NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1034 (11/10/14)

Distinguishes N.Y. State 496 (1978), 512 (1979), 649 (1993)

Topic: Executor as lawyer's client; confidential information - disclosure of suspicion of misconduct by executor; withdrawal from representation of executor

Digest: Lawyer who represents executor has no ethical duty to beneficiary of estate, absent agreement to contrary. Lawyer must avoid assisting the client in conduct the lawyer knows to be illegal or fraudulent and must not knowingly make a false statement to a third person. A lawyer representing a client before a tribunal and who knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. It is not clear that the inquirer has sufficient knowledge of misconduct by the client in this case. A suspicion of misconduct is not enough. But a reasonable belief that the client is engaging or has engaged in criminal or fraudulent conduct constitutes grounds for withdrawal from representation. If withdrawing when Rule 3.3(b) does not apply, the lawyer must preserve the confidences of the client unless an exception to confidentiality in Rule 1.6(b) applies. In any event, before making any permitted or required disclosures, the lawyer should remonstrate with the client.

Rules: Rules 1.2(d); 1.6(a); 1.16(b)(1); 1.16(c)(2), (4) and (7); 1.16(e); 3.3(b); 3.4(a); 4.1

FACTS

1. A lawyer has been serving as attorney of record for a client who is one of a decedent's two surviving children. The client is (i) the executor of the decedent's estate, (ii) a beneficiary of half the residuum of that estate, and (iii) trustee of a supplemental needs trust created for the benefit of his sibling, who is disabled.[1] The trust will be funded with the other half of the residuum. To close this estate informally, the client must obtain a release from the sibling and then fund the trust. The lawyer is aware that an account of the client's proceedings as executor must be prepared and furnished to the sibling to obtain a legally effective release. The account will contain a statement by the client that, inter alia, all assets of the estate have been properly accounted for and that the client does not know of any assets that are not included in the account.

2. The lawyer has come to believe that the client could not truthfully make the

[1] The inquiry does not state the nature of the disability. We assume it is a medical disability, and not one that would qualify the sibling as a person under a disability under Section 103(40) of the SCPA, including an infant, an incompetent, or an incapacitated person, in which case special procedures would have been required.

representations that would be required to obtain a legally effective release. This belief is based on the facts that the client has not provided the lawyer with back-up for distributions from the estate accounts, that initial distributions may have been unequal (although that situation seems to have been corrected), that the client has mentioned selling an estate asset to a third party for 10% of what the client believed was its value, and that the client has repeatedly failed to cooperate with the lawyer throughout the course of the estate's administration. Because there will be no judicial settlement of the executor's account, the lawyer is concerned that the sibling will not be protected against any possible mismanagement of the estate.

QUESTION

2. Is the lawyer obligated to protect the trust beneficiary? May the lawyer withdraw from the representation? If so, what information may or must the lawyer disclose?

OPINION

Must the Lawyer Protect the Trust Beneficiary?

3. This Committee has issued a series of opinions addressing a lawyer's obligations when representing a fiduciary. For example, in N.Y. State 496 (1978), we decided that the attorney for the guardian of an infant should reveal the guardian's failure to comply with a court order relating to the infant's property. Consistent with the then prevailing case law, our analysis began by saying:

> The lawyer, although nominally characterized as attorney for the guardian, in fact and legal theory represents the guardian only as and to the extent that the [guardian] acts in a fiduciary capacity for the infant's benefit. The lawyer owes his allegiance to the infant whom he represents through the guardian. Hence the lawyer is ethically bound to treat the infant as his client and to act in a manner consistent with the best interests of the infant when those interests appear to conflict with the actions of the guardian.

Similarly, in N.Y. State 649 (1993) we discussed authorities both in this state and elsewhere, concluding that a lawyer for a fiduciary has a duty not only to the fiduciary client but also to serve the best interests of an estate to which the fiduciary owes fiduciary duties. *See also* N.Y. State 512 (1979) (a lawyer retained by the executors of an estate has a duty also to serve the best interests of the estate to which they owe their fiduciary responsibilities).

4. At the time we issued N.Y. State 496, the courts had recognized a kind of derivative (or constructive) representation of beneficiaries where the lawyer represented a fiduciary charged with the administration of an estate or trust in which such beneficiaries were interested. The courts continued to develop the concept of derivative representation in the years following the issuance of N.Y. State 496 and eventually created a so-called "fiduciary exception" to the attorney-client privilege. *See, e.g.*, Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev. 1319 (1994). Under the fiduciary exception, courts would not protect confidential communications between a lawyer and a fiduciary against discovery by an allegedly aggrieved beneficiary.

