ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.2(d), 1.6, 1.16, 3.3(a)(3), 3.7, and 4.1(b). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 91-24
April 3, 1992

Topic: Duty of attorney for estate to report taking of money by guardian from disabled person's estate.

Digest: Attorney for disabled adult's estate should report the taking of money from the estate by a guardian to the probate court even though taken under a claim of right by the guardian where the attorney did not represent the guardian personally in connection with the estate.

Ref.: Illinois Rules of Professional Conduct, Rules 1.6, 1.16, 3.7(a)(1)-(4), 3.3(a)(2), 3.3(a)(6), 4.1(b).

FACTS

An attorney established a guardianship for a person in a nursing home on a pro bono basis. At the time the guardianship was established, the guardian informed the attorney that the disabled person had bank accounts totaling less than $12,000.

Later, the disabled person died and the attorney was contacted, apparently by the guardian, to assist in closing out the guardianship. Information provided to the attorney by the guardian and third parties demonstrated that the estate included stocks, bonds, and cash totaling over $100,000.

The attorney drafted both an initial inventory and an inventory as of the date of the disabled person's death and forwarded the inventories to the guardian who made no objection to the inventories as prepared by the attorney.

Subsequently, the guardian took $30,000, which the attorney believes clearly belonged to the estate, claiming that she owned that property. She now refuses to return the money to the estate.

QUESTIONS

1. May the attorney disclose the guardian's taking of the estate's property? Must the attorney disclose it to the court?
2. Should the attorney file a motion to withdraw from the proceedings? If the attorney does so move, what information may the attorney disclose in the motion and what information is the attorney prohibited from disclosing, either in the motion or in response to questions from the court.

OPINION

It is assumed that the guardian did not reasonably believe that the attorney represented her personally at the time she disclosed her taking of the $30,000. Accordingly, the communication by the guardian to the attorney, even if made in confidence, (and the other information acquired by the attorney in the course of his representation of the estate) would not be covered by the attorney-client privilege nor would it be considered a "secret" of the guardian. See Rule 1.6, Confidentiality of Information.

The attorney's "clients" in this matter, for attorney-client privilege purposes, are: (1) the disabled person's estate, both before and after the disabled person's death; and (2) the guardian, in his capacity as guardian. The guardian is not represented personally by the attorney but is represented only in his capacity as guardian for closing out the guardianship.

Under these circumstances, the attorney's knowledge of the "taking" of the estate's property by the guardian is neither privileged information nor a secret. The attorney may report such taking to the State's Attorney if he believes there are grounds for criminal prosecution. Moreover, as attorney for the estate, the attorney must file a report with the probate court making full disclosure of all relevant facts. The attorney should therefore file with the court both the initial inventory and the one prepared as of the date of the disabled person's death. The attorney should further report to the court, in a revised inventory or otherwise, the fact that the guardian has taken $30,000 from the estate.

If a dispute arises between the attorney and the guardian over the administering of the estate or the winding up of the guardianship, or if it appears the attorney will likely become a witness on behalf of the estate in the proceedings, the attorney should file a petition with the court to have a special representative appointed for the estate in connection with these matters. See Rule 3.7, Lawyer as Witness.

On the facts and assumptions stated there would be no obligation on the part of the attorney to withdraw from representation because of a risk that confidences or secrets of a client (the estate and guardian as guardian) would otherwise be improperly disclosed. Depending on developments in the case, the attorney may or may not have to withdraw if he will likely be called as a witness. See

Rule 3.7(a)(1)-(4). If the attorney were to seek to withdraw voluntarily under Rule 1.16, Declining or Terminating Representation, or under Rule 3.7, or under some other Rule, the provisions of 1.16(d), would have to be complied with. Rule 1.16(cd) provides: "In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including...complying with all applicable laws and rules." Thus, even in the event of the attorney's withdrawal, a report to the court showing the taking of the money by the guardian should be filed.

Moreover, subparagraphs (a)(2) and (a)(6) of Rule 3.3, Conduct Before a Tribunal, provide that in appearing in a professional capacity before a tribunal, a lawyer shall not "(2) fail to disclose to a tribunal a material fact known to the lawyer when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" [guardian as guardian] and shall not "(6) counsel or assist the client in conduct the lawyer knows to be illegal or fraudulent." Rule 4.1, Truthfulness in Statements to Others, further provides that in the course of representing a client a lawyer shall not: "(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." In light of the foregoing provisions, the attorney would appear to have some exposure to discipline, and civil liability, if he does not disclose to the probate court the information about the guardian taking property from the estate he represents and the taking is later determined to be improper.

Even if the taking of the $30,000 by the guardian is done under a claim of right for expenses, or for repayment of a debt, or on some other legitimate basis, the attorney's duty to the estate requires that he take the steps necessary to protect the estate from the possibly fraudulent action of the guardian. If the attorney does not take steps to have the propriety of the taking of the money determined now, he runs the risk that both his and the guardian's actions will later be determined fraudulent.

* * *