

State Bar of South Dakota

Ethics Opinion 95-4

April 4, 1995

- **Rules: 1.14**
- **Subject: Durable power of attorney; Competency of client; Guardianship of client**
- **Summary: An attorney with a durable power of attorney which allows attorney to handle the client's financial affairs may seek the appointment of a guardian or other protective action for an attorney that reasonably believes that the client cannot adequately act in her own best interest. Other protective action may mean depositing the client's valuables with the court.**

FACTS

You were retained by a client to render assistance in her financial affairs. She said she did not want to be bothered with details, so you prepared a durable power of attorney giving you the authority to handle her financial matters. After full disclosure, she signed the durable power of attorney.

The client then brought to your office three or four garbage bags full of mostly unopened mail. In going through the bags, you found several uncashed interest and dividend checks, some more than two years old. You also discovered that your client owned shares in a real estate limited partnership that at one time had a value of \$15,000.00. The limited partnership is now in bankruptcy.

The client also had a Dalkon Shield claim. You joined with counsel in Minneapolis and resurrected the Dalkon Shield claim. You also investigated the limited partnership investment and referred the matter to the appropriate authorities. You also obtained reissued interest and dividend checks and cashed the same, depositing them in your trust account.

During your initial consultations with your client, you noted that her behavior and ideation were, on occasion, eccentric. However, client lived independently and generally had knowledge and awareness of her financial affairs. In your opinion, she was competent to sign the power of attorney.

As your relationship continued, your client's behavior became bizarre. Your client admitted herself to the psychiatric unit at a local hospital for suicidal ideation. Eventually, she refused to see or communicate with you. You sent her a trust check for her interest and dividends and the check remained uncashed for six months. Eventually, you deposited her money directly into her bank account.

The Dalkon Shield Trust has made an offer to settle your client's claim. Co-counsel agrees that it is a fair offer, considering that part-way through working up the claim your client refused to cooperate.

The Dalkon Shield Trust refuses to accept your durable power of attorney to sign the release. Your client refuses to see you and will not talk about the claim, much less sign the release. You have been advised by your co-counsel that if your client's claim is settled, she will likely receive

additional funds within the next two or three years when excess trust assets are distributed to claimants.

Your client has family in Sioux Falls but is estranged from them. Client's mother attempted to have her involuntarily committed last year, but was unsuccessful. Your client does not have a guardian, but her mother is the payee of her SSI benefits.

Based upon these facts, your question to this Committee is what should be done ethically to protect your client's interests?

OPINION

It is the opinion of this Committee that your conduct should be guided by Rule 1.14. Rule 1.14 provides:

- 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 reasonably 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.

Based upon Rule 1.14, if you reasonably believe that your client cannot adequately act in her own interest, you may seek the appointment of a guardian or take other protective action with respect to the client. Additionally, you should review SDCL 15-6-67 as you may be able to deposit with the court all things of value in your possession pertaining to the client (including the settlement offer on the Dalkon Shield claim) and let the court decide how the matter should be handled.

Michael S. McKnight
Chair, Ethics Committee
State Bar of South Dakota