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New York State Bar Association
Committee on Professional Ethics

Opinion 1069 (8/19/15)

Topic: Conflict of interest; simultaneous representation.

Digest: Despite the potential for conflict, a lawyer who represents an immigrant child in federal administrative removal proceedings may simultaneously represent the proposed guardian in a state family court proceeding provided that the lawyer reasonably believes he can competently and diligently represent both clients simultaneously, and the lawyer obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

Rules 1.0(e), (f) & (j), 1.7(a) & (b), 1.14, 4.2, 4.3

Modifies: N.Y. State 274 (1972), N.Y. State 256 (1972)

FACTS

1. A lawyer represents an immigrant child (the "child") in administrative removal proceedings before a federal Immigration Judge in New York. The object of this representation is to prevent the child from being deported to the child's country of origin.

2. To prevent the child's deportation, the lawyer is assisting the child in pursuing a form of relief from removal known as Special Immigrant Juvenile Status ("SIJS"), defined under 8 U.S.C. § 1101(a)(27)(J)(i)-(iii)(2009).[1] The statute provides that an immigrant who is present in the United States and is under the age of 21 and unmarried can achieve lawful permanent residency by fulfilling the following requirements:

- the immigrant has been declared dependent on a juvenile court located in the United States;
- administrative or judicial proceedings have determined that

[1] Avoiding deportation is not the only reason for applying for SIJS status. Without legal immigration status, the immigrant-minor cannot receive working papers, and is ineligible for college financial aid and other government benefits.

- reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; and

- it would not be in the immigrant's best interest to be returned to the immigrant's or parent's previous country of nationality or country of last habitual residence.

3. In New York, the most common way to have a child declared "dependent on a juvenile court" and to seek an administrative or judicial determination on the SIJS requirements of "reunification" and "immigrant's best interest" is to file a petition pursuant to Article 6 of the New York Family Court Act proposing the appointment of a guardian. The proposed guardian may be a relative, family friend, or anyone who is willing to care for the child and look out for the child's best interests until the child has reached the age of twenty-one. The proposed guardian often is already the caretaker for the child, but needs a court order to have complete control over the care and best interests of the child. *See In Re Diaz v. Munoz*, 118 A.D.3d 989, 990-991, 989 N.Y.S.2d 52, 54 (2d Dep't 2014).

4. When a proposed guardian retains a lawyer, the lawyer assists the proposed guardian by advising in the preparation of the Family Court petition, filing the petition and other required documentation with the Family Court, and representing the proposed guardian during the Family Court proceedings. The Family Court proceedings often require testimony from both the proposed guardian and the child. The testimony typically revolves around whether the proposed guardian is suitable to be appointed as the guardian.

5. During the guardianship proceedings, the proposed guardian is potentially adverse to the child's parent(s). The proposed guardian is seeking to gain control over decision-making for the child, while the child's parents will be giving up their parental rights. In these proceedings the child is called the "subject child," and is not considered an adverse party. However, the child's interests may be inconsistent with those of the parents or the proposed guardian, or both. To protect the interests of the child, the Court will sometimes appoint an attorney for the child.

6. After the Family Court decides whether to appoint the proposed guardian, the guardian (if the guardian has been approved) or the appointed lawyer for the child (whether or not the guardian has been approved) may make a motion to the Family Court to request a determination called "Special Findings" regarding the child's eligibility for SIJS. If the Family Court determines that the child meets the statutory requirements, the court will issue an Order of Special Findings.

7. After the Family Court proceedings have concluded, the lawyer representing the child before the federal Immigration Judge then takes the final Order of Guardianship and Order of Special Findings from the Family Court and files Form I-360 (Petition for Special Immigrant) with U.S. Citizenship and Immigration Services ("USCIS"), a branch of the Department of Homeland Security. If the application is approved by USCIS, the child will receive lawful permanent residency in the United States and the administrative removal proceedings will be terminated.

QUESTION

8. May a lawyer who represents a child in an administrative removal proceeding in federal Immigration Court act as the lawyer for a proposed guardian of the child in an Article 6 guardianship proceeding in New York Family Court?

