Attorney Professionalism Forum: The Problematic Client and When is it time to Withdraw/ Reprinted with permission from the New York State Bar Association Journal, September/October 2020, Vol. 92, No.7

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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TO THE FORUM:

I represent a client who is the executor and beneficiary of a decedent's estate, as well as the trustee of a supplemental needs trust created for the benefit of his disabled sister. The client requested that I close the estate, but in order to do so I need to obtain a release from his sister and fund the trust. I have serious concerns regarding the client's honesty that I believe may prohibit him from making the truthful representations required to obtain a legally effective release. For example, despite my many requests, the client has consistently refused to provide me with the back-up for distributions from the estate accounts. To make matters worse, I recently overheard the client on a personal call when visiting my office stating that he intended to dispose of certain estate assets as quickly as possible, even if that meant selling them for significantly less than face value.

Do the rules of ethics require me to take any action with respect to the client's dishonesty? Given that there is no judicial settlement of the executor's account, do I have an ethical obligation to protect the trust beneficiary? Are there any other ethical rules I should be aware of?

Sincerely,
Sandy R. Suspicious

DEAR SANDY:

As a lawyer, navigating tensions between your duties to your client and your ethical obligations can present challenges. As discussed in prior Forums, there is often a fine line between an attorney's duty to be an advocate for a client and the responsibilities that we have as officers of the court to be truthful and candid. See Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. In most instances, lawyers navigate this boundary without difficulty. However, there are some circumstances, such as the one you describe in your inquiry, that require a lawyer to give more thought to their ethical obligations under the Rules of Professional Conduct (RPC). So, what responsibilities do attorneys have when they suspect their client's behavior threatens their ethical obligations?

Professor Roy Simon reminds us that RPC 3.3 is one of the most important provisions in the RPC because it imposes a duty of candor on every lawyer who represents a client before a tribunal. See Roy Simon, Simon's New York Rules of Professional Conduct Annotated, at 960 (2019 ed.). RPC 3.3(b) provides that a lawyer representing a client before a tribunal who knows that the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. The disclosure obligations imposed on attorneys under RPC 3.3(b) are mandatory and even apply to client intentions that have not come to fruition or those that threaten the integrity of the proceeding if the attorney knows that a client intends to commit a fraudulent or criminal act. *Id.* Comment [12] to RPC 3.3 explains that mandatory disclosure obligations such as those imposed by RPC 3.3 are critical to the practice of law because "lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process." RPC 3.3, Comment [12].

However, before discussing your disclosure obligations under RPC 3.3(b), we recommend having a frank and straightforward conversation with your client to ascertain whether your suspicions and concerns about your client's dishonesty are well founded, and if so, inform the client of the consequences of the intended actions. As lawyers, we have an obligation to provide counsel to our clients and take all reasonable efforts to dissuade fraudulent or illegal conduct. If, after meeting with your client it is clear that your suspicions are on point and that your client nevertheless intends to proceed in the same course, your mandatory disclosure obligations under RPC 3.3(b) may be triggered.

Based on the facts you have given us, it appears that you suspect that your client has used funds from the estate accounts for an improper purpose, which calls into question the accuracy of the final accounting of the estate. Whether you have

an obligation to disclose your client's suspected misconduct under RPC 3.3(b) turns on two factors – (1) whether you "know" that the client has engaged or is engaging in criminal or fraudulent conduct relating to the proceeding, and (2) whether the probate matter you describe in your inquiry constitutes representation before a tribunal. See RPC 3.3(b). Pursuant to RPC 1.0(k), a lawyer "knows" something when they have "actual knowledge" of the fact in question; "a person's knowledge may be inferred from circumstances." RPC 1.0(k). According to the New York State Bar Association (NYSBA) Committee on Professional Ethics (the "Committee"), the key to this analysis is whether the attorney has actual knowledge that the information is false or misleading, and that a mere suspicion of misconduct is not enough to trigger disclosure under RPC 3.3(b). See NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014) (citing NYSBA Comm. on Prof'l Ethics, Op. 837 (2010) ("[a]lthough a person's knowledge may be inferred from circumstances, it is clear that a mere suspicion would not be enough to constitute knowledge")). Professor Simon notes, however, that a lawyer may be charged with "knowledge" of a certain fact if a reasonable, objective attorney would say that the lawyer in question "should have known" a fact. See Simon, Simon's New York Rules of Professional Conduct Annotated, at 38.

In our view, the fact that you overheard your client discussing disposing of certain assets in the estate for a reduced sum, without more, likely does not rise to the level of having actual knowledge that your client is engaged in fraud or wrongdoing with respect to the estate. Other factors such as what facts the client disclosed about determining the value of the assets, the circumstances in which the sale price was determined, and the circumstances compelling the sale of the estate's assets also should be considered. Therefore, as stated above, we recommend that you have a frank discussion with your client about his intentions and the potential consequences of making false representations in estate accounting documents.

Next, the question of whether the matter you describe in your inquiry is considered "before a tribunal" as within the meaning of RPC 3.3(b) is slightly more complicated. The definition of "tribunal" in RPC 1.0(w) includes a court. The Committee has opined that even despite the fact that obtaining an informal accounting of the estate does not require the approval of the Surrogate's Court so long as the beneficiaries sign a form of "receipt and release" provided by the Surrogate's Court, because the affidavits filed by the fiduciary and the form of receipt and release all have captions indicating that the matter is before the Surrogate's Court, the matter is considered before a tribunal pursuant to RPC 3.3(b). See NYSBA Comm. on Prof'l Ethics, Op. 1034 (2014). Thus, if your remonstration with the client does not result in the client's submission of an accurate accounting, RPC 3.3(b) obligates you to take reasonable remedial measures, including, if necessary, disclosure of the fraudulent conduct to the tribunal.

