NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 970 (6/21/13)

Topic: Disclosure of deceased client's file

Digest: If an executrix of a decedent's estate who seeks files possessed by the decedent's former attorney is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all those files. If, on the other hand, her status as executrix does not confer on her the same legal right as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized.

Rules: 1.6(a), 1.9(c), 1.15(c), 1.16(e)

FACTS

1. The inquirer represented a client who is now deceased. The executrix of the former client's estate has requested the client's file. The inquirer wants to know his obligations regarding this request.

QUESTION

2. What are a lawyer's obligations regarding a request for a former client's file from the executrix or executor of that former client's estate?

OPINION

3. This inquiry turns on a threshold legal question: does an executrix of an estate stand in the shoes of a decedent to such a degree that the executrix is entitled to access the decedent's confidential information?[1] Matters of law, however, are beyond the purview of this Committee.

[1] The answer to this legal question may be yes, no, or "it depends on the circumstances." In the context of litigation brought on behalf of an estate against an estate planning attorney, the Court of Appeals, recognizing the special legal relationship between a personal representative and a decedent, concluded that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309 (2010). Moreover, there is considerable support for the proposition that, at least in certain circumstances, an executrix is authorized to waive the attorney-client privilege of the decedent. *See Mayorga v. Tate*, 302 A.D.2d 11, 11-12 (2d Dept. 2002) (concluding that an executor may waive the privilege "in the interest of the deceased client's estate"); *accord In re Colby*, 723 N.Y.S.2d 631 (N.Y. Co. Sur. Ct. 2001).

There is, however, at least in older cases, some support for the view that an executor cannot waive a decedent's attorney-client privilege. *See, e.g., Westover v. Aetna Life Ins. Co.*, 99 N.Y. 56 (1885) (presenting question of doctor-patient privilege, though opinion also addresses attorney-client privilege) ("An executor or administrator does not represent the deceased for the purpose of making such a waiver."); *Matter of Beiny*, 129 A.D.2d 126, 517 N.Y.S.2d 474, 479 (1st Dep't 1987) ("While it is questionable whether even a duly appointed executor would have had the power to waive the decedent's attorney-client privilege ..., it is quite certain that one merely named as executor in an unprobated will would have had no authority whatsoever to do so."); *Matter of Alexander*, 130 N.Y.S.2d 648 (Sur. Ct. Suff. Co. 1954) ("it should be borne in mind that the power to waive the privilege arising out of the relationship of attorney and client ended with the death of the client so that no one can now waive it"); *cf.* CPLR §4504(c) (allowing personal representative to waive doctor-patient privilege of deceased client except as to "information which would tend to disgrace the memory of the decedent"). It is worth noting, additionally, that the duty of confidentiality is broader than the attorney-client privilege. *See* Comment [3] to Rule 1.6 ("The confidentiality duty applies not only to matters communicated in confidence to the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to representation, whatever its source.").

Accordingly, we do not opine on this threshold question. Instead we consider the implications of the alternative answers under the Rules of Professional Conduct (the Rules).

4. In any circumstances in which the answer to the legal question is yes, this inquiry is straightforwardly controlled by N.Y. State 766 (2003), which concluded that a former client is presumptively entitled to access to all his files possessed by his former attorney. The opinion was influenced by *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson*, 91 N.Y.2d 30, 34 (1997), which adopted the majority rule that that upon termination of an attorney-client relationship, a client is "presumptively accord[ed] ... full access to the entire attorney's file on a represented matter with narrow exceptions."[2]

5. N.Y. State 766 was based on two provisions in the Code of Professional Responsibility, DRs 9-102(c) and 2-110(A)(2), which are now comparably set forth in Rules 1.15(c)(4) and 1.16(e). Rule 1.15(c)(4) provides that "a lawyer shall ... promptly pay or deliver to the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e), which addresses termination of representation, provides, in relevant part:

> "A lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including ... delivering to the client all papers and property to which the client is entitled...."

These provisions of the current Rules support our conclusion in N.Y. State 766 just as did the corresponding provisions of the prior Code.

6. Thus if, as a matter of law, an executrix stands in the shoes of a decedent for these purposes, then the executrix is presumptively entitled to access to the decedent's files possessed by the inquirer, subject only to the inquirer's ability, as to particular materials, to make a substantial showing of good cause to refuse client access.

7. If, on the other hand, an executrix's legal status does not confer on her a general right of access to the decedent's confidential information (and the rest of this opinion is based on that assumption), then the inquirer's professional responsibilities are more complicated. Rule 1.9(c)(2) addresses a lawyer's obligation to refrain from revealing confidential information of a former client.