OPINION

9. The focus of the question is whether representing both the proposed guardian in Family Court and the child in Immigration Court would create an impermissible conflict of interest. Conflicts of interest with current clients are governed by Rule 1.7, which provides:

> (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.

10. The issues raised under this inquiry are therefore (1) whether representing the child in one proceeding and the prospective guardian in another would involve the lawyer in representing "differing interests" and, if so, (2) whether the lawyer "reasonably believes" the lawyer can "provide competent and diligent representation" to each client (the child and the proposed guardian), and, if so, (3) whether it is possible to obtain informed consent from the child, who is a minor.

Would the Lawyer be Representing "Differing Interests"?

11. Under the definition of "differing interests" in Rule 1.0(f), "differing interests" include "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." Differing interests can arise even if the lawyer does not represent the guardian and the child in the same proceeding.

12. Differing interests may arise in many ways. For example, if the child does not want a guardian appointed, or if the child wants someone other than the proposed guardian to be appointed, then differing interests exist between the child and the proposed guardian, and the lawyer has a conflict of interest under Rule 1.7(a)(1).

13. In many guardianship proceedings, however, we understand that the child and the proposed guardian will share a common goal – the child wishes to have the proposed guardian appointed by the court in order to help defend the immigration proceeding[2] and the proposed guardian desires to be the legally appointed guardian for the child. However, despite the common goal, the child and the proposed guardian may have differing interests that would adversely affect the lawyer's professional judgment.

14. For example, one potential source of conflict is that the Family Court may require an investigation of the guardian, including the guardian's relationship with the child, the guardian's criminal history, and any allegations of abuse. It is in the child's best interest for this investigation to be thorough, whereas the proposed guardian my want to limit the investigation. Another potential source of conflict is that, as counsel to the guardian, the lawyer needs to advise the guardian of the legal responsibilities that accompany guardianship (e.g. potential responsibility for the costs of the child's health care, or potential liability for damages if the child vandalizes the property of others). The child may want the lawyer to downplay the risks so that the proposed guardian does not become frightened and back out, whereas the proposed guardian presumably wants to understand all of the risks in light of his or her own personal and financial circumstances.

15. In some cases, a reasonable lawyer may conclude that differing interests do not exist (for example, if the proposed guardian has been caring for the child for a long time, and both the child and the proposed guardian want to formalize the existing relationship by obtaining a court appointment for the guardian). Even when the interests of the guardian and the child appear to be consistent, circumstances may change. The family court proceeding currently appears to be one undertaken to advance the child's interests in the federal immigration proceeding. However, this proceeding involves factors upon which the child may have strong and changeable opinions -- in particular, allegations of abuse, neglect, abandonment, or similar conduct, against one or both of the child's parents. The possibility of a desired change of course in the future by a child cannot be dismissed out of hand. The lawyer thus must be sensitive to changes that might create differing interests. Such potential changes will be addressed if the family court appoints separate counsel for the child in the family court proceeding.

16. In N.Y. State 836 (2010), we addressed whether a single lawyer could represent both an incapacitated person and his guardian in a proceeding to terminate the guardianship. The attorney had previously represented the incapacitated person (then an "alleged incapacitated person") in connection with the appointment of a guardian. At the time of the inquiry, the

[2] The lawyer must determine that this is truly the child's wish. The lawyer may not substitute his or her judgment for that of the child. See N.Y.S.B.A. Standards, *infra*, ¶ 26.

parties' interests seemed to be aligned, since both parties said they believed that the guardianship should be terminated. However, we expressed a concern that the guardian might be seeking to escape the responsibilities of the guardianship because he wished to move across the country, even though the incapacitated person would be better served by continuing the guardianship. Consequently, we determined that, in order to undertake the joint representation, the lawyer had to meet the conditions of Rule 1.7(b). We opined that the lawyer could reasonably conclude that he could provide competent and diligent representation to both parties, and that the lawyer could therefore undertake the dual representation, as long as he obtained informed consent from each client, confirmed in writing. Finally, in N.Y. State 836, we warned that obtaining informed consent would require the lawyer to fully inform each party of the possible risks of the dual representation.

17. We reach the same conclusion in this opinion that we did in N.Y. State 836, *i.e.* in many cases representing the immigrant-child and the prospective guardian will involve representing potentially differing interests, and the lawyer must consider whether he or she can adequately represent both and obtain informed consent.

