New York State Bar Association

Committee on Professional Ethics

Opinion 746 – 7/18/01

Topic: Representing incapacitated client; petitioning for appointment of guardian; attorney-in-fact under durable power of attorney; representation of oneself as attorney-in-fact/petitioner

Digest: Lawyer serving as client's attorney-in-fact may not petition for appointment of guardian without client's consent unless lawyer determines that client is incapacitated, that there is no practical alternative through use of power of attorney or otherwise to protect client's best interests, and that no one else is available to serve as petitioner. Subject to conflict of interest restrictions, lawyer may represent self in proceeding if client does not oppose petition and lawyer will not be a witness.

Code: DR 4-101, DR 5-101, DR 5-102(A), DR 5-105(A), DR 5-108(A), EC 7-11, EC 7-12

QUESTION

When an attorney, who has been named by a client as attorney-in-fact in a durable power of attorney, later determines the client is no longer competent to handle his or her own affairs, may the attorney petition for appointment of a guardian and, if so, may the attorney represent him- or herself (as petitioner) in the guardianship proceeding?

LEGAL BACKGROUND

Durable Power of Attorney

In 1975, the New York legislature amended the law relating to powers of attorney to permit the granting of a power which would remain in full force even after the grantor became incompetent.[1] This enables individuals to plan for the possibility of future disability by designating persons of their choice to manage their financial affairs.[2] This "durable" power was seen as a means of handling matters that might otherwise require the expense, delay, inconvenience and possible embarrassment of having a court appoint a guardian who might be unknown to the grantor. The statute provides a detailed form for the granting of a number of specific and general powers which vest the grantee with a virtually alter-ego status for the grantor. There are some limitations not pertinent to this opinion.[3] Although the power to retain an attorney in the future is not among the specific powers listed in the statutory form, neither does the statute specifically prohibit the retention of an attorney by the attorney-in-fact.

Guardianship under Article 81 of the Mental Hygiene Law

Article 81 of the Mental Hygiene Law was enacted in 1993. The statute allows for the judicial appointment of a legal guardian for one 's personal needs, property management or both,[4] when a person is incompetent to conduct his or her own affairs.[5] The statute contemplates a system which is tailored to meet the specific needs of the individual by taking into account the personal wishes, preferences and desires of the alleged incapacitated person. The guardian is to engage in the least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual.[6]

There is a two-pronged test to determine whether a guardian should be appointed. First, the court must consider all of the evidence, including the report of a "court evaluator," and the sufficiency and reliability of all available resources.[7] Included among the "resources" to be considered is a valid power

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1 N.Y. Gen. Oblig. Law §5-1501 *et seq.*.

2 1988 Recommendations of the Law Revision Commission.

3 The form does not authorize the making of medical or other health care decisions. N.Y. Gen. Oblig. Law §5-1501. Also, the agent cannot perform acts which, by their nature, by public policy or by contract, require personal performance. *Zaubler v. Picone*, 100 A.D.2d 620 (2d Dept 1984). Examples are voting and commencing a divorce action in behalf of the principal.

4 N.Y. Mental Hyg. Law § 81.02(a).

5 *Id.* §81.06, *et seq.*

6 *Id.* §81.01.

7 *Id.* §81.02(a).

of attorney.[8] Second, the individual must agree to the appointment or must be incapacitated.[9] A determination of incapacity must be based on clear and convincing evidence that the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability.[10]

A guardianship proceeding may be brought by one of seven different categories of persons or entities, including "a person otherwise concerned with the welfare of the person alleged to be incapacitated."[11] The court is authorized to award legal fees to the petitioner's counsel, payable from the assets of the incompetent individual.[12]

An attorney-in-fact is required to account to a later-appointed guardian during the continuance of the appointment, notwithstanding the durable nature of the power.[13] It is not clear from New York statutes whether the guardian has the power to revoke a durable power of attorney,[14] although the uncertainty is not germane to this inquiry. The differing and seemingly overlapping roles of the attorney-in-fact and Article 81 guardian cause some confusion, but the statute contemplates dismissal of a petition for appointment of a guardian where it is determined that the alleged incapacitated person had, in lucid times, carefully thought out and provided for how his or her affairs might be handled under such circumstances. The existence of a durable power of attorney can be a factor in such a dismissal.[15]

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8 *Id.* § 81.19(d). "In making any appointment under this article the court shall consider: 1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501 ... of the general obligations law..."

