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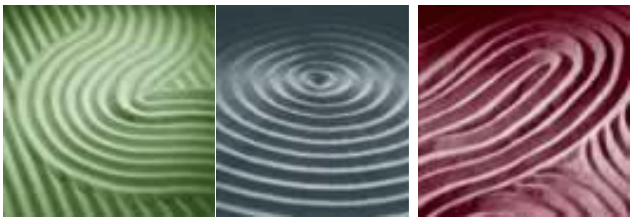

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Privacy considerations for an estate practice

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A law firm's estates practitioners collect highly sensitive personal information (and in some cases personal health information) on a daily basis. When meeting with a client in order to prepare his or her Will, we will obtain information on all aspects of their personal and financial lives, from dates and places of birth, citizenship and social insurance numbers to detailed information regarding assets (including bank account numbers, and RRSP, RRIF and insurance contract details) and income, as the value and manner of ownership of assets are critical pieces of information in the estate planning process. Personal information collected will also include the client's marital status (and history), and in many cases, that of their children, documents such as prior Wills, marriage and separation agreements, and shareholder and other business agreements.

Such detail is necessary to ensure that the designing of the estate plan and the drafting of Wills, powers of attorney and trusts for the client are carried out properly. For example, it is important for the solicitor to be aware that the client owns shares of privately-owned corporations, has a marriage contract with her spouse, or owns the matrimonial home jointly with someone other than his wife. Often, insurance policies will be specifically identified in a Will or insurance declaration. Further, after the death of the client, the list of assets collected by the solicitor, if available, will assist the executor with the administration of the Estate.

When a client retains a solicitor to prepare a Will, powers of attorney or a trust indenture for him, it is certainly arguable that consent to the collection and use of the client's personal information for the purposes of preparing and implementing the estate plan is implied.[1] Further, where the solicitor retains the original Will for safekeeping, consent to the subsequent disclosure of the Will to the executor of the estate upon the death of the client, would also be implied. (Moreover, the executor, as the representative of the deceased client would be entitled to the original document, albeit not necessarily to other sensitive personal information that the solicitor has on file.) That said, in the retainer (or reporting) letter to the client, it is prudent, and good business practice, to include the law firm's privacy statement, emphasizing that the client's personal information will be used solely for the purposes set forth in the retainer, including the release of the Will to the executor upon the death of the client.

As noted above, the solicitor collects highly sensitive personal information regarding, for example, the assets of the client. Often, this information is collected in a "Personal Data Form" that the solicitor forwards to the client prior to the initial meeting. Including a privacy statement with such a document that sets out the purpose for the collection and policies regarding retention and safeguarding the information, which will likely be retained in the file for many years, would be appropriate.

Can this personal and financial information that the solicitor collects and uses at the estate planning stage be used at the time the estate is being administered? Can it be disclosed to the executor upon the death of the client? While the implied consent to provide the Will to the executor may extend to such information, solicitors should request express consent from clients for this disclosure (which may not occur for many years), particularly as the purpose arguably has changed. A signed direction from a client to release his or her Will to the named executor upon death, powers of attorney to the attorney (under certain circumstances) and other personal information (e.g., bank account numbers and information regarding investments) to the executor or attorney would ensure optimal compliance with PIPEDA. Where a power of attorney has been prepared, the direction should include authorization to release the client's Will to the attorney acting under a continuing power of attorney for property or guardian of property if the client becomes incapable of managing property.[2]

Since the final implementation of PIPEDA on January 1, 2004, financial institutions have become increasingly cautious regarding the disclosure of personal information regarding their clients. Consequently, law firms have found that when acting as solicitors for estates, executors are required to execute formal consents to the release of information to the solicitor. It would be prudent for the estate solicitor to pre-empt this requirement, so that the administration of the estate is not slowed unnecessarily.

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[1] Jana Steele, "PIPEDA and Estates Law," *Deadbeat* v. 22, n. .2: 3.

[2] Section 33.1 of the *Substitute Decisions Act* requires a guardian (or trustee) to determine the provisions of the incapable person's Will and s. 35.1 requires such guardian or attorney, in most cases, not to dispose of property subject to a specific gift for a Will.

Very often, an estate planning client will provide the solicitor with personal information about third parties – their spouses and former spouses, their children and children's spouses. This information is often crucial to the estate plan. The client may be providing information regarding his daughter's disability and the government benefits she receives in order to ensure that a trust for her includes certain provisions. The disclosure of such information by the client to the solicitor without the consent of the third party is governed by the exemption in para. 7(3)(a) of PIPEDA:

> (3) For the purposes of clause 4.3 of Schedule 1 [the consent requirement], and despite the note that accompanies that clause, an organization [which includes a person (subs. 2(1))] may disclose personal information without the knowledge or consent of the individual only if the disclosure is
>
> > (a) made to ... a barrister or solicitor who is representing the organization [person].

When the estate is being administered, the disclosure of such third party information by the solicitor should not necessarily be made as a matter of course to, for example, beneficiaries, disappointed beneficiaries or the executor of the estate. The executor or others with a financial interest in the estate may want such information in order to challenge (or uphold) the Will or testamentary capacity of the client. Where a dispute surrounding a Will arises, "there appears to be consensus in Ontario cases that solicitor and client privilege does not apply in trials involving the issue of validity of a will."[3] Quebec's *Code of Civil Practice*[4] provides that a court order is required before a notary may be "bound" to provide "communication or copies of a revoked will... unless the request is made by the testator..." The PIPEDA exemption to the consent requirement for disclosures "required by law" may apply in these situations; however, the estates practitioner should tread carefully to ensure the situation she is faced with fits into the exemption.

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[3] Brian Schnurr, *Estate Litigation*, 18.4.

[4] Article 866. See Murray Sklar, "Can a Notary be forced to reveal the contents of a previously revoked Will?" *Willpower* No. 112, April 2004.

Principle 5 of PIPEDA requires that personal information be retained "only as long as necessary for the fulfillment of those purposes" for which the information was collected. The general practice of estates practitioners is to maintain a client's estate planning file beyond the client's death. Clients may change their estate plans many times during their lives and the information in the file will be of assistance with later planning. Moreover, in many situations, the potential for estate litigation exists; evidence of the client's testamentary capacity, which could in certain instances b considered personal health information, or his rationale for disinheriting a child, found in the solicitor's file, will be crucial to the litigation.

Given the sensitivity of the personal information collected in an estates file, it is essential that the information be carefully safeguarded, even within the confines of the law firm. While original Wills, powers of attorney and trusts are often kept in a firm's vault (which may only be accessed by designated individuals), the files themselves (soft and hard) should also be kept in secure locations, including locked cabinets and password-protected computer directories. A password-protected Wills directory that may be accessed only by the estates solicitors, clerks and their assistants is advisable, so that such documents are only accessed on a need-to-know basis. Encryption of estate planning documents sent to clients via email should be considered (and if not employed, clients should be made aware of the potential that the security of their documents may compromised). Drafts should be properly disposed of – shredded, not recycled. And, when the file is finally to be discarded, it must be done securely, with the obligations of PIPEDA in mind.