Ethics Opinion 2007-3

• Rules: 1.6; 1.14
• Subject: Disclosing confidential information to one holding a Power of Attorney for the client.
• Summary: A power of attorney may not be used to obtain confidential information when the client has instructed such information should not be disclosed.

I. Facts.

Attorney drafted a Will and Power of Attorney for Client, who executed them in 2002. In 2006, a niece of Client ("Niece") requested a copy of Client's Will. Attorney advised Niece that Attorney could not furnish a copy of the Will because it is a private document.

Thereafter, in October of 2006, Attorney conferred with the Client about Client's will. The Client is 90 years old, has never been married, is residing in an assisted living center, and recognizes problems with his health. The Client stated that the Will expresses his wishes, and that no one should be permitted to see the Will during his lifetime. Client confirmed those instructions in writing.

In April of 2007, Niece again demanded a copy of Client's will. The demand included a copy of a Durable General Power of Attorney that Client executed on March 30, 2007. Attorney informed Niece of Client's instructions, and declined to furnish the will to the niece.

On April 16, 2007, the lawyer for Niece sent a letter to Attorney, threatening either to sue Attorney, or file a complaint with the South Dakota Bar Association "Grievance Committee" if it Attorney failed to provide the Client's Will to the Niece. On April 22, 2007, Attorney consulted the Client. Client confirmed that he does not want his Will changed, or for any person to know its contents during his lifetime. Client further stated that his assets are to remain in his name, and are to be distributed under the provisions of the Will as written.

Attorney asks whether he must provide a copy of the Client's Will to the Niece.

II. Discussion

An attorney must keep a client's communications confidential unless an exception applies. Rule 1.6. There is no exception in the facts presented to the Committee. Therefore, Attorney cannot give the Niece the Will.

Niece's lawyer asserts, in essence, that the POA makes the Niece a "co-client" in the shoes of Client. The Committee disagrees. Who is the "client" is a question of substantive law. "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Preamble to South Dakota Rules of Professional Conduct ¶17, SDCL 16-18 Appendix. "The existence of an attorney-client relationship is usually a question of fact dependent upon the communications and circumstances." *Keegan v. First Bank of Sioux Falls*, 519 NW2d 607, 611 (SD 1994).

The Committee believes that, under the "communications and circumstances," the Niece is not a "client" for the "specific purpose" of reviewing Client's Will. First, absent a guardianship, conservatorship or other legal limitation, Client can revoke or modify the attorney-in-fact's authority. Second, if the general POA ever gave the Niece the authority to review the Will, the April 22, 2007 communication from Client to Attorney revoked it. Attorney believes that Client is slipping, but, until he is adjudicated unable to make such decisions, Rules 1.6, and 1.14(a) & (c) require that Attorney continue to protect Client's confidences.

John L. Brown, Chair
Ethics Committee
State Bar of South Dakota