

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 20th day of April, 2022.

On March 1, 2022, came the Virginia State Bar, by Jay B. Meyerson, its President, and Karen A. Gould, its Executive Director and Chief Operating Officer, pursuant to the Rules for Integration of the Virginia State Bar, Part Six, Section IV, Paragraph 10-4, and filed a Petition requesting consideration of Legal Ethics Opinion No. 1894.

Whereas it appears to the Court that the Virginia State Bar has complied with the procedural due process and notice requirements of the aforementioned Rule designed to ensure adequate review and protection of the public interest, upon due consideration of all material submitted to the Court, it is ordered that Legal Ethics Opinion No. 1894 be approved as follows, effective immediately:

LEGAL ETHICS OPINION 1894. CONFLICT OF INTEREST: REPRESENTING MULTIPLE INFANT CLAIMANTS BY “NEXT FRIEND.”

INTRODUCTION

This opinion addresses the possible conflicts of interest that arise when a lawyer represents multiple children in a tort case against a day care center in which it is alleged that multiple assaults on the children have occurred. When conflicts of interest arise, the principal question is who has the capacity or authority to waive a conflict of interest assuming the conflict of interest is waivable?

HYPOTHETICAL

A lawyer has been approached by the two sets of parents of two unrelated children who they believe were assaulted by an employee at a day care center. The employee has been accused of assaulting multiple children and the lawyer believes that additional parents will likely seek her representation. The lawyer is concerned that the employee and the day care center may not have sufficient assets to adequately compensate all the victims. The lawyer is also concerned that the children, being very young, may have divergent accounts of the employee’s actions. The lawyer is concerned that information obtained on behalf of one child might be advantageous to the other

child to the detriment of the first. The parents, as likely “next friends,” have their own claims for medical expenses and have the same conflict issues as the children.

QUESTIONS

1. Does the lawyer have a conflict of interest when concurrently representing multiple sets of children and their “next friends” against the same tortfeasor?

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

APPLICABLE RULES AND 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 1.8. Conflict of Interest: Prohibited Transactions.

* * *

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

* * *

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: 478, 618, 1483, 1725, and 1844.

DISCUSSION

There is at least a potential for conflict of interest between multiple plaintiffs or defendants in litigation, if only because of the possibility of disagreement regarding possible settlement offers. Even if the parties are unlikely to disagree, their circumstances may differ sufficiently that an attorney exercising independent judgment would clearly consider recommending different approaches to settlement and other litigation decisions. If there is a limited pool of money available, there may be a significant risk that the settlement of one of the cases will impact future settlements for other clients of a lawyer even if the settlements of the claims are negotiated separately. On the other hand, Rule 1.7 permits a lawyer to represent multiple parties whose interests are generally aligned, even though subsequent events may require the lawyer's withdrawal.

Built into Question #1 is the assumption that the funds or assets available are not sufficient to compensate fully the claims of all the children's claims against the same tortfeasor. In Legal Ethics Opinion 478 (September 20, 1982) the committee opined that it is not improper for an attorney to represent several creditors against a single debtor, if, after full disclosure to

each creditor, all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim. The committee reaffirmed this opinion in Legal Ethics Opinion 1483 (September 1, 1992). *See also* Legal Ethics Opinion 616 (November 13, 1984).

In this hypothetical it is also possible that the defendant may offer all available proceeds in a lump sum—an aggregate settlement of all of the children's cases. Rule 1.8(g), sometimes called the "aggregate settlement rule" is applicable:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

An aggregate settlement is possible where the defendant has limited funds to settle and it enables the defendant to dispose of multiple cases expediently by avoiding the time and expense of haggling with plaintiffs' counsel over the merits of each individual client's case. This leaves the plaintiffs' counsel with the ethical dilemma of dividing the settlement among the multiple represented clients.

"An aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client." *Arthurlee v. Tuboscope Vetco International, Inc.*, 274 S.W. 3d 111, 120 (Tex. App. 2008). Thus, if the lawyer negotiates an individual settlement with the defendant for each represented client, the aggregate settlement rule does not apply. However, the lawyer must still manage the concurrent representation conflict pursuant to the requirements of Rule 1.7. This would require that the lawyer exercise independent professional judgment in the best interests of each client and that the representation of each client is not materially limited by the lawyer's ethical duties to the other clients.

