Formal Ethics Opinion

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-439
Issued: September 16, 2016

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at http://www.kybar.org/237), before relying on this opinion.

Question 1

What should an attorney do when the attorney has reason to believe that an elderly or special needs client is or has been abused, neglected, or exploited?

Answer

After careful investigation of the underlying facts, the attorney should take remedial action if necessary to protect the client from abuse, neglect or exploitation. See opinion.

Question 2

What should an attorney do when the attorney has reason to believe that a client is or has abused, neglected, or exploited a person to whom the client owes a fiduciary duty?

Answer

The attorney should advise the fiduciary client to stop the abuse, neglect or exploitation and to rectify any past harm. If the fiduciary client refuses to comply with this advice, the attorney may reveal client confidential information if necessary to stop the abuse neglect or exploitation or to rectify past harm. See opinion.

To answer these questions it is first necessary to analyze the reporting statutes found in KRS Chapter 209, "Protection of Adults." Kentucky's reporting rules are for the protection of vulnerable adults – those, who, "because of mental or physical dysfunctioning, are unable to carry out the activity of daily living, or protect themselves from neglect, exploitation or a hazardous or abusive situation without assistance from others, and who may be in need of protective services." KRS 209.020.

The nature of the mandatory reporting statute requires that any person "having reasonable cause to suspect that an adult has suffered abuse, neglect or exploitation" to file a report with the Cabinet for Health and Family Services. KRS 209.030. The Kentucky statute does not contain an exception for attorneys.

What is "neglect" under the statute? KRS 209.020 (16) defines neglect as an adult who, because of physical or mental dysfunctioning, in is unable to perform or obtain for himself or herself the goods and services necessary to maintain health and welfare, or the deprivation by someone else of services necessary for the health and welfare of the adult. As many elderly people might fit this definition there are some definitive signs which may evidence a finding that a person is suffering from neglect; for example, they do not keep themselves nor their home clean; they do not eat properly and a sudden loss of weight is evident; they do not seek nor would know how to obtain medical attention; they misplace their valuables, money and the like; they do not pay or they overlook the necessary payment of household expenses; they are confined to bed or otherwise immobile; they are dependent on others for the necessities of life.

One who has assumed a caretaker's role is obligated to provide the services necessary to maintain the health and welfare of the older person; failure to do this is neglect. KRS 209.020(16). And financial exploitation may become evident. Spending the adult's money for something other than the welfare of the adult is evidence of financial exploitation. KRS 209.020 (9). This situation occurs when someone, often a caretaker, spends (misappropriates) the adult's money and is exacerbated when the caretaker withdraws the adult's money from a trust or the adult's bank account.

What is abuse? Less frequent than neglect or exploitation, adult "abuse" is the infliction of injury, unreasonable confinement, intimidation or punishment that results in physical pain or mental injury. Neglect imposed as punishment would fit this definition

In the opinion of the Committee, Kentucky's mandatory reporting requirements would not be construed by the Kentucky Supreme Court to require that an attorney reveal confidential client information in order to make a report of abuse, neglect or exploitation to or by the attorney's client. The Kentucky Constitution vests the judicial power of the Commonwealth exclusively in the Court of Justice (sec. 109) and provides that the Supreme Court of Kentucky "shall, by rule, govern admission to the bar and the discipline of lawyers." (sec. 116). In *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682 (Ky. 1980), the Court made it clear that the judicial branch has the sole power and responsibility for governing the activities of lawyers. *Turner v. Kentucky Bar Association*, 980 S.W.2d 560 (1998).

To the contrary is *Chambers v. Stengel*, 37 S.W.3d 741 (Ky. 2001), certifying Kentucky law to the federal court of appeals. In *Chambers*, the Kentucky court opined that a statute providing criminal sanctions for attorneys who solicit accident or disaster victims within 30 days of the disaster or accident does not impinge on the constitutional power of the judiciary. The court pointed out that the judicial branch has the power to discipline lawyers but does not have the power to criminalize attorney conduct. The General Assembly has the power and duty to create criminal laws.

The Committee recognizes that the knowing or wanton failure to report adult abuse, neglect, or exploitation is a Class B misdemeanor. KRS 209.990(1); however, requiring attorneys to reveal confidential information to make such a report may undermine the attorney's duties of confidentiality and loyalty, cutting to the core of the attorney client relationship. Rule 1.6,

Comment (1). It is the opinion of the Committee that an attorney may ethically choose not to make a report of confidential client information of abuse, neglect or exploitation unless, of course, the Kentucky Supreme Court holds otherwise.

