

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 95-11

October 9, 1995

The Committee has received a request for an opinion regarding whether an attorney may disclose to a deceased client's relatives notes and information concerning his preparation and the client's execution of the client's will.

FACTS

The attorney requesting the opinion prepared a will for a client several years ago. In that will the client left the entire estate, other than token bequests, to a friend and left nothing to any members of the client's family. The client is now deceased and the attorney's firm has not been retained to probate the will. Certain of the client's relatives who were left nothing in the will have contacted another law firm and are apparently considering challenging the will. They have asked the attorney requesting the opinion to give them his notes concerning the process of preparing and executing the will. The attorney would like to furnish these relatives with his notes and all the information he has on this subject if that action is permissible. He asks whether he may give this information to them ethically.

DISCUSSION

Rule 1.6, N.D.R. Professional Conduct, provides, in relevant part:

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this rule. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. Such revelation or use is:

.

(c) Permitted when impliedly authorized in order to carry out the representation;

.

(g) Permitted to comply with law or court order . .

. . .

The Rules of Professional Conduct establish that an inquiry as to what a lawyer may reveal pursuant to Rule 1.6 is distinct from judicial application of the rules of attorney-client privilege. As stated in the Rules of Professional Conduct,

These Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion or duty to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

Scope, N.D.R. Professional Conduct. Further, the Comment to Rule 1.6 states:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. . . .

This principle of confidentiality is also given effect in the attorney-client privilege and the work product doctrine. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose or use to the disadvantage of a client such information except as required or permitted by the Rules of Professional Conduct or other law.

. . . .

Provisions in other law may seem to permit or require a lawyer to disclose information relating to a representation. Such a provision raises the legal issue

of which directive takes precedence -- the general rule of non-revelation found in this Rule or the provision in other law authorizing disclosure. It is the lawyer's obligation to disclose only when the precedence of the law authorizing disclosure is clear; an order of a court requiring or permitting disclosure is to be taken as a determination of that precedence.

The attorney-client privilege is a protector of some matters related to the representation of a client, and, as to a part of the information possessed by a lawyer about a client, operates as an obligation of the lawyer not to reveal. However, the law of attorney-client privilege differs among the jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, and the client has not consented to the disclosure or the the [sic] disclosure is neither permitted nor required by these Rules, the lawyer must invoke the privilege to resist disclosure whenever the privilege is applicable. The failure to invoke the client's privilege in such circumstances is a violation of the obligation recognized in this Rule. If invocation of the privilege results in a ruling issued by a court or other tribunal of competent jurisdiction requiring the lawyer to disclose the information, the lawyer may comply; that compliance is not a violation of the obligation of confidence recognized in this Rule.

. . . .

The duty of confidentiality continues after the client-lawyer relationship has terminated.

The Connecticut Bar Association Committee on Professional Ethics has opined that "[t]he principal [sic] of confidentiality is governed by two related bodies of law: (1) the attorney-client privilege in the law of evidence; and (2) the rule of confidentiality established in professional ethics. . . . The ethical duty of confidentiality is broader than the evidentiary privilege for attorney-client communications. The ethical duty applies to all information that relates to the representation of a client. Moreover, this duty applies in all contexts, not just those where a lawyer is acting as a witness." CT Bar Ass'n Comm'ee on Professional Ethics, Informal Opinion 96-6 (Feb. 7, 1994).

The Connecticut opinion concerned a situation in which there was a dispute while a client was still alive, although incompetent, about the disposition of the client's property after the client's death. The issue was whether the attorney could disclose information about his client's intentions with regard to disposition of her property. The committee cited the "implied waiver" section of Rule 1.6 ("A lawyer shall not reveal information

relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation") and concluded that because his client had not consented, the attorney could make no disclosure of his communications with the client until the client's will was admitted to probate. The committee decided that when the will was probated, the implied waiver exception would likely allow the attorney to testify concerning the client's statements. The opinion also noted that it addressed only the ethical duty of confidentiality and if a court ordered the attorney to disclose the information, the attorney must comply with the court's orders. Id.

