



Legal Ethics

## Ethics Opinions

LEGAL ETHICS

### OPINION 1999-2

An attorney who reasonably believes that a client is substantially unable to manage their own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property.

#### ISSUE:

What action, if any, may an attorney take if the attorney believes that a client is so mentally impaired that the client is not capable of making rational choices regarding the subject of representation?

#### DIGEST:

An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, [1] may, but is not required to, take protective action with respect to the client's person and property. [2] Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client. [3]

#### AUTHORITIES INTERPRETED:

ABA Model Rule 1.14 (b) permits an attorney to seek a guardianship of the attorney's own client if the attorney reasonably believes that the client cannot protect his or her own interests. California has no such rule.

California case law states that when there is no California Rule on a subject, the courts can look to the ABA Rules and published California ethics opinions for guidance, *People v Ballard* (1980), 104 Cal App 3rd 757,761. See also COPRAC (State Bar Standing Committee on Professional Responsibility and Conduct) Formal Opinion 1983 70. Unfortunately, those authorities disagree. There is some California civil case law dealing with these issues that appears to have been ignored by most of the discussion in the California Ethics Opinions.

*Sullivan v. Dunne* (1926) 198 Cal 183, appears to be the earliest case addressing this issue. It holds that the client must have capacity to contract in order to give the attorney authority to represent the client in a civil proceeding. In dicta, it states that if the client had contract capacity when hiring the attorney, then lost it, the contract would necessarily end, as the authority of an agent ends when the principal becomes incompetent.

The ABA Model Code of Professional Responsibility was promulgated in 1969. Canon 7 was the zealous representation section. EC (Ethical Consideration) 7 12 stated that if the client was mentally incompetent, the attorney "may be" compelled to make decisions in court on behalf of the client. The ECs were silent on the problems that arise outside of court proceedings.

In *Conservatorship of Chilton* (1970) 8 Cal. App. 3rd 34, the attorney was introduced to the client by the client's boyfriend, and proceeded to act for the client. The appellate court upheld the trial court's finding that the boyfriend was a "designing" person seeking to take advantage of the client and denied the attorney's petition for fees. One of the facts used against the attorney was his opposition to the conservatorship, when the existence of the conservatorship was clearly needed to protect the client. Another finding was that he advocated positions taken by a clearly incompetent client. Another was that the client lacked the capacity to enter into an attorney client relationship with the attorney.

In *Caldwell v. State Bar* (1975) 13 Cal. 3rd 488, one of the facts used to discipline the attorney was that he continued to expend client funds under a power of attorney after the client had been adjudicated incompetent. The Caldwell Court cited *Sullivan* for support. There was no mention of EC 7 12.

The first California ethics opinion to take up this issue was San Diego Opinion 1978 1. It concludes that to seek a conservatorship for the attorney's own client, the attorney would necessarily reveal client secrets, and to do

so would be contrary to the rules of professional conduct. There was no mention of *Sullivan, Chilton, Caldwell*, or EC 7 12.

The ABA Model Rules of Professional Responsibility were promulgated in 1983. Model Rule 1. 14 (b) states that the attorney should, as far as reasonably possible, maintain a normal attorney client relationship with an impaired client. The Rule goes on to permit an attorney to seek a guardianship of the attorney's own client if the attorney reasonably believes that the client cannot protect his or her own interests.

COPRAC, when commenting in 1986 on proposed changes to the California Rules of Professional Conduct, recommended against a California rule similar to ABA Model Rule 1. 14, on the basis that such a move is adverse to the client and also constitutes the revelation of client confidences in violation of Bus & Prof 6068(e). There was no mention of *Sullivan, Chilton, or Caldwell*.

Los Angeles Opinion #450 (1988), was next in chronological order. It concludes that an attorney cannot seek a conservatorship for his or her own client, based on the rationale that a conservatorship proceeding would be adverse to the client, and therefore the attorney would be representing conflicting interests. This opinion did not consider the ABA Model Rule 1. 14, *Sullivan, Chilton, or Caldwell*. It never revisited the issue in a published opinion.

