New York State Bar Association
Committee on Professional Ethics

Opinion 1194 (06/11/2020)

Topic: Confidentiality of Information; Conduct before a Tribunal; Withdrawal

Digest: A lawyer who represents an executor has no ethical duty to the estate's beneficiaries. A lawyer may withdraw, or seek permission to withdraw from a tribunal that requires such permission, when the client ignores the lawyer's request to provide the lawyer with documents pertinent to the representation or if the lawyer has a reasonable belief that the client is engaging or has engaged in criminal conduct. A lawyer who knows that a client intends to engage in criminal or fraudulent conduct related to the proceeding "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Even if such disclosure is not required, a lawyer may reveal confidential information to the extent reasonably believed to be necessary to prevent the client from committing a crime or to comply with law. A lawyer representing an executor may donate a retainer fee to the beneficiaries of the estate.

Rules: Rules 1.0(i), 1.6, 1.16, 3.3(b)

FACTS

1. The inquirer is a New York attorney who represents an executor in the probate of an estate. The executor had managed the decedent's financial affairs and acted as the decedent's health care proxy during the decedent's later years. The decedent had no known living relatives. The decedent's estate, not insubstantial, was bequeathed mostly to charities, but the will made a modest gift to the executor.

2. Months after a probate petition was filed, the inquirer learned that the executor was the beneficiary of a transfer-on-death designation – known to practitioners in the field as a "TOD designation" – of a significant sum. Before the inquirer learned of this fact, the executor had presented the decedent's death certificate to the institution handling the decedent's account and arranged the transfer of the TOD designation sums to the executor's account. The TOD designation was created after the will's execution, and so, but for the superseding TOD designation, the inquirer believes that the assets would likely have been distributed to the decedent's charitable beneficiaries. Thus, we are told, the size of the beneficiaries' inheritance likely depends on the legitimacy of the TOD designation.

3. According to the inquirer, the executor gave the inquirer varying, conflicting explanations about the reason for, and circumstances of, the TOD designation. The inquirer says that the TOD designation could have been accomplished without the involvement of an attorney or any witnesses, thus insulating the transaction from any meaningful scrutiny. The inquirer says that the executor has repeatedly refused the inquirer's requests to provide copies of the TOD designation, and continues to do so, which heightens the inquirer's concern about its legitimacy.

4. The Surrogate's Court has granted letters of appointment to the executor. The Surrogate's Court inventory form does not itemize the TOD securities accounts. The inquirer believes that the

executor will "likely" not disclose the TOD distribution to the Surrogate's Court. The inquirer believes the Surrogate's Court and the N.Y. Attorney General's Charities Bureau would find this omission to be misleading and fraudulent conduct by the executor.

5. The inquirer sent a letter to the executor expressing the inquirer's intention to withdraw from the representation and sending a check (from an IOLA account) in the amount of the original retainer fee for deposit in the decedent's estate. The executor has now retained an attorney who will continue the administration of the estate. After the executor received the intent-to-withdraw letter, the executor declined to cash the IOLA check made out to the decedent's estate, stating that the inquirer did the work and should be compensated. The inquirer does not want to be compensated in any fashion and prefers the money go to the decedent's charitable beneficiaries.

QUESTIONS

6. The inquirer raises several issues:

(a) Is a lawyer retained to represent an executor obligated to protect the interests of an estate's beneficiaries?

(b) May a lawyer withdraw from this representation when a client is not cooperating with the lawyer and the lawyer suspects wrongdoing on the part of the executor?

(c) What disclosures about the suspected wrongdoing may or must the lawyer make?

(d) What can a lawyer do with a retainer fee that the lawyer does not want to keep?

OPINION

An Estate Lawyer's Duties to Beneficiaries

7. We addressed an estate lawyer's duties to beneficiaries in our Opinion 1034 (2014). There, we said (at ¶ 6) that the "question of who is the client is largely a matter of law," a principle consistent with paragraph 9 of the Preamble to the N.Y. Rules of Professional Conduct ("Rules"), which teaches that "substantive law external to these Rules determine whether a client-lawyer relationship exists." Issues of law are beyond our jurisdiction. Nevertheless, in Opinion 1034, we noted that § 4503(a)(2) of the Civil Practice Law and Rules ("CPLR") provides that, "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." We then concluded that, absent other law or agreements to the contrary, "the Rules and the CPLR require that the lawyer consider the executor as the only client." *Id.* ¶ 8.

8. Accordingly, with the same caveat contained in N.Y. State 1034, we do not believe that the inquirer has any ethical duty running directly to the beneficiaries of the estate. We do not opine on the much-litigated issue whether privity between an estate lawyer and an heir is a requisite to standing in a legal malpractice action against the estate lawyer.

