

**ALASKA BAR ASSOCIATION  
ETHICS OPINION 94-3**

**Representation of Client Under Disability**

Bar counsel has requested an opinion giving general guidance to the Bar with respect to lawyers' ethical duties in representing clients with mental disabilities. The Committee has concluded:

a) An attorney representing a client under guardianship for disability has an absolute duty to advocate his or her client's desires even if those desires conflict with client's best interests as viewed by attorney.

b) Counsel for the disabled have the same duty of fidelity owed in any attorney-client relationship which includes a duty to avoid conflicting interests.

The specific request arose out of a disciplinary proceeding. Bar counsel felt that the situation was of general application and was likely to arise in the future. The following hypothetical facts were furnished by Bar counsel.

FACTS

Client is a severely retarded individual subject to the care and control of Guardian. Client was deemed in need of treatment to address "sexually aberrant behavior." Guardian was directed and empowered by the court to seek out and secure a treatment program for such behavior. Client is able, in the broadest terms, to participate in important decisions concerning general objectives relating to his interests. Guardian, however, believes that Client is generally incapable of competently performing the evaluation and assessment necessary for making informed decisions about the means for achieving those objectives.

Attorney X works for Non-Profit Agency (hereafter "NPA"), an organization dedicated to advocating the legal rights of developmentally disabled individuals. The organization, among other things, initiates litigation on behalf of developmentally disabled persons, with a particular eye toward "test cases" which might be expected, not only to assist particular individuals, but also to effect broader systemic rights for developmentally disabled person as a group. Attorney X, paid by NPA, represented Client even before the court-imposed guardianship.

Institution is a state-run psychiatric facility in which Client has been placed and at which Client is expected to

receive treatment. Institution is represented by attorneys for the state (which attorneys are hereafter collectively referred to as "State").

Client expressed a clear desire to Guardian, Institution, and Attorney X that he be permitted to receive outpatient/community-based treatment which would allow him to leave Institution. Attorney X and Guardian, after evaluation and consultation, concluded that no such placement would be possible unless and until Client was given diagnosis and effective treatment for a specific sexually oriented psychological disorder. Institution was asked to provide such treatment. Institution refused the request, concluding that no diagnosis for the particular disorder had or could be made concerning Client, and that treatment for the condition was therefore neither necessary nor appropriate. Further, Institution maintained that Client's outpatient goal might be reached without such treatment.

Attorney X disagreed, and after consultation with Client and Guardian, filed a Petition for Treatment Order in the guardianship matter in order to compel Institution to initiate the desired treatment program. As part of that petition, it was necessary to seek independent diagnosis of Client's condition. One of the tests required for such diagnosis, while neither painful, permanent, nor involving surgery, did involve potentially embarrassing and physically intrusive procedures. When informed of the required tests, Client became upset and expressed strong desires not to go through with the diagnostic tests. Guardian, as well as Attorney X, continued to believe that such testing was absolutely necessary in order to secure needed treatment for Client and to accomplish Client's continually-expressed goal that he be permitted to receive outpatient treatment.

State, perceiving a developing conflict between Client and Guardian, and concluding that Attorney X had failed to independently protect Client's interests, filed a Petition to Review Guardianship independent of the Petition for Treatment Order. This petition, in essence, alleged that Guardian and Attorney X had together embarked on a course of diagnosis and treatment which was contrary to Client's best interests. According to the State this action had been undertaken over Client's expressed or implied objections. State maintained not only that the test was inconsistent with Client's expressed desires, but also that the diagnosis sought by Guardian and Attorney X, if obtained, would label Client with a particular sexual deviance which might carry an extreme stigma and might have permanent negative effects on Client. State questioned whether Client was receiving appropriate independent adversarial representation in the face of the apparent conflict between his own interests and the desires of the Guardian.

Attorney X withdrew as counsel with respect to State's petition to appoint adversary counsel in the Petition to Review Guardianship. The court appointed separate counsel in the guardianship review matter. Attorney X remained counsel of record in the Petition for Treatment Order.

Attorney X continued to maintain that his agency, NPA, was a necessary party to the guardianship review matter, and independently appeared to assert that NPA, through Attorney X, should continue as Client's counsel. Attorney X reasoned that, although it had withdrawn as counsel for Client for purposes of the narrow guardianship review motion, it was nonetheless appropriate for NPA to independently participate in the guardianship motion proceedings on the ground that NPA had independent interests. The asserted interests were: (1) protecting the "reputational interest" of NPA attorneys against charges of

unethical conduct and (2) protecting NPA's interests in pursuing "issues concerning the representation of incompetent persons."

