

**THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE**

Opinion 2009-09
(July 2009)

Inquirer's client purchased real property from John Doe. At the time, John Doe was a defendant in an ongoing personal injury suit. Inquirer's client reported paying \$10,000 for the property when the transfer was recorded, however an additional \$45,000 in cash was paid to John Doe on the side. Inquirer had nothing to do with client's purchase of the property. A judgment was then obtained against John Doe in the personal injury suit. After judgment was entered against him, John Doe sold another property he owned to his sister for \$1.00. The plaintiff in the personal injury suit has sued Inquirer's client and John Doe's sister seeking to undo both conveyances as they were allegedly made at below fair market value and for the purpose of avoiding execution of a judgment.

The client first contacted Inquirer after being sued by the plaintiff in the personal injury case. The plaintiff's lawyer asked inquirer if there was any relationship between her client and John Doe. The inquirer responded that there was not and advised plaintiff's attorney that if the case against inquirer's client went forward, discovery would be taken to identify plaintiff's evidence that the conveyance amount was below fair market value. Inquirer then asked if plaintiff was amenable to voluntarily discontinuing the suit filed against Inquirer's client. Plaintiff's counsel responded by asking for an affidavit from inquirer's client confirming no relationship with John Doe, that the conveyance was for fair market value and that no additional cash was given to John Doe on the side.

After receiving Plaintiff counsel's response, inquirer's client stated for the first time that the \$45,000 cash paid to John Doe was not only for the purchase of the real property, but included three old cars and a boat located at the property. Inquirer's client confirmed that the deal to purchase the cars and boat was oral and that he did not receive titles for the vehicles, but that he might be able to get titles from John Doe. The inquirer then offered to follow-up on this for the client. Subsequently, after pointed questions from inquirer, the client confirmed that John Doe offered to sell him the property at one price if payment was by check, and at a lower price if the deal involved a cash payment on the side.

The inquirer, concerned about revealing privileged information as well as having her services used for dishonest purposes, poses the following questions:

1. She does not know how to answer her opposing counsel's request for the affidavit, without directly or indirectly suggesting that there's a problem, i.e., that the property was exchanged either for less than fair value, and/or that there was cash given to John Doe on the side over and above the sales price.

She is concerned that simply saying her client won't provide an affidavit essentially tells opposing counsel that the client did not act properly and that such a statement potentially amounts to revealing privileged information.

2. If the Committee's advice is to withdraw from the case, does inquirer have a duty to tell the next lawyer about what happened? The inquirer is concerned that her client will simply not be so candid with his next lawyer, who will then not know about this and who will accordingly take the case from start to finish.
3. If inquirer withdraws she will need to file a motion to do so. She does not know what she would be allowed to put in her papers seeking to withdraw and needs guidance on that point if it is recommended that she do so.
4. Finally, inquirer wonders whether there is a way to convince her client to go back and make the deal above board. She of course knows it would be best and would hopefully mean he would cap any exposure to criminal charges, but she does not know what the ramifications would be to her client, other than of course the lawsuit filed against him probably resulting in a verdict against him with the property going to the plaintiff.

Inquirer's first question involves confidentiality of client information. Rule 1.6 of Pennsylvania's Rules of Professional Conduct deals with confidentiality and 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).

(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:

(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.

Rule 1.6 makes reference to Rule 3.3, which provides as follows:

Rule 3.3 Candor Toward the Tribunal

(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;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; 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.

Inquirer may not produce the client affidavit requested by plaintiff's counsel. Doing so would constitute a false statement to the court in violation of Rule 3.3(a)(1). However, in order to maintain client confidentiality as required under Rule 1.6, Inquirer should simply advise plaintiff's counsel that the requested affidavit will not be provided. The fact that plaintiff's counsel may infer from inquirer's response that inquirer's client bears some culpability in connection with the conveyance from John Doe does not constitute a breach of client confidentiality by inquirer.

With regard to inquirer's second and third questions concerning withdrawal from representation, Rule 1.16 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;
- (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.

Under the facts as presented, the Committee does not believe withdrawal by the inquirer is required under Rule 1.16. However, the Committee strongly advises inquirer to have further candid discussion with the client. If, after such discussion, Inquirer reasonably believes that the client paid cash for the property in order to avoid paying additional transfer taxes and/or for the purpose of helping John Doe avoid having the property go to a judgment creditor, and the client insists on submitting the requested affidavit or intends to conceal the facts surrounding the purchase of the property when responding to pleadings and/or discovery, the inquirer is prohibited under Rule 1.16 from continuing representation and must withdraw from the case. Absent circumstances requiring withdrawal, it should be noted that withdrawal from any representation is permitted under Rule 1.16 if it can be accomplished without “material adverse effect on the interests of the client” and if the withdrawing attorney complies with “applicable law requiring notice to or permission of a tribunal.” As a practical matter, if the inquirer chooses to withdraw, the Committee suggests advising the client to retain substitute counsel in order to avoid having to file a motion with the court. If substitute counsel cannot be obtained and withdrawal is required under Rule 1.16, the motion to withdraw should not reveal confidential information. It should simply state that inquirer reasonably believes that continued representation will result in violation of the Rules of Professional Conduct. Anything more specific should be submitted to the court in camera, if necessary. If withdrawal is desired but not required, inquirer’s motion can simply refer to the applicable subparagraph of Rule 1.16 that permits such withdrawal. In addition, given the deadline for answering plaintiff’s complaint, the Committee suggests filing a motion to stay the response date pending determination of the motion to withdraw.

If inquirer’s representation is terminated, and substitute counsel is retained, the Rules of Professional Conduct impose no duty on inquirer to advise the new attorney of inquirer’s concerns about the client’s veracity and possible culpability in connection with the conveyance from John Doe. However, it should be noted that pursuant to Rule 1.6(d), inquirer’s duty not to reveal information relating to representation of a client continues after the client–lawyer relationship has terminated.¹

¹ In order to avoid revealing to substitute counsel confidential information in the form of memorandum or notes relating to the facts surrounding the client’s acquisition of the property from John Doe, inquirer is advised to release client’s file directly to client. Inquirer should include written confirmation that the file is being released to the client and that the client bears sole responsibility for providing all or part of the file to substitute counsel. Inquirer is further advised to send a separate letter to substitute counsel advising that the file was released to the client and that inquirer therefore cannot warrant that counsel is receiving

Finally, inquirer seeks advice about counseling the client to attempt to rectify any wrongdoing in connection with the conveyance from John Doe. Although this question seeks substantive legal advice that is beyond the purview of this Committee, inquirer is strongly advised to refer the client to a criminal attorney who can fully explain all options available to the client as well as the ramifications of those options.

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.*

Inquirer's entire file.