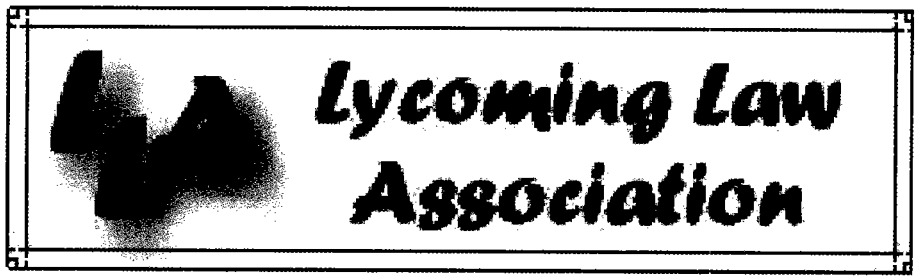

Bill Knecht
Julie Steinbacher
Dale Tice

Elder Law Ethics

Lunch & Learn

December 19, 2007

June 3, 2003

Re: Inquiry No. 2003-032

You have contacted me in my capacity as a member of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility. While this matter was not formally directed to my attention by the committee, I have offered to give you an informal opinion.

As indicated to me, you received a letter from a person, not currently a client, requesting your help with regard to possible abuse in a nursing home. You are, through your professional experience, familiar with this nursing home and believe that there may be substance to the person's complaints. Upon reviewing the letter, the writer appeared to be well organized, to use words and concepts appropriately, and the writer, based on this limited contact appeared to be oriented with regard to time, place person, and situation.

You are further aware, because of your specialty in Elder Law that the proper means for providing protection for someone would be to contact the appropriate person in the Department of Aging.

You attempted to contact the person by going to the nursing home, but the person was asleep and you were informed could not be roused for several hours. Your commitments to other clients do not permit you to make another attempt to see this person until next week. You are concerned about having this situation evaluated as quickly as possible.

Your query is whether the Pennsylvania Rules of Professional Conduct permit you or prohibit you from contacting the appropriate person at the Department of Aging.

The first question which may be dispositive of the entire matter is whether the Rule of Professional Conduct apply at all in that the person is not currently a client of yours. Because you do not represent the nursing home involved, nor are you in any way involved in an adversary proceeding involving the person, Rules 4.1, 4.2, 4.3 and 4.4 do not apply to this situation. While the committee has recommended to the Board of Governors and to the PBA House of Delegates the advocacy of adopting a rule concerning prospective clients, proposed Rule 1.18, this rule is not in effect in Pennsylvania and therefore there is no duty specified in the Rules of Professional Conduct regarding someone who is not yet a client.

The question of whether a lawyer/client relationship actually exists is currently governed by substantive law. The method for determining this, as indicated in the PBA Ethics Handbook, Section 1.2a3 is:

> The modern trend is to find the existence of a client-lawyer relationship whenever the would-be client reasonably believes under the circumstances that the client is entitled to look to the lawyer for advice. Even in a social or family setting, the mere offering of legal advice can create a client-lawyer relationship. Whenever a lawyer knows or should know that a would-be client may rely on the lawyer's advice in connection with a legal matter, the lawyer should expect that a client-lawyer may be found to exist.

PBA Legal Ethics Handbook, Section 1.2a3 as above (Laurel S. Terry, Aims C. Coney, Jr. and Thomas Wilkinson, Jr., December 1998 addition, revised and expanded April 2000).

Because the only evidence of you willingness to consider undertaking any representation of this person was your presence at a time when he was not awake, it is unlikely that a lawyer-client relationship would be found to exist, and you are therefore free to contact the Department of Aging.

Even if a lawyer-client relationship exists, there is no indication that this client is under a disability requiring you to take any special measures. Furthermore, the client is explicitly requesting your assistance in remedying the situation, making the revelation of this information perfectly proper under Rule 1.6.

Accordingly, under either conclusion, you would be free to contact the Department of Aging in order to request an investigation to protect the person's rights.

advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 3.10 Issuance of Subpoenas to Lawyers

A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

Comment:

[1] It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6, the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are

ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. Rule 1.6 permits a lawyer to disclose information when necessary to prevent or rectify certain crimes or frauds. See Rule 1.6(c). If disclosure is permitted by Rule 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime or fraud.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment:

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3 Dealing with Unrepresented Person

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Comment:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

[10] Lawyers participating in the sale of a law practice are subject to ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client informed consent for those conflicts which can be waived by the client (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation. See Rules 1.6 and 1.9.

[11] If approval of the substitution of the purchasing attorney for the selling attorney is required by the Rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See Rule 1.16.

Applicability of the Rule

[12] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in the sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[13] This Rule does not apply to transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

Rule 1.18 Duties to Prospective Clients

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information which may be significantly harmful to that person learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or;

(2) all of the following apply:

(i) the disqualified lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;

(ii) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to the prospective client.

Comment:

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer

free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information, such as an unsolicited e-mail or other communication, to a lawyer, without any reasonable expectation that a client-lawyer relationship will be established is not a "prospective client" within the meaning of paragraph (a). A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not entitled to the protections of paragraphs (b) or (c) of this Rule. A person's intent to disqualify may be inferred from the circumstances.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing significantly harmful information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c) the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(ii) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.19 Lawyers Acting as Lobbyists

(a) A lawyer acting as lobbyist, as defined in any statute, or in any regulation passed or adopted by either house of the Legislature, or in any regulation promulgated by the Executive Branch or any agency

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the total fee is not illegal or excessive and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes over Fees

[5] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[6] It is Disciplinary Board policy that allegations of excessive fees charged are initially referred to Fee Dispute Committees for resolution.

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.

Comment:

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] A lawyer has duties of disclosure to a tribunal under Rule 3.3(a) that may entail disclosure of information relating to the representation. Rule 1.6(b) recognizes the paramount nature of this obligation.

Authorized Disclosure

[6] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information

relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends or learn that the client has caused serious harm to another person. However, to the extent that a lawyer is required or permitted to disclose a client's purposes or conduct, the client may be inhibited from revealing facts that would enable the lawyer effectively to represent the client. Generally, the public interest is better served if full disclosure by clients to their lawyers is encouraged rather than inhibited. With limited exceptions, information relating to the representation must be kept confidential by a lawyer, as stated in paragraph (a).

[8] Where human life is threatened, the client is or has been engaged in criminal or fraudulent conduct, or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question.

[9] Several situations must be distinguished:

[10] First, a lawyer may foresee certain death or serious bodily harm to another person. Paragraph (c)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and that the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[11] Second, paragraph (c)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime that is reasonably certain to result in substantial injury to the financial or property interests of another. Disclosure is permitted under paragraph (c)(2) only where the lawyer reasonably believes that such threatened action is a crime; the lawyer may not substitute his or her own sense of wrongdoing for that of society at large as reflected in the applicable criminal laws. The client can, of course, prevent such disclosure by refraining from the wrongful conduct.

[12] Third, a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). To avoid assisting a client's criminal or fraudulent conduct, the lawyer may have to reveal information relating to the representation. Rule 1.6(c)(3) permits doing so.

[13] Fourth, a lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. In such a situation, the lawyer did not violate Rule 1.2(d). However, if the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate and overriding interest in being able to rectify the consequences of such conduct. Rule 1.6(c)(3) gives the lawyer professional discretion to reveal information relating to the representation to the extent necessary to accomplish rectification.

