A common question arises as to whether an attorney has an obligation to disclose confidential information of a deceased client to the decedent’s court-appointed personal representative, or alternatively, to third parties based upon a purported waiver of the privilege by the personal representative. In 2007, the Commission addressed the confidentiality obligations of an attorney to maintain the confidences and secrets of a deceased client in Opinion 192. Opinion 192 makes clear that if the PR for a deceased client decides not to claim the attorney/client privilege on behalf of the decedent or to waive the privilege, or if the PR simply requests information, absent a rule of law or court order, the lawyer has an obligation to undertake an independent analysis with respect to the requested disclosure and determine whether the decedent would have authorized it.

Although Opinion 192 dealt with then applicable Maine Rule 3.6(h), the analysis is not changed by the adoption of the Maine Rules of Professional Conduct. Rule 1.6(a) similarly requires that a lawyer not reveal a confidence or secret of a client unless:

(i) The client gives informed consent;

(ii) The lawyer reasonably believes the disclosure is authorized in order to carry out the representation; or

(iii) The disclosure is permitted by Paragraph (b) (7) of Rule 1.6.

Both the old and the new rules provide that there are two safe harbors allowing attorneys to disclose confidences and secrets of a deceased client. Those disclosures are allowed (1) when the disclosure is authorized to carry out the representation, or (2) as required by law or order of the court. Thus, as was noted in Opinion 192 and as is the case now, in many cases a lawyer’s
Disclosure of information at the request of a personal representative will fall within those safe harbors. Disclosure of information, for example, regarding a will’s execution or a decedent’s testamentary intent would ordinarily further the attorney’s representation of the client. If, however, the attorney believes that the information would not further the client’s purpose, would be detrimental to a material interest of the client, or would be contrary to the client’s specific wishes, the attorney may disclose the confidential information only as required by law or by a court order. In short, despite a PR’s waiver of the attorney/client privilege (or the PR’s request for the attorney to divulge confidential material), the attorney still may be ethically obligated to claim the privilege on behalf of his now deceased former client. For example, if the attorney knows the information would embarrass the client or be detrimental to a material interest of the client, or if the client specifically requested that the information be kept unqualifiedly confidential, then the lawyer must maintain the confidence. The only safe harbor available to the attorney under such circumstances which would allow the attorney to divulge the information would be a court order specifically providing for such disclosure.

In short, Opinion 192 endures. When information is sought from an attorney regarding the confidences and secrets of a deceased client, the attorney may not rely simply upon a request or waiver of the privilege by a personal representative, but rather must engage in the analysis required by Rule 1.6 as part of the attorney’s own ethical obligation with respect to the requested disclosure.