



IN PRACTICE...with CNA®

A Practitioner's Perspective on Emerging Legal Trends | 2021 Issue 3

Lawyers' Duties Regarding Legal Files After a Client's Death

Courts uniformly have held that the attorney-client privilege survives the death of a client. Various courts and ethics opinions have also analyzed a lawyer's responsibilities to former clients to preserve confidential information after the representation concludes. Many states have adopted the Uniform Probate Code ("Code") that provides, upon the death of a person, the personal representative of the estate takes possession and control of the decedent's real and personal property. The Code is silent whether personal property includes legal files held by a lawyer. Complex issues arise regarding the lawyer's duties to her former client when the personal representative seeks files that are unrelated to the administration of the estate.

Attorney-Client Privilege After Death and Other Recent Changes in the Law

A Colorado Supreme Court case decided in November 2020 addresses two seemingly inconsistent and long-standing legal maxims: (1) the attorney-client privilege survives the death of the client and (2) a decedent's personal representative has a right to take possession of all the decedent's property. In *In the Matter of the Estate of Louis Rabin* ("Rabin"), the decedent's personal representative asserted that she had a right to take possession of all legal files in possession of the decedent's former attorney regardless of whether the files were needed for the administration of the estate. *In re Estate of Louis Rabin*, 474 P.3d 1211 (Colo. 2020).

In *Rabin*, the attorney countered that the personal representative's request would violate decedent's attorney-client privilege, which survives his death. The personal representative subpoenaed the attorney for the decedent's legal files and the lawyer moved to

quash. The probate court quashed the subpoena, and the case eventually was heard by the Colorado Supreme Court. The court held that personal representatives are not per se entitled to legal files from the decedent's lawyers who were not involved in drafting the will being probated or who did not have files that were needed for the administration of the estate. The case was decided under Colorado's probate code and Colorado Rule of Professional Conduct 1.6, which is similar to American Bar Association Model Rule 1.6.

The U.S. Supreme Court has held that the attorney-client privilege applies during the representation as well as following the death of a client. *Swidler & Berlin v. United States*, 524 U.S. 399, 404, 407 (1998) (Deputy White House Counsel met with an attorney about possible violations of law in connection with the firing of White House employees; the attorney took notes during the meeting, which were later sought by the government, after the Deputy White House Counsel committed suicide). *See also*, *Restatement (third) of the Law Governing Lawyers*, 60 cmt. (e) (2000). The Court noted that survival of the privilege after a client's death is consistent with the policy of fostering candid discussions between client and lawyer so the lawyer may give advice regarding the matter. The Court noted there are certain exceptions such as the testamentary exception to allow disclosure of privileged information because "the privilege, which normally protects the client's interest, could be impliedly waived in order to fulfill the client's testamentary intent." *Id.* at 405 (citations omitted). In other circumstances, however, the lawyer may not waive the privilege. *Id.* at 410-11. (Lawyer cannot reveal confidential information to federal agents after client's suicide).

Probate and ABA Model Rules 1.6 and 1.16

Colorado and seventeen other states have adopted the Code of Uniform Probate Code. *Legal Information Institute*, Cornell Law School, <https://www.law.cornell.edu/uniform/probate>. The Code describes a personal representative's duties and authority in winding down the decedent's affairs and distributing assets to the beneficiaries. A personal representative's primary duty is to settle and distribute a decedent's estate in accordance with the terms of the will. *Id.* In *Rabin*, the Colorado Supreme Court concluded that legal files are not the type of personal property that Colorado's probate code contemplated for distribution by the personal representative. 474 P.3d 1211.

The Court in *Rabin* also analyzed a lawyer's duties under the Colorado Rules of Professional Conduct including Rules 1.6 and 1.16. Model Rule 1.6(a), like the Colorado Rule, prohibits an attorney from revealing confidential information relating to a client matter unless the client has consented to or impliedly authorized the release of such information to carry out the representation. ABA Model Rule 1.6; see also ABA Model Rule 1.9(c) concerning ethical duties to keep information confidential after the representation concludes. However, Model Rule 1.6(b) permits an attorney to reveal confidential information in certain circumstances including if authorized by law or court order. Comment 3 describes the principles of confidentiality which include attorney-client privilege, attorney work product, and confidential information received by the lawyer during the representation of the client.