An Estate Lawyer's Right To Withdraw from a Representation

9. Rule 1.16 governs whether a lawyer must or may withdraw from the representation of a client. Rule 1.16 provides, in relevant part, that withdrawal is appropriate when "the client insists

upon taking action with which the lawyer has a fundamental disagreement"; or when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively." Rule 1.16(c)(4) & (7). On our view, either of these Rules entitle the inquirer to withdraw from representing the estate on the facts presented. *See* N.Y. State 1034 ¶ 16. In addition, Rule 1.16(c)(2) permits a lawyer to withdraw from a representation when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Should the inquirer come to the reasonable belief that the client has implicated the lawyer's services in criminal or fraudulent conduct, 1.16(c)(2) would provide an additional ground for withdrawal. Rule 1.16(b)1) makes this permissive withdrawal mandatory if the lawyer concludes that the representation "will result in a violation of these Rules or of law."

10. The above grounds for withdrawal are subject to the caveat, contained in Rule 1.16(d), which governs matters before a tribunal. Rule 1.16(d) states that, if the tribunal's own rules require permission before withdrawal, permission must be obtained notwithstanding good cause for terminating the representation. It is for the inquirer to determine whether the rules of the Surrogate Court require that court's permission for withdrawal.

An Estate Lawyer's Duty To Make Disclosures to a Tribunal

11. The inquirer owes a duty of confidentiality to the client under Rule 1.6(a). Limits exist on this duty, however, two of which are of special import here. Rule 1.6(b)(6) permits a lawyer to disclose client confidential information "when permitted or required under these Rules or to comply with other law or court order." While this committee cannot answer the question of whether "other law" compels disclosure, it can opine on the effect of Rule 3.3, which mandates disclosure of confidential information in certain situations. Specifically, "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 fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(b). Rule 1.0(i), in turn, defines "fraud" as denoting conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive," unless it lacks an element of scienter or a knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another."

12. While the inquirer in this case "suspects" that the executor intends to engage in conduct that the inquirer believes is fraudulent in relation to the proceeding (*i.e.,* by failing to disclose information pertaining to the TOD account to the Surrogate Court), this suspicion must rise to the level of "knowledge" to trigger remedial measures and, if necessary, disclosure. If the inquirer knows that the executor intends to commit fraud related to the proceedings, then Rule 3.3(b) requires the inquirer, after a final effort to persuade the executor to disclose the TOD account, to report the information concerning the TOD designation to the tribunal, a duty that continues despite the lawyer's withdrawal from the representation. *See* N.Y. State 1123 ¶ 4 (2017).

13. The question whether the inquirer knows of the executor's intent to commit fraud appears to turn on two factors: (a) whether the executor will, in fact, omit the TOD account from the Surrogate Court's inquiry; and (b) whether the inclusion of the TOD account on the inventory is legally required (s*ee* § 207.20 of the Uniform Rules for the Surrogate's Court (requiring disclosure to the Court of any asset "owned by the decedent individually")). The first factor depends on the degree of the inquirer's knowledge of the executor's intent; the second is a legal issue beyond the purview of this Committee.

14. At risk of repetition but for the sake of clarity: Even if Rule 3.3(b) does not mandate disclosure after a failed effort to persuade the executor to do so, the inquirer must still consider Rules 1.6(a)(3) and 1.6(b)(2) & (6). *See* N.Y. State 1034. Under those Rules, disclosure would be permitted if the lawyer "reasonably believes" that disclosing the information is "necessary" to "prevent the client from committing a crime" or is required by "law or court order." This disclosure would be permissible only if the failure to disclose the TOD account to the Surrogate's Court would constitute a criminal fraud or other violation of law. As this too turns on a legal determination beyond the purview of this committee, we cannot answer it. As with Rule 3.3(b), if the inquirer decides to make a permissive disclosure under Rule 1.6(b), the inquirer should first "remonstrate with the client about the desirability" of disclosing the TOD account to the Surrogate's Court.

The Estate Lawyer's Retention of the Fee

15. Finally, with respect to the inquirer's unsuccessful attempt to return the retainer fee to the executor, the inquirer is free to keep the fee or, if the inquirer wishes, to donate the fee to one of the estate's beneficiaries or another charity of the inquirer's choosing. Nothing in the Rules prohibits such a gift. We caution only that, subject to the foregoing, the inquirer in making any gift must be mindful of whatever ongoing duties of confidentiality that the inquirer owes the executor.

CONCLUSION

16. A lawyer representing an executor of an estate is not ethically obligated to protect the interests of the estate's beneficiaries. A lawyer may withdraw, or seek permission to withdraw from a tribunal that requires such permission, when the client ignores the lawyer's request to provide the lawyer with documents pertinent to the representation or when the lawyer reasonably believes that the client has involved the lawyer's services in criminal or fraudulent conduct. A lawyer must disclose the client's fraudulent conduct with regard to the represented matter if he *knows* that the conduct involves fraud and if other remedial measures have failed. The same disclosure is permitted when the lawyer "reasonably believes" that disclosing the information is "necessary" to "prevent the client from committing a crime." A lawyer representing an executor may donate a retainer fee to the beneficiaries of the estate.

(27-19)