

## Lawyer Liability For The Acts Of Fiduciary Clients

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Many attorneys who practice in the guardianship area struggle with the issue of "who is their client." Is it the guardian? The ward? Or are the fiduciary<sup>Ftn 1</sup> and beneficiary<sup>Ftn 2</sup> joint clients? Minnesota law follows the majority view in identifying the fiduciary as the lawyer's client. While this view eliminates doubt about the lawyer's obligations to the fiduciary, it sheds little light upon the duties or responsibilities, if any, owed to beneficiaries. For example, could a lawyer be civilly liable to a ward for the guardian's improper behavior? Moreover, what are the lawyer's ethical obligations to a ward when the guardian (i.e., client) seeks the lawyer's advice because he or she has converted or self-dealt with guardianship assets? Lawyers who ignore these issues run the risk of malpractice judgments and/or professional discipline. Unfortunately, even for lawyers who regularly tackle these issues, the answers are sometimes less than clear.

### Civil Liability for a Fiduciary's Misconduct

As a general rule, attorneys have malpractice exposure only to persons with whom they have "an attorney-client relationship." *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981). Minnesota, like the majority of other states, holds that the lawyer represents the fiduciary and does not represent the beneficiaries. See e.g., *Goldberger v. Kaplan Strangis and Kaplan, PA*, 534 N.W.2d 734 (Minn. App. 1995). This view is consistent with that held by the ABA in Formal Opinion 94-380 (May 9, 1994).

Because Minnesota malpractice law does not recognize beneficiaries as clients, civil liability to beneficiaries can typically only arise under the third-party beneficiary exception to the privity requirement. The exception is that a non-client may maintain a malpractice action as an intended third party beneficiary where the client's sole purpose in retaining the attorney was to benefit the non-client directly and the attorney's negligence causes the non-client to suffer damages. *Admiral Merchants Motor Freight, Inc. v. O'Connor and Hannan*, 494 N.W.2d 261, 266 (Minn. 1992). In determining whether such a duty to a non-client exists, Minnesota courts apply a balancing test of:

The extent to which the transaction was intended to affect [the non-client], the foreseeability of harm to [the non-client], the degree of certainty that [the non-client] suffered injury, the closeness of the connection between the [lawyer's] conduct and the injury and the policy of preventing future harm.

*Goldberger, supra* at p. 4 (citing *Lucas v. Hamm*, 15 Cal. Rptr. 821, 823-24, 364 P.2d 685, 687-88 (1961)). The third-party beneficiary exception was carved out primarily to provide a remedy to beneficiaries damaged

by negligently drafted wills or trusts. At the same time, Minnesota courts have extended this third-party beneficiary analysis to permit suits by other classes of beneficiaries against lawyers. For example, in *Admiral Merchants v. O'Connor and Hannan*, *supra*, the Minnesota Supreme Court determined that a corporate subsidiary of the law firm's corporate client was an intended third party beneficiary and could maintain a legal malpractice action against the law firm. The third-party beneficiary analysis was similarly extended to pension plan participants who were permitted to bring a malpractice suit against the pension plan's lawyers who represented the plan through the plan's administrator (i.e., the firm's client). See *Anoka Orthopedic Associates, PA, v. Mutschler*, 773 F.Supp. 158 (D. Minn. 1991). At first glance, the extension of the third-party analysis to classes of beneficiaries beyond devisees might portend danger for Minnesota lawyers practicing in the probate, trust, conservatorship and guardianship areas. However, recent decisions by the Minnesota Court of Appeals suggest otherwise.

In *Goldberger v. Kaplan Strangis and Kaplan PA*, the Appeals Court held that beneficiaries of an estate lack standing to bring a legal malpractice action against the personal representative's attorney. The estate's beneficiaries were not the "direct, intended beneficiaries" of the services provided to the personal representative by his attorney. Rather, the lawyer's services served the "best interest of the estate" and therefore the third-party beneficiary of the services was the estate itself. The individual beneficiaries were characterized by the court as only, "incidental beneficiaries."

