

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 12th day of April, 2023.

On March 10, 2023, came the Virginia State Bar, by Stephanie E. Grana, its President, and Cameron M. Rountree, its Executive Director, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1893.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1893 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1893. REPRESENTING CHILD WITH PARENT AS “NEXT FRIEND”

This legal ethics opinion addresses possible conflicts of interest that may arise when a parent, guardian, or other person as “next friend” engages a lawyer to represent a minor child.

QUESTIONS PRESENTED

1. Can the lawyer have a conflict of interest in representing the child if the parent’s directions, in the lawyer’s judgment, are not in the child’s best interest?
2. If the answer to Question 1 is “yes,” and a conflict does arise, may that conflict of interest be waived, and if so, how?

SHORT ANSWERS

1. Generally, no, there is no conflict of interest because the interests of the parent and the child are usually mutually aligned, and the parent’s fiduciary relationship with the child raises a presumption that the parent is acting in the child’s best interests.
2. If a conflict arises between the interests of the child and parent who is acting as “next friend,” the lawyer should petition the court to appoint a guardian ad litem to protect the child’s interests, or a different “next friend” to replace the parent, and must advise the parent to consult independent counsel.

APPLICABLE RULES AND LEGAL ETHICS OPINIONS

RULE 1.7. Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), 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 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 each affected client consents after consultation, and:

- (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) the consent from the client is memorialized in writing.

RULE 1.14. Client With Impairment

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Legal Ethics Opinions 786, 957, 1304, 1725 and 1762.

REPRESENTATION OF CHILD

Lawsuits filed on behalf of a minor child are brought in the name of the child by a “next friend,” typically the child’s parent(s) or guardian(s). Va. Code § 8.01-8. Nonetheless, the child, not the parent/“next friend,” is the real party in interest in such an action. *Herndon v. St. Mary’s Hospital, Inc.*, 266 Va. 472 (2003). When a lawsuit is filed on behalf of a minor child or a petition seeking court approval of a settlement of the minor child’s claim is filed, a guardian ad litem may be appointed by the court to represent the interests of the minor child pursuant to Virginia Code § 8.01-9. However, the statute further states that if an attorney is representing a person under disability, no guardian ad litem need be appointed.

The child is the real party in interest, but the lawyer must look to the child’s “next friend” to speak for and act on behalf of the minor child and to make decisions in the child’s best interests regarding the child’s claim against the tortfeasor. The parent as “next friend” is a fiduciary of the child and thus part of the child’s attorney-client relationship with the lawyer, however, the lawyer has no independent attorney-client relationship with the parent unless explicitly agreed to. The lawyer should communicate with the parent to ensure an understanding that the lawyer’s client is the child, not the parent, and the lawyer’s obligation is to the client.

For example, in a claim for a child’s personal injuries, the parent ordinarily has a lien for medical expenses incurred on behalf of the child, and unless the parent waives the lien, it may be paid out of the minor child’s recovery against the tortfeasor. Va. Code § 8.01-36. The lawyer is obligated to protect the parent’s interest once there is a successful recovery for the child, to the same extent as the lawyer would for any third party holding a lien against a settlement or recovery, but the lawyer does not represent the parent for recovery of their lien. *See* Rule 1.15(b)(4) and Cmt. [4].

POTENTIAL CONFLICTS BETWEEN PARENT/“NEXT FRIEND” AND CHILD

A conflict may arise when the parent, acting as “next friend,” directs and controls the lawyer’s representation in an unreasonable way that is detrimental to the best interests of the child. An example of this is if a parent, acting as “next friend,” unreasonably demands that the lawyer settle the child’s case for substantially less than what the lawyer believes is a realistic settlement amount, but for an amount that will fully satisfy the parent’s lien for medical expenses. Generally, however, the parent’s and child’s interests are not at odds because the

lawyer's goal is to pursue the maximum recovery for the child's tort claim from which third-party liens can be satisfied.

The committee believes that generally a lawyer may presume that the child's parent is acting in the best interests of the child even though the parent may have a lien on the settlement or recovery obtained on the child's case. This presumption may be relied upon until the lawyer has reason to believe that the parent is no longer placing the child's interests first. Maine Professional Ethics Comm'n Op. 154 (November 12, 1996):

This presumption is fundamental to the legal relationship between parents and children in our society. Failure to acknowledge this presumption would impose unacceptable costs on the resolution of disputes including the expense of obtaining and paying a guardian ad litem to act on behalf of the child throughout the case, a step that will usually disrupt family relationships and should not be required unless necessary to serve the best interests of the child.

While the committee acknowledges the presumption, a conflict between the parent and child may arise. The parent's lien may not be the only source of a potential conflict. The parent/"next friend" might act unreasonably in some other way or make decisions that conflict with the lawyer's professional judgment. The lawyer will have to examine the facts and circumstances on a case-by-case basis. Using the child's personal injury claim example, a lawyer may need to consider information such as the relationship between the parent and child; the value of the child's claim compared to the parent's lien and whether the parent has agreed to waive or reduce their lien; the age and maturity of the child; the amount of any available insurance proceeds or other financial resources to pay the claim and liens; the type/amount of reimbursement the parent is seeking; the responsibility of the parent in causing or contributing to the child's injuries; liability, and the respective positions and expectations of the parties. The committee recognizes that issues that may create a conflict may not be known at the outset, making it necessary for the lawyer to frequently reassess potential conflict throughout the representation. Moreover, if the "next friend" is not a parent or guardian but some other third party, the presumption discussed in the Maine ethics opinion does not apply.

CAN A CONFLICT BETWEEN PARENT/"NEXT FRIEND" AND THE CHILD BE CURED?

Turning to Question #2, if there is a conflict caused by the "next friend" directing the lawyer for their benefit rather than the best interests of the child, the lawyer must determine

whether the conflict can be cured with the informed consent of the client under Rule 1.7(b). The most essential requirement is that “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to [the] affected client” notwithstanding the conflict. Some conflicts are too great to be cured with informed consent, as Comment [19] to Rule 1.7 states:

A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.

Another problem for the lawyer in this hypothetical is the ability to obtain the client’s consent when his client is a minor. This committee has consistently opined that a minor cannot provide the consent required by provisions of the Rules of Professional Conduct. Legal Ethics Opinions 786, 957, 1304, 1725 and 1762. Thus, this attorney cannot obtain any required consent from the child.

If a conflict arises because the parent’s and child’s interests conflict, the lawyer cannot reasonably accept consent of the parent on behalf of the child. Assume, for example, that the parent acting as “next friend” directs the lawyer to settle the child’s case for an amount that is less than the lawyer believes is a reasonable settlement value for the child’s case, but that is sufficient to fully satisfy the parent’s lien. In that event, a conflict exists. The lawyer cannot reasonably accept consent of the parent on behalf of the child. The lawyer may seek appointment of a guardian ad litem to address the competing interests of the child and parent, or may seek judicial approval of the infant settlement, and must advise the parent to seek independent counsel. Alternatively, if the parent/“next friend” is acting unreasonably, the lawyer may petition a court to appoint a substitute “next friend.”

A Copy,

Teste:


Clerk