THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2013-6
(July 2013)

The inquirer represents an elderly woman who moved into an assisted living facility in 2008. In September 2008, the inquirer prepared and the client signed a power of attorney and a new will. The will leaves one $50,000 gift to a cousin of the client, and leaves the remainder of the estate to various charitable institutions. The will names the inquirer as the alternate executor; because the executor has died, the inquirer is now the acting executor of the will.

At the same time the testator made her will, she executed a power of attorney, which named S, the daughter of a friend of the client as attorney-in-fact. The client felt that S would be helpful in managing the client's affairs. The inquirer recalled that the client asked for guidance about the appropriate fee for S; the inquirer suggested an amount but advised that the decision was ultimately the client's.

The client is now in hospice and in a coma.

The inquirer recently learned from S and the client's financial advisor that between September 2008 and December 2008, the client, her financial advisor and S met to sign papers that placed the client's individual accounts into joint survivorship accounts with S, the terms of which, taken at face value, would mean that upon client's death, the assets held in such accounts would become the property of S. (The only asset that was not placed into a joint account was an annuity, the terms of which provided that a lump sum was payable to the client's estate upon her death.)

According to S, the purpose of putting the accounts in joint survivorship status with S was said to be to allow S to more readily manage the client's bills. If that were the sole purpose, changing the accounts to be owed jointly with right of survivorship was not necessary. Moreover, doing so had the secondary effect of making S the owner of virtually all of the client's estate upon the client's death. It is possible, of course, that the client did know of and intended this effect of making the accounts joint with a right of survivorship, but apparently S did not report such an intent when interviewed by inquirer. Notwithstanding that, S apparently does now understand that as things now stand, upon the client's death, S will succeed to ownership of all of the assets in the joint accounts.

The inquirer strongly suspects that even if the client consented to naming S as a co-owner on the accounts for convenience purposes only, that the client had no idea of the dispositive effect of doing so. The Committee, of course, has no opinion on that subject, but based on the facts reported, considers the inquirer's views to be reasonable.

The inquirer informed S that the power of attorney gave her that authority, and that moving the assets into joint accounts had been, therefore, unnecessary. S told the inquirer, "I'm surprised [the client] didn't tell you." The day after her conversation with S, inquirer reviewed the terms of the will with S, who volunteered to pay the $50,000 bequest to the client's cousin. However, the estate will be unable to fulfill the bequests to the charitable institutions because the assets have been transferred into joint accounts.

The inquirer has requested guidance on whether she has a duty as Executor to notify the Attorney General's office about the transfer of the assets into joint accounts, noting that although the Attorney General will receive a copy of the inheritance tax return, the joint assets alone would not arouse suspicion.

Several Pennsylvania Rules of Professional Conduct (the "Rules") inform the analysis of this inquiry.

Rule 1.1 **Competence** provides that:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.2 **Scope of Representation and Allocation of Authority Between Client and Lawyer** provides, in relevant part, that:

(a)... A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation....

Rule 1.3 **Diligence** provides that:

"A lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 1.4 **Communication** provides, in relevant part, that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.....

Rule 1.6 **Confidentiality of Information** provides, in relevant part, that:

(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....

Finally, Rule 1.14 **Client with Diminished Capacity** provides, in relevant part, that:

(a) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem.

(b) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.4 imposes on attorneys an obligation to communicate with their clients about any decisions or circumstances affecting the client's objectives in the engagement. It is possible, if unlikely, that the client's consent to the transfer in late 2008 was informed and voluntary. Accordingly, the inquirer first must attempt to communicate with the client to determine whether she understands the consequences of her then purported agreement to transfer her assets into accounts that are jointly held with S. If inquirer can conclude that the client gave informed and voluntary consent, no communication with the Attorney General is required.

More likely, however, given the information about the client's deteriorating health, the inquirer will not be able to determine whether the client gave informed consent to the transfer of funds. Indeed, since the client is in a coma and near death, that result is virtually certain. The terms of the will, drafted by the inquirer just weeks prior to the transfer of her assets to joint accounts, set forth the inquirer's clear intent about the

distribution of her estate and suggest that even if her consent was obtained, it was likely not informed or otherwise obtained improperly. It would be more than odd to render all the dispositive terms of her estate void in favor of S, a daughter of a friend.

