

## ***State Bar of South Dakota***

### **Ethics Opinion 98-6**

September 4, 1998

- ***Rules: 1.6, 1.14***
- ***Subject: Confidential information; Wills***
- ***Summary: Attorney must preserve client confidentiality of a disabled client unless disclosure is authorized by one of a limited number of exceptions.***

#### **FACTS**

You have a very elderly, widow client who both you and her doctor believe is incompetent to execute wills. A bank is her conservator. Your client has no children, but has numerous nieces and nephews and a foster child.

Decades ago, the client and her deceased husband executed a "conjoint and mutual last will and testament" which provided that their estate would succeed to a life estate in the survivor and then for descent in unequal shares to named surviving nieces, nephews and the foster child.

This decades old will was never probated. All property was held in joint tenancy which was terminated by affidavit. More than a decade ago your client executed another will revoking all prior wills and altering the prospective heirs and amounts. Within the past few years, when she was still competent, she again, with your assistance, executed another will, again terminating all prior wills and codicils. You are of the opinion that the last two wills executed by your client revoke the "conjoint and mutual last will and testament."

Now, the conservator has advised that the estate should be decreased to avoid tax consequences. You ask whether you may disclose the existence of the decades old "conjoint and mutual last will and testament" to the conservator and/or prospective heirs.

#### **OPINION**

It is the opinion of this Committee that your ethical obligations are governed by the following principles and depend on resolution of substantive legal questions on which we may not opine pursuant to the guidelines of this Committee. See Ethics Committee Guidelines.

SDCL 16-18 Appx, Rule 1.6(a) provides:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....

Rule 1.6(b)(3) also provides that:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (3) to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used.

In addition, Rule 8.4(d) provides that, "It is unprofessional conduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice."

This Committee believes that client confidentiality is the rule that should be breached only if one of the exceptions applies. To determine whether either applies depends upon resolutions of substantive legal questions concerning the effectiveness of the later wills revoking the "conjoint and mutual last will and testament." In addition, it would depend on resolution of the substantive legal questions concerning the power and authority of the conservator. Ultimately, the substantive legal questions would determine whether the prospective heirs and/or conservator have any legal right to the information. This Committee is precluded by Committee guidelines from opining on issues of substantive law.

Clearly, Rule 1.14(a) dictates that in dealings with a disabled client, the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." As the Comments to Rule 1.14 state, in part:

The fact that the client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian ..., the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

The Comments also discuss the limited circumstances when the lawyer should consider appointment of a legal representative and restrict such consideration to "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." Rule 1.14(b)

Within the above framework, resolution of the substantive legal issues concerning revocation of the "conjoint and mutual last will and testament" and the legal rights of the conservator, will resolve whether any of those persons have rights to information concerning your client. Unless resolution of those issues of substantive law would grant legal rights to prospective heirs and/or the conservator, it is the opinion of the Committee that the information is confidential and not to be disclosed.

Lonnie R. Braun  
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State Bar of South Dakota