Law Society of British Columbia

Practice Resource

Navigating requests for your deceased client's file

Introduction

This resource is designed to provide BC lawyers with guidance on handling requests for the legal files of their deceased clients in the context of estate litigation or challenges to the validity of a will. A request for the disclosure of a client's file often arises in the context of a wills dispute; for example, you may receive a request from a beneficiary under the will to disclose your files, notes and records related to estate planning or drafting of your client's last or prior will, or related estate planning documents. The decision whether or not to disclose part of your client's file is a challenging one which brings up both ethical and substantive law considerations, and it is prudent to be deliberate in how you deal with these requests.

This resource reviews relevant rules under the BC *Code of Professional Conduct* (the 'Code'), outlines some substantive law guidance as a starting point for your research, and provides a framework for what to consider when weighing whether to disclose part or all of your file. Please note that the discussion of substantive law is intended to provide you with a starting point for your research, and is not an exhaustive overview of the case law in this area. As with any practice resource, lawyers are expected to exercise their professional judgement in determining the applicability and correctness of the information and to proceed accordingly.

Ethical considerations

A lawyer's ethical duty of confidentiality to their clients is outlined in Chapter 3, section 3 of the Code. In particular, Code rules 3.3-1, 3.3-2, and 3.3-2.1 are often engaged when a lawyer receives a request for a deceased client's file.

Code rule 3.3-1: Confidential information

Code rule 3.3-1 directs us to hold information related to the business and other affairs of our clients in strict confidence. The duty of confidentiality continues after conclusion of your retainer, indefinitely, including after the death of your client. Some exceptions to confidentiality include:

(a) when expressly or impliedly authorized by the client;

(b) when required by law or a court order;

(c) when required to deliver the information to the Society, or

(d) when otherwise permitted by this Code rule.

This ethical rule of confidentiality is broad and applies to all information about your client acquired in the course of the professional relationship, and regardless of the nature or source of the information or the fact that others may hold the same knowledge.[1]

Code rule 3.3-2: Use of confidential information

In addition to the broad duty of confidentiality set out in Code rule 3.3-1, Lawyers must not use or disclose confidential information to or for the benefit of a third party, such as a beneficiary under a will, without their client's consent.

Code rule 3.3-2.1: Lawyers' obligation to claim privilege when faced with requirement to surrender document

If you are required by legislation to produce a document or provide information that may be privileged information, unless your client waives privilege you have an obligation to first claim solicitor-client privilege. If you are required by law or court order to disclose client information, you may only disclose what is required.

More guidance

For more guidance on confidentiality and handling requests for confidential information, whether under subpoena or otherwise, you may also wish to review the Practice Advisors FAQ, in particular question 1, "When do I have a duty of confidentiality to a client? What if I am subpoenaed to give evidence?". You may also wish to review the Annotations to Code rules 3.3-1, 3.3-2 and 3.3-2.1.

In particular, the Law Society's Ethics Committee provided an opinion on confidentiality and practice concerns to lawyers in the handling of requests for confidential or privileged information and documents, in particular from an attorney (acting under a Power of Attorney):

> It is not improper for a lawyer to require an attorney to obtain a court order compelling the lawyer to provide the confidential or privileged information or documents to the attorney if the lawyer is uncertain as to whether there is an identity of interest between the client and the attorney or where the lawyer is unsure if the information requested

[1] Code rule 3.3-1 commentary 2.

relates to the client's incapability or an area of authority granted to the attorney.[2]

Substantive considerations

The ethical rule of confidentiality must be distinguished from the privilege.[3] Privilege, once established, is broad and encompasses all communications within the framework of the lawyer-client relationship.[4] Communication, either written or oral, is considered privileged if (i) it occurs between a lawyer and their client, (ii) entails the seeking or giving of legal advice; and (iii) is intended to be confidential by the parties.[5]

In *Skogstad v Law Society (British Columbia)*, the BC Court of Appeal stated that the protection of the confidentiality of communications between a lawyer and their client is a substantive rule of law and a core legal value, adding that the privilege of these communications is a fundamental right.[6]

Confidentiality and privilege survive death

As noted above, a lawyer's duty of confidentiality to their client survives the professional relationship and continues indefinitely, beyond the client's death. In *Geffen v Goodman Estate*, the Supreme Court of Canada held that lawyer-client privilege survives the death of the client and passes on to their personal representative.[7] The BC Supreme Court considered *Geffen* in *Wood v Wilkie*, and held that a wills file should not be produced unless the validity of a will is called into question.[8]

While a deceased client's personal representative may be in a position to waive privilege over a deceased's legal file,[9] privileged information cannot be disclosed by a lawyer unless there is a clear waiver of privilege or unless properly authorized or compelled by law to do so. The guiding principle for lawyers in possession of a client's prior will or a wills file should be to protect their former client's privilege and confidentiality.