[14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party

who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[15] Sixth, a lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[16] Seventh, a lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[17] Eighth, it is recognized that the due diligence associated with the sale of a law practice authorized under Rule 1.17 may necessitate the limited disclosure of certain otherwise confidential information. Paragraph (c)(6) permits such disclosure. However, as stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having a need to know it, and to obtain appropriate arrangements minimizing the risk of disclosure.

[18] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.

[19] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.

[20] Paragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[21] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (c). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[22] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually

be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[23] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[24] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[25] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lobbyists

[26] A lawyer who acts as a lobbyist on behalf of a client may disclose information relating to the representation in order to comply with any legal obligation imposed on the lawyer-lobbyist by the legislature, the executive branch or an agency of the Commonwealth which are consistent with the Rules of Professional Conduct. Such disclosure is explicitly authorized to carry out the representation. The Disciplinary Board of the Supreme Court shall retain jurisdiction over any violation of this Rule.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Comment:

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility
Formal Opinion 2007-100
Client Files – Rights of Access, Possession and Copying, Along with Retention Considerations

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility frequently receives questions from lawyers on the topic of ethical considerations relating to rights to client files. These inquiries include questions regarding the proper definition of the client "file", lawyer responsibilities to maintain and return the file, and lawyer and client rights to the contents of the file. A number of authorities and commentators have addressed these issues in the years since the Committee issued Formal Opinion 99-120 on this topic. Accordingly, the Committee believes that an update and restatement of the Committee's views is appropriate.

This Formal Opinion supersedes all prior inconsistent opinions of the Committee and should be reviewed for guidance by Pennsylvania lawyers when they are opening, closing or taking other action with respect to the contents of a client's file. For guidance on attorneys' retaining liens and charging liens and the circumstances under which a client is entitled to the return of a file, see Formal Opinion 2006-300, Ethical Considerations in Attorneys' Liens.[1]

A. Rights to the Client File

It is generally accepted that client files are maintained by a lawyer for the benefit of his or her principal, the client.[2] In Pennsylvania, there is authority for the proposition that not only does the client have a right of access to the file, but also the client has an ownership interest in the contents of the file.[3] This issue has not, however, been adjudicated by the Supreme Court of Pennsylvania. In the case of *Maleski v. Corporate Life Insurance Co.*, the Commonwealth Court stated: "once a client pays for the creation of a legal document, and it is placed in the client's file, it is the client, rather than the attorney, who holds a proprietary interest in that document."[4]

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[1] This Formal Opinion does not address a lawyer's obligations with regard to incriminating property received from the client as discussed in *Commonwealth v. Stenhach,* 514 A.2d 114 (Pa. Super. 1986). The Formal Opinion also does not address client funds or other property within the scope of Pa. R.P.C. 1.15. The Committee believes that although some of the considerations involved with respect to client files are the same as those involved with respect to other client property governed by Pa. R.P.C. 1.15, the provisions of Pa. R.P.C. 1.15 do not directly apply to the complete client file. By way of example only, if Pa. R.P.C. 1.15 applied directly to the entire client file, it would mean that a client file would have to be kept separate from the lawyer's own property, and each item of the file would be subject to recordkeeping and maintenance requirements that would be impossible to meet.

[2] *See* PBA Informal Opinion 89-75; PBA Informal Opinion 94-146.

[3] *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994). *Maleski* involved a statutory liquidator's claim to legal files held by a former law firm for an insurance company in liquidation proceedings. The law firm asserted, among other things, a work product basis for refusing to turn over the requested documents, arguing that the law firm had a proprietary interest in the files. In part based on Pa. R.P.C. 1.15(b), the court reasoned that the client held a proprietary interest in the legal files and that the firm had no right to withhold the files from the former client's statutory successor in interest.

[4] *Maleski*, 163 Pa. Commw. at 47, 641 A.2d at 6.

Client files also are business records of the lawyer. Absent some agreement or duty to the contrary, the lawyer should have the right to maintain copies of all file materials, if only as a basis for documenting the course of the representation.[5] Therefore, in the view of the Committee, the lawyer may, at his or her own expense, make and retain copies of client files.[6] Obviously, however, the lawyer is bound by any applicable duty of confidentiality with respect to the documents or their contents.[7]

Questions can arise both in the context of requests for possession of the client file and requests for access. Requests for possession generally will follow termination of the lawyer-client relationship, whereas requests for access without possession might occur during or after the relationship.[8] Generally speaking, even if a client does not seek to take possession of the physical file, the client should be given reasonable access to the file.[9] Except for situations involving attorneys' liens, disputes between a lawyer and client concerning possession of or access to the file generally can be settled by photocopying the file materials. In the case of documents with independent legal significance, determining who gets the original and who gets the copy will require some care but should not present difficult choices. In general, items such as original client business records, deeds and other real estate records, estate papers, insurance policies, and personal papers should be returned to the client unless there is a specific agreement or other reason for the lawyer to retain custody.[10]

B. The Contents of the "Client File"

In *Maleski*, the Commonwealth Court took a very broad view of the contents of the client's file. There, the court concluded that lawyer notes and memoranda are part of the goods and services "purchased" by the fee paying client and thus belong to the client.[11] Based on *Maleski*, the Legal Ethics and Professional Responsibility Committee stated in Formal Opinion 99-120 that a lawyer's file notes and, possibly, drafts of documents are part of a client's file.[12] Based in part on the continuing inquiries on this topic, however, the Committee believes some elaboration is appropriate.

The term "client file" is easily stated but can be difficult to apply. In the most simplistic sense, the term encompasses the physical items that are placed into a segregated physical storage

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[5] *See, e.g.*, Pa. R.P.C. 1.16(d) (Upon termination of representation, the "lawyer may retain papers relating to the client to the extent permitted by other law.").

[6] *Quantitative Fin. Strategies Inc. v. Morgan Lewis & Bockius, LLP*, 55 Pa. D. & C.4th 265 (Phila. Cty., March 12, 2002); *see also* PBA Informal Opinion 96-157; PBA Informal Opinion 94-17.

[7] *See* Pa.. R.Prf.C. 1.6(a), (d) (lawyer has duty to maintain confidentiality of client information).

[8] *See, e.g.*, Pa. R.P.C. 1.16(a) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers . . . to which the client is entitled. . . .").

[9] *See* PBA Formal Opinion 99-120; *see also Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994)..

[10] *See* PBA Formal Opinion 99-120; *see also* PBA Formal Opinion 2001-300 (stating that a lawyer may retain original estate documents, but only at the client's request).

[11] *Id.* at 46-47, 641 A.2d at 6.

[12] *See* PBA Formal Opinion 99-120.

place, such as a file folder, drawer or box. In reality, however, it is obvious that the file can encompass items that are not physically segregated, or are not themselves "physical" objects. For example, a client's file might consist in part of a central collection of legal documents (such as copies of pleadings in a litigation matter), documentary evidence, and correspondence. These items should be easy to define. Nevertheless, all but very small matters will have a variety of other documents relating to that particular representation, such as electronic mail messages, telephone notes, research notes, billing materials and other things. Some of these items might be collected in the physical file and others might be maintained elsewhere (as in a lawyer's desk file for telephone notes). Moreover, some of these items will relate to the substance of the representation and others might have a closer association to the administrative functions involved with running a law practice (such as assignment memos given to subordinate lawyers).

In addition, as a consequence of the proliferation of electronic mail, electronic documents, and the ability to send and receive documents via electronic mail, almost all documents will exist in multiple locations (e.g., on multiple hard drives and on multiple locations on network servers). For example, when an electronic mail message includes multiple recipients and follow-up replies, each person's retained version of such a string of communications can be extremely similar, yet different (such as when one recipient chooses to reply to only some of the original addressees).

