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Lawrence J. Fox

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## It's All in the Atmosphere

### Cover Page Footnote

Mr. Fox, a graduate of the University of Pennsylvania & the University of Pennsylvania Law School, is a managing partner at Drinker, Biddle & Reath. He is a member of the ABA Standing Committee on Ethics and Professional Responsibility and Vice-Chair of the ABA Section on Litigation.

# IT'S ALL IN THE ATMOSPHERE

LAWRENCE J. FOX\*

## I. LAWYER FOR THE FIDUCIARY

THE rain continued into a second day and the low-lying clouds created a depressing blanket of gloom that even New York City, dressed in its holiday best for Christmas, could not overcome. Perhaps the accompanying low barometric pressure explains the unusual, disturbing, and wrong-headed result that was reached that Sunday morning by the group assembled for the Conference on Ethical Issues in Representing Older Clients. But whatever the reason, by 9:30 a.m. the hand-picked delegates had not only jettisoned the principle that fiduciaries are entitled to effective representation from their lawyers, but also endorsed a larger principle that will (a) turn lawyers into policemen for their clients, (b) create an irreconcilable conflict of interest between the lawyer's duties to her client and the lawyer's newly created duties to third parties, and (c) increase the potential that lawyers will be held liable for the transgressions of their clients.

The proposal that was adopted reads as follows:

A lawyer representing older persons must recognize that the *fiduciary*, not the beneficiary, is the client and is the party to whom a duty is owed. The lawyer has only derivative duties to the beneficiary as a result of the representation of the fiduciary. . . . A lawyer for a fiduciary acting in any fiduciary capacity *may* communicate otherwise confidential information to a court having jurisdiction and to parties to whom the fiduciary owes duties. Disclosures relating to those duties are impliedly authorized by MRPC 1.6(a) in order to carry out the representation.<sup>1</sup>

Why should the bar get so exercised about this proposal? The image of the poor helpless beneficiaries about to suffer untold damage at the hands of the errant fiduciary, saved at the last minute by the receipt of a warning from the heroine lawyer for the fiduciary can generate warm fuzzy feelings and provide the hope of improving the public's image of the profession. But these salutary effects, as tempting as they may be, come at a cost—a cost so huge that it would redefine the fundamental notion of lawyering.

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1. See Conference on Ethical Issues in Representing Older Clients, *Recommendations of the Conference*, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989, 997-98 (1994) [hereinafter *Recommendations*].

### A. *The Client's Viewpoint*

The proposal should be considered first from the point of view of the fiduciary. Having been appointed trustee in a world fraught with legal minefields, only the truly ignorant would proceed without hiring counsel to negotiate the treacherous terrain. But the proposal adopted in the shadow of the Metropolitan Opera House<sup>2</sup> would assure that if the trustee hired counsel, the counsel she would get would be driving not an armored, all-terrain vehicle but rather a tippy golf cart providing little or no protection to its occupant. Instead of counsel who would explain to her client that everything learned in the representation would remain confidential, this client would be told that anything told to counsel could and would be used against the trustee because the counsel would feel free "to communicate otherwise confidential information to a court having jurisdiction, and to parties to whom the fiduciary owes duties."<sup>3</sup> So, instead of this hapless trustee being in a position to share her hopes, dreams, fears, plans, and questions with her counsel, this trustee would be placed in the position where she would have to worry everytime she met with counsel that counsel might run to the beneficiaries to tell them what the trustee was considering. Indeed, the proposal is so open-ended that the disclosures counsel for the trustees could make would even include "Do you know what your trustee said about you?" or "Do you know what thought the trustee shared with me?" In this context, the most important question raised by the proposal is this: if counsel for the trustee is free to act in this manner, where does the trustee get the real counsel to which she is clearly entitled? If each counsel hired by the trustee is automatically subject to the duty to disclose to the beneficiaries that is contemplated by the proposal, there is no escape from the trustee trap.

