

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-314
Issued: August 1986

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: A lawyer has been representing a personal injury client, but has serious doubts about the client's competency. The lawyer is discharged by the client without warning, and counsel is concerned about possible undue influence by successor counsel or others, as well as the effects of the discharge on the client's interests. May the lawyer initiate proceedings for a conservatorship or similar protection of the client?

Answer: Qualified yes.

References: EC 7-12; Proposed Model Rules 1.14 and 1.16 and Comment.

OPINION

The current Code does not adequately address the problem encountered by lawyers who must deal with the disabled client. These are relegated to EC 7-12, which states that "if the disability of the client and the lack of legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client."

Proposed Model Rules 1.14 and 1.16 address the problem more directly, and we cite them as persuasive authority in answering the question.

Model Rule 1.14(a) states that in dealing with the disabled client, the lawyer "shall, as far as is reasonably possible, maintain a normal client-lawyer relationship with the client." Sub part (b) of the same Rule permits the lawyer to "seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

Although a client ordinarily has the right to discharge the lawyer at any time, with or without cause, the mentally incompetent client may lack the legal capacity to exercise that right, and the discharge may be seriously adverse to the client's interests. Accordingly, the lawyer should be permitted to help the client understand the consequences of the discharge, and according

to the Comments to Model Rule 1.16 (Declining or Terminating Representation), may in an extreme case, initiate proceedings for a conservatorship or similar protection of the client.

The Committee does not feel that an attorney should take such action after discharge, except in extreme cases. We emphasize extreme cases, in recognition of the client's presumed right to discharge counsel and retain other counsel, and the need for substantial evidence of incompetency, undue influence, and/or prejudice to the interests of the client. Counsel must recognize that the initiation of judicial proceedings may adversely impact on other interests of the client, or create an appearance that counsel is serving only his or her own interests. In no event should the attorney initiating such action serve as the guardian or conservator for purposes of exercising decision-making power relating to the discharge.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.