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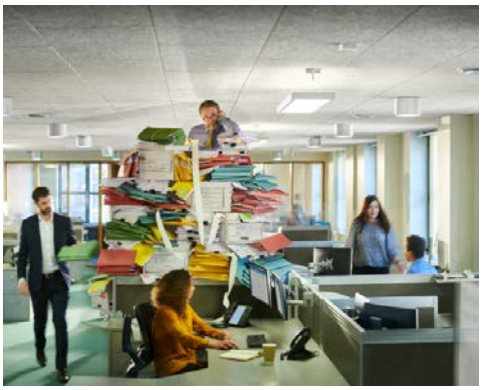

SIGNATURE SERIES:
Tackling the Closed File Beast

FACULTY:

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Abbate, Balkan, Colavita & Contini, LLP

September 28, 2022
Suffolk County Bar Association, New York

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Marian C. Rice, Esq. – L'Abbate Balkan Colavita & Contini, LLP

Marian C. Rice is the managing partner and chairs the Attorney Professional Liability Group at the New York and New Jersey law firm of L'Abbate Balkan Colavita & Contini, LLP, where she has represented attorneys for over 40 years. In 2021, Marian was included in Super Lawyer's List of the Top 50 Women Attorneys in the New York Metro area and has been designated a Super Lawyer annually since 2008. She is currently the co-Chair of NYSBA's Law Practice Management Committee and a member of the Committee on Professional Ethics.

Marian is a past President of the Nassau County Bar Association and holds the AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethics and legal ability. Ms. Rice also served as an ABA Presidential appointee to the ABA Standing Committee on Lawyer's Professional Liability from 2009 through 2012 and was Chair of the New York State Bar Association - Committee for Insurance Programs from 2008 to 2013.

Tackling the Closed File Beast

Presented at

Suffolk Academy of Law

September 28, 2022

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TABLE OF CONTENTS

- NY Eth. Op. 623, *Closed Files; Disposition Procedures; Dissolution of Law Firm* (Nov. 7, 1993)
- NY Eth. Op. 460, *Preservation of Closed Files* (Feb. 28, 1977)

IV. CNA Professional Counsel – Creating a File Retention and Destruction Policy

I

Tackling the Closed File Beast

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An attorney's obligation to maintain closed client files has been on my mind a lot recently. We moved our office about 18 months ago. And while we thought we had a fairly robust file retention and destruction policy, when we began to plan our move, we realized our intentions while good, may not have been compliant. We had a lot of client files.

Fortunately, we also had sufficient time to address the problem and a goal date by which we had to complete our review, assessment and, where appropriate, return or purge. We all know attorneys never address issues without deadlines. Finishing a 15-year lease and the move to a new office provided a drop-dead date with no wiggle room. Mission was accomplished but the obvious lesson learned was – life would have been easier had we kept to the game plan all along.

While ethics opinions generally state that "with certain important exceptions" an attorney has no ethical duty closed files for an indefinite period, it is the "important exceptions" that make the process difficult. An attorney's ethical obligation to properly retain and dispose of closed client files transcends the closure of an attorney's law practice,[1] the dissolution of a law firm,[2] natural disaster,[3] inheriting a law firm's closed files by joining the firm[4] - even death.[5] In other words – you can't avoid it. And ignoring the problem just increases the dilemma of what to do with the closed files. Before addressing how you can keep up with your obligations on client files, some background on the related court rules, case law and ethical obligations are in order.

The Bright Lines

Lawyers like bright lines. Unfortunately, the only crystal-clear delineation of record retention obligations an attorney or law firm must meet keep applies to certain bookkeeping records and escrow obligations. Under Rule 1.15 of the New York Rules of Professional Conduct ("RPC"), these documents must be kept by the law firm:

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[1] NYCLA Eth. Op. 725
[2] N.Y. State Op. 623 (1991)
[3] N.Y. State Op. 2015-6
[4] N.Y. State Op. 1192 ¶ 12 (2020).
[5] Nassau Bar Opinion 43-89 (1989)

- the records of all deposits in and withdrawals from the escrow and operation bank accounts maintained in the attorney's practice of law, specifically identifying the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement;
- a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
- all retainer and compensation agreements with clients;
- all statements to clients or other persons showing the disbursement of funds to them or on their behalf;
- all bills rendered to clients;
- all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;
- copies of all retainer and closing statements filed with the Office of Court Administration; and
- checkbooks and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips regarding the special accounts specified in RPC 1.15 (B) and other bank account which records the operations of the lawyer's practice of law.

Attorneys must also maintain accurate, contemporaneous entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of practice. Luckily given our digital capabilities these days, these requirements may be satisfied by maintenance of original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

These records must be contemporaneously maintained and must be available for production for seven years. Violation of Rule 1.15 results in mandatory disciplinary action. Vigilant adherence to these bright-line requirements is critically important.

In addition, various statues and court rules may also affect upon a law firm's obligation to retain files. For instance, the First and Second Departments require the attorneys for both plaintiff and defendant in lawsuits seeking damages for (1) personal injury or for property damages; (2)

death or loss of services resulting from personal injuries (3) condemnation or (4) change of grade proceedings must maintain their files for seven years.[6] Attorneys need to determine whether their specific areas of practice mandate specific file retention obligations.

The Case by Case Analysis

Excepting the bright-line examples cited above, the analysis of what must be kept by the attorney from the files maintained in the representation of a client must be decided case by case - not the most encouraging response one wants to hear when formulating a standardized file retention policy. The Court of Appeals has broadly held that the client has a presumptive right to access the file maintained in the client's representation except for documents that might violate a duty of nondisclosure owed to third party, a duty imposed by law, or firm documents intended only for internal law office use.[7] As a result, a client's right to some or all of what is broadly termed the "client file" is a question of law.

Let's start with the premise that under Rule 1.15(e)(4), an attorney must promptly deliver to a client, upon request, any property of the client in the lawyer's possession. Essentially the ethics opinions divide the components of a closed file into four categories: (1) documents belonging to the attorney; (2) documents the attorney is under a legal duty to keep; (3) documents the client must keep; and (4) the remaining majority of documents found in an attorney's file.[8]

The opinions state that documents belonging to the attorney may be disposed of in a fashion that honors the client's privilege provided the lawyer has no other legal duty to keep the materials and there is no apparent indication the client has a need for the file. The problem with this subjective analysis is evident. If one employs the analysis utilized by most ethics opinions, there is little in a file which may be unqualifiedly categorized as materials belonging to the attorney.

Documents that the attorney is legally obligated to keep refers to the bright-line items noted above: generally, the documents identified in RPC 1.15(d)(1), various appellate rules, and those documents mandated by one's specific area of practice.

The analysis of those documents the client must keep is difficult. To get it right, you must know your client's business/personal issues. If original documents that cannot be replaced exist,

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[6] E.g., 22 NYCRR § 603.25 (First Department); 22 NYCRR § 691.20(f) (Second Department).

[7] *See Sage Realty v. Proskauer Rose*, 91 N.Y.2d 30 (1997).

[8] New York State Bar Association Committee on Professional Ethics, Opinion No. 623 (1986);

for example wills, the originals must be kept virtually *ad infinitum* unless returned to the client. The best rule is to return to the client all original documents and filings, keeping a copy (scanned) for the attorney's file. If the documents cannot be returned to the client, the attorney must keep the documents for at least the period required by the client's business or longer if it appears the client might have a need for the document after the legal period has expired.

The last category, the majority of documents likely to be found in a client's file, may be destroyed consistent with the client's instructions. If no such instructions exist, the attorney must make reasonable efforts to return the file to the client. The first step towards that process is to send a letter to the client indicating that destruction of the file is intended, offering to return the file and describing any documents the client may want or need in the file. If the client cannot be located or does not respond, the attorney may discard the file except for those documents which the client must retain and documents the client may foreseeably need. Remember that substantive emails are part of the client's file and the attorney's ethical obligations extend to that part of the client's closed file as well.[9]

All this is of little assistance to the attorney who would like to practice law for his or her current clients besides closing the files on already completed matters. However, there is no bright line date sanctioned by the ethics opinions beyond which an attorney may discard a file with impunity. Common sense must be used given an attorney's area practice with a view towards exceeding by a significant margin the statute of limitations for legal malpractice or other claims that may be made against an attorney arising out of the representation of a client.[10] If one's practice regularly involves the representation of infants, care must be taken to consider that the infancy toll would extend the ordinary limitations period. A review of the ethics opinions combined with securing the client's instructions for the disposition of a file in the original retention letter, should provide a law firm with guidelines suitable to its practice.

Developing Your Plan

You have miles of closed files you pay dearly to store. Where do you start? Do not let the huge backload of long-closed files paralyze you into taking no action. Start the process by putting your document retention plan into place with the next file that walks in the door.

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[9] N.Y. Eth Op. 2008-1.

[10] While the period of limitation for legal malpractice is three years, (CPLR 214(6), the period of limitations for a claim under Judiciary Law § 487 is six years. *Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10 (2014).

First, state your policy clearly in your engagement letter.[11] If you are at a point where you are virtually paperless, tell the client the files are maintained electronically.

Second, scan incoming and outgoing documents as a matter of daily practice. This ensures that your current files will be much less of a problem once they are closed. And any attorney living through the past 15 months of the global pandemic knows the value of accessing your files (securely) from remote locations. Attend a NYSBA seminar on how to convert your office to an orderly paperless environment.

Third, establish a protocol on *how* to close a file. Develop standard procedures, geared to your practice, setting forth what steps must be taken before a file may be closed. Common procedures include: (1) sending a letter to your client documenting the termination of the representation, reminding the client of the firm's retention policy before destruction and returning any original documents they may need or they provided during the representation; (2) checking to ensure that all necessary orders or judgments have been filed; (3) ensuring all security interests have been properly docketed and calendared for renewal, if necessary; (4) determining whether any documents properly belong in the firm's form system or brief bank; (5) confirming that all parties were entered in the firm's conflict system; (6) removing any duplicate documents and filing any loose papers; and (7) calendaring the file for destruction, if appropriate. A perpetual inventory of all files destroyed by the firm, with the date of destruction, must be kept.

Fourth, make sure everyone *follows* the plan. Start with requiring the attorneys to send a single group email stating the date the file is closed. The email should alert accounting to make sure a final invoice is generated; calendaring to make sure that any necessary dates are recorded; administration to make sure the file is reviewed, the originals segregated and returned, duplicates disposed of and the balance of the file, scanned and closed.

The Backlog

And how do you tackle the backlog? The first step is to survey the problem. Set realistic goal for each month of closed files starting with the most recent matters. Lists should be generated for attorneys to mail or email the clients about the firm's destruction policy. A form letter or email makes the odds of it being sent to the client greater but, if you tailor it to the client's representation, you can make it a marketing opportunity. From recent experience, many clients will ask for copies

[11] *See,* New York State Bar Association Committee on Professional Ethics Opinion 2010-1, for a discussion on the use of engagement letters to manage the lawyer's file retention obligation and sample engagement letter provision.

of the document that reflects how the engagement terminated: e.g., a closing statement, court decision or settlement agreement but most will whole-heartedly agree that the file should be destroyed. If you can do so, scan the balance of the file. We made significant progress having a dedicated scanner manned by hourly workers who saved the files in an orderly fashion. At the end of the day, it was less expensive than renting the real estate to house the closed files.

If a law firm has not been monitoring its possession of client's files at the conclusion of the representation, this is a mammoth but essential undertaking. Ignoring the backlog of closed files with not make the problem go away – the black hole of improperly closed client files will only multiply as time goes by. The time to close files properly and under your ethical obligations begins with the next matter you open. You must start someplace.

II

RULE 1.15:
PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust

accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

22 NYCRR 691.20

Section 691.20. Claims or Actions for Personal Injury, Property Damage, Wrongful Death, Loss of Services Resulting from Personal Injuries, Due to Negligence or Any Type of Malpractice, and Claims in Connection With Condemnation or Change of Grade Proceedings

Currentness

<This rule was updated pursuant to court order dated May 20, 2020.>

(a) Statements as to Retainers; Blank Retainers.

(1) Every attorney who, in connection with any action or claim for damages for personal injury or for property damages, or for death or loss of services resulting from personal injuries, due to negligence or any type of malpractice or in connection with any claim in condemnation or change of grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby the attorney's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 30 days from the date of any such retainer or agreement of compensation, sign personally and file with the Office of Court Administration of the State of New York a written statement of such retainer or agreement of compensation, containing the information hereinafter set forth. Such statement must be filed by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division.

(2) A statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained. Such statement shall contain the following information:

Retainer Statement | For office use:

TO THE OFFICE OF COURT ADMINISTRATION OF THE
STATE OF NEW YORK

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1. Date of agreement as to retainer

2. Terms of compensation

3. Name and home address of client

4. If engaged by an attorney, name and office address of retaining attorney

5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence

6. If a Condemnation or change of grade proceeding:

(*a*) Title and description

(*b*) Date proceeding was commenced

(*c*) Number or other designation of the parcels affected

7. Name, address, occupation and relationship of person referring the client

Dated: ....., N.Y. ..... day of ....., 20...

Yours, etc.

Signature of Attorney

_____

Print Attorney's Name

or _____

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Type Office and P.O. Address

_____ Dist. _____ Dept. _____ County

NOTE: CPLR 2104 AND 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION.

(3) An attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file electronically with the Office of Court Administration a written statement of such retainer in the manner and form as above set forth, which statement shall also contain particulars as to the fee arrangement, the type of services to be rendered in the matter, the code number assigned to the statement of retainer filed by the retaining attorney and the date when said statement of retainer was filed.

(4) No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney was left blank at the time of its execution by the client.

(b) Closing statement; statement where no recovery.

(1) A closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required, as follows: Every attorney upon receiving, retaining or sharing any sum in connection with a claim, action or proceeding subject to this section shall, within 15 days after such receipt, retention or sharing, sign personally file with the Office of Court Administration by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division and serve upon the client a closing statement as hereinafter provided. Where there has been a disposition of any claim, action or proceeding, or a retainer agreement is terminated, without recovery, a closing statement showing such fact shall be signed personally by the attorney and filed electronically with the Office of Court Administration within 30 days after such disposition or termination.

(2) Each closing statement shall be on one side of paper 8-1/2 inches by 11 inches and be in the following form and contain the following information:

Closing Statement For office use:

TO THE OFFICE OF COURT ADMINISTRATION

OF THE STATE OF NEW YORK

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1. Code number appearing on Attorney's receipt for filing of retainer statement. _____

2. Name and present address of client _____

3. Plaintiff(s) _____

4. Defendant(s) _____

5.(a) If an action was commenced, state the date: _____, 20 _____, _____ Court, _____ County.

5.(b) Was the action disposed of in open court? _____.

If not, and a request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the clerk of the part to which the action was assigned. _____.

If not, and an index number was assigned but no request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the County Clerk. _____.

6. Check items applicable:

Settled( ); Claim abandoned by client( ); Judgment( )

Date of payment by carrier or defendant _____ day of _____, 20 _____

Date of payment to client _____ day of _____, 20 _____

7. Gross amount of recovery (if judgment entered, include any interest, costs and disbursements allowed) $ _____ (of which $ _____ was taxable costs and disbursements).

8. Name and address of insurance carrier or person paying judgment or claim and carrier's file number, if any _____

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9. Net amounts: to client $ _____; compensation to undersigned $ _____; names, addresses and amounts paid to attorneys participating in the contingent compensation _____

10. Compensation fixed by:

retainer agreement ( ); under schedule ( ); or by court ( ).

11. If compensation fixed by court: Name of Judge _____ Court _____, Index No. _____, Date of Order _____

12. Itemized statement of payments made for hospital, medical care or treatment, liens, assignments, claims and expenses on behalf of the client which have been charged against the client's share of the recovery, together with the name, address, amount and reasons for each payment _____

13. Itemized statement of the amounts of expenses and disbursements paid or agreed to be paid to others for expert testimony, investigative or other services properly chargeable to the recovery of damages together with the name, address and reason for each payment _____

14. Date on which a copy of this closing statement has been forwarded to the client _____, 20 ___

NOTE: CRPLR 2104 AND 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A

STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION.

