



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1046 (1/8/15)

Topic: Representing incapacitated client; conflict of interest

Digest: A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

Rules: 1.0(f), 1.7(a) & (b), 1.14(a)

FACTS

1. The inquiring law firm or its lawyers receive court appointments under the Mental Hygiene Law to serve as Court Evaluator or Guardian to an Alleged Incapacitated Person ("AIP") or Counsel to an AIP. These appointments are necessary when there is no family member or close associate willing to serve on behalf of the AIP.
2. Often, it is the residential care facility (the "Care Facility") where the AIP resides that is the petitioner in the proceedings, because there are no family members or close associates to act as petitioner.
3. The duties of a Court Evaluator are to interview the AIP and determine whether the AIP understands English, to explain the nature and possible consequences of the proceeding and the rights of the AIP, to determine whether the AIP wishes legal counsel of his or her own choice, to interview the petitioner or others familiar with the AIP's condition, affairs and situation, to determine whether sufficient resources are available to provide for the personal needs or property management of the AIP without the appointment of a guardian, and to make a written report and recommendation to the court.
4. The role of a Guardian is to manage the property and provide for the personal needs of the AIP, if the court determines (as a result of the guardianship petition) that the AIP cannot manage his or her own personal needs and either (i) the AIP agrees to the appointment, or (ii) the court determines that the AIP is incapacitated as defined in section 81.02(b) of the Mental Hygiene Law. Where the AIP does not have sufficient assets to manage his or her personal

needs, the Guardian will apply for Medicaid to help to defray the costs of the Care Facility.

5. The role of independent counsel to the AIP is to represent the interests of the AIP where (i) the AIP has requested counsel, (ii) the AIP wishes to contest the petition or does not consent to the authority requested in the petition to move the AIP from where the AIP presently resides to a nursing home or other residential care facility, or (iii) the court determines that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP.

6. The inquiring law firm also represents residential care facilities in various matters involving Medicaid benefits, guardianship, litigation and collection. However, the law firm does not represent the Care Facility in any matter in which it has accepted an appointment to serve on behalf of a resident. Such work is handled by other law firms that regularly represent the Care Facility.

QUESTION

7. May lawyers in a firm accept court appointments to serve as Court Evaluator, Guardian or Counsel to an Alleged Incapacitated Person in a proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility if their law firm simultaneously represents the health care facility in matters unrelated to the AIP?

OPINION

8. The answer to the question depends upon whether there is a conflict of interest under Rule 1.7. Rule 1.7(a) states, in part, "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." Thus the answer to the question turns on (a) whether the lawyer or others in the lawyer's firm represent both the AIP and the Care Facility, and (b) whether the interests of the AIP and the Care Facility are "differing interests" or there is a significant risk that the lawyer's professional judgment on behalf of the AIP would be adversely affected by the lawyer's personal interest in remaining in the good graces of the Care Facility.

9. Rule 1.0(f) defines "differing interests" as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Comment [8] under Rule 1.7 explains:

Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. . . . The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client.

Court Evaluator for an AIP

10. The responsibilities of a Court Evaluator differ from those of counsel to an alleged incapacitated person. The person acting as court evaluator is required to make inquiry into an AIP's assets, mental state and ability to handle his or her affairs, and then to report the findings to the court, so that the court may decide whether a guardian is needed and who that guardian should be. A Court Evaluator need not be a lawyer.

11. An appointment by a court to serve as a Court Evaluator under the Mental Hygiene Law does not create a lawyer-client relationship. Consequently, the limitations of Rule 1.7(a)(1) do not apply to a lawyer serving in such role,¹ because the lawyer does not "represent" the AIP.

Guardian for an AIP

12. The responsibilities of a Guardian do not begin until the court determines a Guardian should be appointed. For a general description of guardianship proceedings, see N.Y. State 986 (2013). As in the case of a Court Evaluator, a Guardian does not have an attorney-client relationship with the AIP. Consequently, the limitations Rule 1.7(a)(1) do not apply to a lawyer serving in such role.

Counsel for an AIP

13. Unlike a Court Evaluator or a Guardian for an AIP, Counsel for an AIP does have an attorney-client relationship with the AIP. Consequently, it is important to determine whether the AIP and Care Facility have "differing interests" in the guardianship proceedings under Rule 1.7(a)(1) and whether the lawyer's professional judgment on behalf of the AIP will be adversely affected by the lawyer's personal interests in remaining in the good graces of his or her firm's regular client, the Care Facility, under Rule 1.7(a)(2). It is irrelevant that the lawyer does not represent the AIP and the Care Facility in the same matter. *See* Rule 1.7, Comment [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated.")

