Scenario 2[1]

You are a famed trial lawyer, well known for your many victories, humility and penchant for wearing bowties. Some months ago, you, along with your associate, also known for his many victories, humility and red sneakers, took on a contingency fee case for a lovely family. The daughter was injured in an automobile crash. Unfortunately, although for you it's really fortunate because you're going to make a ton of money, your client, Lily Smith suffered a cataphoric knee injury. At the time of the injury, Lily was the highest ranked 17-year-old gymnast in the State and a shoo-in for the next USA Olympic team. She can no longer do gymnastics, at any level.

The medical treatment, including multiple surgeries, costs totaled $112,000 when Lily finally reached a medical end point. Thankfully, Mr. Smith had great health insurance through his employer and Anthem covered most of the bills. Mr. Smith did, however, pay about $10,000 out-of-pocket in co-pays, co-insurance and travel costs for a hotel near an out of town hospital for one surgery by a specialist. Anthem has, though, sent Mr. and Mrs. Smith, Lily's parents, a notice of a subrogation claim.

1. Days before mediation, Lily turns 18 and asks that her parents no longer be part of the case, not be informed of the mediation or the final settlement amount. At mediation, Lily instructs you to accept the defense's final and best offer of $75,000. Of course, you've had numerous conversations leading up to the mediation and know that Mr. and Mrs. Smith believe any settlement less than $250,000 must be rejected, in large part because of the sizeable subrogation claim against them. Lily has also decided she does not want her parents to get any of the money or be reimbursed for medical costs. As far as Lily is concerned, her parent's money issues are their problem, she's taking the money and going to backpack across Japan.
    a. May you comply with Lily's wishes?

2. Of course, when the Smith's first came to you, Lily was a minor, so you filed suit through Mr. Smith at next friend. During the course of the representation, being a great lawyer, you discover there is $5,000 of Med Pay available. When you tell Mr. Smith, he is very excited because he wants to buy a new motorcycle, so he instructs you to collect and disburse, to him, the $5,000 as quickly as possible.
    a. May you comply with Mr. Smith's wishes?

3. As it turns out, because you are very busy and important, you were wrong (well, your associate gave you bad information and he's since been terminated); Lily doesn't turn 18 until next year. So, Mr. and Mrs. Smith are part of the mediation. You also misunderstood their position on settlement (again, that damned associate). Lily wants nothing less than $250,000. Mr. and Mrs. Smith have instructed you to

[1] These scenarios and analysis are derived from Opinion #154 of Maine's Professional Ethics Commission. As far as one could tell, New Hampshire's Ethics Committee has not produced an opinion on point.

take the $75,000 offer. For your part, you agree with Lily, the case, especially in your hands, is worth at least $250,000.

a. May you comply with Mr. and Mrs. Smith's request?

4. When you explain that you must file a motion with the court seeking permission to settle, because Lily is a minor, Mr. and Mrs. Smith ask you to request reimbursements to them for Lily's cell phone payments. It's been so expensive paying for Lily's older siblings bills and the figure this will be a good chance to teach Lily responsibility.
    a. May you make the request for reimbursement in your motion?
    b. May you advocate for reimbursement for during oral argument?

5. After meeting with the clients during the for the first few minutes of initial intake, just long enough for them to be appropriately in awe of you, you turned the matter over to your red-shoed associate. After all, you had fishing to do and could take credit for a big settlement later, no one would believe that stupid associate did anything of value. Anyway, during the interview your associate finds out that, while the defendant driver was negligent, it sure sounds a lot like Mr. Smith, who was driving Lily at the time of the crash, was negligent too. Of course, Mr. Smith didn't get hurt so your associate didn't bother to tell you he was involved in the crash. At the end of the interview, Mr. Smith signed the fee agreement on Lily's behalf.
    a. Can either Mr. or Mrs. Smith act as next friend in this situation?
    b. What should have happened when this information came to light?

The Rules

To begin, we start at everyone's favorite place; the Rules of Professional Conduct. Rule 1.7 Conflicts of Interests states:

> (a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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

(c) Notwithstanding (a) and (b) above, a lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not:

(1) a co-defendant of a defendant also represented by the New Hampshire Public Defender Program; or

(2) a witness in a case in which the New Hampshire Public Defender Program represents a client and it is a case in which the New Hampshire Public Defender Program determines that there is a significant risk that the representation of the witness will materially limit the lawyer's responsibilities to the existing client.

In some circumstances, most in fact, when a lawyer's only client is a child it is the parent's role, and appropriately so, to speak and act on behalf of the child. So, as a general rule, the lawyer should consider the parents as the authorized representative of the child unless and until the lawyer reasonably believes that the parent is not motivated or acting in the best interest of the client. Of course, the largest concern is when a parent might also be a party, whether a plaintiff or defendant, in the same matter.

One thing is clear, a lawyer must decide at the outset of representation if there is a conflict and, if there is, whether it is waivable. Generally, in cases where both parent and child have claims, the likelihood of a non-waivable conflict is high. But, like almost everything in the law, the analysis must be done on a case by case basis.

An issue unique to parent-child consent is that a minor cannot consent independently without a guardian so the lawyer must make another determination; whether the parent can consent on behalf of the minor.

With all that said, the presumptive rule across the nation seems to be that parents are acting in the best interests of their children even if the parent has a claim. As a lawyer, you may rely on this assumption, but you can't ignore reasonable signs that would cause one to doubt the parent's motives. New Hampshire uses the harsh reality test. "If a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent." *Ethics Committee Comment to Rule 1.7*.

