This legal ethics opinion addresses possible conflicts of interest that may arise when a parent, guardian, or other person as “next friend” engages a lawyer to represent a minor child in a personal injury case against a tortfeasor. In addition, the parent or guardian may also have a claim for past and future expenses for medical treatment of the minor child.

Questions

1. Does the lawyer have a conflict of interest pursuing a parent’s medical expense lien for treatment of their child’s injuries caused by the tortfeasor while concurrently representing their child in a claim against that same tortfeasor?

2. Assuming the answer to Question 1 is “yes,” may that conflict of interest be waived, and if so, how?

Short Answer

1. Generally, no, there is no conflict of interest because the interests of the parent and the child are usually mutually aligned, and the parent’s fiduciary relationship with the child raises a presumption that the parent is acting in the child’s best interests.
2. Should a conflict arise between the interests of the child and parent, the lawyer should petition the court to appoint a different “next friend” to replace the parent and advise the parent to consult independent counsel.

Applicable Rules and Legal Ethics Opinions

RULE 1.7 Conflict of Interest: General Rule.

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

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

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

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

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

RULE 1.14 Client With Impairment
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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

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

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

Representation of Parent/Next Friend and Child

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

The General Assembly amended the statute in 2013 giving the parent a lien on any recovery on behalf of the child for reimbursement of medical expenses incurred to treat the child’s injuries. Va. Code § 8.01-36(B).

Lawsuits filed on behalf of a minor child are brought in the name of the child by a “next friend,” typically, but not always, the child’s parent(s) or guardian(s). Virginia Code § 8.01-8. The reason for this rule is the child, not the parent/next friend, is the real party in interest, in such an action. Herndon v. St. Mary’s Hospital, Inc., 266 Va. 472 (2003). When a lawsuit is filed on behalf of a minor child or a petition seeking court approval of a settlement of the minor child’s claim is filed, a guardian ad litem may be appointed by the court to represent the interests of the minor child pursuant to Virginia Code § 8.01-9. However, the statute further states that if an attorney is representing a person under disability, no guardian ad litem need be appointed.

The child is the real party in interest but the lawyer looks to the child’s next friend to speak for and act on behalf of the minor child and make decisions in the child’s best interests regarding the child’s claim against the
tortfeasor. Usually, the same lawyer is pursuing recovery for both the child’s claim and the parent’s lien. The parent may waive the lien for reimbursement of medical expenses or the parent’s lien may be paid out of the minor child’s recovery against the tortfeasor. The lawyer should communicate with the parent to ensure an understanding that the lawyer’s client is the child, not the parent, and the lawyer’s paramount obligation is to the client-child. The lawyer is obligated to protect the parent’s interest as the lawyer would for any third party holding a lien against a settlement or recovery. See Rule 1.15(b)(4) and Cmt. [4].

As stated above, the lawyer must consult with and take direction from the next friend, who in this hypothetical is the parent. Whether the relationship between the lawyer and the parent is an attorney-client relationship or whether the parent is a non-client third party that has retained the lawyer to represent the child is a question of law and fact. In either case, a potential conflict could arise between the child and parent/next friend. Regardless of how one characterizes the relationship, if the parent’s interests or goals conflict with the child’s, then courts have the power either to substitute another person as next friend or to appoint a guardian ad litem, even when the parent sues as general guardian. See,
e.g., Horacek v. Exon, 357 F. Supp. 71, 74 (D. Neb. 1973) (appointing a guardian ad litem for minor plaintiffs in civil rights action because parents' interests might conflict with those of children and such appointment did not displace parents as general representatives of children).

Potential Conflicts Between Parent/Next Friend and Child

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

The committee believes that generally a lawyer may presume that the child's parent is acting in the best interests of the child even though the parent may have a lien on the settlement or recovery obtained on the child's case. This presumption may be relied upon until the lawyer has reason to believe that the parent is no longer placing the child's interests first. Maine Professional Ethics Comm’n Op. 154 (November 12, 1996):
This presumption is fundamental to the legal relationship between parents and children in our society. Failure to acknowledge this presumption would impose unacceptable costs on the resolution of disputes including the expense of obtaining and paying a guardian ad litem to act on behalf of the child throughout the case, a step that will usually disrupt family relationships and should not be required unless necessary to serve the best interests of the child.

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

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

Were the committee to assume that the parent is also a client for purposes of recouping past medical expenses of the child and an award of future medical expenses for the child throughout the child’s minority, while handling the child’s claim under the direction of that parent, a conflict could arise. Both the parent and the child (by a guardian ad litem) may waive the conflict if appropriate and allow the lawyer to continue to represent the child and parent, or continue representing the child but not the parent.
Regardless of whether the lawyer is petitioning the court to approve a settlement or moving toward trial because a settlement cannot be reached, appointment of a guardian *ad litem* is necessary to secure the child’s waiver of the conflict.

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

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

Turning to Question #2, if there is a conflict of interest, the lawyer must determine whether the conflict can be cured with the informed consent of the affected client under Rule 1.7(b). The most essential requirement is that “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” notwithstanding the conflict. Some conflicts are too great to be cured with informed consent, as Comment [19] to Rule 1.7 states:
A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

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

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