Dated: _____, NY, _____ day of _____, 20 _____

Yours, etc.

_____

Signature of Attorney

_____

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Print Attorney

or _____

Type Office and P.O. Address

_____ Dist. _____ Dept. _____ County

(If space provided is insufficient, riders on sheets 8-1/2 inches by 11 inches and signed by the attorney may be attached.)

(3) A joint closing statement may be served and filed in the event that more than one attorney receives, retains or shares in the contingent compensation in any claim, action or proceeding, in which event the statement shall be signed by each such attorney.

(c) Confidential nature of statements.

(1) All statements of retainer or closing statements filed shall be deemed to be confidential and the information therein contained shall not be divulged or made available for inspection or examination except upon written order of the presiding justice of the Appellate Division. (See subdivision [g] of this section.)

(2) When a retainer or closing statement has been filed electronically pursuant to this section, the official record shall be the electronic recording of the document stored by the Office of Court Administration.

(d) Deposit of collections; notice.

(1) Whenever an attorney, who has accepted a retainer or entered into an agreement as above referred to, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a special account in accordance with the provisions of Rule 1.15 of the Rules of Professional Conduct. Within 15 days after the receipt of any such sums he shall cause to be delivered personally to such client or sent by registered or certified mail, addressed to such client at the client's last known address, a copy of the closing statement required by this section. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw for himself the amount so claimed to be due him for compensation and disbursements. For the purpose of calculating the 15-day period, the attorney shall be deemed to have collected or received or been paid a sum of money on the date that he receives the draft endorsed by the client, or if the client's endorsement is not required, on the date the attorney receives the sum. The acceptance by a client of

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such amount shall be without prejudice to the latter's right in an appropriate action or proceeding, to petition the court to have the question of the attorney's compensation or reimbursement for expenses investigated and determined by it.

(2) Whenever any sum of money is payable upon any such claim, action or proceeding, either by way of settlement or after trial or hearing, and the attorney is unable to locate a client, the attorney shall apply pursuant to Rule 1.15 of the Rules of Professional Conduct to the court in which such action or proceeding was pending, or if no action had been commenced, then to the Supreme Court in the county in which the attorney maintains an office, for an order directing payment to be made to the attorney of the fees and reimbursable disbursements determined by the court to be due said attorney and to the Lawyers' Fund for Client Protection of the balance due to the client, for the account of the client, subject to the charge of any lien found by the court to be payable therefrom.

(e) Contingent fees in claims and actions for personal injury and wrongful death.

(1) In any claim or action for personal injury or wrongful death, or loss of services resulting from personal injury or for property or money damages resulting from negligence or any type of malpractice, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in any schedule of fees adopted by this department is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of any provisions of the Rules of Professional Conduct as set forth in Part 1200 of this Title, unless authorized by a written order of the court as hereinafter provided.

(2) The following is the schedule of reasonable fees referred to in paragraph (1) of this subdivision: either

SCHEDULE A

(i) 50 percent on the first $1000 of the sum recovered;

(ii) 40 percent on the next $2000 of the sum recovered;

(iii) 35 percent on the next $22,000 of the sum recovered; or

(iv) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

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(v) A percentage not exceeding 33⅓ percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(3) Such percentage shall be computed by one of the following two methods, to be selected by the client in the retainer agreement or letter of engagement:

(i) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert medical testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

(ii) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements.

The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(4) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A above because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney who filed the statement of retainer, pursuant to this section, has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A of paragraph (2) of this subdivision; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(5) The provisions of subdivision (e) of this section shall not apply to an attorney retained as counsel in a claim or action for personal injury or wrongful death by another attorney, if such other attorney is not subject to the provisions of this section in such claim or action, but all other subdivisions of this section shall apply.

(6) Nothing contained in subdivision (e) of this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

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(7) Nothing contained in subdivision (e) of this section shall be deemed applicable to the fixing of compensation for attorneys for services rendered in connection with the collection of first party benefits as defined by article 51 of the Insurance Law.

(8) The provisions of paragraph (2) of this subdivision shall not apply to claims alleging medical, dental or podiatric malpractice. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in section 474-a of the Judiciary Law.

(f) Preservation of records of claims and actions.

Attorneys for both plaintiff and defendant in the case of any such claim or cause of action shall preserve, for a period of seven years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other date relating to the claim of loss of time from employment or loss of income; medical reports, medical bills, X-ray reports, X- ray bills; repair bills, estimates of repairs; all correspondence concerning the claim or cause of action; and memoranda of the disposition thereof as well as canceled vouchers, receipts and memoranda evidencing the amounts disbursed by the attorney to the client and others in connection with the aforesaid claim or cause of action and such other records as are required to be maintained under Rule 1.15 of Part 1200 of this Title.

(g) Special authorization to divulge retainer and closing statements filed by attorneys.

Pursuant to paragraph (c)(1) of this section, the presiding justice of the Appellate Division of the Supreme Court in the second judicial department does hereby order that, without his further specific order, the clerk of the said Appellate Division and the Office of Court Administration of the State of New York, jointly and severally, are authorized to permit any agent or representative of the Treasury Department or of the district director of internal revenue of the United States, upon the presentation of written authorization from a supervising official or head in the office of said department or district director, to examine and copy any retainer or closing statement heretofore or hereafter filed by any attorney in the office of the said clerk or the Office of Court Administration of the State of New York, in accordance with said rules regulating the conduct of attorneys and counselors at law.

(h) Omnibus filings in property damage actions or claims.

Attorneys prosecuting actions or claims for property damage may make semi-annual omnibus filings of retainer statements and closing statements.

Credits

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Sec. filed Oct. 23, 1974; amds. filed: March 17, 1975; Oct. 27, 1977; March 28, 1979; Feb. 5, 1987; April 3, 1989; June 11, 1990; Sept. 5, 1991; May 18, 1993; April 15, 1995; April 30, 1998; Jan. 27, 2004; Nov. 9, 2004; April 2, 2009 eff. April 1, 2009; Feb. 27, 2014 eff. Feb. 19, 2014; amd. through Court Notices eff. Dec. 7, 2016; amd. through Court Notices eff. June 8, 2020.

Current with amendments included in the New York State Register, Volume XLIV, Issue 38 dated September 21, 2022. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 691.20, 22 NY ADC 691.20

End of Document

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22 NYCRR 603.25

Section 603.25. Claims or actions for personal injuries, property damage, wrongful death, loss of services resulting from personal injuries and claims in connection with condemnation or change of grade proceedings

Currentness

<Editorial Note: This rule was updated pursuant to court order dated June 8, 2020.>

(a) Statements as to retainers; blank retainers.

(1) Every attorney who, in connection with any action or claim for damages for personal injuries or for property damages or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby the attorney's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 30 days from the date of any such retainer or agreement of compensation, sign personally and file with the Office of Court Administration of the State of New York a written statement of such retainer or agreement of compensation, containing the information hereinafter set forth. Such statement must be filed by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division.

(2) A statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained. Such statement shall contain the following information:

Retainer Statement for Office Use:

TO THE OFFICE OF COURT ADMINISTRATION OF THE STATE OF NEW YORK

1. Date of agreement as to retainer

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2. Terms of compensation

3. Name and home address of client

4. If engaged by an attorney, name and office address of retaining attorney

5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence

6. If a condemnation or change of grade proceeding:

(*a*) Title and description

(*b*) Date proceeding was commenced

(*c*) Number or other designation of the parcels affected

7. Name, address, occupation and relationship of person referring the client

Dated: _____, New York, _____ day of _____, 20 ___

Yours, etc.

Signature of Attorney

Attorney Name

Office and P.O. Address

Dist. Dept. County

NOTE: CPLR 2104 and 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A

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STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION

(3) An attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file electronically with the Office of Court Administration a written statement of such retainer in the manner and form as above set forth, which statement shall also contain particulars as to the fee arrangement, the type of services to be rendered in the matter, the code number assigned to the statement of retainer filed by the retaining attorney and the date when said statement of retainer was filed.

(4) No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney was left blank at the time of its execution by the client.

(b) Closing statement; statement where no recovery.

(1) A closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required, as follows: every attorney upon receiving, retaining or sharing any sum in connection with a claim, action or proceeding subject to this section shall, within 15 days after such receipt, retention or sharing, sign personally, file with the Office of Court Administration by electronic transmission in a manner directed by the chief administrative judge and approved by the presiding justice of the Appellate Division and serve upon the client a closing statement as hereinafter provided. Where there has been a disposition of any claim, action or proceeding, or a retainer agreement is terminated, without recovery, a closing statement showing such fact shall be signed personally by the attorney and filed electronically with the Office of Court Administration within days after such disposition or termination.

(2) Each closing statement shall be on one side of paper 8 ½ inches by 11 inches and be in the following form and contain the following information:

Closing Statement for Office Use:

TO THE OFFICE OF COURT ADMINISTRATION OF THE STATE OF NEW YORK

1. Code number appearing on Attorney’s receipt for filing of retainer statement.

2. Name and present address of client

3. Plaintiff(s)

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4. Defendant(s)

5.(*a*) If an action was commenced, state the date: _____, 20 ___, _____ Court, _____ County.

(*b*) Was the action disposed of in open Court?

If not, and a request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the clerk of the part to which the action was assigned .....

If not, and an index number was assigned but no request for judicial intervention was filed, state the date the stipulation or statement of discontinuance was filed with the County Clerk .....

6. Check items applicable: Settled ( ); Claim abandoned by client ( ); Judgment ( ).

Date of payment by carrier or defendant _____ day of _____, 20 ___

Date of payment to client _____ day of _____, 20 ___

7. Gross amount of recovery (if judgment entered, include any interest, costs and disbursements allowed) $ _____ (of which $ _____ was taxable costs and disbursements).

8. Name and address of insurance carrier or person paying judgment or claim and carrier's file number, if any.

9. Net amounts: to client $ _____; compensation to undersigned $ ___ ___; names, addresses and amounts paid to attorneys participating in the contingent compensation _____.

10. Compensation fixed by: retainer agreement ( ); under schedule ( ); or by court ( ).

11. If compensation fix by court: Name of Judge _____ Court _____ Index No. _____ Date of order _____

12. Itemized statement of payments made for hospital, medical care or treatment, liens, assignments, claims and expenses on behalf of the client which have been charged against the client's share of the recovery, together with

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the name, address, amount and reason for each payment.

13. Itemized statement of the amounts of expenses and disbursements paid or agreed to be paid to others for expert testimony, investigative or other services properly chargeable to the recovery of damages together with the name, address and reason for each payment.

14. Date on which a copy of this closing statement has been forwarded to the client _____, 20 ___.

NOTE: CPLR 2104 and 3217 REQUIRE THAT THE ATTORNEY FOR THE DEFENDANT FILE A STIPULATION OR STATEMENT OF DISCONTINUANCE WITH THE COURT UPON DISCONTINUANCE OF AN ACTION

Dated: _____, New York, _____ day of _____, 20 ___.

Yours, etc.

Signature of Attorney

Attorney's Name

Office and P.O. Address

Dist. Dept. County

(If space provided is insufficient, riders on sheets 8 ½ inches by 11 inches and signed by the attorney may be attached.)

(3) A joint closing statement may be served and filed in the event that more than one attorney receives, retains or shares in the contingent compensation in any claim, action or proceeding, in which event the statement shall be signed by each such attorney.

(c) Confidential nature of statements.

(1) All statements of retainer or closing statements filed shall be deemed to be confidential and the information therein contained shall not be divulged or made available for inspection or examination to any person other than the client of the attorney filing said statements except upon written order of the presiding justice of the Appellate Division.

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(2) When a retainer or closing statement has been filed electronically pursuant to this section, the official record shall be the electronic recording of the document stored by the Office of Court Administration.

(d) Deposit of collections; notice.

(1) Whenever an attorney, who has accepted a retainer or entered into an agreement as above referred to, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a special account in accordance with the provisions of section 603.27 of this Part. Within 15 days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered or certified mail, addressed to such client at the client's last known address, a copy of the closing statement required by this section. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw for himself the amount so claimed to be due him for compensation and disbursements. For the purpose of calculating the 15-day period, the attorney shall be deemed to have collected or received or been paid a sum of money on the date that he receives the draft endorsed by the client, or if the client's endorsement is not required, on the date the attorney receives the sum. The acceptance by a client of such amount shall be without prejudice to the latter's right in an appropriate action or proceeding, to petition the court to have the question of the attorney's compensation or reimbursement for expenses investigated and determined by it.

(2) Whenever any sum of money is payable upon any such claim, action or proceeding, either by way of settlement or after trial or hearing, and the attorney is unable to locate a client, the attorney shall apply, pursuant to Rule 1.15(f) of the Rules of Professional Conduct (Part 1200 of this Title [Rule 1.15(f)]), to the court in which such action or proceeding was pending, or if no action had been commenced, then to the Supreme Court in the county in which the attorney maintains an office, for an order directing payment to be made to the attorney of the fees and reimbursable disbursements determined by the court to be due said attorney and to the Lawyers Fund for Client Protection of the balance due to the client, for the account of the client, subject to the charge of any lien found by the court to be payable therefrom.

(e) Contingent fees in claims and actions for personal injury and wrongful death.

(1) In any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in any schedule of fees adopted by this department is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the exaction of unreasonable and unconscionable compensation in violation of any provision of the Rules of Professional Conduct (Part 1200 of this Title) with respect to conduct on or after April 1, 2009, or the former Code of Professional Responsibility, as adopted by the New York State Bar Association effective January 1, 1970, as amended, with respect to conduct on or before March 31, 2009, unless authorized by a written order of the court as hereinafter provided.

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(2) The following is the schedule of reasonable fees referred to in paragraph (1) of this subdivision: either,

SCHEDULE A

(i) 50 percent on the first $1,000 of the sum recovered,

(ii) 40 percent on the next $2,000 of the sum recovered,

(iii) 35 percent on the next $22,000 of the sum recovered,

(iv) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

A percentage not exceeding 33% percent of the sum recovered. If the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

(3) Such percentage shall be computed by one of the following two methods, to be selected by the client in the retainer agreement or letter of engagement: (i) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or (ii) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

(4) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A, above, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney who filed the statement of retainer, pursuant to this section, has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A, above; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if

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any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(5) The provisions of this subdivision shall not apply to an attorney retained as counsel in a claim or action for personal injury or wrongful death by another attorney, if such other attorney is not subject to the provisions of this section in such claim or action, but all other subdivisions of this section shall apply.

(6) Nothing contained in this subdivision shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(7) Nothing contained in this subdivision shall be deemed applicable to the fixing of compensation for attorneys for services rendered in connection with the collection of first-party benefits as defined by section 5102 of the Insurance Law.

(8) The provisions of paragraph (2) of this subdivision shall not apply to claims alleging medical, dental, or podiatric malpractice. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in Judiciary Law, section 474-a.

(f) Preservation of records of claims and actions. Attorneys for both plaintiff and defendant in the case of any such claim or cause of action shall preserve, for a period of seven years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other data relating to the claim of loss of time from employment or loss of income; medical reports, medical bills, X-ray reports, X- ray bills; repair bills, estimates of repairs; all correspondence concerning the claim or cause of action; and memoranda of the disposition thereof as well as cancelled vouchers, receipts and memoranda evidencing the amounts disbursed by the attorney to the client and others in connection with the aforesaid claim or cause of action and such other records as are required to be maintained under section 603.27 of this Part.

(g) Omnibus filings in property damage claims or actions. Attorneys prosecuting claims or actions for property damages are permitted to make semi-annual omnibus filings of retainer statements and closing statements.

Credits

Renumbered from § 603.7 through Court Notices eff. Oct. 1, 2016; amd. through Court Notices eff. June 8, 2020.

Current with amendments included in the New York State Register, Volume XLIV, Issue 38 dated September 21, 2022. Some sections may be more current, see credits for details.

