

Conflicts of Interest in Joint Representation of Siblings in Guardianship Proceedings

I. Introduction and Issues Presented

In New York guardianship proceedings for immigrant children seeking Special Immigrant Juvenile Status (“SIJS”), siblings are often jointly represented by one attorney (most commonly by a court-appointed law guardian). Because the siblings are seeking, at least initially, to be placed with the same guardian, there is no inherent conflict of interest in the joint representation. If, however, the siblings’ interests diverge at some point during the proceedings, conflicts may arise, leading to the potential for ethical violations should the attorney continue with the representation.

The most likely fact pattern leading to a conflict in these proceedings would be if one or more of the siblings changes their mind with respect to the identity of their putative guardian. In that circumstance, once the siblings can no longer agree, their lawyer may not be able to ethically represent all of the siblings without going against the express wishes of at least one client.

The question posed by this memorandum is as follows: once the siblings’ interests are no longer aligned, can their jointly engaged lawyer continue to represent one (or more) of the siblings or must the attorney withdraw completely from the matter?

II. Short Answer

New York’s Rule of Professional Conduct (“RPC”) 1.7 provides the framework for representing clients with a potential conflict of interest. Pursuant to RPC 1.7, an attorney generally may not represent clients with “differing interests.” However, New York’s ethics

authorities and courts have established that while an attorney who becomes conflicted during the course of a joint representation should withdraw from one (or more) of the affected clients, often she may remain counsel for the remaining clients. Absent unusual circumstances, there is no obligation for the attorney to withdraw fully from the representation.

III. Legal Analysis

A. General Framework for the Representation of Children in Family Court

As a general matter, Section 241 of New York's Family Court Act establishes a right to counsel for minor children who are the subject of a family court proceeding. *See* N.Y. Fam. Ct. Act § 241 (2019). Pursuant to this Act, siblings in SIJS/guardianship proceedings are frequently represented by law guardians, a court-appointed attorney to advocate for their interests, although they are free to obtain private counsel, including from legal services organizations.

It is not uncommon for one law guardian or other lawyer to represent all siblings in a single matter. Many times all siblings agree on the same course of action in the family court; however, circumstances may change for the children, leading them to make independent decisions on their guardianships. It is under these circumstances that potential conflicts of interest may arise.

B. New York Conflict of Interest Rules¹

1. RPC 1.7 Conflict of Interest: Current Clients

Under New York RPC 1.7, which governs conflicts of interests between an attorney's current clients,

¹ We have limited the scope our research to the New York Rules of Professional Conduct. If you intend to practice in other jurisdictions, please be sure to review those jurisdictions' version of the Rules, as they vary from state to state.

a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

New York RPC 1.7(a) (emphasis added). As defined by the RPCs, "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." NY RPC 1.0(f). In this context, a conflict of interest based on differing interests would include the representation of two or more siblings in a guardianship proceeding who disagree on their proposed guardian. As such, under RPC 1.7(a), once the jointly represented siblings present "differing interests," their lawyer may no longer represent any of the clients, unless the lawyer fulfills the requirements of RPC 1.7(b), which allows for the continued representation of clients in the event of a conflict.

RPC 1.7(b) establishes the following conditions that must be met to "clear" a conflict of interest:

(1) the lawyer reasonably believes he can provide competent and diligent representation in spite of the conflict;

(2) the representation is not otherwise prohibited by law;

(3) the representation does not involve the assertion of claims against the other client in the same proceeding (*i.e.* the lawyer may not represent both sides in a litigation or other tribunal); and

(4) each affected client gives informed consent, confirmed in writing.

See NY RPC 1.7(b). If the attorney for the siblings satisfies these four requirements, particularly with respect to obtaining informed consent in writing from each client (as discussed further below), the attorney may permissibly continue the representation of one (or more) of the clients.

2. *RPC 1.7 Commentary*

The comments to New York's Rule 1.7 provide additional support and clarification on resolving conflicts of interest among joint clients. In particular, the comments make clear that an attorney may continue to represent a subset of joint clients in the face of a previously unforeseen conflict. Per the comments,

If a conflict of interest arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.