It is hard to quarrel with the policy reasons underlying the court's refusal to extend the third-party beneficiary analysis to estate beneficiaries. The interests of individual estate beneficiaries are not necessarily consistent with those of the "estate." In fact, beneficiaries often have conflicts among themselves, let alone with the personal representative. The incongruence between these interests is enough by itself to prohibit application of the third-party beneficiary analysis to estate beneficiaries. But what about guardians and wards or conservators and conservatees? Because their interests are by definition congruent, shouldn't the third-party beneficiary analysis apply? If the guardianship or conservatorship is established under Minnesota law, the answer appears to be "no."

Prior to *Goldberger*, the Appeals Court had similarly declined to extend third party relief to a ward in a legal malpractice action against the attorney who represented the ward's guardian. *Perry v. Great American Insurance Co.*, 1994 WL 101991 (unpublished decision, Minn. App.). The alleged malpractice was the attorney's failure to prevent further defalcations by the guardian after the guardian had previously told the attorney about unauthorized loans the guardian had made to himself from guardianship funds. Here again the Appeals Court concluded the ward was not the "directed and intended beneficiary of the lawyer's services" nor was there "an intent to provide a direct benefit to a third party." Like the *Goldberger* devisees, the ward was characterized as only "an indirect beneficiary" of the lawyer's services. Although the Appeals Court did analyze the *Lucas v. Hamm* factors, it still found that the factors weighed against finding liability to the ward:

The lawyer was retained to obtain approval of a guardianship and assist the guardians in preparing the annual reports. The lawyer did what he was hired to do. The lawyer's services affected [the ward] only indirectly.

*Perry, supra* at p. 2. The justification for the *Perry* court's conclusions is somewhat puzzling.

How do the lawyer's services in a guardianship matter only "indirectly" affect the ward? The entire purpose of most guardianships is to benefit a single individual (i.e., the ward). A guardian exists only because the

ward by definition lacks capacity to act in some fashion or another.<sup>Ftn 3</sup> A guardian has only a representative interest in the guardianship, whereas the interest of the ward is personal. Since the lawyer represents the guardian only in his or her capacity as a fiduciary, how can there be conflicts of interests between the guardian and ward over issues such as abuse or misuse of guardianship assets? And even assuming there is conflict over this issue, shouldn't the ward's interest take precedence?<sup>Ftn 4</sup> After all, isn't part of the public policy underlying guardianships to prevent such calamities? The *Perry* decision is also difficult to reconcile with an earlier decision permitting a minor to bring a malpractice suit against his former personal injury attorney. *Cook v. Connolly*, 366 N.W.2d 287 (Minn. 1985). In *Cook*, the Supreme Court held that an attorney-client relationship existed between the minor child and the attorney even though the minor's mother had been appointed guardian for the personal injury action. In doing so, the Court stated:

To suggest that [the minor's] mother alone is the client, and not [the minor] is to ignore the mother's representative capacity and [the minor's] direct interest. Maintenance of [the minor's] cause of action was for [the minor's] benefit and the attorney was paid for his services from [the minor's] recovery."

The distinction between the relationships in *Cook* and *Perry* are difficult to discern. Like *Cook*, the *Perry* guardian existed only in a representative capacity and the ward possessed a direct or primary interest in the guardianship funds. The *Perry* guardianship, like the *Cook* personal injury action, was maintained exclusively for the ward's benefit and the attorney was presumably paid for his services from guardianship funds.

The Appeals Court's refusal to extend third-party liability to estate beneficiaries is sound. Its reluctance to recognize the critical distinctions between devisees and wards, although puzzling, appears to be intentional. The civil liability trend in Minnesota law appears to be a lawyer-friendly one. The Appeals Court decision in *Perry*, albeit an unpublished one, strongly suggests that an attorney's civil liability may extend only so far as the guardian, especially when *Perry* is read in light of *Goldberger*.