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N.Y. Comp. Codes R. & Regs. tit. 22, § 603.25, 22 NY ADC 603.25

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III

91 N.Y.2d 30
Court of Appeals of New York.

In the Matter of SAGE REALTY CORPORATION et al., Appellants,
v.
PROSKAUER ROSE GOETZ & MENDELSOHN L.L.P., Respondent.

Dec. 2, 1997.

Synopsis
Law firm's former client appealed from order of the Supreme Court, New York County, Abdus-Salaam, J., refusing to order discovery of certain files of law firm. The Supreme Court, Appellate Division, 235 A.D.2d 355, 653 N.Y.S.2d 12, held that law firm files were private property and not discoverable, and thus affirmed. Former client appealed by permission. The Court of Appeals, Levine, J., held that: (1) abrogating *Zackiva Communications Corp. v. Milberg Weiss Bershad Specthrie & Lerach,* 223 A.D.2d 417, 636 N.Y.S.2d 768, counsel's former client is entitled to inspect and copy any documents which relate to representation and are in possession of counsel, absent substantial grounds for counsel to refuse access; (2) firm would not be required to disclose documents which might violate duty of nondisclosure owed to third party, or otherwise imposed by law, or firm documents intended for internal law office review and use; and (3) generally, unless law firm has already been paid for assemblage and delivery of documents to client, performing that function is properly chargeable to client.

Reversed and remitted.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***985 *31 **879** Nixon, Hargrave, Devans & Doyle L.L.P., New York City (Frank H. Penski, Richard A. Lafont, Christine A. Char and Constance M. Boland, of counsel), for appellants.

***986 *32 **880** Proskauer Rose Goetz & Mendelsohn L.L.P., New York City (Nancy Kilson and Richard L. Spinogatti, of counsel), pro se.

OPINION OF THE COURT

LEVINE, Judge.

In 1994, petitioners retained Proskauer Rose Goetz and Mendelsohn LLP to provide all legal services in connection with a $175 million mortgage financing with Nomura Asset Capital Corporation and Nomura Securities International, Inc. (Nomura mortgage financing) and a restructuring of ownership interests, all involving four major New York City office buildings and various interests in six other New York properties. The restructuring entailed the formation of numerous limited liability companies, the conversion of existing partnerships to limited liability companies and the transfer of real estate assets, partnership interests and membership interests to a number of these limited liability companies.

Those transactions were completed at the end of 1995. The legal work in planning, structuring, negotiating and preparing ***33** the necessary closing papers was, concededly, of very substantial complexity, for which the fees totaled approximately $1 million. The closing report alone consisted of some 14 volumes containing more than 550 documents.

In early 1996, petitioners and the Proskauer firm had a falling out. Petitioners then retained Nixon, Hargrave, Devans, & Doyle LLP, their present counsel, to represent them in connection with all matters related to the Nomura mortgage financing and the commercial real estate ownership restructuring. Nixon, Hargrave asked Proskauer to turn over its files in their entirety on the financing and restructuring matters, and tendered a check for Proskauer's bindery expenses for those transactions, that being the only remaining outstanding claim of Proskauer for payment with respect to services and disbursements arising out of those matters.

In addition to the closing report documents previously delivered, in the course of negotiations between the two firms during the spring of 1996, Proskauer also turned over additional documents from its files consisting of client-supplied papers, client correspondence and what could be characterized as supporting closing papers such as appraisals, tax forms, formal legal opinions and environmental and engineering reports. The firm also furnished a 58–page index of its files on the Sage Realty

transactions obtained from its records department's computerized file management program. Proskauer refused, however, to turn over a large number of items identified in the index such as internal legal memoranda, drafts of instruments, mark-ups, notes on contracts and transactions and ownership structure charts. Petitioners claim that Proskauer also failed to turn over firm correspondence with third parties and conference negotiation notes.

This special proceeding was then commenced by petitioners to recover all of the outstanding papers in the Proskauer files relating to Proskauer's representation on the foregoing real estate financing and restructuring matters. The petition alleges that, although the Nomura mortgage financing and commercial real estate ownership restructuring may have culminated in a closing, there remain outstanding complex financial and tax reporting obligations of petitioners requiring legal guidance from their present counsel. In subsequent affidavits, Nixon, Hargrave averred that the underlying documents, such as drafts and transaction charts, are needed for complete understanding of how certain provisions in the various legal instruments were finally negotiated and to assess the full ***34** extent of petitioners' ongoing compliance obligations. Proskauer's response was that all third-party correspondence and all documents provided by petitioners in relation to these transactions had been delivered and that those papers, together with the previously delivered closing binder containing all closing instruments, supporting documents and summaries of contents, were amply sufficient to enable present counsel to advise petitioners on their continuing obligations. Proskauer refused to make any further general transfer of its files on the represented matters, albeit expressing willingness to entertain a *****987 **881** particularized request upon a showing of need.

Supreme Court, relying upon *Zackiva Communications Corp. v. Milberg Weiss Bershad Specthrie & Lerach,* 223 A.D.2d 417, 636 N.Y.S.2d 768, accepted Proskauer's position that petitioners were not entitled to more from the firm's files than the closing binder documents and their own client papers, all of which had previously been furnished by that firm. The Appellate Division affirmed (235 A.D.2d 355, 653 N.Y.S.2d 12). That Court held that as to the "concluded business financing and restructuring matters," the Proskauer files at issue, the firm's "drafts, internal memoranda, mark-ups, research" and other internal documents containing " 'the opinions, reflections and thought processes' " of counsel were Proskauer's "private property," which need not be furnished to petitioners absent a showing of particularized need. We granted petitioners leave to appeal, and now reverse.

A majority of courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions (*see, Resolution Trust Corp. v. H——, P.C.,* 128 F.R.D. 647; State Bar of Ga., Formal Advisory Opn. No. 87–5; Massachusetts Rules of Court, rule 3:07, DR 2–110[A][4] [1997]; Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline, Opn. No. 92–8; *Maleski v. Corporate Life Ins. Co.,* 163 Pa.Cmwlth. 36, 641 A.2d 1; *Matter of Kaleidoscope, Inc. (Scroggins v. Powell, Goldstein, Frazer & Murphy),* 15 B.R. 232, *revd. on abstention grounds* 25 B.R. 729; State Bd. of Cal. Standing Comm. on Professional Responsibility and Conduct, Formal Opn. No.1992–127; Connecticut Bar Assn. Comm. on Professional Ethics, Opn. No. 94–1; State Bar of Mich. Comm. on Professional and Judicial Ethics, Syllabus CI–926 [1983]; Oregon State Bar Assn., Formal Opn. No.1991–125).

The American Law Institute, in its Restatement (Third) of the Law Governing Lawyers essentially embraced the majority ***35** position (*see,* Restatement [Third] of Law Governing Lawyers § 58 [Proposed Final Draft No. 1, 1996]). The draft Restatement provides that a former client is to be accorded access to "inspect and copy *any documents possessed* by the lawyer *relating to the representation,* unless substantial grounds exist to refuse" (*id.,* § 58[2] [emphasis supplied]). Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, "such originals and copies of other documents possessed by the lawyer relating to the representation as the * * * [former] client reasonably needs" (*id.,* § 58[3], comment d).

By contrast, a minority (although a substantial number) of courts and State bar legal ethics authorities, including the Appellate Division in this case and in *Zackiva Communications Corp. v Milberg Weiss Bershad Specthrie & Lerach, supra,* distinguish between the "end product" of an attorney's services, the documents representing which belong to the client, and the attorney's "work product" leading to the creation of those end product documents, which remains the property of the attorney (*see, Federal Land Bank v. Federal Intermediate Credit Bank,* 127 F.R.D. 473, *mod* 128 F.R.D. 182; *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus,* 824 S.W.2d 92 [Mo.App.]; Alabama State Bar, Formal Ethics Opn. RO–86–02; Arizona State Bar Comm. on Rules of Professional Conduct, Opn. No. 92–1; Illinois State Bar Assn., Opn. No. 94–13; North Carolina

State Bar Ethics Comm., RPC 178 [1994]; Rhode Is Sup. Ct. Ethics Advisory Panel, Opn. No. 92–88 [1993]).

End product, under the foregoing minority view, includes such items as pleadings actually filed in an action; correspondence with a client, opposing counsel and witnesses; and other papers "exposed to public light by the attorney to further [the] client's interests" (*Federal Land Bank v. Federal Intermediate Credit Bank, supra,* 127 F.R.D., at 479); and the final versions of contracts, wills, corporate records and similar records prepared for the client's actual use (*see,* Illinois State Bar Assn., Opn. No. 94–13). The attorney's work ***988 **882** product, to which the client is not entitled access, includes all preliminary documents "used by the lawyer to reach the end result," such as internal legal memoranda and preliminary drafts of pleadings and legal instruments (*Federal Land Bank v. Federal Intermediate Credit Bank, supra,* 127 F.R.D., at 479). As to these and similar documents, the minority view is that the client is only entitled to access to the extent of a demonstrated need in order to understand the end product documents, with the burden of ***36** justification on the client (*see, Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, supra,* 824 S.W.2d, at 98).

We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view. First, an expansive general right of the client to the contents of the attorney's file, upon termination of the attorney-client relationship, more closely conforms to the position taken by the courts of this State on the client's broad rights to the contents of the file when representation ceases on a matter still pending (*see, Tekni–Plex, Inc. v. Meyner & Landis,* 89 N.Y.2d 123, 137, 651 N.Y.S.2d 954, 674 N.E.2d 663, *rearg. denied* 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503; *Matter of Vega,* 94 A.D.2d 799, 463 N.Y.S.2d 49; *Melendez v. Union Hosp.,* 88 A.D.2d 831, 451 N.Y.S.2d 137). An "attorney's work product" exception has been rejected in that context (*see, Matter of Vega, supra,* at 800, 463 N.Y.S.2d 49; *Melendez v. Union Hosp., supra,* at 831–832, 451 N.Y.S.2d 137).

Moreover, when the attorney's file is sought in connection with a pending matter, courts also have refused to recognize a property right of the attorney in the file superior to that of the client (*see, Bronx Jewish Boys v. Uniglobe, Inc.,* 166 Misc.2d 347, 350, 633 N.Y.S.2d 711; *see also, In Re Grand Jury Proceedings,* 727 F.2d 941, 944, *cert. denied sub nom. Vargas v. United States,* 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37; *Matter of Calestini,* 321 F.Supp. 1313, 1316). We can discern no principled basis upon which exclusive property rights to an attorney's work product in a client's file spring into being in favor of the attorney at the conclusion of a represented matter. Indeed, this case illustrates that, often, no unequivocal line can be drawn between pending and completed legal matters; hence, the continued likelihood of useful reference to work product materials in the client's file.

Second, the minority position adopted by the courts below unrealistically and, in our view, unfairly places the burden on the client to demonstrate a need for specific work product documents in the attorney's file on the represented matter. Again, this case is illustrative that in a complex transaction where the file may be voluminous (commensurably increasing the likely usefulness of work product materials to advise the client concerning ongoing rights and obligations), the client's need for access to a particular paper cannot be demonstrated except in the most general terms, in the absence of prior disclosure of the content of the very document to which access is sought. The attorney in possession of the contents of the file is in a far better position to demonstrate that a particular document would furnish no useful purpose in serving the client's present needs for legal advice.

***37** Affording the client presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions, is also supported, although not necessarily dictated, by the lawyer's ethical obligations arising out of representation in a given matter. As we recognized in *Tekni–Plex, Inc. v. Meyner & Landis,* 89 N.Y.2d, at 130, 651 N.Y.S.2d 954, 674 N.E.2d 663, *supra*, an attorney's fiduciary relationship with a client may continue even after representation has concluded. Among the duties of an attorney as a fiduciary and agent of the client are those of openness and conscientious disclosure. As we remarked in another context, equally applicable here, "[s]ince the reign of Elizabeth I, the law has as a matter of policy encouraged full disclosure between attorney and client" (*Matter of Jacqueline F. v. [Segal],* 47 N.Y.2d 215, 218, 417 N.Y.S.2d 884, 391 N.E.2d 967). That obligation of forthrightness of an attorney toward a client is not furthered by the attorney's ability to cull from the client's file documents generated ***989 **883** through fully compensated representation, which the attorney unilaterally decides the client has no right to see (*see,* Restatement [Third] of Law Governing Lawyers, *op. cit.,* § 58, comment c [citing full disclosure obligations of a fiduciary to a beneficiary and of an agent to a principal in Restatement (Second) of Trusts § 173, at 378; Restatement (Second) of Agency § 381, at 182]; *Resolution Trust Corp. v. H——, P.C., supra,* 128 F.R.D., at 649–650; *Matter of Kaleidoscope, Inc. (Scroggins v.*

Powell, Goldstein, Frazer & Murphy), supra, 15 B.R. at 244).

Thus, we conclude that the courts below erred in restricting petitioners' access to the Proskauer files on the firm's representation in the instant financing and real estate ownership restructuring matters essentially to end product documents. Barring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation.

Proskauer, however, should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law (*see, e.g.,* Restatement [Third] of the Law Governing Lawyers, *op cit.,* § 58, comment c). Additionally, nonaccess would be permissible as to firm documents intended for internal law office review and use. "The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved" (*id.*). This might include, for example, documents containing a firm attorney's general or other assessment of the ***38** client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation. Such documents presumably are unlikely to be of any significant usefulness to the client or to a successor attorney. Upon remittal, which will be required in the instant case, disputes concerning access to these and other categories of internal law firm papers will be resolved in the first instance by Supreme Court through a hearing which might necessitate in camera review. Moreover, Proskauer can apply to that court for protective remedies in the event of oppression or harassment in connection with demands for file inspection, delivery of original documents or reproduction.

We also conclude that, as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement.

Finally, we caution that our holding in this matter is not to be construed as altering any existing standard of professional responsibility or generally accepted practice concerning a lawyer's duty to retain and safeguard all or portions of a client's file once a matter is concluded. The dispute here is solely over client access to the specific files which, in fact, were retained following the termination of Proskauer's representation.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings not inconsistent with this opinion.

TITONE, BELLACOSA, SMITH, CIPARICK and WESLEY, JJ., concur.

KAYE, C.J., taking no part.

Order reversed, with costs, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

All Citations

91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985, 1997 N.Y. Slip Op. 10219

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NY Eth. Op. 1212 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2021 WL 125949

New York State Bar Association
Committee on Professional Ethics

TOPIC: PUBLIC DEFENDER'S OBLIGATION AS TO CLOSED FILES AND TRANSFER OF FILES UPON DE-FUNDING OF PROGRAM

Opinion Number 1212
January 8, 2021

Digest: Absent the client's informed consent, a public defender may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client matters to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files from a defunded program must be maintained in the manner required of dissolving law firms.

***1 Rules**: 1.0(h), 1.0(p), 1.15(c)(4), 1.16(e), 7.2(b)(1)

FACTS:

1. The inquirer is an attorney with a not-for-profit public defender's office representing defendants in criminal matters as part of a county's assigned counsel program. The county has defunded the public defender's office and is moving to an alternate program to satisfy its obligation to provide counsel in accordance with New York County Law Article 18-B. Once the public defender's office has effectively withdrawn from representing its current clients, the county has requested that the public defender's office turn over open and closed client files to the assigned counsel program, which is administered by an employee of the county attorney's office. The closed files, which span more than 30 years, have all been converted for storage into electronic format.

QUESTIONS:

2. May a defunded public defender's office turn its open client files over to the county's assigned counsel program?

3. May a defunded public defender's office turn its closed client files over to the county's assigned counsel program?

OPINION:

4. County Law Article 18-B requires counties to provide criminal defense representation to qualified indigent persons. A county may fulfill its obligations under Article 18-B by appointing a public defender, by furnishing counsel through a private legal aid bureau or society designated by the county, or through a bar association plan in which the services of private counsel are rotated and coordinated by an administrator. *See* County Law § 722.

