



**The Law Society
of Manitoba**

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GONE BUT NOT FORGOTTEN: DUTIES AND RESPONSIBILITIES WHEN A CLIENT DIES

Practice Management

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GONE BUT NOT FORGOTTEN: DUTIES AND RESPONSIBILITIES WHEN A CLIENT DIES

It is almost certain that at some point in your practice, a client will pass away. This article offers some guidance on your obligations and your next steps.

YOUR CLIENT IS GONE (*BUT NOT FORGOTTEN*)

You were retained by a client. When the client dies, you no longer have a client, and so your retainer is at an end. However, your professional duties to your client continue.

DUTIES OF CONFIDENTIALITY AND PRIVILEGE

The Code of Professional Conduct Rule 3.3-1 provides:

A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule.

The duty of confidentiality survives the professional relationship and continues indefinitely. (Commentary [3])

Code Rule 3.3-2 prohibits the disclosure of a client's confidential information to the client's disadvantage or for the benefit of a third person without the client's consent, and Code Rule 3.3-3 provides that even where the lawyer is obligated by a court order or *The Legal Profession Act* to disclose, the lawyer must not disclose more information than is required.

ENDURING POWER OF ATTORNEY

The authority of an attorney under an enduring power of attorney terminates when the donor dies, unless it is an irrevocable power of attorney for value. (See *The Powers of Attorney Act*, sections 13 and 5(2).) The Attorney does not have the authority to require the release of the file and cannot take any action on behalf of the deceased.

YOUR WILL CLIENT

If you have drawn a will for your client, the client may have given you specific instructions about what information you can disclose after their passing, and to whom. For example, they may have left a letter for their family, describing why they have chosen specific bequests.

Although it is not presently recommended, you may have stored the original will. In this case, the client's consent to providing the will to the executor is presumed. This fulfills the testator's intention in creating the will.

These steps are not the same as releasing the entire file or having a chat with the executor about your interactions with the client. The file, including your notes and your recollections, remains privileged and confidential. The executor or personal representative does not simply step into the shoes of the deceased client, and does not have the right to waive privilege or require the release of the file. It is your duty to claim privilege on behalf of your client.

THE WILLS EXCEPTION

There is a narrow exception where the validity of the will itself is in question. The wills exception allows *a court to order disclosure* of the lawyer's file to assist in the determination of the testator's true intention, or whether undue influence or lack of capacity has prevented the will from reflecting their true intention.

Privilege is for the benefit of the client. The wills exception permits the privilege to be waived and information disclosed, when it furthers the client's interest to do so. **A court order is required.**

SOME PRACTICAL PROBLEMS

There are numerous potential circumstances in which you may be faced with decisions about what information can be shared following the death of a client. In "[Privilege & Releasing the Lawyer's Will File](#)", Krista Clendenning poses some vexing situations, including the question of disclosure if the lawyer is aware of a later will than one which is submitted for probate, or if the lawyer has reason to believe that a testator was not competent at the time a will was drawn. In "[Solicitor Client Privilege in Estate Litigation](#)", Dana Nelko questions whether the files for all of your deceased client's matters might be released on the executor's request. He concludes:

The practical response to such a request is to err on the side of "privilege is paramount". The party requesting disclosure has the onus of establishing that the interest of justice compels the waiving of privilege in particular circumstances. The Supreme Court has made it clear that privilege is more than an evidentiary rule but a substantive right and any challenge/request for the disclosure of confidential

information should initially be cautiously considered. As a result, even if a request for disclosure is made by the executor or personal representative, the lawyer, if submitted, should protect the privilege unless compelling reasons are advanced for such disclosure. It is neither complicated nor expensive for the executor to obtain advice and direction from the court in cases where a dispute arises concerning the disclosure of privileged materials.

When faced with such a dilemma, contact the Law Society's Practice, Ethics and Equity Advisor or your insurer, the Professional Liability Claims Fund at the Law Society for advice. You might be advised to resist a court application and assert the client's privilege. The insurer may appoint counsel to assist you with this in appropriate circumstances. Where the wills exception clearly applies, you might be advised to take no position in the court application. In very limited circumstances, if all of the interested parties agree, you may be given advice on resolving matters by agreement.

YOUR ACTIVE CLIENT - DISCLOSING DEATH

You must notify the party opposite of your client's death, as well as the Court if there is a pending court matter. Your duty of candour will not permit you to misrepresent the fact that you no longer have a client.

