

LANE'S CASE PROVIDES GUIDANCE ON A COMPLEX PROFESSIONAL RESPONSIBILITY ISSUE: DISCLOSURE OF CONFIDENTIAL CLIENT INFORMATION

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The New Hampshire Supreme Court recently issued an opinion addressing when an attorney can disclose information damaging to a former client. See *Lane's Case*, ___ N.H. ___, 2005 N.H. LEXIS 178 (December 28, 2005). The case requires a close reading both because of the complex fact pattern and because the Court fails to clarify a key underlying issue - - the relationship between the estate's attorney and the executor.¹ Attorneys doing estate work should carefully read the case for its impact on their work, and may conclude that they should clarify the nature of their relationship with the executor and the estate in retainer agreements. This article will focus on the confidentiality question.

In 2003, the Professional Conduct Committee found that Attorney Kendall Lane, among other violations, had breached his duty of confidentiality to a former client under Rule 1.9. Attorney Lane represented the estate of Robert Bennett from 1992-1994. Robert Bennett was survived by his wife, three daughters and one

¹ There is substantial confusion both in the literature and among experienced NH estate practitioners as to whether the lawyer for an estate represents the estate through the executor or whether she has an independent attorney-client relationship with the executor. See e.g., Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEG. ETHICS 15 (1987). While this distinction may not in the normal course prove crucial, it is important if the fiduciary, as was found in *Lane's Case*, takes steps adverse to the estate or trust itself. During preparation of this article, discussions with experienced practitioners reflected no consensus on this question. The Court may not have reached this important question since no party challenged Dick Bennett's client status. See *Lane's Case*, 2005 N.H. LEXIS 178 at 21. Justice Dalianis, in dissent, noted that "Lane's law firm represented Robert Bennett's estate, with Dick Bennett as executor." *Id.* at 37.

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son, Dick Bennett. The son was the executor of the estate and later was appointed trustee of the mother's trust. Lane was not the attorney for Mr. Bennett in his capacity as trustee. *Id.* at 2-3.

In late 1995, Mrs. Bennett's mental condition deteriorated, and she required a more secure placement. During a series of family meetings to decide on the best placement, the daughters became concerned that their brother was mismanaging their mother's funds.² They hired Attorney Silas Little to investigate. *Id.* at 4-6.

The financial dispute centered on the proceeds of two accident insurance policies and one life insurance policy. None of the proceeds of these policies were listed as assets of the estate. Additionally, Lane testified that he was not made aware of the possible existence of the life insurance policy when he probated the estate. After being contacted by Little, Lane retrieved the estate file from storage and provided information about the accident policies to Attorney Little. *Id.*

The improper disclosure claim relates mainly to the life insurance policy, the existence of which had been denied by Mr. Bennett. One of the daughters, now Lane's sister-in-law, had located documents suggesting that such a policy existed. She asked Lane and his wife to check on this. Lane contacted the insurance company by phone and found that there was indeed a life insurance policy. He followed this call with a letter, on law firm letterhead, asking for further information on the distribution of the funds. In that letter he indicated that the firm "represents the Estate of Robert Bennett."³ The company produced information, leading Lane to conclude that the funds had been deposited in an account held jointly by the surviving wife, Jane Bennett, and Dick Bennett. Lane turned these materials over to Attorney Little without notifying either Dick Bennett or his attorney. Little initiated litigation to remove Dick Bennett as trustee of his mother's trust. *Id.* at 7-9.

² Attorney Lane married one of Robert Bennett's daughters in 1996. His wife, Molly, was actively involved in the later dispute between the daughters and the son, who was then acting as trustee of the mother's trust. The Court's analysis does not view this as legally relevant to the issues presented.

³ This letter resulted in a claim that Lane violated Rule 8.4(c), which bars dishonest conduct. The Court rejected this claim since there was no evidence of intentional misconduct on Lane's part. Since it was not raised below, the Court did not resolve whether negligent misrepresentation can violate Rule 8.4. *Id.* at 17-20.

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After that case was settled, Mr. Bennett's attorney filed a complaint with the PCC, which found that Lane violated his duty of loyalty to the estate under Rule 1.9 and should be suspended for six months. The Supreme Court Referee disagreed, finding that the PCC had not proven by clear and convincing evidence any violations of the Rules of Professional Conduct. *Id.* at 9-10.