9 *Id.* § 81.02(a)(2).

10 *Id.* § 81.02 (b).

11 *Id.* §81.06(a)(1).

12 N.Y. Mental Hyg. Law § 81.16(f).

13 N.Y. Gen. Oblig. Law § 5-1505(2).

14 N.Y. Mental Hyg. Law § 81.22(b), prohibits a guardian from revoking a power granted under General Obligations Law §5-1501, but section 5-1505(2) provides that the guardian..."shall have the same power such principal would have had if he or she were not disabled or incompetent to *revoke, suspend or terminate all or any party of such power of attorney"* (emphasis added). At least one court has acknowledged the conflict. *See Rochester General Hospital (Levin)*, 158 Misc. 2d 522, 529 (S. Ct. Monroe Co. 1993).

15 *See, e.g., Matter of Crump (Parthe),* 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 850 (2d Dep't 1996) (alleged incapacitated person made valid power of attorney and health care proxy).

OPINION

May the attorney-in-fact petition for the appointment of a guardian?

For the reasons discussed below, the lawyer who serves as the client's attorney-in-fact may petition for the appointment of a guardian without the client's consent only if the lawyer determines that the client is incapacitated and that there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests.

Although no disciplinary rule of the Code expressly addresses the representation of an incapacitated client, the obligations of lawyers representing clients with questionable capacity are addressed by ECs 7-11[16] and 7-12.[17] Additional guidance is afforded by various opinions of bar association ethics committees in the state, *see, e.g.,* N.Y. City 1997-2; N.Y. City 1987-7; Nassau County 98-2, and in the secondary literature. *See, e.g.,* Nancy M. Maurer & Patricia W. Johnson, "Ethical Conflicts in Representing People With Questionable Capacity," in *Representing People With Disabilities* (N.Y.S. Bar Ass'n, 2d ed. 1997); Association of the Bar of the City of New York, Committee on Professional Responsibility, "A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients," 52 *The Record* 34 (1997) ("A Delicate Balance"). Additionally, guidance may be found in the literature on legal ethics outside New York. *See, e.g., Annotated Model Rules of Professional Conduct* ("*Annotated Model Rules*") 209-27 (4th ed. 1990) (annotation to Rule 1.14 of ABA Model Rules of Professional Conduct); Restatement (Third) of the Law, The Law Governing Lawyers ("Restatement"), §24 (2000). The following general principles emerge from this material.

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16 EC 7-11 provides: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, . . . Examples include the representation of an illiterate or an incompetent. . .."

17 EC 7-12 provides:

> Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

The lawyer-client relationship is an agency relationship that is ordinarily created by express or implied agreement between the lawyer and client. *See* Restatement, *supra,* §14. Therefore, the client must ordinarily have the capacity to enter into this agreement, *id.* §14, comment d, and to determine the objectives of the representation. *Cf.* EC 7-7; DR 7-101(A)(1). Under agency principles, a lawyer's authority to act for the client would ordinarily terminate upon the client's permanent, total incapacity as it would upon the client's death, but this is not invariably true. *See* Restatement, *supra*, §31, comment e. In court proceedings, for example, it may be appropriate for a lawyer to continue to represent the totally incapacitated client in order to protect his or her interests.[18]