Code Rules 5.1-1 and 5.1-2 provide that lawyer must treat the tribunal with candour, fairness, courtesy, and respect. Code Rule 5.1-2 (e) and (k) specifically note that a lawyer may not suppress what ought to be disclosed or permit a party to be presented in a misleading way. Code Rule 5.1-5 summarizes that a lawyer must always act in good faith.

PENDING COURT MATTERS - EVERYTHING STOPS

Your deceased client can no longer give you instructions to participate in litigation or negotiations. You have no client. You cannot file or use documents previously signed by the deceased. Everything stops, or at least is stayed.

Provided your deceased client's executor or administrator wishes to continue the court action on behalf of the estate, an **order to continue** will be required. Be aware that if your deceased client was the defendant (and therefore the estate isn't interested in the case proceeding) any interested party may obtain an order to continue.

King's Bench Rule 11 deals with the transfer or transmission of interest:

11.01 *Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, no further steps in the proceeding shall be taken until an order to continue the proceeding by or against the other person has been obtained.*

An order to continue can be obtained on requisition and without notice, by any interested party:

***11.02(1)** Where a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending, any interested person may, on filing an affidavit verifying the transfer or transmission of interest or liability, obtain on requisition from the registrar an order to continue (Form 11A), without notice to any other party.*

An order to continue should be sought within a reasonable period of time:

***11.03** Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay...*

An order to continue must be served on all other parties promptly (KBR 11.02(2)).

YOUR CLIENT'S PERSONAL PROPERTY

Once an executor or administrator has been appointed, you may return to the estate, through them, any personal property of the client which you may have been holding, including the client's original documents. The client's **original documents** typically belong to the estate and include:

1. **Wills and Codicils** – The client's original last will and testament and/or any amendments.
2. **Title Deeds** – Original documents related to the ownership of real property.
3. **Agreements/Contracts** – Signed agreements to which the client was a party (e.g., a real estate purchase agreement).
4. **Promissory Notes** – Original loan documents or financial instruments belonging to the client.
5. **Share Certificates** – Original certificates showing ownership of shares in a corporation.
6. **Personal Identification Documents** – Passport, birth certificate, or other ID that was held by the lawyer.
7. **Corporate Records** – Original incorporation documents, minute books, or shareholder agreements for any companies the client owned or with which they were involved.

Confidential Documents are protected by solicitor-client privilege, and should not automatically be disclosed to the executor. These include:

1. **Client-Lawyer Correspondence** – Emails, letters, or memos between the client and lawyer discussing legal matters, advice, or strategy.
2. **Legal Advice Notes** – Any memos, briefing notes, or legal research prepared by the lawyer as part of their advice to the client.
3. **Draft Documents** – Drafts of legal documents (e.g., wills, contracts, or pleadings) containing confidential information about the client’s legal instructions or intentions.
4. **Client’s Instructions** – Notes or records from meetings or communications where the client provided instructions to the lawyer.
5. **Litigation Strategy Documents** – Any confidential documents outlining the lawyer’s strategy or advice for litigation or negotiations.
6. **Privileged Investigative Reports** – Reports or assessments created in the course of representing the client that are privileged.

Confidential documents that involve legal advice, client instructions, or privileged communications must remain confidential unless there is express permission from the client (such as in the will) or a court order. In case of doubt, the lawyer should carefully assess each document and consider seeking court directions if necessary to protect confidentiality while fulfilling their duty to the estate.

BILLING AND TRUST FUNDS

You may render an account to the estate for work performed prior to the death of your client, and after delivery of the account, may transfer funds from your trust account to pay it. Any funds remaining in trust are to be returned to the estate.

In the event that no personal representative has yet been appointed, you are required to hold the funds in your trust account. These funds cannot be distributed until someone is appointed to manage the estate.

If you are aware of any potential heirs, creditors, or other interested parties, you could reach out to inform them of the need to apply for administration of the estate. Heirs or creditors may have a vested interest in ensuring the estate is administered, which could prompt someone to apply for letters of administration.

If no one comes forward, the Public Guardian and Trustee (PGT) of Manitoba can potentially step in to administer the estate in cases of intestacy (no will) or when no personal representative applies. This is particularly common for small estates where no family member or other interested party wants to take on the role.