### **Ethical Responsibilities to Beneficiaries**

Separate and apart from civil liability issues are the lawyer's ethical obligations to a ward or conservatee. Even though Minnesota malpractice law appears to regard wards as non-clients or unrepresented persons, can lawyers treat wards as non-clients without fear of being subject to professional discipline? The Rules of Professional Conduct appear to say "no."

For example, Rule 1.14, MRPC, which is entitled "Client Under a Disability" establishes the professional obligations owed to disabled clients. The comment to this rule appears to contradict the *Perry* court's treatment of the ward as a non-client:

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interests, the lawyer may have an obligation to prevent or rectify the guardianship misconduct.

Rule 1.14 clearly states that the ward's interests are paramount to that of the guardian when the guardian engages in misconduct. Moreover, another ethical rule, which restricts a lawyer's ability to assist dishonest clients, suggests that lawyers may not ethically deal with a ward as a non-client. Rule 1.2(c), MRPC, prohibits lawyers from counseling or assisting clients in fraudulent behavior. The comment further advises that where the fraudulent behavior is continuing, the lawyer cannot reveal the wrongdoing unless

authorized to do so by Rule 1.6. The comment appears, however, to impose a higher or different duty where the offending client is a fiduciary:

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with the beneficiary.

Unfortunately, nowhere in the rules of professional conduct is the nature or extent of these "special obligations" addressed.

The American College of Trusts and Estate Counsel (ACTEC) is the only authority who has so far attempted to quantify these special obligations from an ethical perspective. ACTEC has published its own commentaries to the Rules of Professional Conduct for the guidance of trust and estate lawyers.<sup>[Ftn 5](#)</sup> The ACTEC commentaries advise that in some circumstances "the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries." The example used by ACTEC to illustrate this point is the fiduciary who is self-dealing or embezzling estate assets. According to ACTEC, the lawyer should take affirmative steps to protect the beneficiaries, including disclosure of the fiduciary misconduct to the beneficiaries, or the court if necessary. Nevertheless, the ACTEC comments are just that -- comments, and it is not axiomatic that a lawyer would be disciplined for failing to heed their guidance.

So what *must* a lawyer do when he or she discovers that the client is a miscreant guardian or conservator? Ironically, the required course of conduct is typically not dictated by any duty to the ward or conservatee. Instead, it is the lawyer's confidentiality duty to the guardian and the lawyer's candor to the tribunal obligation which are most often controlling.

Depending upon the circumstances there may be three options for dealing with dishonest guardians: (1) withdrawal; (2) rectification; and/or (3) disclosure. The ethical standards are clear that a lawyer cannot assist a fiduciary in fraudulent behavior. *See* Rule 1.2(c). Hence, continuing to represent the fiduciary who refuses to rectify an embezzlement or wishes to conceal the embezzlement is not an option. In these situations, the lawyer must at a minimum withdraw. *See* Rule 1.16(a)(1). In addition, lawyers are permitted, but not required, to reveal confidential client information if it is necessary to rectify a fiduciary's fraudulent behavior. *See* Rule 1.6(b)(4) (permitting disclosure of confidential information necessary to rectify a client's fraudulent act in furtherance of which the lawyer's services were used).

Another exception to the client confidentiality obligation is the lawyer's candor to the tribunal obligation. Rule 3.3 prohibits lawyers from: (1) failing to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by the client; and (2) offering evidence the lawyer knows is false. Further complicating these obligations is Rule 3.3(a)(4) which requires a lawyer to take "reasonable remedial measures" where he or she has offered false evidence and thereafter comes to know of its falsity. The comment to Rule 3.3 describes reasonable remedial measures as a step-by-step process:

1. Where false evidence has been offered, the lawyer is directed to first remonstrate with the client confidentially;
2. Should that fail, the comment advises the lawyer to withdraw if the withdrawal will remedy the situation;
3. Where withdrawal will not remedy the situation, the lawyer is required to make disclosure to the court.

