

# Advisory Opinion 1992-2

## CLIENT CONFIDENCE AFTER DEATH OF CLIENT

Police advised John Doe he was a target of an investigation regarding allegations of a sexual crime against a child. Doe proclaimed his innocence to the police, and then retained an attorney for advice and representation. Thereupon, attorney and Doe had several confidential discussions. Police informed attorney they were proceeding with prosecution of Doe. On the evening of Doe's last meeting with attorney, he was found dead under suspicious circumstances. Police contacted the attorney and wanted information about Doe's statements to her, telling her that they needed the information to help determine the cause of Doe's death. Attorney has learned that there are claims Doe was killed by the father of the alleged victim, or alternatively, that he committed suicide. Doe was unmarried, and is survived by his mother and a sister. Police say they will get the mother and sister to sign waivers, and if the attorney does not cooperate, they will seek an order of a court. The attorney has raised attorney/client privilege on behalf of the deceased client, and requests our assistance. She has no doubt the discussions were confidential, but agrees that some of the information might be considered relevant to the investigation at hand.

There are delineated exceptions in SCRA 1986, 16-106 (Repl. Pamp. 1991) to the rule that "[a] lawyer shall not reveal information," as follows:

1. When the client consents.
2. When the client must be prevented from a criminal act likely to cause imminent death or great bodily harm, or substantial injury to property or finances of another.
3. To establish a claim or defense for the lawyer in a contest with the client.
4. To establish a defense for the lawyer in a claim against the lawyer based on the client's conduct.
5. To respond to allegations concerning the misconduct by the lawyer in representation of the client.

Our rule is silent as to the effect of a client's death, and there is no New Mexico authority applicable to this question or the facts of the inquiry. The ABA comment following Rule 16-106 notes that confidentiality survives termination of the relationship, and also that the lawyer must invoke the privilege when applicable, but must comply with an order of a court requiring disclosure.

Many other states have addressed the ethical issue presented here. Their analysis may be categorized and summarized as follows:

1. Survival: Many jurisdictions which have considered the issue have believed that the privilege survives death. In re: John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990); Connecticut Bar Ass'n Comm. Informal Op. 90-26 (10/5/90); Mississippi State Bar Comm. Op. 119 (6/5/86); Bar Ass'n of Nassau County, N.Y. Comm. Ops. 88-36 (9/29/88) and 89-26 (6/6/89); Vermont Bar Ass'n Comm. Ops. 88-1 (undated) and 88-6 (undated); State Bar of Wis. Comm. Op. E-89-11 (5/24/89); Washington State Bar Ass'n Comm. Op. 175 (7/82); Los Angeles County, Cal. Bar Ass'n Comm. Formal Op. 414 (4/29/83); Maryland State Bar Ass'n Comm. Op. 80-31 (undated), 83-3 (9/27/82), 84-107 (9/19/84), and 85-93 (6/20/85).
2. Personal Representative: Some authorities have believed that a personal representative inherits the privilege. CJS, Attorneys at Law § 171; Mississippi State Bar Comm. Op. 119 (6/5/86); North Carolina State Bar Ass'n Comm. Op. 268 (7/9/80).
3. Lawyer's Judgment: Some authorities have believed that a lawyer may reveal confidences after death of a client when the lawyer reasonably believes it is in the decedent's interest, and the decedent would have waived if alive. Virginia State Bar Comm. Op. 812 (undated) and 1207 (5/2/89); Alabama State Bar Comm. Op. 85-70 (6/19/85).
4. Widow and Heirs: One authority said that the confidence of the client can be revealed to the widow or

heirs. North Carolina State Bar Ass'n Comm. Op. 268 (7/9/80).

5. Strict Construction: Some authorities appear to believe that the confidences may not be revealed absent a specific exception in the rule or order of a court. In re: John Doe Grand Jury Investigation; Connecticut Bar Ass'n Comm. Informal Op. 90-26 (10/5/90); Washington State Bar Ass'n Comm. Op. 175 (7/82); Maryland State Bar Ass'n Comm. Op. 80-31 (undated).

In New Mexico the term "Personal Representative" has a broad application, NMSA 1978, § 45-1-201(29) (Repl. Pamp. 1989), but requires appointment of a court of competent jurisdiction, § 45-3-103. Unless restricted by the district court, § 45-3-504, a personal representative has the same power over a decedent's property as an absolute owner, § 45-3-711.

New Mexico law holds that attorneys have no option to waive privilege for a client, and are obligated to assert it. *Hunter v. Kenney*, 77 N.M. 336, 422 P.2d 623 (1967).

In our opinion, the attorney must continue to assert the deceased client's privilege in this matter until the happening of either of the following:

1. A personal representative is appointed and, after consultation, makes an informed waiver; or
2. After assertion of the privilege before a court convened for purposes of considering the matter, the attorney is ordered by the court to reveal information.

One of the foundations of our profession is the client's right to confidence. We do not believe that Rule 16-106 should be construed to create any exception of convenience, or to put upon an attorney any right or obligation to do anything other than assert the privilege. Along with the exceptions clearly noted in the rule, we do agree that an attorney should comply with the order of a court and scheme of the New Mexico Probate Code which regulates the affairs of a decedent.