### B. *The Lawyer's Viewpoint*

The analysis from the point of view of the attorney is equally dismal. The lawyer is denied full consultation with the client. Because the client understands what happens if information is shared, the flow of information is cut off and the lawyer loses the opportunity to remonstrate with the client, one of the more valuable benefits confidentiality confers on the profession. But the proposal also creates additional mischief. If this rule were adopted as an amendment to Model Rule 1.6, it would create significant liability exposure for counsel. In a world in which lawyers are sued with ever increasing frequency, the fact that a lawyer had the discretion to disclose confidential information, and did not, will be no defense to the claim that if the lawyer had disclosed confidential information some harm or other could have been prevented. Thus, the proposed

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2. This is technically a lie. The Metropolitan Opera House is due north of Fordham Law School.

3. See *Recommendations*, *supra* note 1, at 998.

rule has an even more Draconian effect on undermining the lawyer-client relationship than would first appear. Because intelligent lawyers interested in their self-preservation will not simply contemplate whether a client secret should be disclosed, the rule, despite its use of soft language like "may," will be read as requiring disclosure in all instances.

There is no doubt that the proposal springs from the best of intentions. The lawyers who proffer it are seeking to protect the interests of the trust or the poor helpless beneficiaries thereof, a noble endeavor indeed. The problem is that, in fashioning the solution, they have ignored the interests of the one person who is entitled to the greatest protection from the lawyer: the lawyer's client. This problem could easily be avoided, of course, by implementing a policy that the confidentiality-destroying proponents ignore. The lawyer can represent the trust or the beneficiaries and so inform the trustee. Then, the trustee, if she thinks she needs separate counsel, either generally or on a particular matter, can retain her own counsel who, freed from duties to anyone other than her client, can provide the confidential advice to which the trustee is entitled.

### C. *The Effect on the Profession*

This proposal also must be viewed as part of a much larger and more insidious problem. The world is filled with fiduciaries. They are trustees of trusts, executors of wills, directors of corporations (both non-profit and for profit), guardians of children and incompetents, and lawyers for class representatives. These fiduciaries all, by definition, owe duties to beneficiaries, shareholders, wards, and absent class members.

An endless clamor, led by no less a luminary than Harris Weinstein, recent Chief Counsel of the Office of Thrift Supervision, asserts that the obligations of lawyers for these fiduciaries should be seriously altered to take into account the fiduciaries' obligations to individuals and even the government.<sup>4</sup> But this effort, whether it is put forth by those who wish to protect helpless trust beneficiaries or by the guardians of the federal deposit insurance plan, must be resisted for two critical reasons. First, simply because a fiduciary owes a duty to a beneficiary does not mean a lawyer for the fiduciary owes duties to the beneficiary as well. The lawyer's duties, absent the generally recognized exceptions,<sup>5</sup> should be only to his client. Otherwise, the lawyer suffers from the very conflicts of interest Model Rule 1.7 was designed to avoid. If the lawyer owes duties to the trustee and the trustee's interests diverge from the interests of the beneficiaries, the lawyer should not be forced to choose or compromise the duties he owes to the trustee. Suggesting that the duties of the client become the duties of the lawyer, however, achieves precisely this result.

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4. For a more detailed discussion of Weinstein's argument, see Lawrence J. Fox, *OTS v. Kaye, Scholer: An Assault on the Citadel*, 48 Bus. Law. 1521, 1523-1525 (1993).

5. Lawyers may not lie or mislead, aid and abet a client violation of law, or violate the criminal law. See Model Rules of Professional Conduct Rule 1.2(d) & cmt. "c" 6-9 (1993); Model Code of Professional Responsibility DR 7-102(A)(7) & EC 7-5 (1993).

Second, lawyers should not be held liable for the transgressions of their clients. The law places fiduciary obligations on the person or persons who are obliged to fulfill the role of fiduciary. If the fiduciary fails to fulfill the obligations, the fiduciary should be held liable. However, so long as the lawyer does not aid and abet, only the client should be held liable for client transgressions. Yet, the proposed rule expands lawyer liability in precisely this way. All the lawyer need know is some fact that might suggest or raise suspicion regarding a client misdeed and the lawyer's failure to breach confidentiality or otherwise deter or prevent the transgression will result in lawyer liability.