18. If the inquirer here believes he can adequately represent both the prospective guardian in the family court proceeding and the child in the immigration proceeding, then, in order to undertake the joint representation, the lawyer must comply with the conditions of Rule 1.7(b), including obtaining the consent of both clients, confirmed in writing.

19. We note that some courts and advocacy groups believe that the lawyer should not represent both the guardian and the child in the same proceeding. See *Special Immigrant Juvenile Status, A Step-By-Step Guide for Safe Passage Project Volunteer Attorneys* (Updated November 23, 2014) ("*Safe Passage Project Guide"*)[3] (taking the position that the same attorney cannot represent both the prospective guardian and the child in the state court guardianship proceeding);[4] Westchester County Family Court, "Frequently Asked Questions" regarding SIJS-

[3] The Safe Passage Project is a 26 U.S.C. § 501(c)(3) not-for-profit corporation housed within New York Law School, which trains pro bono attorneys to represent children in need of immigration assistance. *Safe Passage Project Guide*, p. 5.

[4] The Safe Passage Project Guide states recommends only representing the child, and helping the guardian to fill out certain forms: "It is important to understand is [sic] that you, as an attorney, do not represent the proposed guardian in this proceeding. However, you should talk to the proposed guardian about the process, assist him or her in filling out the paperwork, and discuss what to expect when filing the petition and appearing in Family Court. Nonetheless, the proposed guardian is not your client. If you would like to represent the proposed guardian in the family court proceedings you can choose to do so but you will not be able to represent the youth in the family court. An attorney will be appointed for the youth. But note that you may find your communication and access to the youth is now severely restricted because you will have to communicate through the attorney for the child. We recommend that you remain solely counsel for the youth." Safe Passage Project Guide at p. 19. We note, without opining on the applicability here, that Rule 4.3 prohibits a lawyer from giving legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

related guardianship applications, available on the website of the Office of Court Administration (Court views representation of both the child and the guardian as a conflict of interest. Lawyer for child may assist the guardian in preparing the petition for guardianship, but cannot represent both child and guardian in the guardianship proceeding.[5]). While these groups and courts may believe that it is best practice for the lawyer not to represent both the child and the guardian, and while the conditions in Rule 1.7 may be difficult to meet, the only *per se* conflict of interest in Rule 1.7 is that in subparagraph (b)(3), which prohibits a lawyer from representing a client who has a claim against another client the lawyer represents in the same proceeding before a tribunal. Representing the child and the guardian does not fall under that *per se* prohibition; thus the simultaneous representation of the child and the guardian is non-consentable only if it falls under subparagraph (b)(1). This opinion applies in those situations where the lawyer can meet the conditions in Rule 1.7(b)(1), and sets forth additional requirements that apply because the child is a client with "diminished capacity" In our view, if the child has a separate lawyer for the guardianship proceeding, then the impact of any differing interests will be diminished, and a reasonable lawyer could conclude that the lawyer can provide competent and diligent representation to the proposed guardian in the Family Court and to the immigrant-child in the Immigration Court. However, if such representation violated any court rules, it might violate Rule 8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

May a Minor Consent to a Conflict of Interest?

20. Some of our older opinions concluded that a minor cannot consent to dual representation. *See* N.Y. State 274 (1972) (consent cannot be obtained where one of the parties is an infant); N.Y. State 256 (1972) (an infant cannot consent to dual representation, so if a conflict of interest exists, then dual representation would violate DR 5-101(A)). The opinions do not explain why a minor cannot give consent. Presumably, the principle stems from an assumption that a child does not have the ability to make reasoned decisions. We do not give opinions on matters of law, but we understand that consent by a minor may be voidable at the request of the minor. This is no different from other advance consents to conflicts under the Rules. *See* Rule 1.7, Cmt. [21] (client who has consented to a conflict may revoke the consent and terminate the lawyer's representation at any time).

