

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

Formal Opinion No. 1987-7

Five years ago, a lawyer began representation of client whose financial affairs were then in disarray. The lawyer initially solved these problems, which included three years of unfiled tax returns and unpaid taxes, and rent arrears that caused a threatened eviction. In the course of the representation, the lawyer learned that the client was an alcoholic. The client made efforts at rehabilitation, promised to find meaningful employment, and for a period of time followed the lawyer's advice to file and pay taxes in a timely manner and to maintain records of expenses. But the client resumed drinking and stopped keeping appropriate tax records. The client's telephone conversations with the lawyer became irrational due to drinking. The client's only known close relative is aware of the client's problem but has chosen not to petition for appointment of a conservator for the client. The lawyer knows of no other qualified person who could or would do so.

In the lawyer's opinion, his client "has suffered substantial impairment of his ability to care for his property and has become unable to provide for himself," within the meaning of N.Y. Mental Hygiene Law § 77.03(a), and therefore should have a conservator appointed for him. Without one, the lawyer predicts the financial, if not personal, ruin of his client.

Because the lawyer's knowledge of his client's problems was gained entirely in the course of the attorney-client relationship, and those problems therefore constitute confidences and secrets of his client within the meaning of DR 4-101(A), he asks whether he may disclose this information to a court in connection with a petition for appointment of a conservator, whether that application is made by himself or someone else.

While DR 4-101 appears to forbid such disclosure in the absence of client consent, this rule presupposes a client who is able to make a considered judgment about such consent. EC 7-12 sets forth the

standard for dealing with a client who cannot make such a considered judgment:

Any mental condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. . . . If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.

Cf. ABA Model Rules of Professional Conduct Rule 1.14. Under EC 7-12, a lawyer must first determine whether a client's disability compels the lawyer to make the decision regarding appointment of a conservator for the client. If so, the lawyer must act with care to safeguard the client's interests. If a lawyer determines that a client's alcoholism, for example, is so severe that the lawyer is compelled to make a decision regarding a conservatorship for the client, and the lawyer concludes that the only reasonable way to safeguard the client's interest is to disclose what the lawyer knows about the client's alcohol problem in a conservatorship proceeding, the lawyer may ethically do so. We emphasize that this is not a course of action to be undertaken lightly, but only as a last resort in the absence of other alternatives that can safeguard a client's interest.

Analogously, N.Y. State 486 (1978) and A.B.A. Inf. Op. 83-1500 (1983) permit disclosure of the intention of a client to take his own life. This Committee has taken a similar position regarding a physically disabled client. N.Y. City 79-47. There, we opined that it was "preferable" that the petitioner be some person other than the

attorney, who could then serve as attorney for the conservator if requested, but if there is no alternative to the attorney himself petitioning for a conservatorship, there is no bar to that course of action.

Finally, a lawyer who concludes that he must disclose his client's disability in a conservatorship proceeding should seek judicial permission to make any submissions containing client confidences or secrets *in camera* and should request that the file be maintained under seal. Such an approach minimizes the risk of prejudice to the client while facilitating the beneficial relief sought. See *e.g.*, N.Y. City 1986-8, 1986-7.

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