BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2014-F-158

Can a lawyer who represented a testator refuse to honor a court order or subpoena to disclose, prior to the client's death, a Will or other testamentary document executed when the testator was competent on the basis that the document is protected against disclosure by the attorney-client privilege or confidentiality.

QUESTION

The inquiring attorney asserts that it has become increasingly common for courts to appoint attorneys in a representative capacity to represent individuals suffering from dementia and/or Alzheimer's who are the subject of a dispute or litigation regarding management of the individual's funds and/or person. It is asserted that attorneys involved in elder-law practice, guardianships, conservatorships, and guardian-ad-litems (GAL)/attorney-ad-litems (AAL) appointed by the court seek the "ward's" last Will and Testament by request, court order or subpoena from the lawyer or law firm which prepared and/or is in custody of the Will. The Will is sought prior to the death of the testator on the basis of alleged need for the appointed lawyer to engage in "estate planning" on behalf of the ward. The inquiring attorney asks:

- Is the law firm and/or each attorney in the firm responsible for asserting the attorney-client privilege if a person other than the client request delivery of the Last Will and Testament before the client's death?

  Response: Yes, if requested in a judicial proceeding and there are non frivolous claims that the Will is protected against disclosure by the attorney client-privilege or other applicable law, as required by Rules of Professional Conduct (RPC) 1.6(c)(2).

- Is the answer any different if a GAL, AAL or Conservator has been appointed over the client by a Court and requests the Will?

  Response: This is an issue of substantive law beyond the scope of the Rules of Professional Conduct.

- Can the GAL waive the attorney-client privilege on behalf of the "ward"?

Response: This is an issue of substantive law beyond the scope of the Rules of Professional Conduct.

- Is the answer any different if a Court orders the law firm to turn over the Will on behalf of either (1) the GAL, (2) AAL, and/or (3) the Conservator?

  Response: The lawyer must comply with the courts order but only after the lawyer has raised all non frivolous claims that the Will is protected against disclosure by the attorney client-privilege or other applicable law, as required by RPC 1.6 (c)(2).

DISCUSSION

The Rules of Professional Conduct (RPC), Tennessee Supreme Court Rule (SCR) 8, nor the Rules of Disciplinary Enforcement, SCR 9, provide any basis, authority, or jurisdiction upon which the Board of Professional Responsibility (BPR) can opine or authorize lawyers to disregard or refuse to honor an order of a court or subpoena. A court order is given full affect unless and until a party obtains dissolution of the order through operation of the judicial system. *In Re Estate of Rinehart*, 363 S.W.3d 186, 189 (Tn. Ct. App. 2011); *Flautt & Mann v. Council of City of Memphis*, 285 S.W.3d 856, 874 (Tenn. Ct. App. 2008). Ethics opinions of the BPR do not have the force of law and are not binding upon the courts of this state. *State v. Jones*, 726 S.W.2d 515, 519 (Tenn. 1987).

Statute governs to whom a Will is to be produced before and after death.[1] TCA 32-2-112(b)[1] provides that during the lifetime of the testator, the Will can only be delivered to the testator or someone authorized by the testator. Whether a Will or other testamentary document which was prepared and executed at a time when the testator was living and competent is subject to attack or change by someone other than the testator is an issue of substantive law to be determined by the court.

The principles of (1) attorney-client privilege and (2) confidentiality must be considered in responding to this inquiry. Tennessee Formal Ethics Opinion (TFEO) 2013-F-156 addressed differences between the two principles, as follows:

> …Although interrelated and often considered essentially the same, the requirements for and exceptions to the (1) attorney-client privilege and (2) confidentiality are substantively different. The attorney-client privilege and its exceptions are governed by statute and common law. Confidentiality and its exceptions are governed by the Rules of Professional Conduct (RPC).

[1] Tenn. Code Annotated (TCA) 32-1-112(b) provides that "the will shall, during the lifetime of the testator, be delivered only to the testator, or to some person authorized by the testator by an order in writing, duly proved by the oath of a subscribing witness. Any will that is deposited after the death of the testator shall be delivered only to a person named in the will as executor, to a next of kin of the testator, or to any other person so authorized by law or court order." TCA 32-1-113(a) provides, in part, that "any person or corporation who has possession of or discovers a written instrument purporting to be the last will and testament of decedent shall mail or deliver that instrument to the personal representative named in the instrument as soon as the person or corporation has knowledge of the death…" (b) requires that in the absence of a personal representative, "then the person having possession of the original instrument shall mail or deliver it to the clerk."

