

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 08-01
April 10, 2008

By letter dated December 6, 2007, the Committee received a request to determine whether the North Dakota Rules of Professional Conduct prevent Requesting Attorney ("RA") from representing a client under the following circumstances.

Representation by RA is requested by an Agent holding a Durable Power of Attorney ("Agent"). The representation is of a client in front of the County Social Services Board and the North Dakota Department of Human Services ("DHS"). The representation is by RA on behalf of the client claiming the client meets the financial guidelines for Medicaid. If DHS – the opposing party in Medicaid Administrative proceedings – defends that the client has a claim, i.e., an asset, against the Agent, does this claim present an unwaivable conflict of interest preventing RA from representing the client?

RA asks that the Committee consider two separate circumstances.

1. The client is competent.
2. The client is incapacitated.

FACTS

RA practices law in North Dakota. RA and the legal group for which he works only represent clients with limited resources. RA represents individuals in Medicaid Administrative proceedings. The clients are often elderly and sometimes reside in nursing homes. Frequently, the clients have appointed an Agent to act on their behalf through a Durable Power of Attorney. Generally, that Agent is one of the children of the client. The Agent contacts the RA on behalf of the client with the request that the RA represent the individual/client.

Prior to accepting representation, RA requests information about the client's income and resources. In other words, the client must qualify for RA's services under RA's financial guidelines. RA considers the income and resources of the individual/client and not the Agent. If the individual/client qualifies for RA's services, an attorney-client relationship is created and it is specifically between the client and the RA. The RA does not consider the Agent to be the client, though RA may work very closely with the Agent in some cases.

DHS, the opposing party in Medicaid Administrative hearings, sometimes takes the position that the Agent has not handled the money and property of the client in a prudent manner. As a result of this alleged lack of prudent management, DHS contends the client has a claim against the Agent and that claim is an asset that impacts eligibility for Medicaid. Such a claim against the Agent is deemed to be a financial asset that would disqualify the client from Medicaid eligibility.

If RA determines the Agent is not self-dealing or committing some other act contrary to the client's interest, RA advocates at the Administrative Hearing that the client is eligible for Medicaid because the client has no claim against the Agent for mismanaging his or her property.

DHS's position is that its claim that the Agent has acted improperly in handling the client's affairs creates a conflict preventing RA – or any other attorney hired by the agent – from representing the client.

RA asks that for purposes of this Ethics Opinion that the Ethics Committee consider two separate scenarios: (1) the client is competent and (2) the client is incapacitated.

DISCUSSION

A. The Rules

The relevant rule of Professional Conduct is Rule 1.7 Conflict of Interest: General Rule.

The Rule states in relevant part:

. . . .

(c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer responsibly believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

N.D.R.Prof. Conduct 1.7(c).

The comment to Rule 1.7 provides guidance on the resolution of conflict questions. The comment states in relevant part:

(4) Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a material limitation on the representation of the client exists; 3) decide whether the representation may be undertaken despite the material limitation, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (c) and obtain their consent. The clients affected under paragraph (c) include any clients whose representation might be adversely affected. The critical questions are the likelihood that a material limitation will eventuate and, if it does, the likelihood that the conflict will interfere with the lawyers independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

N.D.R. Prof. Conduct 1.7, comment 4.

B. Conflict of Interest – Generally

Under Rule 1.7, an attorney must decide (1) the identity of the client(s); and (2) whether there is any adverse affect (material limitation) on the representation due to relationships with another client, third parties or due to the attorney's own interests, N.D.R. Prof. Conduct 1.7(a); whether the attorney's own interests are likely to adversely affect the representation, N.D.R. Prof. Conduct 1.7(b); or whether there might be any adverse affect (material limitation) on the representation due to relationships with another client, third parties or due to the attorney's own interests, N.D.R. Prof. Conduct 1.7(c). If either of the first two inquiries under (2) above is answered in the affirmative, there is an unwaivable conflict of interest. Only if Rule 1.7(c) applies, does the attorney consider waiver/consent of the client.

1. Identification of the client or clients

“[T]he term ‘client’ includes one who is either ‘rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.’” Board of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1192 (2001). Under this definition, the Medicaid applicant is plainly the client of the RA. RA is rendering legal services on the applicant's behalf and the individual's Agent, on his or her behalf has requested that professional legal services be rendered on his or her behalf, i.e., representation in the Medicaid proceedings.

However, the Committee must also consider whether the Agent (holder of the Durable Power of Attorney) has an attorney-client relationship with the RA.

Two ethical duties are entwined in any attorney-client relationship. First is the attorney's duty of confidentiality, which fosters full and open communication between client and counsel.... The second is the attorney's duty of undivided loyalty to the client.” (City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 846.) “The interplay of the duties of confidentiality and loyalty affects the conflict of interest rules that govern attorneys.” (*Ibid.*)

Phillips v. Yapo, 2007 WL 4239991, * 3 (Cal.App. Dec. 4, 2007).

