

**ORANGE COUNTY BAR ASSOCIATION PROFESSIONALISM AND ETHICS
COMMITTEE**

FORMAL OPINION NO. 95-002

STATEMENT OF FACTS

Court-appointed counsel reviews the file in a new case involving the conservatorship of an 88-year old woman who has demanded a hearing on the initial establishment of the conservatorship. The conservatorship was requested by the woman's family who was concerned about her mental and physical condition and her ability to take care of her dwindling estate.

The 88-year-old woman is suffering from dementia. After a brief interview with the client, the court-appointed attorney believes a conservatorship is in the best interest of her client. Further, the expense of a hearing, particularly if a jury is demanded, would exhaust the conservatee's limited estate. The Court has requested counsel apprise the court of the conservatee's desires and the attorney's belief of the best interest of the conservatee.

APPLICABLE RULES

California Probate Code Sections 1470 and 1471

California Rules of Professional Responsibility 3-310

Business and Professions Code Section 6068(e)

ISSUE

May the court-appointed attorney express her own opinion regarding the advisability of a conservatorship to the court where her opinion is contrary to the wishes of the client?

DISCUSSION

Attorneys in the adversarial mode do not provide the court with their opinions regarding the liability or guilt or innocence of their client—that is a job for the factfinder to determined based on the evidence. Similarly, court-appointed attorneys representing proposed conservatees argue it is not their role to offer the court their opinion on the best interest of the client where such an opinion conflicts with the client's expressed wishes. Nonetheless, the court's role in creating a conservatorship is unique in the judicial system and the responsibilities of court-appointed counsel in a conservatorship hearing are also unique from those of a civil or criminal attorney.

California has chosen not to permit attorneys to institute conservatorship proceedings on a client's behalf, without client consent, where the attorney believes the client is incompetent to act in her own best interests. California has permitted, and in some cases mandated, the court to appoint counsel to represent a proposed conservatee where it would be helpful to the resolution

of a conservatorship proceeding. California also mandates the appointment of counsel to a proposed conservatee if so requested by the proposed conservatee. The court-appointed counsel's scope of participation at the conservatorship hearing is governed by the Probate Code, Business & Professions Code and applicable Rules of Professional Conduct.

1. The ABA Model Rules Illustrate the Potential Problems of an Attorney-Client Relationship Between an Attorney and a Proposed Conservatee.

Although the ABA Model Rules of Professional Conduct is not the governing standard in California, our courts and ethics committees do turn to the ABA Model Code on questions about which our own Rules of Professional Conduct are silent or obscure.¹ Additionally, the California State Bar's previous analysis of ABA Model Rules applicable to conservatorship hearings is instructive in creating an approach to analyzing the within set of facts.

A review of the ABA Model Rule 1.4, the comments of critics regarding this rule, and State Bar of California Formal Ethics Opinion No. 1989-112 illustrates the inherent ambivalence in the attorney-client relationship where the best interests of the client may be contrary to the client's wishes. ABA Model Rule 1.14 reads 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 reasonable 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.

There have been many analyses of the above rule and the problems it poses for the attorney representing older clients. Various critiques "of the Model Rules [have pointed] out the seemingly insurmountable problems that arise from the Rules' ambivalence and ambiguity regarding the basis of the attorney-client relationship when the attorney suspects her client is operating under a disability."²

¹ Charles W. Wolfram, *Modern Legal Ethics* 64 (1986).

² Jan Ellen Reid, *Clients with Destructive and Socially Harmful Choices—What's an Attorney To Do?: Within and Beyond the Competence Construct*, 62 *Fordham L. Rev.* 1101, 1115; see also Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas* *Prob. & Prop.*, Jan-Feb. 1988, at 36, 41 (arguing that the Model Rules thrust attorneys into a 'maelstrom of ethical complexities, conundra and contradictions"); James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 *Mo. L. Rev.* 493 (1984) (claiming that Model Rule 1.14 forces a lawyer to assume

The crux of the problem presented by Model Rule 1.14 is that under subsection (a) the attorney-client relationship remains intact with the client as "the boss" instructing the attorney to carry out her stated wishes, however, once the client's mental impairment is so severe she can't discern what is in her best interest, the attorney has no authority to act on behalf of the client by seeking a conservatorship as allowed in subsection (b).³

Further, allowing the attorney to institute conservatorship proceedings "on behalf of the client" places the attorney in the position of violating both her duty of loyalty and her duty of confidentiality to the client. The attorney must necessarily divulge her observations of the client's behavior and/or client secrets in the process of instituting conservatorship proceedings.⁴ If an attorney is allowed to institute conservatorship proceedings, any elderly client may be hesitant to solicit the services of an attorney out of fear that the attorney's observations or interpretations of the client's statements or decisions would eventually lead to conservatorship and institutionalization. The elderly client would have lost the assurance of confidentiality which is an essential part of the attorney-client relationship.