Confidentiality is far broader than the attorney-client privilege. Differences between the two are addressed in RPC 1.6, cmt. [3]:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* Scope.

Attorney-Client Privilege

By statute and common law, Tennessee recognizes an evidentiary attorney-client privilege by which an attorney may not disclose confidential communications between the client and their lawyer. *See*, Tennessee Code Annotated (TCA) 23-3-105[2]; *Bryan v. State,* 848 S.W.2d 72, 79-80 (Tenn. Crim. App. 1992) (perm. app. denied).

> …Thus, the purpose of the privilege is to shelter confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice…Not only must the communication have occurred pursuant to the attorney-client relationship, it must have been made with the intention of confidentiality…

Bryan, 848 S.W. 2d at 79-80. The attorney-client privilege, however, is not absolute. Because of public policy and judicial administration concerns, several exceptions to the privilege have been fashioned. *See*, *Hazlett v. Bryant,* 192 Tenn. 251, 241 S.W.2d 121, 123 (Tenn. 1951)*; Bryan,* 848 S.W.2d. at 80. The privilege can be waived expressly or by other circumstances. *State v. Buford*, 216 S. W. 3d. 323, 325-326 (Tenn. 2007); *Smith Co. Educ. Assoc. v. Anderson,* 676 S.W. 2d. 328, 333 (Tenn. 1984); *Bryan, 848 S.W. 2d at 80.* "…[W]hether the privilege applies to any particular communication is necessarily question, topic or case specific." *Bryan,* 848 S.W. 2d. at

[2] Tennessee Code Annotated 23-3-105 provides:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or a person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

80. The privilege survives the death of the client. *Estate of Queener v. Helton*, 119 S.W.3d 682, 685 (Tenn. Ct. App. 2003) (perm. app. denied); *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 791-92 (Tenn. Ct. App. 2001) (perm. app. denied); *State v. Leonard,* 2002 Tenn. Crim. App. LEXIS 737 at *21, 2002 WL 1987963, at *8 (Tenn. Crim. App., Aug. 28, 2002).

While the attorney-client privilege may be applicable to protect communications between the testator and their lawyer regarding estate planning or resulting documents from disclosure during the lifetime and after the death of the testator, an exception to the privilege may apply to permit the lawyer to make such discloses to establish the testamentary intent of the testator.[3,4,5,6] *Id.*

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[3] The Supreme Court has long accorded privilege to certain communications between attorneys and their clients, while recognizing there are exceptions to this privilege. Hazlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121, 123 (1951). The United States Supreme Court in Swidler & Berlin v. U.S., 524 U. S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) held that the attorney-client privileges survives the death of the client . . .

165 U.S. at 406, 17 S.Ct. 411.

Queener, 119 S.W. 3d at 685

[4] . . . The Court noted that most courts presume that the privilege survives the death of the client, but they view testamentary disclosure of communications as an exception to the privilege. Id. The Swidler Court quoted from United States v. Osborn, 561 F2d 1334, 1340 (9th Cir. 1977):

> [T]he general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs . . .

524 U.S. at 405, 118 S.Ct. 2081 (citations omitted). The Court went on to say that, "The rationale for such disclosure is that it furthers the client's intent." Id.

* * *

In Glover v. Patten, 165 US. 394, 17 S.Ct. 411, 41 L.Ed. 760 (1897), a case which has not been overruled in over one-hundred years, the United States Supreme Court set out what we believe is the applicable rule in the case at bar:

> . . . we are of the opinion that, in a suit between the devisees under a will, ***statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged.*** While such communications might be privileged if offered by third persons to establish claims against an estate they are not written within the reason of the rule requiring their exclusion, ***when the contest is between the heirs or next of kin.***

165 U.S. at 406, 17 S.Ct. 411 (emphasis added)

Hamilton, 67 S.W. 3d at 791-92

[5] In this case, the claims presented are against the Estate, and the issue is not concerning the validity of the deceased's will or claimants there under. In this case, no will of the deceased has been admitted to probate, indeed the record indicates that only a draft of a proposed will was prepared by the attorney. Accordingly, the rationale for the exception by the *Hamilton* Court that this evidence would be admitted to help establish the intent of the maker of a will has no application to the facts of this case.

