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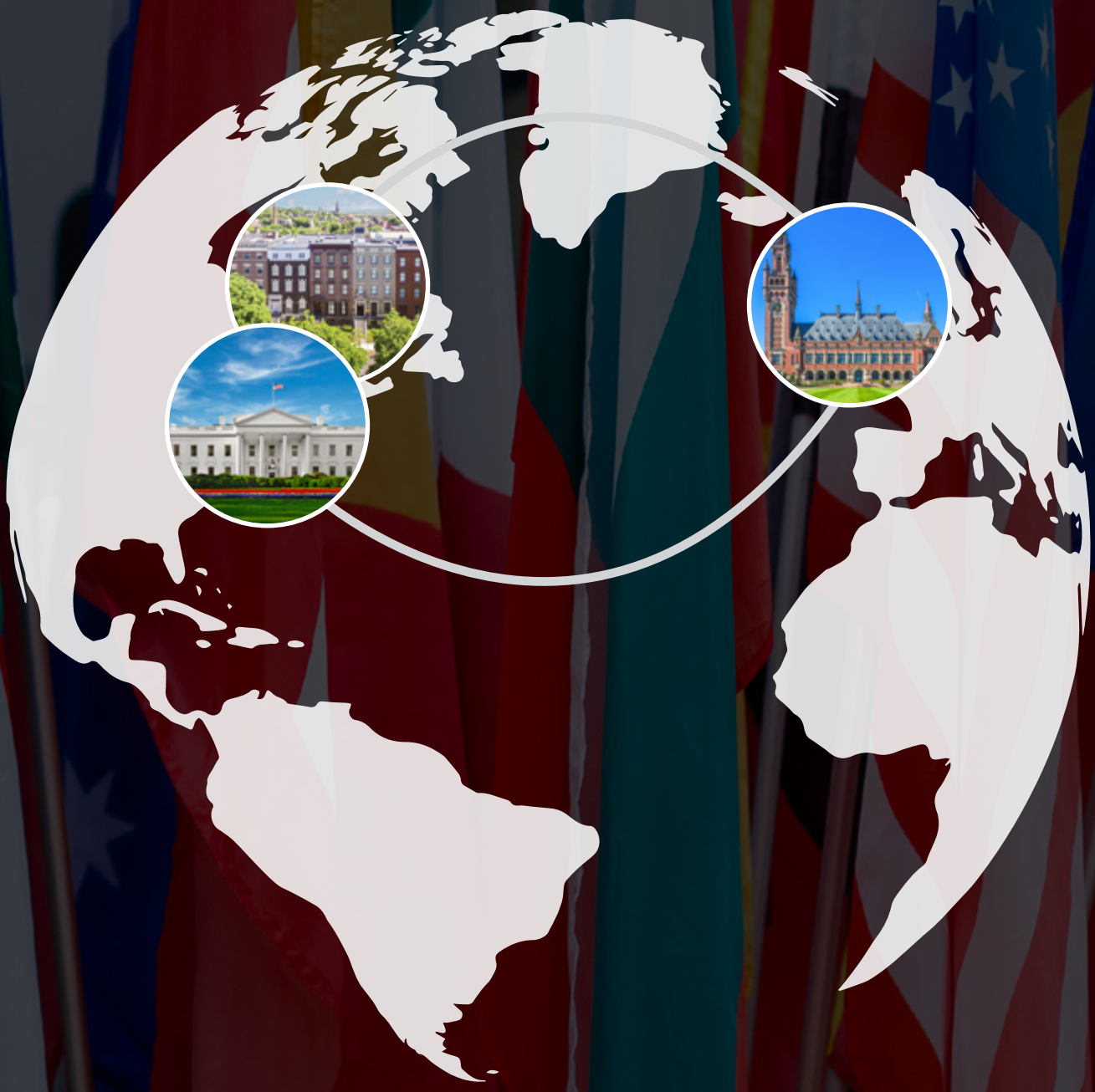

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Does Attorney-Client Privilege Survive a Client's Death?

