



ISBA Professional Conduct Advisory Opinion

Opinion No. 21-02
March 2021

Subject: Confidentiality

Digest: The Illinois Rules of Professional Conduct allow a lawyer to provide the executor and trustee named in a deceased client's estate planning documents with the final executed copies of those documents and whatever portions of the estate planning file may be helpful to the named fiduciary to carry out the deceased client's intent expressed in those documents. The lawyer may give other family members limited information about the deceased client's estate planning documents and file if providing that limited information will allow a beneficiary to enforce her rights or if the disclosure might prevent litigation. If a lawyer receives a subpoena issued in a will or trust contest for a deceased client's estate planning file, the lawyer should contest the subpoena and not comply until a court has ordered the lawyer to comply.

References: Illinois Rules of Professional Conduct, Rule 1.6

Adler v. Greenfield, 2013 IL App (1st) 121066, ¶ 59

Eizenga v. Unity Christian Sch. of Fulton, 2016 IL App (3d) 150519, ¶¶ 24-27

FACTS

A lawyer drafts estate planning documents for a client ("Client") including a will and trust. The beneficiaries of Client's estate plan include Client's spouse ("Spouse") but not Client's children (the "Children"). Client names a non-family member as executor and trustee ("Fiduciary"). Client subsequently passes away. Spouse, Fiduciary, and Children all independently request Client's estate planning file from the lawyer.

QUESTIONS

- 1) What duty does the lawyer have related to releasing Client's estate planning documents and/or estate planning file to Spouse, Fiduciary, and Children?

- 2) Do these duties change if Children have filed a legal proceeding to contest the validity of Client's will and trust?

DISCUSSION

If the lawyer's file includes Client's final will, then the lawyer "shall file it with the clerk of the court of the proper county..." 755 ILCS 5/6-1(a). If the lawyer receives a request for a copy of the final will from any person, the lawyer should direct the person to check the clerk of court records to obtain any final will.

The lawyer's obligations with respect to all other estate planning-related documents in her file are governed by Illinois Rule of Professional Conduct 1.6 which provides that a lawyer has a duty to keep client information confidential unless disclosure is explicitly or implicitly authorized by the client or one of a number of exceptions are met:

(a) 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) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

I.R.P.C. 1.6. Of the exceptions, only exception (b)(6) applies and is discussed below.

Thus, the first question the lawyer should answer is whether Client gave informed consent to a particular disclosure by checking her file to determine if it contains evidence of Client's informed consent to disclose Client's estate planning documents or file. For example, many estate planning attorneys include provisions in their engagement letters stating explicitly who the lawyer may provide documents to (and which documents) after the client's death. Alternately, some estate planning lawyers have discussions with their clients about releasing information after their death and memorialize what the client has consented to in writing in a memo provided to the client and placed in the file. Consequently, if Client gave informed consent to release the estate planning documents and/or file to one or more of Spouse, Fiduciary, or Children, then the lawyer should follow those instructions.

If Client did not give informed consent, then the lawyer should examine whether Client gave implied consent. In the case of implied consent, comment [5] to Rule 1.6 explains that if it is necessary to carry out a representation, consent is implied:

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

I.R.P.C. 1.6 cmt. 5. Because Fiduciary must have copies of the final executed estate planning documents in order to effectuate Client's estate plan, Client has given implied consent allowing the lawyer to provide executed copies of the final will and any operative trust documents, amendments, and restatements to Fiduciary. Related, Client has given implied consent allowing the lawyer to provide Fiduciary with those portions of the estate planning file that may allow Fiduciary to carry out her duties more effectively – like information about Client's assets. Importantly, Illinois takes a minority view that Client has not given implied consent to release Client's entire estate planning file to Fiduciary. *See Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 62 (administrator of estate cannot waive attorney-client privilege which belonged to the decedent).

If lawyer learns that Fiduciary has not disclosed to Spouse that she is a beneficiary of the estate planning documents, and Spouse is not receiving her benefit, then Rule 1.6 authorizes the lawyer to disclose to Spouse enough information about Client's estate plan to allow Spouse to enforce her rights under the estate plan. This disclosure is impliedly authorized as necessary to "carrying out the representation" because without the disclosure, Client's estate planning would not be effectuated. *See* ACTEC Commentaries to the Model Rules of Professional Conduct at p. 80 ("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."); *see also* Florida Ethics Opinion 10-3 (unless client has specifically authorized the disclosure, lawyer may disclose information to serve deceased client's interests).

This analysis may be different if Spouse and Client were co-clients of the lawyer for estate planning purposes. Depending on the terms of the engagement, lawyer may have been obligated to share all information obtained in the course of the representation of Spouse and Client between them, in which case Spouse would be entitled to copies of all estate planning documents and the entire estate planning file. Again, this situation would best be dealt with in a joint representation estate planning letter that specifically states whether the lawyer was authorized to share information disclosed by the co-clients with each other.

Rule 1.6 prohibits the lawyer from disclosing the estate planning documents and the estate planning file to Children. However, if the lawyer determines that providing Children with some information about the estate planning file, for example related to the execution of the will or trust documents, would forestall litigation and save estate and trust resources, then this disclosure is impliedly authorized by Client. *See* ACTEC Commentaries at p. 80 (“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.”)

Once Children file a will contest or trust, they may be able to obtain the estate planning file in response to a subpoena under the testamentary exception to attorney-client privilege. *Eizenga v. Unity Christian Sch. of Fulton*, 2016 IL App (3d) 150519, ¶¶ 24-27. “In general, the attorney-client privilege survives death. However, an exception to the general rule has been recognized in testamentary contexts.” *Id.* The rationale is that the testator or grantor would want all parties to have access to her otherwise privileged communications to determine the testator or grantor’s true intent. *Id.* at ¶26 quoting *United States v. Osborn*, 561 F.2d 1334, 1340 n. 11 (9th Cir.1977). However, in general the lawyer should not reveal the information to Children until the children have filed a will or trust contest and she has received a subpoena.

Even after the lawyer receives a subpoena, the lawyer should not automatically comply. Under Rule 1.6, “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order. I.R.P.C. 1.6(b)(6). Because the client has passed away and is unavailable for consultation, the lawyer should object to the subpoena and only provide the documents after the court enters an order to comply with the subpoena. ABA Formal Opinion 473 at pp. 6-7.

CONCLUSION

In conclusion, the lawyer should provide Fiduciary with final executed estate planning documents and any information in the file Fiduciary needs to effectuate Client’s intent reflected in the estate planning documents. The lawyer may also provide information to Spouse if lawyer believes Spouse requires that information to protect her rights as beneficiary under the estate planning documents but the lawyer should limit the amount of information she provides as much as possible. The lawyer should not provide any information to Children unless the lawyer believes that providing the information to Children would prevent litigation or the lawyer is compelled to provide the information by a subpoena issued in a will or trust contest. If a lawyer receives a subpoena issued in a will or trust contest for a deceased client’s estate planning file, the lawyer should contest the subpoena and not comply until a court has ordered the lawyer to comply.

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