The Trial Court found the draft document was not a valid will and could not be treated as one, but that it could be treated as evidence of decedent's intentions. The evidence does not establish a basis for an

If a client or former client's Will or other testamentary document is sought in a judicial or other proceeding in which the lawyer may be required to produce the information or document under compulsion of law, whether by order of the court, subpoena or otherwise, the lawyer is required to comply with and be governed by RPC 1.6 (c)(2).[7,8] In the absence of informed consent of the

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exception to the privilege and the Court was in error to rely on the unexecuted document to establish deceased's intent.

119 S.W. 3d, at 686.

Queener, 119 S.W.3d at 686

[6] Both *Hamilton* and *Queener* quote with approval from 81 AmJur.2d Witnesses, § 389:

> Where the client is dead and the controversy arises concerning the validity of the deceased client's will, or between the claimants thereunder, no privilege exists as to communications between the testator and his attorney concerning the drafting of a will. Thus, communications by a client to the attorney who drafted his will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him, although there is authority for the proposition that the privilege protecting a client's communications to the attorney who drew his will may be invoked against the claimants adverse to the interests of the client, his estate or his successors.

Hamilton, 67 S.W. 3d at 792; *Queener*, 119 S.W. 3d at 685.

[7] Rule of Professional Conduct (RPC) 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless:
>
> (1) the client gives informed consent;
> (2) the disclosure is impliedly authorized in order to carry out the representation; or
> (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
>
> (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
>
> (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules; or
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

client, the lawyer must reveal the information or document if ordered to so by the tribunal, but only after the lawyer has raised all non-frivolous objections that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. ABA Annotated Model Rules of Professional Conduct, (7th Ed. 2011), p. 96. The lawyer is obligated to disclose no more than the court requires. The rule requires the lawyer to resist disclosure if there are any non frivolous claims that the information is protected from disclosure by the privilege. *See*, ABA Formal Op. 94-385 (1994); ABA Annotated Model Rules, p. 111. If no non-frivolous claims are available, the information or document can be revealed by the lawyer in a judicial proceeding without raising the issue with the tribunal. Whether the attorney-client privilege, an exception to or waiver[9] of the privilege are applicable is governed by substantive law, not the Rules of Professional Conduct and on which the BPR cannot opine.[10] By the terms of RPC 1.6(c)(2), it is the court or the tribunal, not the BPR, which determines whether the requested information or document is protected from disclosure by the attorney-client privilege or other applicable law. If the court determines that the information or document is not protected from

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respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law;

(3) to comply with RPC 3.3, 4.1, or other law.

[8] Comment [14b] to Rule of Professional Conduct (RPC) 1.6 provides:

> [14b] A lawyer might be called as a witness to give testimony concerning a client or might be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. 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. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by RPC 1.4. Unless review is sought, however, paragraph (c)(2) permits the lawyer to comply with the court's order.

[9] *State v. Leonard,* M2001-00368-CCA-R3-CD, 2002 WL 1987963, at *8 (Tenn. Crim. App. Aug. 28, 2002), provides:

> …Although an issue of first impression in Tennessee, other jurisdictions have adopted the common law provision that the attorney-client privilege may be waived by the client, his guardian, or conservator, the personal representative of the deceased client, the successor, trustee, or similar representative of a corporation, association or other organization whether or not in existence (citation omitted) . . . Those jurisdictions adopting this provision however, have done so in the limited circumstances involving recovery of real property and will contests. (citation omitted).
>
> ...[b]ecause the privilege exists to protect the client, it belongs only to the client and thus may not be asserted by a third party.

[10] The Rules of Professional Conduct, ". . . are not intended to govern or affect judicial application of either the attorney-client privilege or work-product privilege. . . ." Rules of Professional Conduct, Scope [22].

disclosure by the privilege, RPC 1.6(c)(2) requires that the information or document be revealed by the lawyer unless the decision of the court is appealed[8].