You can contact the PGT to notify them of the situation, as they have the legal authority to apply for administration when no one else does. The PGT may also distribute assets and settle any liabilities, including paying legal fees.

If the estate remains unadministered and there are significant funds involved, or you are uncertain about how to proceed, often the safest course of action is to apply to the court for directions. The court can give instructions on how to handle the remaining trust funds, whether they should be transferred to a public trustee or held for a longer period

PAYING MONEY OUT OF COURT

Where money is to be paid out of court to a deceased client, the funds may be paid to their personal representative, upon satisfactory proof to the registrar of the person's death and the authority of the personal representative (see KBR 73.10).

CLOSING THE FILE

When your retainer is at an end, close the file and retain it in the ordinary course. If you anticipate the possibility of a claim in relation to the will (such as a claim of incapacity) be sure to retain the entire file, and particularly your notes. If you anticipate the possibility of a claim against you, report it to your insurer (the Professional Liability Claims Fund at the Law Society), who will open a Pre-claim file and hold it in case a claim develops.

DEATH OF A CLIENT OF THE PUBLIC GUARDIAN AND TRUSTEE (PGT)

The Public Guardian and Trustee will continue to manage their deceased client's property and legal affairs until an executor or administrator is appointed. The PGT will then turn over the deceased client's assets to the executor or administrator to deal with in accordance with the will. If there is no executor or administrator the PGT may apply to be the administrator. For more information on the PGT's role, see [Death of a Client](#).

REAL ESTATE TRANSACTIONS

A deceased person cannot convey land. Should your client pass away mid-transaction, you cannot register a transfer of land, mortgage or other instrument which was previously signed.

The interest of a deceased party must be transmitted into the name of the executors/administrators for the estate. For a detailed discussion of real estate matters and death, including transmissions due to ownership changes resulting from the administration of the

estate of a deceased person, discharge of a mortgage for a deceased mortgagee, an administration order for an estate worth less than \$10,000, and real property applications by the executors or administrators of an estate, see the [Manitoba Land Titles Guide](#).

Where funds are to be paid to a deceased party (for example, the payment to a deceased owner without an estate representative of remaining funds following a foreclosure), or other unusual circumstances, seek guidance from the Law Society's Practice, Ethics and Equity Advisor.

FAMILY PROPERTY ACT PROCEEDINGS

Only a surviving spouse or common law partner may apply for the accounting and equalization of family property; the personal representative of a deceased spouse or common law partner may not do so. However, if an application was made and has not been completed prior to the passing of one party, either the surviving party or the personal representative of the deceased party may continue the application. (See the FPA, s. 28.)

DEPONENT WHO DIES PRIOR TO TRIAL

Should a person who has been examined for discovery die before trial, a party may read their testimony into evidence, with leave of the trial judge (KBR 31.11(7)).

CONFLICTS OF INTEREST

Your deceased client is your former client. You may not act against a former client unless the new matter is a fresh and independent matter wholly unrelated to any work previously done for the client (see Code Rule 3.4-10). This means, for example, that you may not act against your deceased client's estate.

COPING WITH YOUR CLIENT'S DEATH

The lawyer/client relationship may be superficial if it is of a short, transactional nature. More often it is an intimate one, where you have come to care for your client over the length of time in which they have trusted you as their confidante, and you have worked together and offered them your support and guidance.

If your relationship as their lawyer has been known to their family, you may be able to attend the funeral or memorial, make a charitable donation or express your condolences to their family and loved ones. In other cases, the fact that you have been consulted at all is confidential and you cannot participate in these common rituals.

This may leave you with unsettling feelings. You cannot share your memories of your client with anyone. Your feelings of sadness may be puzzling to your own family and friends, who may not understand your grief over the passing of “just” a client. The sudden unexpected death of a dear client due to catastrophe or suicide may be extremely difficult to process alone.

Your feelings are worthy of acknowledgement. Find a way to grieve for your client. Seek support from colleagues who also worked with the client, or those who similarly experienced the passing of a client. Take time to practice self-care. Allow yourself the space and time to think about your client and your feelings for them. Employ the strategies that help you cope. Avail yourself of wellness resources, including obtaining assistance through the [Manitoba Blue Cross Employee Assistance and Wellness Solutions](#) program or [Law\(yer\) Strong](#).

Your feelings are a reflection of your deep care for your client. Acknowledging them is a recognition of your strength and value as a helping professional, and is part of being your best self.