

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2004-01 Request No. 875
Issued March 5, 2004

FACTS:

The inquiring attorney prepared a will for an elderly client several years ago. Since that time, the client's mental health has deteriorated and a neurological physician has told the client's family that Alzheimer's disease is suspected. One of the client's adult children has asked the inquiring attorney to represent him/her in a petition for guardianship over the client. The inquiring attorney states that he/she believes that a guardianship is in the elderly client's best interest.

ISSUE PRESENTED:

(a) Is the inquiring attorney's representation of an individual in a petition for guardianship over the inquiring attorney's elderly client a conflict of interest? (b) If not, will the representation run to both the elderly client and the petitioner/guardian?

OPINION:

(a) Rule 1.14 permits the inquiring attorney to represent an individual in a petition for guardianship over the inquiring attorney's own client provided the inquiring attorney reasonably believes that a guardianship is in the client's best interest. (b) In addition to the ethical obligations that arise under the attorney-client relationship between the guardian/petitioner and the inquiring attorney, the inquiring attorney also may have ethical obligations to the ward where the actions of the guardian are adverse to the interests of the ward.

REASONING:

Rule 1.14 of the Rules of Professional Conduct states:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian, or take other protective action with respect to a client, only

when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The inquiring attorney's elderly client's mental health has deteriorated and Alzheimer's disease is suspected. Further, the inquiring attorney believes that a guardianship for the client is in the client's best interest. Rule 1.14 permits the inquiring attorney to seek the appointment of a guardian for the client under these facts and circumstances. Indeed, the Commentary to Rule 1.14 instructs that "[i]f a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. . . . Evaluation of these considerations is a matter of professional judgment on the lawyer's part." Thus, it is not a conflict of interest for the inquiring attorney to represent an individual who seeks a guardianship over the inquiring attorney's own client.

An attorney for a guardian may have obligations to both the guardian and the ward. These obligations generally arise where the guardian's actions are adverse to the ward's interest. Under such circumstances, the ward of an estate is not some third party to whom an attorney owes no duty. Rhode Island Sup. Ct. Ethics Advisory Panel Opinion 92-23 (1992). According to the Comment to Rule 1.14:

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.

The Comment to Rule 1.2 also recognizes that "where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary." See also R. I. Sup. Ct. Ethics Advisory Panel Opinion 92-23 (1992) (attorney owed ethical and fiduciary duty to ward to take remedial steps where attorney for guardian had knowledge of guardian's willful misappropriation of estate funds.)

The Panel concludes that it is not a conflict of interest for the inquiring attorney to represent a petitioner in a petition for guardianship over the inquiring attorney's own elderly client where the inquiring attorney reasonably believes that a guardianship is in the elderly client's best interest. The Panel further concludes that in addition to the obligations that arise under the attorney-client relationship between the inquiring attorney and the petitioner/guardian, the inquiring attorney also may have ethical obligations to the ward as where the actions of the guardian are adverse to the interests of the ward.