Confidentiality

If a client or former client's Will or other testamentary document is sought outside a judicial or other proceeding in which a lawyer may be required to produce evidence, the disclosure is governed by the confidentiality rules of the Rules of Professional Conduct (RPC) 1.6[7] and 1.9(c)[11], respectively, rather than the attorney-client privilege. RPC 1.6(a)[7] prohibits a lawyer from revealing any information, whatever or whoever its source, relating to the representation of a current client unless (1) the client has given informed consent, (2) the disclosure is impliedly authorized to carry out the representation, or (3) the disclosure falls within one of the exceptions permitted or required by the rule. Any disclosure permitted by an exception referenced in RPC 1.6(c)(3) is limited to that which the lawyer reasonably believes necessary to accomplish the specified purpose. *See,* RPC 1.6, cmt [13]; ABA Annotated Model Rules of Professional Conduct, (7th Ed. 2011), p. 112. RPC 1.8(b) prohibits a lawyer, in the absence of informed consent, from using information relating to the representation of a current client to the client's disadvantage.

RPC 1.9(c)[11] prohibits a lawyer from revealing information relating to representation of a former client or using such information to the former client's disadvantage unless (1) the former client gives informed consent, (2) the rules would permit with respect to a current client, or (3) the information has become generally known.[12] RPC 1.9(c)(2) incorporates the bases on which RPC 1.6 permits disclosure for a current client. The duty of confidentiality continues after the client-lawyer relationship has been terminated, RPC 1.9(c), cmt. [3a][13] and RPC 1.6, cmt. [17], and

[11] Rule of Professional Conduct (RPC) 1.9(c) provides:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

[12] Comment [8a] to RPC 1.9 defines generally known as follows:

> [8a] Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries, such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known. A lawyer may not, however, justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily.

[13] Comment [3a] to RPC 1.9 provides:

> . . . The lawyer's duty of loyalty survives the termination of the former representation to the extent that it precludes the lawyer from acting to deprive the former client of the benefit of the lawyer's prior work on the former client's behalf.

survives the death of the client. ABA/BNA Lawyer's Manual on Professional Conduct, 55:106 (2006); ABA Annotated Model Rules, p. 103. [14]

Unless permitted or required by RPC 1.6[7] or 1.9(c)[11], a lawyer cannot voluntarily disclose information relating to the representation of the client or former client outside a judicial proceeding. "…A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." RPC 1.6, cmt. [3]. Conversely, a lawyer may reveal such information if permitted or required by the rules.

Both RPC 1.6 (a)(1)[7] and 1.9(c)(1)[11] permit a lawyer to reveal any information or document which the client or former client has given the lawyer informed consent[15] to reveal.[16] If the client or former client is deceased or incompetent, due to dementia, Alzheimer's or otherwise, they can no longer give informed consent. Ethics opinions of the states are inconsistent regarding whether individuals appointed by the court in various capacities can waive confidentiality on behalf of the client or former client. Neither RPC 1.6(a)**(1),** RPC 1.9(c)**(1)** nor the accompanying comments permit someone other than the client or former client to waive confidentiality on behalf of the client. South Carolina Ethics Op. 05-09 (2005). Aside from basis on which the client or former client's lawyer's may disclose information relating to the representation, whether someone other than the client or former client can consent to such disclosure is governed by "other law" beyond the scope of this opinion. RPC 1.6(c)(3)[7]

RPC 1.6(a)(2)[7] and, by incorporation, RPC 1.9(c)(2)[11] permit lawyers to disclose information relating to the representation if impliedly authorized to carry out the representation.[17] The implication is defeated by the testator's instructions to the contrary.[17] In making the determination whether disclosure is impliedly authorized, the lawyer must exercise reasonable professional judgment. Philadelphia Ethics Op. 2007-6 (2007). The analysis is the same for each person who may request such information, although the answer for each will depend on the facts and circumstances of the particular situation and may differ depending on by whom and why the request is made. Florida Bar Op. 10-3(2011); ABA Annotated Model Rules, p. 99. In making the determination a lawyer may consider the client's wishes or intent.**[18]** Doubt should be resolved in favor of not disclosing. Florida Bar Op. 10-3 (2011).

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[14] *See also*, South Carolina Ethics Op. 12-10 (2012); Philadelphia Ethics Op. 2008-10 (2008); New York State Ethics Op. 724 (1999); Rhode Island Op. 96-34 (1996); North Carolina Ethics Op. 206 (1995); Virginia Ethics Op. 1207 (1989); Mississippi Ethics Op. 119 (6/5/86).