Lawyers will need to consider the circumstances and scope of the engagement when determining the scope of the "file." Examples of items that might fall outside the scope of the formal "file" are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem.[13] Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file.

Court and ethics opinions from other jurisdictions have followed two basic approaches in attempting to categorize client files for purposes of determining client rights of access or possession:

- The majority of jurisdictions that have addressed this issue follow the "entire file" approach, concluding that the client is entitled to everything in the lawyer's possession necessary to the continued representation of the client.[14] Based on

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[13] *See* PBA Informal Opinion 96-157.

[14] *See, e.g., In re Sage Realty Corp.*, 91 N.Y.2d 30, 35 (NY 1997) ("We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view"; lawyer should disclose documents unless it would violate duty owed to a third party or duty imposed by law; lawyer also not required to disclose "firm documents intended for internal law office review and use" such as notes regarding "tentative preliminary impressions") (collecting cases); D.C. Bar Opinion 333 (Dec. 20, 2005) (FDIC, as successor to bank client's interests, is entitled to "entire file", including "all material that the client or another attorney would reasonably need to take over the representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client's interests"; attorney not normally required to turn over administrative materials or materials completely unrelated to the substance of the representation); Restatement (Third) of The Law Governing Lawyers, § 46(2) (2000) (client should be given access to all documents relating to the representation unless substantial grounds exist to refuse); Nebraska Advisory Op. No. 2001.3 (general rule is that client is entitled to all documents provided to the attorney, all items obtained via litigation discovery, all correspondence, all notes, memos, briefs and "other matters" generated by counsel on the client's business, but that precise contents of "file" depends on the nature of the work,

Maleski, Pennsylvania is usually identified with this majority. Even under the majority approach, however, a lawyer is entitled to exclude from the file those things that the client has no right to receive. A lawyer might have an obligation not to provide parts of the file either due to the rights of a third party, or some other legal obligation. The best example of such a document is one that relates to secret information of a litigation adversary that is disclosed to the lawyer with the understanding that the lawyer's client will not receive the information.[15]

- A substantial subset of the "entire file" group of jurisdictions allow other "non-substantive" items, generally those associated with law practice management, to be excluded from the "file" that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel.[16]

- A small minority of jurisdictions has adopted a "limited file" approach. Under this view, the client is entitled to "core" materials, such as filed pleadings, correspondence and final memoranda on issues significant to the representation.[17] The remaining materials are not part of the client "file" and the client would not,

(continued...)

agreement between the client and counsel, and the particular circumstances of the case); *see also* Sylvia Stevens, "Client Files, Revisited: What Goes in Them – and Who Owns Them", Oregon State Bar Bulletin (Jan. 2003) (majority view, giving client access to both end product and lawyer work product and other contents of the file, including electronic documents, is the more sound view); New Hampshire Bar Association Practical Ethics Article (Dec. 1998) ("The Ethics Committee continues to believe that the majority view [giving the client access to the entire file] is the proper view"; rejecting notion that counsel can create a separate "risk management file" to segregate materials that otherwise would be in client file and open to client access); Colorado Ethics Op. 104 (April 17, 1999) (adopting majority view that "entire file" is available to client but stating that "internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product", and observing that whether client is entitled to personal attorney notes will depend on circumstances, and that redaction or summarization might be appropriate).

[15] *See, e.g.,* Utah State Bar Ethics Advisory Opinion No. 06-04 (Dec. 8, 2006) (discussing circumstances under which a lawyer in a criminal defense context could potentially withhold information from a client, even though requested and part of client's file).

[16] *See, e.g.,* Maine Ethics Op. No. 187 (Nov. 5, 2004) ("attorney should deliver the client's property and any material, not otherwise readily available to the client, that the attorney knows or has reason to know is or would be of value to the client"; generally observing that documents such as time sheets, billing records, internal case assignment and conflict check forms would not be important to client need not be delivered, but most other documents, including drafts that contain substantive information not found in later drafts, ordinarily would be important to the client); South Carolina Ethics Advisory Op. No. 92-37 (lawyer's personal impressions of the client, and documents relating to other representations that were placed into file for potential reference, need not be made available to client).

[17] *See, e.g., Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App. 1992) (client entitled to lawyer's work product only to the extent it is reasonably necessary to the client's understanding of the lawyer's "end product"); Virginia Legal Ethics Op. 1690 (June 5, 1997) ("The sense of the Committee is that, absent exigent circumstances, material prejudice [to the client] does not occur simply because the successor lawyer has to create the workproduct . . . contained in the original lawyer's files"; supporting lawyer's ability to decline to turn over work product under some circumstances); *see also* John Allen, Focus on Prof. Resp. – Ownership of Lawyer's Files About Client Representations Who Gets the "Original" Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (Michigan law does not support client "ownership" of the file but only a right of access to the file, which does not necessarily include "internal firm records").

in the view of these jurisdictions, be entitled to such materials without some showing of need.

As described more fully in the following paragraphs, the Committee adheres to the majority approach with respect to client access to and possession of file materials.

C. Lawyer-Client Agreements on File Access, Possession and Copying

Given the many fact-specific issues that can arise in the context of the content of client files, rights of access to or possession of client files, and the expense of copying, storing or searching such files, the Committee believes that this is an area that can be addressed by agreement between the client and the lawyer, so long as the agreement is clearly explained and is reasonable. Several ethics authorities from other jurisdictions have observed that a written arrangement with the client can help to define the contents of the file and the circumstances of client access or possession.[18] Nevertheless, it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer.

D. Cost of Collecting, Searching, Delivering and Copying Client File Documents

Client requests for file materials, or copies of file materials, can arise in at least three separate contexts: (1) during the course of representation; (2) during transfer of representation between counsel; and (3) following representation.

The Committee believes that, in each of these contexts, the cost of copying and delivering file materials, as well as the cost of compiling and delivery the actual file, should be handled according to the agreement between the lawyer and the client regarding costs. The Committee recommends making some provision for these circumstances in an engagement letter.

If the client is going to be asked to pay for a significant expense created by such a request, such as the expense of extensive electronic sorting or retrieval, the client should be consulted before the undertaking is commenced so that the client appreciates the consequences and expense of the request.

When a client seeks actual possession of the file, the lawyer may retain copies of client papers unless such retention is prohibited by law or other arrangement with the client.[19]

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[18] *See, e.g.,* New Hampshire Bar Assoc. Ethics Comm., "Clients Are Entitled To Their Files," Practical Ethics Article (Dec. 1998) (some documents could be excluded from the "file" if so defined in the fee agreement but exclusion of all attorney "personal notes" from the file cuts "too broad a swath;" documents needed for protection of client's interests could not be excluded from file; lawyer must "tread carefully" and explain effect and rationale for requested agreement); Nebraska Advisory Op. No. 2001.3 (the scope of the "file" to which the client is entitled depends in part on the agreement between the client and the lawyer); *see also* John Allen, Focus on Prof. Resp. – Ownership of Lawyer's Files About Client Representations Who Gets the "Original" Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter); Nebraska Advisory Op. No. 2001.3 (engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct).

[19] *See* Pa. R.P.C. 1.16(d) ("The lawyer may retain papers relating to the client to the extent permitted by other law.").