In *Drabick v Superior Court* (1988) 200 Cal App 3rd 185, the client was in a coma and the family filed a petition to discontinue life support. Court appointed counsel agreed. The trial court denied the petition. The family appealed. New counsel was appointed on appeal. The appellate attorney argued that trial counsel should have opposed it. The court ruled that when the client is in a coma, the attorney must be guided by his own understanding of the client's best interests. The court recognized, but did not comment upon, the issue addressed here what to do when the client is impaired but able to speak.

When the California Rules were revised in 1989, they were silent on the issue. The next California opinion to visit this issue was COPRAC 1989 112. The opinion adopts the rationale of both the San Diego and Los Angeles opinions. COPRAC noted, but did not discuss, the ABA Rule 1. 14 on impaired clients. There was no mention of *Sullivan, Chilton, Caldwell, or Drabick*.

In San Diego Opinion 1990 3, the hypothetical situation was a child who sought attorney services for a parent's will, where the will favored the child. The discussion includes a statement that the attorney must be satisfied of the testator's competence. If not satisfied, the attorney should not write the will and "may" recommend the institution of a conservatorship. There is no reference to any prior California ethics opinion, including San Diego's own 1978 1. There was no mention of *Sullivan, Chilton, Caldwell, or Drabick*.

The Orange County Bar Association Committee on Professionalism and Ethics, in Opinion 95 002, concluded that court appointed counsel for a proposed conservatee, cannot disclose any facts adverse to the client, who although suffering from dementia, has indicated an opposition to the conservatorship. It concluded that court appointed counsel for a proposed conservatee cannot disclose any facts adverse to the client, who although suffering from dementia, has indicated an opposition to the conservatorship. The OCBA discussed the previous ethics opinions and *Drabick*. There was no mention of *Sullivan, Chilton, or Caldwell*. It did consider the ABA Rule, as well as several published articles on the subject. It did not consider ACTEC, and its opinion predates the *Guide* and the draft *Restatement*.

ACTEC<sup>[4]</sup> notes that there may be a need to take some sort of action, only one of which is to seek a guardianship. ACTEC also notes that the lawyer may have implied authority to disclose limited confidential information of a now impaired client in accord with client's wishes that were clearly stated while the client was competent.

In 1997, the Estate Planning, Trust and Probate Law Section of the State Bar of California published its *Guide*, <sup>[5]</sup> to assist practitioners in dealing with ethics issues. The Guide criticizes the California ethics opinion and calls on the courts to adopt the ABA rules and guidelines.

At the time this opinion is published, the American Law Institute was circulating what it expected to be its final draft of the Restatement, *The Law Governing Lawyers* (1998). In the section under "The Client Lawyer Relationship," the draft Restatement states that "adjustments" are required to the attorney client relationship when the client is impaired, and that the lawyer has to exercise informed judgment in choosing among "imperfect alternatives." Those alternative include discussions of the issue with the client's medical providers or relatives, bringing the issue to the attention of the court, and the discretion to seek a guardianship.

## DISCUSSION

The California ethics opinions stem from an unstated assumption that an attorney has only three options continue to represent the client, withdraw from representation, or represent some family member to seek a

conservatorship. The current California ethics opinions leave the attorney with no way to protect the client. Withdrawing from the case simply leaves a vulnerable client more exposed than before. Opposing a conservatorship for a client who is substantially unable to manage his or her own financial resources or resist fraud or undue influence unfortunately puts the attorney in the role of acting contrary to the client's best interests.

The ABA approach recognizes that there is a problem and that the problem should be addressed. Model Rule 1.4 recognizes that there are a variety of options that an attorney can consider that help the client while avoiding violation of the Rules. These options have been noted and discussed in a wide variety of sources.