5. The New York Legislature, however, disagreed with these exceptions to the attorney-client privilege. In 2002, the Legislature amended § 4503(a) of the Civil Practice Law and Rules (the "CPLR"), which governs the attorney-client privilege in New York. The amendment added a new § 4503(a)(2), which states in relevant part:

> For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
>
> > (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and
> >
> > (ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

6. The question of who is the client is largely a matter of law. *See* N.Y. Rules of Professional Conduct (the "Rules"), Scope ¶[9] ("for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.") The question here is whether the sibling is a client so that the lawyer may disclose otherwise confidential information, and the 2002 amendment to the CPLR calls into question the conclusion of N.Y. State 496 that the attorney for the fiduciary represents not only the fiduciary but also the beneficiary. Under CPLR § 4503(a)(2), for purposes of the attorney-client privilege, absent an agreement to the contrary between the attorney and the personal representative, no beneficiary of an estate may be treated as the client, and the existence of the fiduciary relationship does not by itself constitute a waiver of the privilege.

7. Whether any other New York law (*e.g.*, the law governing fiduciaries) would require the attorney for an estate fiduciary to treat the estate beneficiaries as clients is a legal question beyond our jurisdiction.

8. Absent other law or agreements to the contrary, we conclude that the Rules and the CPLR require that the lawyer consider the executor as the only client. We also conclude that the executor's sibling would have no right to the disclosure of information protected by the attorney-client privilege solely by virtue of the sibling's status as a beneficiary. Moreover, because the executor is the lawyer's only client, the executor would also be ethically entitled to the lawyer's undivided loyalty, including strict confidentiality pursuant to Rule 1.6(a).

Misconduct by the Client-Fiduciary

9. Even if the fiduciary is the lawyer's only client, the lawyer is still bound by the requirements of Rules 1.2(d), 3.3(b), 3.4(a), and 4.1.

10. Rule 1.2(d) states in relevant part:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent ….

11. Rule 3.4 states in relevant part:

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

* * *

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

* * *

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules [.]

12. Rule 4.1 states:

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

13. As we pointed out in N.Y. State 831 (2009), the definition of "fraud" or "fraudulent" in the Rules is broader than the term "fraud" in the law outside of the Rules. The definition in Rule 1.0(i) is as follows:

"Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another. (emphasis added)

14. Taken together, Rules 1.2(d), 3.4(a) and 4.1 prohibit the lawyer from participating in the preparation or submission of an account to the sibling that the lawyer knows to be false or misleading. The question raised by the inquiry is whether or not the information the lawyer has satisfies the requisite knowledge component of the Rules. Rule 1.0(k) defines "knows" as denoting actual knowledge of the fact in question. Although a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge. *Cf.*, N.Y. State 837 (2010) (A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances.)

15. In N.Y. State 837, the client had informed the lawyer that a document that had been introduced into evidence was forged. Consequently, the lawyer came to "know" that it was false evidence. In this case, the fact that the client has not provided the lawyer with back-up for distributions from the estate accounts, that initial distributions may have been unequal (although that situation seems to have been corrected) and that the client has repeatedly failed to cooperate with the lawyer may all constitute grounds for suspicion, but they do not result in the lawyer having knowledge of wrongdoing by the client. The fact that the client has mentioned selling an estate asset to a third party for a price that was 10% of what the client believed was its value may or may not constitute knowledge that the accounting is false, depending upon what facts the client disclosed about determining the value of the asset, and the circumstances in which the sale price was determined.

16. We have also considered whether the lawyer has ethical obligations under Rule 3.3(b). Rule 3.3(b) states:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Thus, Rule 3.3(b) requires a lawyer who represents a client before a tribunal and who knows that the client or another person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding to take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In this respect, it differs from the other Rule provisions cited above, which are subject to the restrictions against disclosure of client confidential information, unless one of the exceptions to confidentiality in Rule 1.6(b) is applicable.

17. Comment [12] to Rule 3.3 explains the reason for Rule 3.3(b): "Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." Whether the lawyer has duties under Rule 3.3(b) depends on two issues -- (1) whether the lawyer "knows" that the client has engaged or is engaging in criminal or fraudulent conduct relating to the proceeding, and (2) whether the probate matter constitutes representation "before a tribunal."

18. Regarding whether the lawyer has the requisite knowledge under Rule 3.3(b), the answer is the same as that discussed above with respect to other rules requiring knowledge.

