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New York State Bar Association
Committee on Professional Ethics

Opinion 1083 (1/21/16)

Topic: Conflict of interest; differing interests

Digest: A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim (*e.g*. regarding quality of care issues) by the guardian against a nursing home that is represented by the inquirer's firm in the matter, the firm could not represent both the guardian and the nursing home, because the conflict would be non-consentable.

Rules: Rules 1.0(f), 1.7(a) & (b), 1.9(a), 1.10(a), 8.4(c).

FACTS

1. The inquirer is a member of a law firm that represents many nursing home clients. The inquirer proposes to form a nonprofit organization (the "Nonprofit") to accept judicial guardianship appointments for low-asset, long-term nursing home residents ("Incapacitated Persons" or "IPs") who lack the necessary capacity to authorize release of the financial records that are needed to document their eligibility for Medicaid, who do not have family members or others holding a power of attorney to manage the Medicaid application process, and who might be at risk of discharge from the facility for non-payment.[1]

2. The inquirer states that the nonprofit organization would be independent from the inquirer's law firm. Neither the inquirer nor any lawyer or employee in the inquirer's firm would be officers, directors or employees of the Nonprofit. The Nonprofit would be staffed by an administrator, who would oversee the Nonprofit's financial obligations. The Nonprofit also would partner with schools or community organizations that could provide social workers or social work students to perform on-site visits with Incapacitated Persons.

3. The inquirer's representation regarding the Nonprofit's independence from the inquirer's law firm is critical to our analysis. Based on that representation, we assume that the Nonprofit's board of directors, its administrator and its staff will not be controlled, directly or indirectly, by the law firm or any of the firm's nursing home clients and that the employees and agents of the Nonprofit will always act in what they perceive to be the best interests of the Nonprofit and those IP clients for whom it serves as guardian, regardless of the impact their actions might have upon the inquirer's law firm or its nursing home clients.

[1] A not-for-profit corporation organized to act as guardian is eligible for such appointment. *See* Mental Hygiene Law, §81.19.

4. The inquirer states that the petitioner seeking the appointment of a guardian for an Incapacitated Person would be the nursing home where the IP resides. The inquirer's firm would represent the nursing home in seeking appointment of a guardian and be paid by the nursing home for that representation.

5. Guardianships may involve two type of responsibilities – guardianship for property management or guardianship to provide for personal needs. As either property management or personal needs guardian, the guardian must act with the utmost care and diligence and the utmost degree of trust, loyalty and fidelity in relation to the IP.[2]

6. Where the incapacitated person has assets, the Mental Hygiene Law gives the property management guardian a number of powers regarding the management of the IP's property.[3] The property management guardian also has the power to apply for government benefits and to authorize access to or release of confidential records. Access to the IP's financial records is necessary to document that the IP meets the income and asset eligibility requirements for Medicaid benefits in connection with an application to the County Department of Social Services ("DSS") for such benefits.

7. Personal needs guardianship involves providing for the personal needs of the IP, including determining who shall provide personal care or assistance to the IP, choosing the IP's place of abode and making health care decisions where there is no health care proxy.[4] The guardian must visit the IP at least four times a year.

8. The inquirer states that the nursing home petitioner would not "nominate" the Nonprofit as guardian, but would "make the judge aware" that the Nonprofit is available to act as guardian. The Nonprofit would charge the nursing home petitioner a one-time flat fee for accepting an appointment to serve as property management and personal needs guardian for the IP. The fee would be based on the anticipated cost of securing a payment source for the IP's nursing home care (primarily the fees due to the law firm retained to prepare the Medicaid application) plus an amount estimated to be necessary to cover the cost of addressing personal needs issues.

9. We assume that the law firm will advise the judge of the capabilities of the Nonprofit and of potential conflicts of interest between the petitioning nursing home and the Nonprofit, including (i) the Nonprofit's capabilities to act as personal needs guardian, and (ii) how the proposed fee structure provides for personal needs issues. *See* Rule 8.4(c) (a lawyer or law firm shall not engage in conduct involving deceit or misrepresentation).