However, where the client has paid for the creation of the file, the cost of the lawyer's copy should be borne by the lawyer, absent agreement to the contrary.[20] A trial court in Philadelphia County has held that a lawyer may retain copies of client papers, even over the client's objection.[21]

E. Recommended Approach

Due to the numerous, case-specific factors that affect the contents of the "file" and the client interests, any general statement of the rule is likely to require special consideration before it is applied. At least one commentator has attempted to set forth a proposed model statute that would require a different analysis depending upon the context in which the request for file access or possession is sought.[22]

Notwithstanding the difficulty in applying any a priori rule, the Committee believes that it will be helpful to set forth a guideline. Accordingly, the Committee reconfirms that the "entire substantive file" approach is the one that best protects the client's interests while accommodating the realities of law practice. As adopted by the Committee, the recommended approach is thus:

> **A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client.**
>
> **The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in**

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[20] *Quantitative Fin. Strategies Inc.*, 55 Pa. D. & C.4th at 282; *see also* PBA Informal Opinion 96-157; Philadelphia Opinion 93-22.

[21] In *Quantitative Financial Strategies, Inc.*, the court refused to issue a writ of seizure for copies of a client's file retained by a law firm after the representation ended, where the firm returned the complete original file to the client, keeping a copy made at the firm's expense. Even so, the court stated that the copy retained by the law firm should be stored, at the law firm's expense, in an independent repository. The court further stated that the client was entitled to be notified before the firm accessed the file. The court stated that this measure would allow the client to scrutinize access to the file to prevent misuse, while at the same time protecting the law firm from unfounded claims of misuse.

[22] Fred C. Zacharias, "Who Owns Work Product?", Vol. 2006 Ill. L. Rev. 127, 163-72 (2006) (setting forth proposed model statute).

response to a generalized request for access to or possession of the "file", the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as "restricted confidential" documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request.

So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.

The Committee stresses that the touchstone for analyzing the need to provide access or possession is whether a document or other item will be useful to the client for the purpose of protecting the client's interests. In the overwhelming majority of situations, the client – not the lawyer – will be the party with the right to decide, in the event of a dispute, whether something in the possession of the lawyer is important to the client's own interests. Therefore, if a client makes a request for a particular item or category of items generated in the course of representing the client, ordinarily the client should be entitled to such information absent prior agreement or some other compelling reason.

F. Opening and Closing Client Files

Disputes over the contents of a lawyer's file and rights of retention can largely be eliminated by agreements between the client and lawyer set forth in the initial engagement letter. Even after an engagement has begun, the lawyer and client are free to modify their engagement agreement to address these matters. The Committee believes that the following topics are worth considering in connection with opening and closing client files:

(1) A lawyer should consider developing a detailed file storage, management, and retention policy. Such a policy can address the return of client documents, document retention and destruction periods, document destruction methods, and "file closing letters" to clients. A lawyer's retention policy should establish a procedure for file destruction that protects client confidentiality while ensuring complete destruction (e.g., burning, shredding, electronic shredding, etc.).

(2) A lawyer or the lawyer's assistant (with lawyer supervision when appropriate) should make the decision of how and when to destroy part or all of the file.

(3) A lawyer should consider statutes of limitations, substantive law, tolling agreements or tolling jurisprudence, the nature of the particular case and the client's particular needs when deciding to destroy a file. A dominant consideration should be the instructions and wishes of the client. In the absence of a prior agreement, the client should be consulted regarding the disposition of the file. In some cases, the lawyer may need to give consideration to the law of spoliation insofar as it would affect the client's ability to use or produce documents or data in an unrelated representation. Abandoned property or files should be handled in accordance with the statements below regarding such property.

(4) Client confidentiality obligations continue after the representation ends. File disposition or destruction should be conducted so as to protect client confidentiality.

(5) An index should be maintained regarding all files destroyed or returned to clients. Consideration should be given to permanent retention of the index and to permanent retention of copies of initial engagement letters (and any supplements or modifications), file destruction notices to clients, and client consents to destruction.

(6) The lawyer and client can consider a specific agreement for handling the client file and data in complex cases. In such situations, where client data can consume thousands of square feet of storage space or many terabytes of electronic data, special arrangements may need to be established to properly maintain, transfer or dispose of such data. In addition, in circumstances in which client property requires special handling or care, the lawyer should consider addressing such items in an engagement letter.[23]

Typically, client files are closed when the representation is terminated. However, the lawyer and client are encouraged to agree to a specific file closure and retention policy at the outset of their relationship, which can be modified as necessary.

PBA Legal Ethics and Professional Responsibility Committee

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

[23] *See* PBA Formal Opinion 99-120.

SUGGESTED MINIMUM RETENTION PERIODS

These periods are suggested minimum retention periods only. Lawyers must be guided by the individual interests, needs or requests of their clients, any court orders applicable to the file, along with any other legal standards, such as tolling standards, that may apply.

NOTIFICATION OF PROFESSIONAL LIABILITY INSURANCE Records of required disclosures must be maintained for 6 years following termination of representation. Pa. R.C.P. 1.4(c).

CRIMINAL Retain until all appeals and post-conviction habeas periods have expired.

DIVORCE Following order of dissolution, retain until time periods for performance of any terms under court order or any settlement agreement have expired.

PERSONAL INJURY Retain until all claims against potential defendants are exhausted. Retain files containing settlements for minors until two years following attainment of age of majority.

REAL ESTATE Retain five years after closing on sale or foreclosure.

ESTATE PLANNING Retain until client's death plus probate period.

PROBATE Retain until estate is settled and all IRS audit periods expired.

IRS TAX RECORDS Retain for seven years. IRS regulations give 6 years to pursue any omission of more than 25 percent of income. Add one year for cushion.

CONTRACT LITIGATION Retain five years after satisfaction of judgment or five years after filing if not brought to trial.

BANKRUPTCY Retain five years after discharge or payment or discharge of trustee or receiver.

*163 Pa. Commw. 49, *; 641 A.2d 7, **;*
*1994 Pa. Commw. LEXIS 180, ****

CYNTHIA M. MALESKI, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, BY HER DEPUTY, RONALD E. CHRONISTER, Plaintiff v. CORPORATE LIFE INSURANCE COMPANY, Defendant

No. 175 M.D. 1993

COMMONWEALTH COURT OF PENNSYLVANIA

163 Pa. Commw. 49; 641 A.2d 7; 1994 Pa. Commw. LEXIS 180

March 22, 1994, ARGUED
March 25, 1994, FILED

SUBSEQUENT HISTORY: [*1]** Memorandum Opinion Redesignated Opinion and Ordered Published April 11, 1994.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner, former counsel to defendant insolvent life insurer sought reconsideration of as order of the commonwealth court (Pennsylvania), regarding the disposition of sealed boxes of documents from petitioner's representation of defendant, in an action originally brought by plaintiff insurance commissioner. Petitioner contended that it was entitled to retain the files, because non-payment of its bills gave it a common law retaining lien.

OVERVIEW: Following a determination that defendant life insurer was insolvent within the meaning found in the Insurance Department Act, 40 P.S. § 221.14, the trial court ordered that defendant be dissolved and liquidated and that plaintiff insurance commissioner be appointed statutory liquidator. The court also directed that all files pertaining to defendant be turned over to petitioner law firm, acting on behalf of plaintiff. After petitioner had served as legal counsel to defendant, petitioner demanded that all files pertaining to defendant be turned over. In compliance with the court's order, petitioner turned over all of defendant's files in its possession, but sealed 19 boxes of documents. Petitioner then filed a motion for reconsideration under the court's original jurisdiction. The court denied the motion, and held that, although it did not waive any potential retaining lien by involuntarily relinquishing files in compliance with the court's order, petitioner's ability to retain the files was vitiated by §§ 221.20(c), 221.23(14). Therefore, petitioner's assertion of a retaining lien did not entitle it to withhold defendant's files from plaintiff.