An aggregate settlement may be offered to multiple claimants in a single case or where the claimants have separate claims against the same tortfeasor. But a Rule 1.7 conflict of interest could just as easily occur in separate lawsuits as it could in the same lawsuit. NYC Bar Ethics Op. 2020-3 (October 26, 2020). If settlements are negotiated separately, and there is no explicit

or implicit linkage, they do not constitute an aggregate settlement, although the attorney may have disclosure obligations under Rules 1.4 and 1.7 to manage the conflict of interest.

Applying Rule 1.8(g) to the hypothetical in this opinion presents obstacles that the lawyer must surmount. First, each client's case may be different in value, strengths, and weaknesses. Second, it is possible that the clients may have to accept less than what their case is worth. Third, the lawyer cannot advocate in favor of one client against the interests of another client. Fourth, the representation must be transparent with each client's case, with information being shared with the other concurrently represented clients. Finally, all the affected clients must agree to the amount of the settlement and its division. Alternatively, the defendant may propose that the settlement of one child's case is contingent upon settlement of the other children's cases being handled by the same lawyer. This is a form of what some describe as an "interdependent" settlement, as settlement for each child's case is negotiated separately. Settlements are "interdependent" if: "(1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations." NYC Bar Ethics Op. 2020-3.

How should a lawyer proceed when faced with a potential interdependent or aggregate settlement? First, the lawyer cannot even participate in negotiating, let alone accept an aggregate or interdependent settlement without first obtaining the informed consent of each client. Even if an aggregate settlement offer is not on the table, and the lawyer is negotiating each child's case individually, the lawyer's settlement negotiations on behalf of one child is likely to materially impact settlement of the other children's cases being handled by the lawyer. NYC Bar Ethics Op. 2020-3. Rule 1.4(c) requires that "[a] lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter." Ideally, as a matter of best practices, the lawyer should discuss with each potential client the problems and issues with aggregate or interdependent settlements before the lawyer is retained, especially when it is foreseeable from the outset that such issues or problems may arise.

When there are limited funds from which multiple claimants can be compensated, there is

a potential for competition between them for their share of the settlement. A lawyer representing multiple claimants in this situation risks becoming an advocate for a larger recovery of one claimant at the expense of the other claimants. Comment [27] to Rule 1.7 explains that “. . . a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.” Thus, with the prospect of only limited funds to recover from the defendant, it may be possible that the multiple clients are generally aligned in interest. The lawyer may reasonably determine that he or she will be able to facilitate an acceptable division of the insurance proceeds among the multiple claimants without advocating against the interests of any of the claimants. As the committee in North Carolina State Bar RPC 251 observed:

Moreover, to require each claimant to have a separate lawyer to prove liability may result in a duplication of effort and additional expense for the claimants. Therefore, a lawyer may represent multiple claimants provided there are no conflicts with regard to the liability issue and the lawyer obtains informed consent from all the claimants at the beginning of the representation. The disclosure to the claimants must include an explanation of the consequences of limited insurance funds and the possibility that there may be a dispute among the claimants as to the division of the insurance proceeds.

In addition, requiring each claimant to have separate counsel would lead to a “race to the courthouse” with one or more claimants exhausting the defendant’s insurance coverage or other sources of recovery, leaving the other claimants without compensation for their injuries.

In addressing Question #2, assuming the conflict can be waived, the committee believes that at the beginning of the multiple representation the lawyer must obtain an informed consent from the next friend of each of the children the lawyer would be representing concurrently. The informed consent must disclose that should an actual conflict arise, the lawyer will withdraw from representing all the affected clients. Rule 1.7(b)(4) requires that this informed consent be memorialized in writing. The informed consent should include disclosures of information known to the lawyer including potential conflicts that can arise in such cases. Before a lawsuit is filed, the next friend of each child may give the informed consent required by Rule 1.7(b). After litigation is commenced, even if it is solely for the purpose of obtaining court approval of the

settlement of the children's claims, a guardian ad litem ("GAL") must be appointed for the minor children and the guardian ad litem must give informed consent to the multiple representation and the division of the settlement proceeds among the multiple children-clients. This would not be necessary but for the fact that there are insufficient funds to compensate fully each of the multiple claimants.

