

State Bar of South Dakota

Ethics Opinion 2000-6

October 16, 2000

- **RULES: 1.2; 1.6; 1.16; 3.3**
- **SUBJECT: Estate: Duty to disclose possible improper source of estate asset.**
- **SUMMARY: Lawyer for an estate may have duty to withdraw or disclose improper source of real estate.**

FACTS

Attorney was retained by the sister of a decedent to handle her brother's estate. The sister was identified as the personal representative in the decedent's Last Will and Testament. The following known facts were taken from the documentation provided by the personal representative and/or review of relevant court documents:

- (1) The decedent had lived with his mother in a house and title to the property was in the name of the mother for many years.
- (2) In February, the decedent was appointed as the mother's guardian and conservator.
- (3) In March, a warranty deed showed the ward/mother by her conservator as the grantor and the conservator/decedent as grantee of the house and lots.
- (4) In April, the mother/ward entered a nursing home.
- (5) In May, the decedent/guardian prepared the initial inventory of the mother/ward's assets. The house and lots were not listed as assets of the mother/ward.
- (6) There was no petition or order in the court guardianship/conservatorship file allowing for a transfer of assets.
- (7) When the mother/ward died her estate was not probated.

Lawyer asks the Committee whether the attorney for the decedent's estate may ethically include the real property as an asset of the decedent's estate.

DISCUSSION

The inquiry does not indicate whether the lawyer has discussed the facts (as he discovered them to be) or the implication of those facts with the personal representative. As such, this inquiry may well be placing the cart before the horse.

Rule 1.2 mandates that a lawyer abide by a client's decisions concerning the objectives of the representation subject to certain exceptions including:

- (d) A lawyer shall not counsel a client to engage in, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional

Conduct or other law, the lawyer shall advise the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.2(d) and (e).

Rule 1.6 governs the extent to which a lawyer may reveal client confidences. Pursuant to Rule 1.6(b) such confidences can be revealed only when the lawyer reasonably believes that it is necessary to prevent the client from committing a criminal act that is likely to result in death or serious bodily harm, to establish a claim or defense on behalf of the lawyer or to the extent necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used. None of these exceptions appear applicable.

However, despite Rule 1.6, client confidences can be revealed in order to comply with Rule 3.3. Rule 3.3 addresses candor toward the tribunal and states in pertinent part:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; ...
- (4) offer evidence that the lawyer knows to be false.

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

Finally, Rule 1.6(b) allows a lawyer to withdraw from representing a client if "(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or "(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent ..."

The common thread of these rules is that a lawyer may not assist in any way a client's effort, past or future, to commit a fraud upon the court. While there was no past fraud committed by the personal representative in this scenario, there was potential fraud committed by the decedent that could affect the validity of assets in the estate. It is the Committee's opinion that the lawyer must investigate all the facts and explain the situation (potential past fraud by the decedent) and consequences to the client. See Ethics Opinion 92-8. If the client's directives would require the lawyer to engage or assist in conduct that would require making a false statement to the probate court or offer evidence that the lawyer knows to be false, then the client must be advised of the ethical limitations of the lawyer's conduct and the lawyer can move to withdraw from further representation. The lawyer cannot assist the client (personal representative and/or the estate) in any fraudulent concealment. However, if the probate can be accomplished without a fraudulent concealment of any alleged improper transfer, the lawyer may proceed or withdraw if that decision is personally repugnant to the lawyer.

Susan Brunick Simons, Chair
Ethics Committee

