

ETHICS OPINION

RO-94-09

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QUESTION:

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"I am currently representing a client who is the Administratrix of the Estate of her late husband. My client's late husband, X, was killed in a motor vehicle accident on March 8, 1994, and subsequently, I was retained to represent her as Administratrix of the Estate of X, and as the spouse of X, regarding a wrongful death claim against the adverse party in the motor vehicle accident. Husband X was survived by my client, two majority age daughters and a minor son. To be formally named as Administratrix of the Estate of X, my client was required to post a surety bond and obtain waivers from the other heirs consenting to her being named Administratrix. When applying for such a bond with Company A, my client was required to complete a bond questionnaire. One question listed on the questionnaire asked if my client had any pending lawsuits and she answers, 'No'. Thereafter, Company A denied my client a bond due to a pending Chapter 13 bankruptcy. Subsequently, I contacted bonding Company B about bonding my client in such matter. Company B's representative requested that I fax him Company A's bond application for his review. Thereafter Company B agreed to issue a bond with a requirement that joint control be exercised by me as client's counsel and I agreed. Also, Company B required that their bond application be completed and returned prior to issuing such bond. Such bond application did not inquire about pending litigation against my client.

Thereafter, wrongful death negotiations with the insurance company of the adverse party led to a settlement of the wrongful death claim. This settlement was for the amount of the limits of the policies of the adverse party. Out of the settlement proceeds were paid my attorney's fees and expenses, with my client receiving the remaining amount, such being in accordance with the law of distribution and the wrongful death statute. Subsequent thereto, I was advised by the attorney representing an heir of the Estate of X, that my client had a lawsuit pending against her in that she had been sued for divorce from an alleged common law marriage by a former live-in acquaintance. This action was pending at the time my client completed the bond application of Company A referenced supra. It is worth mentioning that another attorney has been representing my client regarding the pending divorce action since she received service on such. However, my client contends that there was not a common law marriage and that she feels that such suit is frivolous. Also, she has advised me that because there was a two-month period without any pleadings or communications between counsel for the parties in this divorce action, that she thought the matter had been dropped, thus explaining why she completed the bond questionnaire as she did.

Obviously, this is a serious matter for my client for if she is unsuccessful in her defense against the common law marriage divorce action, her subsequent marriage to X could be held invalid and she could lose any claim to X's Estate that she would have as surviving spouse. Her status as Administratrix of the Estate too, could be removed. Also, any monies received as surviving spouse in the wrongful death settlement could be required to be paid back into the Estate of X.

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QUESTIONS FOR OPINION

1. Do I have a duty to advise bonding Company B of the omission on bonding Company A's questionnaire which was sent to Company B and probably relied upon by Company B, knowing such would be against my client's interest?
2. Do I have a duty to notify the Probate Court where the Estate of X is pending of the facts outlined above knowing such action would be against my client's interest?
3. Do I have a duty to withdraw as counsel for the Administratrix of the Estate of X knowing such action would be against my client's interest?"

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ANSWER:

Rule 1.6 of the Rules of Professional Conduct applies to the facts you have set out. It 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 consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) 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 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."

Rule 1.6(a) says that all information relating to a lawyer's representation of a client is confidential. Therefore, nothing gained during the representation may be disclosed to anyone unless one of Rule 1.6's exceptions applies, or there is authorization from the client or a court.

Rule 1.6(b)'s two exceptions are limited ones. First, a lawyer may disclose confidential information to prevent a client from committing a criminal act only if it could result in "imminent death or substantial bodily harm". The second exception is essentially a self-defense provision for situations where there is a controversy between the lawyer and client regarding an aspect of the representation. In the latter exception, only

such information as is necessary to establish the claim or defense may be disclosed. Your facts do not come within either of these exceptions.

Your client's failure to answer truthfully on the first bond application could be construed as an ongoing fraud, particularly since she has not taken any remedial action to correct it. The issue of a possible prior marriage is certainly a material one, under the circumstances. A lawyer cannot disclose facts about a client's past crimes or fraud under Rule 1.6. However, if a lawyer's services are going to be used to further a fraud, then the lawyer must mandatorily withdraw. In RO-90-76, the Disciplinary Commission noted that once the lawyer has withdrawn, he or she is no longer responsible for the client's continuing fraudulent conduct.

You cannot unilaterally disclose anything to the bonding company. You cannot disclose anything to the probate court at this point. There is nothing to rectify with the court now. The bonding company may elect to stay on the bond, and the divorce case may be frivolous as your client contends it is. You should counsel your client to advise the bonding company of the error in the first application or authorize you to do so. If she refuses, you should withdraw.

MLM/vf

7/27/94