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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To the Forum:

I am an attorney involved in a case against a large biotechnology company accused of defrauding investors and patients. My client was the chief scientist at this company and told me that none of its devices were functional despite investors and health care professionals believing they were. This put hundreds of thousands of patients at risk as they received false test results that either led them to believe they had a disease they did not have or provided them a false sense of relief, allowing their underlying conditions to go untreated. After noticing the devices were producing inaccurate results, my client approached the CEO to warn him. The CEO was dismissive and insisted that the devices worked despite evidence to the contrary. My client was then removed from his position as chief scientist and placed in a clerical role.

Once legal action commenced, my client was called to testify against the company as to his knowledge surrounding the devices' inaccuracy and the CEO's awareness of such. He was distraught about testifying because he was sure that the company would sue him for breaching a non-disclosure agreement all employees were forced to sign upon hiring. While I assured him not to worry, he was not assuaged and felt there was no way out.

Devastatingly, my client committed suicide the day before he was to testify against the company. Rumors swirled that his death was not a suicide but a murder to prevent his testifying. The prosecutor issued a subpoena for my testimony regarding what my client would have testified about. However, while I am being ordered to testify, I do not want to breach confidences.

Does attorney-client privilege survive a client's death? What defenses do I have to defying or quashing the subpoena to uphold the privilege I am bound by?

Sincerely,
V.R. Scared

Dear V.R. Scared:

The short answer is that, yes, the privilege and an attorney's duty to keep client confidences survives that client's death, but that privilege can be waived after death in some instances. Although there are many rules, formal opinions and precedent protecting the confidential relationship, there are many exceptions to that rule that may prevent an attorney from being sanctioned for disclosing confidential information.

Rule 1.6 of the New York Rules of Professional Conduct governs the confidentiality of information exchanged between attorney and client.[1] It prohibits attorneys from "knowingly" revealing confidential information or using

> such information to the disadvantage of a client or for the advantage of the attorney or a third person, unless under 1.6(a): (1) the client gives informed consent; (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted by paragraph (b).

Paragraph (b) of Rule 1.6 outlines several instances in which an attorney may reveal confidential information. It is important to note that under these exceptions, an attorney is not required to reveal confidential information but is merely permitted to do so.

We presume here that none of the exceptions to 1.6(a) apply to your situation and turn to the permissive disclosures under 1.6(b). The most well-known instance in which an attorney may reveal such information is to "prevent reasonably certain death or substantial bodily harm" to the client or third parties. If the death or bodily harm has already occurred, even if the attorney knows of facts and circumstances surrounding such occurrence that could help police in an investigation, the attorney is not required (nor may be compelled) to breach confidentiality. This happened in the infamous "Buried Bodies Case," in which Robert Garrow Sr. (the client) told Frank Armani and Francis Belge (his attorneys) where he had buried the bodies of his murder victims. Under threat of disbarment and criminal charges (not to mention harassment and death threats), Armani and Belge stood their ground and did not disclose.[2] In fact, the Committee on Professional Ethics found that the attorneys would have violated their confidentiality duties if they disclosed the location of the bodies to authorities.

There was tremendous public outcry because disclosure would have brought peace to the families, but that disclosure would not have prevented deaths or harm. Thus, the exceptions under Rule 1.6(b) did not apply, and Armani and Belge were bound by confidentiality. This case is a testament to the importance of confidentiality within the legal community, though we cannot ignore the professional fallout and personal toll maintaining a high ethical code can take. Armani and Belge were ultimately absolved of any wrongdoing.[3]

Another exception under Rule 1.6 states that an attorney may – but need not – reveal confidential information "when permitted or required under these Rules or to comply with other law or court order." This might include a subpoena compelling an attorney to disclose client information as is the case here.