All of these remedial measures are mandatory even if they require disclosure of confidential client information otherwise protected by Rule 1.6.

In the guardianship and conservatorship area, this candor to the tribunal obligation plays a particularly important role in annual accountings filed with the court. Moreover, it can play a pivotal role in determining how far a lawyer must go in the remedial measure process.

**Example:** Assume the guardian has been advised that guardianship funds cannot be invested in commercial real estate. Despite the advice, the guardian invests in commercial real estate and experiences a significant loss. When the guardian's lawyer discovers the loss in preparing the account to be filed with the court, the guardian requests that the lawyer not disclose the investment as a commercial real estate investment on the annual account and pledges to reimburse the guardianship with inheritance funds the guardian expects to receive in six months.

**Analysis:** Rule 3.3(a) would prohibit the lawyer from complying with the guardian's request. Under these circumstances, the lawyer is obligated to advise the guardian that the investment must be accurately disclosed on the account. If the guardian refuses to permit the lawyer to accurately disclose the investment on the account, then the lawyer at a minimum must withdraw from representing the guardian. The lawyer may be permitted, but is not required, to disclose the facts to the ward or the court. See Rule 1.6(b)(4).

The lawyer's obligations differ, however, where an account has already been filed and the lawyer thereafter comes to know that false information is contained in the account.

**Example:** Assume that in preparing an annual account the lawyer asks the guardian for verification of certain certificates of deposit. The guardian shows the lawyer a photocopy of the certificates. The lawyer lists the certificate as a guardianship asset and files the annual account with the court. When the next annual account is being prepared, the lawyer again asks the guardian for verification of the certificates of deposit. When the verification is not produced, the lawyer contacts the bank and determines that the certificates had been redeemed by the guardian prior to the last annual account.

**Analysis:** If the lawyer confronts the guardian and the guardian admits redeeming the certificates, the lawyer may represent the guardian in making the disclosure to the court and rectifying the prior annual account. However, if the guardian refuses to disclose the redemption of the certificates, withdrawal would not fulfill the lawyer's reasonable remedial measure obligation. Unlike the previous example, false evidence has already been placed before the court in the prior annual account. The reasonable remedial measures required under Rule 3.3(a)(4) would require the lawyer to disclose the redemption of the certificates and that they no longer existed when the account was filed. This obligation exists even though the information obtained from the guardian is confidential client information. See Rule 3.3(b).

### Conclusion

Few lawyers knowingly assist guardians or conservators in violating their fiduciary responsibilities. In fact, most of the ethical and liability issues arise out of situations where, at best, the lawyer had only a reason to

know the violations occurred. The truly critical juncture from both an ethical and civil liability standpoint is when the lawyer comes to know of the fiduciary's misconduct. As shown in the examples above, the required course of conduct is often dictated by the lawyer's obligations to the fiduciary and/or the court and only secondarily by undefined duties owed to the beneficiary.

<sup>1</sup> For the purposes of this article I refer to guardians and conservators generically as fiduciaries.

<sup>2</sup> The reference to beneficiaries is intended to include either wards or conservatees.

<sup>3</sup> See also, Wernz, *Duties to Third Parties*, *Bench & Bar* (May/June 1992) indicating that the differences between estate beneficiaries and a ward tend to suggest "a greater set of duties to the ward for the guardian's attorney than for the typical representative."

<sup>4</sup> At least one other court has held that the attorney for the guardian enters into a relationship with both the guardian and the ward, and that the ward's interests overshadow those of the guardian when conversion of guardianship assets occurs. See *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. App. 1976). The *Perry* court rejected this analysis.

<sup>5</sup> ACTEC Commentaries on Model Rules of Professional Conduct, American College of Trusts and Estates Counsel Foundation (approved by ACTEC Board of Regents on October 18, 1993).