Similarly, the Philadelphia Bar Association Professional Guidance Committee has issued an opinion interpreting Rule 1.6 as prohibiting an attorney from disclosing the contents of an earlier will to a deceased client's children. Philadelphia Bar Ass'n Professional Guidance Comm'ee Guidance Opinion No. 91-4 (March 1991). The Committee wrote:

The mandatory language of Rule 1.6(a) prohibits you from disclosing the contents of the Will to the children or their attorney, as your client, the Testator, has not authorized you to do so. The earlier Will constitutes confidential information relating to your representation of the Testator, and your duty not to reveal its contents continues even after your client's death. . . . This opinion does not address whether a court of competent jurisdiction may order you to produce the earlier Will, or whether applicable substantive law would allow the personal representative to waive the attorney client privilege.

Id.

Under North Dakota evidence law the attorney-client privilege may not attach to otherwise confidential communications between a lawyer and a deceased client under certain circumstances. Specifically, N.D.R. Evid. 502(d) establishes that there is no privilege "[a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." As the North Dakota Supreme Court stated in In re Graf's Estate, 119 N.W.2d 478, 481 (N.D. 1963),

There are . . . certain exceptions to the general rule that communications between attorneys and clients are privileged. . . .

. . . .

[T]he confidential nature of communications between attorney and client is not recognized, and this privilege no longer is applicable, in litigation which occurs after the client's death, which litigation is between parties, all of whom claim under the client. Where the litigation is to determine who shall take the property of the deceased and all parties claim under the client, neither party to the litigation can claim that such communications are privileged. Between persons claiming under the deceased client and others who are not heirs, next of kin, legatees, or devisees of the testator, the privilege still would survive.

The reason for this exception to the general rule of holding communications between attorney and client as privileged, is sound. In controversies between heirs at law, devisees, legatees, or next of kin of the client, such communications should not be held as privileged because, in such case, the proceedings are not adverse to the estate. The interest of the estate as well as the interest of the deceased client demand that the truth be determined.

See also Mehus v. Thompson, 266 N.W.2d 920, 923 (N.D. 1978).

Accordingly, under North Dakota evidence law, in a controversy not adverse to the estate and involving an issue between parties who claim through the deceased client, a court may hold attorney-client privilege does not prohibit an attorney from revealing otherwise privileged relevant communications with the deceased client to the deceased client's heirs at law, next of kin, devisees, legatees, and personal representatives. However, as discussed above, that rule of substantive law is distinct from the ethical inquiry. In some circumstances the Rules of Professional Conduct prohibit voluntary disclosure of client information outside of litigation even if a court were to find that testimony concerning that information would not be privileged under North Dakota evidence law.

CONCLUSION

Based on Rule 1.6, absent a court order, you may not disclose confidential information concerning your preparation and the execution of your deceased client's will to the relatives who are seeking to challenge the will unless your client consented to that disclosure or some other basis for revelation or use established by Rule 1.6 applies. If, however, a court finds that the information is not protected by the attorney-client privilege and orders you to produce the information, you must do so.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Laurie J. Loveland and was unanimously approved by the Committee on October 9, 1995.



Alice R. Senechal, Chair

[REDACTED]

August 28, 1995

State Bar Association
of North Dakota
P. O. Box 2136
Bismarck, ND 58502-2136



Re: Ethical question

Ladies and Gentlemen:

As I recall reading somewhere, the Bar Association has a service wherein if an attorney has a question regarding ethics, that question can be posed and an answer received. This is such a request.

I drew the will for a lady several years ago and she is now deceased. I had represented her on other things and recognized that she was somewhat weak in the English language so that I hired an interpreter to discuss the will with her due to its peculiarities. Other than token bequests, she left all of her family out and gave all of her assets which were some \$800,000 or \$900,000 to a friend.

Her husband predeceased her as did her only child. The only relatives she had then were a brother, perhaps two sisters, nieces and nephews.

I recognized that this was going to be a controversial situation so I was extremely careful and had the interpreter visit with the testatrix privately. I visited with her privately. The two of us visited with her together, and the friend also visited with her in all of our presence. She was elderly at the time and could not drive so the friend brought her to the office, but we had the friend wait in a separate area.

I made notes of the procedure we used and the discussions had and attached them to her copy of the will as I knew that this was going to come up.

The PR chose not to use our firm to probate the will.

A law firm in [REDACTED] has now been contacted by certain relatives who were left nothing in the will. I have been requested to furnish my notes to them. I recognize that privilege died with the testatrix, and I would like to furnish my notes and whatever information I have to these people.

Page 2
State Bar Association of North Dakota
August 28, 1995

May I ethically give this material to them?

Yours very truly,

[REDACTED]

[REDACTED]