ETHICS OPINION

RO-95-03

[redacted]

QUESTION:

"This letter requests a formal opinion as to whether the conduct here-in-after described by an Alabama attorney would be a violation of any ethical rule under the Alabama Rules of Professional Conduct, the Alabama Rules of Disciplinary Procedure, the Alabama Standards for Imposing Lawyer Discipline, or any law governing ethical behavior in Alabama.

I would appreciate receiving this opinion, if possible, before the December 1994 meeting of the Commission.

The attorney has been informed on good authority by a family member in the first degree (civil relationship) that a client or prospective client suffers from and has been diagnosed with a psychosis or psychiatric disorder known as bipolar manic depression. The attorney is also informed that the client or prospective client is currently in the manic stage.

May the attorney prepare and deliver legal documents such as a power of attorney, deeds, etc. where the attorney-in-fact or the grantee, respectively, is the client or person suffering from the psychosis? Same question, except a lawsuit is proposed by the manic-depressive. If the attorney may proceed in either question, what steps should the attorney take before such preparation and delivery, or preparation of the lawsuit, respectively?

I cite, not as the sole source Rule 1.14 of the Alabama Rules of Professional Conduct, Sec. 94.01 of McElroy-Gamble, Alabama Evidence, and Sec. 12-21-165(a), Code of Alabama.

I also enclose several pages from The Merck Manual, 1987 Edition; I am sure the Commission will want to look at the entire article, in a later edition."

[A second letter was received from Judge M[redacted] further amplifying his request as follows:]

"I thank you for your letter of informal opinion of Nov. 1994 on my questions concerning the ethical conduct of an attorney who has been reliably informed of a potential client's mental disability of manic-depression while in the manic stage. I regret I must ask for a formal opinion, as I am convinced that the insidious nature of this disease is not fully appreciated. That is why I suggested in my original letter that the entire section on this psychiatric disorder be read, in the latest edition of the Merck Manual. In the brief excerpt I sent you, on pp. 1518 and 1519, the words or derivatives of the words 'delusions' and 'hallucinations' repeatedly occur. Even we laymen understand those words to mean fantasy rather than fact. Surely the opinion would not be the same if the potential client was 'schizophrenic'.

Without reading an accepted treatise such as the Merck Manual, many laymen believe that 'manic-depression' simply means the person is sometimes depressed, and isn't everyone? The '87 Merck article, on p. 1519, says in the 'full-blown manic psychosis' the client's lack of 'insight for inordinate capacity for activity lead to a dangerously explosive psychotic state ..' Yet, your opinion does not mention that the 'lawyer may seek guidance from an appropriate diagnostician', which would be a psychiatrist.

I mentioned in my original letter that the attorney knew that the potential client had been diagnosed, per the relative, with bipolar manic-depression.

I realize a December 1994 opinion from the Commission is probably and understandably not possible. I do desire that the formal opinion, however long it takes, is based on a full understanding of this disease and consideration of all the points in my letters.

One further quote from the '87 Merck Manual, p. 1519 again: 'Psychomotor acceleration is experienced as racing thoughts and is manifested by a flight of ideas, which in the extreme is difficult to distinguish from the loose association of the schizophrenic'.

I have always understood that one of the great purposes of the law is to discourage litigation, particularly useless litigation. Later remedies of attempting to set aside documents to and from an incompetent are not adequate remedies particularly when that litigation could be easily avoided by a 'bright-line' ethics opinion that both makes common sense and serves the purpose of discouraging useless or inadequate litigation.

I humbly suggest that leaving too much burden on the attorney may result in more, not less, legal malpractice suits. I implore the members of the Commission to study this disease in the medical texts before issuing their opinion, and so recite in their opinion."

* * *

ANSWER:

A lawyer may seek the appointment of a guardian or take other protective action if the lawyer reasonably believes that his or her client cannot adequately act in the client's own interest. This determination must be made by the lawyer after analysis of all aspects of the situation, including opinions of medical experts. In dealing with a client with a disability, the lawyer has a heightened degree of professional responsibility to insure that the best interest of the client is served. Any doubts should be resolved in favor of this "best interest".

DISCUSSION:

Rule 1.14 of the Rules of Professional Conduct provides the following:

"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 purpose of this Rule is to address those situations where communications between lawyer and client are difficult [subparagraph (a)] or where they are impossible [subparagraph (b)]. Professor Wolfram describes the questions involved in such representations as "among the most perplexing that a lawyer confronts", Wolfram, Modern Legal Ethics, Student Edition, p.159, West Publishing Co., 1986. Similarly, Professors Hazard and Hodes in their handbook, The Law of Lawyering, §1.14:101, p.439, point out that "Difficult questions of law and morality continue to plague this troublesome area. In practice, situations involving disabled clients do not neatly present distinct 'levels' of disability, so that it may not be clear whether Rule 1.14 has application, or which subsection. Furthermore, even when it is clear that Rule 1.14(a) applies, it is difficult to say how far a lawyer may deviate from a 'normal' client-lawyer relationship in any given instance."

As the difficulty of the situation increases, so too does the lawyer's responsibility. "For every degree that respondent [the lawyer involved] by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client ... he raised by an equivalent degree the standard of conduct which the Court must require of him in his dealings with his client." In re Witte, 615 S.W.2d 421, 422 (Mo. 1981), cert. denied 454 U.S. 1025. At some point, subsection (b) provides "a last resort" solution permitting the lawyer to seek appointment of a guardian or to take other protective action. Exactly where this point is will vary based on the situation. The Comment to the Rule amplifies this stating: "Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence."

There is no bright line between difficult and disabled clients and, thus, none between the application of subparagraphs (a) and (b). It can no more be determined by a layman reading The Merck Manual as can difficult legal issues be determined by reading Black's Law Dictionary. It can and should be made, however, upon consideration of all aspects of the situation, including medical texts as well as opinions of medical experts.

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.

Finally, it must be remembered that the Rule does not provide a solution to all problems attendant to dealing with clients with diminished capacity but as Professors Hazard and Hodes point out, it does provide an intelligible frame of reference for the lawyer and those who might later judge his conduct. The Law of Lawyering, §1.14:101, p.439.

1/26/95

RWN/vf