It is important to note a significant change in the disclosure obligations since the RPC was adopted. Unlike the former Disciplinary Rules of the Code of Professional Responsibility (DR), the RPC does not provide an exception for confidences or secrets when the lawyer has knowledge that the client intends to commit a criminal or fraudulent act. See Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9. Before the adoption of RPC 3.3, DR 7-102(B)(1) stated that a lawyer with evidence "clearly establishing" that a client had perpetuated a fraud on a tribunal had to first insist that the client correct the fraud; if the client refused, the attorney was required to disclose the fraud to the tribunal, except when the information was "protected as a confidence or secret." However, under RPC 3.3(c), the mandatory disclosure duty applies "even if compliance requires disclosure of information otherwise protected by [RPC] 1.6." See NYSBA Comm. on Prof'l Ethics, Op. 837 (2010).

These rules do not create an easy course for you to follow. You appear to have reached an apparent impasse in your attorney-client relationship where your mistrust of the client makes it difficult for you to carry out your representation of the client. Consequently, even if you do not have direct "knowledge" of impropriety on the part of your client, your suspicions, coupled with the client's apparent lack of cooperation, may be sufficient to allow you to withdraw from the representation. See Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3; see also RPC 1.16(c)(7). RPC 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be illegal or fraudulent. RPC 1.16(b)(1) requires a lawyer to withdraw from a representation if he knows that the representation will result in a violation of the RPC or the law. Further, paragraphs (c)(2), (c)(4) and (c)(7) of RPC 1.16 permit a lawyer to withdraw from a representation under standards that are lower than "knowledge" of illegal or fraudulent conduct. For example, a lawyer may be permitted to withdraw where the client: (1) persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) insists upon taking action with which the lawyer has a fundamental disagreement; or (3) fails to cooperate in the representation or otherwise makes the representation unreasonably difficult for the lawyer to carry out effectively. See RPC 1.16 c)(2), (c)(4) and (c)(7).

RPC 1.16(c) also contains a catch-all provision in paragraph (12), which allows a lawyer to withdraw as counsel where the lawyer believes in good faith that "that the tribunal will find the existence of good cause for withdrawal." RPC 1.16(c)(12). In proceedings before a tribunal, a lawyer may

move to withdraw based on any truthful reason the lawyer thinks a court would accept. See Simon, Simon's New York Rules of Professional Conduct Annotated, at 851. Thus, if after speaking with your client, you are certain that your client intends to commit fraud related to the probate proceeding, then RPC3.3(b) requires you – after making valiant efforts to persuade the client to not engage in such conduct – to report the information concerning the fraud to the tribunal. See NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). This duty continues despite the lawyer's withdrawal from the representation. See NYSBA Comm. on Prof'l Ethics, Op. 1123 (2017).

In seeking permission to withdraw, the disclosures the lawyer may or must make about the client's conduct will again depend upon whether the lawyer knows that the client has engaged or is engaging in criminal or fraudulent conduct. If the lawyer does not have such knowledge, the lawyer should regard any information or suspicions about the client fiduciary's conduct as protected by RPC 1.6, which provides:

A lawyer shall not knowingly reveal confidential information, as defined by this Rule . . . . "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.

Comment [6A] to RPC 1.6 provides that in exercising the discretion to reveal information under RPC 1.6(b), the lawyer should consider factors such as: (1) the seriousness of the potential injury to others if the prospective harm or crime occurs; (2) the likelihood that it will occur and its imminence; (3) the apparent absence of any other feasible way to prevent the potential injury; (4) the extent to which the client may be using the lawyer's services in bringing about the harm or crime; (5) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and (6) any other aggravating or extenuating circumstances. See RPC 1.6, Comment [6A]. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. See Vincent J. Syracuse, Maryann C. Stallone & Alyssa C. Goldrich, Attorney Professionalism Forum, N.Y. St. B.J., April 2020, Vol. 92, No. 3; Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., January/ February 2019, Vol. 91, No. 1.

Now, turning to your question regarding whether you have an ethical obligation to protect the trust beneficiary, generally speaking, a lawyer who represents the executor of an estate has no ethical duty to the beneficiary of the estate, absent an agreement to the contrary. See CPLR 4503(a)(2); see also NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). CPLR 4503(a)(2) 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 a client, and the existence of the fiduciary relationship does not by itself constitute a waiver of the privilege. However, it is important that you check the applicable rules in your jurisdiction regarding proceedings involving an infant, incompetent, or incapacitated person, as certain circumstances may require special procedures depending on the nature of the individual's disability.

Whether the law governing fiduciaries, or any other law, would require an attorney representing an estate fiduciary to treat the estate beneficiaries as clients is a legal question that is outside the scope of this Forum and perhaps something we can address in the future. It suffices to say here that recently the Committee concluded that absent other law or agreements to the contrary, the executor may be the lawyer's only client. See NYSBA Comm. on Prof'l Ethics, Op. 1194 (2020). This means that your executor client is ethically entitled to your undivided loyalty, including strict confidentiality pursuant to RPC 1.6(a). Accordingly, your client's sister would have no right to the disclosure of information protected by the attorney-client privilege solely by virtue of her status as a beneficiary of the estate.

Sincerely,
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QUESTION FOR NEXT ATTORNEY PROFESSIONALISM FORUM

TO THE FORUM:

After many years of practicing with Firm A, I have decided to strike out on my own. During my tenure at the firm, I have brought in clients with various needs that were serviced by other lawyers at Firm A. Given my lack of expertise in some of these areas, I do not feel comfortable representing these clients in my new practice. Some of these clients desire to come with me to my new firm despite my protestation. Others do not wish to remain at Firm A after I leave because of their longstanding relationship with me. What are my obligations to these clients?

Sincerely,
Larry Lateral

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