*Sullivan* and *Caldwell* occurred after the client had been decreed incompetent in civil proceedings; the client in *Drabick* was in a coma. But some of the actions in *Chilton* occurred prior to the establishment of the conservatorship. These cases can be relied upon for some guidance once there is a clear court holding of incompetency. The question is then raised, what is an attorney supposed to do when the attorney suspects the incompetency but no court proceeding has occurred? The client's interest requires that something be done. The attorney may be the only one who both sees the problems and has the power to do something.

In criminal cases, the path is more clear, dictated by Pen C 1368. Under Pen C 1368(a), a judge may initiate competency proceedings and may ask defense counsel for an opinion on defendant's mental competency. If so, counsel is mandated to speak. Under Pen C 1368(b), defense counsel can volunteer the opinion. In *People v Hill* (1967) 67 Cal 2nd 105, a criminal defense attorney was permitted to make decisions about the trial when his client appeared to be "insane. " The court reasoned that an insane client was unable to act in his own best interests. In *People v Bolden* (1979) 99 Cal. App. 3rd 375, the Court held that volunteering an opinion did not constitute revelation of client secrets, since the underlying facts were not disclosed.

The approach in criminal cases is dictated by statute, so it does not dictate the approach in civil cases. It can be argued, however, that the criminal statutory scheme is some evidence of a California policy that an attorney for an incompetent person may say and do something other than watch the client self destruct.

The problem is real. There are incapacitated clients. The ABA overtly grants the attorney discretion to act. Existing California ethics opinions state that to act is wrong. The California opinions offer no guidance on how to assist the client, and those that were published after *Chilton* overlook that the holding implies that an attorney should not act contrary to an incompetent client. ACTEC and the *Guide* believe that an attorney should be able to act. So does the draft *Restatement*. We agree. This Committee believes that the attorney has the discretion, but not the mandate, to act. Whatever approach the attorney selects, the actions should be taken after reasonable investigation and research. The actions should be the least intrusive to the client, given the factual situation at hand.

The past ethics opinions uphold form over substance. The opinions may suffer from the implied assumption that there is an all or nothing approach either you bring the conservatorship action yourself, or you represent somebody else doing it, or you do nothing. There are other choices. Some of those choices were not considered when earlier opinions were promulgated. Other sources of law and policy were not ascertained or available when the earlier opinions were published.

Following Model Rule 1. 14(a), the attorney should, as far as reasonably possible, maintain a normal attorney client relationship with an impaired client. As the draft *Restatement* points out, sometimes that means using a relative, therapist, or other intermediary to facilitate communication between attorney and client.

Following Model Rule 1. 14(b) and the ACTEC commentary, if the attorney reasonably believes that the client cannot act in the client's own interests, the attorney may take appropriate protective action to preserve the client's person or property. As the draft *Restatement* points out, the attorney should act only on reasonable belief, based on appropriate investigation. As discussed in the ABA/BNA Manual on Professional Conduct [6] the protective action will depend upon the attorney's perception of the client's condition and the client's interests.

The attorney has the discretion to act but is not required to do so. The draft *Restatement* notes that it is often difficult to decide if a client is sufficiently impaired. ACTEC notes that the decision may be affected by whether the client was a client prior to becoming impaired. An attorney with a long term relationship with a client will be more likely to accurately assess changes than an attorney who sees the client for the first time. The *Guide* points out that the attorney may be the only person with the knowledge and power to forestall conduct adverse to the client. The *Guide* notes that the decision to act involves a clash between the duty of loyalty and the duty to preserve confidences.

Zitrin and Langford [7] note that an attorney may not be qualified to make these decisions, that they can be colored by the attorney's personal beliefs and values, and that an attorney may misjudge the situation. Thus,

the actions should be limited and least intrusive. As the Guide points out, disclosures of client secrets may be limited and do not always have to be disclosures of every confidence. They may be made in camera. The draft Restatement reminds attorneys that a discussion with a relative or therapist may be all that is required. Or the attorney may bring the potential impairment to the attention of the Public Guardian, or the court in pending litigation.