OUTCOME: The court denied the motion of petitioner, former counsel to defendant insolvent life insurer for reconsideration of the trial court's order regarding documents from petitioner's representation of defendant, in an action originally brought by plaintiff insurance commissioner. The court held that petitioner's assertion of a retaining lien was not waived, but did not entitle petitioner to withhold files from the statutory liquidator.

CORE TERMS: liquidator, insurer, liquidated, liquidation, retaining, reconsideration, law firm, sealed, boxes, attorney-client, retention, withhold, common law, life insurance, insolvent

insurer, secured creditor, equitable, wherever, former officers, work-product, liquidation proceedings, right to retain, preferential transfer, professional relationship, client's files, public policy, proof of claim, pre-liquidation, policyholders, non-payment

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Real Property Law > Nonmortgage Liens > Equitable Liens

HN1 Pennsylvania recognizes the equitable right of an attorney to retain possession of documents, money, or other property coming into an attorney's possession by virtue of the professional relationship until the lawyer voluntarily surrenders them or is been paid for his services. It is an equitable, passive lien, without the power of enforcement or sale and valuable only to the extent that the attorney's retention of a client's files will embarrass the client. An attorney's retaining lien has no value to the attorney in and of itself. Rather, its value lies in the need of the client for its files. An attorney may therefore be well entitled to assert such a lien, and may be entitled to payment for the services it rendered from the proceeds of the liquidation. More Like This Headnote

Insurance Law > Industry Regulation > Insurer Insolvency > Liquidations & Rehabilitations

HN2 See 40 P.S. § 221.20(c).

Insurance Law > Industry Regulation > Insurer Insolvency > Liquidations & Rehabilitations

HN3 40 P.S. § 221.23(14) specifically gives the statutory liquidator the power to remove any or all records and property of the insurer to the offices of the commissioner or to such other place as may be convenient for the purposes of efficient and orderly execution of the liquidation. More Like This Headnote

Insurance Law > Industry Regulation > Insurer Insolvency > Liquidations & Rehabilitations

HN4 The right of the statutory liquidator to take immediate possession of the papers of an insolvent insurer "wherever located" is conferred by the express language of 40 P.S. §§ 221.20(c), 221.23(14), in furtherance of that goal when it is proven that an insolvent insurer represents a danger to the public and policyholders, § 221.1. The immediate access to such documents essential to promoting that interest outweighs the added security retention of such files gives to the attorney as a creditor. Moreover, § 221.14 offers attorneys an opportunity to mitigate any diminution of their claim by providing them the opportunity to prove their claim and seek distribution status as a creditor, §§ 221.37-221.42. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Industry Regulation > Insurer Insolvency > Liquidations & Rehabilitations

HN5 The power of the statutory liquidator conferred by the Insurance Department Act, 40 P.S. § 221.14, to obtain possession of the documents of an insurer in liquidation is paramount over the claim of an attorney's lien. Even if the document retrieval provisions of § 221.14 did not supersede retaining liens, the equitable nature of such a lien would dictate that it be superseded in the face of an overriding public policy. In enacting the liquidation provisions of § 221.14, the general assembly seeks to protect the public and policyholders from an insolvent insurer through giving the statutory liquidator the power necessary to maximize the liquidated insurer's estate, § 221.1. Achieving this important goal requires that the statutory liquidator be able to gain access to the papers of the insurer, including its legal files. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Insurance Law > Claims & Contracts > Costs & Attorney Fees > Failure to Pay Claims

Insurance Law > Industry Regulation > Insurer Insolvency > Liquidations & Rehabilitations

HN6 One should not be allowed to insulate his business records and deprive creditors of their full entitlement by delivering them to his lawyer and then withholding payment of the fee. Accordingly, an attorney's assertion of a retaining lien does not entitle them to withhold files relating to their representation of an insurer from the statutory liquidator. More Like This Headnote

COUNSEL: Jerome J. Shestack, Zachary L. Grayson and Linda J. Wells for plaintiff.

Peter J. Tucci, Michael L. Browne, Denise Pallante and Richard A. Sprague for defendant.

James D. Golkow, Patrick J. O'Connor, Gerianne Hannibal and Douglas B. Lang for intervenor, Berry & Martin.

JUDGES: BEFORE: HONORABLE DAN PELLEGRINI, Judge

OPINION BY: DAN PELLEGRINI

OPINION

ORIGINAL JURISDICTION

[*50] **[**7]** The law firm of Berry & Martin (Berry & Martin), former counsel to Corporate Life Insurance Company (Corporate Life) moves for reconsideration of this Court's order of March 9, 1994, regarding the disposition of **[**8]** nineteen sealed boxes of documents from files relating to its representation of Corporate Life. Berry & Martin now contends that it is entitled to retain all files related to its representation of Corporate Life because non-payment of its bills has given it a common law retaining lien on those files.

On February 18, 1994, following a determination that the corporation was insolvent within the meaning found in the Insurance Department Act (Act), [1] this Court ordered that Corporate Life, a Pennsylvania stock life insurance company, be dissolved and liquidated **[***2]** and the Insurance Commissioner be appointed Statutory Liquidator. In addition to the Order of Liquidation, this Court also directed that all files pertaining to Corporate Life be turned over to the law firm of Wolf, Block, Schorr and Solis-Cohen (Wolf, Block) acting on behalf of the Statutory Liquidator. After Wolf, Block determined **[*51]** that Berry & Martin had served as legal counsel to Corporate Life, representatives of Wolf, Block demanded that all Berry & Martin files pertaining to the corporation be turned over.

FOOTNOTES

1 Act of May 17, 1921, P.L. 789, *as amended,* 40 P.S. § 221.14.

In compliance with this Court's order, Berry & Martin turned over all Corporate Life files in its possession, but sealed nineteen boxes of documents, asserting immunity under the attorney-client privilege on behalf of both Corporate Life and its former directors and officers, as well as the work-product doctrine on its own behalf. Berry & Martin then filed a motion for reconsideration of the February 18, 1994, order, essentially seeking a **[***3]** protective order regarding the contents of the nineteen sealed boxes. At issue in that motion for reconsideration were three questions dealing with whether Berry & Martin could withhold documents relating to Corporate life. Specifically raised were:

1) Whether the former managers of Corporate Life could claim Corporate Life's attorney-client privilege in any documents in those files;

2) Whether former directors and officers of Corporate Life could claim a privilege separate from that of the corporation in any documents in those files; and

3) Whether Berry & Martin could assert a proprietary work-product privilege in those files.

On March 9, 1994, this Court issued an Order granting Berry & Martin's Petition for Reconsideration in part. In doing so, we held:

1) The ability to assert any attorney-client privilege with respect to documents in which Corporate Life could have claimed a privilege had passed to the Statutory Liquidator and that former officers and directors of Corporate Life could not assert such a privilege;

2) That Berry & Martin could not withhold any documents from the Statutory Liquidator on the basis of any work-product privilege; and

3) That the former **[***4]** officers and directors of Corporate Life could potentially assert attorney-client privilege as to any communications they could prove were made to Berry & **[*52]** Martin in their individual, as opposed to corporate capacities.

This Court then ordered that an inventory be taken of the nineteen sealed boxes to permit Berry & Martin to identify those documents in which it could assert a personal attorney-client privilege on behalf of the former officers and directors of Corporate Life.

Berry & Martin filed the instant motion for reconsideration which we granted in part by order limiting the reconsideration to the issue of whether Berry & Martin would be entitled to withhold the contents of its Corporate Life files on the basis of an attorney's retention lien. That argument was not raised previously and is presently the only issue before us.

