

BOYCE, MURPHY, McDOWELL & GREENFIELD

ATTORNEYS AT LAW

Jeremiah D. Murphy
Russell R. Greenfield
David J. Vickers
Gary J. Pashby
Vance R.C. Goldammer
Thomas J. Welk
Terry N. Prendergast
James E. McMahon
Douglas J. Hajek
Michael S. McKnight
Gregg S. Greenfield

Norwest Center, Suite 600
101 North Phillips Avenue
P.O. Box 5015
Sioux Falls, South Dakota 57117-5015

Telephone 605 336-2424

Telecopier 605 334-0618

Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

December 18, 1992

Re: Request for Ethics Opinion 92-13

Dear

You have requested an opinion from this Committee regarding the following factual scenario.

FACTS

You represent the guardian in a guardianship proceeding in which the guardian had been appointed the legal guardian of the person and property of guardian's incompetent mother. At the stage of the proceeding in which you began your representation of the guardian, the court was requesting that an initial inventory be submitted to the court as soon as possible. However, the ward's property was in a terrible state of disarray and disrepair, to the extent that the guardian would have to expend a great deal of time and effort in order to present any meaningful inventory of the ward's estate. As such, you assisted the guardian in preparing an initial inventory of the property which was submitted to the court and which indicated that considerable additional work would have to be done in order to restore the estate property to an orderly state and requested that the court approve expenditure of funds for the rehabilitation effort as well as the payment of a monthly salary to the guardian for her service. Although no formal order was entered to affirm the initial inventory submitted by the guardian, you believe the court had given its tacit approval to the inventory and on that basis advised the guardian that she could proceed with the rehabilitation effort.

Thereafter, you maintained only sporadic contact with the guardian. After several months, the guardian contacted you and through a course of discussions, you learned that the guardian may have misappropriated money from the guardianship estate. In this same time frame, you received an inquiry from the court as to the status of the guardianship proceeding. You obtained from the guardian the records the guardian represented she had kept of the transactions she had made on behalf of the ward. Upon examination of these

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records, it became apparent to you that the guardian had indeed misappropriated a significant amount of money from the ward.

The court requested that you make a full disclosure of all transactions that the guardian has made concerning the ward's property. You have made such a disclosure to the court and the court has turned this information over to the sheriff's office for investigation into potential embezzlement, as well as turned the information over to the State's Attorney's office.

Based on these facts, you have requested that this Committee answer the following questions:

- (1) What disclosure, if any, should have been made to the court;
- (2) If full disclosure must be made, can any limitations be imposed on the court's use of this information for the purpose of preventing use of the disclosure by law enforcement in a criminal investigation;
- (3) Given your knowledge of the guardian's conduct, what is your responsibility to the guardian and to the estate.

OPINION

It appears from the facts that disclosure of this information has already been made to the court and therefore the first two questions posed are moot. Nevertheless, this Committee believes it appropriate to address the questions posed by your request.

With respect to your first question, it is the opinion of this Committee that full disclosure was properly made to the court. It is clear from the facts that your client in this scenario was the guardian and not the ward. As such, Rule 1.6 governs the disclosure of information learned by you in the course of your attorney-client relationship. It is the opinion of this Committee that under Rule 1.6(b)(3) disclosure of this information was properly made to the court because disclosure was necessary to rectify the consequences of your client's criminal or fraudulent act in which your services had been used.

This opinion is supported not only under the language of Rule 1.6(b)(3) but also under the language of the Comments to Rule 1.14 which provides:

If a lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation

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to prevent or rectify the guardian's misconduct. See
Rule 1.2(d).

The guardianship laws themselves also impliedly authorize the disclosure by virtue of the nature of the representation. See Rule 1.6.(a). South Dakota law vests the circuit court with exclusive jurisdiction to control the guardian in his management and disposition of the property committed to him. See SDCL 30-26-6. The guardian occupies a position of trust and he may be removed by the circuit court for an abuse of that trust. SDCL 30-27-41. A guardian is a person appointed to take care of the person or property of another. SDCL 30-26-1. Being called upon to report to the circuit court and account for the ward's property is a duty undertaken by the guardian at the time of appointment. Accordingly, when a guardian employs a lawyer in connection with the execution of his or her duties with respect to the property of the ward, disclosures to the court by the attorney with respect to the ward's property are impliedly authorized by virtue of the nature of the representation. Moreover, even if you were justified in refusing to make the disclosure requested by the court, such order could be made directly to the guardian. Upon the guardian's refusal to comply he or she would be subject to be held in contempt upon failure to do so. It becomes only a matter of time until the matter comes to the attention of the prosecuting authorities.

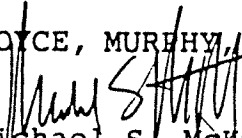
With respect to your second question, it is the opinion of this Committee that there is nothing in the Rules of Professional Conduct which would enable you to limit the use of the information provided to the court.

With respect to your third question, it is the opinion of this Committee that proper course of conduct for you at this point is to seek to withdraw from further representation of the guardian.

If you have any questions, please call.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD


Michael S. McKnight
Chairman, Ethics Committee