132 DUTIES OF CONFIDENTIALITY UPON DEATH OF CLIENT

(Adopted September 2017) (Revised June 2021)

Under the Colorado Rule of Professional Conduct (Colo. RPC) 1.6(a), a lawyer may not reveal any "information relating to the representation of a client" absent the client's informed consent, implied authorization, or an exception. This duty of confidentiality survives the death of a client. *See* Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality but not listing "death of client"); Colo. RPC 1.6, cmt [20] (duty of confidentiality continues after the client-lawyer relationship has terminated); Colo. RPC 1.8 (c)(2) (lawyer may not reveal information related to representation of former client); *see also Wesp v. Everson,* 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after client's death).

Accordingly, a lawyer ordinarily may not disclose client information protected by Colo. RPC 1.6 ("Protected Information") following a client's death. For example, if a family member disappointed with the gift provided under a will inquires about the testator's intentions, the drafting lawyer usually may not respond without violating RPC 1.6. *See* Am. C. Tr. & Est. Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct,* R. 1.6, at p. 80 (5th Ed. 2016) ("*ACTEC Commentaries*") (explaining a lawyer's duty of confidentiality continues after death of client).

If a decedent has authorized the drafting lawyer to make disclosures, such as in a testamentary document (will or revocable trust) or some other writing, then disclosures may be provided to such parties as the deceased client authorized. Other interested parties (*e.g.,* C.R.S. § 15-10-201(27)), not so authorized, *including the personal representative*, are not *per se* entitled

to confidential information of the decedent held by the decedent's counsel. Thus, a lawyer may not provide Protected Information to them, except as ordered by a Court, where explicitly authorized by statute, or where the disclosure is necessary to settle the decedent's estate. *In re Estate of Rabin*, 2020 CO 77 (Nov. 2, 2020). Otherwise, a lawyer may only provide such information as is necessary to settle the decedent's estate and nothing more.[1]

Estate of Rabin is directly on point. There, the Colorado Supreme Court rejected the argument that a personal representative has a *per se* entitlement to a lawyer's legal files grounded either in property law or the Colorado Probate Code. 2020 CO 77, ¶¶ 24, 45. Instead, it applied ethical concepts under Colo. RPC 1.6, 1.16, and 1.16A. *Id.,* ¶¶ 24-32*; see also Colo. RPC 1.16A* cmt. [1] (explaining the term "property" "generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills," meaning the rest of the files remain the lawyer's property). *Rabin* thus rejects the position that a personal representative is entitled to a lawyer's legal file as a matter of right. Instead, under *Rabin*, the protections of the attorney-client privilege, the work-product doctrine, and the ethical duty of confidentiality (Colo. RPC 1.6(a) & cmt. [3]), survive a client's death. *Rabin*, ¶ 29 (citing *Wesp,* 33 P.3d at 194). Unless an exception applies, those protections may be waived only by the client's express or implied waiver. *Rabin*, ¶¶ 30-32.

The attorney-client privilege survives the death of the client in Colorado. That privilege is personal to the client. *People v. Madera*, 112 P.3d 688, 690 (Colo. 2005). "Thus, in light of

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[1] Other states differ concerning such disclosures. Some authorities contend that such a disclosure would have been "impliedly authorized" by the testator's mere retention of counsel, under the rationale that the testator presumably wanted his or her wishes followed. ACTEC Commentaries, at 89-91 (collecting conflicting ethics opinions from around the country). Other authorities reject this analysis. *Id.*

Wesp and the policies that underlie the attorney-client privilege … a client remains the attorney-client-privilege holder even after death." *Rabin,* ¶40. The client may expressly waive the privilege while alive or "[w]hen there has been no explicit waiver, a client's actions before death can impliedly waive the privilege." *Id.*

By nominating a personal representative, a decedent impliedly waives the attorney-client privilege, but only with respect to those communications necessary for estate administration. The decedent's lawyer may ethically provide the personal representative only such information as is necessary to settle the estate. Other files and communications not necessary to settle the estate remain privileged and/or confidential. "[An] attorney cannot provide a decedent's complete legal files to the personal representative *unless* the decedent gave informed consent for such broad disclosure in the will or elsewhere." *Rabin*, ¶ 45 (emphasis in original).

Although *Rabin* arose in the context of estate administration, it is likely that there will be other situations where a third party (decedent's spouse, children, or others) may wish to have access the deceased client's files. In divorce cases, business relationships, criminal matters, and potentially other situations, the decedent's lawyer may be approached about disclosing client communications, files, or documents. The Colorado Bar Association Ethics Committee's opinion is that the restrictions on disclosure of privileged and/or Protected Information prescribed in *Rabin* apply in these other situations as well.

In conclusion, a lawyer may ethically provide Protected Information relating to a deceased client's testamentary wishes only to the extent necessary to carry out those wishes where: (a) the decedent has expressly or impliedly authorized disclosure; (b) the disclosure is to

the personal representative and necessary to settle the estate; or (c) a court orders the disclosure.[2] If none of those circumstances exist and no other exception in RPC 1.6 applies, no such disclosure may be made to third parties, including the personal representative, beneficiaries under the will or other documents, or any other party.

[2] RPC 1.6 requires counsel to "make all non-frivolous objections" to a subpoena seeking the deceased client's information protected by the privilege or the lawyer's obligation of confidentiality. *Rabin* at ¶ 47; *see also* RPC 1.6 cmt. [15] ("Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney client privilege or other applicable law.").