ETHICS ADVISORY PANEL

OPINION 92-23, Request No. 262
Issued May 20, 1992

The Panel is presented with a difficult and unsettled issue of professional ethics. The facts are as follows. The requesting attorney represents a guardianship estate in the Probate Court. The ward of the estate is incompetent. During the process of preparing an accounting to be filed with the Probate Court, the attorney discovered a series of unexplained withdrawals from the estate. The guardian is unable or unwilling to account for the withdrawals, and it appears that the withdrawals were wrongful and/or fraudulent.

Faced with this situation, the requesting attorney first sought to withdraw as counsel. In order to preserve client confidences, the only explanation offered for the motion to withdraw was the requesting attorney's statement to the court that withdrawal was necessary pursuant to Rule 1.16 of the Rules of Professional Conduct. The motion to withdraw was denied by the Probate Court on the ground that attorneys are permitted to withdraw only in circumstances where new counsel enters an appearance simultaneously. The attorney seeks the advice of the Panel with respect to his ethical obligations under these circumstances.

The above factual scenario presents a difficult ethical dilemma. The attorney's simultaneous duties to the court, the guardian, and the guardianship estate cannot be reconciled

easily, or without adverse consequence to one or more of the parties to whom the attorney owes a duty. A reading of the Rules of Professional Conduct clarifies the situation somewhat, but ultimately fails to clearly resolve the ethical dilemma.

At first blush, Rule 1.6(a), entitled "Confidentiality of Information," appears to prohibit the attorney from revealing to any person the fraudulent activities of the guardian. The Rule states plainly that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ." This rule is tempered, however, by the mandate of Rule 1.2(d) that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent . . ." As the comment to Rule 1.2 makes clear, an attorney who suggests how fraudulent conduct might be concealed (in this instance, for example, by counseling the guardian to replace the wrongfully taken monies) violates the provisions of Rule 1.2(d). Moreover, the comment also recognizes that "where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."

To further muddy the waters, Rule 3.3, entitled "Candor Toward the Tribunal", obligates an attorney to disclose material facts to the court when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. As the comment to Rule 3.3 points out, there "are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Against this backdrop, one thing is clear. The requesting attorney may not proffer to the Probate Court an accounting that the attorney believes to be false and/or fraudulent. See Rule 3.3(a)(1). Rather, the attorney should counsel the guardian to make disclosure to the court of the existence and nature of the guardian's unexplained withdrawls. If this effort fails, withdrawal pursuant to Rule 1.16(a)(1) and (b)(1) would ordinarily be appropriate. The Panel notes that the comment to this Rule states that an attorney's representation "that professional considerations require termination of the representation ordinarily should be accepted [by the court] as sufficient."

While the attorney's dual obligations to the guardian and to the court may be reconciled somewhat, first by counseling the guardian to make disclosure and, if that fails, by withdrawing from the case, the conflict between the guardian and the ward is more difficult, if not impossible, to reconcile. Where an attorney represents a guardianship estate, the Panel is of the belief that an unexplained motion to withdraw pursuant to Rule 1.16 is inadequate to fulfill the attorney's special obligations to the ward under the Rules of Professional Conduct. Had the requesting attorney withdrawn, and another attorney entered simultaneously, it would have only been a matter of time until the second attorney discovered the fraud and moved to withdraw pursuant to Rule 1.16. Considering the court's requirement of a simultaneous entry of appearance, a third attorney for the estate would face the same dilemma and would be forced to silently

withdraw pursuant to Rule 1.16, at the same time a fourth attorney entered the case. The net result of these never-ending entries/withdrawals would be the successful concealment from the estate, and the ward, the guardian's wrongdoing. Such a result is not only distasteful, but presupposes that the attorney owes no obligation to the estate or to the ward thereof.

As between guardian and ward, therefore, the initial inquiry is whether the attorney does in fact owe a duty to the ward. If no duty is owed, then the attorney's course of conduct is clear. The attorney may not disclose to the ward the fraudulent activities of the guardian pursuant to the clear mandate of Rule 1.6.