NY RPC 1.7, comment 4 (emphasis added).

As such, withdrawal from all clients is not *per se* required under RPC 1.7. Rather than immediately withdrawing, the attorney must undertake a careful analysis to determine whether she is still able to adequately represent the remaining client(s)' interests, balanced against her remaining duties to the client(s) from whom she has withdrawn. Most importantly, the attorney "must continue to protect the confidences of the client from whose representation the lawyer has withdrawn," and she may not reveal confidential information she has learned about/from her former client. NY RPC 1.7, comment 5 (further discussed below). Finally, "absent the informed

consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” NY RPC 1.7, comment 29A.

Assuming the attorney can (1) adequately represent her remaining clients; (2) continue to protect her former client’s confidential information; (3) avoid asserting direct claims against her former client during the proceeding; and (4) has obtained informed consent from all parties, confirmed in writing, the attorney is not required to withdraw from the representation of all siblings, but rather may ethically continue to represent one or more siblings.

3. Protection of the Former Client’s Confidential Information

As stated above, the attorney has a continuing obligation to protect her former client’s confidences. This means that the attorney may not now reveal any confidential or privileged information she learned from that former client to third parties. This duty, however, does not extend to the co-client, with whom all information will ordinarily be shared. “With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach.” NY RPC 1.7, comment 30. Meaning, absent a specific agreement to the contrary, one joint client cannot keep information from the other. So, at the “outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.” NY RPC 1.7, comment 31.

Further,

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common

representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to the client's benefit.

Id. Thus, while the attorney may not reveal the former client's confidential information to third parties, she may share any information with the sibling with whom she has a continuing attorney-client relationship.

As an example, if one sibling ("Sibling 1") approached her attorney and confided that the putative guardian had been abusive to her, but not to her sibling, and that she wished to seek a separate guardian, the attorney may, and should, reveal this information to the other client ("Sibling 2"). Sibling 2 is entitled to know pertinent information about her potential guardian, even if Sibling 1 would not like to share the information. The attorney must disclose the abuse of Sibling 1, gather any facts that Sibling 2 may have and determine what steps Sibling 2 would like to take, in light of the information.²

If the attorney believes Sibling 1's claims of abuse are credible, she may face additional obligations. First, RPC 3.3 may require disclosure to the tribunal, if it is necessary to correct information, now known to be false, that had been previously presented to the court about the guardian's fitness to raise the siblings.³

Further, while lawyers in New York are not mandatory reporters of child abuse under the State Social Services Law (*see* N.Y. Soc. Serv. Law § 413(1)(a)), the Rules of Professional

² It is possible that Sibling 2's account of the putative guardian is different from Sibling 1's. There may be additional factors that led to the breakdown of relationship between the proposed guardian and Sibling 1.

³ We discuss RPC 3.3 in more detail in the accompanying memorandum entitled "Representation of Derivative Beneficiaries in Immigration Applications and an Attorney's Duty of Candor to the Tribunal." To avoid repetition, we refer you to that memorandum for a more detailed account of that Rule.

Conduct allow attorneys to take protective action when representing children who may not be capable of protecting their own interests. In particular, Rule 1.14 governs the relationship between attorneys and clients with diminished capacity, including some children in some circumstances. If an attorney believes her client has diminished capacity and is at risk of “substantial physical, financial or other harm unless action is taken,” the lawyer may take “reasonably protective action” to ensure her client’s safety. NY RPC 1.14(b). We believe such protective action could include disclosing the risk of abuse to the tribunal, so that the court may intervene and appoint a more appropriate guardian, and/or to child welfare authorities to prompt further investigation.

