Ethics Opinions

Opinion 11-04

Summary: Some information acquired by a lawyer in the course of briefly representing the residuary beneficiary under a will that she drew for the decedent is not protected confidential information because it is "generally known." Other information, not "generally known," is confidential information that may not be revealed. However, the attorney who drew the will has the right to disclose to specific legatees that they are named beneficiaries so that they may take steps to see that the decedent's wishes are carried out. Such disclosure is "implicitly authorized" by Rule 1.6(a) of the Rules of Professional Conduct to carry out the wishes of the decedent, lawyer's former client.

Facts: Attorney was contacted by the son ("Son") of a deceased individual ("Decedent") seeking her assistance in probating the Decedent's will. Son is the Decedent's next of kin and the residuary beneficiary under a will that Attorney had prepared a few years earlier for the Decedent. No contract for services was signed by the Son and no retainer was paid. Son stated that Financial Advisor ("FA"), who had been named executor of the will, had declined to serve or to offer the will for probate due to the relatively small amount of assets in the Decedent's estate. The Son had represented to FA that Attorney was the lawyer for the Decedent's estate, and FA therefore had revealed to Attorney the confidential information that the value of Decedent's estate was less than the total of the specific bequests to named legatees ("Legatees"). When Son learned that he would not benefit as residuary beneficiary under his father's estate plan, he lost interest in pursuing any further action with regard to Decedent's will. Attorney inquires whether she has a right or duty to advise Legatees of information concerning the Decedent's estate. Son has not responded to Attorney's requests for permission to disclose this information to Legatees.

Discussion: It should be noted at the outset that, based on the facts detailed above, Attorney represents Son, both in his capacity as a potential beneficiary of the Decedent's estate and as a person entitled to seek the probate of the will as Decedent's next of kin. This is the case even though no retainer has been paid nor any contract signed, facts which are not required for an attorney-client relationship to exist. *See Mailer v. Mailer*, 390 Mass. 371, 374 (1983) (an implied attorney-client relationship may be established "even though the attorney is never formally retained and the client pays no fee"). Furthermore, there can be no "attorney for the estate," notwithstanding that Son represented Attorney as such to FA, as only the person named or petitioning for appointment as executor or trustee can engage the services of an attorney on behalf of an estate or trust. In Massachusetts, the attorney's duties run to the fiduciary, not to the entity.

The duty to maintain client confidences derives from both the attorney-client privilege and from ethical rules. The attorney-client privilege is an evidentiary not an ethical concept. Comment [5] Mass R. Prof. C. 1.6. An attorney's ethical duty to maintain client confidences is far broader than the attorney-client privilege. Rule 1.6(a) provides that a "lawyer shall not reveal confidential information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." Mass R. Prof. C. 1.6(a). This duty is also subject to certain exceptions under rule 1.6(b) which are not applicable in this instance. *See* Mass R. Prof. C. 1.6(b). The duty to maintain confidences is extremely broad, applying to "virtually all information relating to representation, whatever its source." Comment [5] Mass R. Prof. C. 1.6.

There are several distinct pieces of information that Attorney possesses that would be of interest to Legatees: the fact that the Decedent died, the fact that FA has declined to act, the fact that no probate proceedings have yet been undertaken, and the fact of Legatees' status as beneficiaries under the Decedent's estate planning documents. We will address each of these pieces of information, first from the standpoint of Attorney's representation of Son and then in connection with Attorney's representation of her former client, Decedent.

The Decedent's death is information that Attorney learned in connection with the representation of Son. Even though the information is public information, that does not automatically allow for disclosure. A lawyer must protect even public information communicated in the course of representation unless that information is widely available or generally known. Comment [5A] Mass R. Prof. C. 1.6. In this case, the fact that the Decedent had died was "generally known" information. His obituary appeared in the newspapers and remains easily findable on the internet. Therefore, Attorney may disclose to Legatees the fact of Decedent's death without Son's consent.

That no petition has yet been filed for probate of the Decedent's will is also information Attorney discovered in connection with her representation of Son, as is the fact that FA is unwilling to serve as executor. The lack of a probate is a matter of public record as one can simply search the docket in the appropriate jurisdiction to determine whether a will has -- or has not -- been filed and, if so, whether probate proceedings have been initiated. In the circumstances of this case, we also regard that the fact that no probate of the Decedent's will is pending is information that is so easily obtainable as to permit its disclosure. On the other hand, the information that FA has declined to petition for appointment as executor is confidential information that Attorney gathered solely in the course of representation of Son and this cannot be disclosed to Legatees.

Legatees' status as beneficiaries under the Decedent's estate planning documents, however, was presumably known to Attorney prior to establishing an attorney-client relationship with Son, inasmuch as Attorney drafted the documents for Decedent when she represented him. On the other hand, the fact that the Decedent's assets at his death were so meager as to make the Legatees the only real beneficiaries under the Decedent's will is information that Attorney possesses solely in connection with her representation of Son. For that reason, that information is clearly confidential information that she cannot disclose to Legatees.

Lastly, we address the question of whether Attorney has a right or duty to disclose to Legatees the fact that they were named as beneficiaries in the Decedent's will so that they can take steps to see that his dispositive wishes are carried out. Mass R. Prof. C. 1.6(a) authorizes an attorney to reveal confidential information that is "impliedly authorized to carry out that representation." Attorney's former client Decedent asked for her assistance in connection with the preparation of his estate planning documents. The estate plan contemplated by those documents is presently being thwarted by the circumstances that FA does not want to undertake to probate the will because of the amounts involved and Son doesn't want to proceed with the probate because there is nothing in it for him. As a result, there is a real danger that the Decedent's funds will escheat under the Commonwealth's abandoned property laws and not pass to the people that the Decedent intended to benefit. We are not prepared to advise whether Attorney has a duty as Decedent's former lawyer to take steps to prevent this result from occurring because that involves, at least in part, a question of substantive fiduciary law as to which we may not under our Rules give advice. However, we do think that the language quoted above from Rule 1.6(a) authorizes Attorney, in her status as decedent's former lawyer, to inform Legatees of their status so that they may take such steps themselves, even if Son does not respond to Attorney's requests for permission to make the disclosure. Absent the informed consent of Son, however, we do not think that Attorney may represent Legatees in connection with the probate of Decedent's will or the settlement of his estate. Son, as an heir at law of Decedent, would be an interested person in any such proceedings and is potentially adverse to Legatees, since he would benefit more if the will were not probated and Decedent's estate passed under the intestacy laws. Although Son is a former client, the representation of Legatees would be in the same or a substantially related matter to the one in which Son initially sought Attorney's assistance and under Mass R. Prof. C. 1.9 she would be precluded from representing them absent his consent.

This advice is that of a committee without official government status.

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