Criticism of Model Rule 1.14 is supported by the State Bar of California Standing Committee on Professional Responsibility and Conduct which determined that "it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes, since by doing so the attorney will be divulging the client's secrets and representing either conflicting or adverse interests."⁵

The State Bar opinion indicates that an attorney does not act incompetently⁶ by failing to institute conservatorship proceedings even where the attorney believes it is in the client's best interest. Competent representation is accomplished by simply following the client's instructions and carrying out the limited representation for which the attorney was originally retained.⁷ If the client is acting in such a way that the attorney is unable to carry out her employment effectively

and balance the roles of advocate and guardian); Marshall B. Kapp, *Representing Older Persons: Ethical Challenges*, Fla. B.J., June 1989 (Opining that Model Rule 1.14 and its comments indicate that the attorney's duty to protect the elderly client's interests extend beyond the resolution of the immediate problem.

³ Jan Ellen Rein, *Beyond the Competency Construct*, supra, at p. 1136-1140; See also Restatement (Second) of Agency section 122 (incapacity of the principal general terminates the agent's authority).

⁴ *Id.* at p. 1147.

⁵ State Bar Formal Opinion No. 1989-112.

⁶ See California Rules of Professional Conduct, Rule 3-110.

⁷ State Bar Formal Opinion No. 1989-112 at p. 5.

and reaches the conclusion the client needs a conservator, withdrawal may be permitted.⁸ The institution of conservatorship proceedings by the attorney, however, is never appropriate.

The State Bar Committee is silent, however, on the issue of whether the attorney's observations may be submitted to the court when the attorney has not been hired by the client, but has been appointed by the court for the particular purpose of representing a proposed conservatee. The reasoning of the State Bar Committee in Opinion 1989-112 will be discussed in more detail, *infra*, under Section 4.

2. The Probate Code Authorizes the Court to Appoint Counsel to Represent Proposed Conservatees under Different Circumstances.

Probate Code section 1470 reads, in pertinent part:

(a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines such person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

Probate Code section 1471 reads, in pertinent part:

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of such person in the following proceedings under this division:

(1) A proceeding to establish a conservatorship or to appoint a proposed conservator. . . .

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of such person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.

Under these provisions, counsel is appointed *either* to represent the interest of the

⁸ *Id.* at p. 7.

proposed conservatee⁹ or to help the court resolve the matter¹⁰ or to protect the interests of the proposed conservatee.¹¹ As will be discussed, the purpose of the appointment is critical in determining the role of the attorney at the conservatorship hearing.

3. Under certain circumstances it is appropriate for an attorney to use her won judgment in making recommendations to the court on behalf of a conservatee.

In *Drabick v. Superior Court* (1988) 200 Cal.App 3d 185, 212, 245 Cal.Rptr. 840, 858, the court held that where the conservatee is permanently unconscious, "the attorney must be guided by his own understanding of the client's best interests. There is simply nothing else the attorney can do." In *Drabick*, the conservatee had been in a coma for three years and his brother, the conservator, was requesting the court order the hospital to remove his nasogastric feeding tube. The court-appointed public defender agreed with the conservator and did not oppose the petition.

The state public defender, however, argued on appeal that the public defender should have advocated continued treatment in part because the "irreducible minimum condition of effective representation is the adoption of an adversary position toward the opposing party."¹² The court disagreed and analogized the situation to the court-appointed attorney for a child in a custody dispute.

The court's discretionary authority to appoint counsel in conservatorship proceedings 'is comparable to the court's authority [under Civil Code section 4606] to appoint private counsel to represent the minor's interests in connection with a child custody issue. . . . "[C]ourts have held that the child's attorney in a dependency proceeding must provide 'independent counsel' and not act as a 'mouthpiece' for the minor child or the governmental agency."¹³

After discussion of decisions from other states, the court held based on the facts in that case that "the conservatee's attorney must advocate the conservatee's best interests."¹⁴

On the other hand, the court made no holding with respect to a conservatee who was still

⁹ Probate Code section 1471(a).

¹⁰ Probate Code sections 1470, 1471(b).

¹¹ Probate Code sections 1470, 1471(b).

¹² *Id.* at p. 212.

¹³ *Id.* at p. 213, quoting *In Re David C.* (1984) Cal.App3d 1189, 1208, 200 Cal.Rptr. 115.

¹⁴ *Id.* at p. 214.

able to communicate his wishes: "When an incompetent conservatee is still able to communicate with his attorney it is unclear whether the attorney must advocate the client's stated preferences—however unreasonable—or independently determine and advocate the client's best interests."¹⁵ The trial court in *Drabick* appointed counsel under its *discretionary* power in Probate Code section 1470 which allows the court to appoint counsel to help resolve the issues and protect the interests of the conservatee.

