

Ethics Opinion No. 87-2

Conflict of Interest Relating to Representation of Person Under Disability.

The Committee has been asked three questions, based on the following facts:

Elderly is a wealthy older gentleman suffering from senility. Trust Company has been appointed by the court as conservator of Elderly's sizeable assets. Elderly is represented in his personal affairs by Personal Lawyer.

One of Elderly's contingent assets is a claim against Lawyer Able arising out of Able's representation of Elderly in 4 fairly simple real estate transaction several years ago. As a result of that transaction Lawyer Able received a "fee" in excess of \$200,000.

Trust Company determined that there was sufficient basis to attack the validity of the fee. Trust Company hired Lawyer Baker to file suit against Lawyer Able seeking a refund of the fee. Lawyer Baker is paid from funds of the conservatorship. The suit was filed. Lawyer Able defended, in part, by asserting that he had a substantial claim of his own against Bank arising out of this same transaction. Bank is a sister entity to Trust Company, as both are owned by a common parent and both are represented by a single lawyer, General Counsel.

Lawyer Able inferred strongly that if Trust Company would drop Elderly's claim against him, he would drop his claim against Bank.

The claim by Lawyer Able against Bank was turned over to General Counsel for response on Bank's behalf. General Counsel also undertook to review Trust Company's and Lawyer Baker's handling of Elderly's claim against Able. General Counsel instructed Lawyer Baker to avoid being "aggressive" in the prosecution of Elderly's claim. General Counsel gave additional instructions to Lawyer Baker regarding the handling of Elderly's claim which instructions Baker felt were not in Elderly's best interests.

Lawyer Baker perceived that Trust Company and General Counsel had conflicts of interest and Baker further perceive that these conflicts were adversely interfering with the proper prosecution of Elderly's suit against Able. Baker suggested that Trust Company withdraw as Elderly's conservator and obtain appointment of a substitute conservator. Trust Company refused, and subsequently fired Lawyer Baker.

Based on the foregoing fact situation, the Committee answers the questions posed to it as follows:

(1) Should Lawyer Baker advise Elderly through Personal Lawyer of Trust Company's and General Counsel's possible conflict of interest?

Lawyer Baker has ethical responsibilities to both Trust Company and Elderly. In this situation, however, attorney Baker's principal responsibility is to protect the interests of Elderly. If it appears that Elderly's interests are being compromised by Trust Company, Lawyer Baker is ethically obligated to insure that Elderly's interests are protected. Under this fact situation, disclosure to personal attorney appears to be a satisfactory solution.

Michigan Ethics Opinion CI-805 (9/3/82) is analogous. There, a lawyer representing the guardian of a minor's estate received information clearly establishing that the guardian had misappropriated the estate funds. The Michigan opinion held that the attorney must disclose that fact to the probate court if the guardian refuses or is unable to correct the wrong. Such an act by the guardian constituted perpetration of a fraud upon the ward, and the guardian's refusal to make a fair and full accounting constituted perpetuation of a fraud upon the probate court. Such information is not protected as a confidence or secret of the client. (DR 4-101(C)(2), 5-105, 7-102(B)).

(2) If Lawyer Baker does disclose this to Personal Lawyer, has Baker breached an ethical duty to Trust Company?

No.

(3) Is General Counsel acting properly by actively representing both Bank and Trust Company in this matter?

In a situation of this type, the Committee would not ordinarily anticipate problems arising from the General Counsel representing both the Bank and the Trust Company. Ordinarily, an independent attorney for the conservatorship estate would be appointed, and would act on behalf of the ward, without interference from the Trust Company in the Trust Company's own interests. In other words, the Committee would not normally expect the Trust Company to breach its fiduciary duty with respect to management of the conservatorship estate, for the Trust Company's own benefit.

The conflict of interest arises from the breach of the fiduciary relationship, and not from the dual representation. In the ordinary case, absent other factors, Lawyer Baker would be exercising an independent professional judgment on behalf of Elderly, and there would be no conflict in General Counsel representing both the Bank and Trust Company. Here, however, the representation of the Bank by General Counsel appears to be interfering with the Trust Company's fiduciary relationship to Elderly. Since a conflict of

interest is actually occurring, the Bank and Trust Companies should retain separate counsel.

The Ethics Committee is seriously concerned regarding the ethical violations that appear in this particular situation. The committee requests that the discipline counsel of the Bar Association investigate, and take whatever action is appropriate, with respect to both (a) charging a guardianship estate a fee in excess of \$200,000 in a fairly simple real estate transaction, and (b) the actions of the attorney for the bank-trust company regarding the breach of fiduciary relationship by compromising the claim of the conservatorship to benefit the bank. The situation presented by this inquiry appears potentially quite serious, since it deals with substantial sums of money representing the life time efforts of an elderly gentlemen who is no longer able to tend to his own affairs.

Adopted by the Board of Governors on September 3, 1987.