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

Opinion 1125 (6/2/17)

Topic: Confidential client information

Digest: The New York Rules of Professional Conduct do not require a lawyer to communicate with an individual who is neither a client in the matter nor a party to a document drafted by the lawyer in the matter.

Rules: Rules 1.4, 1.6, 1.9(c), 4.1, 4.2, 4.3 and 4.4.

FACTS

1. The inquirer drafted a will in which the testator disinherited one of his sons. The disinherited son contacted the inquirer and asked her to confirm that she drafted the will, of which the son has a copy. The lawyer's signature is on the will. The inquirer asks whether she has an obligation to respond to her former client's son, who is neither an executor nor a beneficiary.

QUESTION

2. Must a lawyer respond to a query from an individual who is neither a client in the matter nor a party to the document that is the subject of the query?

OPINION

3. One of the lawyer's principal obligations under the New York Rules of Professional Conduct (the "Rules") when representing a client is to maintain the client's confidential information – information gained in or relating to the representation that is protected by the attorney-client privilege, or the disclosure of which would be embarrassing or detrimental to the client or that the client has asked to be maintained in confidence. *See* Rule 1.6. Although information that is generally known in the local community is not protected as confidential information, information is not "generally known" simply because it is in the public domain or available in a public file. *See* Rule 1.6, Cmt. [4]. The lawyer is also prohibited from using or revealing the confidential information of a former client that is protected by Rule 1.6, except to the extent the Rules would permit with respect to a current client. Rule 1.9(c). A deceased client is by definition a former client.

4. Several rules in the New York Rules of Professional Conduct ("the Rules") directly address a lawyer's obligations and limitations regarding communications with others.[1] For example, Rule 1.4 ("Communication") sets out a lawyer's obligations concerning communicating with clients. It contains a robust list of requirements, but they are limited to

communications with clients. Rule 4.2 ("Communication with Person Represented by Counsel") strictly limits the situations in which a lawyer may communicate with represented individuals, but it contains no affirmative obligation to communicate with them. Rule 4.3 ("Communicating with Unrepresented Parties") limits, under specified circumstances, a lawyer's authority to provide legal advice to unrepresented individuals and it prohibits a lawyer, who is communicating with an individual on behalf of a client, from stating or implying that a lawyer is a disinterested party. Again, this rule establishes no affirmative obligation to communicate. Rule 4.1, which expressly applies to communications with "third parties," also establishes no obligation to communicate; instead, it simply requires a lawyer who represents a party to refrain from "knowingly making a false statement of fact or law" when communicating with a third party. Rule 4.4 ("Respect for Rights of Third Persons") limits a lawyer's authority to embarrass, harm or violate the rights of third parties, and it creates a very narrow communicative obligation – *i.e.*, a lawyer who "receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

5. What the above survey of the Rules regarding communications makes clear is that, absent two narrow exceptions -- dispelling a third party's impression of a lawyer's disinterest and notifying a third party regarding receipt of a misdelivered document -- a lawyer has no independent ethical obligation to communicate with third parties.[2]

6. Our prior opinions are consistent with this reading of the Rules. Thus, in N.Y. State 833 (2009), we concluded that a lawyer was not ethically required to respond to an unsolicited written request for representation sent by a person in prison. Specifically, we held that no provision of the Rules "imposes a general obligation upon a lawyer to promptly answer unsolicited mail – or to answer at all." *Id.* More recently, in N.Y. State 1078 (2015), we considered whether a lawyer was permitted, consistent with Rule 1.6 ("Confidentiality of Information"), to disclose to the son of a former client that the lawyer did not draft a will for the deceased client. We concluded that, under limited circumstances, the lawyer was *permitted* to disclose this information (*i.e.*, when it advanced the best interests of the former client). *Id.* Implicit in that conclusion was that the lawyer was not *required* to share information with the son of the former client.

7. Here, the disinherited son is not a client of the inquirer and is not a party to the document drafted by the inquirer.[3] Accordingly, as a survey of the relevant rules makes clear and consistent with our holding in N.Y. State 833, the inquirer has no ethical obligation to respond to the son's query. Indeed, sharing the information would likely not be in the client's best interest and therefore would not be permitted by Rule 1.6(a).

CONCLUSION

8. The New York Rules of Professional Conduct do not require a lawyer to respond to a query – about a document previously drafted by the lawyer – from an individual who is neither a client in the matter nor a party to the drafted document.

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[1] The rules regarding advertising and solicitation also relate to attorney communications, but they are not pertinent to this inquiry.

[2] In 1998, the Office of Court Administration adopted the New York State Standards of Civility, which set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules of Professional Conduct. The first section of these Standards discusses the lawyer's duties to other lawyers, litigants and witnesses and Standard IV in this section states that "A lawyer should promptly return phone calls and answer correspondence *reasonably* requiring a response." 22 NYCRR Part 1200, app. at IV (emphasis added). These standards by their terms do not seem to apply here. In any event, their applicability is beyond the purview of our Committee.

[3] We do not have occasion to address what obligation, if any, the lawyer would have to respond to a query from a party to the drafted document. *See* N.Y. State 833.