5. The inquiring attorney here is employed by a public defender's office, established under the authority of County Law Article 18-A, which had been funded by the county to provide the mandated representation. A public defender's office is a qualified legal services organization and, therefore, constitutes a law firm under the New York Rules of Professional Conduct ("Rules"). *See* Rule 1.0(h) and (p); Rule 7.2(b)(1). The assigned counsel program, however, is not a law firm, but rather is defined as an "Entity that sets forth protocols and policies for assigning attorneys to public defense clients and ensure that those attorneys provide quality representation." *See* N.Y.S. Office of Indigent Legal Services Standards for Establishing and Administering Assigned Counsel Programs - Black Letter Standards with Commentary (July 1, 2019) ("ILS Standards"), § 1.4.c (published at https://ils.ny.gov/files/ACP/ACPStandardswithCommentary9119.pdf)

Transfer of Open Client Files

***2** 6. Lawyers in the public defender's office who are withdrawing from representing a current client (meaning a client with an "open" file) must comply with Rule 1.16(e) which requires them to "take steps, to the extent reasonably practicable, to

avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, [and] delivering to the client all papers and property to which the client is entitled ..."

7. In addition, the lawyers in the public defender's office have a responsibility under Rule 1.6 and Rule 1.9(c) to maintain the client's confidential information. As noted in Comment [2] to Rule 1.6, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source." Rule 1.9(c) generally applies the duty of confidentiality to former clients. Accordingly, the public defender's office may deliver files maintained in connection with an ongoing representation to the clients themselves, or to lawyers who have been appointed pursuant to Article 18-B as successor counsel in particular criminal cases. However, the public defender's office may not deliver such client files to the assigned counsel program, which is neither a lawyer nor a law firm and which does not represent any of the public defender's clients, absent the informed consent of the clients concerned. If delivery of the file to the client is not possible, and if the client's informed consent to delivery of a client file to the assigned counsel program cannot be obtained, then the lawyers in the public defender's office must take steps to preserve the client's file until successor counsel is appointed.

8. We are mindful that administrative transfer of open client files to successor counsel may place a significant burden on an unfunded not-for-profit entity such as the public defender's office. But as Comment [8A] to Rule 1.16 aptly notes, "... lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation." Although responsibility for the cost of preserving the client files during the orderly transition of representation is an issue of law beyond the jurisdiction of the committee, the inquirer may wish to explore whether this expense may qualify as an obligation of the county under Articles 18-A or 18-B of the County Law.

Transfer of Closed Files

9. Under the Rules, a lawyer has no ethical obligation to maintain the entire contents of closed client files indefinitely, but a lawyer may have an ethical obligation to maintain certain documents indefinitely, such as when the lawyer knows or has reason to know the client may need the documents in the future. See N.Y. State 1192 ¶ 12 (2020). Although a client's right to some or all of what is broadly termed the "client file" is a question of law beyond our jurisdiction, we note that a lawyer may have the right to withhold some parts of a client file. *See Sage Realty v. Proskauer Rose*, 91 N.Y.2d 30 (1997) (holding that clients are generally entitled to all documents relating to representation, but a law firm is not required to disclose documents that might violate a duty of nondisclosure owed to third party, a duty imposed by law, or firm documents intended only for internal law office use). We also note that Rule 1.15(c)(4), obligates a lawyer to promptly deliver to the client the property of the client (including papers in the client file) that the client is "entitled to receive."

*3 10. In this instance, the lawyers in the public defender's office have not culled through their closed files and undertaken the sometimes complicated case-by-case and page-by-page analysis that may be necessary to identify (i) the portions of each file to which the client is "entitled," including important papers the client may need in the future, and (ii) the portions of the file the lawyer may withhold from the client. The public defender's office has instead taken the reasonable step of converting all the documents in its closed files to an electronic format, a format that is acceptable, if not preferable in this day and age, as long as the evidentiary value of the documents that may be needed for an appeal or other proceeding is not unduly impaired by this method of storage. *See* N.Y. State 940 (2012) (opining that lawyer satisfies document retention requirements with electronic copies and may destroy original documents, with exceptions, including exception where copies may not be introduced into evidence or otherwise used in place of the originals if the need should arise); *see also*, N.Y. State 623 (1991) (requiring lawyers to maintain documents of a former client that establish substantial personal or property rights "according to law and/or the reasonably foreseeable needs of the client" unless the former client takes possession of such documents or authorizes their destruction).

11. Whether the files are maintained as paper copies or stored in electronic format, attorneys in the public defender's office have the same obligation as members of a law firm to maintain the closed files of former clients. In N.Y. State 1192 (2020), we noted:

> The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held

> that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40-88 (1988).

12. By analogy, the inquirer's obligation to maintain closed client files continues beyond the de-funding of the not-for profit entity in the same fashion as it would in the event of a law firm dissolution. Prior ethics opinions have addressed the breadth of the lawyer's responsibility in situations analogous to that presented by the inquiring lawyer, such as retirement and dissolution. *See, e.g.*, N.Y. State 1192 (2020); N.Y. State 623 (1991); N.Y. State 460 (1977); N.Y. County 725 (1998).

13. As we stated most recently in N.Y. State 1192, a lawyer has no ethical responsibility to maintain closed client files indefinitely except for "original documents of intrinsic value such as wills, deeds or negotiable instruments as well as documents the lawyer knows or should know that the client or third party may need in the future." To the extent the documents contained in the closed client files of the public defender's office fall within these exceptions, we find no material difference in the scope of the inquirer's obligations in this case.

CONCLUSION

***4** 14. Absent the client's informed consent, lawyers in the public defender's office may not deliver open or closed client files to the assigned counsel program. Rather, the public defender's office must facilitate the transfer of open client files to the client or successor counsel appointed by the assigned counsel program and must maintain the files until this transfer can be accomplished. Closed client files must be maintained in the manner required of dissolving law firms.

(31-20)

NY Eth. Op. 1212 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2021 WL 125949

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NY Eth. Op. 1195 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 3447687

New York State Bar Association
Committee on Professional Ethics

TOPIC: ATTORNEY'S OBLIGATION TO ACCEPT CLIENT FILES FROM PRIOR LAW FIRM

Opinion Number 1195
June 11, 2020

DIGEST: A lawyer has no duty to represent clients who were clients of a former law firm and have not engaged the lawyer to represent them at a new firm, no matter whether the lawyer did work on behalf of those clients at the former firm.
***1 Rules**: 1.6, 1.9, 1.16

FACTS

1. The inquirer recently left employment with a law firm in which the inquirer had practiced for some years. Several partners left the firm during the inquirer's last two years at the firm. The inquirer took on a number of matters these lawyers had handled, and settled several of them. In one matter, the inquirer reached a compromise of a lien but then later discovered that another lien existed, at which point the inquirer wrote the client to advise of the outstanding lien and the client's responsibility to pay the lien or negotiate a reduction. The inquirer left the law firm shortly thereafter and started a new firm. Several of the clients from the old firm retained this new firm.

2. Following the inquirer's departure, the former firm began sending files for matters that the inquirer had handled before departure. The inquirer returned the files to the old firm with notice that the inquirer did not represent the affected clients. Nevertheless, the old firm re-sent the files to the inquirer and, we are told, advised those clients in writing that the inquirer was now handling their matters.

QUESTIONS

3. The inquirer asks:

(a) Is a lawyer who leaves a law firm responsible for representing clients represented by the inquirer at the prior firm but who have not retained the lawyer's new firm? (b) Is a lawyer who advised a client about lien prior to departure from a prior firm still responsible for advising the onetime client about the lien? (c) Is it ethical for a law firm an employee of which has left the firm to advise firm clients that the former employee remains responsible for certain matters the departing lawyer had previously handled?

4. Our charter restricts us to responding to inquiries about a lawyer's own prospective conduct, not about the conduct of other lawyers. Consequently, we offer no opinion in reply to the inquirer's third question.

OPINION

5. On the facts presented, we consider clients of the inquirer's former firm who have not retained the inquirer's new firm to be former clients of the inquirer. A lawyer owes only certain discrete obligations to former clients. The most prominent of these are set out in Rule 1.9 of the N.Y. Rules of Professional Conduct ("Rules"), which, among other things, requires a lawyer not to reveal the confidential information of former clients protected by Rule 1.6, and not to represent a client adverse to the former client in a matter that is 'the same or a substantially related matter" to one in which the lawyer previously represented the former client. Rule 1.16(e) also makes provisions for avoiding prejudice to a client upon termination of the attorney-client relationship. For the most part, however, a lawyer's duty of care to clients dies with the end of the attorney-client relationship.

***2** 6. On our view, this means that the inquirer no longer owes clients of the former firm the range of duties attending an ongoing attorney-client relationship under the Rules. This extends to the client of the former firm whom the inquirer advised

about liens. It appears that the inquirer counseled the client to deal with the liens. Unless the client has retained the inquirer's new firm, we see nothing in the Rules to obligate the client further to serve the client, except for making available documents or other information in the inquirer's possession that may avoid prejudicing the erstwhile client's ability to act as instructed.

7. The Rules explicitly state that the existence of an attorney-client relationship is a question of law, not ethics. Rules, Preamble ¶ 9. We do not issue opinions on legal questions, but we do not stray far from our charter in saying that an unaffiliated third party may not unilaterally impose such a relationship without the agreement of the lawyer and the client. Thus, unless clients of the former firm have agreed to retain the inquirer's new firm, the inquirer's duties to those onetime clients are limited to those any lawyer owes a former client. See ALI, Restatement of Law Governing Lawyers (Third) § 14(1) (Formation of a Client-Lawyer Relationship) (a lawyer-client relationship arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services).

CONCLUSION

8. A lawyer owes no duty to represent clients of a former firm absent a client's agreement and instead owes such persons only the duties all lawyers owe to former clients.

NY Eth. Op. 1195 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 3447687

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NY Eth. Op. 1192 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 3484033

New York State Bar Association
Committee on Professional Ethics

TOPIC: RETENTION AND DISPOSITION OF LAWYER'S CLOSED FLLES

Opinion Number 1192
June 9, 2020

DIGEST: With certain important exceptions, a lawyer has no ethical duty to retain closed client flles (or other documents held by the lawyer owned by third parties) for an indefinite period when neither the client nor the third party requests their return. The exceptions are original documents of intrinsic value such as wills, deeds, or negotiable instruments, as well as documents that the lawyer knows or should know that the client or third party may need in the future. Apart from these documents, a lawyer has an ethical duty to retain for seven years certain books and records concerning an attorney-client relationship, and any documents otherwise required by law to maintain.
***1 RULES**: 1.9, 1.10, 1.15

FACTS

1. The inquirer is a New York attorney who acquired a partnership interest in a law firm some years ago. Upon the inquirer's arrival, the firm was, we are told, in a state of disarray in both its financial and administrative affairs. The prospect of the firm's insolvency looms. Of particular concern to the inquirer in the context of a possible dissolution are the files of thousands of clients and former clients of the firm. The inquirer says that most of these files are stale and without connection to any ongoing client of the firm. The costs of disposal of the files,by whatever means, would be substantial.

QUESTION

2. What are a lawyer's obligations in dealing with closed client files?

General Principles

3. In 1977, we wrote: "The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients. Indeed, the Code of Professional Responsibility is remarkably silent on this subject. What is required of lawyers must for the most part be determined in the light of common sense and certain general principles of considerably broader application." N.Y. State 460 (1977).

4. We think that Opinion 460 is still applicable. Although decided under the Code of Professional Responsibility (the "Code"), the Code's successor, the Rules of Professional Responsibility (the "Rules"), effects no change in its reasoning. With the important exceptions noted below, nothing in the Rules requires lawyers to maintain all files and records concerning an attorney-client relationship for any predetermined period of time. Subject to the following caveats, therefore, a lawyer is free to discard such files and records consistent with common sense and the prudential exercise of professional judgment.

5. Sage Realty v. Proskauer Rose, 91 N.Y.2d 30 (1997), teaches that what are generally, if too-broadly-named, as "client files" is a matter of property law. Issues of property law are outside our jurisdiction; we opine only on the Rules. Rule 1.15(a) says, among other things, that a lawyer in possession of "property belonging to another person, where such possession is his or her incident to practice of law, is a fiduciary." Rule 1.15(c)(4) requires a lawyer to "deliver to the client or third person as requested" any "properties in the possession of the lawyer that the client or third person is entitled to receive." For our purposes, we assume that no client or third person has requested the inquirer to return any property, for otherwise the lawyer's duty is plain: the lawyer must deliver to the requesting party whatever the client or third party is entitled to receive. Absent such a request, however, the issues for the fiduciary are a determination of ownership, and whether the lawyer may dispose of the contents of a client file based on that determination.

*2 6. That the lawyer has succeeded to this duty through acquisition of or new membership in a firm is of no consequence. In

our Opinion 623 (1991), decided under the Code but equally applicable today, we said:

The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y. State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40-88 (1988). The recently amended provisions of DR 9-102(G) are also consistent with this principle of joint and several responsibility in requiring that "the former partners or members [of the firm in dissolution] shall make appropriate arrangements" for the maintenance of the records which the firm was required by law to maintain.

When a law firm dissolves or a lawyer retires from practice, additional questions arise concerning the disposition of closed files. Dissolution or retirement from practice clearly does not relieve the lawyer of a professional obligation to maintain closed files. See e.g., N.Y. State 460, supra; see also, EC 4-4, EC 4-6.

7. Three possible ownership claims exist when reference is made to client files: a current or former client, a third person, or the law firm itself. However cumbersome the exercise - and we do not underestimate the burden, especially on the facts presented - the Rules require the lawyer as fiduciary to undertake the task. It is ethically immaterial that the economic burden of disposing of closed files may be far in excess of any practical benefit to the parties involved. In its Opinion 43-89 (1989), cited with approval in N.Y. State 623, the Nassau County Bar Association, deciding under the Code and referring to a custodial attorney's release of files to the client of a deceased attorney, aptly said:

It is no answer to the discharge of custodial counsels' obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not follow solely from the attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent in the lawyer's enjoyment of his professional status, and his concomitant obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any "client," those burdens must be fully discharged even if the benefits of the custody are minimal or non-existent.

*3 See also N.Y. State 398 (1975); N.Y. State 341 (1974); N.Y. City 87-74 (1988).

8. Other authorities generally agree. For instance, In its Opinion 725 (1998), the New York County Lawyers' Association Committee on Professional Ethics said:

Although Inquirer no longer represents private clients, he still is subject to ethical restraints on the length of time he should keep former clients' documents and on the manner of their disposal. Restatement (Third) The Law Governing Lawyers, § 58, cmt. b (Proposed Draft, May 1996). These restrictions are not rigid. They vary case-by-case in light of the concerns of lawyers, clients and the justice system. On the one hand, lawyers wish to avoid unreasonable burdens and expenses from storing closed files. On the other hand, clients and the justice system have an interest in preserving important documents in the event they are needed after a client's file has been closed. See N.Y. State 460 (1977). How these interests are balanced in a particular case usually depends on the type of documents in question.

9. We agree as well. Although of little practical use to the inquirer's circumstances, we note that prudence and good practice counsel in favor of lawyers anticipating the issue of document disposal in engagement letters at the start of a representation, which may outline the law firm's intentions concerning the disposition of files at the close of an engagement and thereby eliminate the problems so many firms face when confronted with stale files and rising storage costs. Today's technology may save some warehouse space but scanning thousands of documents does not necessarily relieve the expense. Foreseeing the issue in engagement letters may thus spare resources better devoted elsewhere.

Files Belonging to Clients and Others

10. In its Opinion 2010-1, the New York City Bar Association Committee on Professional and Judicial Ethics addressed the

issue of old files, and sought to classify the contents of a client file into categories. The Committee recognized, as we do, that "upon termination of the attorney-client relationship ... if the client does not seek access or makes no provision for delivery, [the] attorney may have an obligation to retain certain documents, although the lawyer need not permanently retain all files after an engagement is concluded."

11. One category the Committee recognized were "documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments," which the Committee concluded the lawyer was obligated to retain for an indefinite period. This conclusion is consistent with our recent opinion, NY State 1182 (2020), in which the inquirer was in possession of over five hundred wills, the testators being unknown and, after due diligence, undiscoverable. We concluded there (at ¶ 10):

A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills.

