

## ETHICS OPINION 2013-02

**Rules:** 1.7, 1.9, 1.14(b), 1.18(a)  
**Subject:** Obligations to person with diminished capacity and potential conflicts  
**Summary:** Lawyer may take reasonably necessary action to protect Client with diminished capacity; person is not a “prospective client” if lawyer has not discussed forming client-lawyer relationship with that person.

Attorneys were contacted by Minnesota Counsel who represents a minor child (who is a resident of South Dakota) with regard to minor child’s personal injury claim. Minnesota Counsel initially directed Attorneys to petition to have Mother of minor child appointed as conservator of minor child so as to obtain court-approval of a settlement of the minor child’s claim, and to establish a special-needs trust for minor child to administer the proceeds of the settlement. Minnesota Counsel directed all of Attorneys’ activities in this regard.

Mother and Father of minor child were never married. Minnesota Counsel indicated that Mother had custody of child, so Attorneys had initial telephone conversations with Mother, and sent documents to Mother to be executed for purposes of obtaining her appointment as conservator. However, Attorneys did not ever discuss an attorney-client relationship with Mother. Mother ultimately failed to return the documents.

Meanwhile, Attorneys sought Father to see if he would waive any objection to Mother being appointed. Upon meeting with Father, attorneys learned that Father, not Mother, had custody of minor child, pursuant to a custody order, which also indicated that Mother was to complete drug and alcohol treatment, parenting classes, and other conditions prior to visitation with child. Attorneys also learned that Mother is incarcerated. Meanwhile, Father was neat, responsible, and had been employed with same employer for seven years.

Minnesota Counsel and Attorneys agree that Father, not Mother, should be appointed as conservator for the minor child because that would be in minor child’s best interests under the circumstances. Attorneys now inquire whether, given their prior contact with Mother, there is any conflict of interest or other proscription that prevents them from petitioning for the appointment of Father as conservator of the minor child.

### OPINION

Rules 1.7 and 1.9 with regard to current and former clients restrict the ability of attorneys to act adversely to those clients in substantially-related matters, and Rule 1.18(a) extends those proscriptions to certain prospective clients. However, based upon the facts presented, Mother does not appear to be Attorneys’ current, former, or even prospective client. All of the facts presented indicate that minor child and/or Minnesota Counsel is/are Attorneys’ client(s). Attorneys’ activities were all directed by Minnesota Counsel with the best interests of the minor child in mind. In addition, Attorneys’ contact with Mother was limited to a phone conversation, and sending

documents to have her execute them to obtain her appointment as conservator. These contacts and correspondence were also at the direction of Minnesota Counsel, and were done to protect the rights of the minor child. Finally, the information that Attorneys learned about Mother was obtained from Father, and that information gave Attorneys reason to believe that Father, rather than Mother, was the best potential appointee.

In short, there are no factors indicating that Mother had an actual or prospective attorney-client relationship with Attorneys; nor could she have reasonably believed that one existed. There can be no conflict of interest that would prevent the Attorneys from now seeking to have Father appointed conservator. However, Attorneys should ensure they are providing the Mother with any notice of Father's petition for appointment that the substantive or procedural law may require.

In addition, Rule 1.14(b) provides that, "[w]hen a lawyer reasonably believes that the client has diminished capacity . . . and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . including . . . seeking the appointment of a guardian ad litem, conservator or guardian." Note 5 to this Rule further directs that in taking protective action "the lawyer should be guided by such facts as the wishes and values of the client to the extent known, *the client's best interests* . . . respecting the client's family and social connections." (Emphasis added).

Here, in light of the information the Attorneys received, it is not only permissible, but advisable that Attorneys take steps to have Father, rather than Mother, appointed as conservator.

Neil Fulton, Chair  
Ethics Committee  
State Bar of South Dakota