

Ethics Advisory Opinion Committee

Ethics Opinion No. 2023-01

Issued August 10, 2023

ISSUE

May a lawyer ethically provide estate planning documents to the beneficiaries or heirs of a now-deceased client? May the lawyer ethically provide work-product to the beneficiaries as well?

OPINION

A lawyer may ethically provide to the beneficiaries or heirs of a now-deceased client estate planning documents that the lawyer prepared for the client. The lawyer may provide other work product as well, provided that such disclosure is impliedly authorized in order to carry out the representation.

BACKGROUND

This request was posed to the Ethics Advisory Opinion Committee based on the following facts. A lawyer is retained by a client to prepare a will or trust for the client. In the course of that representation, the lawyer learns the identity of the client's beneficiaries or heirs and identifies them in the relevant trust, will, and related documents. The lawyer also may have taken notes about the client and the client's intentions and retained these notes as work product in the case. After the client dies, the trustee or executor of the estate fails to provide the will, trust, or other documents to the heirs or beneficiaries. The heirs or beneficiaries approach the lawyer who drafted the documents, asking for copies. The beneficiaries or heirs also may ask for work product that relates to the decedent's capacity or intentions.

ANALYSIS

Utah law provides that a trustee has certain duties to “qualified beneficiaries,” including to keep them “reasonably informed about the administration of the trust,” to notify them of the existence of the trust and their “right to request a copy of the trust instrument” within 60 days of the trustee’s knowledge of the decedents death, and “upon request,” to “promptly furnish to the beneficiary a copy of the portions of the trust instrument which describe or affect the beneficiary’s interest.” Utah Code § 75-7-811(1), (2). It is the trustee—not the lawyer who drafted the trust instrument—who has these duties. Similarly, a personal representative of an estate has the duty to “settle and distribute the estate . . . in accordance with the terms of any probated and effective will . . . as expeditiously and efficiently as is consistent with the best interests of the estate.” *Id.* § 75-3-703(1).

Nevertheless, when a trustee of a trust or personal representative of an estate is not complying with these statutory duties, beneficiaries and heirs may approach the lawyer who represented the decedent, seeking the trust instrument, the will, or other relevant documents.

Rule 1.6 of the Utah Rules of Professional Conduct provides the general prohibition that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”¹ Utah R. Prof’l Conduct 1.6(a).

¹ Rule 1.0 defines “Informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Utah R. Prof’l Conduct 1.0(f). The comments explain that “[t]he communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent.” *Id.* cmt. 6. The comments further explain that “[c]onsent may be inferred, however, from the conduct of a client . . . who has reasonably adequate information about the matter.” *Id.* cmt. 7. Accordingly, if the client directs the disclosure, under appropriate circumstances, it can be assumed that the client is informed. The lawyer should verify that the client fully understands the legal ramifications of disclosure.

Likewise, Rule 1.9 provides in part that “[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.” *Id.* 1.9(c)(2).

“The duty of confidentiality continues after the client-lawyer relationship has terminated.” *Id.* 1.6 cmt. 20. “In general, the lawyer’s duty of confidentiality continues after the death of a client,” and “a lawyer ordinarily should not disclose confidential information following a client’s death.” Commentary to Model Rule 1.6, American College of Trust and Estate Counsel (Fifth Edition 2016), cmt. e (“ACTEC Commentary”); *see also* Restatement (Third) of the Law Governing Lawyers § 60 (2000) (“The duty of confidentiality . . . extends beyond the end of the representation and beyond the death of the client.”). Accordingly, a lawyer ordinarily should not disclose confidential information following a client’s death.

However, given the Utah statute that directly states that beneficiaries of a trust are entitled to the trust documents themselves and that the trustee is obligated to provide them within 60 days of discovering the decedent’s death, we consider the drafting lawyer to be “impliedly authorized” to provide those instruments to the beneficiaries if the trustee has not done so. Similarly, given the Utah statute that directs the personal representative of an estate to expeditiously distribute the estate, we consider the drafting lawyer to be “impliedly authorized” to provide the will and other estate instruments to the heirs if the personal representative has not already done so.