*4 12. Another category the City Bar Ethics Committee classified as subject to indeterminate retention consists of documents "that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired." Its opinion cites our N.Y. State 460, and accords with our reasoning there that common sense and the prudent exercise of professional judgment is required before a lawyer disposes of files. Within this grouping we would include documents that may be property of a third party - for example, materials gathered in discovery or due diligence - which a lawyer should retain unless judicial or client contractual obligations otherwise dictate. We agree that this duty is not invariably open-ended, and that some lapse following the relevant limitations period may provide closure.

13. Apart from the foregoing, neither the Rules nor our precedents require maintenance of client files belonging to current or prior clients or other persons for any specific period unless the law, whether by statute, regulations, or rules or orders of court, say the contrary. The City Bar's Opinion 2010-1 said that some jurisdictions require retention periods of five or six years. Onecommentator observed that Illinois Bar Association Committee on Professional Ethics Opinion 17-02, having reviewed resources from various states, and the retention periods dictated by them(some of which were as long as 10 years), arrived at the conclusion that a general default retention period of seven years for ordinary closed file materials is reasonable. J. Rogers, Usually Okay to Destroy Client Files After Seven Years, 33 Law. Man. Prof. Conduct 170 (2017), This may be so, but unless some law, regulation, rule, or order says as much, our view is that the Rules alone impose no such obligation, and that therefore a lawyer, in the absence of a legal duty or an owner's instructions, may dispose of files belonging to current or prior clients or other persons at any time except for those in the categories mentioned above.

Files Belonging to the Law Firm

14. It is not uncommon for files called "client files" to contain materials that belong to the custodial law firm. Whether certain materials in the file - purely internal memoranda written to assist the firm in providing advice, a lawyer's handwritten notes of a meeting - belong to the client or the lawyer is an often litigated issue pivoting on, among other things, legal doctrines such as the work product privilege. We avoid entering into this fray except to say that a law firm may have a possessory interest in some of firm does so, then the lawyer may dispose of them as the lawyer sees fit unless a legal duty (compulsory process being an instance) exists to require their preservation.

15. But other duties remain. Rule 1.15(d) imposes on a lawyer or law firm the duty to maintain certain specific records for a period of seven years, a duty that, like its parallel in the Code, Rule 1.15(h) extends to former partners or a successor firm in the event of dissolution, merger, or sale. In brief summary, these duties of retention are to keep for seven years: (1)complete records of all banking transactions affecting the lawyer's practice; (2) complete records of all special accounts; (3) copies of all retainer and compensation agreements with clients; (4)copies of all statements to clients or others of disbursements of funds on behalf of clients or the others; (5) copies of all client bills; (6) copies of all payments to lawyers, investigators or other persons, not in the lawyer's employ, for services rendered; (7) copies of all retainer and closing statements filed with the Office of Court Administration; and (8) all checkbooks, bank statements and related documents. Some lawyers keep some of these documents only in the client file associated with the services rendered on the client's behalf, and Rule segregate these documents for saving if the client file is otherwise discarded.

*5 16. The foregoing is not meant as an exhaustive list of the records a law firm should keep for itself. For example, while imposing no time limit on its retention other than to the extent of overlap with Rule 1.15(d), Rule 1.10(e) says that, in most circumstances, a law firm "shall make a written record of its engagements, at or near the time of each engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements." This Rule is intended to facilitate compliance with the conflicts rules, including Rule 1.9, which governs conflicts with former clients. Inhering in the Rule is that a firm must be mindful of avoiding conflicts prohibited by Rule 1.9, that is, that the law firm must keep a record for some undetermined period of the scope of an earlier but now-closed representations. Rule1.10(f) warns that a "[s]ubstantial failure to keep" records of these "previous" engagements "shall be a violation" of the Rule no matter whether the failure results in another violation of the Rules.

CONCLUSION

17. In general, an attorney's duty to maintain a client's closed file is a duty that every law firm partner owes to every past firm client, no matter when the individual partner joined the firm, and a duty that continues during and after the firm's dissolution. Nevertheless, except for original documents of intrinsic value or those a lawyer knows or should know the client or a third party may need in the future, nothing in the Rules obligates a lawyer to maintain storage of closed and unsought client files, with the important caveats that a lawyer has certain bookkeeping duties about current and prior representations and that the lawyer must abide by whatever law may apply to the preservation of certain records.

NY Eth. Op. 1192 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 3484033

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NY Eth. Op. 1182 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 469597

New York State Bar Association
Committee on Professional Ethics

TOPIC: DISPOSITION OF WILLS

Opinion Number 1182
January 23, 2020

DIGEST: A lawyer may not dispose of wills even when the testators' locations and/or circumstances are unknown. A lawyer must safeguard the wills indefinitely unless the law provides an alternative.
***1 Rules: 1.15(c)**

FACTS

1. The inquiring lawyer is in possession of over five hundred wills where the testators' whereabouts are unknown to the inquirer and/or cannot be discovered with due diligence. The inquirer (or the inquirer's firm) prepared some of these wills, but most came to be in the inquirer's possession by reason of the inquirer's succession to the practices of other lawyers (in some instances, lawyers who had themselves acquired practices and, with them, wills). Among these wills are some prepared more than seventy years ago.

2. The inquirer has conducted a due diligence search of office records, the internet, and the Surrogate's Court in the county where the inquirer's office is located in an attempt to find information about the testators, executors, or beneficiaries. To date, these efforts have been to no avail and we accept the inquirer's assertion that the prospect of discovering the information is unpromising. The inquirer would like to dispose of the wills for which identifying information is lacking and unlikely to emerge.

QUESTION

3. May an attorney dispose of Wills, when after due diligence and significant passage of time the attorney is unable to learn the whereabouts or other circumstances of the testators?

OPINION

4. Rule 1.15(c)(1) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer shall "promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." Rule 1.15(c)(2) - (4) requires the lawyer to preserve such property, keep complete records and render appropriate accounts, and to promptly pay or deliver the property as requested by the client or third person. A will is a piece of property.

5. In N.Y. State 341 (1974), the Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law "holds them only as a custodian and that the firm was required to notify the lawyer's clients of his retirement." We have indicated that a lawyer who comes into possession of a will by acquiring the practice of a retiring lawyer is required to take reasonable steps to locate and notify third persons, such as the testator, with an interest in the will. N.Y. State 1035 (2014); see N.Y. State 1133 ¶ 9 (2017) (a lawyer "must maintain the files unless and until a client retrieves them or gives notice to the affected clients of some other disposition").

6. We have not previously resolved the question presented here - that is, to outline a lawyer's duties in the event that the lawyer is unable to locate the testator or another person with an interest in the will despite a lawyer's reasonable efforts to do so. The Rules do not explicitly answer that question.

***2** 7. In 1999, the New York City Bar Association's Ethics Committee did address the issue under the N.Y. Code of Professional Responsibility (the ""Code"), and in particular the Code's DR 9-102(c), the language of which was identical to Rule 1.15. In its Opinion 1999-05, the City Bar said that "as to those clients who cannot be located, the lawyer's obligation to

retain the Wills in safekeeping continues indefinitely or in accordance with law." In so concluding, the City Bar relied on Massachusetts Bar Association Opinion 76-7, which concluded that "if the lawyer, cannot find the testator and does not wish to deposit the will with the appropriate court, [the lawyer] remains obligated to use reasonable care to keep it secure."

8. We agree with these opinions. When, as here, an attorney is the custodian of wills - whether by reason of the attorney's own practice or by succession to the practice of other lawyers through acquisition or otherwise - and cannot after due diligence locate a testator, the attorney must maintain the wills indefinitely or act as the law may allow. Our jurisdiction stops at the corners of the Rules, so we have no charter to give legal advice, but we have opined that "[i]n general, when a lawyer is uncertain about what to do with property that he or she holds for safekeeping, the lawyer may seek judicial guidance" N.Y. State 775 (2004). Otherwise put, a lawyer may always seek court permission to dispose of property in accordance with law.

9. We note that Section 2507 of the Surrogate's Court Procedure Act provides that the court "of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it." The Law Practice Management Committee of this Association, in the second edition of its Planning Ahead Guide, explains (at App. 2C ¶ 12) that "[o]riginal wills and other original documents must be returned to clients and may not be destroyed or otherwise disposed of. In the case of original wills, if you are unable to locate the clients after a diligent search, you may file such wills with the Surrogate's Court (be aware of filing fees) or deposit them with an appropriate depository (e.g., the appropriate county bar association) and notify the clients in writing, addressed to their last known address"); see also id. App. 17 ("If a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire or cease practicing ... Consider filing the wills in the local Surrogate's court ... Some County Bar associations offer will registries which may be useful. Another law office may be willing to retain the wills of a deceased or retired attorney").

CONCLUSION

*3 10. A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills.

NY Eth. Op. 1182 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2020 WL 469597

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NY Eth. Op. 1164 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2019 WL 1377132

New York State Bar Association
Committee on Professional Ethics

TOPIC: RETURNING CLIENT FILES WITHOUT KEEPING A COPY; CONDITIONS ON COMPLIANCE

Opinion Number 1164
March 21, 2019

DIGEST: A lawyer has an interest in maintaining a copy of client-owned documents provided to the lawyer during a representation, but in certain instances that interest must yield to a client's legitimate request to destroy those copies. To protect the lawyer's exposure to later suit, the lawyer may condition compliance on the client's request on receipt of certain protections that are reasonable in light of all the facts and circumstances attending the client's request.
***1** Rules: 1.6, 1.15, 1.16

FACTS

1. The inquirer is a New York lawyer who represented a client in an intellectual property matter adverse to the client's former employer. During the course of the representation, the client provided the inquirer with a large amount of data in digital form relating to the dispute between the client and the client's erstwhile employer (though the inquirer does not know the provenance of all the data). In the dispute, the latter alleged that the former had misappropriated proprietary information, some of which is embodied in the data given to the inquirer. Subsequently, the client decided to retain different counsel to handle the dispute, thereby ending the inquirer's attorney-client relationship with the client. The inquirer delivered to successor counsel all the materials comprising the client's file, doing so in the manner that successor counsel requested, but the inquirer retained one or more back-up copies of the data provided by the client during the representation.

2. The inquirer's former client thereafter settled the dispute in a confidential agreement, one provision of which requires the former client to retrieve and destroy all data comprising the subject of the dispute. The inquirer is not a party to the settlement agreement, but the inquirer's former client has requested the inquirer to destroy (and certify to the destruction of) the data in question. The inquirer is concerned that, in complying with this request, the inquirer would be without information that may be needed in the event of a subsequent lawsuit brought either by the former client or by the former client's onetime employer, who claims ownership of the data at issue. To protect against this prospect, the inquirer seeks guidance on the extent to which a lawyer may condition a request to destroy a file on receipt of a release and indemnity - from each party to the settlement agreement - and insistence on maintaining an index of the files destroyed in keeping with the former client's request.

QUESTIONS

3.The inquirer poses two questions:

a) Does an attorney have an obligation to delete backup copies of files or data provided by a client after the client has terminated the legal engagement?

(b) May the attorney condition compliance with such a request on obtaining a release and indemnification (including advance of attorneys' fees and expenses), as well as creating an inventory of file names, sizes, and dates to prove what files were or were not in the attorney's possession?

OPINION

***2** 4. Rule 1.15(c)(4) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer shall "promptly ... deliver to the client ... as requested by the client ... properties in possession of the lawyer that the client ... is entitled to receive." Rule 1.16(e) provides that, "upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client," including, among other things, "delivering to the client all papers and property to which the client is entitled." The Rules offer no guidance on which "papers and property" the client "is entitled to

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receive." Rather, the question of whether documents (including electronic versions) belong to the client is "generally a question of law, not ethics." N.Y. State 766 (1993). Which documents may belong to the client is "not always easy to ascertain" and may entail "a complex issue of both fact and law." N.Y. State 623 (1991). See generally Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y.2d. 30, 37 (1997). Our Committee does not resolve issues of law, and so for our purposes we assume, without deciding, that the data in question belongs to the client.

5. In N.Y. State 780 (2004), we addressed whether a lawyer may retain a copy of documents belonging to a client despite the client's objection. There we said that "there can be little doubt" that a lawyer "has an interest in the file that would permit the lawyer to retain copies of file documents." Citing opinions from other jurisdictions, we concluded that, as a "general rule," a lawyer may retain "copies of the file at the lawyer's expense," notwithstanding a client's objection. See Rule 1.6(c)(5)(i) (lawyer may reveal or use client confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer against an accusation of wrongful conduct); Restatement (Third) of the Law Governing Lawyers § 46, Cmt. d (Am. Law Inst. 1998) (a "lawyer may keep copies of documents when furnished to a client.") In recognition of this interest, we said in N.Y. State 780, a lawyer may insist on a release from a client as a condition of forgoing the lawyer's interest in maintaining a copy.

6. This interest is not unqualified. The Restatement notes that "extraordinary circumstances" may exist in which the very nature of the lawyer's assignment overrides the lawyer's interest in maintaining a copy; as an example, the Restatement cites "when a client retained the lawyer to recover and destroy a confidential letter." Restatement § 46, Cmt. d. Our N.Y. State 780 took a somewhat less narrow view of the possible exceptions to the "general rule" that a lawyer may always maintain a copy of a client file; without attempting to anticipate all conceivable circumstances, we said there that exceptions might include "where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." These qualifications require a fact-intensive inquiry balancing factors favoring a lawyer's interest in maintaining a copy of a client file and factors favoring a client's interest in destruction of that copy. This balance determines the extent to which the lawyer may condition compliance with a client's demand for destruction of a file on protections for the lawyer's benefit.

*3 7. No exhaustive catalog of these factors is practicable, but certain common considerations are likely to recur, among them the strength of the client's claim to ownership; the sensitivity of the documents; the centrality of their sensitivity to the object of the representation; the legitimacy of the client's request for destruction; the extent to which the documents slated for destruction comprise the client file (i.e., one document versus the entire file); the difficulty associated with destruction of the documents; the degree to which the lawyer is subject to a meaningful risk of later liability; and the availability and feasibility of provisions protective of the lawyer's interests. In balancing these and other factors, the weight to be given each depends on the facts and circumstances, with the overriding concern that a lawyer's demand for protections for the lawyer's benefit must be reasonable in light of those facts and circumstances.

8. Applying these considerations to the current inquiry, we believe that it would be reasonable for the lawyer to request a release and a simple hold-harmless agreement from the lawyer's former client in exchange for the lawyer's agreement to destroy the documents at issue. Because the documents originated with the client (no matter their original provenance), the client's claim to ownership is strong. The nature of the dispute - that the documents embody proprietary information - reflects their sensitivity, which appears to be core to the nature of the lawyer's initial engagement, and the settlement agreement supplies a legitimate basis for the client's request. The documents are in an electronic format, so we detect no undue difficulty in achieving the client's aim. If the lawyer destroys the documents as requested, the risk of later liability is correspondingly diminished. Maintaining an inventory of the documents, with which we see no problem, affords the inquirer an additional layer of protection from a subsequent claim. Merely asking for advance payment of legal fees and expenses in the event of suit, or requesting a release and indemnity from the non-client former employer, may not alone violate the Rules, but we are dubious that the lawyer may insist on these conditions before complying with the former client's request that the documents be destroyed and that the lawyer certify to their destruction.

CONCLUSION

9. Compliance with the terms of a settlement reached by a former client provides a legitimate reason to comply with that former client's request to destroy client-owned documents in a lawyer's possession. The lawyer may condition deletion of the file on obtaining a release and a simple hold-harmless clause from the former client, and may maintain an inventory of the

file names, sizes, and dates for data supplied by the former client to the lawyer during the representation and maintained in the lawyer's files.

