

COMMITTEE: Ethics Committee

DATE: October 2014

RULES 3.3-1, 3.3-2 AND 3.3-2.1: POWER OF ATTORNEY ACT

The Law Society's Practice Advisors receive calls from lawyers who have been requested to reveal a client's or former client's confidential or privileged information and documents to persons claiming to be an attorney appointed under an enduring power of attorney for an adult under the *Power of Attorney Act*. A common scenario is that the attorney claims that the adult is no longer capable. The attorney may want the client's will, a copy of the will, family law file, real estate files, etc. In some cases, the lawyer prepared the enduring power of attorney and consequently has at least some file information and a copy of the instrument. In other cases she or he did not prepare it and has no information about the instrument's content or the client's instructions regarding its use.

Practice Advisors often advise a lawyer that the lawyer must not provide an attorney with the client's confidential or privileged information or documents without either the client's consent or a court order (BC Code rules 3.3-1 to 3.3-2.1). Sometimes the client's consent to provide the information or documents to the attorney is included within the enduring power of attorney but more often it is not and there are no clear written instructions available. In many cases it is difficult for the lawyer to know if the client is incapable, if the attorney is acting in the client's best interests, or if the appointment was valid.

The Committee agreed the following points may help lawyers in handling requests for confidential or privileged information and documents from an attorney:

Preparing an enduring power of attorney

When drafting an enduring power of attorney, it would be prudent for lawyers to obtain instructions from the client as to whether or not the lawyer may deliver the client's will, a copy of the will, and other confidential or privileged information and documents (e.g. capacity assessment, the estate file and other client files) to the attorney and under what circumstances. Clear instructions may be included within the contents of the enduring power of attorney.

Requests by the attorney for the client's information or documents

Capable client. If the client is capable, and an attorney asks for the original of the client's will or a copy of the will or other confidential or privileged information or documents from the client's lawyer, the lawyer may deliver the information or documents to the attorney with the client's consent. The consent may be specifically provided for in the enduring power of attorney signed by the client.

Client incapable. If the attorney asks for confidential or privileged information or documents from the lawyer and tells the lawyer that the client is incapable, the lawyer should (a) try to determine the client's capacity and seek the client's instructions; and (b) ask the attorney for (i) a copy of the enduring power of attorney to inform the lawyer as to the effectiveness of the document; and (ii) ask for documentation supporting the client's incapability.

If the lawyer determines the client is incapable, and the client's attorney asks for the original of the client's will or a copy of the will or other confidential or privileged information or documents from the client's lawyer, the lawyer may provide the information or documents to the attorney if the client, while capable, provided clear consent in the enduring power of attorney for the lawyer to do so.

A lawyer must not deliver, to a client's attorney, the original will made by the client if the client gave instructions to the lawyer who holds the client's will, or the will contains instructions, prohibiting delivery of the will to the attorney.

If the client, while capable, did not provide clear consent in the enduring power of attorney to provide the confidential or privileged information or documents to the attorney, the lawyer should not provide the information or documents to the 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 relates to the client's incapability or an area of authority granted to the attorney.

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