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Lawyer May Seek Appointment of Guardian for Client Under a Disability, or Take Other Protective Action Necessary to Advance Best Interest of Client

QUESTION:

"Through Legal Services Corporation, I have agreed to represent an indigent individual in a petition to modify his divorce decree to terminate or reduce his child support since he is now unemployed. He quit his job due to a nervous breakdown and has been hospitalized twice for suicide attempts. He has stopped seeking psychological counseling because he is scared of indigent health care systems and has feelings of paranoia about being watched and/or investigated.

"It has now come to my attention that there in fact is an ongoing investigation about his alleged sexual abuse of one of his children two years ago. He has not been allowed visitation with his children in over a year pursuant to terms in the divorce decree for this very reason.

"Every time I talk to him about any facet of his case he has a complete emotional breakdown. He cannot handle any stress right now. I cannot convince him to seek psychological counseling because of his fear of what might be revealed.

"He is so unstable, I do not believe I can proceed with the petition to modify, because I will not be able to get him through a court proceeding or even the discovery necessary to prove his case. He has no immediate family that I can call upon for help.

OPINIONS OF THE GENERAL COUNSEL Continued from page 75

"I have been approached by opposing counsel (who must represent his client, the ex-wife, who will not consent to a temporary termination of the court-ordered child support), saying that he would be willing to allow an in-chambers presentation to the judge about our dilemma. If I do so I will be divulging to the judge that the man has a serious emotional problem that the judge might want me to establish or he might even order psychological testing to see if my client can adequately assist me with the case. In either event, if the man goes to any counselor, further evidence would be revealed about his serious feelings of guilt and remorse which could be used against him in a criminal investigation.

"I cannot counsel with my client as to which course to take because he cannot deal with conflict without an emotional breakdown and I feel this could jeopardize his life, (i.e. another suicide attempt and/or because he is incapable of making rational decisions). On the other hand, I cannot leave him without relief from the decree of divorce because the arrearages would just keep adding up at \$911.56 per month. (He was formerly employed at a very good wage working in an intensive care unit at a local hospital which caused such a high child support award).

"I am convinced my client's emotional instability is real and I have experience and training to make that judgment.

"How must I proceed in properly representing my client?"

"This is, of course, urgent because a trial date is coming up in a few weeks and I am further concerned for my client's well-being."

ANSWER:

The *Alabama Rules of Professional Conduct* allow you to seek appointment of a guardian for your client, or to take any other protective action if you reasonably believe that your client cannot adequately act in his own interest. Further, the rules allow you to disclose such confidential information as may be required to adequately represent your client and advance your client's interest.

Rule 1.14, *Alabama Rules of Professional Conduct*, states as follows:

"Rule 1.14 Client Under A Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may 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."

The comment portion of Rule 1.14 takes note of the fact that disclosure of the client's disability could adversely affect his interests. The comment directs that the lawyer may seek guidance from an appropriate diagnostician in furtherance of the client's best interest.

The issue which you face requires consideration of the obligation of confidentiality, but also requires that you assess the situation and make a determination as to what you feel would be best, under the totality of the circumstances, for your client's interest. In RO-90-67, the Disciplinary Commission stated that Rule 1.14 "... [R]ecognizes that a lawyer may, on occasion, best serve a client by taking action that, on first blush, might appear to be adverse to the client."

In RO-95-03, the Disciplinary Commission reasoned that a lawyer confronted with such a dilemma must determine what is in the best interest of the client based on the lawyer's analysis of all aspects of the situation, including opinions of medical experts. The Commission further stated:

"Much of the burden of this decision is placed on the lawyer who must keep foremost in his mind the increased standard of responsibility when dealing with a disabled client. He must assess all aspects of the situation, including expert medical opinions, balancing the client's ability to communicate and to appreciate the serious decisions to be made. If the lawyer has doubts, he should resolve those doubts in a manner that best serves his client. The lawyer

should also appreciate the Court's increased concern in matters involving lawyers and their representation of incompetent clients. 'The normal limitations on a lawyer's self-enrichment at the expense of a client are applied with enhanced strictness when the client is a child or otherwise not capable of making fully informed and voluntary decisions.' Wolfram, *supra*, p.159."

Hazard and Hodes, in their treatise *The Law of Lawyering*, deal with Rule 1.14 and give an illustrative case wherein a lawyer is representing a criminal defendant with diminished capacity. Hazard and Hodes determined that the lawyer acts properly in urging his client, who has diminished capacity, to accept a plea bargain offered by the prosecution and to waive a possible insanity defense, even though it would mean a conviction on the client's record and a short jail term. Hazard and Hodes conclude that the lawyer may judge that his client's long-term best interest would be best served by accepting a short jail term rather than an indeterminate stay in a mental institution. Hazard and Hodes feel that in close cases, the lawyer "cannot be disciplined for any action that has a reasonable basis and arguably is in his client's best interests." Section 1.14: 201.

Finally, Rule 1.6, *Alabama Rules of Professional Conduct*, deals with "confidentiality of information." Subsection (b) of Rule 1.6 allows disclosure of information by a lawyer which is otherwise confidential if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act which the lawyer believes is likely to result in imminent death or substantial bodily harm. The Comment provision to Rule 1.6 allows that the lawyer has professional discretion to reveal information in order to prevent such consequences. Therefore, if you determine that the best interest of your client would be served by making disclosure to the court of your client's condition, and the possibility that he might harm himself, and that protective measures should be taken to prevent such harm, the Rule would allow such. In conjunction with Rule 1.14, if you make this determination, then you could seek appointment

of a legal representative for your client to further protect your client's interest.

There is no definitive standard which can be applied in such a situation to guarantee the best result. The rules are fashioned to allow the lawyer to analyze the client's emotional state, and the interest to be advanced by the lawyer on behalf of the client, and then pursue whatever action the lawyer deems best under obviously difficult circumstances. Once the lawyer has determined what he feels to be the proper course of action to best serve his client, the rules allow the lawyer to do what is necessary to advance the interest of the client, while, at the same time, ensure protection of the client and his well-being. [RO-95-06] ▲▼▲

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