Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION NO 1989-112

ISSUE:

May an attorney institute conservatorship proceedings on a client's behalf, without the client's consent, where the attorney has concluded the client is incompetent to act in his best interest?

DIGEST:

Although the attorney may feel that it is in the client's best interest to do so, 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. However, should the client's conduct interfere with or unduly inhibit the attorney's ability to carry out the purpose for which the attorney was retained, withdrawal may be appropriate.

AUTHORITIES INTERPRETED:

Rules of Professional Conduct 3-110, 3-310, 3-700 and 5-210 of the State Bar of California. Business and Professions Code section 6068, subdivision (e).

DISCUSSION

The Committee has been asked to opine on the ethical propriety of an attorney instituting conservatorship proceedings on behalf of a client but against that client's express wishes. For purposes of this discussion, it is assumed that the client's behavior patterns and dealings with his attorney over a significant period of time have convinced the attorney that the client requires a conservator. It is also assumed that other lawyers in the community would have a reasonable basis for concluding the same.

1. Duty to Protect Client Secrets

This situation is governed broadly by Business and Professions Code section 6068, subdivision (e), which provides that an attorney has the duty to:

> maintain inviolate the confidence, and at every peril to himself [or herself] to preserve the secrets, of his or her client.

What the attorney has seen or heard during the course of the relationship with the client may be a client "secret." (See State Bar Formal Opinion 1987-93 which states ". . . the attorney-client relationship involves not just the casual

4. Withdrawal From Employment

Rule of Professional Conduct 3-700[5] subsections (B) and (C) provide for, respectively, mandatory and permissive withdrawal. While there is no explicit provision in rule 3-700 which either permits or requires a member to withdraw from employment based on initiating a conservatorship, under subsection (C)(1), if the client is engaging in conduct which "renders it unreasonably difficult" for the attorney to carry out the employment effectively, and that same conduct leads the attorney to the conclusion that the client needs a conservator, withdrawal may be permitted under the circumstances.[6]

CONCLUSION

It is the opinion of the Committee that instituting a conservatorship on these facts is barred by Business and Professions Code section 6068, subdivision (e), and furthermore creates a conflict that may not be waivable. The attorney must maintain the client's confidence and trust, even though the attorney will be torn between a duty to pursue the client's desires (including protecting his secrets) and a duty to represent his interests, which may best be served by instituting a conservatorship. While the attorney will not fall below the level of competence required by simply continuing the representation for which he or she was retained and avoiding filing a conservatorship for the client, withdrawal may be appropriate or even mandatory if the client's conduct impedes the attorney's ability to effectively carry out the duties for which he or she was retained.[7]

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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[1] California Probate Code sections 1801 and 1828.5, while not controlling on the ethical issue presented here, will provide guidance to the attorney in deciding whether a conservatorship would be appropriate under the circumstances.

[2] American Bar Association Model Rule 1.14 provides that:

> (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 reasons, 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 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.

[3] California Rule of Professional Conduct 3-310 provides:

> (A) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.
>
> (B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.
>
> (C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

(2) the member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that a member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

[6] The Committee wishes to stress that withdrawal under these circumstances should be viewed by the attorney as a last resort. Given his needs and questionable capacity, the client conceivably will be prejudiced by the attorney's withdrawal, which should be sought only if absolutely compelled by the circumstances, after the attorney has done everything he or she possibly can to assist the client.