[15] RPC 1.0(e) provides that " 'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

[16] TCA 34-6-108 and 109(29) permit a client or former client to vest an attorney in fact with the power to reveal confidential legal information.

[17] RPC 1.6, cmt. [5] provides, "[e]xcept to the extent that the client's instructions or special circumstances limit authorization, a lawyer is impliedly authorized to make a disclosure about the client when appropriate in carrying out the representation…"

[18] New York State Bar Op. 970 (2013) (do circumstances meet the standards of implied authorization taking into account factors including deceased's wishes); Kan. Ethics Op. 01-01 (2001) (impliedly authorized to disclose information from deceased client's file to effectuate client's estate plan); Hawaii Ethics Op. 38 (1999) (disclosure is proper if necessary to effectuate client's intended estate plan).

A lawyer is permitted to disclose information relating to the representation of a deceased former client, but only if the lawyer believes that the disclosure would further the client's interest and that the client would have consented to the disclosure. The ABA/BNA Lawyers' Manual on Professional Conduct, 55:506 (2006)[19] provides:

> A lawyer may disclose information relating to the representation of a deceased client only if disclosure would further the client's interests, and only if the lawyer believes that the client would have consented.

Tennessee Advisory Ethics Opinion 2000-A-727, on the basis of the former Rules of Professional Responsibility, provided in part:

> Assuming that waiver or court order do not apply, we are of the opinion that the attorney may reveal confidences and secrets if the attorney believes that the revelation is in the best interests of the client and that the client would consent to waiver of the attorney-client privilege…

If a lawyer believes that disclosure of the contents of the will would be in furtherance of client's interest, and the client did not forbid the lawyer to make the disclosure, RPC 1.6(a)(2) permits the lawyer to furnish the Will as being impliedly authorized to carry out the representation of the client. South Carolina Ethics Op. 05-09 (2005). *See also*, District of Columbia Op. 324 (2004). "A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention…" Philadelphia Ethics Op. 2007-6 (2007).[18] The rule permits a lawyer to reveal such information even after the death of a client and even when no personal representative has been appointed. Id. North Carolina Ethics Op. 206 (1995) provides:

> …It is assumed that a client impliedly authorizes the release of confidential information to the person designated as the personal representative of his estate after his death in order that the estate might be properly and thoroughly administered. Unless the disclosure of confidential information to the personal representative, or a third party at the personal representatives instruction, would be clearly contrary to the goals of the original representation or would be contrary to the express instruction given by the client to his lawyer prior to the client's death, the lawyer may reveal a client's confidential information to the personal representative of the client's estate and … to third parties at the direction of the personal representative.

[19] *See, also*; Florida Ethics Op. 10-3 (2011); Philadelphia Ethics Op. 2007-06 (2007); South Carolina Ethics Op. 05-09 (2005); District of Columbia Ethics Op. 324 (2004); Hawaii Ethics Op. 38 (1999);

If the lawyer determines on the basis of the circumstances of the particular situation that disclosure was not impliedly authorized because contrary to the expressed instructions of the testator or contrary to the testator's intent, wishes or goals of the representation, the lawyer may not disclose the information or document, even to someone appointed by the court or designated by the personal representative. Other bases provided in the rules discussed herein may, however, permit or require disclosure of the information or document.[1,7,11]

As discussed in **Attorney-Client Privilege** above, a lawyer is required to comply with RPC 1.6(c)(2) with respect to orders or subpoenas of the court.

