

**OPINION 2019-1**

**VERMONT BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY COMMITTEE**

**SYNOPSIS**

Attorney for an estate executor is required to notify the Probate Court that funds listed on a final accounting filed by the attorney and referenced as being held by the attorney's client, the executor, are unaccounted for.

**FACTS**

Requesting attorney represents the executor of an estate. The estate is insolvent; it has assets, but they are insufficient to satisfy the claims of all estate creditors. Tens of thousands of dollars of estate funds were being held in escrow by the executor. Requesting attorney filed a final accounting in which the tens of thousands of dollars were listed as being held in the executor's separate account. After filing the final accounting, the executor client advised requesting attorney that emergency circumstances of a personal nature had required client to expend the tens of thousands of dollars on matters unrelated to the estate and they were gone. Proceedings are still pending before the probate court relating to the estate.

Requesting attorney has asked the committee for its opinion as to the attorney's responsibilities under the Rules of Professional Conduct.

**QUESTION PRESENTED**

Is the requesting attorney required to notify the court or estate creditors that material information set forth in the final accounting filed with the court by the attorney is materially inaccurate?

## ANALYSIS

Rule 3.3 entitled "Candor to the Tribunal" contains the following provisions pertinent to this opinion request:

- (a) A lawyer shall not knowingly:
  - (1) ... fail to correct a false statement of material fact ... previously made to the tribunal by the lawyer.
  - (3) ... If a lawyer ... has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person ... has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

The above provisions of V.R.P.C. 3.3 mandate that the requesting attorney inform the probate court that the funds listed in the final accounting as being held by the client are no longer held by the client.

Under Rule 3.3, if an attorney discovers that information or documents provided to the court are materially incorrect, the attorney has a duty to notify the court. This duty extends to disclosure of information that would otherwise be privileged or confidential, if necessary to correct the record with respect to a material inaccuracy. (See Comment 10 to Rule 3.3 which emphasizes that disclosure to the tribunal is required "even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.")

The competing considerations with respect to client confidences and privileged information are the confidentiality provisions of V.R.C.P. 1.6; but that Rule contains an express

exception in subparagraph (b)(3) which mandates disclosure of otherwise confidential and privileged information, if disclosure is necessary “to ... mitigate or rectify substantial injury to the financial interests or property of another that ... has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” Rule

1.6(b)(3) states:

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

...

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Here, a loss of tens of thousands of dollars is certainly a substantial injury to the financial interests of estate creditors, and the “injury” reasonably appears to have resulted from the client having misappropriated estate funds while using the requesting attorney's services in representing the estate.

The committee would caution, however, that the attorney must first

remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the ... correction of the false statements.

Rule 3.3. Comment [10].

Further, the attorney must disclose only sufficient information to discharge his or her responsibilities under Rule 3.3 and under Rule 1.6 and should take cautions to avoid providing confidential information potentially detrimental to the client which is not essential to discharging the attorney’s disclosure responsibilities to the court.

**CONCLUSION**

Requesting attorney must disclose to the court information learned from their client that would otherwise be confidential and privileged in order to correct a material misrepresentation in a document filed by the attorney with the court.