The best advice on how to determine if you will be materially limited representing both parent and client is to examine and evaluate all the facts, the nature of the relationship between the parent and child, the amount of insurance money available to pay a claim, the age of the child, the value of claims for each, seriousness of the child's injury, what types of things the parents are seeking to have reimbursed and the parent's level of helping the child get appropriate treatment for the injuries.

If, after evaluating all the circumstances, you feel you can't represent both or get assent from the parent for the child, you have choices. If the information you've obtained doesn't give you some unethical advantage, you could represent one of the parties. Of course, you need to advise the other to get his or her own counsel. You could also seek a guardian ad litem for the minor.

But, bear in mind Rule of Professional Conduct 1.14 Client with Diminished Capacity which encompasses minors:

> (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.
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The New Hampshire Ethics Committee comment to this rule points to the ABA model rules comment and also states, separately, "ABA Comment 4 says that the lawyer would "ordinarily look to" any legal representative (such as a guardian) for decisions. The situations in which the client's legal representative should not be the person making decisions are limited to two situations: where the lawyer represents the client in a matter against the interests of the legal representative or where that the legal representative instructs the lawyer to act in a manner that will violate that person's legal duties toward the client. *See Restatement Third, The Law Governing Lawyers §* 24(c) (2000)." In other words, the parents call the shots for a minor because the parent is the legal representative of his or her child or, as the ABA comment puts it, "[i]n matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d)."

Violating the conflict of interest rules is a serious matter. In *Boyle's case*, 135 N.H. 21 (1992) and *In re Wyatt's Case,* 159 N.H. 285 (2009), lawyers who violated the conflicts rules suffered real consequences, the least of which was a two-year suspension. The Court will look

at the ABA Standards for Imposing Lawyer Sanctions, considering a) the duty violated; b) the lawyer's mental state; c) the potential or actual injury caused by the misconduct; and d) any aggravating or mitigating factors. *Wyatt* at 307. But, bear in mind the Court starts at this point: "We typically impose disbarment pursuant to the Standards where conflicted attorneys act pursuant to some selfish or improper motive." *Id*.

So, with all the information in mind and everything as clear as dirt, let's turn to the answers to our hypotheticals.

And the Answers

1. The long and the short of it is this. Once Lily reaches 18, she becomes the boss. It's her case. In fact, in practice, it's best practice to have the newly minted adult sign a new fee agreement.

   If you were smart and brought a separate claim for the parents for the medical and other costs they've paid, you now have a conflict and would need written consent from both to proceed representing both. So, in all likelihood, here, you have to withdraw. The subrogation claim doesn't touch Lily. *Blue Cross/Blue Shield of New Hampshire-Vermont v. St. Cyr*, 123 N.H. 137 (1983); *Vachon v. Halford*, 125 N.H. 577 (1984); *and Lutkus v. Lutkus,* 141 N.H. 552 (1997).
2. This is a prime example of a reasonable basis for an attorney to second guess the presumption that a parent is acting in his child's best interest. While there are other legal issues at play in how the med pay money can be spent, as a technical matter, the claim for medical payments does belong to Mr. Smith so, unless, taking the med pay compromises Lily's claim, you can comply with the request. If, though, in your analysis, you determine that med pay must be used for medical payments and cannot be used for that new motorcycle, you can't follow the instructions and, more importantly for our discussion, if you can't get Mr. Smith back on track with the law, you won't be able to represent either him or Lily and you must withdraw.
3. Remember, because of that stupid associate with the red sneakers, you only brought a claim for Lily. With that in mind, your obligation here is make sure Mr. Smith fully understands the value of the case, your evaluation and the method you used to get to the value. You'll need to articulate the likelihood of success and of getting paid the larger value.

   If, after all that, Mr. Smith still wants to take the short money, you need to determine if you now have a reasonable basis to believe your representation is being materially affected. You can settle if you believe Mr. Smith is putting Lily's interests first, but make sure Mr. Smith is prepared to appear to make a case before a judge, who must approve any and all minor settles over $10,000, for the low settlement. If, however, you believe Mr. Smith is not acting in Lily's best interest, you should seek a guardian ad litem.
4. As a starting point, you have to ask yourself if the cell phone bill is something that Lily should pay for. After all, if Lily wanted a car, the court would likely grant that request. So, why not a cell phone? The key is that the Smiths have already paid for Lily's older siblings cell phones. This is, in a way, unfair treatment of Lily. Of course,

as an experience lawyer, who has settled hundreds of minor cases, you've been in court and seen this request made and rejected. And, of course, you'll explain all that to Mr. Smith.

If Mr. Smith insists, your duty of candor to the tribunal and to not bring non-meritorious claims or make non-meritorious contentions take over. Rule 3.3 and Rule 3.1. You cannot bring motions for what you know to be improper relief. If Mr. Smith insists you make the request, it is likely time to withdraw, again. Of course, simply in the realm of parent-child conflict, Mr. Smith is no longer acting in the best interest of the Lily as his request will delay or prevent settlement. Again, you should consider seeking a guardian.

5. This should have been clear from the moment the associate showed up wearing red sneakers; fire him. Here, you can represent Lily but neither parent can act as next friend, there is a high probability of Mr. Smith's liability and that creates financial exposure for both him and his wife. If should be clear that Mr. Smith and Lily have divergent interests. You'll likely need a guardian to handle these proceedings. Also, the red sneaker lawyer should have made it clear to Mr. Smith that there is a potential suit against him.

Additional Reading that Might Help (or not)

For those who would like a more in-depth discussion of the analysis involved in representing children and of cases that are outside the realm of personal injury, there is an excellent article for the Fordham Law Review by Professor Nancy Moore. "Conflicts of Interests in the Representation of Children," Prof. Nancy J. Moore, Fordham Law Review, Volume 64, Issue 4, Article 21 (1996).