132 DUTIES OF CONFIDENTIALITY OF WILL DRAFTER UPON DEATH OF TESTATOR

Adopted September 26 2017

A lawyer's duty of confidentiality continues after the death of a client. *Cf.* Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality, and "death of client" not listed); Colo. RPC 1.6, cmt. [20] (duty of confidentiality continues after the client-lawyer relationship has terminated); Colo. RPC 1.9(c)(2) (lawyer may not reveal information related to representation of former client); *see also Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after death of client).

Accordingly, a lawyer ordinarily should not disclose client information following a client's death. For example, if a family member is disappointed with the gift provided under a will and asks the drafting lawyer questions about the testator's intentions, the lawyer usually may not respond without violating Rule 1.6. *See also* American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, R. 1.6, at p. 80 (5th ed. 2016) ("ACTEC Commentaries") (lawyer's duty of confidentiality continues after death of client).

If the decedent had authorized the drafting lawyer to make such disclosures or if the deceased client's Personal Representative (who holds the rights to the client information) gives consent, then the lawyer may provide an interested party, including a potential litigant, with client information regarding a deceased client's dispositive instruments and intent. *See id.*. This

could include prior instruments and communications relevant to those instruments. *Id*. The disclosure should be no broader than necessary to carry out the decedent's wishes. *Id.*

If neither the client nor the Personal Representative has authorized the disclosure, however, there is a split of authority as to whether the lawyer may disclose client information as a matter of ethics. Some authorities contend that such a disclosure would have been "impliedly authorized" by the testator's mere retention of counsel, under the rationale that the testator presumably wanted his or her wishes followed. *Id.* at 88-91 (collecting conflicting ethics opinions from around the country, including Iowa Op. 98-11 (1998), which concludes that questions related to the decedent's potential implied authorization turn on individual facts, and thus a lawyer should not make such disclosures without a court order). Other authorities reject this analysis. *See ACTEC Commentaries* at 88-91 (citing North Carolina 2002 Op. 7 (2003), which concludes that the lawyer may make such disclosures if consistent with the attorney-client privilege).

There is no case authority in Colorado on this ethical point, as *Wesp* addresses only the privilege question, not the ethical issue. While some other states have held that the act of communicating with a drafting lawyer itself may constitute implied consent under Rule 1.6 to disclosure of client information (to enhance the chances of the testator's wishes being carried out), no Colorado decision so holds. The Colorado Bar Association Ethics Committee is of the opinion that simply retaining a lawyer to draft estate documents, without more, is not sufficient to constitute implied consent for the lawyer to voluntarily provide information protected by Rule 1.6.

Therefore the safer course of action is for the drafter not to provide such information voluntarily without the consent of either the testator or the Personal Representative. If a court

orders the drafting lawyer to disclose information, however, then the lawyer may reveal the information without violating Rule 1.6. *See* Colo. RPC 1.6(b)(8) (lawyer excused from requirement of confidentiality to comply with court order).

In conclusion, a drafting lawyer may ethically provide client information relating to a deceased client's testamentary wishes as necessary to carry out those wishes where: (a) the decedent authorized such disclosure; (b) the Personal Representative authorizes such disclosure; or (c) a court orders such disclosure. If none of those circumstances are present (and no other exception in Rule 1.6 applies), no Colorado authority would allow the drafting attorney to provide client information to third parties, including beneficiaries under the will and other documents.