The key legal issue is whether Lane's voluntary disclosure of information on the life insurance policy violated his continuing duty of confidentiality to a former client under Rule 1.9(b), as then in force.⁴ Subject to an exception that will be discussed below, Rule 1.9 bars a lawyer from using information relating to the representation to the disadvantage of a former client. The Court held that the rule applied to this case and wrote:

The committee argues that Lane turned confidential information relating to his representation of his former client, Dick Bennett, over to the attorney representing Lane's wife, Molly Bennett Lane, who was engaged in an ongoing dispute with her brother over the accounting of funds in their mother's trust. Such information indicated, among other things, that Dick Bennett might have been lying about the existence of a life insurance policy. Thus, the committee argues that Lane used information to the disadvantage of his former client. No party argues that the information concerning the life insurance proceeds that Lane turned over to Attorney Little did not relate to his representation of Dick Bennett, and we agree with the committee that such information was used to Dick Bennett's disadvantage. We, thus, hold that that the committee proved by clear and convincing evidence that Lane violated Rule 1.9(b) when he provided

⁴ Though both parties argued the case under existing Rule 1.9(c), the Court decided this case using the 1996 version of the Rule—the version in effect at the time of the alleged violation. The older rule is less protective of former client confidentiality. Under the former Rule 1.9(b), an attorney was barred from disclosing client information only if it was used to the disadvantage of the former client. The current version of Rule 1.9(c) bars disclosure, regardless of the use, unless a specific exception applies. *Lane's Case*, ___ N.H. ___, 2005 N.H. LEXIS 178 at 10-13 (December 28, 2005). This distinction, though of no moment in the life insurance issue discussed in this Advisory, was dispositive in one of the claims not covered in this article. That claim related to the disclosure of information on the accident policies. The Court agreed with the Referee that the disclosure "worked to the advantage of Lane's former client, [Dick Bennett] as executor of the Estate of Robert Bennett." *Id.* at 14.

Attorney Little with evidence of the existence of the John Hancock life insurance policy, unless such use is permitted by Rule 1.6. *Id.* at 21.

Presumably based on the parties' arguments, this passage seems to assume that Lane's client was Dick Bennett, individually, rather than the estate acting through Dick Bennett in his capacity as executor.

The Court then addressed whether Attorney Lane was permitted to disclose this otherwise protected information by the exceptions to Rule 1.6. Rule 1.6 is the rule governing confidentiality for current clients. It sets out both the general rule that all information relating to the representation is confidential and two permissible grounds for disclosure. These exceptions are incorporated into Rule 1.9.

The key exception for this case allows an attorney to reveal otherwise confidential information "to the extent the lawyer reasonably believes necessary... to prevent a criminal act that the lawyer believes is likely to result in . . . substantial injury to the financial interest or property of another. . . ." NH R. Prof. Conduct, R 1.6(b)(1) (2005). The Court found that the facts fit within the meaning of the exception. In addressing the exception issue, the Court resolved several previously unanswered legal questions concerning the discretionary disclosure provisions of Rule 1.6.

First, the Court, recognizing the fundamental nature of client confidentiality in the lawyer-client relationship, placed the burden on the attorney to prove the applicability of any exception purportedly authorizing disclosure. *Lane Case*, 2005 N.H. LEXIS 178 at 22-23. Such proof must satisfy the preponderance of the evidence standard. The practical consequences of this ruling for future disciplinary proceedings are significant. Had the Court placed the burden on the PCC, the Committee would have to show by clear and convincing evidence that an alleged exception does not apply.

Second, the Court, having affirmed the importance of client confidentiality, tempered the attorney's burden in such cases by holding that the lawyer need only prove a reasonable belief that disclosure is necessary to prevent future criminal activity. The Court found sufficient evidence to support the "referee's finding that Lane reasonably believed that his disclosure was necessary to prevent future criminal activity by Dick Bennett." *Id.* at 27.

On this point, Justice Dalianis dissented. She argued for a more probing judicial evaluation of whether Lane's belief that his disclosure of confidential information was needed to stop a future crime was both objectively and subjectively reasonable. She looked to Lane's testimony and concluded that he could not satisfy this standard. *Id.* at 32-34.

In looking at the reasonableness of Lane's choice to disclose facts to Silas Little, Justice Dalianis also questioned why Lane did not take less drastic measures first. She argued that, in order to adequately protect the duty of confidentiality, a lawyer considering disclosure should first seek to persuade the client to take suitable actions. Justice Dalianis looked to the strong policy that lawyers making disclosure should "proceed in a manner least damaging to the attorney-client relationship." *Id.* at 35. The majority opinion does not speak to this point, which clearly must be considered by practicing attorneys before taking the irrevocable act of disclosure.

Lane's Case provides guidance to and caution for lawyers considering whether to disclose confidential information. The case emphasizes the importance of the duty of confidentiality by placing the burden to prove a justification for disclosure on the lawyer. It also gives the lawyer considering whether to take the drastic step of disclosure some room to exercise judgment on the threat posed by the client's actions.

Unfortunately, the case could have provided much needed clarity to probate lawyers on their role. Such guidance would have helped lawyers counsel fiduciaries on their responsibilities to the estate or trust and to explain the level of personal loyalty and confidentiality the fiduciary can expect from the attorney - - particularly in situations in which the fiduciary acts against the interests of the estate.

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