Berry & Martin contends that because it has not been paid approximately $ 500,000 for legal work done on behalf of Corporate Life, Pennsylvania law gives it the right to retain all Corporate Life files in its possession, and consequently, it may refuse to turn those files over to the Statutory Liquidator. [2] The **[**9]** Statutory Liquidator disputes whether Berry **[***5]** & Martin can assert such a lien, but contends that even if it can, the authority it has to take possession of Corporate Life files under the Act is paramount to such a lien. Moreover, it contends that Kevin Berry, a principle in Berry & Martin, was also an officer of Corporate Life acting as in-house counsel to the insurer and knew that Corporate Life was insolvent when it billed the insurer over $ 500,000. The Statutory Liquidator contends that to the extent Berry & Martin could exercise any lien, that lien would constitute a voidable preferential transfer under 40 P.S. § 221.30(a) (iv).

FOOTNOTES

2 While in reality, Berry & Martin's Corporate Life files, those contained in the nineteen sealed boxes, are already in the possession of the Statutory Liquidator, we recognize that Berry & Martin's relinquishing the files was in compliance with this Court's order and was involuntary. Under such circumstances, Berry & Martin has not waived any retaining lien it might have. c.f. *Silverstein v. Hirst*, 376 Pa. 536, 103 A.2d 734 (1954). We therefore continue to refer to Berry & Martin's right to "retain" those files.

[*6]** HN1 Pennsylvania recognizes the equitable right of an attorney to retain possession of documents, money, or other **[*53]** property coming into an attorney's possession by virtue of the professional relationship until the lawyer voluntarily surrenders them or has been paid for his services. *Smyth v. Fidelity & Deposit Co.*, 125 Pa. Superior Ct. 597, 190 A. 398, *aff'd*, 326 Pa. 391, 192 A. 640 (1937). It is an equitable, passive lien, without the power of enforcement or sale and valuable only to the extent that the attorney's retention of a client's files will embarrass the client. *Id.* An attorney's retaining lien has no value to the attorney in and of itself. Rather, its value lies in the need of the client for its files. Berry & Martin may therefore be well entitled to assert such a lien, and may be entitled to payment for the services it rendered from the proceeds of the liquidation. However, even assuming that Berry & Martin can prove a valid interest in Corporate Life's files and is entitled to payment, such a purported attorney's lien, as a matter of law, does not act as a bar to a statutory liquidator **[***7]** taking possession of those files prior to the distribution of the proceeds of the insurer in liquidation proceedings under the Act.

In entering into a professional relationship with Corporate Life, Berry & Martin undertook to represent a client engaged in possibly the most regulated field of business in the Commonwealth: the selling of life insurance. By representing a business engaged in the sale of life insurance policies, Berry & Martin took on a client with full knowledge that it was regulated in every aspect of its operation, and subject to regulatory liquidation if need be for the "protection of the interests of the insureds, and the public generally." 40 P.S. § 221.1.

Berry & Martin's ability to retain Corporate Life's legal files is vitiated by two provisions of the Insurance Department Act relating to the power and authority of the statutory liquidator to recover the papers of a liquidated insurer. 40 P.S. § 221.20(c) provides that:

> HN2 The liquidator shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the date of the filing of **[***8]** **[*54]** the petition for liquidation. He may recover and reduce the same to possession. . . .

In addition, HN3 40 P.S. § 221.23(14) specifically gives the statutory liquidator the power to:

> remove any or all records and property of the insurer to the offices of the commissioner or to such other place as may be convenient for the purposes of efficient and orderly execution of the liquidation.

These sections form part of a comprehensive regulatory scheme which speaks directly to the power of a statutory liquidator to gain access to those non-privileged documents which may assist in the Act's goal of maximizing the assets of a liquidated insurance company for distribution to the insureds.

Under the New York version of the Uniform Insurer's Liquidation Act containing provisions virtually identical to those found in the Act, the Federa1 District Court for the Northern District of Ohio addressed the issue presented here. In *Superintendent of Insurance of the State of New York v. Baker & Hostetler*, 668 F.Supp. 1054 (N.D. Oh.), *aff'd without opinion*, 826 F.2d 1065 (6th Cir. 1987), the statutory liquidator sought possession of the **[***9]** liquidated insurer's files **[**10]** from its pre-liquidation law firm. The firm had refused to deliver the files, asserting that the insurer's non-payment of approximately $ 300,000 in legal fees entitled it to retain them under a common law attorney's lien. *Id.* at 1055. In ordering the law firm to turn over the files to the statutory liquidator, the court relied on the language of Section 7409 of the New York Insurance Law (Consol. 1985), which gave the statutory liquidator the right to recover all books, records and papers of the liquidated insurer "wherever located." *Id.* Noting

that the same language appears in Section 3903.52(A) of the Ohio Revised Code, the court stated that the language is:

> very clear on this *point-regardless of any lien Baker may have in the books, accounts or records of Union Indemnity, it must turn those documents over to the superintendent. . . .*

[*55] *Id.* (Emphasis added.) The court went on to point out that by delivering the records to the statutory liquidator, the law firm would not lose any security interest it could prove in the appropriate proceeding. *Id.* at 1056.

In another case, **[***10]** *In re: Liquidation of Mile Square Health Plan,* 218 Ill. App. 3d 674, 578 N.E.2d 1075, 161 Ill. Dec. 429 (Ill. 1991), an Illinois court reached a different conclusion under distinguishing circumstances. In *Mile Square,* an attorney with no connection to a liquidated insurer and who had only performed work for the liquidated insurer on a single occasion in opening a default judgment, submitted a claim for its only bill, $ 2,365. *Id.* at 1077. The statutory liquidator accepted the claim as that of a general creditor and demanded the surrender of the insurer's files. *Id.* While the court recognized that an attorney would be unable to exercise his lien by retaining documents if it would adversely affect the public interest, it did not apply this principle. *Id.* at 1079. Instead, the court held that since the effect of assigning the attorney general creditor status would be to strip the attorney of the secured status he would have had if he retained possession of the files, the attorney would be permitted to retain them until he was either paid or adequate security was provided. *Id.* at 1081. Unlike the present situation, **[***11]** *Mile Square* involved a lien asserted by an attorney with no prior connection to the insurer, who performed limited services in a routine matter for a relatively insignificant fee. This distinguishes that case, although not totally, from the circumstances here where Berry & Martin's proposed lien stems from ongoing representation as corporate counsel.

In any event, we think that the approach taken by the court in *Baker & Hostetler* is the better one. The entire purpose of the pervasive regulation of the insurance industry is to protect the public and policy holders. HN4 The right of the statutory liquidator to take immediate possession of the papers of an insolvent insurer "wherever located" was conferred by the express language of 40 P.S. § 221.20(c) and 221.23(14) in furtherance of that goal when it is proven that an insolvent **[*56]** insurer represents a danger to the public and policyholders. 40 P.S. § 221.1. The immediate access to such documents essential to promoting that interest outweighs the added security retention of such files gives to the attorney as a creditor. Moreover, the Act offers attorneys an opportunity to mitigate any diminution of their claim by providing them the **[***12]** opportunity to prove their claim and seek distribution status as a creditor. 40 P.S. §§ 221.37-221.42. [3]

FOOTNOTES

3 While certainly not controlling, a similar situation arises under the Bankruptcy Code. It is generally accepted that a common law attorney's lien is not extinguished when a client files for bankruptcy. *Browy v. Bannon,* 527 F.2d 799 (7th Cir. 1976). However, the Bankruptcy Code contains a separate provision which would permit the court or trustee to take possession of a debtor's files in which an attorney may assert a retaining lien. 11 U.S.C. § 542(e). The attorney may then go on to establish his right to take part in the distribution of the estate as a secured creditor and may even be entitled to adequate protection to preserve their secured claim. In essence, he maintains secured creditor status, even though he no longer has possession of the security.