Another question is whether a single GAL could adequately represent the interests of all the minor children in this situation or must a GAL be appointed for each? The committee believes the standard for whether a GAL has a conflict in representing multiple children is whether the children's best interests differ so that advocating for one child's best interests is detrimental to another child's best interests. Presumably each child will also be represented by the child's parent or "next friend" who, at the outset, will have given informed consent to the multiple representation of the children by the lawyer. Essentially, a single GAL faces the same situation our hypothetical lawyer faces with the representation of multiple minor children with differing facts or interests that must be reconciled against a limited fund with which to compensate each child fully. The fact that a child would be entitled to a larger recovery if more funds were available does not necessarily mean a single GAL representing multiple children has an incurable conflict or is incapable of approving and recommending to the court a division of the limited funds in the best interests of all the children. The final decision as to the division of the settlement proceeds or recovery resides with the court.

Attorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules. For example, an attorney would follow Rule 1.7 to determine if there would be a possible conflict of interest if the attorney served as GAL. *Advocacy In Motion: A Guide to Implementing the Standards to Govern the Performance of Guardians Ad Litem for Children*, Court Improvement Program, Office of the Executive Secretary of the Supreme Court of Virginia (November 2018) at 12. *See also* Legal Ethics Opinion 1844 (December 18, 2008).

In Legal Ethics Opinion 1725 (April 20, 1999) the committee stated: "[a] lawyer who serves as an infant's GAL, whether or not an attorney-client relationship exists, must act in

conformity with the ethical standards governing the avoidance of conflicts of interests that impair independent professional judgment or dilute loyalty.” In LEO 1725, the committee also stated an informed consent to a GAL’s conflict of interest emanates from the court:

If a lawyer contemplates being appointed by the court as GAL for a child and senses the potential for a conflict of interest, either because of a personal interest under DR:5-101(A), or a multiple representation under DR:5-105, then the attorney, before appointment, must make the same full disclosure to the court that he or she would make to a *sui juris* client for an informed consent to the representation. . . .

Thus, the committee believes that any necessary consent to a possible conflict must emanate from the court. As stated above, the child is incapable of giving consent to the representation and waiving the conflict. The court, which has the statutory responsibility for supervision of the GAL according to Va. Code § 16.1-266, is the only agency with the authority to consent to such representation. In like fashion, the GAL must fully disclose to the court any conflict of interest that may arise after the appointment.

Thus, since the court appoints the GAL, the court serves as the gatekeeper and it is the duty of the court to see that the GAL faithfully represents and protects the child’s interests. The court may enforce this duty by removing and appointing another one. LEO 1725.

CONCLUSION

Provided the requirements of Rule 1.7 can be met, a lawyer may represent multiple children against the same tortfeasor even when funds are insufficient to compensate fully the claims held by each represented child. The parents or persons serving as “next friend” may give the lawyer informed consent to the multiple representation. To obtain informed consent, the lawyer must explain any known risks, issues, or problems in the multiple representation, preferably before undertaking the representation. If the prospect of an aggregate or interdependent settlement is under consideration, the lawyer must obtain, via the “next friend,” each client’s informed consent before negotiating such a settlement. To participate in making an aggregate settlement, the lawyer must obtain the informed consent of all affected clients. Informed consent requires that each client knows and agrees to how the settlement is allocated and what amount shall be distributed to each. If one or more clients disagrees with the settlement, the lawyer may not participate in the aggregate settlement. Similarly, a lawyer should

not participate in negotiations to settle one lawsuit that is dependent on, or where there is a significant risk that it will impact, the terms of a settlement of another lawsuit being handled by the lawyer without obtaining written informed consent from each client. Unless the differing interests of those clients who desire to settle can be reconciled with those who do not, the lawyer must withdraw from the representation of all the clients.

Upon filing a petition for a court to approve the settlement, a guardian ad litem must be appointed to waive the lawyer's conflict in representing multiple children and to recommend that the court approve a proposed settlement negotiated on each of the children's behalf by the lawyer. If the children's cases cannot be settled and suit is filed, a guardian ad litem must be appointed to represent the interests of the children.

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Teste:


Clerk