In the course of representing a client, a lawyer generally "must provide independent, zealous and competent representation and must preserve the client's confidences in accordance with the provisions of the Code of Professional Responsibility." N.Y. City 1997-2. This is true even where, because of the client's age or mental condition, the client's ability to participate fully in making decisions relating to the representation is impaired. *Id.* When representing a client whose ability to make considered decisions is impaired, the lawyer "must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client." Restatement, *supra*, §24(1). This includes a responsibility to "maintain the flow of information and consultation as much as circumstances allow," including, where it will be helpful, through "the use of a relative, therapist, or other intermediary." *Id.* §24, comment c. Although the lawyer may accept direction from those who are legally authorized to direct the representation on behalf of the client, the lawyer's ultimate responsibility is to the client. *See* N.Y. State 371 (1975); *cf.* N.Y. State 698 (1998).

The lawyer's responsibilities may vary, however, depending on the client's age or mental condition. EC 7-11. Further, the lawyer may have additional responsibilities when "[a]ny mental or physical condition ... renders a client incapable of making a considered judgment on his or her own behalf," including a

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18 According to the Restatement:

> The general rule . . . may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of an incapacitated client. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation . . .. If representation were terminated automatically, no one could act for a client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority therefore does not terminate automatically in such circumstances, the lawyer must act in accordance with the principles of § 24 [dealing with a client with diminished capacity] in exercising continuing authority.
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> Restatement, *supra* § 31, comment e.

responsibility "in court proceedings to make decisions on behalf of the client." EC 7-12. The lawyer may not, however, "perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent." *Id.*[19]

As ECs 7-11 and 7-12 reflect, 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. When a client's capacity to make decisions is impaired, seeking to withdraw is generally seen as the least satisfactory response because doing so leaves the client without assistance when it is most needed. *See Annotated Model Rules, supra*, at 225 (citing authority). Seeking the appointment of a guardian or conservator over the client's objection is also generally to be avoided if possible. Often, notwithstanding his or her impairment, the client will be capable of making those decisions relating to the representation that are entrusted to the client. *See* Restatement, *supra*, §24 comment c ("Disabilities in making decisions vary...; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times"), *quoted with approval in* N.Y. City 1997-2. Even where the client is incapable of making necessary decisions, however, it will often be preferable not to seek the appointment of a guardian because doing so would be "embarrassing for the client," Restatement, *supra*, §24 comment b, or "too expensive, traumatic, or otherwise undesirable or impractical in the circumstances." *Id.* § 24 comment d.

Thus, seeking a guardian is appropriate only in the limited circumstances where "a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available." *Id.* §24 comment e. *Accord* "A Delicate Balance," *supra*, at 43 (noting "the almost universal view ... that guardianships, though occasionally necessary, are often quite onerous: they may drain the client's estate, result in protracted legal proceedings, and substitute the judgment of a total stranger for those of the client, the client's family, and the client's personal attorney"); ABA Formal Op. 96-404 (1996) ("The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic solutions are available."); Recommendations of the Conference on Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989, 991 (1994) (“Recommendations”) (“The lawyer should refer or petition for guardianship of the client only if there are no appropriate alternatives.”). In such drastic circumstances, notwithstanding the duty of confidentiality imposed by DR 4-101, the lawyer may reveal client confidences and secrets to the limited

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19 There is disagreement about the scope of this limitation; for example, authorities disagree as to whether or not, in a court proceeding, a lawyer may settle a case when the client lacks capacity to do so. Maurer & Johnson, *supra*, at 1-7 & n.41.

extent necessary to protect the client. *See* N.Y. City 1987-7 (1987) (when the client is unable to care for him- or herself or property because of alcoholism, and will face financial, if not personal, ruin as a result, the lawyer may disclose confidences to the court in seeking appointment of a conservator, but should seek the court's permission to do so in camera and under seal), *discussed in* Maurer & Johnson, *supra*, at 1-16.