The Panel finds this result inconsistent with the spirit and purpose of the Rules of Professional Conduct.[1] The ward of the estate is not some third party to whom the attorney owes no duty. The comment to Rule 1.14 recognizes this:

> 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.

---

1. See Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. 5 Legal Ethics 15 (1987). See also Rule 1.2(d) and comment thereto ("where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary") and Rule 3.3(b) (the obligation of candor toward the tribunal applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6").

Numerous courts have reached the same conclusion. As the Arizona Court of Appeals found in Flickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976):

> [W]hen an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If [the attorney] knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward's interests overshadow those of the guardian.
>
> Flickett, supra, 27 Arz. App. at 794-95, 558 P.2d at 989-90.[2]

---

2. See, also, Gump v. Wells Fargo Bank, 237 Cal. Rptr. 311 (1987) (trustee's attorney sought to avoid discovery of communications with the trustee on the basis of privilege; the court ordered disclosure to the beneficiaries on the theory that the trustee is the beneficiaries' "agent" and that the attorney therefore acts on the beneficiaries' behalf when representing the trustee); Morales v. Field, 160 Cal. Rptr. 239, 244 (1980) ("when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary"); Riggs National Bank v. Zimmer, 355 A.2d 709, 714 (Del. Ch. 1976) (attorney serves at request of trustee for the benefit of the beneficiaries; "in effect the beneficiaries were the clients . . . as much as the trustees were, and perhaps more so"); In re Estate of Larson, 694 P.2d 1051 (Wash. 1985) (attorney-client relation is with the personal representative of an estate but the attorney has a fiduciary relation to the personal representative that runs to the beneficiaries); ABA Standing Committee on Ethics and Professional Responsibility Informal Decision C-754 (1964) (stating that "an outside attorney . . . is technically selected and employed by the fiduciary in its capacity as such, but . . . in fact usually also represents the beneficiaries of the estate, whose interests or desires may conflict with the fiduciary's technical duties or limitations in that capacity and thus with the interests of the fiduciary").

The Panel is of the opinion that Rules 1.2 and 1.6 require the requesting attorney to undertake remedial measures with regard to the guardian's misappropriation of guardianship funds. The requesting attorney should therefore counsel the guardian to disclose to the ward the existence and nature of the withdrawals. If the guardian fails to do this, the requesting attorney may disclose the relevant facts to the ward. In this instance, it would appear that disclosure to the Probate Court would be appropriate given the ward's incompetence.

The Panel does not suggest that the Rules of Professional Conduct give rise to an attorney/client relationship with the beneficiary where an attorney undertakes representation of a fiduciary. Nor does the Panel suggest that representation of a fiduciary obligates an attorney to provide the beneficiary with the full panoply of rights and privileges enjoyed by a client. We do believe, however, that in instances where an attorney representing a guardianship estate has knowledge of the guardian's wilful misappropriation of funds from the estate, the attorney owes an ethical and fiduciary duty to the incompetent ward to undertake appropriate remedial steps.[3] Other factual situations may call for differing responses. As stated in the Preamble to the Rules of Professional Conduct:

---

3. See comment to Rule 1.14 (an attorney may have an obligation to prevent or rectify guardian's misconduct); See also Rule 1.2(d) and comment thereto.

> Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Panel recognizes that the prospect of an attorney disclosing obviously sensitive matters to the ward of the estate has serious ramifications upon the attorney's relationship with the guardian. In the present matter, those ramifications can be lessened somewhat by frank discussion and thoughtful counseling of the guardian. In the future, the Panel believes that an attorney should explain to a guardian the ethical duties to which he/she is bound prior to accepting the representation. Full disclosure at the onset of the attorney's representation will at least serve to dispel any unjustified expectations on the part of the guardian, and will also ensure that the guardian understands the fiduciary obligations to which both he/she and the attorney are bound.

[RODIO]LI095000.DM3