Conservatorship is an option, but it need not necessarily be the first or only option. Conflict of interest rules of course prohibit an attorney from acting adversely to an existing client. Thus, if the attorney currently represents the client, absent an appropriate conflict of interest waiver, the attorney may not be able to represent third parties who bring the conservatorship action. 8/ But that still leaves the attorney free to represent the client in conservatorship proceedings and to advocate a structure to meet the client's needs. The client's interests may be best met by a conservatorship only of the estate, or one with special conditions, or one which retains rights and powers to the conservatee under Prob C 1873. Thus, it may be appropriate for the attorney to suggest the commencement of such proceedings without representing the proposed conservator, or without becoming the conservator.

There is also the practical risk recognized in *Estate of Moore* (1968) 258 Cal. App. 2nd 458, that the client will then seek to terminate the person seeking to establish the conservatorship. In *Moore*, a doctor brought the conservatorship action. All requested relief was granted, except that of appointing the doctor as the conservator.

The client's best interests are paramount, not the attorney's role. Thus, an attorney who believes that the client is impaired is not acting adverse to the client by suggesting to a court that an investigation for a possible conservatorship be established. Rather, the attorney is suggesting an approach that is designed to preserve the clients' estate, perhaps even the person. If the attorney is discharged for making the suggestion, the attorney has nevertheless put the client's interests above the attorney's.

Today's statutory scheme in conservatorships is protective of conservatees. Conservatorships are established only on clear and convincing evidence, Prob C 1801(e). Conservatorships are reviewed biennially, Prob C 1850. There are now court investigators, Prob C 1419, who interview proposed conservatees and report to the Court prior to establishment of any conservatorship, Prob C 1454. Such persons are in a position to act as a check against the unscrupulous or misguided attorney, as well as providing a periodic assessment if the constraints should be removed. If there are no other known persons, then the Public Guardian should be notified, Prob C 2920.

There is no California statute that governs this issue. An attorney can rely upon ABA Rule 1.4 and on some of the language in *Chilton* in undertaking such a request, but the contrary California ethics opinions are a great deterrent to any attorney's willingness to act. We therefore hope that this opinion, coupled with the collection of authorities in one location, will act as support for the attorney who wishes to act. Clearly there are situations in which the client's interest is served by some form of court supervised intervention in order to prevent the client from self destructing, or to prevent others from taking advantage of a client who is easy prey.

## CONCLUSION

As a general rule, an attorney recommends actions to clients and the clients decide what course to take. An impaired client presents challenges that are not easily resolved under customary rules, because the rules assume a rational, sober client. An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client's person and property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client.

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### Footnotes:

1. Language taken from Probate Code 1908(b) on conservatorships.
2. Modified from the criteria applied by the American College of Trust and Estate Counsel (ACTEC) in commenting on Model Professional Rule of Conduct (MRPC) 1. 14.
3. Modified from the criteria applied by the American College of Trust and Estate Counsel (ACTEC) in commenting on Model Professional Rule of Conduct (MRPC) 1. 14.
4. American College of Trust and Estate Counsel.
5. *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel*, House and Ross, editors, published in 1997 by the Estate Planning, Trust and Probate Law Section of the State Bar of California.

6. Client Under a Disability," in the chate "Lawyer Client Relationship, beginning at page 31:601 of the *ABA/BNA Lawyer's Manual on Professional Conduct* (1998). The section was last revised on November 20, 1991, although the Manual has been updated periodically through October 1998.
7. Richard Zitrin and Carol Langford, *Legal Ethics in the Practice of Law* (The Michie Company 1995), Chapter 4, "Who Controls the Case?".
8. This opinion is not intended to address the conflict of interest issues that may be involved with respect to joint clients and/or third parties.

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