In 2022, the New York Committee on Professional Ethics issued Formal Opinion 2022-1 regarding an attorneys' obligations upon receiving a subpoena for documents that contain confidential information learned while representing a client.[4] The committee opined that a subpoena may constitute "other law" under Rule 1.6, such that the disclosure of confidential information would be appropriate. Before proceeding with disclosure, however, the attorney must take certain steps, such as communicating or attempting to communicate with the current or former client whose information is requested, seeking the client's consent to provide the requested information and, if consent is not received, the attorney must "assert reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections." Following this committee's guidance, you must assert the objections and disclose responsive records not subject to those objections.[5]

The American Bar Association issued similar guidance in 2016, Formal Opinion 473.[6] However, the ABA added the caveat that if the client is unavailable for consultation regarding the confidential information – such as in your case – "the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other initial demand on any reasonable ground." After showing that the attorney made reasonable attempts to consult with the client and is unable to do so, the attorney is permitted to comply with the court order. Following the ABA's guidance, you should meet and confer with the party issuing the subpoena to limit the subpoena before asserting objections and choosing to disclose responsive records not subject to those objections. In either case, as your client is deceased, you must make reasonable objections to disclosure to the prosecution and the court.

Apart from disclosure of records, there may be instances where an attorney may have to provide testimony about a client or their representation. According to New York Civil Practice Law and Rules 4503(a), attorneys are generally prohibited from disclosing any communication made between the client and attorney. This law even prevents a client from being compelled to disclose such communication "in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

This section of the CPLR mandates that the attorney-client privilege can survive the client's death. However, *Mayorga v. Tate* illustrates that an administrator or executor can waive privilege, in which case an attorney can be compelled to testify.[7]

In *Mayorga*, the defendant-attorney had represented the decedent in a matrimonial action and was being accused by the executor of legal malpractice during that prior representation. During the malpractice action, the executor sought disclosure of the attorney's file in regard to the decedent. While the attorney successfully argued that the file is covered by the attorney-client privilege even after his client's death, the court held that the executor may waive the attorney-client privilege. The court held that "just as the attorney-client privilege itself survives the death of the client for whose benefit the privilege exists, the right to waive that privilege in the interest of the deceased client's estate also survives and may be exercised by the decedent's personal representative."

The court explained that the statute, CPLR 4305(a)(1), expressly permits the "client" to waive the privilege. For purposes of the statute, the client's conservator or executor of their estate "may act as a surrogate for the client and waive the privilege on the client's behalf" when the client is incapacitated or otherwise unable to waive it themselves.

In your situation, you may invoke the attorney-client privilege to object or move to quash the subpoena as it is law that this privilege survives the client's death. However, if your client's personal representative decides to waive that privilege, you may have to abide by the subpoena.

Precedent and ethics opinions suggest that you will not be sanctioned for disclosure or proper non-disclosure; however, it might be worth considering your reputation as an attorney in the eyes of potential clients if you do choose disclosure.

The attorney-client relationship is considered to be a fiduciary relationship, meaning that attorneys must act in the best interests of their clients. Breaching confidentiality may be considered a breach of this fiduciary duty that an attorney may be sued for. This would arise under a legal malpractice action. In an action like this, the plaintiff-client must prove (1) the existence of a fiduciary relationship; (2) misconduct by the defendant-attorney; and (3) damages that were directly caused by the misconduct.[8] An attorney's failure to maintain confidentiality with the client may be the kind of misconduct anticipated by this cause of action.

In your situation, you would likely have a defense to such an action because you were compelled by the

court to make a disclosure that breached confidentiality. And while your deceased client is not capable of bringing an action against you, there is the question of whether his estate might do so.

Generally, non-clients cannot bring an action against an attorney who did not represent them, as non-clients lack privity between themselves and the attorney. In *In re Estate of Pascale,* the court granted the attorneys' motion to dismiss a legal malpractice action brought against them by the legatees of their deceased client's will.[9] The court found that "the lack of privity between any of the legatees under the decedent's will and the attorneys precluded the legatees from recovering damages." So, while a personal representative or executor of an estate may have the authority to waive privilege, it is not a given that they have standing to sue you for breach of confidentiality under these circumstances.