In E-360 (1993), the Committee addressed a similar question – whether an attorney is required to report child abuse by a client. Unlike KRS 209.020, the reporting statute (KRS 620.030) recognizes the attorney-client *evidentiary* privilege as a ground for not making a report. In E-360, the Committee reasoned that the exception might have been intended to protect all confidential information, not just information falling within the attorney–client privilege. Based on this reasoning, the Committee concluded that the statute did not conflict with the Rules of Professional Conduct.

In passing, the Committee alluded to what is the core of this opinion – that a statute interpreted to require lawyers to violate the ethical duty of confidentiality to report abuse, neglect or exploitation to or by their clients violates Sections 27 and 28 of the Kentucky Constitution (the separation of powers provisions). It is significant that Rule 1.6(b)(4) is permissive; the rule permits, but does not require, lawyers to reveal client confidential information to comply with "other law."

In the context of child abuse, the Indiana Ethics Committee reached a similar result: a lawyer's duty of loyalty and confidentiality trumps a statutory duty to report abuse. Indiana Op-2 (2015).

The next question is whether an attorney *may* report abuse, neglect or exploitation over the client's objection. Rule 1.6 (b)(1) permits an attorney to reveal client confidential information if the lawyer reasonably believes it is necessary to prevent death or serious bodily harm. More broadly, Rule 1.6(b)(4) permits a lawyer to reveal confidential client information to comply with other law; in this context the "other law" is the reporting statute. Disclosure in reliance on the reporting statute is limited to what the lawyer reasonably believes is necessary to protect the person, whether a client or a person abused by a fiduciary client, from abuse, neglect or exploitation. Before revealing confidential information, the lawyer should fully investigate the underlying facts.

If the client is the one who is or has been abused, neglected or exploited: Rule 1.14(c) states that an attorney is impliedly authorized to reveal client confidential information if necessary to protect a *mentally impaired* client. In most cases in which reporting is appropriate, the client suffers from mental impairment that adversely affects the client's decision making authority (diminished capacity). As a practical matter, mental impairment (the Rule 1.14 term) may be equated with "mental dysfunctioning" (the KRS 209.020 term) although the latter term appears to go beyond decision making capacity. Rule 1.14(b) provides that,

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interests, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability

to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian or conservator.

The Comments to Rule 1.14 elaborate on the protective measures an attorney might consider that would best protect the client, keeping in mind the "goal of intruding into the client's decision-making autonomy to the least extent feasible." Comment [6] to Rule 1.14.

Comment [6] to Rule 1.14 suggests that "diminished capacity" is a flexible concept including many factors – for example a client's ability to articulate a rationale for a decision, whether the decision is in accord with the client's long-term goals, whether the decision is fair and rational, etc.

An attorney consulting another professional to determine if the client has diminished capacity should be aware that mandatory reporting duties of the other professional might result in reporting that is not in the client's best interest.

The reporting statute speaks also of "physical dysfunctioning", a term which does not correspond to "diminished capacity" (the Rule 14 term). It is the opinion of the Committee that an attorney with a physically dysfunctional client may reveal client confidential information to protect the client from abuse, neglect or exploitation.

In trying to protect a mentally or physically impaired client from abuse, neglect or exploitation, an attorney has many options: for example, contacting family members, seeking a change in living conditions, a change in bank account, the appointment or removal of a trustee or guardian, or by reporting the situation to the Cabinet.

If the client is the one who is or has been abusing, neglecting or exploiting an impaired person: If an attorney represents a fiduciary who is abusing, neglecting or exploiting a mentally or physically impaired person, the attorney should counsel the fiduciary client about the requirements of Kentucky law, as discussed above, and the need to stop the abuse, neglect, or exploitation; further, to advise the client of the need to rectify any past harm. If the fiduciary refuses to cooperate the attorney may reveal confidential information, including information about past abuse, if necessary to protect the impaired person from further abuse. In so doing the attorney would rely on Rule 1.6(b)(4), which allows an attorney to reveal client information to comply with law (in this case the reporting statute). However, if the attorney represents a client in a criminal case, the attorney may not disclose confidential information about the client's past activities without the client's consent.

In addition to advising the fiduciary client of the requirements of law, the attorney may seek to withdraw from the representation. Rule 1.16(b)(2).

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. This Rule provides that formal opinions are advisory only.