

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

Draft Released for Comment—1/20/2022

18 2. Should a conflict arise between the interests of the child and parent,
19 the lawyer should petition the court to appoint a different “next friend” to
20 replace the parent and advise the parent to 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

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45 (a) When a client's capacity to make adequately considered
46 decisions in connection with a representation is diminished,
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 Parent/Next Friend and Child

66 In cases involving personal injury to a minor (infant), typically a parent
67 or “next friend” engages a lawyer to pursue a claim on behalf of the infant
68 to recover damages for pain and suffering, permanent injury, and
69 impairment of earning capacity after attaining majority. At common law, the
70 parent had a cause of action for loss of services during minority and
71 necessary expenses incurred for the infant's treatment. *Baumann v.*

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72 *Capozio*, 269 Va. 356 (2005). The Code of Virginia recognizes the two
73 separate claims at common law. Virginia Code §§ 8.01-36 and 8.01-243(B).
74 The General Assembly amended the statute in 2013 giving the parent a
75 lien on any recovery on behalf of the child for reimbursement of medical
76 expenses incurred to treat the child’s injuries. Va. Code § 8.01-36(B).

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 child’s
89 next friend to speak for and act on behalf of the minor child and make
90 decisions in the child’s best interests regarding the child’s claim against the

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91 tortfeasor. Usually, the same lawyer is pursuing recovery for both the
92 child’s claim and the parent’s lien. The parent may waive the lien for
93 reimbursement of medical expenses or the parent’s lien may be paid out of
94 the minor child’s recovery against the tortfeasor. The lawyer should
95 communicate with the parent to ensure an understanding that the lawyer’s
96 client is the child, not the parent, and the lawyer’s paramount obligation is
97 to the client-child. The lawyer is obligated to protect the parent’s interest as
98 the lawyer would for any third party holding a lien against a settlement or
99 recovery. See Rule 1.15(b)(4) and 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, if
107 the parent’s interests or goals conflict with the child’s, then courts have the
108 power either to substitute another person as next friend or to appoint a
109 guardian *ad litem*, even when the parent sues as general guardian. See,

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110 e.g., *Horacek v. Exxon*, 357 F. Supp. 71, 74 (D. Neb. 1973) (appointing a
111 guardian *ad litem* for minor plaintiffs in civil rights action because parents'
112 interests might conflict with those of children and such appointment did not
113 displace parents as general representatives of children).

114 Potential Conflicts Between Parent/Next Friend and Child

115 A conflict may arise, for example, when the parent/next friend directs
116 and controls the lawyer’s representation of the child while also directing the
117 lawyer to pursue aggressively the parent’s claim for expenses for medical
118 treatment of the child or when the parent is acting unreasonably to the
119 detriment of the child. Generally, however, the parent’s and child’s interests
120 are not at odds because the lawyer’s goal is to pursue the maximum
121 recovery for both the child’s tort claim and the parent’s lien.

122 The committee believes that generally a lawyer may presume that the
123 child’s parent is acting in the best interests of the child even though the
124 parent may have a lien on the settlement or recovery obtained on the
125 child’s case. This presumption may be relied upon until the lawyer has
126 reason to believe that the parent is no longer placing the child’s interests
127 first. Maine Professional Ethics Comm’n Op. 154 (November 12, 1996):

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

136 While the committee acknowledges the presumption, circumstances
137 may become known later in which a conflict may arise. The lawyer will have
138 to examine the facts and circumstances on a case-by-case basis
139 considering information such as the relationship between the parent and
140 child; the values of their respective claims; the age and maturity of the
141 child; the amount of any available insurance proceeds or other financial
142 resources to pay the claims; the type of reimbursement the parent is
143 seeking; the involvement or responsibility of the parent in causing or
144 contributing to the child’s injuries; liability, and the respective positions and
145 expectations of the parties. The committee recognizes that these issues
146 may not be known at the outset making it necessary for the lawyer to
147 frequently reassess potential conflict throughout the joint representation.
148 Moreover, if the “next friend” is not a parent or guardian but some other

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149 third party, the presumption discussed in the Maine ethics opinion does not
150 apply.