NY Eth. Op. 1164 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2019 WL 1377132

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NY Eth. Op. 1094 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2016 WL 3355905

New York State Bar Association
Committee on Professional Ethics

TOPIC: CLIENT FILE - ACCESS BY LAWYER TO FILE OF FORMER CLIENT

Opinion Number 1094
May 6, 2016

Digest: Lawyer may not provide a copy of client's file to previous counsel if the client objects, unless an exception to the duty of confidentiality applies.
***1 Rules**: 1.2(g), 1.6(a) & (b), 1.15(c)

FACTS

1. The inquiring lawyer represents an alien who is attempting to reopen removal proceedings on the grounds of ineffective assistance by the client's former counsel. The client has brought an ethics complaint against the former counsel. The former counsel has asked the inquiring lawyer to give him access to the file in order to respond to the client's ethics complaint, but the inquirer's client has refused to grant consent. (The former counsel previously turned over the client file to the inquiring lawyer, apparently without retaining a copy of the file.)

QUESTION

2. May a lawyer give a client's former counsel access to the client's file so that the former counsel may defend against an ethics complaint by the client if client has refused consent to allow the inquiring lawyer to provide access?

OPINION

3. The question of a lawyer's access to a file is generally a question of law and not a question of ethics under the New York Rules of Professional Conduct (the "Rules"). See N.Y. State 766 (1993); Sage Realty Corp. v. Proskauer Rose Goetz and Mendelsohn, 91 N.Y.2d 30 (1997). This Committee generally does not have jurisdiction to decide matters of law.

4. In New York State 780 (2004), which interpreted the former Code of Professional Responsibility, we stated, "Nothing in the Code prohibits a lawyer from retaining copies of the file." That proposition is still true under the Rules. Here, it appears that the previous lawyer did not retain a copy of the file.

5. A client's file ordinarily constitutes "confidential information" of the client within the meaning of Rule 1.6(a) because it consists of "information gained during or relating to the representation" of the client that the client ""has requested be kept confidential." See N.Y. State 1032 (2014). The fact that the client's former counsel previously had access to the client's file does not take the file out of the definition of "confidential information."

6. The former counsel now needs access to the file to defend against an ethics complaint made by the former client. Under Rule 1.6(b)(5)(i), a lawyer may reveal or use confidential information to defend the lawyer against an accusation of wrongful conduct. "Implicit in that rule is the lawyer's right to retain copies of the file ... to defend against an accusation of wrongful conduct." N.Y. State 780 (construing former DR 4-101(C)(4)). Had the former counsel retained a copy of the file, there is no question that he/she would have had the right to access that file for purposes of defending against the ethics complaint. See N.Y. State 1032 (2014) (explaining limits of the "self-defense" exception to the duty of confidentiality). But Rule 1.6(b)(5) gives a lawyer only the right to retain the client's file - it does not give a former counsel an independent right to obtain the file after relinquishing it.

*2 7. Here, the client has refused consent to allow the former counsel access to the file. The situation thus falls squarely within the definition of ""confidential information" in Rule 1.6(a), which includes information that the client "has requested be kept confidential." Absent an applicable exception to confidentiality under Rule 1.6, the entire file remains confidential

and the inquirer therefore may not turn over the file.

8. Rule 1.6(b)(6) articulates one of the exceptions to the duty of confidentiality: a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary "to comply with other law or court order." Thus, the inquirer could ethically allow access to the file, even over the client's objection, if other law or a court order required him/her to do so. Because what is necessary to comply with other law or a court order raises questions of law beyond our jurisdiction, we will not speculate on whether a subpoena or other law would qualify for the exception in Rule 1.6(b)(6) and allow the inquirer to give previous counsel access to the file.

9. So far we have focused exclusively on Rule 1.6. For the sake of completeness, we add that no other provision of the Rules requires the inquirer to turn over the file without the client's consent. Rule 1.2(g) provides "a lawyer does not violate these rules by ... treating with courtesy and consideration all persons involved in the legal process," but it does not obligate the inquiring lawyer to share the file in the face of the client's refusal. Similarly, Rule 1.15(c)(4) requires a lawyer to "promptly pay or deliver to the client ... properties in the possession of the lawyer that the client ... is entitled to receive," but it contains no reciprocal language requiring the client to deliver anything to the lawyer.

CONCLUSION

10. Nothing in the Rules of Professional Conduct permits or requires a lawyer to provide a client's file to the client's former lawyer in the face of the client's instructions to the contrary, unless an exception to the duty of confidentiality applies.

(8-16)

NY Eth. Op. 1094 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2016 WL 3355905

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NY Eth. Op. 2015-6 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2015 WL 10937084

New York State Bar Association
Committee on Professional Ethics

TOPIC: ETHICAL DUTIES WHEN CLIENT FILES ARE ACCIDENTALLY DESTROYED

Formal Opinion 2015-6
September, 2015

DIGEST: When client files are destroyed in an accident or disaster, an attorney may have an ethical obligation to notify current and former clients. Where the destruction of a client file compromises the lawyer's ability to provide competent and diligent representation to the client, the lawyer must take reasonable steps to reconstruct the file sufficiently to allow the lawyer to provide such competent and diligent representation or must notify the client if he is unable to do so. The lawyer must also notify the current or former client if an accident or disaster compromises the security of confidential information.
*1 **RULES**: 1.1, 1.3, 1.4, 1.15, 1.16
QUESTION: What ethical obligations govern a lawyer's duty to notify clients that their files have been destroyed?

Opinion

I. Introduction

Natural or man-made disasters may cause the inadvertent destruction of client files. In February 2015, for example, a fire raged through a Brooklyn warehouse, destroying sensitive legal and medical data and scattering documents around the area. Several law firms, government agencies and businesses stored documents at the affected warehouse.[1] In autumn of 2013, Hurricane Sandy surged through New York City and destroyed thousands of barrels of evidence housed in a warehouse in Red Hook, Brooklyn.[2] And on September 11, 2001, numerous New York firms saw documents destroyed in the wake of the terrorist attacks on the World Trade Center.

This opinion will address a lawyer's ethical duties to his clients when files are destroyed by an unforeseen disaster or accident.[3] We assume, for the purposes of this opinion, that the lawyer has no agreement with the client as to the disposition of client files after the representation ends. Specifically, the opinion will address the following questions:
1. When must a lawyer notify a client that files relating to its legal matter have been destroyed?

2. What must the lawyer do to continue providing competent representation to the client after files have been destroyed?

3. What is a lawyer's duty when he knows a client's confidential information may be compromised as the result of a disaster?

II. A Lawyer's Duty to Notify Current and Former Clients About Files Destroyed in a Disaster or Accident

A. The Duty to Preserve Client Files

Under the New York Rules of Professional Conduct (the "Rules"), a lawyer has certain obligations with respect to property and files belonging to clients and third persons both during and after the representation. For example, Rule 1.15(a) states that a lawyer who is "in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law" acts as a "fiduciary" to the property owner. Rule 1.15(c)(4) requires the lawyer to "promptly ... deliver to the client or third person as requested by the client or third person the ... properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e) states that a lawyer must deliver "to the client all papers and property to which the client is entitled" at the end of the representation. The question of whether files related to a client's matter are the client's "property" is a question of law on which we cannot opine, as our jurisdiction is limited to interpreting the Rules. *See* NYCBA Formal Op. 1986-4 (1986) (whether files belong to client or attorney is a legal question beyond the Committee's jurisdiction). New York case law suggests, however, that a client has a property interest in - or, at a minimum, free access to - most documents or other materials relating to the client's matters. *See Sage Realty Corp. v. Proskauer Rose*

Goetz & Mendelsohn L.L.P., 91 N.Y.2d 30 (1997) (client is "entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation").

***2** Putting aside technical arguments about whether client files constitute client "property," prior ethics opinions have established that lawyers have a duty to preserve documents relating to their client matters. *See, e.g.*, NYCBA Formal Op. 2010-1 (2010) (lawyers have a duty to preserve and safeguard documents relating to representation); NYSBA Op. 766 (2003) ("former client is entitled to any document related to the representation unless substantial grounds exist to refuse access"); NYCLA Op. 725 (1998) (lawyer should take reasonable steps to retain closed client files); NYCBA Formal Op. 1986-4 (guidelines for preserving and delivering client files); ABA Formal. Op. 471 (2015) (detailing lawyer's obligations under the ABA Model Rules of Professional Conduct when responding to former client's request for papers and property in the lawyer's possession). The duty to preserve client files, however, does not extend indefinitely. *See* NYCBA Formal Op. 2010-1 ("lawyer need not permanently retain all files after an engagement is concluded") (citing NYSBA Op. 623 (1991)); NYCLA Op. 725 (Under certain circumstances, attorney may discard a former client's file). For certain records, the Rules specify a seven-year retention period. *See* R. 1.15(d) (requiring a lawyer to maintain certain "bookkeeping records" for "seven years after the events that they record"). Yet, for most client files, the Rules are silent as to the length of time they must be preserved. Because of this uncertainty, lawyers may have a tendency to keep old client files in storage either from an abundance of caution, or simply from inertia. Consequently, when client files are destroyed in a disaster or accident, lawyers may be uncertain as to their ethical obligations concerning those files.

B. The Duty to Notify Clients or Former Clients When Files Are Inadvertently Destroyed

Given that lawyers have a duty to preserve client files (at least for some period of time), it follows that an attorney may have a duty to notify the client or former client when such files have been inadvertently destroyed. This inference is supported by Rule 1.4, which requires an attorney to "promptly inform the client of material developments in the matter," keep clients "reasonably informed about the status of a matter," and "promptly comply with a client's reasonable requests for information." R. 1.4(a)(1)(iii), (a)(3), (a)(4). This duty also arises from the fiduciary duty that lawyers assume when they take possession of property belonging to clients or third parties. *See* R. 1.15(a) (lawyer who holds property of client or third party acts as a """"fiduciary").

There is no bright line rule to determine whether the inadvertent destruction of a document triggers a duty to notify the client or former client. Lawyers should make such determinations on a case-by-case basis, taking into account factors such as the relevance of the document to the matter, the type and age of the document, the status of the legal matter, and the ease of replicating the document. Although NYCBA Formal Op. 2010-1 addressed a different issue - when a lawyer *may destroy* client files after the representation ends - the Committee's analysis is helpful in assessing when the duty to notify is triggered. The opinion suggested grouping files into three categories of importance:
***3** • *Category 1*: Documents with "intrinsic value or those that directly affect property rights." This includes documents such as wills, deeds and negotiable instruments.

• *Category 2*: Documents that a lawyer "knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired." This is probably the broadest category of documents, and may include documents relating both to active and inactive client matters.

• *Category 3*: Documents with relatively little importance that would "'furnish no useful purpose in serving the client's present needs for legal advice.'" (quoting *Sage Realty*, 91 N.Y.2d at 36).

Applying this framework, NYCBA Op. 2010-1 concluded that "Category 1 documents must be preserved or returned to the client, unless the client specifically directs a different disposition." Similarly, if Category 1 files are inadvertently destroyed, we conclude the lawyer has an affirmative obligation to take reasonable steps to notify the client or former client, unless there is an agreement to the contrary. By contrast, NYCBA Op. 2010-1 concluded that "there is no obligation to preserve or return Category 3 documents," nor is express client consent necessarily required to destroy such documents. Accordingly, if - after conducting a reasonable inquiry - the attorney concludes that the documents fall into Category 3, he has no affirmative duty to notify the client of their inadvertent destruction, unless he and the client have agreed otherwise. The attorney is required, however, to comply with a client's "reasonable request[]" for information about those files, pursuant to Rule 1.4(a)(4). Thus, if the client or former client inquires about the status of Category 3 files, the attorney must promptly inform the client that the

documents were inadvertently destroyed.

As NYCBA Op. 2010-1 notes, Category 2 documents must be analyzed on a case-by-case basis. The Committee suggested that, before destroying a Category 2 document at the end of the representation, the lawyer should determine whether "the document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement, or whether no such need exists because the document relates solely to a claim fully and finally resolved through litigation." We must emphasize, however, that NYBCA Op. 2010-1 dealt only with the disposition of client files *after* the representation ends. By contrast, our analysis must distinguish between Category 2 documents that relate to active matters, such as ongoing litigations or negotiations, and inactive matters, particularly those that have been closed for a significant period of time.

With regard to active matters, we conclude that the lawyer must take reasonable steps to notify the client if Category 2 documents are inadvertently destroyed. With respect to closed matters, however, the lawyer must determine - after a reasonable inquiry - whether the "client foreseeably may need" the documents. NYCBA Formal Op. 2010-1. For example, if the lawyer reasonably concludes that the "document relates solely to a claim fully and finally resolved through litigation," he is not required to notify the client of the document's destruction. By contrast, if there are open issues relating to the matter, such as related lawsuits, indemnification claims, subsequent negotiations, subsequent performance issues or contract breaches, or malpractice issues, the lawyer should take reasonable steps to notify the client that the file was destroyed. *See id.* (lawyer should consider whether "document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement"). Other factors that may be relevant to the decision to notify the client include:
*4 • The amount of time that has passed since the matter was closed;

• Whether the firm previously gave the client reasonable notice that the files were available to be collected or delivered and whether the client responded to such notice;

• Whether the firm delivered copies of the files to the client at the conclusion of the matter or the client received copies of the files while the matter was ongoing;

• Whether the firm has previously made unsuccessful attempts to contact the client;

• Whether the contents of the file can be reconstructed from other sources.

Naturally, the most prudent option is to notify the client when any Category 2 documents are inadvertently destroyed. In our view, however, if the lawyer has evidence that the client retained copies of the documents at the end of the representation, he has no duty to notify the client that the lawyer's copies of the documents were destroyed. In addition, if the lawyer has advised the client in writing at the end of the matter that her files will be destroyed without further notice if not retrieved by a certain date, and those files are inadvertently destroyed in an accident after that date, the lawyer is not obligated to notify the client.

III. Fulfilling the Duties of Competence and Diligence After Client Files Are Inadvertently Destroyed

Lawyers are required to "provide competent representation to a client," defined as possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." R. 1.1(a). A lawyer must also "act with reasonable diligence and promptness in representing a client," and "not neglect a legal matter entrusted to [him]." R. 1.3(a), (b). The destruction of client files may significantly impact the lawyer's ability to competently or diligently represent his client. Upon learning that client files have been destroyed, the lawyer must first assess whether any of those files are needed to continue providing competent and diligent representation on open matters. If so, the lawyer must make reasonable efforts to reconstruct the destroyed file. This may include seeking copies of records from other sources, such as the court, government agencies, opposing counsel, co-counsel or the client herself.[4] If the lawyer is unable to reconstruct the file to the extent necessary to provide competent and diligent representation, he must promptly disclose this fact to the client.

IV. Duties with Respect to Confidential Information in the Wake of a Disaster or Accident

Under Rule 1.6, "a lawyer shall not knowingly reveal confidential information" belonging to a client, and must "exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from

disclosing or using confidential information of a client." R. 1.6(a), (c). The comments to Rule 1.6 explain that a lawyer must take precautions to prevent confidential information relating to the representation of the client "from coming into the hands of unintended recipients." R. 1.6, Cmt. [17]. Furthermore, special circumstances may warrant special precautions to protect confidential information, depending on the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. *Id.* The duty of confidentiality continues after the attorney-client relationship has ended. *See* R. 1.9(c)(2) (lawyers may not "reveal confidential information of [a] former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client").

*5 In the wake of a disaster or accident, confidential information may be compromised. For example, in the Brooklyn warehouse fire, papers were strewn about the immediate area. Although the lawyer may not be able to prevent the dissemination of confidential information in such a situation, the fact that confidential information is no longer secure would be a material development in the representation. Consequently, the lawyer has a duty to notify his clients - not only that client files may have been destroyed - but also that confidential information may have been compromised. R. 1.4(a)(1)(iii). As indicated above, the extent of a lawyer's duty to take affirmative steps to protect confidential information in *anticipation* of a disaster is beyond the scope of this opinion.

V. Conclusion

When client files are destroyed in an accident or disaster, an attorney may have an ethical obligation to notify the client or former client. Where the destruction of a client file compromises the lawyer's ability to provide competent and diligent representation to the client, the lawyer must take reasonable steps to reconstruct the file and must notify the client if he is unable to do so. The lawyer must also notify a client or former client if an accident or disaster compromises the security of the client's confidential information.

