

PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-2
(February 2010)

Inquirer drafted a will for a client who devised her residence to A. The client later entered a nursing home where, according to her niece, she was mentally incapacitated. While the client was in the nursing home, the same niece, pursuant to a power of attorney from the client, sold the client's residence. The client later died and her niece was named executrix of the estate. Inquirer represents the niece in her capacity as executrix of the estate. During administration of the estate, Inquirer sent A the requisite Notice of Beneficial Interest together with a letter explaining that although the will devises real property to A, it had been sold during the decedent's lifetime. Inquirer now asks whether he is under a duty to make further disclosures to A pursuant to 20 Pa.C.S.A. 2514, subparagraph 16.2, a nonademption statute that provides, in part, that the devisee of real property that is sold during the principal's lifetime by an agent under a power of attorney while the principal is an incapacitated person has the right to the net proceeds of the sale.

Whether statutory law bestows on A the legal right to the net proceeds of the real property that was devised to A under the will is a substantive legal matter (*i.e. do the facts support the relief provided by the statute*) and as such is beyond the purview of this Committee. As a result, the Committee's opinion is predicated on Inquirer's analysis of that substantive legal issue and his representation that such a right exists in A.

Inquirer's question implicates 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.

Comment [1] to Rule 4.1 states that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

In the letter accompanying the Notice of Beneficial Interest to A, Inquirer advised that the property devised to A under the will had been sold during the decedent's lifetime.

This statement implied that A would not receive a distribution in connection with the devise. Without further disclosure, such a statement constitutes a misrepresentation under Rule 4.1 because it is a partially true but misleading statement. Inquirer must advise the executrix that full disclosure must be made to A concerning A's substantive legal right to the net proceeds from the sale of the decedent's property.

If the executrix refuses to authorize such disclosure, following remonstrations with the executrix, the inquirer must withdraw from further representation of the executrix, advise A of this action, and further advise A to immediately seek the advice of separate counsel.

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 only carries such weight as an appropriate reviewing authority may choose to give it.*