The position of trustee was established to make someone responsible for the assets of the trust, their investment, and their distribution. Isn't it enough to say that public policy is fulfilled when the trustee is found responsible for any deviations from the fulfillment of his or her duties? Is there really a public policy reason to make the trustee's lawyer a surety or guarantor of trustee conduct? And even if it were desirable to add this extra level of protection, isn't it clear that the price that is paid for that extra protection (loss of real counsel for the trustee, breach of confidentiality, reluctance of lawyers to serve as counsel to trustees) is far too high?<sup>6</sup>

On that fateful Sunday morning no less an eminence than the distinguished, and distinguished looking, John Pickering rose to defend the new proposal, arguing in his stentorian tones, with the grace only John Pickering can muster, that the rule provided an opportunity for lawyers to do something in the public interest. But it is not up to lawyers in the representation of clients to act in the public interest. The public interest is best served when lawyers do not attempt to represent that interest at all, but rather when they represent their clients' interests with loyalty, fidelity, and confidentiality.

## II. JOINT REPRESENTATION

The group that addressed client confidentiality seemed to be similarly affected by the unfortunate weather. That is the only explanation the author can surmise would lead lawyers of otherwise good will and independence to craft a proposal that disserves not only lawyers but their clients as well. In addressing the issues raised as to how to handle confidential information in a joint representation situation, the group

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6. The reliance of the drafters of the proposal on these disclosures as being "impliedly authorized by MRCP 1.6(a)" is troubling as well. *See Recommendations, supra* note 1, at 998. That exception always has been interpreted as applying when the client is unable to give consent, not as an exception that literally swallows the rule. *See, e.g.,* ABA, *Annotated Model Rules of Professional Conduct* 94 (2d ed. 1992) (stating that the exception applies "whenever a lawyer represents a client with whom it is not possible to maintain a normal client-lawyer relationship" and providing as examples a young child in a custody proceeding or a disabled client.)

assembled at the Fordham Law School on that fateful Sunday morning made the following recommendations:

After discussing the scope and terms of the representation, the lawyer and clients should enter into an agreement, preferably in writing, about the confidentiality of their disclosures. The discussion should include the review of the following options . . . :

- a. The lawyer *may*, in his or her discretion, disclose to each client all information gained in the course of the representation notwithstanding the fact that the person communicating the information subsequently requests that such information not be disclosed.
- b. The lawyer *must* disclose to each client all relevant information gained in the course of the representation notwithstanding the fact that the person communicating the information subsequently requests that such information not be disclosed.
- c. The lawyer *cannot* disclose to one client any information gained in the course of the representation from the other client without the clients' consent.<sup>7</sup>

Although the group also opined that Option a is the "preferred practice,"<sup>8</sup> it is clear that both Options a and c are unacceptable. To address Option c first, an option the group admittedly conceded to be "strongly discouraged,"<sup>9</sup> there is no basis for concluding that what has been undertaken is a joint representation when the lawyer is *barred* from disclosing confidential communications from one client to the other. The first time the lawyer learns of information that, absent the undertaking not to disclose, the lawyer would feel obliged to disclose to the other, the lawyer will be operating under an impossible conflict of interest. Knowing such information, the lawyer will have no alternative but to withdraw. Given the impossible conflict-generating potential inherent in Option c, there is absolutely no basis for even listing it as an option. Yet, for reasons that are inexplicable, the group voted to include it.

Option a is similarly flawed. It provides that the lawyer may "in his or her discretion"<sup>10</sup> disclose confidential information. This creates two problems. First, as already noted at the beginning of my comments, any time a lawyer may do something and chooses not to, the result will be liability for the lawyer, if as a result of the non-disclosure, someone is harmed.

Second, providing the lawyer in advance with this level of discretion creates a conflict of interest in which the lawyer, having received confidential information, must establish some standards for determining when it will be shared. It is far better from the perspective of both the clients and the lawyer to know that the information must be disclosed so

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7. *See Recommendations, supra* note 1, at 994

8. *See id.* at 995.

9. *See id.*

10. *See id.* at 994.

that no one is left wondering whether some important information has not been shared.

The only reasonable solution to the joint representation dilemma is Option b, which provides that the lawyer must disclose to each client all material information. This avoids the conflict of interest for the lawyer and the anxiety that a rule either barring or simply permitting the sharing of such information would create.