

Ethics Advisory Opinion Committee
Ethics Opinion 22-03
Issued March 7, 2022

ISSUES

1. How are conflicts of interest between a child suffering personal injury and a parent who retains a lawyer to represent the child resolved?
2. What duties does the lawyer owe to the child, regardless of instructions received from the parent?
3. What duties does the lawyer owe to the child when the parent has discharged the lawyer from the lawyer's representation of the child?

OPINION

4. In representing the interests of the child, the conflict rules found in Rules 1.7, 1.8, and 1.9 of the Utah Rules of Professional Conduct apply even when the lawyer is retained by the parent. Further, the lawyer is obligated to protect property belonging to the child pursuant to Rule 1.15 of the Utah Rules of Professional Conduct.

BACKGROUND

5. This request was posed to the Ethics Advisory Opinion Committee ("EAOC") based upon the following facts: Lawyer A represents both a parent and child with personal injury claims. Parent wishes to donate her portion and the child's portion of the settlement to charity. It is not clear from the submitted facts whether the settlement offer or was a joint offer or whether separate settlement offers were made to parent and the child. The EAOC thus addresses both scenarios.

DISCUSSION

6. When a lawyer is retained by a parent for the benefit of a child, the lawyer must recognize that the child is a client. In the fact scenario presented, there is a claim by the parent for herself and a claim for her minor child. These claims are separate and distinct. “If the parent and the child are co-clients, the client-lawyer relationship will be governed by principles applicable to joint client situations.” Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, *THE LAW OF LAWYERING* § 2.06, at 2-9 (4th ed. 2016).

7. Rule 1.7(a) of the Utah Rules of Professional Conduct forbids a lawyer from representing a client if there is a concurrent conflict of interest. Comment 2 requires the lawyer to clearly identify the client or clients and determine if a concurrent conflict exists.

8. Before agreeing to represent both parent and child, the lawyer must analyze potential existing conflicts between the child and the parent seeking to hire the lawyer. Most importantly, the lawyer must initially consider if fault may be attributed to the parent. If such is the case, the interests of the parent are “directly adverse” to the interests of the child because the concurrent representation would involve the assertion of a claim by one client against the other. *See* Utah R. Prof. Cond. 1.7(a)(1) & 1.7(b)(3).

9. Rule 1.7 provides that a lawyer “shall” not represent clients with adverse interests. “Shall” and “shall not” define proper conduct for purposes of professional discipline. *See* Utah R. Prof. Cond. pmb1., ¶ 14. Thus, it is imperative that the lawyer not enter into a lawyer-client relationship with a parent whose interests conflict with those of the child. “In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the

result can be additional cost, embarrassment, and recrimination.” Utah R. Prof. Cond. 1.7 cmt. [29].

10. Conversely, when the interests of the parent align with the interests of the child, it is entirely proper to represent the interests of both pursuant to Rule 1.7(a)(1). Thus, a parent to whom no fault can be attributed and the injured child are not adverse in an action against a third-party tortfeasor. Successful pursuit of a third-party tortfeasor on behalf of both parent and child occurred in the scenario considered by the EAOC as part of this Opinion.

11. A divergence of interests only occurs when the parent seeks to divert monies that belong to the child, albeit to a charity. This raises a conflict between parent and child because the parents’ interests in the child’s recovery are now directly adverse. There is a significant risk that the parent’s desire to donate the child’s portion of the recovery will materially limit or adversely affect the child’s rights in the recovery of damages. Utah R. Prof. Cond. 1.7(a)(2).

12. Because conflicts of legal interests are not usually within public knowledge, the most appropriate first course of action would be to consult with the parent. Rule 1.4(a)(5) of the Utah Rules of Professional Conduct requires the lawyer to consult¹ with the client about relevant limitations on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct. That consultation must be sufficiently detailed to permit the client to make informed decisions regarding the representation. Utah R. Prof. Cond. 1.4(b). Presumably, this consultation will be sufficient to resolve conflicts between parent and child over what will be done with the child’s portion of the settlement funds.

¹“Consult” is defined as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Utah R. Prof. Cond. 1.0(c).

13. Rule 1.2(a) of the Utah Rules of Professional Conduct requires the lawyer to abide by the client's decision to settle a matter. Presumably, that instruction would come from the parent who retained the lawyer. Regardless of these instructions, if the child's recovery is compromised, the lawyer owes a duty to the child to protect the child's interest in the settlement funds. Rule 1.15(d) provides, in pertinent part: "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." Utah R. Prof. Cond. 1.15(d). Rule 1.15(e) further provides: "When in the course of representation a lawyer is in possession of property in which two or more persons ... claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute." Utah R. Prof. Cond. 1.15(e).

14. If a consultation with the parent was not sufficient to protect the child's interests, the lawyer would need to take reasonably necessary steps to protect the child. Rule 1.14 of the Utah Rules of Professional Conduct provides, in pertinent part:

(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 for 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.

The lawyer would therefore need to consider whether there was another parent, guardian, or responsible adult who could intervene on the child's behalf to protect the child's interest in the settlement funds and, if not, seek to have a guardian ad litem or conservator appointed to represent the child's interests in the settlement funds. The guardian ad litem or conservator would then be required to participate in the matter to the extent necessary to protect the child's interests.

15. A lawyer shall not represent a client when the lawyer is discharged. Utah R. Prof. Cond. 1.16(a)(3). Nevertheless, discharge by the parent does not end the lawyer's duties owed the child, and the lawyer must continue to protect the child's interest. A representative case is *In re Fraser*:

[T]he attorney owes a duty to the ward, as well as to the guardian. Since the guardian in this case manifested a greater interest in obtaining money for herself than in serving the interest of the ward, it would have been hazardous to the interest of the ward to turn the assets of her small estate over to the guardian.... [The attorney] cannot be faulted for refusing to abandon the ward at the guardian's request.

523 P.2d 921, 928 (Wash. 1974) (en banc), *overruled on other grounds by In re Disciplinary Proceeding Against Boelter*, 985 P.2d 328, 337 (Wash. 1999) (en banc); *see also Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) ("In fact, we conceive that the ward's interests overshadow those of the guardian."). Upon discharge by the parent, if the lawyer reasonably² believes the minor child is at substantial³ risk of financial harm, the lawyer must take reasonably necessary protective action. Utah R. Prof. Cond. 1.14(b).

² "Reasonably" is defined as "the conduct of reasonably prudent and competent lawyer." Utah R. Prof. Cond. 1.1(m). "Reasonable belief" means "the lawyer believes the matter in question and the circumstances are such that the belief is reasonable." Utah R. Prof. Cond. 1.1(n).

³ "Substantial" is defined as "a material matter of clear and weighty importance." Utah R. Prof. Cond. 1.1(r).

16. The lawyer's duties are enhanced when the parent's and child's settlement is joint rather than a separate settlement for each. Rule 1.8(g) precludes aggregate settlements of claims unless each client gives informed consent, confirmed in writing signed by each client. "Informed consent" means "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Utah R. Prof. Cond. 1.1(f). As a minor child may not give informed consent to the joint offer, appointment of a guardian ad litem or conservator would be required under Rule 1.14(b) of the Utah Rules of Professional Conduct.