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Confidentiality and Solicitor-Client Privilege After Death by Umair Abdul Qadir

It is trite law that solicitor-client privilege – the form of privilege that attaches to communications between lawyers and their clients for the purposes of providing legal advice – is a fundamental tenet of our legal system.

This form of privilege protects a client’s ability to make fulsome disclosure in order to obtain legal advice, and recognizes the sanctity of the relationship between the lawyer and the client. In *Solosky v. The Queen*, the Supreme Court of Canada held that “[t]he right to communicate in confidence with one’s legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client.”¹

In addition to the common law concept of privilege, lawyers are also bound by an ethical duty of confidentiality to their clients. For instance, in Ontario, section 3.3-1 of the *Rules of Professional Conduct* provides:

“A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

- (a) expressly or impliedly authorized by the client;
- (b) required by law or by order of a tribunal of competent jurisdiction to do so;
- (c) required to provide the information to the Law Society; or
- (d) otherwise permitted by rules 3.3-2 to 3.3-6.”²

Solicitor-Client Privilege Survives Death

Solicitor-client privilege belongs to the client, and survives their retainer with their lawyer. Thus, while a current or former client is still alive, the application of privilege is fairly straightforward: unless the client waives privilege or an exception to the general rule applies, the lawyer should maintain confidence over the client’s communications.

However, solicitor-client privilege also survives the death of the client. As a result, lawyers should be prepared to navigate the tricky legal and ethical issues that may arise when they receive a request for their records or their evidence, and a deceased client is no longer available to waive privilege.

The “Wills Exception” to Solicitor-Client Privilege

After the death of a client, a solicitor who has custody of the deceased’s Last Will and Testament may provide the Will to the deceased’s personal representative. However, privilege still attaches to the communications between the solicitor and the deceased client.

For instance, where the validity of a Will is challenged, the disclosure of communications between the testator and the solicitor and the solicitor’s evidence can help ascertain the testator’s true testamentary intentions.

In *Geffen v. Goodman Estate*, a case dealing with the validity of a transfer to an *inter vivos* trust, Justice Wilson noted that

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“[t]he general policy which supports privileging such communications is not violated.

The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were.”³

Waiver of Privilege and Confidentiality After Death

The Supreme Court of Canada’s decision in *Goodman Estate* served to extend the “wills exception” to allow for disclosure where there was a challenge to an *inter vivos* trust. However, it is important to note that the “wills exception” does not result in the waiver of privilege over all of the deceased client’s legal files.

Courts have been reticent to extend the exception beyond the rationale of allowing for the determination of a testator’s true intentions. For instance, in a recent decision, Justice Fish of the British Columbia Supreme Court refused to apply the “wills exception” where the production of the deceased’s family law lawyer’s file was sought in relation to a challenge to the validity of the cohabitation agreement between the deceased and his common-law spouse.⁴

Lawyers may receive requests for their records or their evidence in many matters that fall outside the purview of the “wills exception.” For instance, in contentious estate proceedings, the parties may seek production from solicitors who provided advice on matrimonial, real estate or corporate issues. In non-contentious matters, the deceased’s personal representative may request access to the deceased’s legal files as part of the administration of the estate.

Generally speaking, lawyers are able to comply where a request for the deceased client’s legal records is made by the estate trustee of the deceased’s estate. In *Hicks Estate v. Hicks*, after carefully reviewing the jurisprudence, the Ontario District Court confirmed that privilege reposes in the personal representative of the deceased client, and that the personal representative “can waive privilege and call for disclosure of any material that the client, if living, would have been entitled to ...”⁵

Although the deceased client’s personal representative steps into his or her shoes, lawyers may still wish to tread carefully when responding to such requests for their file. For example, where there is a risk that the authority of the estate trustee may be challenged, it would be prudent to ask for a court order authorizing the release of the deceased client’s confidential information.

However, where it is clear that there is no current or anticipated challenge to the authority of the estate trustee, lawyers may respond to requests for disclosure from the estate trustee in the same manner that they would respond to such a request from the deceased client prior to his or her death.

The “wills exception” and the devolution of solicitor-client privilege to a deceased client’s personal representative highlight some of the tricky issues that may arise after a client dies.

Lawyers should carefully consider any requests for their evidence or copies of their files. If there is uncertainty, it would be prudent to consult with a lawyer and obtain legal advice in order to ensure that complying with the request for disclosure would not result in a breach of the duties of confidentiality and privilege owed to the client.⁶

¹ *Solosky v. The Queen*, [1980] 1 SCR 821 at 832.

² The Law Society of Upper Canada, *Rules of Professional Conduct*, s 3.3-1.

³ *Geffen v. Goodman Estate*, [1991] 2 SCR 353 at 387.

⁴ *Brown v. Terins Estate*, 2015 BCSC 775.

⁵ *Hicks Estate v. Hicks*, [1987] OJ No 1426, 1987 CarswellOnt 367.

⁶ Lawyers in Ontario who receive a request for their Will file or for their evidence after the client’s death should also contact and report such communications to LawPRO.



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