151 But the parent’s and child’s interests diverge when there are
152 inadequate assets to fully compensate both. In those cases, every dollar
153 the parent gets from their lien is a dollar taken from the child. Because the
154 defendant or insurer will often pay a fixed amount to settle the entire case,
155 whether the funds are given to parent or child, the potential for a conflict
156 exists. There are at least two ways to resolve this conflict: either the parent
157 waives their lien in favor of the child; or, as discussed below, a guardian *ad*
158 *litem* is appointed to oversee and approve the settlement and to ensure
159 that the settlement is in the child’s best interests. In both instances, the
160 lawyer may need to advise the parent to seek independent counsel.

161 Were the committee to assume that the parent is also a client for
162 purposes of recouping past medical expenses of the child and an award of
163 future medical expenses for the child throughout the child’s minority, while
164 handling the child’s claim under the direction of that parent, a conflict could
165 arise. Both the parent and the child (by a guardian *ad litem*) may waive the
166 conflict if appropriate and allow the lawyer to continue to represent the child
167 and parent, or continue representing the child but not the parent.

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168 Regardless of whether the lawyer is petitioning the court to approve a
169 settlement or moving toward trial because a settlement cannot be reached,
170 appointment of a guardian *ad litem* is necessary to secure the child’s
171 waiver of the conflict.

172 It is possible that the conflict cannot be resolved because the parties
173 will not waive the conflict, or the conflict is such that informed consent
174 should not be sought. If so, the lawyer must withdraw from both the child’s
175 and parent’s case or seek informed consent to continue the representation
176 of one of them.

177 Can the Conflict Between Parent/Next Friend and the Child be
178 Cured?

179 Turning to Question #2, if there is a conflict of interest, the lawyer
180 must determine whether the conflict can be cured with the informed
181 consent of the affected client under Rule 1.7(b). The most essential
182 requirement is that “the lawyer reasonably believes that the lawyer will be
183 able to provide competent and diligent representation to each affected
184 client” notwithstanding the conflict. Some conflicts are too great to be cured
185 with informed consent, as Comment [19] to Rule 1.7 states:

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186 A client may consent to representation notwithstanding a conflict.
187 However, when a disinterested lawyer would conclude that the
188 client should not agree to the representation under the
189 circumstances, the lawyer involved cannot properly ask for such
190 agreement or provide representation on the basis of the client's
191 consent.

192 Another problem for the lawyer in this hypothetical is the ability to
193 obtain the client's consent if one of the clients is a minor. This committee
194 has consistently opined that a minor cannot provide the consent required
195 by provisions of the Rules of Professional Conduct. Legal Ethics Opinions
196 786, 957, 1304, 1725 and 1762. Thus, this attorney cannot obtain any
197 required consent from the child.

198 In the event a conflict arises in which the parent's and child's interests
199 are directly adverse, the lawyer cannot reasonably accept consent of the
200 parent on behalf of the child. Assume, for example, that the insurance
201 coverage or other sources of recovery are insufficient to fully compensate
202 the child and discharge the parent's lien. In that event a conflict has arisen
203 in which the parent's and child's interests are directly adverse. The lawyer
204 cannot reasonably accept consent of the parent on behalf of the child. The
205 lawyer must seek appointment of a guardian *ad litem* to address the
206 competing interests of the child and parent, and must advise the parent to

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207 seek independent counsel. Alternatively, if the parent/next friend is acting
208 unreasonably, the lawyer may petition a court to appoint a substitute next
209 friend. Because of the lawyer’s duty of loyalty to the child-client, the lawyer
210 must not advocate against the interests of the client in the division of the
211 insurance proceeds. North Carolina State Bar RPC 251 (July 18, 1997).
212 See *also* Maine Professional Ethics Comm’n Op. 154 (November 12,
213 1996).

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