An attorney-client relationship is marked by the requirement of both confidentiality and loyalty. See also N.D.R. Prof. Conduct 1.7, comment (“Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.”). “Conflicts of interest affect a lawyer's loyalty, which “is an essential element in the lawyer's relationship to a client. Comment, N.D.R. Prof. Conduct 1.7; see also Continental Res., Inc. v. Schmalenberger, 2003 ND 26, ¶ 12, 656 N.W.2d 730. When a lawyer has conflicting responsibilities as the lawyer for various clients, those loyalties owed to the client are impaired. See In re Christensen, 2005 ND 87, ¶ 14, 696 N.W.2d 495.” In the Matter of Disciplinary Action against James J. Bullis, 2006 ND 228, ¶ 13, 723 N.W.2d 667, 671.

Because the RA does not owe a duty of loyalty to the Agent, under these facts, the Agent is not a client of RA. The only client is the applicant for Medicaid benefits.

When an attorney is engaged by an agent, it is a prudent practice for the attorney at the commencement of the representation to confirm in writing the identity of the client and the nature of the relationship with the agent.

2. Material limitation on the representation of the client

To determine whether a material limitation exists, the RA must decide whether he cannot or may not be able to consider, recommend, or carry out an appropriate course of action for the client because of his other responsibilities or interests in this case to the third party Agent. See N.D.R. Prof. Conduct 1.7, comment 3. RA must decide if he can vigorously represent the client despite the alleged claim against the Agent. Although RA does not formally have any responsibilities or interest in the Agent, the RA may be hindered in his or her representation of the client if the client is unable to participate in the litigation and defense of his or her case. In other words, if the Agent is the primary conduit of information used to represent the client, adequate representation of the client may be impacted. The RA must ensure that his loyalties are directed to the client and not the Agent. Further, the RA must ensure that he has the ability to investigate all claims thoroughly.

- i. Competent Client.** If the client is competent, the RA may not have a conflict of interest in continuing the representation despite the mismanagement of funds claim by DHS because there may not be a material limitation on the RA's ability to represent the client. Depending upon the specific facts of each case and the RA's judgment as to whether the Agent's involvement may adversely impact the lawyer's representation of the client, the RA may need to request that the client consent to the representation. Therefore, if RA believes that "the representation of the client might be adversely affected," Rule 1.7(c), then in order to continue representation, the RA must reasonably believe that the representation will not be adversely affected and the client must consent after consultation.
- ii. Incapacitated Client.** If the client is incapacitated, the RA may not have a conflict of interest in continuing the representation despite the mismanagement of funds claim by DHS because there may not be a material limitation on the RA's ability to represent the client. Depending on the specific facts of each case and the RA's judgment as to whether the Agent's involvement may adversely impact the lawyer's representation of the client, the RA may need to request that the incapacitated client be appointed an independent guardian who may decide after consultation whether consenting to representation is reasonable. Therefore, if RA believes that "the representation of the client might be adversely affected," Rule 1.7(c), then in order to continue representation, the RA must reasonably believe that the representation will not be adversely affected and the client's independent guardian must consent after consultation.

Attorneys with a client under a disability have a special obligation to that client. See N.D.R. Prof. Conduct 1.14 Client under a Disability. The comment to Rule 1.14 states in relevant part:

In those situations where a legal representative has not been appointed but in the lawyer's professional judgment such an appointment would serve the client's best interest, or is in fact necessary for the effective completion of a transaction involving the client's property, the lawyer should seek to have a legal representative appointed to act on behalf of the client. The nature and extent of the client's disability may be disclosed by the lawyer to the extent the lawyer reasonably believes necessary to obtain the appointment of a legal representative.

N.D.R. Prof. Conduct 1.14, comment.

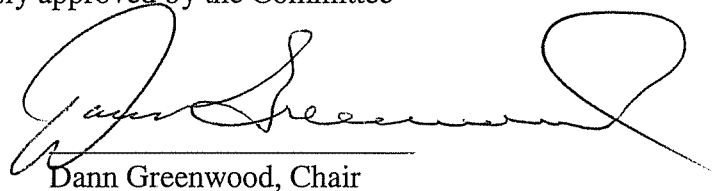
CONCLUSION

The RA may represent the client despite DHS's claim that the Agent mismanaged the client's funds and, therefore, the client has an asset disqualifying him or her from Medicaid eligibility only if the RA believes that his representation of the client will not be adversely affected by RA's relationship with the Agent. If RA believes that his representation of the client might be adversely affected by his relationship with the Agent, but he reasonably believes that it will not be adversely affected, the RA must seek client consent after consultation with the client. If the client is incapacitated, RA must request that an independent guardian be appointed to consider whether consent after consultation is appropriate.

This Opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule provides:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This Opinion was drafted by Adele Page and unanimously approved by the Committee on April 10, 2008.



Dann Greenwood, Chair