

ADVISORY ETHICS OPINION 95-19

SYNOPSIS:

Where an attorney learns through a client confidence that one of several jointly represented clients has committed a fiduciary crime against one of the other joint clients, the attorney may not breach the confidence by alerting law enforcement authorities or third parties or by alerting the other clients, but the attorney must immediately withdraw from further representation of any of the clients.

FACTS:

Requesting attorney represented a minor child and her parents for injuries sustained by the child in an automobile accident. In Probate Court proceedings filed by the attorney to establish a guardianship for the minor child to conserve her settlement share, the mother was appointed guardian for the minor. A surety bond was secured to protect the child's net settlement proceeds as required by the Probate Court. The injury case was closed. The guardianship requires an annual accounting to the Probate Court. The attorney did not intend to continue with representation with respect to that matter, but no formal withdrawal from the guardianship case has been filed or approved.

A year after the proceeds of the injury settlement had been distributed and the guardianship established, the attorney received a call from the father indicating that the mother had withdrawn funds from the guardianship account and had disappeared. The father believed the funds were being used by the mother for her own purposes. For purposes of this opinion we are assuming that the funds were misappropriated by the mother at the time they were withdrawn from the guardianship account, and, thus, any criminal conduct is completed, not continuing.¹

The attorney asks whether the attorney can take further action to protect the minor child and in particular whether the attorney can notify the surety to ensure that timely notice is given of the unauthorized withdrawal or notify authorities in hopes that the mother can be found before the funds are fully spent.

ANALYSIS:

The first issue for analysis is whether the attorney had an ongoing attorney-client relationship with the parents and the child at the time the attorney received the call from the father or whether the attorney-client relationship with all three had ended at the conclusion of the injury case. From the facts presented the attorney is still the attorney of record in the Probate Court. The guardianship estate is an ongoing matter subject to the Probate Court's continuing jurisdiction. Given the attorney's "of record" status in that court, we conclude the attorney continues to have an attorney-client status with respect to the parents and the child, each of whom the attorney jointly represented in the injury case and at the time the probate proceedings were filed. Although the representation is clearly dormant and the attorney is expected to take no further action with respect to these clients, they remain clients by virtue of the attorney's appearance in the probate proceedings.

The call from the father is a confidence as to the father under DR 4-101(A). The call also constitutes a secret as to the mother since it is information gained in the professional relationship, the disclosure of which would likely be detrimental to the mother. Under DR 4-101(B) the attorney may not reveal a secret or a confidence. These are deemed privileged communications for purposes of determining an attorney's disclosure obligations under the code. See Opinion 92-10 concluding that a secret constitutes a privileged communication for purposes of determining an attorney's reporting obligation under DR 1-103.² As noted in the statement of facts, any criminal conduct by the mother has already been committed and, thus, disclosure under DR 4-101(C) is not an option. The attorney is concerned that by not notifying the surety of what has occurred the minor child may be prejudiced in that the surety may later claim that timely notice of the loss of the funds was not provided and thus the bond may not be payable. The potential for injury to one client does not provide an exception to the attorney's duty to preserve the secrets and confidences of his other clients.

¹ If the mother's conduct were a continuing crime, then the attorney would be permitted to disclose the conduct under authority of DR 4-101(C)(3) which permits an attorney to reveal the intention of a client to commit a crime and the information necessary to prevent the crime.

² If the attorney's representation of the clients had terminated prior to the father's call, then the analysis described above would be slightly altered in that the father's call to the attorney would have created a new attorney-client relationship between the father and the attorney only. The information disclosed in the call would still be a confidence as to the father, but it would not be a secret of the mother since the mother would not be a client and the information learned in the call would not be information learned in the call would not be information gained in the attorney's professional relationship with the mother. Nonetheless, the attorney would still be prohibited from disclosing the information unless the father consents to disclosure.

A conflict between the parties became apparent when the father first relayed information about the mother's conduct to the attorney. Once the conflict became apparent the attorney could give no advice to the father or any other party other than to advise each party that an irreconcilable conflict has arisen and that the attorney must withdraw from any further representation of any party. The attorney can recommend to each client that separate counsel be obtained. The attorney is also required to notify the Probate Court that the attorney must withdraw from any further representation of any party. The attorney can recommend to each client that separate counsel be obtained. The attorney is also required to notify the Probate Court that the attorney must withdraw from the further representation of any of the parties. In our view the attorney is permitted to tell the court that withdrawal is mandated on the grounds of an irreconcilable conflict that has arisen. If the court inquires as to the basis for the conflict the attorney is further permitted to indicate that the facts creating the conflict came to the attorney by way of a privileged communication which the attorney is not permitted to disclose.