HN5 The power of the statutory liquidator conferred by the Act to obtain possession of the documents **[***13]** of an insurer in liquidation is paramount over the claim of an attorney's lien. Even if the document retrieval provisions **[**11]** of the Act did not supersede retaining

liens, the equitable nature of such a lien would dictate that it be superseded in the face of an overriding public policy. *In re: Garcia,* 69 B.R. 522 (Bankr. E.D. Pa), *aff'd,* 76 B.R. 68 (E.D. Pa.), *Aff'd without opinion,* 838 F.2d 460 (3d Cir. 1987). In enacting the liquidation provisions of the Act, the General Assembly sought to protect the public and policyholders from an insolvent insurer through giving the statutory liquidator the power necessary to maximize the liquidated insurer's estate. 40 P.S. § 221.1. Achieving this important goal requires that the statutory liquidator be able to gain access to the papers of the insurer, including its legal files. In *Garcia,* the Bankruptcy Court refused to permit an attorney to shield the debtor's files from discovery on the basis of a retention lien because of the necessity for full disclosure to insure that the estate would be maximized. In affirming the Bankruptcy Court, the District **[***14]** Court reiterated the overwhelming public policy interest at stake and aptly noted that HN6 one should not be allowed to insulate his business **[*57]** records and deprive creditors of their full entitlement by delivering them to his lawyer and then withholding payment of the fee. *Garcia II, supra,* 76 B.R. at 69. Accordingly, Berry & Martin's assertion of a retaining lien does not entitle them to withhold files relating to their representation of Corporate Life from the Statutory Liquidator.

Berry & Martin's right as a creditor and the priority of its claim must be resolved through the liquidation proceedings set forth in the Act. The Act provides a mechanism and procedures by which a claim against the insurer is to be submitted and its status as a creditor determined. If Berry & Martin desired to make a claim on the estate of Corporate Life, it must first file a proof of claim in accordance with 40 P.S. § 221.38. It may even attempt to prove secured creditor status in that proof of claim. 40 P.S. § 221.38(a)(5). The Statutory Liquidator may accept Berry & Martin's claim, or may dispute it as to validity, or reasonableness. 40 P.S. § 221.41. Even if the Statutory **[***15]** Liquidator accepts Berry & Martin's claim in full and as secured, it may still seek to avoid that claim as a preferential transfer based upon the allegations of Kevin Berry's position within Corporate Life. 40 P.S. § 221.30. Berry & Martin will have access to this Court to review any of these determinations, but only once they are made. [4] 40 P.S. §§ 221.31, 221.40, 221.43.

FOOTNOTES

4 For this reason, we do not address the issue of whether Kevin Berry's alleged participation in the pre-liquidation management of Corporate Life would give rise to a voidable preference.

An appropriate order will be entered.

DAN PELLEGRINI, JUDGE

ORDER

AND NOW, this *25th* day of *March,* 1994, Petitioners' motion for reconsideration of this Court's Order of March 9, 1994, on the basis of the assertion of an attorney's lien is DENIED.

DAN PELLEGRINI, JUDGE

ORDER

AND NOW, this *11th* day of *April,* 1994, it is ordered that the opinion filed March 25, 1994, shall be designated OPINION rather than MEMORANDUM OPINION, and that it **[***16]** shall be reported.

DAN PELLEGRINI, JUDGE

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consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a client-lawyer relationship separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded. Complete records of the receipt, maintenance and disposition of such property shall be preserved for a period of five years after termination of the client-lawyer relationship or after distribution or disposition of the property, whichever is later.

(b) Upon receiving property of a client or third person in connection with a client-lawyer relationship, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in connection with a client-lawyer relationship a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim an interest, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) In those parts of this Rule dealing with funds of clients or third persons which the lawyer receives in connection with a client-lawyer relationship, excluding funds which the lawyer receives while acting as fiduciary for an estate, trust, guardianship or conservatorship, the following definitions are applicable:

(1) Trust Account means an interest-bearing account in a financial institution, as defined in Rule of Disciplinary Enforcement 221, in which the lawyer deposits such funds.

(2) Qualified funds means such funds when they are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

(3) Nonqualified Funds means all other such funds.

(4) An Interest On Lawyer Trust Account (IOLTA Account) is an unsegregated Trust Account for the deposit of Qualified Funds by a lawyer.

(5) The IOLTA Board means the Pennsylvania Interest on Lawyers Trust Account Board.

(e) The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying bank services charges on that account, and only in an amount necessary for that purpose. A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner. At all times while a lawyer holds funds of a client or third person in connection with a client-lawyer relationship, the lawyer shall also maintain another account that is not used to hold such funds.

(f) All Nonqualified Funds shall be placed in a Trust Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.

(g) All Qualified Funds shall be placed in an IOLTA Account. The rate of interest payable on an IOLTA Account shall not be less than the highest rate or dividend generally available from the financial institution to its non-IOLTA Account customers when the IOLTA Account meets or exceeds the same minimum balance and other account eligibility qualifications applicable to those other accounts. In no event shall the rate of interest payable on an IOLTA Account be less than the rate paid by the financial institution on negotiable order of withdrawal accounts (NOW) or super negotiable order of withdrawal accounts. An account shall not be considered an IOLTA Account unless the financial institution at which the account is maintained shall:

(1) Remit at least quarterly any interest earned on the account to the IOLTA Board.

(2) Transmit to the IOLTA Board with each remittance and to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, the amount of interest remitted from the account and the average daily balance, if available.

(h) A lawyer shall be exempt from the requirement that all Qualified Funds be placed in an IOLTA Account only upon exemption requested and granted by the IOLTA Board. If an exemption is granted, the lawyer must hold Qualified Funds in a Trust Account. Exemptions shall be granted if: (1) the nature of the lawyer's practice does not require the routine maintenance of a Trust Account in Pennsylvania; (2) compliance with this paragraph would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest financial institution or on other compelling and necessitous factors; or (3) the lawyer's historical annual Trust Account experience, based on information from the financial institution in which the lawyer deposits funds,

demonstrates the service charges on the account would significantly and routinely exceed any interest generated.

(i) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment in good faith that the monies deposited were Qualified Funds.

(j) There is hereby created the Pennsylvania Interest On Lawyers Trust Account Board, which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court. Additionally, upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA funds for the purpose set forth in this Rule. The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) Disbursement and allocation of IOLTA Funds shall be subject to the prior approval of the Supreme Court. The IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program. Additionally, a copy of the IOLTA Board's proposed annual budget shall be provided to the Court, designating the uses to which IOLTA Funds are recommended.

(k) Interest earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

(l) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P.L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P.L. 469, No. 117).

Comment:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. The obligations of a lawyer under this Rule apply when the lawyer has come into possession of property of clients or third persons because the lawyer is acting or has acted as a lawyer in a client-lawyer relationship with some person. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more Trust Accounts. The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Whenever a lawyer holds funds of a client or third person, the lawyer must maintain at least two accounts: one in which those funds are held and another in which the lawyer's own funds may be held. A lawyer should maintain on a current basis books and records in accordance with sound accounting practices consistently applied and comply with any recordkeeping rules established by law or court order.

[2] The following books and records shall be maintained for each Trust Account:

(i) bank statements and check registers (which shall include the payee, date, amount and the client matter involved);

(ii) all transaction records returned by the financial institution, including canceled checks in whatever form and records of electronic transactions;

(iii) records of deposits and a ledger separately listing each deposited item and the client or third person for whom the deposit is being made.

