THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-11
(December 2009)

The inquirer represented the Decedent in 1999 when he prepared her will. At the time, the Decedent was elderly but did not lack capacity to execute her will. The will names the Decedent's daughter and husband (i.e. Decedent's son-in-law) as co-executors. Decedent appeared to enjoy a close relationship with her son-in-law, to whom she also gave a limited, springing power of attorney to handle all financial matters on her behalf. The will gives all tangible personalty and 82% of the residuary estate to the Decedent's daughter (her only child) and the Decedent's son-in-law. The remaining 18% of the residuary estate is distributable among 12 individuals and 2 charities.

The Decedent died in June 2009. The cause of death stated in the death certificate was Parkinson's disease. Decedent's daughter and son-in-law have retained the inquirer to represent them in their capacity as co-executors. At a meeting to discuss estate administration, Decedent's daughter stated that Decedent had begun to show signs of cognitive decline a "couple years" after she signed the will but the daughter did not remember exactly when this began. The son-in-law informed inquirer that on February 1, 2004, the Decedent changed the designation of a brokerage account (which contained most of her assets) from her individual name to a joint account with the daughter. Both co-executors confirmed that Decedent was of sound mind and still living independently at the time the account was re-designated. According to the son-in-law, Decedent initiated the re-designation of the brokerage account by requesting the appropriate forms. The son-in-law then helped complete the forms at Decedent's request. Inquirer has asked the co-executors for copies of those forms but has not received them.

According to the co-executors, in the second half of 2004, Decedent sold her house, moved in with the daughter, and began taking the drug "Namenda." In December 2004, Decedent was apparently diagnosed with Parkinson's disease. The inquirer asked to speak with Decedent's physician to discuss her mental state at the time the brokerage account was placed in joint names. Decedent's daughter advised that the physician was not willing to speak with the inquirer on that issue but might be willing to confirm the dates on which Decedent was diagnosed with Parkinson's disease and began taking medication. Inquirer has asked for contact information for the physician but as yet it has not been provided.

At the time of her death, Decedent's assets totaled approximately $266,000, of which approximately $243,000 was in the brokerage account that had been re-designated as joint with her daughter. Decedent also owned a mutual fund individually with an approximate value of $12,000.

According to the inquirer, under current Pennsylvania case law the creation of a joint account *after* the execution of a will does not have the effect of transferring that account to the surviving account holder upon the death of the original account holder unless there is clear and convincing evidence that this was the result intended by the decedent, and further that a testamentary plan contained in a validly executed will can not be changed merely by the creation of a joint account with rights of survivorship. [Alexander Estate, 29 Fid.Rep.2d 97 (O.C. Div. Allegheny, 2009); Uzzle Estate, 29 Fid. Rep.2d 321 (O.C. Div. Montg., 2009); Novosielski Estate, 937 A.2d 449 (Pa. Super. 2008); Piet Estate, 949 A.2d 886 (Pa. Super. 2008)].

Based upon inquirer's interpretation of the aforementioned case law and facts available to him at this time, he has concluded that Decedent's re-designation of the brokerage account as a joint account with daughter does not have the effect of superseding her will and therefore the account is deemed to be an asset of the Decedent's estate subject to the provisions of her will. The inquirer also has concluded that current case law mandates this position regardless of the question of undue influence unless other facts come to light to establish by clear and convincing evidence that Decedent intended the re-designation of the account to supersede the scheme set forth in her will. Based on inquirer's conversations with the co-executors, it appears unlikely that such an evidentiary standard could be met. However, according to the inquirer, the Pennsylvania Supreme Court is currently reviewing the decision in Novosielksi Estate, which could result in the joint brokerage account not being considered an estate asset.

The inquirer has informed the co-executors of his analysis of the case law and his conclusion that the brokerage account is an asset of the estate. In response, the co-executors have instructed inquirer not to disclose existence of the joint brokerage account to any beneficiaries named in the will pending the outcome of the Pennsylvania Supreme Court review of Novosielski Estate.

The inquirer asks the following:

1. Assuming inquirer has no actual knowledge of undue influence or lack of capacity concerning the re-designation of the brokerage account, is inquirer at this time, or at any time prior to the Pennsylvania Supreme Court issuing an opinion in connection with

Novosielski Estate, required to disclose the existence of the joint brokerage account if questioned by a beneficiary or when communicating with beneficiaries regarding the assets of the estate or possible distribution amounts?

2. Do the Pew Trust cases, prior rulings by the Professional Guidance Committee or any provision of the Rules of Professional Conduct require inquirer to do so, or is inquirer prohibited by the Rules from doing so?

3. Is inquirer required to advise the co-executors that they must disclose the existence of the joint brokerage account if questioned by a beneficiary or if otherwise communicating with a beneficiary regarding assets of the estate or possible distribution amounts?

4. Does the inquirer have any obligation to investigate the truthfulness or accuracy of the co-executors statements regarding the mental state of the Decedent at the time of the re-designation of the brokerage account?