21. Nevertheless, when the Rules were adopted in 2009, they included, for the first time, special provisions on clients with "diminished capacity," including as a result of minority. *See*

[5] The questions include whether the lawyer may represent the child and prepare the petition on behalf of the proposed guardian. This apparently refers to dual representation in the guardianship proceeding and not to simultaneous representation of the child in the immigration proceeding and the guardian in the family court proceeding. The court answers that it views representation of both the child and the guardian as a conflict of interest: "Although it may be a practice or service of your organization to assist the guardian in preparing the petition for guardianship, you cannot represent both parties. You must make it clear to the Court who you are representing. Therefore, the Court will always assign an attorney for the subject child from the attorneys for children panel. If you choose to act as co-counsel with such attorney, an attorney for the proposed guardian will be assigned."

Rule 1.14. Rule 1.14 does not assume that a child cannot consent to conflicts. *See, e.g.* Cmt. [1] ("When the client is a minor . . . maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being."); Comment [4] ("whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.")

22. In N.Y. State 836 ¶¶ 11-12 (2010), we concluded that the lawyer could obtain consent from the incapacitated person to a dual representation if such person could make a reasoned decision to consent. We said:

> 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 [of] our Rules of Professional Conduct, our prior opinion in N.Y. State 746, and New York's Mental Hygiene Law -- 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.

[Footnotes and paragraph numbers omitted.]

23. Similarly, in N.Y. State 1059 (2015), where we were considering whether a lawyer may disclose certain confidential information of an unaccompanied child, we held that a minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. Nevertheless, we warned that it may not be possible for all children to give consent:

> First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with "verbal minors ages twelve or older who affirmatively seek a lawyer's assistance" that such clients "generally will be capable of making considered judgments concerning the representation." N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is "a rebuttable presumption that children above the age of twelve are competent"). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United

States.

24. We stressed in that opinion that the lawyer must make full disclosure of information adequate for the child to make an informed decision, and must adequately explain the material risks of the proposed course of conduct and reasonably available alternatives. We also advised that the extent of the information needed and risks to be addressed would vary both with the nature of the information being disclosed and the sophistication of the child. Finally, we warned that the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element of submissiveness on the part of their indigent clients," and such requests should be made only under circumstances where the lawyer is satisfied that the client could refuse to consent without any sense of guilt or embarrassment.

25. We are aware of a number of opinions of New York courts holding that a child may not consent to dual representations. *See, e.g. Key v. Arrow Limo Inc*., 2014 W.L. 3583893 (Sup. Ct., Kings Co. 2014); *Christie v. Kramer*, 2012 WL 5898054 (Sup. Ct., Kings Co. 2012). However, these cases involve whether a lawyer may represent both a parent-driver and a child involved in an automobile accident, under circumstances where the lawyer will have to sue the parent on behalf of the child (to benefit from the parent's auto insurance policy) or waive the right to sue the parent. In such cases, the courts have found that the differing interests of the parent and child are so severe that the conflict of interest is non-consentable. We do not believe such is the case here.

26. Even before the adoption of Rule 1.14, the courts recognized the ability of children to make decisions affecting their own interests. In 2007 the Chief Judge of New York made it clear that unless a child is incapable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious harm, the attorney must not "substitute judgment" in determining and advocating the child's position, even if the attorney believes that what the child wants is not in the child's best interests. Rules of the Chief Judge, § 7.2. *See* NYSBA Standards for Attorneys Representing Children in New York Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings (2014) at p. 46:

> The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, each child should be assessed individually to determine if he or she has the capacity to make decisions that bind the attorney with respect to fundamental issues such as whether the child wishes to be adopted.

27. The same analysis applies here. The lawyer must assess whether the child has the capacity to make a reasoned decision regarding the potential conflict. Comment [6] to Rule 1.14 advises that the lawyer should consider and balance such factors as (i) the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and (ii) the consistence of a decision with known long-term commitments and values of the client. With a child, the age of the child will also be a factor. If the lawyer concludes that the immigrant-child is capable of making a reasoned decision, the lawyer must provide the child with information and explanations suitable to the child's level of understanding.

CONCLUSION

28. A lawyer who represents an immigrant child in a federal administrative removal proceeding may simultaneously represent a proposed guardian in a state Family Court proceeding provided the lawyer reasonably believes he can competently and diligently represent both clients, and obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

[10-15]