CLEVELAND BAR ASSOCIATION
Professional Ethics Opinion 86 - 5

Headnotes

1. A lawyer, presently representing a wife, is prevented from advising a son and other relatives of their potential claims against that client/wife.

2. A lawyer can initiate proceedings for the appointment of a guardian for husband/client, when the lawyer "reasonably believes that the client cannot adequately act in the client's own interest" and as long as the lawyer's actions do not conflict with the interests of his other client, the wife.

3. A lawyer, due to his ongoing representation of the wife, is prevented from taking a position adverse to the appointment of wife as guardian of the husband.

Statement of Facts

H (husband) married his first wife many years before the facts giving rise to this controversy. During that marriage, he adopted his first wife's natural son ("S"). Presently, S is incarcerated and has two daughters ("D1 and D2").

In 1978, H entered into an antenuptial agreement with his present wife ("W"). The antenuptial agreement concerned the manner in which the property of each would be treated during the course of their marriage. It made specific provisions to keep certain assets separate and it had specific provisions for any modification to the agreement. H and W were then married.
In 1984, H created a trust to handle a substantial amount of assets. This trust provided that in the event of H's death, S and W would have a life estate to the trust assets with the remainder going to D1 and D2. In the event that H should become incompetent, the trust assets could be used to provide for H's comfort, maintenance and support. Further, trust assets could be used for providing similar support to others who were financially dependent upon H. A bank was named as trustee ("T").

Also in 1984, H wrote a letter instructing T about matters of H's care in the event of the trust's operation.

In 1985, H issued a power of attorney to W to handle certain of H's assets.

For many years, the inquiring lawyer ("L") represented H. Presumably, L represented H in the preparation of the antenuptial agreement as well as in the preparation of the trust. Throughout his representation of H, L also represented W in the preparation of tax returns as well as in a pending litigation matter in which H and W are parties. As a result, L has obtained detailed and confidential information regarding the financial condition of W.

As a result of an illness and based on certain actions of H, L believes that H is incompetent. L further believes that W is dealing with H's property in a manner that is inconsistent with the antenuptial agreement. A controversy has developed between L and T as to the relationship between the antenuptial agreement and the trust. Further, L has expressed the position that the trust language would not permit the trust assets to be
used for the benefit of W since W, as a result of her own financial situation, is not financially dependent upon H. L has expressed this opinion in letters to T and W's independent counsel.

Due to H's incoherence and incompetence, L cannot receive any instructions from H. L fears that W will use trust assets in a manner which will decrease the contingent interests of S, D1 and D2.

L proposes to write a letter to S advising him of the circumstances and stating that S should obtain legal counsel and possibly take action against T and W.

Questions Presented

1. Whether L, as a result of the present representation of W by L, is prevented from advising S, D1 and D2 of potential claims against W.

2. Whether L can initiate proceedings for the appointment of a guardian for H.

3. Whether L is prevented from taking a position adverse to the appointment of W as guardian for H.

Reasoning and Authority for Conclusions

Question One

L's ongoing representation of W, even though the matter is unrelated to the controversy involving H's assets, prohibits L from advising S, D1 or D2 of potential claims against W. An attorney owes his full loyalty to his clients. Such loyalty is an indispensable part of the attorney-client relationship.

"Neither his personal interests, the interests of other clients,
nor the desires of third persons should be permitted to dilute (a 
Lawyer's) loyalty to his client." Ethical Consideration 5-1. 

In Toledo Bar Association v. Kolby, 22 Ohio St. 2d 185 
(1970), Respondent was charged with violating the Rules of 
Professional Conduct and Canons of Professional Ethics for 
attempting to bribe witnesses. In the Per Curiam opinion the 
Court stated that:

The Lawyer owes 'entire devotion to the interest of 
the client, warm zeal in the maintenance and defense of 
his rights and the exertion of his utmost learning and 
ability,' to the end that nothing be taken or withheld 
from him, save by the rules of law, legally applied. 
Id. at 188. (Emphasis added).

Thus, the Court conveyed that an attorney's loyalty to his client 
be exemplified by "entire devotion". It is incomprehensible that 
L's representation of W would be considered loyal if he were to 
advise S, D1 or D2 of potential claims against W.

The Committee on Ethics and Professional Responsibility 
of the American Bar Association faced a similar situation in 
1982. Informal Opinion No. 1495. In that situation, a lawyer 
requested direction as to whether or not he could simultaneously 
represent a plaintiff against a corporation which the lawyer was 
defending in another unrelated lawsuit. The Committee determined 
that an attorney was prevented from simultaneously representing 
adverse interests. The Committee concluded as follows:

These requirements apply even though the matters are 
unrelated. The duty of loyalty to the client demands 
that the client not be concerned about who in the 
business organization the lawyer may come into contact 
with, what the lawyer may learn or be told [or] whether 
the lawyer may subconsciously be influenced by the 
differing interests of another.
In the present case, L does not propose to represent S, D1 or D2, but rather proposes to communicate with them about the existence of possible claims they hold against his client, W. Generally, a lawyer may advise a non-client of a potential legal right or claim against another so long as the lawyer does not seek representation after providing such advice and so long as providing the advice is "motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations." Ethical Consideration 2-3. However, a lawyer may not take action adverse to a present client's interests.