RPC 1.6(c)(3)[7], and by incorporation, RPC 1.9(c)(2)[11] require "a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary…to comply with…other law."[20] Statute may require the lawyer to disclose the Will[1]. GAL, AAL, conservators, guardians and others serving in a representative capacity are appointed by courts or tribunals. The duties, authorities and/or responsibilities of each are governed by statute and/or order of the court, over neither of which the Rules of Professional Conduct nor the Board of Professional Responsibility has authority or jurisdiction. If other law grants specific authority to one acting in a representative capacity to access or disclose the client's or former client's confidential information or documents, RPC 1.6(c)(3) would require that the information or document be revealed or provided by the lawyer.[21] For instance, T.C.A. 34-3-107(2)(F) provides that the court can vest a conservator with power to receive or release confidential information for their ward.[21] In the absence of informed consent or other applicable basis which would permit disclosure, if the court's order of appointment does not vest the conservator with power to receive the ward's confidential information, the lawyer may not provide the Will or other information relating to the representation of the client or former client to the conservator. Whether others appointed in other representative capacities have the power or authority to receive the ward's confidential information is less well defined. Such matters are governed by substantive law beyond the scope of an opinion of the BPR.[20] If "other law" does not require disclosure of information relating to representation pursuant to RPC 1.6(c)(3), no other exception

[20] RPC 1.6, cmt. [12] provides, in part, "…Whether such law supersedes RPC 1.6 is a question of law beyond the scope of these Rules…If…the other law supersedes this Rule and requires disclosure, paragraph (c)(3) requires the lawyer to make such disclosure as are necessary to comply with the law.

[21] TCA 34-1-104 requires that "the letters of conservatorship shall either: (1) Recite the specific powers to be exercised by the conservator and the specific powers retained by the person with a disability; or (2)Have attached to them the order or orders of the court specifying the powers to be exercised by the conservator and the powers retained by the person with a disability." Likewise, TCA 34-1-129 requires that "the letters conservatorship or guardianship shall either: (1) Recite the specific powers removed from the minor or person with a disability and transferred to the fiduciary; or (2) Have attached to them the order or orders of the court specifying the powers removed from the minor or person with a disability and transferred to the fiduciary…" TCA 34-2-105(3) requires that an order appointing a guardian "state any other authority or direction as the court determines is appropriate to properly care for the person and property of the minor. TCA 34-3-107(2) provides the court shall "enumerate the powers removed from the respondent and those to be vested in the conservator." The statute further specifically provides that "to the extent not specifically removed, the respondent shall retain and exercise all of the powers of a person with a disability." TCA 34-3-107(2)(F) provides that one of the powers which the court may vest in the conservator is "the power to give, receive, release, or authorize disclosure of confidential information."

to the confidentiality rules permit disclosure of such information to a GAL[22], conservator, guardian or others appointed in a representative capacity simply by the fact of their appointment by the court.

RPC 1.9(c)(3)[11] permits disclosure of information relating to the representation of a former client if the information has become "generally known." If the Will or other testamentary document of a former client is part of the public record, the document is "generally known" and may be revealed or provided by the lawyer. RPC 1.9(c), cmt. [8a].[12]

CONCLUSION

Specific responses to the inquiry are at pages 1-2 herein. Because other possible fact scenarios regarding disclosure of information relating to the representation of a client or former client are too numerous and varied to address individually, lawyers should be governed generally by the foregoing when such information is sought from the lawyer by someone other than the client or former client. Generally, the lawyer must comply with RPC 1.6[7] or 1.9(c)[11] and shall not provide any information or document relating to the representation except: with the informed consent of the current or former client, RPC 1.6(a)(1) and 1.9(c)(1); the disclosure was impliedly authorized, 1.6(a) (2) and 1.9(c)(2); the disclosure is required by order of the court specifically granting authority for such disclosure, RPC 1.6(c)(2) and 1.9(c)(2); the disclosure is required by other law, 1.6(c)(3) and 1.9(c)(2); the information or document is generally known, RPC 1.9(c)(3), as discussed herein, or as otherwise permitted or required by the rules.

This 13th day of June, 2014.

ETHICS COMMITTEE:

Susan McGannon

J. Russell Parkes

Francis Guess

APPROVED AND ADOPTED BY THE BOARD

[22] Depending on the differing circumstances or types of proceeding in which appointment of a GAL is deemed necessary, GALs may be appointed pursuant TCA 34-1-107, TCA 36-4-132, TCA 37-1-149 and Tenn. SCR 40 and 40A. The appointment of a GAL generally does not form an attorney-client relationship between the GAL and the ward. However, SCR 40(c)(1) provides that the GAL represents the child. If the appointment of a GAL forms an attorney-client relationship between the GAL and the ward, the Rules of Professional Conduct, including RPC 1.6 and 1.9(c), are applicable, and the disclosure of information relating the representation by the GAL would be governed as discussed herein.