

LEGAL ETHICS OPINION 1769

CONFLICT – WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN AN OTHER MATTER.

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs concurrent conflicts of interest, and Rule 1.14, which addresses representing a client with a disability. Rule 1.7 squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
 - (2) each client consents after consultation.

The committee notes that under Rule 1.10(a), any conflict arising under Rule 1.7 for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, “as far as reasonably possible, maintain a normal client-lawyer relationship” However, should the lawyer reasonably believe that “the client cannot adequately act in the client’s own interest,” then the lawyer “may seek the appointment of a guardian or take other protective action.” Rule 1.14(a)

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and (b). Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter - that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 - are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 and Rule 1.14, the ABA correctly made a critical distinction. *See*, ABA 96-404 (1996)¹. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a)...

¹The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

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This committee concurs with the ABA's analysis of the interplay between Rule 1.7 and Rule 1.14 in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

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