[3] The records required by this Rule may be maintained in electronic or other form if they can be retrieved in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

[4] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (e) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding that part of the funds which are the lawyer's.

[5] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a Trust Account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[6] Paragraph (c) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client unless the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. When there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[7] Other applicable law may impose pertinent obligations upon a lawyer independent of any obligations arising from this Rule. For example, a lawyer who serves only as an escrow agent is governed by the law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule. A lawyer who receives funds while serving as an executor or trustee remains subject to the formal accounting procedures and other supervision of the Orphans Court; when such funds are nominal in amount or reasonably expected to be held for such a short period that sufficient interest will not be generated to justify maintaining a segregated account such funds may, in the discretion of the lawyer, be deposited into the IOLTA Account of the lawyer even though such deposit is not required.

[8] A lawyer must participate in the Pennsylvania Lawyers Fund for Client Security. It is a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

[9] Paragraphs (g) through (l) provide for the Interest on Lawyer Trust Account (IOLTA) program, and the definitions in paragraph (d) distinguish two types of funds of clients and third persons held by a lawyer: Qualified Funds, which must be placed in an IOLTA account, and Nonqualified Funds, which are to be placed in an interest bearing account unless the client or third person specifically agrees to another investment vehicle for the benefit of the client or third person. There are further instructions in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest on Lawyers Trust Account Board, 204 Pa. Code, § 81.1 et seq., which are referred to as the IOLTA Regulations.

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.

Comment:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

[9] Paragraphs (g) through (l) provide for the Interest on Lawyer Trust Account (IOLTA) program, and the definitions in paragraph (d) distinguish two types of funds of clients and third persons held by a lawyer: Qualified Funds, which must be placed in an IOLTA account, and Nonqualified Funds, which are to be placed in an interest bearing account unless the client or third person specifically agrees to another investment vehicle for the benefit of the client or third person. There are further instructions in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest on Lawyers Trust Account Board, 204 Pa. Code, § 81.1 et seq., which are referred to as the IOLTA Regulations.

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(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;

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Comment:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.17 Sale of Law Practice

A lawyer or law firm may, for consideration, sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in Pennsylvania;

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Inquirer represented A, executor under the will of her mother, M, in the settlement of M's estate. The beneficiaries of the will are A; another daughter, B; a son, C; and a church. C is an incapacitated adult, and A also is the guardian of C, her brother. Inquirer has also been the attorney for A in her capacity as guardian.

By virtue of information obtained from various reliable sources, Inquirer has learned that M's assets included a silver coin collection, an undetermined amount of cash, and a brand new truck, none of which had been disclosed by A to be assets of the estate. Inquirer has confronted A with this information, and A denies that such assets existed. Inquirer does not accept this statement. At this point no filings had occurred with the Court or Pennsylvania Department of Revenue.

Inquirer has asked what course of action she should take.

At first blush it would appear that Rule 1.6(c)(2) would apply and that Inquirer would have a choice as to whether or not to rectify the consequences of her client's fraudulent act in the course of which Inquirer's services were being used. She, of course, would have to withdraw from both representations under the provisions of Rule 1.16. It has been suggested in the past that Rule 8.4(d), proscribing conduct that is prejudicial to the administration of justice might require disclosure, but that interpretation has been far from certain.

Disclosure to beneficiaries would seem to be the most obvious choice of remedial action.

What has occurred to clarify a situation like this comes from a development in the substantive law. The Orphans' Court of Montgomery County, a premier court in dealing with the law of decedents' estates, has decided two cases. Both decisions included opinions joined in by Judge Taxis, a highly respected judge in the decedents' estates field. In Pew Trust, 16 Fid. Rep., 2d, 73 (1975), it was held that a lawyer representing a fiduciary has duties to beneficiaries which transcend the normal duties a lawyer has to a client. Failure to carry out those duties can expose the lawyer to possible liability. In a companion decision, Pew Trust (No. 2), 16 Fid. Rep., 2d 80 (1995), involving the same set of litigation, it was held that under the circumstances of that case, the lawyer had a conflict of interest in an action by the beneficiaries against the trustee and that he was disqualified from representing the trustee. The opinions clarify that the attorney does not represent the beneficiaries as clients, but has special duties to them.

The core holding of the Court's opinion in the first case appears on page 74 and reads as follows:

"Model Rule 1.2 implies that where the client is the fiduciary, the fiduciary's lawyer may

be charged with special obligations in dealing with a non-client beneficiary. Hence, (law firm's) duties run not only to its client, but also to the non-client Trust beneficiaries. Once that duty has been established, the beneficiaries have a right to state a cause of action against (law firm) for breach of fiduciary duty."

Further comments of the Court as to the nature of these duties at page 75 are:

"The duties owed by counsel for the fiduciary to the non-client beneficiaries are characterized as 'joint', 'derivative', or 'secondary' duties. These duties are prohibitive or restrictive, as opposed to the affirmative duties owed by counsel for the fiduciary to its client."

"These restrictive duties arise primarily because of the nature of the representation and the relative positions of the lawyer, fiduciary and beneficiaries, that is, because the lawyer stands in a fiduciary relationship as to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries."

"These 'derivative' duties are largely restrictive and are tantamount to prohibitions from the lawyer taking advantage of his or her position to the detriment of the fiduciary or its beneficiaries."

The first two sentences in the first quotation appear almost verbatim in the disqualification opinion, and the latter three quotations appear verbatim in that opinion.

The opinions cite cases from a number of other states, as assisting in arriving at the Court's conclusion, and the subject has been dealt with by a number of writers. A few cases have gone off on the tangent of stating that the attorney represents the estate as a whole. This concept presents a number of difficulties. Fortunately the Montgomery County court avoided these pitfalls, and I think has steered the proper course for Pennsylvania. I think it should presently be regarded as the law.

Where the dereliction is as serious as in this case, I have no doubt that the principles enunciated demand revelation by the attorney. There will have to be a lot of development in the law to clarify the effect of this new principle in the many situations which can arise, but this will await time.

The Court has already related its principle to Rule 1.2. In addition, Rule 8.4(d) will now also mandate another exception to the confidentiality rule as stated in Rule 1.6. The phrases in the preamble, "officer of the legal system" and "public citizen having a special responsibility for the quality of justice", although constituting only "general orientation", would seem to come into play here.

I conclude that Inquirer is required to reveal the derelictions of the executor and guardian, a suitable course being notification to all beneficiaries. In the case of the incapacitated person, she can notify the attorney whom the son has engaged.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT. MOREOVER, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT AN OPINION OF THE FULL COMMITTEE.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the total fee is not illegal or excessive and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes over Fees

[5] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[6] It is Disciplinary Board policy that allegations of excessive fees charged are initially referred to Fee Dispute Committees for resolution.

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;

[9] Paragraphs (g) through (l) provide for the Interest on Lawyer Trust Account (IOLTA) program, and the definitions in paragraph (d) distinguish two types of funds of clients and third persons held by a lawyer: Qualified Funds, which must be placed in an IOLTA account, and Nonqualified Funds, which are to be placed in an interest bearing account unless the client or third person specifically agrees to another investment vehicle for the benefit of the client or third person. There are further instructions in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest on Lawyers Trust Account Board, 204 Pa. Code, § 81.1 et seq., which are referred to as the IOLTA Regulations.

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.

Comment:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.17 Sale of Law Practice

A lawyer or law firm may, for consideration, sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in Pennsylvania;

public. The Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 8.5. Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), 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. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows 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.

Comment:

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).