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[2] Ethics Committee minutes, October 2014, item 8.
[3] See Code rule 3.3-1 commentary 2.
[4] *Descôteaux et al. v. Mierzwinski*, 1982 SCR 860 at 893.
[5] *Solosky v The Queen*, 1980 SCR 821 at 837.
[6] *Skogstad v Law Society (British Columbia)*, 2007 BCCA 310 at para 6.
[7] *Geffen v Goodman Estate*, 1991 SCC 353 at para 19.
[8] *Wood v Wilkie*, 2012 BCSC 1120; *Wills, Estates and Succession Act,* s. 142.
[9] For further discussion on the right of a personal representative to waive a deceased's privilege, see *Stapleton v Doe*, 2017 BCSC 12, *Novak v Seemann*, 2023 BCSC 1784 and relevant sections of the *Wills, Estates and Succession Act*.

General exceptions to confidentiality and privilege

Despite our obligations surrounding confidentiality and privilege, there are exceptions at law where it may be proper for a lawyer to disclose a client's information.

In the context of estate litigation, specifically challenges to the validity of a will, the "wills exception" to privilege would fall under the category of required by law. The wills exception to privilege is a concept borne out of substantive law.

The wills exception to privilege

Although privileged while a client is living, a client's last will and testament does not remain privileged after their death, as it was created to be shared with their executor to carry out the deceased's wishes. The communications between a lawyer and their client when creating the will, however, remain privileged.

The "wills exception" to privilege allows a lawyer to disclose aspects of their client's file and to speak about their dealings with the deceased in limited situations. For example, if a dispute regarding the validity of your client's will arises after their death, the wills exception to privilege may apply and aims to help resolve the dispute by providing evidence as to your client's capacity and/or the absence of undue influence.

In *Geffen*, Madam Justice Wilson shed light on the reasoning for this exception:

> The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing the inquiry on who those heirs or successors properly are. In summary, it is, in the words of Anderson Surr. Ct. J. in *Re Ott*, *supra*, "[i]n the interests of justice" to admit such evidence.[10]

In *Wood v Wilkie*, the court held that a request for a file related to a prior will should not be disclosed unless there are proceedings which directly relate to, and call into question, the validity of that will. [11]

Practical tips

Deciding whether to disclose a client's file or share a prior will can be difficult and complex; if you find yourself in this position, be sure to consider the specific circumstances carefully,

[10] *Geffen v Goodman Estate*, 1991 SCC 353 at 387.
[11] *Wood v Wilkie*, 2012 BCSC 1120.

including the authority of the executor, personal representative, or other individual requesting the file. The cautious approach would be to refuse to produce until court proceedings commence, however there will be circumstances in which demanding a court order before producing any documents for the executor of an estate would not be in the best interests of your client.

Communicating with an executor or other parties about a deceased client's file can also be challenging. These conversations often require navigating both the emotional aspects of the situation and your ongoing duty of confidentiality. Initial discussions should remain general until you confirm who has the authority to act on behalf of the deceased and the extent of that authority.

When in doubt, here are some practical tips and questions to guide you:

- **Clarify the authority of the requestor.** If someone requests your wills file, ask under what authority they are acting. For non-wills files, consider whether access to the file is necessary for administering the estate and if the individual has sufficient authority to request it.

- **Confirm the executor's appointment.** Before proceeding with any request, confirm that the executor or personal representative has been formally appointed and inquire further to determine if the request relates to the administration of the estate.

- **Request a court order if needed.** If you are uncertain whether to disclose privileged information or understand that the request for your file is in anticipation of litigation, inviting the requestor to obtain a court order is a cautious and effective approach to ensure compliance with your ethical obligations. This is particularly true where there is a challenge to the will and it is not clear who the ultimate executor will be.

- **Keep detailed notes of your decision-making process.** Document your reasoning for disclosing or withholding information, including the specific inquiries you made and the steps you took to confirm the requestor's authority. This documentation can protect you in the event of disputes or claims.

- **Consult with a trusted colleague or senior lawyer.** When faced with a complex or unfamiliar situation, discussing the matter with a colleague or mentor can provide valuable insights and guidance. Remember, Code rule 3.3-6 provides that a lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

- **Seek guidance from a Practice Advisor.** If you're unsure about how to proceed, contact a practice advisor for advice tailored to your situation. Please note that although practice advisors do not advise on substantive legal matters such as privilege or the wills

exception to privilege, they can help you talk through a problem and answer questions about your ethical and professional obligations.

- **Know when to involve the Lawyers Indemnity Fund (LIF).** Visit the Lawyers Indemnity Fund website to review your policy. If you suspect that the request for your file could potentially lead to a challenge to the will that you drafted, it will often be prudent to contact LIF. You may wish to contact claims counsel in Wills and Estates or one of LIF's advance ruling advisors.

Conclusion

Handling requests for the legal files of deceased clients requires careful consideration of your ethical obligations under the BC Code and relevant substantive law. By asking applicable questions of the requestor, reviewing applicable Code rules, case law, and legislation, documenting your decision-making, and requesting a court order when necessary, you can navigate these requests while upholding your duty of confidentiality to your client.

Questions

If you have further questions, or would like to discuss a particular issue, please feel welcome to contact a practice advisor.

Lawyers must exercise their professional judgment respecting the correctness and applicability of the material. The Law Society accepts no responsibility for any errors or omissions and expressly disclaims any such responsibility.

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