

Utah Ethics Opinions

2008.

08-2. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE:

OPINION NO. 08-02

Issued March 11, 2008

¶ 1. **Issue:** Under what circumstances may an attorney who has represented a party in conjunction with a proceeding to appoint a guardian for an adult incapacitated person represent the guardian that is subsequently appointed as a result of that proceeding?

¶ 2. **Conclusion:** The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Rules of Professional Conduct, Rules 1.7 and 1.9, the same way an attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances of the case raise the specter of a direct or material adversity, or if the representation of another client creates a material limitation on the lawyer's ability to represent the guardian effectively in light of the fiduciary, statutory and court imposed obligations on the guardian, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients. If there is an on-going proceeding involving both the former client and the prospective new client (the guardian), the conflict may not be waived and the representation of the guardian must be avoided.

¶ 3. **Background:** The issue addressed by this opinion arises in the context of a request under Utah Code Ann. § 75-5-303 (1988) for the appointment of a guardian of an incapacitated person. Under that section, the incapacitated person herself or ". . . any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.(fn1) Once the guardian is appointed, he or she may retain counsel to advise with respect to the conduct of the guardian's duties.

¶ 4. The nature of the proceedings leading to the appointment of a guardian involve several parties, including the person (usually a relative) requesting the appointment. This person is frequently represented by counsel. The person for whom guardianship is required to be represented by counsel. The proceedings seeking the appointment may be largely consensual or they may be contested. Conflicts in

the proceedings will primarily arise in two different contexts:

a) the party to the guardianship wishes to be appointed guardian, and other parties in interest object in favor of an unrelated third party guardianship or

b) the person for whom the guardianship is sought objects to the appointment.

Additional conflicts other may arise, depending on the nature of the guardianship proceeding and the identity of the parties to it, but should nonetheless be resolved as set forth below.

¶ 5. **Analysis:** If an attorney who has represented one of the parties in a contentious guardianship proceeding wishes to subsequently represent the person appointed as guardian, he or she must determine whether there is an impermissible conflict of interest in the subsequent representation. Resolution of the question is dependent on the facts of each given situation.

¶ 6. The conflict scenarios set forth above raise an issue under Utah Rule of Professional Conduct Rule 1.7 (Conflict of Interest: Current Clients) and Utah Rule of Professional Conduct Rule 1.9 (Duties to Former Clients), depending on whether the attorney continues to represent the party his or her previous client or whether the attorney withdraws from the prior representation.

¶ 7. Rule 1.7(a) provides:

. . .that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

¶ 8. Notwithstanding the provisions of Rule 1.17(a), Rule 1.7(b) provides:

A lawyer may represent the second client if:

(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 in other proceedings before a tribunal; and

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

¶ 9. Rule 1.9(a) provides that an attorney may not represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." Rule 1.9(b), the ongoing duty of confidentiality, prohibits the use of confidential information obtained during the representation of the former client, unless the former client gives informed consent, confirmed in writing; Rule 1.9(c), the ongoing duty of loyalty, prohibits the use of any information obtained during the former representation to the disadvantage of the former client.

¶ 10. In the case where there has been no dispute over the necessity for, or the identity of the appointed guardian, analysis of these rules will likely result in the conclusion that the subsequent representation of the guardian - whether concurrent with a continued representation of the former client or not - presents no conflict of interest that would preclude representation.

¶ 11. In a contested proceeding in which the attorney has represented the person for whom the guardian was appointed, the application of the conflict of interest rules may well lead to the conclusion that the attorney may not represent the guardian following his or her appointment. In fact, the attorney may actually be disqualified from such representation; see, e.g., *In the Matter of the Guardianship of Tamara L.P.*(fn2), discussing the conflict of interest issue in the context of the appointment of a guardian ad litem for a minor child, which discussion is equally applicable to the representation of an adult of allegedly diminished capacity.

¶ 12. Application of these rules to representation of the appointed guardian following a contentious guardianship proceeding might also lead to the conclusion that representation of the appointed guardian must be declined, depending on the nature of the conflict and the interests of the party to the guardianship proceeding weighed against the responsibilities of the guardian and his legal representative.

¶ 13. The duties of the guardian are set forth in Utah Code Ann. § 75-5-312. These duties of the guardian are not necessarily adverse to the interests of any party to a contentious guardianship proceeding. If analysis of the facts

and circumstances leads to the conclusion that, taking into account these duties, representation of the guardian will neither be "directly adverse" to, nor materially limited by, the lawyer's obligations to his other client, then there would be no ethical impediment to representing the subsequently appointed guardian.