When a question arises concerning the client's capacity, "[c]lients with disabilities should be presumed capable of making decisions and participating in the lawyer-client relationship." Maurer & Johnson, *supra*, at 1-9. In determining whether the client has the capacity to direct the representation, "the lawyer must take account not only of information and impressions derived from the lawyer's [communications with the client], but also of other relevant information that may reasonably be obtained, and the lawyer may in appropriate cases seek guidance from other professionals and concerned parties." N.Y. City 1997-2; *see generally* Recommendations, *supra*, 62 Fordham L. Rev. at 991.

In light of these general principles, it appears that seeking appointment of a guardian without the client's informed consent will be proper only if the lawyer believes the client is incapacitated, the lawyer cannot adequately protect the client's interests by using the power granted in the durable power of attorney, and there is no other practical alternative that is less restrictive. *See* Recommendations, *supra*, 62 Fordham L. Rev. at 991 (recommending the following as examples of protective actions that the lawyer may take as a preferable alternative to petitioning for guardianship the following: involving family members, use of durable powers of attorney, use of revocable trusts, referral to private care management, referral to long-term care ombudsman, use of care and support systems, referral to disability support groups, and referral to social services or other government agencies). As discussed above, Article 81 favors the least intrusive intervention available to meet the personal and financial needs of a person alleged to be incapacitated; in fact, courts construing that statute have penalized persons for bringing frivolous Article 81 petitions when other resources could be used to meet the client's needs.[20] Assuming that the client has sufficient assets and a valid power of attorney, the holder of the power of attorney may be able to meet the personal and financial needs of the incapacitated client by hiring necessary personnel to care for those needs, including taking the step of applying for admission to a nursing home under the broad powers of the durable power of attorney.[21] Absent sufficient assets, public

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20 See, for example, *Matter of Crump (Parthe),* 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 2d 950 (2d Dep't 1996), where the court ordered the earlier appointed guardian to return the property to the alleged incapacitated person and required the petitioner to pay the guardian's compensation, her own legal fees, the fees of the court evaluator and those of her expert. The court found that the alleged incapacitated person had sufficient assets and valid durable power of attorney and health care proxy.

21 *Cf. Matter of Maher*, 207 A.D. 2d 133 (2d Dept 1994) (affirming trial court's determination that there was no need for an appointed guardian for property management pursuant to

assistance may be brought to bear in the process of applying for admission to a nursing home. If there is no valid health care proxy, there is a provision in the statute to bring a proceeding for the appointment of a limited guardian to handle the health care needs of the person whose needs are at issue.[22] In sum, the appointment of a guardian should be sought only where necessary and, in many situations, the lawyer's ability to continue to exercise the power of attorney will make the appointment of a guardian unnecessary.

Finally, even if petitioning for appointment of a guardian is warranted, the lawyer who serves as both lawyer and attorney-in-fact for the client is not necessarily the preferable person to serve in the additional role as petitioner under Article 81. Rather, unless the client consents, "[t]he lawyer should act as petitioner only of there is no one else available to act." Recommendations, *supra*, 62 Fordham L. Rev. at 991. Thus, the lawyer should initially ascertain whether a family member, friend, or other concerned individual is available to serve in that role.

May the attorney represent him- or herself as petitioner in the guardianship proceeding?

If the lawyer currently represents the client, and the client opposes the appointment of a guardian, then the lawyer may not also represent him- or herself (or anyone else) as petitioner in an Article 81 proceeding. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest under DR 5-105(A). Indeed, in that event, the client might well expect to receive the attorney's assistance in *opposing* the guardianship petition. Even if the alleged incapacitated person was formerly a client but is no longer one, if he or she objects to the appointment of a guardian the lawyer may be barred by DR 5-108(A) from representing him- or herself (or anyone else) as petitioner, since the current representation would likely be adverse to a former client in a matter substantially related to the subject of the former representation. In that event, as attorney-in-fact, the lawyer should retain separate counsel to process the Article 81 matter.