10. If the Nonprofit is appointed property management guardian, it might opt to, but would

[2] *See* Mental Hygiene Law § 81.20

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[3] *See* Mental Hygiene Law § 81.21

[4] *See* Mental Hygiene Law § 81.22

not be required to, hire the inquirer's law firm to prepare and file the IP's application to the DSS for Medicaid benefits.

11. The inquirer identifies three reasons for forming the Nonprofit – one practical and two financial. The practical reason, the inquirer states, is that guardianship judges have complained that they have difficulty finding persons who will accept guardianship appointments in low-asset cases, and the appointments therefore are being made to non-profit organizations. According to the inquirer, the nonprofit organizations accepting such appointments in the inquirer's geographic practice area often do not have the staffing or expertise to fulfill their duties to successfully prosecute a Medicaid application. In these cases, the burden and expense of securing Medicaid funding falls to the nursing home where the IP resides, while the designated non-profit guardian receives court-awarded guardianship fees for performing little or no work.

12. The financial reasons both stem from the negative economic effects on the inquirer's nursing home clients that result from the current financing system. The first arises from the way the DSS is required to treat, for the purpose of establishing an IP's Medicaid budget, the monthly payment amounts typically awarded to non-profit organization guardians that are paid out of the IP's Social Security benefit payments. Medicaid recipients in nursing homes are responsible for paying the nursing home a certain amount of the nursing home costs each month out of their income, usually out of the monthly Social Security benefit. This amount is termed the recipient's Net Available Monthly Income (NAMI). Medicaid benefits are paid to the nursing home in an amount equal to the difference between the facility's approved Medicaid rate and the NAMI amount. However, the DSS does not disregard guardianship fees that are paid out of the IP's Social Security benefits in determining the Medicaid budget. According to the inquirer, the monthly guardian's fee is typically $450. Thus, on an annualized basis, the nursing home may receive $5,400 (i.e. 12 x $450) less for an IP for whom a guardian has been appointed, compared to nursing home residents whose cost of care is being paid by Medicaid but who do not have guardians.

13. The second financial reason is that, according to the inquirer, where a nonprofit organization guardian is appointed, the social security benefit payment and other income is often paid directly to the non-profit organization, so that it may deduct its monthly court-awarded fee. The non-profit organization is then expected to remit the balance to the nursing home. However, many of the existing non-profit organizations accepting guardianship appointments often fail to pay over or are late in paying over the excess to the nursing home, to the home's financial detriment.

QUESTIONS

14. If the Nonprofit were appointed property management guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the inquiring lawyer or the lawyer's firm accept an engagement from the Nonprofit to prepare and file the Medicaid application for an Incapacitated Person? Does the fact that the inquirer formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

15. If the Nonprofit were appointed personal needs guardian for an Incapacitated Person who is a resident of a nursing home represented by the inquirer's firm, could the Inquirer's firm represent the Nonprofit? Would the fact that the firm formed the Nonprofit or regularly represents the nursing home constitute a conflict of interest?

OPINION

16. The jurisdiction of our Committee is to interpret the New York Rules of Professional Conduct (the "Rules") as they apply to the conduct of lawyers. We therefore make no determinations here on whether the Nonprofit meets the requirements of the Mental Hygiene Law for a guardian of IPs, the provisions of the tax law governing not-for-profits, including their eligibility to receive and retain non-profit status under the Internal Revenue Code, or the provisions of any business corporation law with respect to the governance of the Nonprofit.

Conflicts of Interest

17. The principal conflict rule in the New York Rules of Professional Conduct (the "Rules") governing concurrent representations is Rule 1.7. Rule 1.7(a) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
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> (1) the representation will involve the lawyer in representing differing interests; or
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> (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.

18. 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." Comment [8] to Rule 1.7 explains the meaning of "differing interests":

> [8] 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 conflict in effect forecloses alternatives that would otherwise be available to the client. 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 the client.

Moreover, differing interests can arise even if the lawyer does not represent the two clients in the same proceeding. *See* Rule 1.7, Cmt. [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").

19. Finally, while lawyers are associated in a firm none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a).

20. We assume for purposes of this opinion that each of the inquirer's nursing home clients is a continuing client. Once the inquirer forms the Nonprofit, if the inquirer continues to represent the Nonprofit, the Nonprofit and the nursing homes will be concurrent clients. Similarly, once the Nonprofit has been formed, if the Nonprofit has been named guardian and the Nonprofit seeks to hire the inquirer's firm to prepare a Medicaid application or to pursue matters involving personal care, the Nonprofit and the nursing home would be concurrent clients.

21. If the Nonprofit has not selected the law firm to prepare the Medicaid application, and if the law firm were to do no other work for the Nonprofit, then the Nonprofit would be a former client. The lawyer's ethical duties to a former client are found in Rule 1.9(a), which prohibits a lawyer who formerly has represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing. For example, another client would have a substantially related matter if the other client sought to challenge the creation or tax exemption of the Nonprofit.

The Formation of the Nonprofit

22. As we understand the inquiry, in forming the Nonprofit, the law firm is acting on its own and not on behalf of a client. Consequently the terms of Rule 1.7(a)(1) and 1.9 do not apply. If the firm were construed to be representing the to-be-formed organization, then such Rules would apply. *See* Scope ¶ [9] ("Whether a client-lawyer relationship exists for any specific purpose can depend in the circumstances and may be a question of fact.").

23. If the law firm has no client in connection with the formation of the Nonprofit, or if the Nonprofit is its only client, the issue under Rule 1.7(a)(2) is whether there is a significant risk the lawyer's representation of the Nonprofit would be adversely affected by the lawyer's interest in remaining in the good graces of his or her nursing home clients. Since we accept the inquirer's representation that the creation of the Nonprofit would be in the interest of nursing home clients, such risk does not arise.

24. It is possible that the law firm could be deemed to be acting on behalf of a nursing home client in forming the Nonprofit. Although the inquirer states that the law firm is acting solely on a pro bono basis in forming the Nonprofit, the objective of forming the Nonprofit is, at least in part, to benefit financially the firm's nursing home clients. If the law firm is deemed to represent

one or more nursing home clients in the formation of the Nonprofit, the issue under Rule 1.7(a) would be whether representing one nursing home client in the formation of the Nonprofit and representing other nursing home clients in other matters constituted representation of interests that are "differing." See Rule 1.0(f) (definition of "differing interests"). While this is a question of fact, it seems unlikely that representing one client in the formation of the Nonprofit would involve differing interests from those of the firm's other clients.

Representation of the Nonprofit in Property Guardianship Matters

25. If the law firm is asked to represent the Nonprofit in connection with property management guardianship matters involving a resident of a nursing home represented by the law firm, including preparing and filing a Medicaid application, there is a potential conflict under Rule 1.7(a)(1), in that a reasonable lawyer might conclude that the representation involves the law firm in representing differing interests. The guardian of an incapacitated person must act in the best interests of the incapacitated person, whereas the nursing home may have financial interests that differ from those of the incapacitated person. Whether a reasonable lawyer might so conclude will clearly depend on the factual circumstances. If the IP has limited assets, *e.g.*, below the Medicaid threshold, the interests of the resident and the nursing home in the appointment of a guardian and the successful completion of a Medicaid application would seem to be the same. *See* N.Y. State 1046 (2015) (the interests of the incapacitated person and the care facility are not always differing).[5] Ultimately, however, the question whether there are differing interests is one of fact that is beyond the jurisdiction of this Committee.

26. Even if there were no differing interests in the matter, there is still a question of whether the lawyer has a personal interest conflict under Rule 1.7(a)(2). As we said in N.Y. State 1046:

> Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner under the guardianship proceeding, or into which the Guardian might place the AIP [alleged incapacitated person], 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.

[5] In N.Y. State 1046, we were asked whether a law firm that regularly represented nursing homes could represent an alleged incapacitated person in the guardianship proceeding where the firm did not represent the nursing home in the guardianship proceeding. Because the guardianship proceeding here would have ended when the Nonprofit has been appointed guardian, the posture is slightly different and the special consent issues discussed there do not arise here. But because the guardian has the duty to act in the best interests of the IP, many of the conflict issues are the same. For example, if, during its research into the IP's finances in connection with the Medicaid application, the law firm discovered that the IP had assets above the Medicaid threshold, there would be a conflict of interest between the Nonprofit as Guardian and the nursing home. The interests of the nursing home in being paid by the resident as a "private pay" patient and the interest of the resident in preserving assets, or even the interest of the guardian in being paid sufficient guardianship fees to cover the costs of serving as guardian, may be differing. *See* Nina Bernstein, *To Collect Debts, Nursing Homes are Seizing Control Over Patients*, N.Y. Times, Jan. 25, 2015; Nancy Levitan, *Nursing Home Petitioners and Guardianship*, N.Y. State Bar Ass'n J. (Sept. 2015).

This question is also a factual one that is beyond the jurisdiction of this Committee.

Representation of the Nonprofit in Personal Needs Matters

27. Personal needs matters, such as quality of care issues, treatment decisions and decisions about the IP's place of abode, are more likely to involve differing interests between the guardian, which must exercise the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person, and the law firm's nursing home client. This question, too, is one of fact that is beyond our jurisdiction. But if a facility's violations may lead to substantial monetary penalties or disenrollment from the Medicare or Medicaid programs, or if facilities compete for residents to fill empty beds, and if an injury sustained by a resident caused even in part by noncompliance with government standards and procedures may lead to litigation, then the prospect of conflicting loyalties between the lawyer's nursing home clients and the guardian with respect to personal needs issues would seem to be not insubstantial.

Client Consents to Conflicts

28. A lawyer may sometimes represent a client despite the existence of a conflict, if the conditions set forth in Rule 1.7(b) are met:

> (a) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (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
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> (4) each affected client gives informed consent, confirmed in writing.

Under Rule 1.7(b), client consent does not cure a conflict of interest if the representation is prohibited by law, if the lawyer could not reasonably believe that he or she will be able to provide competent and diligent representation to each affected client, or if the representation involves one client asserting a claim against another client represented by the lawyer in the same litigation or other before a tribunal.

29. Thus, the inquirer and the inquirer's law firm clearly could not represent the guardian with respect to a guardianship matter involving a resident of a client nursing home if (i) the firm did not believe it could provide competent and diligent representation to both the nursing home and the IP, (ii) if the dual representation were prohibited by law, such as the Mental Hygiene

Law, or (iii) if the firm represented both the nursing home and the guardian in the same matter and the dual representations involved the assertion of a claim by the guardian against the nursing home or by the nursing home against the guardian, as guardian for the IP. In any such case, the conflict would be non-consentable.

30. Even if the inquirer's firm did not represent the nursing home in such matter, there would still be a question under Rule 1.7(a)(2) whether there is a significant risk that the lawyer's professional judgment on behalf of the guardian might be adversely affected by the lawyer's personal financial interest in remaining in the good graces of the nursing home client. Thus, if the matter involved the assertion of a claim by the guardian against a nursing home client of the law firm, even if the law firm represented only the guardian and not the nursing home in the matter, the question remains (and we do not opine) whether the lawyer could reasonably believe that he or she could provide competent and diligent representation to the guardian.

CONCLUSION

31. A lawyer whose firm represents nursing homes may form a nonprofit corporation for the purpose of accepting judicial guardianship appointments for low-asset nursing home residents who lack the capacity to document their eligibility for Medicaid. But representing the nonprofit in certain matters might present conflicts of interest. For example, if the nonprofit is appointed property management guardian for an incapacitated person who resides in a nursing home client of the firm and the firm is asked to provide services for the guardian (such as preparing the Medicaid application) there is a potential conflict of interest between the guardian and the nursing home client, but if the incapacitated person has limited assets, the interests of the two clients are unlikely to differ. If the nonprofit is appointed personal care guardian for an incapacitated person who resides in a nursing home client of the law firm, the interests of the guardian and nursing home clients are more likely to differ. Consent to a conflict of interest by both the nonprofit and the nursing home may be possible, but if the matter involved a claim by the guardian against a nursing home client (i.e. regarding quality of care issues) that is represented by the inquirer's firm in the matter, the firm could not also represent the nursing home, because the conflict would be non-consentable.

(19-15)