Similarly, Model Rule 1.16(d) outlines an attorney's duties upon termination of the representation and provides that an attorney should "take steps to the extent reasonably practicable to protect a client's interests," including "surrendering papers and property to which the client is entitled." ABA Model Rule 1.16. The rule does not explicitly address the lawyer's obligations to provide papers after the death of a former client, however. Attorneys often keep client files for many years after the representation has concluded. Thus, such files may be requested by a personal representative upon the former client's death. The Court in *Rabin* determined that the personal representative does not simply step into the shoes of the decedent with respect to client files, making Rule 1.16 inapplicable.

The District of Columbia Bar analyzed a lawyer's obligations to a former client—specifically, when a spouse who is executor requests that the deceased spouse's attorney release information obtained during the course of the attorney-client relationship—in Ethics Opinion 324. District of Columbia Ethics Op. 324 <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion324.cfm> (2004). The Opinion emphasized that the fundamental principle underlying Rule 1.6 is that a lawyer "should hold inviolate client secrets and confidences so that the client will be encouraged to communicate fully and frankly with the lawyer even as to embarrassing and legally damaging subject matter" (internal citations and quotations omitted). The Opinion advises that an attorney confronted with the situation outlined above will need to use his or her best professional judgment to decide whether the client would want the confidential information given to the personal representative. The Opinion noted that an attorney who reasonably believes that he or she knows what the client would have wanted, based on what the client stated or the best available evidence of what the client's instructions would have been, should carry out the client's wishes.

Similarly, in a Nassau County (N.Y.) Ethics Opinion, the committee addressed a situation in which attorney paperwork was requested after a client's death. In that Opinion, a client sought legal advice about divorcing her husband. The woman asked her attorney to keep the matter secret and not serve her husband until she had discussed the divorce with her college-aged children. The woman died suddenly ten days later and her husband found a check stub showing her payment of the attorney's retainer. The husband requested itemized billing information from the lawyer. The Ethics Opinion concluded that the attorney should not reveal the billing information if the information revealed the client's confidences or secrets related to the attorney's representation of her. Nassau. Op. 03-4 at 2, 5.

The personal representative does not simply step into the shoes of the decedent with respect to client files.

Rabin makes it clear that a personal representative does not automatically become the holder of the decedent's attorney-client privilege for the purpose of obtaining the attorney's files for legal services that have nothing to do with the administration of the decedent's estate. In light of this opinion, lawyers must analyze the files they hold that a personal representative is seeking to determine whether the contents can be disclosed because of a testamentary exception or another exception, or whether the lawyer should wait until subpoenaed or seek a court order. In practice, one should consider the following in deciding whether to provide a client's file to the personal representative:

- Do the files relate to testamentary documents that are necessary for the administration of the estate? If so, they may fall within the testamentary exception to attorney-client privilege.
- What would the former client's wishes have been, based on the client's statements or the best available evidence?
- Who is seeking the information and is it necessary for the administration of the estate?
- Did the lawyer participate in drafting the will, a prior will that is in controversy, or other testamentary documents?
- Do the client files involve an ongoing matter such as litigation or the sale of a business?

When confronted with a personal representative requesting all legal files, and where the lawyer is uncertain whether an exception applies or believes the decedent would not want certain files provided to the personal representative, the best practice would be to seek an order from the court either authorizing or prohibiting a release of the files.

Conclusion

The ABA Model Rules and the Code potentially create competing demands on an attorney's duties to a deceased client. While lawyers should generally disclose files that relate to testamentary documents, the lawyer must consider whether other legal files being requested should be disclosed. If uncertain whether to provide the files in the lawyer's possession, the lawyer should seek an order from the appropriate court.

This article was authored for the benefit of CNA by:

Nancy L. Cohen

Nancy L. Cohen is the managing member of Cohen|Black Law, LLC, in Denver Colorado. Ms. Cohen represents law firms and lawyers, judges, healthcare professionals, accountants and other professionals on professional liability defense, grievances and other matters. Ms. Cohen also represents clients in business and real estate litigation. She handles appellate and trial matters in state and federal courts. Ms. Cohen recognizes that providing risk management advice to clients can assist in avoiding potential litigation. For her commitment to legal ethics and professional accomplishments, she has earned the highest peer rating possible of AV Preeminent from Martindale-Hubbell. Ms. Cohen has been selected to the Colorado Super Lawyers for Professional Liability Defense since 2013.

Ms. Cohen is a member of the Professional Liability and Ethics committees of the Colorado Bar Association. Ms. Cohen served as president of the Denver Bar Association. She is a fellow of the American Bar Association Foundation and the Colorado Bar Foundation and is the first lawyer receive the University of Denver Sturm College of Law's Alumni Professionalism Award.

Ms. Cohen thanks Jana Houghtaling for her assistance with this article.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com