

AO 1982

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Advisory Opinion  
Dual Representation of Personal Injury Plaintiff and Conservator Spouse- Possible Conflicts

October 12, 1982

ADVISORY OPINION

ADOPTED BY COMMITTEE: OCTOBER 12, 1982

FACTS:

The attorney in this matter is contacted by the wife of a Maine resident, who is severely injured while employed by a New Hampshire employer, sustaining ninety (90%) percent brain damage. Workers Compensation benefits are obtained by the Attorney on behalf of the injured husband. The wife is appointed Conservator for the husband, through a Maine Probate Court. The attorney advises the wife to set up a financial plan, "which will provide for the future security of the family," and urges the wife "to consult with a financial adviser and follow careful accounting practices to meet her fiduciary obligations." Through the course of numerous dealings with the wife, the attorney feels that he has entered into an attorney/client relationship with her. As a result of his meetings with the wife, the attorney is not satisfied that she has established an adequate financial plan, pursuant to his recommendations.

ISSUES:

1. Does the attorney have a duty to act on behalf of the husband to require the wife to provide an accounting of the funds she has received and to establish an adequate financial plan if she has not already done so?
2. If so, would such action constitute a breach of the attorney/client relationship with respect to the wife?

RESPONSE:

Under Canon 7 and DR 7-101, a lawyer has a duty to represent a client zealously within the bounds of the law. This is especially so where a client is not competent or able to enforce his own rights.

The wife, as Conservator, has a fiduciary duty to manage the husband's benefits in a responsible manner. Because of the husband's condition, the husband's attorney wishes to satisfy himself that this is being done.

However, the attorney has established an attorney/client relationship with the wife. Pursuant to DR 4-101, the attorney has a duty to preserve the confidences and secrets of his client. This rule extends to confidential communications between himself and the wife. Thus, while the attorney may wish to force the wife to account for her handling of the funds received on behalf of the husband, such action on the part of the attorney could very well lead to a

breach of the attorney/client relationship which he has developed with the wife and would risk his having to use information obtained in confidence with the wife and would risk his having to use information obtained in confidence from the wife, against her.

The attorney in essence is representing two clients who may have differing interests. DR 5-105 (A) states: “A lawyer shall decline proffered employment...if it would be likely to involve him in representing different interests...” A lawyer may represent multiple clients only if it is obvious that he can adequately represent the interests of each, and if each “consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each.”

Because of the husband’s injury, this proviso cannot be met. Accordingly, he should withdraw from employment from both clients. (EC 5-15)