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REPRESENTING A CLIENT OF QUESTIONABLE COMPETENCE

Adopted: April 16, 1993

Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

Editor's Note: See Rule 1.14 of the Revised Rules for additional guidance.

Inquiry #1:

Attorney A represents a client on a social security matter and determines, from confidential communications with his client, that the client is, in the attorney's opinion, not competent to handle his affairs in relation to the representation and that the client's actions in regard to the matters involved in the representation are detrimental to the client's own interest. For example, the client who sought the attorney's assistance with receipt of benefits from the social security administration, refuses to cash checks obtained for the client from social security despite the client's obvious need for financial support. The attorney believes that either a guardian should be appointed for the client under state law or that a representative payee should be appointed for the client under federal social security law. The client refuses to agree for the attorney to seek the appointment of a guardian, to seek the appointment of a representative payee, or even for the attorney to discuss this problem with the client's family. The attorney is of the opinion that the client lacks the capacity to form objectives necessary for a normal attorney/client relationship.

May the attorney seek the appointment of a guardian or a representative payee for the client?

Opinion #1:

Yes. The Rules of Professional Conduct do not speak directly to the question presented. There is language in the comment to Rule 2.8 concerning discharge and withdrawal suggesting that where an attorney is representing a client who is mentally incompetent she may "in an extreme case... initiate proceedings for a conservatorship or similar protection of the client." It follows that Attorney A may under the circumstances described seek the appointment of a guardian or a representative payee without the client's consent and over the client's objection if such appears to be reasonably necessary to protect the client's interests. In so doing, the attorney may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose the confidential information which led her to conclude that the client is incompetent, except as permitted or required by Rule 4(c).

Inquiry #2:

In taking that action, may the attorney reveal confidential information so as to establish the grounds for guardianship or representative payee status?

Opinion #2:

See the answer to Inquiry #1.

Inquiry #3:

If the attorney may not seek appointment of a representative payee or guardian, must the attorney withdraw from the matter?

Opinion #3:

See the answer to Inquiry #1.