The opinions set forth by the Committee are predicated on inquirer's analysis and interpretation of the underlying substantive legal issues involved in the inquiry. However, the Committee makes no representations as to the accuracy of inquirer's position on such substantive matters.

It is clear that the first three questions posed by the inquirer implicate certain duties established by Pennsylvania's Rules of Professional Conduct. First, there is the duty to keep confidential information relating to representation of a client established by Rule 1.6, which provides as follows:

Rule 1.6 Confidentiality of Information

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
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> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
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> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
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> > (1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to secure legal advice about the lawyer's compliance with these Rules; or

(6) to effectuate the sale of a law practice consistent with Rule 1.17.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

These questions may also implicate the duty to be truthful to third persons in the course of representation of a client as established by Rule 4.1, which provides as follows:

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

In a prior opinion (Opinion 2004-7) issued by this Committee involving representation of the guardian of an incompetent's estate, that inquirer also faced the task of identifying exactly who the client was. This Committee noted that in such situations it is *"…useful to consult the Commentaries on the Model Rules of Professional Conduct issued by the American College of Trust and Estate Counsel (ACTEC) (Third Edition, 1999)*." With regard to those Commentaries, Opinion 2004-7 contains the following references and discussion:

"First, there is a comment distinguishing between a general and individual representation.

General and Individual Representation Distinguished. A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

ACTEC Commentaries to Model Rule 1.2

While it is clear that the inquirer had only one client, the Guardian, it is as clear that the representation here was of the Guardian in a representational capacity. The inquirer was engaged to represent the Guardian as she tried to protect the interests of the Guardianship Estate in the Guardian's care. There was no representation of the Guardian in any other capacity. Therefore, the lawyer's duties to her client, the Guardian, must be considered in the context of her duties to those beneficiaries as well.

In such cases, ACTEC Commentary provides insight into the care due from a lawyer to the Beneficiary.

Duties to Beneficiaries. The nature and extent of the lawyers duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). ***The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them.*** *[Emphasis added.] The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a*

fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate. ***The scope of the representation of a fiduciary is an important factor in determining the extent of the duties owed to the beneficiaries of the fiduciary estate.*** *[Emphasis added.] For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than ones the lawyer owes to other third parties. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those due to other adverse parties or nonclients.*

ACTEC Commentaries to Model Rule 1.2."

As noted in Opinion 2004-7, the ACTEC Commentaries are not binding, but are considered by the Committee to be helpful and persuasive.

In this instance, it is clear that the inquirer's representation of the co-executors is in a representational capacity, which is to say that he was engaged to represent the co-executors in their capacity as fiduciaries of the estate. The inquirer was not engaged to represent the co-executors individually. As such, although the inquirer may owe some restrictive duties to the beneficiaries, the duty regarding confidentiality of information established by Rule 1.6 is owed primarily to the co-executors, not to the individual beneficiaries who are not the inquirer's clients. This view is supported by the opinion in Pew Trust, 16 Fiduc.Rep.2d 73 (Montg. 1995), which held that the beneficiaries are not clients of the attorney representing the estate fiduciaries, although the attorney may nevertheless have a duty of care known as "derivative duties" to those beneficiaries. In addition, the ACTEC Commentaries that were referenced in Opinion 2004-7 were cited as authoritative as to this issue in Pew Trust.

Question #1:

Neither the Rules of Professional Conduct nor the Pew Trust case require the inquirer to disclose the existence of the brokerage account to the beneficiaries prior to any time established for such disclosures under substantive law governing estate administration. For example, substantive law may require that the nature and value of the brokerage account be disclosed on the estate's inventory and inheritance tax return, assuming the account is still considered an estate asset under Pennsylvania case law when those items are filed. As a practical matter, this means that inquirer could advise beneficiaries

who ask about estate assets that an inventory and inheritance tax return listing all estate assets will be filed at the appropriate time.

Question #2:

Given the clients' instructions, Rule 1.6 prohibits the inquirer from revealing information about the brokerage account prior to any time established under substantive law for such disclosure. This is because information about the brokerage account was obtained during the course of representing the co-executors and they have not consented to its disclosure. Moreover, such disclosure is obviously not "impliedly authorized" since the co-executors have expressly prohibited its release. If pressed by a beneficiary for specific information about estate assets, the inquirer is advised that in order to comply with Rule 4.1, he may not give out false information but must answer "truthfully." The inquirer must advise the co-executors of his duty to respond to specific questions in this manner. Under the facts presented, this means that he must indicate that he has not been authorized to disclose specific information about estate assets.

Question #3:

Inquirer is advised to consult substantive law about the co-executors' duties concerning disclosure of information relating to estate administration.

Question #4:

Absent actual knowledge of fraudulent and/or criminal conduct, the Rules of Professional Conduct do not require the inquirer to investigate the veracity of information provided by the co-executors. However, the inquirer is advised to review substantive law in this area as well.

CAVEAT: *The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.*