Footnotes

1 *See* Vivian Yee, Fire at a Brooklyn Warehouse Puts Private Lives on Display, The New York Times, Feb. 1, 2015, available at www.nytimes.com/2015/02/02/nyregion/large-warehouse-fire-continues-to-burn-in-brooklyn.html.

2 *See* David Goodman, Flooding of 2 Police Warehouses Destroys Evidence Needed for Criminal Trials, Jan 1, 2013, available at www.nytimes.com/2013/01/02/nyregion/hurricane-destroyed-evidence-held-by-new-york-police.html.

3 This opinion addresses only those obligations that arise in the wake of a disaster or accident that results in the destruction of client files. Naturally, there are steps a lawyer can and should take before such a disaster occurs to minimize the risk of damage. *See, e.g.*, NYSBA Op. 940 (2012) (discussing the use of off-site backup tapes to store client information); NYCBA Report on "The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations" (Nov. 2013) (discussing use of cloud storage). That topic is beyond the scope of this opinion. The destruction of client files may also trigger other duties that are beyond the scope of this opinion, such as notifying the lawyer's malpractice insurance carrier.

4 We recognize that reconstructing a client's file may, in certain instances, come at a substantial cost. We do not opine on whether it is permissible for the lawyer to charge his client for reconstructing the file. Such a determination is at least in part a question of law on which we cannot opine and is also beyond the scope of this opinion.

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NY Eth. Op. 2010-1 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2010 WL 11508163

New York State Bar Association
Committee on Professional Ethics

TOPIC: AGREEMENTS FOR THE DISPOSITION OF CLIENT FILES AT THE END OF AN ENGAGEMENT

Formal Opinion Number 2010-1
2010

DIGEST: Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions.
***1 RULES**: 1.00), 1.15, 1.16(e)

USE OF CLIENT ENGAGEMENT LETTERS TO AUTHORIZE THE RETURN OR DESTRUCTION OF CLIENT FILES AT THE CONCLUSION OF A MATTER

QUESTION:

May a lawyer and client at the outset of a representation agree to the disposition of the client's files upon conclusion of the engagement?

OPINION

I. Background

Lawyers routinely face questions regarding the disposition of client files upon completion of an engagement.[1] In addressing these questions, ethics opinions have focused almost exclusively on an attorney's obligations absent an express agreement with, or directive from, the client. There appears to be little, if any, guidance regarding consensual arrangements for the final disposition of client files.

Plainly, upon termination of the attorney-client relationship, the client is "presumptively accord[ed] ... full access" to the lawyer's files on a represented matter. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34 (1997) (hereinafter, *Sage Realty*). And to provide that access, a "lawyer may simply deliver [the files] to the client" at the end of an engagement. ABCNY Formal Op. 1986-4. But if the client does not seek access or makes no provision for delivery, her attorney may have an obligation to retain certain documents, although the lawyer need not permanently retain all files after an engagement is concluded. *See* N.Y. State 623 (1991) (citing N.Y. State 460 (1977) and

ABA Informal Op. 1384 (1977)); *see also* RESTATEMENT (THIRD) OF LAW: THE LAW GOVERNING LAWYERS § 46 (1998) (lawyers' obligation to take reasonable steps to preserve and safeguard documents relating to a representation of a former client does not require lawyers to preserve documents indefinitely).[2] Nevertheless, over time, the burden of dealing with closed files may be substantial as the volume of paper and electronic data mounts, and the cost of storage increases. Lawyers understandably wish to minimize this burden and expense consistent with their obligations to their clients and former clients upon completion of a matter or engagement.

This opinion addresses the use of engagement letters to provide a practical and ethical solution for handling client files at the conclusion of a matter. we find that an attorney may include a provision in retainer agreements and engagement letters authorizing the lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents (other than original deeds, wills or similar documents with intrinsic value). Prior to discarding any documents, however, the attorney must take reasonable steps to preserve all documents that she has an obligation to retain or return to the client.

II. A Lawyer's Obligation to Retain Client Files

*2 The New York Rules of Professional Conduct provide little guidance on what a lawyer must do with client files upon completion of a matter. Rule 1.16(e) addresses, among other things, the handling of client files, but only in the context of transferring an ongoing matter to another attorney. The rule provides that
[u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled*, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

N.Y. Profl Conduct R. 1.16(e) (2009) (emphasis added).

Other than Rule 1.16(e), there are no Rules specifically applicable to the retention or disposition of client documents.[3] Nevertheless, prior ethics opinions and case law establish that attorneys may have continuing obligations with respect to documents in closed client files depending on the nature and contents of the documents in question. *See, e.g., Sage Realty*, 91 N.Y.2d 30 (1997); ABCNY Formal Op. 2008-1; ABCNY Formal Op. 1986-4; N.Y. State 460 (1977); N.Y. State 623 (1991); D C. Bar Op. 283 (1998). These authorities categorize client documents as follows: *Category 1*: documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments. *See* D.C. Bar Op. 283 (1998). *Category 2*: documents that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired. *See* N.Y. State 460 (1977). *Category 3*: documents that need not be returned to the client because they "would furnish no useful purpose in serving the client's present needs for legal advice," *Sage Realty*, 91 N.Y.2d at 36, or are "intended for internal law office review and use." *Id.* at 37.

III. The Use of Engagement Letters to Specify the Disposition of a Client's File Upon the Conclusion of a Matter

The foregoing categories provide a useful framework when drafting a provision in an engagement letter governing the disposition of a client's file at the end of a matter. Category 1 documents must be preserved or returned to the client, unless the client specifically directs a different disposition. In contrast, there is no obligation to preserve Category 3 documents. Consequently, an engagement letter may provide for their destruction at the end of the engagement, although express permission of the client may not be required. *See* N.Y. State 623 (1991) (documents belonging to the attorney may immediately be destroyed without consultation or notice, absent "extraordinary circumstances manifesting a client's clear and present need for such documents.").

*3 With regard to documents in Category 2, there must be an analysis to determine the appropriate disposition of this material. For example, the lawyer needs to consider whether the document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement, or whether no such need exists because the document relates solely to a claim fully and finally resolved through litigation. This determination, however, cannot in all cases be made prospectively, *i.e.*, at the beginning of the engagement. At that juncture, the attorney may not have seen or be able to anticipate all of the documents that will become part of the client file, much less anticipate the need, if any, the client may have for such documents at the end of the matter. The determination, therefore, most likely will have to be made when the representation has ended, before any such documents are discarded. And the client may authorize the lawyer at the outset of the engagement to undertake a final review of the closed file and determine in her sole discretion which of the Category 2 documents, if any, should be retained by the lawyer or returned to the client.

An engagement letter therefore may stipulate to the procedure governing disposition of client documents upon conclusion of a matter. In that connection, with client consent, the engagement letter may authorize an attorney to take one of the following steps after the file is closed: discard all documents in the file (apart from Category 1 documents), return all documents to the client, or return only those documents requested by the client and discard the balance of the file. This approach has support in a number of ethics opinions finding or suggesting that a lawyer and her client may agree on the final disposition of the client's documents at the outset of an engagement. *See* ABCNY Formal Op. 2008-1 (suggesting the use of engagement letters to define obligations regarding preservation of e-data at the conclusion of the matter); N.Y. State 623; Ariz. State Bar Op. 08-02 ("[a] lawyer *may* fulfill the lawyer's ethical obligations [regarding file retention] by tendering the entire file to the client at the termination of the representation") (italics in original); Cal. State Bar Standing Comm. On Prof'l Responsibility & Conduct, Formal Op. 2001-57 (stating that written fee agreements may provide "that following the termination of the

representation the contents of the file [[excluding Category 1 documents] may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client"); D.C. Bar Op. 283 (retainer agreement may provide for the immediate delivery, temporary storage, or immediate destruction of files following completion of the representation).[4]

This approach raises the question of whether it is permissible to agree in advance to the disposition of Category 2 documents at a time when it may be difficult, if not impossible, to fully foresee the client's need, if any, for any particular document(s) after the matter has been concluded. We believe that such an agreement is permissible under the Rules provided that at the outset of the engagement, the lawyer obtains the informed consent of the client.[5] As we previously have noted, "a client's sophistication is an important determinant of the degree of disclosure required to obtain informed consent ..." ABCNY Formal Op. 2008-2. Thus, depending on the sophistication of the client and the other pertinent circumstances affecting the representation, to obtain informed consent, the lawyer may need to explain to her client the likely categories of documents anticipated to comprise the file, the lawyer's obligation to retain or return Category 1 documents, the lawyer's obligation to identify and retain or return documents the lawyer knows the client will need following completion of a matter or engagement, and the risk that the lawyer may discard certain documents that may prove useful to the client in light of developments occurring only after the documents have been discarded.

***4** We address two additional practical questions. First, what must a lawyer do at the end of a matter if she is directed by her client to discard the entire file (including Category 1 and 2 documents), even after she has advised the client to retain some or all of the documents? In such circumstances, the lawyer is obligated to provide competent advice on the matter and to follow the client's instructions regarding the pursuit of any lawful course of action: "once the client is fully informed (taking into consideration the client's level of sophistication) as to the legal consequences" of the decision, the lawyer should abide by the client's instruction. N.Y. State 713 (1999) (lawyer should comply with client's instructions so long as fully informed and client is not directing lawyer to engage in illegal activity).

Second, there may be instances where the lawyer is unable to locate her client at the conclusion of an engagement, precluding the lawyer from returning files as directed by the client. In such circumstances, prudence will dictate that the lawyer retain Category 1 and 2 documents for some period of time. This approach has been adopted in a number of ethics opinions from other jurisdictions, some of which prescribe the length of time that such files should be retained. *See, e.g.*, Conn. Bar Ass'n Informal Op. 98-23 (1998) (retain Category 1 records for "as long as is practicable"); D.C. Bar Op. 283 (five year retention period beginning at time of termination); Ala. Bar Op. 93-10 (1993) (six year retention period). Special circumstances may require a longer preservation period than others, including for example, representations involving clients who were minors during a period of the engagement or matters involving estate planning.

Below, we include a sample engagement letter provision, but the facts and circumstances of any particular engagement may require that it be modified.

IV. Sample Engagement Provision For Disposition of Files at the Termination of the Engagement

Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within sixty (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that "materials" include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process.

***5** Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the

right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.

Some additional caveats should be noted here:
1. At the end of the engagement, the attorney and firm should develop a process whereby the attorney and other assistants at the firm cull through the various documents to ensure that Category 1 and 2 documents are reviewed and preserved or, where authorized and appropriate, discarded.

2. While not required, it may be prudent for the lawyer, when sending a closure letter advising that the engagement is concluded, to describe the category of documents contained in her files that will be discarded. From a risk management standpoint, use of closure letters that more specifically describe what steps are to be taken with regard to a client's files may be the best practice.

3. A lawyer may charge the client "customary fee schedules" for gathering and producing records to a client.[6] ABCNY Formal Op. 2008-1 applied this principle to e-data retrieval and production, finding that the reasonableness of such fees will depend on the circumstances, including the need for engaging third parties to assist in the work and the accessibility of the e-data. Lawyers should use their good judgment as to what a reasonable, customary fee is and disclose the charges to the client in an engagement letter.

4. An attorney must ensure that the client's confidences are maintained during this process, including the use of third-party services regarding e-data and the destruction of e-data.

5. If a client can no longer be found, reasonable efforts should be made to locate the client to return the documents, as previously requested by the client.

6. An attorney should keep a record describing the disposal of any client documents for a reasonable period of time.

Footnotes

1 Lawyers have sought to address these questions by, among other things, preparing and implementing records retention and destruction policies ("RRD policies"). This Opinion does not address the ethical, legal and other issues presented in drafting RRD policies. We note, however, that there are a number of helpful guides regarding the proper construction and implementation of those policies. *See, e.g.*, Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 L. LIBR. J. 7 (2001).

2 This Opinion addresses ethical considerations bearing on the disposition of client files. It does not address obligations to retain files imposed by applicable law or other specific circumstances, including statutory obligations imposed upon certain financial institutions, requirements to preserve electronic and other data upon notice of a potential claim, or retention periods imposed by an attorney's malpractice insurance carriers.

3 Certain local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases. *See, e.g.*, N.Y. Ct. App. 1st Dept. R. 603.7(f) (2009). And New York Rule of Professional Conduct 1.15 provides detailed requirements for the preservation of an attorney's own financial records.

[4] A number of ethics opinions and other authorities have observed that a written arrangement with the client may help define the attorney's obligations regarding the handling of client files during and at the end of the representation. *See, e.g.*, Pa. Bar Ass'n Comm. on Legal Ethics, Op. 2007-100, at 5 (2007); Neb. Advisory Op. 2001.3 (the scope of the "file" to which the client is entitled depends in part on the agreement between the client and the lawyer and engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct); *see also* John Allen, *Focus on Professional Responsibility: Ownership of Lawyer's Files About Client Representations—Who Gets the "Original"? Who Pays for the Copies?*, 79 MICH. B. J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter).

[5] Rule 1.0(j) of the New York Rules of Professional Conduct provides that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

[6] *Sage Realty*, 91 N.Y.2d at 38.

NY Eth. Op. 2010-1 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2010 WL 11508163

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NY Eth. Op. 2008-1 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2008 WL 11336615

New York State Bar Association
Committee on Professional Ethics

A LAWYER'S ETHICAL OBLIGATIONS TO RETAIN AND TO PROVIDE A CLIENT WITH ELECTRONIC DOCUMENTS RELATING TO A REPRESENTATION

Formal Opinion Number 2008 - 1
July 2008

QUESTIONS

*1 What ethical obligations does a lawyer have to retain e-mails and other electronic documents relating to a representation? Does a lawyer need client permission before deleting e-mails or other electronic documents relating to the representation? When a client requests that a lawyer provide documents relating to the representation, may the lawyer charge the client for the costs associated with retrieving e-mails and other electronic documents from accessible and inaccessible storage media?

OPINION

I. Background

We live in the digital era. Lawyers routinely use e-mail to formally convey important information and documents to clients, colleagues, and other counsel. Just as routinely, lawyers use e-mail to conduct informal conversations. In many law practices, lawyers are as likely to send an e-mail as to pick up the telephone or walk down the hall to a colleague's office.

The growing reliance by lawyers on digital technology, of course, is not limited to e-mails. Virtually all correspondence, transactional documents, and court filings originate as electronic documents. Many of these electronic documents are never converted into paper format, and lawyers have become increasingly comfortable in drafting, editing, and commenting on these documents. Emblematic of the growing reliance on electronic documents, courts and administrative agencies now increasingly insist that lawyers make filings electronically. In addition, many lawyers and law firms, taking advantage of widely available document imaging technology, convert their paper records into electronic documents for organizational and storage purposes.

Given this reality, we believe that it would be useful to address some of the ethical issues implicated by a lawyer's reliance on e-mails and other electronic documents. Specifically, this Opinion addresses (i) a lawyer's ethical obligation to retain e-mails and other electronic documents relating to a representation; (ii) the ethical limitations on a lawyer's ability to delete e-mails and other electronic documents; (iii) the extent to which a client has a presumptive right to e-mails and other electronic documents in a lawyer's possession; and (iv) the extent to which a lawyer may charge a client for producing e-mails and other electronic documents at the client's request.[1]

II. A Lawyer's Obligation to Retain E-mails and Other Electronic Documents

A lawyer's file relating to a representation includes both paper and electronic documents.[2] The ABA Model Rules of Professional Conduct (the "Model Rules") define a "writing" as "a tangible or electronic record of a communication or representation ...." Rule 1.0(n), Terminology.

The Code of Professional Responsibility (the "Code") does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation. The only Code provision that specifically requires a lawyer to retain client records is DR 9-102. That disciplinary rule imposes mandatory record-retention requirements with respect to a small number of discrete documents, such as retainer agreements, bills to clients, bank statements, and records of transactions in escrow accounts. *See* DR 9-102(D)(l)-(10).

