PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2011-4
(November 2011)

The inquirer's client is the administratrix of an estate. Before retaining the inquirer, the client applied for Letters of Administration and advised the Register of Wills that she was the sole intestate heir of the estate despite the fact that she has three siblings. Client then retained the inquirer to help prepare an inventory and inheritance tax return and advised that the estate at that time consisted of a house in which she alone was living.

Subsequent to hiring the inquirer, the client advised him of the existence of her siblings. The inquirer discovered bank accounts and filed the inventory and a tax return that listed the siblings. The client then advised that her siblings were willing to let her have the remaining estate assets. The inquirer prepared a family settlement agreement that, if agreed to by the siblings, would confirm such an agreement and sent it to the siblings at confirmed addresses. Since that time, none of the siblings have responded to the inquirer's letters or calls.

The inquirer has advised the client of her duty to distribute the balance of the liquid assets and that she could stay in the house until one of her siblings insisted on its sale, but that she cannot deed the house to herself individually, and runs a risk of a sibling seeking rent at some time hereafter. The client is now unresponsive to the inquirer.

The inquirer now wishes to withdraw from the representation.

The inquirer asks the following questions:

1. Does the inquirer have a duty to the Register of Wills to advise the Register of the client's falsehood when the client applied for Letters of Administration?

2. Does the inquirer have a duty to the other heirs to advise them of the funds available for distribution and the client's lack of responsiveness? Should the inquirer urge the other heirs to engage counsel?

3. Should the inquirer remonstrate in writing with the client before taking any further action?

The inquirer's first question implicates Pennsylvania Rule of Professional Conduct (the "Rules") 1.6, which provides in relevant part 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).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary. . .

(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 . . . . .

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

Rule 1.0(e) **Definitions** provides as follows:

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

It is clear that based on the definition of "Tribunal" that the Register of Wills when he or she acts to grant letters of administration under the Probate, Estates and Fiduciary Code 20 Pa. C.S.A. on the application of a person seeking such letters is a "tribunal" under this definition. (See also, Phila. Bar Assn. Professional Guidance Committee Opinion 92-17, Pennsylvania and Pennsylvania Bar Assn Opinion 92-69.) Thus, Rule 3.3, **Candor Toward The Tribunal** is relevant to the inquiry. It provides in relevant part that,

"(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . ; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The Committee believes Rule 3.3(b) clearly applies to what has happened here. The lawyer knows that the client offered false evidence to the Register of Wills in order to secure her letters of administration. Thus, the Rule requires the inquirer to take reasonable remedial measures. He has taken one step already by filing a copy of the estate tax return that was filed with the Pennsylvania Department of Revenue. That return discloses on its face that there are three siblings, thereby notifying the tribunal of the falsity of the original application for letters.

Also, as discussed further below, the inquirer intends to advise his client clearly and unambiguously that she must carry out the duties that she has as administratrix of the estate to all of her siblings, specifically that she must distribute to them all amounts due to them under the law.

The Committee believes that by taking these steps the inquirer will have satisfied his duty to take remedial measures required by Rule 3.3.

Since the siblings of the client are unrepresented, the inquirer's second question implicates Rule 4.3, which provides as follows:

Rule 4.3. Dealing with Unrepresented Person.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

The inquirer reports that he did send to the siblings a proposed family settlement agreement that would have confirmed that they agreed, as represented by the client, that she could retain all of the remaining estate assets, notwithstanding their entitlement to share in them under the law. He has never had any response from them indicating either assent to such an agreement or disagreement.

The inquirer must determine whether the inquirer's obligations to the other heirs under Rule 4.3 were met through the correspondence accompanying the family settlement agreement that was sent to them or by some other communication. If so, then Rule 4.3 does not require the inquirer to make additional disclosures to the other heirs. If the inquirer believes he has not met the obligations to the heirs under Rule 4.3, the Rule only permits the inquirer to advise the heirs that they can secure separate counsel to advise them. However, Comment [2] to Rule 4.3 states that "[t]his Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." Therefore, although Rule 4.3 only permits the inquirer to advise the heirs that they can secure separate counsel, Comment [2] permits the inquirer to further advise the heirs that they have rights in the estate that will be given up by signing the family settlement agreement.

In addition to the inquirer's ethical obligations under the Rules, the inquirer may have an obligation under substantive law to disclose the client's conduct. In Pew Trust, 16 Fiduc. Rep. 2d 73 (Montg. 1995) the Court held that although a lawyer representing a fiduciary does not represent the beneficiaries of the trust or estate, the lawyer has derivative duties

to the beneficiaries, which are similar to the duties owed by the fiduciary to the beneficiaries. The Committee does not express any view on that topic.

The inquirer's third question implicates Rule 1.16, which provides as follows:

Rule 1.16. Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct **or other law;** [emphasis added].

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

In the situation posed by the inquirer, **prior to taking any action at all**, the inquirer must fully remonstrate with his client. Obviously, since the client refuses to communicate with him, the inquirer is going to have to do this in writing, and have it delivered to the client in a reasonable fashion geared towards her actually receiving it and providing him with proof that he sent it, i.e. certified mail return receipt requested or by overnight or courier service. In that letter to the client, the inquirer should outline her refusal to communicate with him, and advise that if she does not do so within a time certain he will have no choice but to cease his representation of her. The letter must also point out the necessity of her completing her duties as the administratrix, and list what those specific duties are, that is, that she must prepare an account to be sent to the other heirs and adjudicated by the Court. The inquirer should also caution her that she can neither take estate funds for her own use nor sell estate property without making an equal distribution to all the heirs at law absent a properly executed family settlement agreement. The inquirer must advise the administratrix that if she does not respond to his letter within a time certain, that he will have no choice but to withdraw. If the client does not respond in a timely fashion, then the inquirer should withdraw, advise the executrix that he has withdrawn, return the estate checkbook to her, and send a letter to the Register of Wills advising that he has withdrawn from the matter.

In summary, the inquirer must determine whether more specific disclosure of the impact of the family settlement agreement requires further communication with the other heirs in order to comply with Rule 4.3 and furthermore whether the Pew decision requires that such disclosure be made under substantive law. If the client fails to respond to the inquirer's writing, the inquirer certainly has a reason for permissive withdrawal under Rule 1.16b6. Since the inquirer has no independent confirmation that the heirs are giving up their rights in the estate, the only way to properly resolve that issue and conclude administration is by adjudication. The client's failure to take action to conclude administration would constitute an ongoing violation of the client's fiduciary obligations to the other heirs i.e. "the other law" referred to in Rule 1.16a1. In addition, it could also violate the inquirer's derivative duties to the other heirs under *Pew.*

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.