

ADVISORY ETHICS OPINION 87-14

SYNOPSIS:

After withdrawing from the joint representation of a husband and wife in a probate court proceeding due to a potential conflict between the interest of the clients, an attorney may not thereafter undertake the representation of the wife only in a related probate guardianship proceeding where the husband and wife's interests may be in conflict and where information gained during the earlier joint representation may be relevant to the guardianship proceeding.

FACTS:

A lawyer was appointed by the Probate Court to represent both husband and wife in an probate accounting. The lawyer determined at the time that the interests and position asserted by both clients was identical. The lawyer later determined there might be some question as to the wife's ability to adequately communicate her position, so a guardian *ad litem* was appointed by the Court to assist the wife. The guardian *ad litem* on behalf of the wife asserted a position different in the probate matter from that of the husband, so the lawyer withdrew from representation of both parties due to the adversity of their conflicting positions under DR 5-105(B). After his withdrawal, the wife's parents initiated a new involuntary guardianship petition against her. The attorney is then requested to represent the wife through court appointed guardian *ad litem* in this new involuntary guardianship matter, and inquires whether such representation is appropriate.

ANALYSIS:

The decision as the ethical propriety of representing only the wife in this new matter hinges upon (a) whether the lawyer's independent professional judgment on the wife's behalf is likely to be adversely affected by the previous representation, (b) whether or not the attorney, pursuant to the previous representation, gained any secrets or confidences which in this new matter would potentially be used adversely to the husband, and (c) whether or not the proposed representation would have a tendency to diminish public confidence in the legal system.

The lawyer initially withdrew from the representation of both husband and wife because the wife's guardian *ad litem* asserted a position inconsistent from that of the husband, therefore preventing the attorney from continuing representation of either client under DR 5-105(B). Although the attorney would be advocating the interests of only the wife through the guardian *ad litem*, it is not inconceivable that, as part of the involuntary guardianship process, the husband might be called as a witness by the wife's parents in an attempt to provide evidence to support the involuntary guardianship.

This brings us to the issue of whether in the earlier representation of both, the attorney may have gained knowledge of secrets and confidences of the husband which, in the involuntary guardianship hearing process, might be used to the advantage of the wife or as cross-examination material against the husband.¹ Although the husband is no longer a client, the attorney is still obligated to preserve the secrets and confidences gained in his earlier representation. The probability that this information may emerge on cross-examination seems directly contrary to the mandates of Canon 4.² The test is whether his representation of the wife in the involuntary guardianship is likely to require the attorney to do anything which will injuriously affect his former client and "whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through his former connection."³

While the lawyer may, under certain circumstances, use this information after full disclosure and authorization by the former client,⁴ there is the overriding concern of avoiding even the appearance of impropriety.⁵ The public perception of this attorney cross-examining a former client could create the appearance that the cross-examination information would have, or at least could have, been gained by virtue of the previous representation, whether or not such a waiver had been obtained from the client. It is our view, therefore, that public confidence and the avoidance of even the appearance of impropriety mandate the attorney refusing to represent the wife.

¹ DR4-101(a)(A)(B).

² See previous Opinion No. 80-14.

³ *In Re: Themelis*, 117 Vt. 19(1951).

⁴ See: DR 4-104(C)(1).

⁵ EC 9-1, 9-2.