Maintaining the sanctity of the attorney-client confidential relationship is necessary for the effective practice of law. Without their client's trust, attorneys are unable to provide proper and effective representation. In many circumstances, the laws and ethics rules protect this relationship. Sometimes, though, disclosure of this information is necessary to prevent harm or achieve justice. Even then, attorneys are generally not required to disclose all information.

Sincerely,
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Question for the Next Forum

The Jones Company needs advice on a real estate transaction that has complicated federal and local tax ramifications. The company is considering hiring one of the following:

(a) Archie Anderson is both a New York-admitted attorney and a CPA. Anderson has separate websites for his work as an attorney and as an accountant, advertises both his law firm and accounting firm separately to the general public and keeps separate books and records for each. Anderson says he will handle the real estate transaction through his law firm and provide the necessary tax services through his accounting firm at a lower hourly rate but one higher than the accounting firm, Smith & Taylor, across the street.

(b) Bill Baker is a New York-admitted attorney whose practice emphasizes real estate. He does not do tax work, but his brother-in-law, Carl Carlson, has an accounting firm in which Baker has a one-third ownership interest. Carlson offers his firm's accounting services to the general public (i.e., not just to Baker's clients). Baker says he will handle the legal work but will refer the accounting/tax work to Carlson, who also charges more than Smith & Taylor.

(c) Davis & Davis is a 30-lawyer real estate firm that has a CPA as a full-time employee. The CPA only does work for Davis & Davis clients. Davis & Davis bills the CPA at an hourly rate that is also higher than the highest rate charged by Smith & Taylor.

Under New York Rule of Professional Conduct 5.7, what disclosures must each of these providers make to The Jones Company, and what conflict waivers (if any) must they obtain?

Would your answer above change if each provider was doing purely legal work on the real estate deal for The Jones Company, and The Jones Company asked for help with a local tax filing on an unrelated matter that requires no tax law expertise?

Sincerely,
G. C. Jones

Endnotes

1. In fact, the New York City Bar proposed adding an explicit amendment to Rule 1.6 that would state: "[T]his rule does not prohibit a lawyer from revealing or using confidential information, to the extent that the lawyer reasonably believes necessary, to prevent or rectify the conviction of another person for an offense that the lawyer reasonably believes the other person did not commit, where the client to whom the confidential information relates is deceased." However, this applied only to situations where the client's confidential information would rectify a wrongful conviction and was not incorporated into Rule 1.6 as it stands today. See New York City Bar, Committee on Professional Responsibility, Proposed Amendment to Rule of Professional Conduct 1.6 – Authorizing Disclosure of Confidential Information of Deceased Clients (2010).

2. https://nala.org/client-confidentiality-buried-bodies-case/2018/.

3. New York State Bar Association Committee on Profession Ethics, Formal Opinion No. 479 (1978).

4. https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/lawyers-obligations-receiving-subpoena-seeking-client-info.

5. *See also* Ethics Opinion 1198, requiring lawyers who received subpoenas or court orders to disclose confidential information of a former client to first consult with the former client and should seek to limit the demand or disclosure prior to disclosing any confidential information.

6. American Bar Association Formal Opinion 473, Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information (2016).

7. *Mayorga v. Tate*, 302 A.D.2d 11 (2d Dep't 2002). *See* http://www.newyorkle-galethics.com/personal-representatives-waiving-attorney-client-privilege-after-death/.

8. *Harbor Consultants Ltd. v. Roth*, 26 Misc. 3d 1219(a) (Sup. Ct., N.Y. Co. 2010), *citing Kurtzman v. Bergstol*, 20 A.D.3d 588, 590 (2d Dep't 2007).

9. *In re Estate of Pascale*, 168 Misc. 2d 891 (Sup. Ct., Bronx Co. 1996). *See also Deeb v. Johnson*, 145 Misc. 2d 942 (Sup. Ct., Rensselaer Co. 1989) (holding that an attorney was not liable to the executors for the harm caused by his negligence in drafting the decedent's will because there existed no privity between the parties).