

## **ETHICS ADVISORY OPINION**

### **12-10**

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

#### **Factual Background:**

Client was a widow with two adult children. Client remarried and then resided in South Carolina with new spouse. Client and new spouse separated in 2010. After the separation, Client moved out of state to live with family for about two years.

Spouse filed actions for separate support and maintenance in South Carolina and equitable division of the marital estate. Lawyer is retained to represent Client in these actions. Client, after suffering from dementia and other health problems, died before the litigation was resolved. The litigation was subsequently dismissed by Spouse.

After Client's death, client's brother applied to be and was appointed as Administrator of the Client's estate in the state where client most recently resided. Subsequently, Spouse filed a last will and testament with the probate court in the other state. The will named Spouse as sole heir and Personal Representative of Client's estate. Based upon the will, the probate court relieved Brother and appointed Spouse as Executor of the estate.

Spouse, as executor of the estate, now demands return of client's file as property of the estate. The file appears to contain non controversial items such as car titles, and financial documents, as well as more sensitive items (letters, notes, etc.) that were directly related to the prior family court action.

#### **Question Presented:**

Given the previous adversarial posture between Client and Spouse, may Lawyer return Client's file to Spouse in his capacity as Personal Representative of the estate?

**Summary of Opinion:**

Lawyer should produce items only to the extent that he can determine that either the deceased client or the Probate Court specifically authorized its release to the spouse. Any other information should not be released absent a Court order.

**Opinion:**

The Inquirer seems to draw a distinction between items in the file that are more asset oriented, such as car titles and deeds, and those that may be more sensitive, such as letters or other communications. For the purposes of this answer, however, those distinctions are irrelevant. Rule 1.6 covers “information relating to the representation of the client,” and to try to separate the controversial items from those that seem to be more straightforward is an exercise not contemplated by the Rules. All of the information Lawyer received was, in some way “related” to the representation of Client.

The first primary consideration in this case is whether the attorney client confidentiality extends beyond the death of the client. The EAC has previously concluded, in opinion 05-09, that attorney client confidentiality survives the death of the client, and there is no authority for its waiver by third parties.

In this particular scenario, the Rules of Professional Conduct require that the attorney only turn over the contents of the file if compelled to do so by court order. Rule 1.6 (a) prohibits a lawyer from revealing information relating to the representation of a client unless the client consents, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by 1.6(b). The client is deceased, so no informed consent can be obtained from Client. As Lawyer was retained specifically for the separate support and maintenance action (now dismissed), the disclosure of these items to the Personal Representative of the estate cannot be said to be in furtherance of Lawyer’s representation of Client.

Rule 1.6(b) has 7 subparts, but the only applicable provision in Rule 1.6(b) is sub-section (7), which allows the attorney to reveal confidential information in order to comply with a law or court order. The Lawyer may either proactively file an action in the Probate Court, asking that the Court determine his obligation to disclose this information, or assert the confidentiality privilege to the Personal Representative, who can then seek an order regarding production of the material. The Lawyer may consider producing to the Court an inventory of the arguably privileged items so that the Court can more accurately determine their proper distribution.