8. Rule 1.9(c)(2) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter ... reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client." The protections of Rule 1.6, as applied through Rule 1.9(c)(2), are not limited to former clients who are still alive; those

[2] Exceptions arise when the attorney can make "a substantial showing … of good cause to refuse client access." For example, the attorney "should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law," or "firm documents intended for internal law office review and use." 91 N.Y.2d at 37.

protections continue to apply as to a deceased former client.[3]

9. Rule 1.6 defines "confidential information" as consisting of

> "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's knowledge of legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

A lawyer is, of course, permitted to provide those contents of a deceased client's file that do not fall within Rule 1.6's definition of confidential information. *See* D.C. Opinion 324 (2004) (attorney whose client is deceased may turn over information that is not a confidence or secret to client's spouse who is executor of client's estate).

10. As to confidential information, Rule 1.6(a)(2) allows for disclosure that is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." Comment [5] to Rule 1.6 notes, for example, that in some situations, "a disclosure that facilitates a satisfactory conclusion to a matter" may be impliedly authorized. Indeed, we believe that implied authorization will comfortably cover many disclosures that an attorney would contemplate making to a former client's executor. *See* D.C. Opinion 324 (2004) ("In the ordinary case, release of information an executor requests would be authorized under" D.C.'s comparable Rule 1.6); Disciplinary Board of the Hawaii Opinion 38 (1999) (attorney disclosure to executor of former client's estate "is impliedly authorized in order to carry out the representation"); North Carolina Opinion 206 (1995) (a lawyer may reveal a client's confidential information to the personal representative of the client's estate, unless the disclosure would be contrary to the goals of the original representation or would be contrary to the client's instructions to the lawyer).

11. A lawyer in the inquirer's situation needs to consider whether the circumstances meet the standards for implied authorization, taking into account factors including what is known about the deceased client's wishes. For example, disclosure of information pertinent to the

[3] *See, e.g.,* D.C. Opinion 324 (2004); Philadelphia Opinion 2007-6 (following American College of Trust and Estate Counsel commentary on Rule 1.6 that in general, "the lawyer's duty of confidentiality continues after the death of a client"); South Carolina Opinion 05-09 (effect of Rule 1.6 "continues after the representation has ended …, and many, if not most, jurisdictions that have issued ethics opinions believe the rule extends after the death of the client"); *cf. Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (recognizing prevailing common-law rule that despite death of a client, material that had been protected by attorney-client privilege remains so unless subject to an exception) (citing cases including *People v. Modzelewski*, 203 A.D.2d 594 (2d Dept. 1994)); *Mayorga v. Tate*, 302 A.D.2d at 11-12 (asserting that "the attorney-client privilege … survives the death of the client for whose benefit the privilege exists" and citing cases); *People v. Vespucci*, 745 N.Y.S.2d 391 (Nassau Co. Ct. 2002) (surveying five approaches to issue of whether privilege survives, and finding support in New York law for two of the five approaches, both involving survival of the privilege, when privilege belonged to an deceased individual rather than an "expired corporation").

settlement of an estate may often be appropriate where the lawyer provided trusts and estates representation to the deceased client and such disclosure would facilitate the client's testamentary disposition in a way that the client would have favored. *See* D.C. Opinion 324 (disclosure to executor permitted where release of information would further the interests of former client in settling estate).[4]

12. Even where the lawyer prepared the client's will, however, there may be confidential information in the client's file that would not facilitate the settling of the client's estate or for other reasons may not advance the best interests of the client. In that case the material must remain undisclosed. *See* Nassau County 03-4 (2003) (attorney who represented client who died before divorce action was commenced could not provide itemized billing to spouse-executor where information sought would reveal information that client wanted to keep secret); D.C. Opinion 324 (2004) (citing ethics opinions and concluding that an attorney "who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes").

CONCLUSION

13. When the executrix of an estate seeks files possessed by the decedent's former attorney, the ethical obligations of that attorney turn on the legal rights of the executrix. If the executrix is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all the files, except when there is good cause to refuse access to particular materials.

14. If, on the other hand, her status as executrix does not confer on her the same legal right of access as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized under the Rules.

(8-13)

[4] If an executor can waive a decedent's attorney-client privilege when it is "in the best interest of the deceased's estate," *Mayorga v. Tate*, 302 A.D.2d 11-12, the applicable waiver analysis in that situation will often be comparable to the analysis employed under the implied authorization doctrine.