The inquirer's question, then, is whether the inquirer has a *duty* to report the transfer to the Attorney General. For guidance on this issue, the inquirer should consider an attorney's obligations under Rules 1.1, 1.2 and 1.3 of the Rules of Professional Conduct, each of which sets forth, broadly, an attorney's duties to provide competent and diligent representation. Rule 1.2 requires a lawyer to abide by a client's decisions concerning the objectives of representation. If the inquirer concludes that communication with the Attorney General is required in order to fulfill his or her obligation to provide competent representation to the client, Rules 1.2, 1.6(a) and 1.14(b) provide the inquirer with the authority to do so and set forth the parameters within which those steps may be taken.

Rule 1.2 authorizes a lawyer to "take such action on behalf of the client as is impliedly authorized to carry out the representation...." In addition, subsection (b) of Rule 1.14 authorizes an attorney whose client has diminished capacity and is at risk of "financial or other harm unless action is taken" to take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client...." Accordingly, inquirer has the authority to act on the client's behalf, without the client's consent, in order to protect the client's financial interests and effect the intent manifested in her September 2008 will. Contacting the Attorney General is one way to meet the inquirer's obligations in this regard.

Acting with the authority to proceed on the client's behalf, the next issue is the extent to which the inquirer may disclose otherwise possibly confidential information to the Attorney General. Rule 1.6(a) addresses an attorney's confidentiality obligations and states, generally, that any information the attorney learns in the course of a representation is confidential, but states that disclosure of such confidential information may be "impliedly authorized in order to carry out the representation." Rule 1.14(c) reaffirms the confidentiality obligations imposed by Rule 1.6 as applied to clients who have diminished capacity, and similarly authorizes lawyers to reveal information about the client, "*but only to the extent* reasonably necessary to protect the client's interest." (Emphasis added.)

Although the inquirer learned the information about the transfers from S and the financial advisor, since it concerns the representation of the client the information is confidential under Rule 1.6 as information relating to the engagement and learned in the course of the representation. Even so, disclosure to the Attorney General is authorized under Rules 1.6a and Rule 1.14c as a disclosure necessary in order to carry out the representation – that is, to fulfill the client's intent manifested when the inquirer drafted and the client signed her will. The Committee notes that the authority to disclose the client's confidential information is not unfettered. Thus, the inquirer should reveal only

such information to the Attorney General that is necessary to ensure that steps are taken to effect the client's intent as manifested in her will.

Should the client die prior to making such disclosures, the inquirer then has a duty as executor of the estate to gather the assets of the estate. Rule 1.9, **Duties to Former Clients** provides in part that,

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Since confidentiality survives death, Rule 1.9c2 still requires an analysis of the Rules in order to determine if the confidential information may be revealed. As the attorney who represented the client, the inquirer would still be permitted to make the disclosures of confidential information discussed in this opinion. However, since the inquirer is also the executor of the estate, once the client dies, a different rationale permitting disclosure exists. In past opinion 2003-11,
http://www.philadelphiabar.org/page/EthicsOpinion2003-11?appNum=2
this Committee held that,

...Rule 1.14, which deals with a client under a disability, recognizes the court's ability to appoint a legal representative, such as a guardian, to act on behalf of a client in certain circumstances. The comments to Rule 1.14 state that when a legal representative has been appointed for a client, the lawyer should look to the representative for decisions on behalf of the client. Since an executor is the legal representative of a decedent's estate, it follows that a lawyer may look to that person for decisions on behalf of the estate. Therefore, ... [the] executor of the client's estate, ...would be authorized to consent to the disclosure of confidential information and information relating to representation of the client.

Thus, combining the inquirer's duties to gather the assets of the estate, along with her ability, now as executor of the estate to reveal confidential information gained while she was representing the client, the inquirer may still make the disclosures as described above to the Attorney General provided she believes that doing so is consistent with her past competent representation of the client, or in the alternative, is a legitimate action in order to gather the assets of the estate.

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.