4. Obtaining Informed Consent⁴

At the onset of representing siblings as part of a joint representation, the lawyer should make clear to the clients that there are certain risks associated with common representation, including the occurrence of a future conflict between the joint clients. RPC 1.7 makes clear that to obtain the informed consent of multiple clients, all potential pitfalls must be disclosed. Thus, “[w]hen representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved.” NY RPC 1.7, comment 18; *see also* NY RPC 1.7, comment 29 (the “lawyer should consult with each client concerning the implications of the common representation, including the advantages and

⁴ This memorandum does not discuss whether, and at what age, a minor may consent to waive a conflict of interest in immigration or family court proceedings. Lowenstein Sandler has previously researched the law on ascertaining minors’ competence to make legal decisions and managing representation when minors lack such competence. We would be happy to share a copy of that memo.

the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.").

Because of the inherent risk of future conflict in a joint representation, in order to resolve all doubts, the joint engagement letter should contain a description of these potential pitfalls and a confirmation that the issues were actually discussed. To aid in this process, we've provided comments to the joint representation language contained in your engagement letter.

C. Ethics Opinions and Case Law Support "Limited" Withdrawal in Sibling Conflict-of-Interest Cases

Ethics authorities in New York have already concluded that joint representation in the immigration/guardianship process is ethically permissible as a general matter. While it is not entirely analogous, Opinion 1069 from the New York State Bar Association held that the joint representation of a putative guardian and an immigrant child pursuing Special Immigrant Juvenile Status is permissible, provided that the attorney follows the demands of RPC 1.7(b). *See* Opinion 1069, New York State Bar Association, Committee on Professional Ethics (Aug. 19, 2015).

Importantly, the Committee noted that

Even when the interests of the guardian and the child appear to be consistent, circumstances may change. . . . this proceeding involves factors upon which the child may have strong and changeable opinions . . . The possibility of a desired change of course in the future by a child cannot be dismissed out of hand. The lawyer thus must be sensitive to changes that might create differing interests.

See Op. 1069 at ¶ 15. As such, this Opinion provides a close parallel to the current situation, because conflicts between siblings may suddenly arise, though perhaps less often than between a child and the proposed guardian. Thus, pursuant to this Opinion, joint representation of multiple

siblings in a guardianship proceeding should be permissible, so long as the attorney remains sensitive to the potential for future conflicts. *See* Op. 1069 at ¶¶ 17-18.

Once the siblings no longer agree on their guardianship application, they have expressed “differing interests,” and it may become impossible for their joint attorney to continue the representation. The practice commentaries which have been appended to the end of Section 241 of the Family Court Act note that a potential conflict may arise from

[t]he representation of two or more siblings who are involved in a child protective or child custody proceeding. A common practice is to assign a single law guardian to represent multiple related children. That is not a problem, so long as there exists no conflict or potential conflict. However, when a conflict may arise, for example when siblings desire different dispositions, the law guardian should immediately move to withdrawal [sic] and substitute separate counsel for each child.

“Law Guardian Conflicts,” Family Court Act Practice Commentaries, Prof. Merrill Sobie, as part of N.Y. Fam. Ct. Act § 241 (emphasis added). Thus, Professor Sobie argues for the complete withdrawal of a conflicted law guardian in favor of two (or more) separate counsel for the now-conflicting siblings.

Despite this declaration from Professor Sobie, the overwhelming authority in the State of New York supports a lawyer’s more limited withdrawal from the representation of one or more siblings, while maintaining the representation of the remainder. In *In re Randi NN*, the Appellate Division held that a law guardian would not be disqualified from representing a child in a guardianship/visitation application where the child’s siblings were seeking visitation rights, even though the lawyer had previously represented the child’s siblings in their own guardianship

applications. *In re Randi NN*, 68 A.D.3d 1458 (App. Div. 2009). The court remedied the potential conflict by appointing a separate law guardian for the siblings, explaining:

To the extent that the grandmother asserts that a conflict of interest exists due to the siblings seeking visitation with the child that the Law Guardian may oppose, the appointment of separate Law Guardians for the siblings—appointments which the child’s Law Guardian suggested—insures that the siblings will be properly represented.

