

Nebraska Ethics Advisory Opinion for Lawyers
No. 71-5

THE INQUIRER RAISES THE FOLLOWING PROBLEM:

"I HAD REPRESENTED AN ELDERLY LADY IN A NUMBER OF MINOR LEGAL MATTERS. AS SHE BECAME LESS ABLE TO HANDLE HER OWN AFFAIRS, A DAUGHTER PETITIONED THE COUNTY COURT TO HAVE A GUARDIANSHIP ESTABLISHED NAMING A BANK AS GUARDIAN OF THE PROPERTY AND AN INDIVIDUAL AS GUARDIAN OF THE PERSON. I ACTED AS ATTORNEY IN THE ESTABLISHMENT OF THE GUARDIANSHIP. THIS SAME DAUGHTER HAS NOW RETAINED OTHER COUNSEL, AND INSTIGATED A PROCEEDING TO REMOVE THE GUARDIAN OF THE PERSON ALLEGING HE IS UNFIT TO SERVE IN THAT CAPACITY.

"IF I NOW REPRESENT THE INTERESTS OF THE GUARDIAN OF THE PERSON IN THE REMOVAL PROCEEDINGS, HAVE I PLACED MYSELF IN A POSITION OF HAVING A CONFLICT OF INTEREST? IT SHOULD BE BORN (SIC) IN MIND THAT ALL PARTIES ARE AWARE OF MY REPRESENTATIVE OF THE WARD BEFORE THE ESTABLISHMENT OF THE GUARDIANSHIP, AS WELL AS BEING ATTORNEY FOR THE GUARDIANSHIP TO DATE ."

The facts stated in the inquiry indicate that this is not a guardianship of a minor, Chapter 38, Article 1, R.R.S. 1943, nor a spendthrift guardianship, Chapter 38, Article 3, R.R.S. 1943, but, rather, the guardianship of a mentally ill or mentally incompetent person, Chapter 38, Article 2, R.R.S. 1943, as to whom there is guardianship of the estate and the person.

The attorney had represented the ward in a number of

legal matters before the guardianship, she became unable to manage her affairs, her daughter petitioned the county court for the appointment of a guardian, and separate guardians for the ward's estate and person were appointed. The attorney represented the daughter in the guardianship proceedings. All parties are aware of the attorney's representation of the ward before guardianship, as well as his representation of the guardians since that time. The daughter has now employed other counsel in a proceeding to remove the guardian of the person because of alleged "unfitness".

Within the foregoing facts, the following question is asked:

If I now represent the interests of the guardian of the person in the removal proceedings, have I placed myself in a position of having a conflict of interest?

Although a proceeding for the appointment of a guardian is inquisitorial in nature, rather than adversary, there is, even so, a hostility to freedom, however benevolent the move, *Hall v. Hall*, 122 Neb. 228, 240. The proceeding for the removal of the guardian of the person appears to be adversary, inasmuch as the statutory grounds for the removal of a guardian, Section 38-507, R.R.S. 1943, are:

1. That he is insane;
2. That he is otherwise incapable of discharging his trust; and
3. That he is evidently unsuitable.

Accordingly, if the attorney attempted the employment he would appear in opposition to a former client in an adversary proceeding involving one facet of his former employment. There may, or may not be, a conflict of interest in fact, but at this time this can not be predicted. It may bear the indicia of impropriety, however.

However, I am of the opinion that the attorney should decline the employment for a reason which is to me

more compelling.

The ward was his client before the guardianship and it may be, and should be, presumed that he served her best interests in the guardianship proceeding. Since that tie she could neither employ nor discharge him. Her best interests may, or may not be, best served by the removal of the guardian of the person. This is an issue of fact which is not resolved at this time. If he represents the guardian of the person and resists the removal proceedings he may be rendering a disservice to the ward. He should not prejudge the matter.

I conclude that there may a conflict of interest and that there will be an appearance of impropriety if the employment is accepted.

The proposed employment falls within the prohibition of EC 9-6, of the Code of Professional Responsibility, which in part provides:

Every lawyer . . . [should] . . . strive to avoid not only professional impropriety but also the appearance of impropriety.

In *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, the court said (p. 93):

. . . As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134:
"An attorney should not only avoid impropriety but should avoid the appearance of impropriety." . . .

In *Wise, Legal Ethics*, Second Edition, 1970, it is said (pp. 256, 273):

. . . [I]f there is the slightest doubt as to whether a proposed representation involves a conflict of interest between two clients, or between a new client and a former client, or may encompass the use of special knowledae or information obtained through

service of another client or while in public office, or necessitates a conflict between the interests of a present or former client and those of the attorney, the doubt can best be resolved by Matthew VI, 24: "No man can serve two masters." . . .

* * *

As was said at the outset "No man can serve two masters". If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict between the interests of any client and that of the attorney, or may require the use of information obtained through the service of another client, the employment should be refused.

This opinion is limited to the facts presented here. The ward never discharged the attorney and is now unable to do so. The daughter of the ward was the petitioner in the guardianship proceeding and is now the petitioner in the removal proceeding. The present issue was one of the issues in the guardianship proceedings. The guardian of the person may in fact be insane, otherwise incapable of discharging his trust, or evidently unsuitable. If the attorney accepts the employment, he must zealously represent the guardian, Canon 7, Code of Professional Responsibility, which might be a disservice to the ward who never discharged him.

There appear to be substantial reasons why there will be an appearance of impropriety if the employment is accepted, and, indeed, something more than the "slightest doubt" of which Wise speaks.