A more difficult question is whether the lawyer is also “impliedly authorized” to provide work product as well to the beneficiaries and heirs. The ACTEC Commentary states that “if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with *information*

regarding a deceased client's dispositive instruments and *intent, including prior instruments and communications relevant thereto.*" ACTEC Commentary (emphases added).² A lawyer may be impliedly authorized to make disclosure of information related to the representation, including estate planning documents, if it will promote or benefit the client's estate plan. *See* ACTEC Commentary, *Obligations after Death*. The ACTEC Commentary states in full:

If consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. The personal representative or client may also authorize disclosure of other confidential information learned during the representation if there is a need for that information. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Ethics opinions from other states reach the same conclusion. An opinion from the District of Columbia concludes that, "[i]f the matter relates to the husband's fiduciary duties in handling the disposition of the wife's estate, and if disclosure of the information is impliedly authorized in order to further the deceased client's interests as the former attorney can best ascertain them, then the attorney should furnish the materials to the husband/executor." D.C. Bar Legal Ethics Comm., Op. 324.

A Tennessee opinion concludes that "[a] lawyer is permitted to disclose information relating to the representation of a deceased former client, but only if the lawyer believes that the

² Of course, consent could and should ideally be given by the client's personal representative. However, in the factual scenario imagined the trustee or executor may not be cooperating with the named beneficiaries or heirs.

disclosure would further the client's interest and that the client would have consented to the disclosure." Tenn. Bd. Prof. Resp., Formal Op. No. 2014-f-158.

And a Hawaii opinion concludes that "[u]nder HRPC 1.6, however, attorneys may reveal confidential information when disclosure has been impliedly authorized in order to carry out the representation. In determining what disclosures are necessary to carry out the representation of a deceased client, the attorney may consider the intentions of the client. For example, if an attorney reasonably and in good faith determines that confidentiality should be waived in order to effectuate the deceased clients' intended estate plan, the attorney would be permitted and obligated to make such disclosure." Haw. Disc. Bd., Formal Op. No.38.

Similarly, it is well accepted that the personal representative or trustee under the estate planning documents may waive the attorney-client privilege in and for the interest of the estate, but not otherwise. *United States v. Yielding*, 657 F.3d 688, 707 (8th Cir. 2011) ("The cases that have considered this question in detail recognize that a posthumous waiver must be in the interest of the deceased client's estate."); *Mayorga v. Tate*, 752 N.Y.S.2d 353, 356 (2002) ("It is in light of this logic that the common law has always provided that an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client.")

The reason the disclosure must be for the benefit of the estate or trust is to encourage full discussion between the client and attorney without fear of posthumous waiver. *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) ("Knowing that communications will remain confidential even after death serves a weighty interest in encouraging a client to communicate fully and frankly with counsel."); *In re Est. of Rabin*, 474 P.3d 1211, 1221 ("To hold otherwise would drastically undermine a lawyer's duty of confidentiality to a deceased client. It would grant the personal representative authority to request, from every one of a decedent's former

attorneys, the decedent's entire legal history, regardless of subject matter and the needs of the estate.”)

We therefore conclude that a lawyer in possession of a work product related to the deceased client’s will, trust, or estate may disclose that work product to the client’s beneficiaries or heirs, provided that disclosure “is impliedly authorized in order to carry out the representation” of the client. This should include documents that will promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention. Disclosures ordinarily should be limited to information that the lawyer would be required to reveal as a witness.

Finally, we note that best practices for estate planning lawyers should involve addressing with the client the issue of post-death disclosure. The informed client may give express written permission for such disclosure, and this would obviate any need to explore whether consent was “implied” or would promote the client’s estate plan.