

'Til Death Do Us Part

The Attorney-Client Privilege and the Duty of Confidentiality after a Client's Death

BY JOHN M. PALMERI AND GREG S. HEARING

In *Freirich v. Rabin*,¹ the Colorado Supreme Court recently addressed the application of the attorney-client privilege and the duty of confidentiality following the death of a lawyer's client. Expanding on the holding of *Wesp v. Everson*,² the Supreme Court held that the attorney-client privilege and the duty of confidentiality both survive a client's death, and a lawyer may only disclose client files and communications "as necessary to settle the decedent's estate."³

Background

Louis Rabin died testate and appointed his widow, Claudine Rabin, as his personal representative.⁴ In the process of administering the estate, the personal representative was presented with a claim from Louis's ex-wife for \$200,000 based on promissory notes he had executed that were payable to the ex-wife upon his death.⁵ The personal representative asked Louis's longtime attorney to provide all of Louis's legal files.⁶ Louis's attorney initially refused, citing both the attorney-client privilege and the duty of confidentiality.⁷ A subpoena followed, which Louis's attorney successfully moved to quash.⁸ The lawyer provided his notes and the file with respect to the promissory notes to the ex-wife after determining that those materials were not privileged. He refused to produce any other files.

An appeal followed. The Colorado Court of Appeals reversed the trial court order quashing the subpoena. The Court held that client files are property of the estate and that the personal representative holds the right to access the client files unless the will provided otherwise.⁹ The

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Court of Appeals also held that the personal representative held the attorney-client privilege.¹⁰ As a result, it concluded that Louis's communications could be disclosed to the personal representative without violating the attorney-client privilege.¹¹ Louis's attorney filed a petition for certiorari.¹²

Supreme Court Decision

The Supreme Court first addressed the Court of Appeals' holding that client files are property

within the meaning of CRS § 15-12-709 of which the personal representative was entitled to take control.¹³ The Court concluded that "a personal representative does not acquire a right to take possession of a decedent's legal files under section 15-12-709 except documents having intrinsic value or directly affecting valuable rights such as securities, negotiable instruments, deeds, and wills."¹⁴ In reaching its holding, the Supreme Court noted that a lawyer's ethical duty to provide client papers and property as necessary for the continued protection of the client's interest does not create a property interest in the entire file.¹⁵ "Clients have no property right, tangible or intangible, to their full legal files under section 15-12-709."¹⁶

Having addressed the claim that Louis's files were property, the Supreme Court next addressed the personal representative's claim that she became the privilege holder.¹⁷ Again, the Supreme Court reversed the Court of Appeals, noting that both the attorney-client privilege and the duty of confidentiality survive death and impose obligations on a lawyer to protect privileged and confidential information absent an express or implied waiver.¹⁸

Having determined that the privilege survives death and does not transfer to the personal representative, the Supreme Court then examined whether an express or implied waiver had occurred. The Court found no express waiver in the personal representative's appointment but held, as a matter of first impression, that "by nominating a personal representative, a client impliedly waives any claim of attorney-client privilege with respect to communications necessary for estate administration, unless the client expressly manifested the intent to maintain the privilege."¹⁹ "A decedent's former attorney may therefore provide a personal representative with privileged information necessary for the personal representative to settle the estate."²⁰ The Supreme Court applied a similar analysis with respect to the duty of confidentiality.²¹

Takeaways for the Practitioner

The opinion suggests that lawyers should carefully consider whether to rely on the exception "as necessary to settle the decedent's estate."

The attorney-client privilege and the duty of confidentiality still require lawyers to maintain client confidences and to assert nonfrivolous objections when faced with requests for either privileged or confidential materials. *Rabin* does not create a blanket waiver nor an absolute exception. Recognizing a limited exception to the attorney-client privilege and the duty of confidentiality, the Supreme Court noted in a lengthy footnote that the personal representative bears the burden of establishing a waiver and further noted that a district court may be required to conduct an in camera review to determine the necessity and extent of a waiver,²² if any, when the client has “manifested the intent to maintain the privilege” irrespective of the appointment of a personal representative.

Lawyers will face difficulty analyzing the necessity of posthumous disclosures to the administration of their former clients’ estates and must remain mindful of their ongoing

obligations to the former clients. It is also highly relevant to trust and estate lawyers who, going forward, will want to discuss the scope of the waiver, if any, after the client’s death and the appointment of a personal representative. Ultimately, this is an important case for any attorney dealing with the death of a client. ^{CL}



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NOTES

1. *Freirich v. Rabin*, 2020 CO 77.
2. *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001).
3. *Rabin*, 2020 CO at ¶ 15.
4. *Id.* at ¶ 1.
5. *Id.*
6. *Id.* at ¶ 2.
7. *Id.* at ¶ 6.
8. *Id.* at ¶¶ 7-10.
9. *In re Estate of Louis Rabin*, 2018 COA 183 at ¶¶ 17-18.
10. *Id.* at ¶ 24.
11. *Id.*
12. *Rabin*, 2020 CO 77 at ¶ 14.
13. *Id.* at ¶ 17.
14. *Id.* at ¶ 24 (quoting Colo. RPC 1.16A ct. 1) (internal quotation marks omitted).
15. *Id.* at ¶¶ 23-24.
16. *Id.* at ¶ 27.
17. *Id.* at ¶ 28.
18. *Id.* at ¶ 29 (citing CBA Ethics Comm., Formal Op. 132 (2017)).
19. *Id.* at ¶ 42.
20. *Id.*
21. *Id.* at ¶ 45.
22. *Id.* at ¶ 42, n.8.

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