



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1126 (6/19/17)

Topic: Confidential information; prospective client

Digest: A lawyer may not disclose a prospective client’s confidential information without the informed consent of the prospective client or some other exception to the Rules governing a lawyer’s duty of confidentiality.

Rules: 1.0(j), 1.6(a) & (b), 1.9(a) & (c), 1.18(a) & (b)

FACTS

1. The inquirer jointly represented Husband and Wife in drafting a joint revocable trust. The retainer agreement signed by both clients provided that the lawyer could not withhold information from either client.

2. The trust agreement provided that (i) upon Wife’s death, her share of the trust estate would be distributed to a credit shelter trust for the benefit of Husband during his lifetime, and (ii) upon Husband’s death, the funds in the credit shelter trust would be distributed to Wife’s children from a prior marriage. After Wife died, Husband met with the inquirer to review what needed to be done to administer the trusts, but declined to retain the inquirer to assist him with the administration.

3. Recently, Husband died, and Husband’s sister (Sister), who is named in the trust instrument as Husband’s successor trustee, contacted the inquirer. She disclosed that Husband did not fund the credit shelter trust, but put those assets in his own name for the benefit of Sister, effectively disinheriting Wife’s children.

4. The inquirer informed Sister the inquirer cannot represent her in the administration of the trust estate. The inquirer asks whether he may or must advise Wife’s children that the trust established by their mother has not been administered according to the trust agreement.

QUESTION

5. May or must the lawyer disclose, to Wife’s children, who are the beneficiaries of a trust, that their step-father, as trustee of the trust, did not adhere to the provisions of the trust agreement and misappropriated trust property?

OPINION

6. Although the inquiry does not state that Sister sought legal advice from the inquirer, the clear implication of the inquirer's informing Sister that the inquirer could not represent her is that, at the time of the call from Sister to the inquirer, Sister was a "prospective client" within the meaning of Rule 1.18(a) of the New York Rules of Professional Conduct (the "Rules"), i.e. "a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." As Comment [2] to Rule 1.18 points out, whether a person who communicates with a lawyer is a "prospective client" depends on, among other things, whether that person is communicating unilaterally to the lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and thus is not a "prospective client." Nothing in the facts suggests the Sister did not have that reasonable expectation. Therefore, while the question whether Sister is a prospective client is one of fact that is beyond the jurisdiction of this Committee, the remainder of this opinion assumes that Sister was a prospective client.

7. Under Rule 1.18(b), the lawyer has confidentiality obligations to a prospective client. Rule 1.18(b) provides:

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

8. Rule 1.9(c) prohibits a lawyer from using confidential information of a former client that is protected by Rule 1.6 to the disadvantage of the former client, unless the Rules would permit or require disclosure with respect to a current client. Thus, the effect of Rule 1.18(b) is that the inquirer may not reveal or use the information provided by Sister unless (i) Sister gives informed consent, confirmed in writing or (ii) the disclosure is permitted by Rule 1.6(b). Neither exception applies here.

9. Central to this inquiry are the Rules of Professional Conduct concerning confidential client information. Under Rule 1.6, 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." *See* Rule 1.6(a).

10. If Sister reasonably believed that the inquirer represented her as successor trustee to Husband – which is a factual question that we cannot resolve – then the information that she conveyed to the inquirer regarding Husband's failure to fulfill his obligations under the trust agreement may be protected by the attorney-client privilege. In any event, it is information that is likely to be embarrassing to Sister and detrimental to her, to the extent it affects her right to assets as a beneficiary of Husband's estate.¹

11. Rule 1.6(a) further provides:

A lawyer shall not knowingly reveal confidential information, as defined by this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

12. The first two exceptions do not apply here. The inquirer does not say that Sister has given informed consent to the inquirer's disclosure of the information to Wife's children. Moreover, the disclosure will not advance the best interests of Sister, and thus is not "impliedly authorized." Accordingly, the inquirer may not disclose the information unless disclosure is permitted by Rule 1.6(b).

13. None of the exceptions in Rule 1.6(b) seems to apply here. For example, Rule 1.6(b)(2) allows for disclosure to prevent the client from committing a crime. But it is not clear what actions Sister intends to take or whether those actions would constitute a crime (a question of law that is beyond the jurisdiction of this Committee to determine).

14. Thus, the inquirer may not disclose the information learned from Sister to Wife's children.

CONCLUSION

15. A lawyer who assisted a married couple with establishing a trust must not disclose information he learns about one spouse's misappropriation of trust assets, when he learns of the misappropriation from a successor trustee who was seeking legal advice as a prospective client. A lawyer may not disclose a prospective client's confidential information without the informed consent of the prospective client or some other exception to the Rules governing a lawyer's duty of confidentiality.

(7-17)

¹ The provisions of the trust agreement and information that H did not fulfill his obligations under the trust agreement may also be confidential information of the inquirer's former client, H. However, analyzing the inquirer's confidentiality obligations to H is more difficult than analyzing the inquirer's confidentiality obligations to S. H apparently waived confidentiality *vis a vis* W. But it is not clear whether anyone stands in W's shoes in that regard and the answer to that question is one of law that is beyond the jurisdiction of this Committee. *Cf.* N.Y. State 970 (2013) (whether executrix for will of former client is entitled to lawyer's files of the former client's matter depends on whether executrix is legally entitled to the files). Moreover, it is not clear that any of the exceptions to confidentiality in Rule 1.6(b) would apply to H. Even if H's actions in failing to comply with the provisions of the trust were criminal, they would constitute a past crime. Although Comment [6D] to Rule 1.6 notes that some crimes are continuing in nature, we think it is unlikely this provision applies given that the lawyer was not involved with H's misuse of the trust assets.