An attorney has the obligation not to represent conflicting interests without the consent of his clients, and not to accept employment as a lawyer without first disclosing to his clients his relationship with any adverse party. Toledo Bar Association v. Miller, 22 Ohio St. 2d 7, (1970). In Miller, defendant was found to have violated his professional responsibility by "acquiring an interest adverse to his clients." Id. at 11.

Similarly, L owes a professional obligation to W. L's communication to S, D1 or D2 would be adverse to W's interest. Disciplinary Rule 7-101 directly speaks to this as follows:

(A) A lawyer shall not intentionally: . . .

(3) Prejudice or damage his client during the course of the professional relationship, except as required in DR-7-102(B).

(B) In his representation of a client, a lawyer may: . . .
(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

More specifically, Disciplinary Rule 7-104 states:

(A) During the course of his representation of a client, a lawyer shall not: . . .

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

L may not prejudice or damage W by suggesting to S, D1 or D2 that they take legal action against W or T. Certainly, L can refuse to aid W or participate with W in the conduct L believes to be in conflict with the provisions of the trust and the antenuptial agreement. Because the claims would be adverse, and therefore in conflict with the interests of W, L may not advise S, D1 or D2 that in his opinion they have claims against W.

The Code of Professional Responsibility very narrowly limits those instances in which a lawyer may communicate with others about matters adverse to his client. Specifically, Disciplinary Rule 7-102 states:

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.

The facts as presented suggest that a controversy exists regarding the reading of trust's and antenuptial agreement's language. Since this Committee is not in a position to provide a
legal opinion, we are unable to equate the action of W to perpetrating a fraud upon a person and express no opinion in this regard. If it constitutes a fraud on the S or others then Disciplinary Rule 7-102-(B)(1) controls. If it constitute a prospective crime, then Disciplinary Rule 4-101(C)(3) authorizes appropriate disclosure.

In reaching his conclusions that W is not financially dependent upon H, L relied upon information he gained through his attorney-client relationship with W. L is obligated to hold this information in confidence. Nothing in the facts suggest that W has consented to L disclosing this information to any third parties. Disciplinary Rule 4-101(C)(2) states that a lawyer may reveal confidences when permitted under the disciplinary rules or required by law or court order. Based on our previous discussion, this exception does not appear to apply to the present case unless L can demonstrate that W's actions constitute the perpetration of a fraud or the intention of W to commit a crime.

For these reasons, absent fraud or prospective crime, L is not permitted to advise S, D1 or D2 of his opinion that they may have claims adverse to W.

**Question Two**

Can L initiate proceedings for the appointment of a guardian of H? As earlier discussed in this draft opinion, an attorney owes his full loyalty to his clients. This loyalty includes the preservation of confidences and secrets of his
clients, even after the termination of the lawyer's employment. Ethical Consideration 4-6.

There may be a question as to whether or not L is a true party in interest to initiate a guardianship appointment. In any event, the initiation of guardianship proceedings for H may benefit H or S or D1 and D2, but at the same time may be detrimental to the interests and position of another of L's clients, i.e. W.

L is clearly precluded from using or revealing any confidences, secrets or information from multiple clients since the probability of harm to one or more clients is clear. See, Ethical Considerations 4-1, 4-2, 4-5 and 4-6.

If L directly involves himself with initiating guardianship proceedings L could be called to give testimony or act as a witness. "The roles of an advocate and of a witness are inconsistent;..." Ethical Consideration 5-9.

L could not continue as an advocate without revealing confidences and secrets gained from his representation of multiple clients, i.e. H and W. An advocate for one will surely harm the interests of the other. It is a position that cannot be assumed by any attorney.

On the other hand, if L "reasonably believes that the client cannot adequately act in the client's own interest," he may initiate guardianship proceedings. ABA Model Rules of Professional Conduct, Rule 1.14(B).
The lawyer has a duty or obligation to consider instituting guardianship proceedings for H, when H cannot act for himself.

L cannot institute proceedings or take any positions which are actually or potentially adverse to his other client W. This situation would constitute a clear conflict of interest and is unethical.

Question Three

Is L prevented from taking a position adverse to the appointment of W as guardian for H?

The answer is clearly yes except to the extent that disclosures discussed earlier are permitted or required. The attorney shall maintain the independence of professional judgment and remain completely loyal to his clients.

This requirement of independence of judgment and loyalty preclude the attorney from accepting employment or continuing employment where those requirements are threatened, diluted or destroyed. See, Ethical Consideration 5-14.

If the attorney L exercises his independent judgment on behalf of client H to detriment of W, he would be in violation of Disciplinary Rule 5-105. The action of L would dilute if not destroy his fiduciary relationship and obligations to W.

An attorney cannot serve multiple clients with potential or actual conflicting interests. It is impossible as well as unethical for an attorney to zealously serve two clients with opposing positions and interests.
Ethical Consideration 5-15 states in part:

If a lawyer is requested to undertake or continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment.

Further, Ethical Consideration 5-15 states that the lawyer representing multiple clients with actual differing interests would have to withdraw from employment.

A thorough review of all Ethical Considerations and Disciplinary Rules suggests that L should be precluded from advising S, the son of H, to initiate guardianship proceedings for H, if such proceedings are adverse or in conflict with W's position or interests. L is also precluded from taking any adverse action or position in relation to W except to the extent that the disclosures discussed earlier are permitted or required.

Attorney L is clearly in the middle of multiple clients, H and W, who have related but conflicting positions and interests. L's actions should not assist the interests of one over the other.

Conclusions

The conclusions are the same as the headnotes.