19. The question of whether the matter is "before a tribunal" within the meaning of Rule 3.3(b) is a mixed one of ethics and law. Our understanding is that the probate matter at issue here was filed with the Surrogate's Court, which granted letters testamentary to the executor. Although the accounting is informal -- meaning that no approval of the Surrogate's Court will be necessary as long as the beneficiaries sign a form of "receipt and release" provided by the Surrogate's Court -- our understanding is that the affidavits filed by the fiduciary and the form of receipt and release all have captions indicating that the matter is before the Surrogate's Court. Moreover, consistent with SCPA § 207.1(d), attorneys of record are required to file a motion under CPLR § 321(b)(2) to withdraw unless a substitution can be arranged on consent of the client. These factors suggest that the matter is before the Surrogate's Court. The definition of

"tribunal" in Rule 1.0(w) includes a court. Although we believe the inquirer must make his own determination on this question, it appears to us that the matter is before a tribunal within the meaning of Rule 3.3(b) and that the preparation of an inaccurate accounting is clearly "related to the proceeding" within the meaning of Rule 3.3(b).

20. Rule 3.3(b) would require the lawyer, if he knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, to take reasonable remedial measures, including, if necessary, disclosure to the tribunal, if remonstration with the client did not result in the client's submission of an accurate accounting. Because it is not clear that the inquirer has such knowledge, we will not discuss here the considerations of what remedial measures are reasonable. *But see* N.Y. State 837 (2010).

Withdrawal from Representation

21. Even if the lawyer does not have "knowledge" of impropriety on the client's part, his suspicions and the client's apparent lack of cooperation may be sufficient to warrant withdrawal from the representation. Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. Indeed, Rule 1.16(b)(1) will require a lawyer to withdraw from a representation if he knows that the representation will result in a violation of the Rules or of law. And paragraphs (c)(2), (c)(4) and (c)(7) of Rule 1.16 *permit* a lawyer to withdraw from a representation under standards that are lower than "knowledge" of illegal or fraudulent conduct, where (1) the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent, (2) the client insists upon taking action with which the lawyer has a fundamental disagreement, or (3) the client fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. Furthermore, Rule 1.16(c)(1) always permits withdrawal for any reason if it can be accomplished without material adverse effect on the interests of the client.

Disclosure to the Court

22. Although we cannot resolve issues of substantive or procedural law, as noted above, in Surrogate's Court under SCPA § 207.1(d), attorneys of record are required to file a CPLR § 321(b)(2) motion to withdraw unless a substitution can be arranged on consent of the client. If a motion to withdraw will be required, then Rule 1.16(d) will apply and the lawyer will need the court's permission to withdraw.

23. In seeking permission to withdraw, the disclosures the lawyer may or must make about the client's conduct depend upon whether the lawyer knows that the client has engaged or is engaging in criminal or fraudulent conduct. If the lawyer does not have such knowledge, the lawyer should regard any information or suspicions about the client fiduciary's conduct as protected by Rule 1.6(a), which provides in relevant part:

> A lawyer shall not knowingly reveal confidential information, as defined by this Rule …. "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

24. Rule 1.6(a) generally prohibits a lawyer from revealing confidential information unless the client gives informed consent or the disclosure is permitted by Rule 1.6(b) or required by Rule 3.3. Rule 1.6(b) would allow the lawyer to reveal confidential information to the extent he reasonably believes necessary (1) to prevent the client from committing a crime (but not to prevent a non-criminal fraud or to rectify a past crime or fraud), (2) to the extent implicit in withdrawing a written or oral representation the lawyer has previously made and that he reasonably believes is still relied upon by a third person, where he has discovered that the representation was based on materially inaccurate information or is being used to further a crime or fraud, or (3) to comply with other law or court order. *See generally* Rule 1.6, Cmts. [6], [6A], [6C], [6D], [12], [13], [14], [15A].

25. In particular, in determining whether to exercise the discretion to reveal information under Rule 1.6(b), the lawyer should consider the guidance set forth in Comment [6A] to Rule 1.6.[2] In addition, if the lawyer believes, after balancing the factors set forth in Comment [6A], that disclosure is warranted, the lawyer should first remonstrate with the client about the desirability of filing a proper accounting.

26. Even if the lawyer obtains permission to withdraw, he must still abide by the requirements of Rule 1.16(e), which states:

> Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

CONCLUSION

27. In sum, the lawyer has no ethical duty to the non-client beneficiary. His only client is the executor and his ethical duty is to avoid assisting the client in conduct that he knows to be illegal or fraudulent. The lawyer may not assist the client in conduct the lawyer knows is fraudulent or knowingly make a false statement to a third person. And a lawyer who represents a client before a tribunal and who knows that the client intends to engage, is engaging or has engaged in

[2] This comment provides: "The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime."

criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. It is not clear that the inquirer has sufficient knowledge of misconduct by the client in this case. A suspicion of misconduct is not enough. But a reasonable belief that the client is engaging or has engaged in criminal or fraudulent conduct constitutes grounds for withdrawal from representation. If withdrawing when Rule 3.3(b) does not apply, the lawyer must preserve the confidences of the client unless an exception to confidentiality in Rule 1.6(b) applies. In any event, before making any permitted or required disclosures, the lawyer should remonstrate with the client.

(29-14)