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

Opinion 1140 (12/11/17)

Topic: Conflicts; representation of testifying expert witness

Digest: A law firm may draft a will for a testifying service provider who treats individuals represented by the firm in workers' compensation claims. The law firm is not ethically required to volunteer disclosure of the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

Rules: 1.0(f), 1.6, 1.7, 3.3(a) & (c), 4.1.

FACTS

1. The inquiring law firm represents injured workers in workers' compensation matters. A health care service provider, who has both a professional and a long-time social relationship with the lawyers in the firm, has asked the firm to draft wills for him and his wife and will pay the firm's normal legal fees for this work. The service provider treats some of the injured workers who are represented by the law firm. There is no referral arrangement, formal or informal, between the service provider and the law firm.

2. Occasionally, the service provider is asked to testify at a hearing before a Workers' Compensation Law Judge about the treatment the service provider intends to render or has rendered to an injured worker whom the law firm represents, typically when, whether before or after the treatment has started, the insurance carrier denies coverage. The testimony usually addresses whether the provider's treatment falls within the Workers' Compensation guidelines and includes the scope of or need for the particular treatment the service provider renders to the injured worker. The law firm, representing the injured worker, calls the service provider as a witness on behalf of the firm's client.

QUESTION

3. May a law firm draft wills for a testifying expert and his wife and, if so, must the firm disclose its attorney-client relationship with the witness to opposing counsel, the tribunal, or anyone else, in those matters in which the expert is called to testify on behalf of the firm's client?

OPINION

4. Rule 1.7(a) of the New York Rule of Professional Conduct (the "Rules") provides:

> "[A] lawyer shall not represent a client if a reasonable

> lawyer would conclude that either:
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> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Rule 1.0(f) defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

5. Lawyers owe duties of loyalty and independent judgment to their current clients. Conflicts of interest may undermine and impair a lawyer's loyalty or exercise of independent judgment on behalf of a client. Comment [2] to Rule 1.7 provides that resolution of a conflict of interest problem "requires a lawyer, acting reasonably, to (i) identify clearly the client or clients, [and] (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." Comment [8] to Rule 1.7 says that the "mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference of interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

6. In our view, drafting a will for a person the inquirer employs as an occasional expert is not discordant with the firm's concurrent representation of clients whom the service provider treats and on whose behalf the service provider may testify. The proposed representation (drafting a will) does not implicate differing interests, is not adverse to the firm's representations workers' compensation claims matters, and is not factually or legally related to the claims of the firm's injured clients. No reason emerges to suppose that drafting of estate documents for the provider will adversely affect the firm's professional judgment in representing any other current client (unless the provider's testamentary plans affects one of the injured workers – a situation we imagine would rarely if ever arise). The "mere possibility" of a future conflict between the workers' compensation clients and the service provider and his spouse does not require disclosure and consent from the respective clients.

7. Neither the law firm's interest in receiving its routine fee for drafting wills or any follow-on work, nor its longstanding social relationship with the service provider, poses a "significant risk" of impairing the lawyer's ability to exercise professional judgment on behalf of its clients in workers' compensation matters – for instance, in deciding whether to call the service provider as a witness – so as to engender a "personal interest" within the meaning of Rule 1.7(a). N.Y. State 901 ¶ 12 n. 3 (2011) (concurrent representation of a corporation on business matters and of a corporate officer in acquiring a summer home in which the corporation has no stake does not constitute a personal interest conflict).

8. Nor does anything in the Rules require the law firm to disclose to anyone that the firm has represented the service provider in estate matters. Obviously, if a workers' compensation client or opposing counsel asks the law firm about any relationships between the law firm and the witness, the law firm has an obligation to assure that the response is truthful. *See* Rule 4.1 (a lawyer "shall not knowingly make a false statement of fact" to a third person). This obligation is subject to the confidentiality requirements of Rule 1.6(a), which may require the service provider's informed consent to disclosure, particularly because estate matters are often sensitive. In proceedings before a tribunal, however, Rule 1.6(a)'s duty of confidentiality may yield to other concerns. For example, if a tribunal asks about any relationship between the expert witness and the law firm, the law firm must be honest with the tribunal and must assure that the witness is honest as well, including correcting untrue testimony if necessary. *See* Rule 3.3(a) & (b) (a lawyer "shall not make a false statement of fact" to a tribunal, and must take "reasonable remedial measures" if lawyer comes to know that a witness offered by the lawyer has testified falsely). In the event of false testimony, Rule 3.3(c) overrides the duty of confidentiality; that Rule says the duties in Rules 3.3(a) & (b) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." N.Y. State 1123 ¶¶ 8-10 (2017) (noting obligation to disclose confidential information if necessary to correct false information submitted to a tribunal). Subject to these considerations, however, we see nothing in the Rules that compels the voluntary disclosure of an attorney-client relationship between the law firm and its testifying expert.

CONCLUSION

9. A law firm may draft wills for a testifying service provider who treats clients of the firm without disclosure to or consent of the respective clients. The law firm is not ethically required to disclose the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

(25-17)