*2 The Code, however, contains several provisions that implicitly impose on lawyers an obligation to retain documents. For instance, under DR 6-101, a lawyer has an obligation to represent a client competently. *See also* EC 6-1 ("Because of the lawyer's vital role in the legal process, the lawyer should act with competence and proper care in representing clients."). Similarly, DR 7-101(A)(3) states that "[a] lawyer shall not intentionally ... [p] rejudice or damage the client during the course of the professional relationship," subject to certain defined exceptions in DR 2-110 and DR 7-102.

In 1986, before the explosive growth in electronic documents, this Committee addressed a lawyer's obligations regarding the retention and disposition of documents in the lawyer's file at the end of a representation. Endorsing several guidelines adopted by the American Bar Association,[3] we recognized as a starting point that certain documents in a lawyer's file might belong to the client and should be returned at the client's request.[4] ABCNY Formal Op. 1986-4. This Committee further opined, without significant elaboration, that before destroying any documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents.[5]

As to documents "that belong to the lawyer" or "as to which no clear ownership decision can be made," this Committee opined that the questions whether and how long to retain these documents were "primarily a matter of good judgment." *Id.* We noted that with respect to these documents, the lawyer should use care not to destroy or discard documents (i) that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired; or (ii) that the client has not previously been given but which the client may need and may reasonably expect that the lawyer will preserve. *Id.*

In any given representation, a number of documents will likely fall into one of these two categories. Among those documents are legal pleadings, transactional documents, and substantive correspondence. Other documents regularly generated during a representation, such as draft memoranda or internal e-mails that do not address substantive issues, are unlikely to fall into these categories. Often a lawyer will need to exercise good judgment, document by document, to determine whether specific documents should be retained.

To be sure, our 1986 Opinion does not require a lawyer to retain every paper document that bears any relationship, no matter how attenuated, to a representation. For instance, consistently with the guidelines described above, a lawyer does not have an ethical obligation to keep every handwritten note of every conversation relating to a representation. The same conclusion will often be reached with respect to drafts of correspondence, of pleadings, and of legal memoranda, among other types of paper documents.

*3 Because many e-mails and other electronic documents now serve the same function that paper documents have served in the representation of a client, we believe that the retention guidelines articulated in our 1986 Opinion should also apply to e-mails and other electronic documents.

As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in our 1986 Opinion. No ethical rule prevents a lawyer from deleting those e-mails.[6]

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under our 1986 Opinion. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.

III. A Lawyer's Obligations to Organize and Store E-mails and Other Electronic Documents

We next consider whether a lawyer has any ethical obligation to organize in any particular manner those e-mails and other electronic documents that the lawyer retains, or to store those documents in any particular storage medium.

We do not believe, as a general matter, that a lawyer has any ethical obligation to organize electronic documents in any particular manner, or to store those documents in any particular storage medium. In determining how to organize and store electronic documents, a lawyer should take into consideration the nature, scope, and length of the representation, and the client's likely need for ready access to particular documents. From an ethical standpoint, a lawyer should ensure that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve.

This is more of an issue for e-mails than for other electronic documents. Law firms frequently store electronic documents other than e-mails, such as transactional documents and court filings, in a document management system. In such a system, electronic documents are typically coded with several identifying characteristics, including by client and matter. Many document management systems permit documents to be located by using those identifying characteristics, making it much easier to assemble them.

***4** E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time. With such a system, a lawyer will have to take affirmative steps to preserve those e-mails that the lawyer decides to save. Furthermore, unless a lawyer organizes the saved e-mails to facilitate their later retrieval, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as explained in Part V below, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by moving those e-mails to an electronic file devoted to a specific representation, or by coding those e-mails with specific identifying characteristics, such as a client and matter number, when the e-mails are first sent or received.

IV. A Lawyer's Obligation to Provide the Client with E-mails and Other Electronic Documents in the Lawyer's Possession

A related, but distinct, issue is the scope of a lawyer's obligation to provide the client with e-mails and other electronic documents retained by the lawyer. Put differently, once a lawyer decides to retain an e-mail or other electronic document — even when that electronic document does not have to be retained under our 1986 Opinion — does the lawyer have an obligation to provide the client with that electronic document upon request?

The Code does not explicitly address this issue. The Code recognizes that a client has a right to certain "papers and property" in the possession of the lawyer, but does not spell out what those "papers and property" consist of. *See, e.g.*, DR 2-110(2) (providing that, upon withdrawing from a representation, a lawyer shall "deliver[] to the client all papers and property to which the client is entitled"); DR 9-102(C)(4) (providing that lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive").[7]

The leading New York case discussing this issue is the Court of Appeals' 1997 decision in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 37 (1997). Abandoning the distinction adopted by some courts "between documents representing the 'end product$' of an attorney's services, which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney," *id.* at 35, the Court of Appeals adopted what it termed the ""majority view." It held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively accord[ed] ... full access" to the lawyer's file on a represented matter. *Id.* at 34.[8]

***5** *Sage Realty* recognized two principal exceptions to the general rule of presumptive right of full access. The Court of Appeals held that a client is not entitled to the disclosure of (i) "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law", or (ii) certain "firm documents intended for internal law office review and use" that are "unlikely to be of any significant usefulness to the client or to a successor attorney." *Id.* at 37-38. The Court of Appeals elaborated that this second category might include "documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." *Id.*[9]

Consistently with the exceptions recognized by *Sage Realty*, a client does not have a presumptive right of access to e-mail communications between lawyers of the same law firm that are "intended for internal law office review and use" and are "unlikely to be of any significant usefulness to the client or to a successor attorney." Although it would be impossible to construct a list of the types of e-mails that would fall within the *Sage Realty* exceptions, those e-mails might include an instruction to another lawyer or employee of the firm to perform a particular task; a preliminary analysis by a lawyer of a factual or legal issue in the representation; or a communication by a lawyer addressing an administrative issue.

The *Sage Realty* Court did not address whether a lawyer would need to provide client access to otherwise inconsequential documents similar to those intended for "internal law office review and use," but sent instead to or from a third party not employed by the lawyer's firm. Common examples of these documents are an e-mail sent to opposing counsel confirming the starting time of a deposition, or an e-mail sent to a testifying expert asking for transcripts of recent testimony. A lawyer is not under an ethical obligation to provide a client with electronic documents of this sort.

V. A Lawyer's Entitlement to Reimbursement for Providing the Client with Electronic Documents in the Lawyer's File

The burden associated with retrieving and producing e-mails and other electronic documents is mitigated by the lawyer's ability, under *Sage Realty*, to charge the client based on the lawyer's "customary fee schedules" for gathering and producing documents to a client. *Sage Realty*, 91 N.Y.2d at 38. Although the Court of Appeals' *Sage Realty* decision principally related to paper documents, we do not see any principled reason why a lawyer's fees may not reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. *See* DR 2-106.[10] The reasonableness of that fee will often depend on the circumstances. On the one hand, it may be reasonable for a lawyer to charge a client for hiring an outside vendor to assist in the retrieval of electronic documents that a lawyer has stored on a less accessible storage medium that was widely in use at the time of retention. On the other hand, it may not be reasonable for a lawyer, who chooses not to use widely available and cost-effective technology to organize or code electronic documents, to then charge the client the additional costs resulting from the lawyer's choice.

***6** In some situations, a client might request a copy of the electronic documents in the lawyer's file, but decline to pay the lawyer's reasonable fee associated with the retrieval and review of those documents. As a general matter, a lawyer is not obligated to shoulder the costs of retrieving electronic documents in order to return those documents to the client. As the Court of Appeals held in *Sage Realty*: "[A]s a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement." 91 N.Y.2d at 38. We are reluctant, however, to articulate a bright-line rule. There may be some circumstances under which a client reasonably expects its lawyer to manage the client's e-mails and other electronic documents to allow for those materials to be sent to the client without either the lawyer or the client incurring substantial additional expense.[11] A lawyer should also consider whether to insist on the advance payment of fees associated with the retrieval and review of electronic documents when it is reasonably foreseeable that the client would suffer immediate harm as a result of any delay in the delivery of the requested documents.

VI. At the Outset of the Engagement Lawyer and Client Should Consider Discussing the Retention, Storage, and Retrieval of E-mails and Other Electronic Documents

In light of the exponential growth in e-mails and other electronic documents, and the pace of technological change involving the organization and storage of electronic documents, it may be prudent for a lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of an engagement. Lawyer and client may find it worthwhile to discuss and reach agreement at the outset on issues such as (i) the types of e-mail and other electronic documents that the lawyer intends to retain, given the nature of the engagement; (ii) how the lawyer will organize those documents; (iii) the types of storage media the lawyer intends to employ; (iv) the steps the lawyer will take to make e-mail and other electronic documents available to the client, upon request, during or at the conclusion of the representation; and (v) any additional fees and expenses in connection with the foregoing. Consistently with the holding of *Sage Realty* and DR 2-106, those costs should accord with the lawyer's customary fee schedule and must not be excessive. By raising these issues at the outset of the representation, perhaps as part of the engagement letter, a lawyer and a client will be able to make informed decisions about the appropriate manner of retention, storage, and retrieval of electronic documents to which a client has a presumptive right

of access.

CONCLUSION

In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

*7 In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.

Footnotes

1 This Opinion does not purport to address issues relating to the duty of a lawyer and client to preserve evidence, including electronic documents, that arise when a party has notice that the evidence is relevant to litigation or reasonably should know that the evidence may be relevant to anticipated litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006).

2 The term "lawyer's file" is fast becoming a throwback to an earlier era, connoting as it does a collection of sorted physical documents. In this Opinion, "lawyer's file" means the collection of documents relating to a representation, regardless of the (electronic or paper) form or character (sorted or unsorted) of the documents.

3 Formal Opinion 1986-4 of the Committee on Professional and Judicial Ethics stated in pertinent part:

> With respect to papers that belong to the lawyer, or papers as to which no clear ownership decision can be made, the answer to the questions whether and how long to retain such files is primarily a matter of good judgment, in the exercise of which the lawyer should bear in mind the possible need for the files in the future. *See* ABA Inf. Op. 1384 (1977); N.Y. State 460 (1977). The ABA guidelines, which follow, are particularly helpful:
>
> 1. Unless the client consents, a lawyer should not destroy or discard items that ... probably belong to the client ....
>
> 2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be

necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.

4. In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

8. A lawyer should [consider preserving], perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of

ABCNY Formal Op. 1986-4.

[4] Although the 1986 Opinion recognized the distinction between documents that are the client's property and documents that are the lawyer's, it did not articulate any rules for drawing that distinction. This is understandable because the distinction is a question of law, and is therefore beyond the Committee's jurisdiction. *See, e.g.*, N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."); ABCNY Formal Op. 1986-4 ("Initially, it must be determined whether the papers in question, including work product, belong to the client or to the attorney. This is a legal question beyond our jurisdiction."),

[5] *But cf.* ABA Informal Op. 1384 (1977) ("A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.").

[6] On a related subject, the Committee on Professional Ethics for the New York State Bar Association has set forth procedures for the disposal of an attorney's file at the conclusion of the representation. *See* N.Y. State 623. With respect to documents belonging to a client, the New York State opinion calls for the lawyer, in the first instance, to make the documents available to the client and, depending on the nature of the client's response, to take steps designed to give the client a full opportunity to take possession of those documents. With respect to documents belonging to the lawyer, the New York State opinion provides that a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances showing a client's "clear and present need for such documents." N.Y. State 623 (citing N.Y. State 398 (1975) and ABCNY Formal Op. 1986-4).

[7] *See* Cal. State Bar Formal Op. 2007-174 (construing e-mail and certain other electronic documents to fall within the scope of California Rule of Professional Conduct 3-700(D)(a), which provides that when a client requests the return

of the "[c]lient papers and property," they include any items that are "reasonably necessary to the client's representation").

8 The *Sage Realty* Court agreed with those lower courts that "refused to recognize a property right of the attorney in the file superior to that of the client." 91 N.Y.2d at 36. For this proposition, *Sage Realty* relied upon the New York Supreme Court's decision in *Bronx Jewish Boys v. Uniglobe, Inc.*, which held that:

Under New York Law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S.2d 711, 713 (Sup. Ct. 1995)(intemal citation omitted).

9 The exceptions identified by *Sage Realty* to the presumption of client access to the documents in the lawyer's file are consistent with Comment (c) to Section 46 of the *Restatement (Third) of the Law Governing Lawyers*, which also recognizes circumstances under which a lawyer may refuse to provide certain documents in the lawyer's file to the client:

A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved ....

10 In those instances when a lawyer's electronic documents have not been coded, or saved to a specific file, a lawyer will need to take steps to ensure that in returning electronic documents to a client, the lawyer does not inadvertently reveal the confidences and secrets of another client. See DR 4-101(B)(1).

11 *See* Model Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law,"). The lawyer may retain copies of the client file at the lawyer's expense. *See* N.Y. State 780 (2004).

NY Eth. Op. 2008-1 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2008 WL 11336615

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NY Eth. Op. 780 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2004 WL 3021155

New York State Bar Association
Committee on Professional Ethics

TOPIC: RETAINING COPIES OF CLIENT'S FILE OVER CLIENT'S OBJECTION; LIMITATION OF ATTORNEY LIABILITY

Opinion Number 780
December 8, 2004

DIGEST: Generally proper for a lawyer to retain copies of a client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.
*1 Code: DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

QUESTIONS

1. May a lawyer retain copies of the client's file over the objection of the client?

2. May the lawyer demand a release from liability as a condition of not retaining copies?

OPINION

1. **May copies of file documents be retained by the lawyer**?

When a lawyer's employment by a client ends, whether because the lawyer withdraws, the client terminates the engagement or the matter is completed, the lawyer is required to deliver to the client property, including files, which the client is entitled to receive as a matter of law. The New York Code of Professional Responsibility (the "Code") does not provide guidance on which documents the client is entitled to receive as a matter of law. Rather, the Code provides in various sections only that the lawyer is ethically obligated to return to the client that which the client is legally entitled to receive. DR 2-110(A)(2) of the Code, governing withdrawal from employment, requires a lawyer contemplating withdrawal to "[deliver] to the client all papers and property to which the client is entitled." Similarly, DR 9-102(C)(4) of the Code provides that a lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

The question of which documents the client is entitled to receive is "generally a question of law, not ethics." N.Y. State 766 (1993). *See* N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."). *See* Restatement (Third) of the Law Governing Lawyers § 46(2).

Although the Code does not explicitly address the issue of whether the *lawyer* has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest. As a preliminary matter, nothing in the Code prohibits a lawyer from retaining copies of the file, while EC 4-6 refers to "personal papers of the client" as distinguished from "papers of the lawyer." DR 4-101(C)(4) of the Code provides as an exception to the general rule of confidentiality the lawyer's right to reveal a client's confidences or secrets in order to collect fees or defend against an accusation of wrongful conduct. Implicit in that rule is the lawyer's right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct New York case law appears to recognize that both the client and the lawyer have an interest in the file.[1] Finally, the lawyer's right to retain copies of the file may be reflected in a retainer agreement or an engagement letter.

*2 In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense.[2] This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances.

2. May a lawyer demand a release as a condition of not retaining copies of the file?

Although this Committee has previously held that a lawyer may not insist on a general release as a condition of returning the client's file, N.Y. State 339 (1974), it has not addressed the question whether a lawyer's agreement to give up the right to retain copies of the file may be conditioned on such a release. Because we believe that a lawyer has a right to retain copies of the file, if the client objects to the lawyer's retention of copies, we hold that the lawyer may insist on a general release as a condition of acquiescence.

DR 6-102(A) of the Code prohibits a lawyer from "prospectively" seeking to limit liability to a client for malpractice, but does not prohibit a lawyer from seeking a release for work *already completed*, as contemplated here. A lawyer may "ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair", which steps include advising the client to seek independent counsel in the negotiation and consummation for the release. N.Y. State 591 (1988).[2]

CONCLUSION

A lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.

Footnotes

1 In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997), the Court of Appeals observed that courts have "refused to recognize a property right of the attorney in the file superior to that of the client." The New York Supreme Court case cited in *Sage* for that proposition is *Bronx Jewish Boys v. Uniglobe, Inc.*:

> