



LEGAL ETHICS OPINION 1893—REPRESENTING CHILD AND “NEXT FRIEND” AS PLAINTIFFS IN PERSONAL INJURY CASE

Draft Revised September 14, 2022

19 a different “next friend” to replace the parent and advise the parent to  
20 consult independent counsel.

21 Applicable Rules and Legal Ethics Opinions

22 RULE 1.7 Conflict of Interest: General Rule.

23 (a) Except as provided in paragraph (b), a lawyer shall not  
24 represent a client if the representation involves a concurrent  
25 conflict of interest. A concurrent conflict of interest exists if:

26 (1) the representation of one client will be directly adverse to  
27 another client; or

28 (2) there is significant risk that the representation of one or more  
29 clients will be materially limited by the lawyer’s responsibilities to  
30 another client, a former client or a third person or by a personal  
31 interest of the lawyer.

32 (b) Notwithstanding the existence of a concurrent conflict of  
33 interest under paragraph(a), a lawyer may represent a client if  
34 each affected client consents after consultation, and:

35 (1) the lawyer reasonably believes that the lawyer will be able to  
36 provide competent and diligent representation to each affected  
37 client;

38 (2) the representation is not prohibited by law;

39 (3) the representation does not involve the assertion of a claim  
40 by one client against another client represented by the lawyer in  
41 the same litigation or other proceeding before a tribunal; and

42 (4) the consent from the client is memorialized in writing.

43

44 RULE 1.14 Client With Impairment

45 (a) When a client's capacity to make adequately considered  
46 decisions in connection with a representation is diminished,

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47 whether because of minority, mental impairment or some other  
48 reason, the lawyer shall, as far as reasonably possible, maintain  
49 a normal client-lawyer relationship with the client.

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

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

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

65 Representation of Child

66 In cases involving personal injury to a minor (infant), typically a  
67 parent, as “next friend,” engages a lawyer to pursue a claim on behalf of  
68 the infant to recover damages for medical expenses, pain and suffering,  
69 permanent injury, loss of earnings and impairment of earning capacity.

70 Previously, at common law, the parent had a cause of action for loss of  
71 services during minority and necessary expenses incurred for the infant's  
72 treatment. *Baumann v. Capozio*, 269 Va. 356 (2005). The Code of Virginia

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73 recognized the two separate claims at common law. Virginia Code §§ 8.01-  
74 36 and 8.01-243(B). The General Assembly amended the statutes in 2013,  
75 giving the parent a lien on any recovery on behalf of the child for  
76 reimbursement of medical expenses incurred to treat the child’s injuries.

77       Lawsuits filed on behalf of a minor child are brought in the name of  
78 the child by a “next friend,” typically, but not always, the child’s parent(s) or  
79 guardian(s). Virginia Code § 8.01-8. The reason for this rule is the child, not  
80 the parent/“next friend,” is the real party in interest, in such an action.

81 *Herndon v. St. Mary’s Hospital, Inc.*, 266 Va. 472 (2003). When a lawsuit is  
82 filed on behalf of a minor child or a petition seeking court approval of a  
83 settlement of the minor child’s claim is filed, a guardian ad litem may be  
84 appointed by the court to represent the interests of the minor child pursuant  
85 to Virginia Code § 8.01-9. However, the statute further states that if an  
86 attorney is representing a person under disability, no guardian ad litem  
87 need be appointed.

88       The child is the real party in interest, but the lawyer looks to the  
89 child’s “next friend” to speak for and act on behalf of the minor child, and  
90 make decisions in the child’s best interests regarding the child’s claim  
91 against the tortfeasor. The parent may waive the lien for reimbursement of

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92 medical expenses or the parent’s lien may be paid out of the minor child’s  
93 recovery against the tortfeasor. The lawyer should communicate with the  
94 parent to ensure an understanding that the lawyer’s client is the child, not  
95 the parent, and the lawyer’s paramount obligation is to the client-child. The  
96 lawyer is obligated to protect the parent’s interest once there is a  
97 successful recovery for the child, as the lawyer would for any third party  
98 holding a lien against a settlement or recovery. See Rule 1.15(b)(4) and  
99 Cmt. [4].

100 As stated above, the lawyer must consult with and take direction from  
101 the “next friend,” who in this hypothetical is the parent. Whether the  
102 relationship between the lawyer and the parent is an attorney-client  
103 relationship or whether the parent is a non-client third party that has  
104 retained the lawyer to represent the child is a question of law and fact. In  
105 either case, a potential conflict could arise between the child and  
106 parent/“next friend.” Regardless of how one characterizes the relationship,  
107 if the parent’s interests or goals conflict with the child’s best interests, then  
108 courts have the power either to substitute another person as “next friend” or  
109 to appoint guardian ad litem, even when the parent sues as general  
110 guardian. See, e.g., *Horacek v. Exxon*, 357 F. Supp. 71, 74 (D. Neb. 1973)

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111 (appointing a guardian ad litem for minor plaintiffs in civil rights action  
112 because parents' interests might conflict with those of children and such  
113 appointment did not displace parents as general representatives of  
114 children).

115 Potential Conflicts Between Parent/“Next Friend” and Child

116 A conflict may arise when the parent, acting as “next friend,” directs  
117 and controls the lawyer’s representation in an unreasonable way that is  
118 detrimental to the best interests of the child. An example of this is if a  
119 parent, acting as “next friend,” demands that the lawyer settle the child’s  
120 case for substantially less than its full value, but for an amount that will fully  
121 satisfy the parent’s lien for medical expenses. Generally, however, the  
122 parent’s and child’s interests are not at odds because the lawyer’s goal is  
123 to pursue the maximum recovery for the child’s tort claim, which also then  
124 provides the best opportunity for satisfying the parent’s lien for medical  
125 expenses paid by the parent.

126 The committee believes that generally a lawyer may presume that the  
127 child’s parent is acting in the best interests of the child even though the  
128 parent may have a lien on the settlement or recovery obtained on the  
129 child’s case. This presumption may be relied upon until the lawyer has

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130 reason to believe that the parent is no longer placing the child’s interests  
131 first. Maine Professional Ethics Comm’n Op. 154 (November 12, 1996):

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

140 While the committee acknowledges the presumption, circumstances  
141 may become known later in which a conflict may arise. The parent’s lien  
142 may not be the only source of a potential conflict. Another potential source  
143 of conflict may be that the parent/“next friend” is acting unreasonably and  
144 not in the child’s best interests or is making decisions that conflict with the  
145 lawyer’s professional judgment. The lawyer will have to examine the facts  
146 and circumstances on a case-by-case basis considering information such  
147 as the relationship between the parent and child; the value of the child’s  
148 claim compared to the parent’s lien; the age and maturity of the child; the  
149 amount of any available insurance proceeds or other financial resources to  
150 pay the claim and liens; the type/amount of reimbursement the parent is  
151 seeking; the involvement or responsibility of the parent in causing or

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152 contributing to the child’s injuries; liability, and the respective positions and  
153 expectations of the parties. The committee recognizes that these issues  
154 may not be known at the outset making it necessary for the lawyer to  
155 frequently reassess potential conflict throughout the representation.  
156 Moreover, if the “next friend” is not a parent or guardian but some other  
157 third party, the presumption discussed in the Maine ethics opinion does not  
158 apply.

159         But the parent’s and child’s interests diverge when there are  
160 inadequate assets to fully compensate both. In those cases, every dollar  
161 the parent gets from their lien is a dollar taken from the child. Because the  
162 defendant or insurer will often pay a fixed amount to settle the entire case,  
163 whether the funds are given to parent or child, the potential for a conflict  
164 exists. There are at least three ways to resolve this conflict: (1) the parent  
165 waives their lien in favor of the child; (2) the lawyer may seek judicial  
166 approval of the infant settlement; or (3) as discussed below, a guardian ad  
167 litem is appointed to oversee and approve the settlement and to ensure  
168 that the settlement is in the child’s best interests. In these instances, the  
169 lawyer may need to advise the parent to seek independent counsel.



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170 Can a Conflict Between Parent/“Next Friend” and the Child be  
171 Cured?

172 Turning to Question #2, which assumes there is a conflict caused by  
173 the “next friend” directing the lawyer for their benefit rather than the best  
174 interests of the child, the lawyer must determine whether the conflict can be  
175 cured with the informed consent of the affected client under Rule 1.7(b).  
176 The most essential requirement is that “the lawyer reasonably believes that  
177 the lawyer will be able to provide competent and diligent representation to  
178 [the] affected client” notwithstanding the conflict. Some conflicts are too  
179 great to be cured with informed consent, as Comment [19] to Rule 1.7  
180 states:

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

187 Another problem for the lawyer in this hypothetical is the ability to  
188 obtain the client’s consent when his client is a minor. This committee has  
189 consistently opined that a minor cannot provide the consent required by  
190 provisions of the Rules of Professional Conduct. Legal Ethics Opinions

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191 786, 957, 1304, 1725 and 1762. Thus, this attorney cannot obtain any  
192 required consent from the child.

193         If a conflict arises in which the parent’s and child’s interests conflict,  
194 the lawyer cannot reasonably accept consent of the parent on behalf of the  
195 child. Assume, for example, that the insurance coverage or other sources  
196 of recovery are insufficient to fully compensate the child and discharge the  
197 parent’s lien. In that event a conflict has arisen in which the parent’s and  
198 child’s interests are directly adverse. The lawyer cannot reasonably accept  
199 consent of the parent on behalf of the child. The lawyer may seek  
200 appointment of a guardian ad litem to address the competing interests of  
201 the child and parent, or may seek judicial approval of the infant settlement,  
202 and must advise the parent to seek independent counsel. Alternatively, if  
203 the parent/“next friend” is acting unreasonably, the lawyer may petition a  
204 court to appoint a substitute “next friend.” Because of the lawyer’s duty of  
205 loyalty to the child-client, the lawyer must not advocate against the interests  
206 of the client in the division of the insurance proceeds. North Carolina State  
207 Bar RPC 251 (July 18, 1997). See *a/so* Maine Professional Ethics Comm’n  
208 Op. 154 (November 12, 1996).