Id. at 1461. Thus, when presented with a law guardian’s conflict of interest, New York courts recognize that the addition of independent law guardians, as opposed to the withdrawal of existing attorneys, cures the potential conflict.

Other courts have ordered similar relief, *i.e.*, requiring separate representation for children whose interests have diverged, but not requiring the initial law guardian to step down completely. In *Corigliano v. Corigliano*, the Appellate Division reversed the Family Court’s refusal to provide a separate law guardian for one of three siblings in a guardianship proceeding, holding:

As the law guardian adopted the position that the subject child remain with the mother and his two siblings at the outset of the proceeding, without making an appropriate inquiry, the potential conflict of interest in the law guardian’s continued representation of the subject child warrants the appointment of an independent law guardian for the subject child.

Corigliano v. Corigliano, 297 A.D.2d 328, 329 (App. Div. 2002); *see also In re James I.*, 128 A.D.3d 1285 (App. Div. 2015) (remanding guardianship proceeding to provide separate law guardians for siblings with different interests); *Matter of Brooke D.*, 193 A.D.2d 1100 (App. Div. 1993) (remanding proceeding to family court to determine whether law guardian should withdraw from representation of five out of six siblings, remaining only with sixth sibling).

New York Courts appear to be reluctant to disqualify law guardians based on alleged conflicts of interest, and routinely will deny such motions, preferring instead to appoint additional attorneys rather than to remove a qualified and informed law guardian from the matter entirely. *See, e.g., In re S.A. v. S.K.*, 977 N.Y.S.2d 670 (Bx. Fam. Ct., Aug. 26, 2013) (refusing to disqualify child's law guardian on motion by maternal grandmother alleging conflict of interest due to law guardian's concurrent representation of child's siblings in related proceedings). Conflicts of interests among siblings arise frequently in family court. Based on the majority of case law in New York, an attorney jointly representing two or more siblings may ethically continue to represent a subset of the group, so long as a new and independent attorney can step in as counsel to the now-conflicted former clients.

D. Court Rulings Supersede Rules of Professional Conduct

We understand that when conflicts of interest among siblings arise, one common consequence is that the court will appoint a new lawyer for one or more of the siblings, leaving the existing lawyer to represent the remaining siblings. In this instance, even if there were a conflict of interest under RPC 1.7, this action by the judge would trump the Rules of Professional Conduct. Case law in the state has consistently held that the courts may overrule or even disregard the RPCs as needed. Indeed, the Court of Appeals held (in discussing the precursor Disciplinary Code), that

While unquestionably important, and respected by the courts, the [disciplinary] code does not have the force of law. That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as

guidelines to be applied with due regard for the broad range of interests at stake.

Niesig v. Team I, 76 N.Y.2d 363, 369-70 (N.Y. 1990) (emphasis added); *see also Gordon v. Obiakor*, 117 A.D.3d 681, 682 (App. Div. 2014) (applying *Niesig* to the Rules of Professional Conduct).

As such, while we can safely conclude that it is not an ethical violation to remain as counsel to a subset of clients from a joint representation, even if it were, it is clear that appointment by the court would eliminate any potential ethical prohibitions. When a court instructs an attorney to continue representing one or more siblings after a conflict has developed with another sibling, the attorney should, pursuant to NY RPC 1.4, explain the situation to the remaining clients and assure them of the attorney's now-undivided loyalty to them and to achieving their goals in the matter.

IV. Conclusion

Based on the New York Rules of Professional Conduct, ethics opinions, and case law on the subject, an attorney jointly representing two or more siblings in a guardianship proceeding, who faces a conflict of interest during the pendency of the proceedings, may ethically withdraw from one (or more) of the siblings, but continue to represent the remaining sibling(s). This conclusion is predicated on either one of two assumptions: (1) that the lawyer has adhered to New York's RPC 1.7(b) and obtained informed written consent from the affected clients to proceed in this manner, or (2) that the court has instructed the lawyer to continue to represent one or more of the siblings after the lawyer has apprised the court of the conflict.