Differing interests

14. Guardianship proceedings are not typical adversarial court proceedings and the interests of the AIP and the Care Facility are not always differing. The guardianship proceeding often is commenced by the Care Facility for the purpose of providing financial assistance to the AIP to remain in the Care Facility. These proceedings are rarely contested. Consequently, although the interests of the petitioner in a guardianship proceeding theoretically conflict with those of the AIP, we have concluded that, where the AIP does not oppose the guardianship, or is incapacitated and cannot express an opinion, the lawyer does not represent such a differing interest. *See* N.Y. State 986 (2013) (lawyer may serve as the petitioner), N.Y. State 746 (2001)

¹ In the role of Court Evaluator or Guardian, a lawyer will receive information of a sensitive nature from the individual. This information is not "confidential information" covered by Rule 1.6(a) because it is not received from a client, although the Mental Hygiene Law or other law may create other responsibilities of confidentiality.

(same). On the other hand, if the AIP has requested independent counsel, or if the court has appointed counsel for the AIP after determining that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP, then it is quite possible there are more than theoretically differing interests. Because determining whether the interests of the AIP and the Care Facility are "differing interests" raises questions of fact, such determination is beyond the jurisdiction of this Committee.

The Lawyer's Personal Financial Interests

15. Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner in a guardianship proceeding, or into which a Guardian might place the AIP, the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer.

Consent to Conflicts of Interest

16. If the court appointment as counsel for the AIP creates a differing interest conflict or a personal interest conflict under Rule 1.7(a), the next step is to determine whether the conflict is consentable under Rule 1.7(b), and, if so, whether the lawyer may obtain informed consent from both the Care Facility and the AIP.

17. The process of obtaining consent to a conflict under Rule 1.7(a) requires a lawyer to satisfy the four subparagraphs of Rule 1.7(b). Specifically, the lawyer must determine that (i) he or she can provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law, and (iii) the representation does not involve the assertion of a claim by the Care Facility against the AIP (or vice versa). Rule 1.7(b)(1), (2) and (3). Finally, each client must give "informed consent, confirmed in writing." Rule 1.7(b)(4). In N.Y. State 986, we applied Rule 1.7(b)(1)-(3), concluding that the inquirer could not represent both the AIP and his sister, who wished to be appointed guardian, because their positions as to the AIP's living arrangements were inconsistent. However, we did not reach the issue of consent.

18. In N.Y. State 836 (2010), we concluded that a conflict analogous to the one here was consentable. There, the lawyer had represented an incapacitated client in connection with the appointment of a guardian (one of the client's adult children). However, the client had subsequently been living independently and no longer needed a guardian. In addition, the guardian was planning to move across the country. Accordingly, the client and the guardian wanted the lawyer to represent them jointly in applying for termination of the guardianship. We noted that the interests of the client and the guardian were potentially differing, although we determined that the lawyer could reasonably believe that the lawyer could provide competent and diligent representation to both parties. Consequently, because the representation would not be adversarial and because the matter would be supervised by the court, we concluded that the conflict was consentable.

19. Before accepting a court appointment to represent the AIP in the proceeding here, the inquirer must obtain the informed consent of both the Care Facility and the AIP. Obtaining consent of the Care Facility ordinarily will not be problematical (even after explaining that the

lawyer's obligation is to provide diligent representation to the AIP). However, obtaining informed consent of the AIP is more complicated.

20. In N.Y. State 836 (2010), we discussed the ability of an AIP to give consent. We noted that a lawyer must take special care when obtaining consent from a person who may be, or has been deemed to be, incapacitated and under guardianship. This careful assessment was necessary because, if the client's capacity to make reasoned decisions was so diminished that the client could not give informed consent, then the lawyer could not satisfy the informed consent requirement of Rule 1.7(b)(4). There, however, we concluded that a client may consent to dual representation despite the possible determination of incapacity. We relied on Rule 1.14(a) (which directs the lawyer to maintain a conventional relationship with the client to the extent possible), on the Mental Hygiene Law (which states that an incapacitated person retains all powers and rights except those that are specifically granted to the Guardian), and on our opinion in N.Y. State 746 (2001) (which stated "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").

21. Because the inquirer needs to obtain consent before accepting a court appointment to act as counsel to an AIP where the lawyer's firm also represents the Care Facility in other matters, the lawyer should make sure that the court is aware that the firm represents the Care Facility in unrelated matters, and that the lawyer will need to obtain consent to a potential conflict from both the Care Facility and the AIP before proceeding.

CONCLUSION

A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

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