

Lawyers Must Be Aware of Duties Owed Fiduciaries

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Many attorneys who practice guardianship and conservatorship law struggle with the issue of "who is their client?" Is it the guardian or conservator? The ward or conservatee? Or are the fiduciary and beneficiary joint clients? Minnesota law follows the majority view in identifying the fiduciary as the lawyer's client. See *e.g., Goldberger v. Kaplan Strangis and Kaplan, PA*, 534 N.W.2d 734 (Minn. App. 1995).

While this view eliminates doubt about the lawyer's obligations to the fiduciary, it sheds little light upon the duties or responsibilities owed to beneficiaries. For example, what are the lawyer's ethical obligations to a conservatee when the conservator (i.e., client) seeks the lawyer's advice because he or she has converted or self-dealt with conservatorship funds? Since Minnesota malpractice law appears to characterize conservatees, wards and other beneficiaries as non-clients, can lawyers treat wards and conservatees as non-clients without fear of professional discipline? According to the Rules of Professional Conduct, the answer may be "no."

Rule 1.14, MRPC, which is entitled "Client Under a Disability" establishes the professional obligations owed to disabled clients. The comment appears to conflict with malpractice law's treatment of a beneficiary 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, the comment to Rule 1.2(c), MRPC, also appears to impose a higher duty on a lawyer who is representing a miscreant 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 is the nature or extent of these "special obligations" addressed.

So what must a lawyer do when he or she discovers that the client is a miscreant guardian or conservator? Depending upon the circumstances, there may be three options for dealing with dishonest guardians: (1) withdrawal; (2) rectification; and/or (3) disclosure.

A lawyer cannot assist a fiduciary in fraudulent behavior. Rule 1.2(c). Therefore continuing to represent a fiduciary who refuses to rectify an embezzlement or wishes to conceal the embezzlement is not an option and the lawyer must, at a minimum, withdraw.

This same lawyer would be permitted, but not obligated or required, to reveal confidential client

information if necessary to rectify the guardian's theft. 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).

Given these obligations, a lawyer who discovers his or her client is an embezzling guardian would not be permitted to continue representation unless the embezzled funds were either replaced or disclosed to the court. Moreover, depending on the circumstances the lawyer may, but is likely not required to, disclose confidential client information if the guardian refuses to cooperate or continues to misuse guardianship funds.

The lawyer's obligations change significantly, however, if the lawyer has already provided the court with false evidence in the form of an accounting showing the existence of funds which had in fact been embezzled. 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.

More importantly, Rule 3.3(a)(4) demands that "reasonable remedial measures" be taken when the lawyer has offered false evidence and thereafter comes to know of its falsity. Reasonable remedial measures are defined in the comment as requiring disclosure to the court by the client, and ultimately by the lawyer if the client refuses.

Most importantly, the disclosure-to-the-court obligation applies even if it requires disclosure of confidential client information otherwise protected by Rule 1.6.

Hence the lawyer who discovers that his or her client is an embezzling fiduciary after an accounting has been filed with the court may very well have additional obligations which will not be fulfilled by simply withdrawing from representation. If the accounting includes false information, the lawyer's remedial measures are likely limited to convincing the client to admit the unauthorized use of funds or disclosure by the lawyer to the court where the client refuses to do so.

Conclusion

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

The truly critical juncture from an ethical standpoint is when the lawyer comes to know of the fiduciary's misconduct.

Ironically, the proper 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.