State maintained Attorney X, having withdrawn from representation of Client in the Petition to Review Guardianship on conflict grounds, could not, under the conflicts rules, continue to independently appear and participate in the guardianship review matter on NPA's independent behalf.

### DISCUSSION

Alaska Rules of Professional Conduct, Rule 1.14 provides the general framework in which both questions may be evaluated. Under subsection (a), a lawyer is required "As far as reasonably possible" to maintain a normal client/lawyer relationship with the client in spite of the client's inability to adequately consider decisions because of mental disability. The "normal" attorney-client relationship includes at the very least a duty of competence (Rule 1.1), a duty to consult and abide by the client's decisions concerning the objectives of representation (Rule 1.2), a duty of diligence (Rule 1.3), a duty to explain and advise (Rule 1.4), a duty of confidentiality (Rule 1.6), and a duty to avoid conflicts of interest (Rule 1.7). The commentary to 1.14 makes clear that even if maintaining the ordinary client lawyer relationship may not be possible, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. The commentary makes plain competency is often a matter of degree and that to the extent of meaningful participation in decision making, the disabled individual must be consulted concerning his or her own well-being. In that respect, the lawyer representing a disabled person is obliged to maintain the ordinary attorney-client relationship.

The difficulties which have arisen in the hypothetical situation would be avoided if the lawyer's obligations to the disabled client are considered in terms of the ordinary attorney-client relationship. The relationship of attorneys representing individuals under disabilities is often replete with conflicts between the individual's expressed desires and the attorney's view of what is in the client's best interest. In this case, however, a guardian had been appointed. The guardian's responsibility is to advocate the client's best interests. If necessary the guardian may appear through counsel. The hypothetical, however, makes plain that lawyer represented the individual rather than the guardian as the attorney-client relationship pre-existed the guardianship proceeding. Therefore, this individual had the right to look to this lawyer as the protector of his interests as he expresses those interests. The "Client" made his position on testing clear. In ordinary attorney-client relationships, lawyers are not free to act contrary to their client's desire merely because the lawyer believes such actions to be the better course. The lawyer in the hypothetical illustration is equally responsible to advocate for the client's expressed desires.

When faced with a course of conduct that the lawyer believes to be in the disabled client's best interest to which the client objects, a lawyer must fulfill the obligations of the attorney-client relationship. Those obligations can only be fulfilled by explaining to the client as carefully as possible the ramifications of the course of treatment sought. The lawyer must disclose both the positive benefits which will come as well as the negative aspects of the treatment. The lawyer must do so to the best of his/her ability given the limitations of the client's understanding. In this hypothetical, the client clearly objected to the treatment. While it is simple to say on a paternalistic level that the client is not

competent to know what is in his own best interest, it is equally true that the client may not be able to articulate convincingly the reasons why the client does not wish to undergo the treatment. If the client cannot be persuaded, the lawyer's duty is to represent the interests of the disabled person. If the guardian ad litem persists in undertaking the treatment to which the client objects, it is the lawyer's duty to make his client's wishes known to the court. The disabled client has no one but his attorney to speak for him. Perhaps the client's wishes do not carry the day before the finder of fact. Nevertheless, a disabled individual has the right to be heard through counsel. Counsel has a duty to zealously advocate on behalf of that individual.

Further, counsel has a clear conflict of interest between his client and the interests of NPA which paid the lawyer's fee. Ordinary rules of conflict of interests apply even in cases of disability. In this case, the lawyer was paid by NPA. This arrangement requires consent of the client after meaningful consultation. The lawyer must also determine that there is no interference with the lawyer's independence of professional judgment, or with the client-lawyer relationship. Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, except when the lawyer reasonably believes that the representation will not be adversely effected and the client consents after consultation.

Representation of the disabled is by definition difficult. Nevertheless, the disabled like all members of society have an absolute right to look to counsel for independent advocacy of their interests. Fidelity and passionate advocacy of the interests of clients who cannot speak for themselves uphold the highest aspirations of the Bar.

Approved by the Alaska Bar Association Ethics Committee on September 1, 1994.

Adopted by the Board of Governors on October 27, 1994.

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