

Utah Ethics Opinions

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69. USB EAO Opinion No. 69

Utah State Bar

Ethics Advisory Opinion No. 69

Approved November 16, 1979

Summary: An attorney may represent the husband and guardians of the wife even though he formerly represented the husband in an incompletd divorce action if both parties consent after full disclosure and if the attorney withdraws from the divorce proceedings.

Facts: The following fact situation has been presented to the Ethics Committee:

1. Lawyer A represents husband in a divorce proceeding. Lawyer B represents wife.
2. In June, 1978, the court orders inter alia wife not to encumber or dispose of and/or pledge assets during the divorce proceedings. In August, 1978, wife borrows large sums of money, using marital home as collateral, and enters into a business venture which promptly fails.
3. In October, 1978, wife's and husband's daughter and son-in-law hire lawyer C and file a petition to declare wife incompetent. In December, 1978, wife is declared incompetent and daughter and son-in-law are appointed guardians of person and estate of wife. Divorce action is held in abeyance. Lawyer B withdraws from representation of wife and, some weeks later, lawyer C withdraws from representation guardians.
4. In January, 1978, creditors from business venture file suit against wife. Guardians hire lawyer D to represent them in that action. Guardians agree to pay lawyer D a \$500 retainer if affirmative claims are denied and 1/2 of funds collected from affirmative claims asserted on behalf of wife's estate as contingency fee, if such claims are sustained. However, lawyer D refuses to represent guardians in divorce action and in any other facet of the guardianship without receiving retainers for each specific matter (e.g., for each creditors claim). Guardians do not have funds to pay these retainers.
5. In summer of 1979, creditor holding home as security for loan to wife files notice of default and notice of sale on home which was pledged by wife as collateral on loan for business (without court permission and without any

knowledge and/or participation by husband). Lawyer D will not represent guardians without further retainer, guardians do not have funds for additional retainer, and no action is taken until lawyer A, on behalf of husband, files third party action in divorce proceeding to restrain sale of home.

6. Husband and guardians then ask lawyer A to represent the estate of wife against third party defendant creditor. Guardians are dissatisfied with lawyer D's representation of them and, therefore, also ask lawyer A to represent the estate of wife generally.

7. Lawyer D consents in writing to lawyer A representing estate in third party action only.

8. Lawyer A advises husband that he cannot represent him in the future in the divorce action.

9. Lawyer A advises guardians that he cannot represent the person and/or estate of wife in the future in the divorce action.

10. Husband and guardians sign a retainer agreement with lawyer A to represent them in the third party action only and acknowledge lawyer A's advice that he cannot represent either side in future divorce proceedings. Husband and guardian agree jointly to pay lawyer A's fees based upon an hourly rate but without an advance retainer.

The following questions are posed to the Committee arising from the foregoing fact statement:

1. Can lawyer A represent both husband and estate of wife in third party action?
2. Can lawyer A represent guardians of wife in actions, except divorce action, on lawyer D's matter, involving person and estate of wife?
3. Can guardians discharge lawyer D and hire lawyer A to represent them as wife's guardians in all matters except divorce action?
4. If third party action is consolidated with the action now being litigated by lawyer D and guardians discharge lawyer D, can lawyer A represent guardians in lawyer D's matter also.
5. Is the answer to any of these questions affected if husband agrees jointly with guardians, to pay lawyer A's fees with regard to third party action or with regard to all matters affecting the person and/or estate of wife.
6. Are there any other ethical considerations not raised in the above questions inherent in the hypothetical fact

situation.

Opinion: The fact situation described raises questions both as the duty owed by the attorney to the husband as his client in the divorce action and in the newly assumed matter, and to the wife (through her guardians) in the creditor matters. The lawyer formerly represented the husband in the divorce proceedings. Now his services are sought to represent the guardians of the wife and/or the husband in various creditor problems. The lawyer proposes to withdraw as counsel for the husband in the divorce action and states that he will not represent the guardians of the wife in those divorce proceedings. Such refusal to proceed further in the divorce proceedings by the attorney is proper as the outcome of the creditor matters will undoubtedly affect the final divorce proceeding. It appears that the husband and guardians have similar objectives in the creditor matters in preserving the assets of the wife and/or marital estate.

The provisions of Canon 4, DR 4-101(B)(3) and (C)(I) are applicable, requiring that an attorney not reveal confidences or secrets of a client except "with the consent of the client or clients affected, but only after a full disclosure to them." Thus, any information gained by the attorney from the husband during the divorce proceedings may be revealed by him during the creditor litigation only after full disclosure to the husband and obtaining of consent from the husband.

The problems as to conflict of interest have a similar effect. An attorney must decline employment of multiple clients if he is representing differing interests unless "it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." It is not clear from the fact situation that there is in fact a differing of interests between the husband and the guardians of the wife in the creditor matters. However, in order to forestall objections, the attorney should make full disclosure to both parties of any potential for differing interests and should obtain informed consent from them to his representation of both. Canon 5, DR 5-105(A) and (C).

Therefore, the attorney can undertake to represent both the husband and the guardians of the wife in all of the creditor problems, including the third party action, if informed consent to such representation is given by both clients as to the potential conflict of interest and potential disclosure of client confidences.

Similarly, the guardians of the wife can employ the lawyer to perform services in the matter in which lawyer D is now representing them, as they have full authority to discharge lawyer D and employ new counsel. The only caveat is that lawyer A should not solicit such employment.

The arrangement described for the payment of fees in these matters is permissible so long as the clients understand the source of payment of the fees and the lawyer continues to exercise professional judgment independently for both clients. Such an arrangement is permissible under Canon 5, DR 5-107(A), which provides that "except with the consent of his client after full disclosure, a lawyer shall not . . . accept compensation for his legal services from one other than his client." Also, section (B) states that "a lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

In conclusion, the lawyer may undertake the representation as described in the fact situation, so long as full disclosure is made to the clients and consent obtained, and the attorney exercises independent judgment on behalf of each client.

However, the Committee wishes to point out that it would be preferable in this situation for the guardians of the wife to retain counsel other than attorney A and that only the practical, financial impossibilities of so doing justify the proposed arrangement. This comment is added as to encourage similar arrangements because of difficulties of adequate disclosure.

Rule Cited:

Canon 4 & 5