] Consentability alone, however, is not enough. When a conflict is consentable, Rule 1.7(b)(4) requires that Lawyer actually obtain informed consent, confirmed in writing, from each of the clients. Rule 1.0(e) defines “confirmed in writing,” and we assume lawyer will confirm any consent in writing in accordance with that definition. Rule 1.0(j) defines the crucial term “informed consent” as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

[10.] Accordingly, Lawyer must fully inform each party of the possible risks of the dual representation. One such risk is that material disagreements may later arise between the two clients that will preclude Lawyer from reasonably believing

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<sup>1</sup> Comment 28 to Rule 1.7 recognizes that “[w]hether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them.”

that he can continue to provide competent and diligent representation to each of them. In that case, Lawyer would no longer be able to represent both clients, and both clients would have to engage new lawyers unless one client (who would now be a former client) gives informed consent, confirmed in writing, for the lawyer to continue representing the other client.

[11.] When obtaining informed consent from Client, Lawyer must take special care because Client is presently deemed to be incapacitated and under guardianship. However, three sources – Rule 1.14 our Rules of Professional Conduct<sup>2</sup>, our prior opinion in N.Y. State 746<sup>3</sup>, and New York’s Mental Hygiene Law<sup>4</sup> -- all support the conclusion that Client may consent to this dual representation despite Client’s present legal designation of incapacity. Of course, Lawyer must carefully assess Client’s capacity to understand the conflict and to make a reasoned decision whether to consent to the representation despite the conflict. This careful assessment is necessary because if Client’s capacity to make reasoned decisions is so diminished that she cannot give informed consent to the dual representation, then Lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4). If a lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4), then the lawyer cannot undertake the dual representation.

[12.] In seeking Client’s informed consent to the dual representation, Lawyer must take Client’s capacity into account and provide Client with information and explanations suitable to Client’s understanding. Again, since the discharge of the Guardian will take place only if the court determines it is appropriate, any concerns we might have about the feasibility of obtaining informed consent from the incapacitated Client are substantially mitigated.

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<sup>2</sup> Rule 1.14 (“Client with Diminished Capacity”) deals with representing a person with diminished capacity and directs that “the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.”

<sup>3</sup> In N.Y. State 746 (2001) (which was based on provisions of the New York Lawyer’s Code of Professional Responsibility then in effect), we said “there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation. Insofar as the client is making reasoned decisions concerning those matters that are for the client to decide and these decisions appear to be in the client’s best interests, there would ordinarily be no need for the lawyer even to consider withdrawing from the representation or seeking the appointment of a guardian who would substitute his or her judgment for that of the client.” This is consistent with recognizing an incapacitated client’s ability to consent to the dual representation.

<sup>4</sup> The Mental Hygiene Law mandates that an incapacitated person should be afforded the greatest amount of independence and self-determination possible, and states that an incapacitated person retains all of the powers and rights except those which are specifically granted to the guardian. N.Y. Mental Hyg. Law § 81.20 and 81.29.

## CONCLUSION

[13.] Lawyer who previously represented an incapacitated Client in connection with a the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian seeking termination of the guardianship, provided Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients and Lawyer obtains informed consent from each client, confirmed in writing.

(34-09)