If the client does not object to appointment of a guardian, the attorney may be forbidden from serving as a lawyer in the guardianship proceeding if there will be a contested hearing under Article 81 on the issue of client incompetence and it is obvious that the attorney would be called as a *witness* in the Article 81 hearing on that issue. In that event, too, the lawyer should retain separate counsel to process the Article 81 matter. DR 5-102(A); N.Y. State 635 (1992).

Article 81, because the allegedly incapacitated person's attorney had the client's power of attorney).

22 N.Y. Mental Hyg. Law §81.22 (a)(8).

If the client does not oppose the guardianship petition and the lawyer will not serve as a witness, then we are aware of no categorical ethical restriction against the attorney-in-fact representing him- or herself as petitioner in the Article 81 proceeding. Although serving in the dual role means that there is no independent individual client to whom the lawyer is accountable, given other safeguards, we do not believe that this in itself makes the dual role impermissible. For example, while there is an absence of accountability (when an attorney-in-fact hires him- or herself) concerning the extent of attorney fees in processing the Article 81 matter, the court will oversee the reasonableness of such fees. Mental Hygiene Law Sec. 81.16 (f) ("...court may award reasonable compensation for the attorney for the petitioner..."). While there would also be an absence of client scrutiny of the attorney's conduct when the petitioner in the proceeding is not another competent person or entity,[23] once the petition is presented, the court must appoint a "court evaluator," whose duties include consulting with the person alleged to be incapacitated, determining whether the person wishes separate legal counsel, investigating and reporting to the court as to the nature of the incapacity and what action should be taken.[24]

The lawyer must consider whether the lawyer's own interests, including any interests arising out of the role as attorney-in-fact, may reasonably affect the lawyer's exercise of professional judgment as lawyer in the Article 81 proceeding, in which event there may be an impermissible conflict of interest under DR 5-101. However, we conclude that when one petitions under Article 81 in one's role as attorney-in-fact, the dual role as attorney-in-fact and lawyer for oneself as attorney-in-fact does not give rise to a conflict *per se*. Although we are unaware of any prior ethics opinions precisely on point, we note that, in other contexts, lawyers have been permitted to serve in a fiduciary capacity and, at the same time, to represent themselves as fiduciaries. *See, e.g.*, N.Y. State 610 (1990) (observing that "it is not improper under the Code for a lawyer-draftsman to serve as executor of a will so long as the decision to nominate the attorney is the product of the client's own free will."); N.Y. State 471 (1977) (opining that it would be ethically proper for an attorney to serve as a receiver in a mortgage foreclosure action and retain the attorney's firm as counsel for the action). Moreover, although this committee cannot offer opinions on questions of law, we note that we are unaware of any legal restraint on a person holding both attorney-in-fact and attorney at law roles.[25]

Finally, as a matter of sound practice, this problem should be considered and addressed with the client at the time the power of attorney is drafted. Ideally, the lawyer and client will make provisions concerning the client's future

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23 The proceeding may be brought by seven different categories of persons or entities, including "the person alleged to be incapacitated", or "a person otherwise concerned with the welfare of the person alleged to be incapacitated." Entities include the department of social services, a hospital, a school, and a residential health care facility. *Id.* §81.06.

24 *Id.* §81.09.

25 2A N.Y. Jur. 2d §19, citing *Ginsberg. v. Brody*, 185 N.Y.S. 46 (N.Y. App. Term 1920).

incapacity, including the possible need to retain counsel for an Article 81 proceeding and whether the attorney will serve as counsel in the proceeding.[26]

CONCLUSION

A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that the client is incapacitated; there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests; and there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent him- or herself in the proceeding.

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26 One can add provisions to the statutory form of durable power of attorney if they are not inconsistent with other provisions of the statutory short form. N.Y. Gen. Oblig. Law §5-1503. While the naming of an attorney to conduct an Article 81 proceeding is not included in the specified powers, it would not be inconsistent with those powers.