4. The Duty of Loyalty, Confidentiality of a Court-Appointed Attorney to a Proposed Conservatee.

California Business and Professions Code section 6068 provides, in part, "It is the duty of an attorney. . . (e) to maintain inviolate the confidence, and at every peril to himself [or herself] to preserve the secrets, of his or her client."¹⁶ The court has stated the duty of confidentiality absolutely prohibits the dissemination of the client's secrets. "An attorney is prohibited from divulging the client's secrets gained during the attorney-client relationship, and from acting in any manner whereby the attorney is forced to use such secrets to the client's disadvantage."¹⁷ There are no "exceptions" to this Rule which would entitle an attorney to divulge a client's secrets in a conservatorship context.

In State Bar Formal Opinion 1987-93, the Committee on Professional Responsibility and Conduct stated that what the attorney observes during the course of the representation may be a "secret" and that information imparted to the attorney by the client may be embarrassing or detrimental to the client if divulged, and as such qualifies as a "secret" whether or not it falls under the definition of attorney-client communication. Based on its reasoning in this opinion, the State Bar Committee found in a later opinion that an attorney's instituting conservatorship proceedings would necessarily divulge client secrets.¹⁸

The facts here are distinguishable from the facts presented in State Bar opinion 1989-112 where the attorney was employed by the client on a matter unrelated to the proposed conservatorship. In this case it is not the actions of the attorney, based on her observations during an attorney-client relationship, which may result in the institution of conservatorship proceedings. The seriousness of the confidentiality problem between attorney and client is reduced, albeit not eliminated. There is no danger that the attorney's observations may result in the future commencement of conservatorship proceedings; they have already commenced.

Nonetheless, application of the principals of the duty of loyalty and duty of confidentiality may be similarly applied in the facts here. The court-appointed attorney's duties may vary,

¹⁵ *Id.* at p. 212.

¹⁶ See also California Rules of Professional Conduct, Rule 3-110.

¹⁷ *Stockton Theatres v. Palermo* (1953) 121 Cal.App.2d 616, 264 P.2d 74.

¹⁸ State Bar Formal Opinion 1989-112 at p. 2.

however, based on the nature of the appointment and whether it arises out of Probate Code section 1470(a), 1471(a) or 1471(b).

First, under Probate Code section 1470(a) the appointment of counsel for the conservatee is discretionary by the court for the purpose of providing help in resolving the issues before the court (i.e. *In re Drabick, supra*) or to protect the interests of the conservatee.¹⁹ Under Probate Code section 1470(a) the conservatee has not contested the hearing and there is no "opposing" viewpoint which needs to be represented. Under these circumstances the attorney may inform the court as to her own opinions regarding the best interest of the client.

Similarly, under Probate Code section 1471(b), the conservatee has not requested the appointment of counsel. The court has been compelled, due to information in the investigator's report or some other source, to appoint counsel to help resolve the issues and/or protect the interests of the client. Although the appointment of counsel is not discretionary in this instance, the role of counsel is still the same as under Probate Code section 1470(a) where there is no "opposing" viewpoint.

The facts in this case, however, are that the proposed conservatee has demanded a hearing to oppose her family's request to appoint a conservatorship. Counsel has been appointed under Probate Code section 1471(a) "to represent the interest" of the proposed conservatee. The client has expressed her wishes to oppose the conservatorship and any opinion with respect to the "best interests of the client" which the court-appointed attorney offers to the court must not violate the strict duty of loyalty and confidentiality. Under these circumstances, it would be improper for the court-appointed attorney to divulge any "secrets" (i.e. any information which may be embarrassing or detrimental to the client), including the attorney's own observations and opinions, to the court without the client's consent.

Accordingly, under the limited facts presented here, it is the responsibility of court-appointed counsel to maintain the duty of loyalty and confidentiality in her representation of the proposed conservatee and to not provide any information to the court which may be contrary to the interests expressed by her client. If the court insists court-appointed counsel provided information to the court which would force counsel to violate her duty of loyalty or confidentiality under the Rules of Professional Conduct, then counsel *must* withdraw from employment with permission from the court.²⁰

CAUTIONARY NOTE

Opinions rendered by the Professionalism and Ethics Committee are provided as an

¹⁹ e.g. Appointment of counsel under Probate Code §1470(a) may also be appropriate where proposed conservatee does not oppose the conservatorship, but children disagree as to scope of conservatorship and proposed conservatee wants the children to agree.

²⁰ California Rules of Professional Conduct, Rule 3-700.

uncompensated service of the Orange County Bar Association. Opinions are advisory only and no liability whatsoever is assumed by the Committee or the Orange Counsel Bar Association in connection with such opinions. Opinions are relied upon at the risk of the user. Opinions of the Committee are not binding in any manner upon the courts, the State Bar of California, the Board of Governors, any disciplinary committee, the Orange County Bar Association or the individual members of the Committee.

The user of this opinion should be aware that subsequent judicial opinions and revised rules of professional conduct may deal differently with the areas covered.