



Committee on Professional Ethics

Opinion #496 - 11/1/78 (44-78) Topic: Confidences of client;
guardian of infant;
disclosing violation
of court order; with-
drawal from employment

Digest: Attorney for guardian
of infant should dis-
close guardian's unwill-
ingness to comply with
court order.

Code: Canons 4 and 7
EC 7-12
DR 2-110(C) (1) (b) and (d);
4-101(C) (2);
7-102(B) (1)

QUESTION

Should an attorney for the guardian of an infant disclose the guardian's unwillingness to comply with a court order directing the disposition of funds belonging to the infant?

OPINION

An appropriate answer to the question posed requires us initially to explore the nature of the lawyer's relationship to the guardian and the infant. The lawyer, although nominally characterized as attorney for the guardian, in fact and legal theory represents the guardian only as and to the extent that the latter acts in a fiduciary capacity for the infant's benefit. The lawyer owes his allegiance to the infant whom he represents through the guardian. Hence, the lawyer is ethically bound to treat the infant as his client and to act in a manner consistent with the best interests of the infant when those interests appear to conflict with the actions of the guardian.

The final arbiter of the infant's interests is, of course, the court from which the guardian's powers are derived and to which the guardian must ultimately account. For this reason, there can be no confidential or secret information concerning the guardian's conduct as a fiduciary of the infant which the lawyer is ethically bound to withhold from the court. Thus, for example, where the guardian acted in a manner that the lawyer deemed inconsistent with the best interests of his infant ward, it was held that the lawyer could reveal the guardian's conduct, notwithstanding the guardian's objection to such

disclosure. As was explained in N.Y. City 269 (1933):

"In view of the fact that it is the policy of the law to preserve and protect the rights of infants, who are wards of the Court, it is the opinion of the Committee that it is not improper for an attorney to submit to the Court any fact showing a willful or reckless disregard by the guardian of the rights of his ward in relation to matters entrusted to the attorney."

While the language of N.Y. City 269, supra, is permissive only, it should be observed that the disclosure there involved what was essentially a disputed matter of judgment. In the matter now before our Committee, however, the lawyer has been advised of a clear and continuing violation by the guardian of a court order directing the disposition of funds belonging to the infant. Under such circumstances, we believe that the lawyer should reveal the guardian's misconduct to the court.

In urging disclosure, we are aware that there is no longer any provision of the Code of Professional Responsibility which requires a lawyer to disclose a client's confidences or secrets. See, N.Y. State 454 (1976). Effective November 1976, our House of Delegates amended DR 7-102(B)(1) and thereby eliminated from the Code the only provision which might theretofore have been interpreted to require that a lawyer divulge certain kinds of confidential or secret information. The theoretical tension between Canons 4 and 7 was then clearly resolved in favor of preserving the confidences and secrets of a client. Cf., N.Y. State 466 (1977) with N.Y. State 479 (1978); see also, DR 4-101(C)(2). Nevertheless, in view of the nature of the relationship of the lawyer to both the guardian and the infant, as well as the infant's relationship to the court, we believe that there can be no information bearing upon the guardian's exercise of his fiduciary responsibilities which could properly be deemed confidential or secret as against the court. The lawyer is thus left fully subject to the mandate of Canon 7 requiring him zealously to protect the rights of his infant client. See, EC 7-12.

Since the guardian refuses to comply with the court's order, in addition to disclosing the guardian's conduct to the court, it may also be appropriate for the lawyer to seek withdrawal from his employment under the provisions of DR 2-110(C)(1)(b) and (d).

For the reasons stated, the question posed is answered in the affirmative.