¶ 14. However, the guardian is a fiduciary for the incapacitated person, and is further constrained in the exercise of his duties by statutory and court imposed obligations, all of which must be carried out in the best interests of the incapacitated person. This being the case, it is not difficult to imagine a scenario in which there is substantial potential for conflict between the views of the client or former client and the statutory obligations of the guardian. For example, there could be a difference of opinion regarding the best use of the ward's money and property, or as to the appropriate medical care or living conditions of the ward.(fn3)

¶ 15 The Comments to the Utah Rules of Professional Conduct give guidance as to how to identify and address conflict of interests that arise in a non-litigation context and should be carefully reviewed by any attorney in determining whether there is a conflict of interest under Rule 1.7 or Rule 1.9, arising out of either direct adversity or material limitation on the attorney's ability to represent the guardian. Comments [8](fn4), [26](fn5) and [32](fn6) to Rule 1.7 are particularly helpful in that regard.

¶ 16. If the attorney determines that there is either a direct adversity of interest or a significant risk that his representation of the guardian may be materially limited by his obligations to the protected person, Rule 1.7 requires that the attorney may only continue to represent both clients if he has determined that he will be able to provide competent and diligent representation notwithstanding the adversity or limitation, the representation is not prohibited by law(fn7), and it does not involve the assertion of a claim by one client against the other client in litigation. In that event, Rule 1.7(b)(4) provides that the conflict may be waived by the informed consent, confirmed in writing, of both affected parties. Rule 1.9(a) requires the informed consent of the former client only, again confirmed in writing. Of course, if the representation of the guardian is "directly adverse" to the interests of a former client and there is an on-going proceeding in which both the old and new clients continue as parties, the conflict is non-consentable. Rule 1.9 (b).

¶ 17. There is no issue with respect to the informed consent of the existing client, who can freely give such consent if he so wishes. The guardian, however, has statutory and court-imposed obligations with respect to the ward and may be constrained thereby from waiving the conflict; whether this an issue in a given case would require analysis of the

facts and circumstances of that particular situation. It may be desirable under this circumstance, if possible, to petition the court that appointed the guardian for additional guidance on this point.

¶ 18 Additional ethical issues are raised if the attorney who wishes to represent the guardian has previously represented the person for whom the guardianship was sought. These issues are governed by Utah Rule of Professional Conduct 1.14, which together with the comments to Rule 1.14, sets forth the considerations governing representation of parties with diminished capacity. As set forth in Comment [4] to Rule 1.14, if a guardian is appointed, the lawyer who formerly represented the client with diminished capacity should " . . . ordinarily look to the representative for decisions on behalf of the client." Although this Rule speaks to the issue of being appointed guardian and does not directly address the issue of being appointed counsel to the guardian, an attorney who has formerly represented the client with diminished capacity should carefully consider representation of the appointed guardian, as well.

¶ 19. The comments to the ABA Model Rules point out that the seeking of a guardian is a "serious deprivation of the client's rights" and a lawyer representing the person of alleged diminished capacity should only initiate such a proceeding if there are no other, less drastic, solutions available. Moreover, if a third party initiates the guardianship proceeding, the attorney should not represent the third party, nor should the attorney seek to be appointed guardian of a client with diminished capacity. See ABA Formal Ethics Opinion 96-404 (1996) (lawyer who files guardianship proceeding under Rule 1.14(b) should not act or seek to be appointed as guardian, except in the most exigent of circumstances; that is, when immediate and irreparable harm will result from the slightest delay).

¶ 20. **Conclusion:** The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Utah's Rules of Professional Conduct, Rules 1.7 and 1.9 the same way the attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances of the case raise the specter of a direct or material adversity, or if responsibilities to the client impose a material limitation on the attorney's ability to represent the guardian effectively in light of the fiduciary, statutory, and court imposed obligations on the guardianship, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients.

Footnotes:

1. Utah Code Ann. § 75-5-303(1) (1988).

2. 503 N.W. 2d 333, 336, 177 Wis. 2d 770, 779 (Wis.Ct.App. 1993).

3. See, e.g., *Guardianship of Nelson*, 663 P.2d 316, 204 Mont. 90 (Mont. 1983).

4. Comment [8] to Rule 1.7 describes the danger of the "material limitation" type of conflict, observing that "The conflict in effect forecloses alternatives that would otherwise be available to the client . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

5. Comment [26] to Rule 1.7 describes the relevant factors to be considered as: " . . . the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree."

6. Comment [29] to Rule 1.7 provides:

Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between parties has already assumed antagonism, the possibility that a client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer will subsequently represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

7. There does not appear to be any provision of Utah law that would prohibit the attorney for one of the parties to the guardianship proceeding from representing the subsequently appointed guardian.