ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6(a), 1.14, and 8.3, as well as Illinois Supreme Court Rule 776. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 92-12
January 22, 1993

Topic: Confidentiality; competence of attorney

Digest: An attorney may not use or reveal information given him by a doctor/client concerning the doctor's patient (an attorney considered to be incompetent to practice law) but he may suggest alternatives that the doctor can pursue with the patient and his family.

Ref.: Illinois Rules of Professional Conduct, Rules 1.6(a) and 8.3
Illinois Probate Act, Article XI(a)
Illinois Supreme Court Rule 758
In re Himmel, 125 Ill.2d 531, 533 N.E. 2d 790 (1988)
Illinois Revised Statutes, Chapter 110, Section 8-802

FACTS

A doctor consults with Attorney A (his long-time counsel) to discuss a patient who is Attorney B, a solo practitioner. The doctor has examined Attorney B and finds him to be irreversibly senile. In the doctor's opinion, B is not competent to continue practicing law. Another consulting physician concurs. Conversations with Attorney B and his family cannot bring about the retirement of Attorney B. Attorney A has this knowledge solely as a privileged communication from the doctor, who is bound by the physician/patient privilege. The doctor and Attorney A believe

harm will result to Attorney B, his clients, the bar, the courts, and the public if Attorney B continues to practice law.

QUESTION

What steps may Attorney A take to remedy this situation without violating ethical obligations?

OPINION

Two privileges are invoked in this inquiry; the physician-patient privilege between the doctor and Attorney B, and the attorney-client privilege between the doctor and Attorney A. Subject to exceptions not applicable here, the physician-patient privilege bars disclosure by any physician of information acquired in attending his patient and for the purpose of treating the patient, without the patient's expressed consent. (Illinois Revised Statutes, Chapter 110, Section 8-802.) The doctor has not violated the privilege by seeking professional advice from his attorney, Attorney A. However, since the privilege is personal to the patient, it cannot be waived by the physician's disclosure to his attorney. The disclosure is itself protected under the attorney-client privilege as a "confidence or secret of the client" which the attorney is prohibited from using or revealing. (Rule 1.6, Illinois Rules of Professional Conduct.)

No question of mandatory reporting under Rule 8.3 is presented, since (1) there is no indication of misconduct by B of the type which must be reported, and (2) A's knowledge, in any event, is protected as a confidence. (See In re Himmel, 125 Ill.2d 531, 533 N.E. 2d 790 (1988).

Attorney A may, however, advise his doctor/client that the doctor suggest to Attorney B and his family (with whom the doctor has previously discussed his concerns) that a guardian be appointed for Attorney B. B's consent to the appointment would not be required. (See Illinois Probate Act, Article XI.) An alternative would be for Attorney A to advise the doctor that a family member could communicate the family's concerns about B's fitness to practice law to the appropriate disciplinary authority, the Attorney Registration and Disciplinary Commission, which is empowered to initiate an inquiry to determine whether an attorney is incapacitated and should be transferred to inactive status (Supreme Court Rule 758). In either case, neither the physician-patient nor the attorney-client privilege is violated. Whether either suggestion would be followed would necessarily be left up to Attorney B or his family.

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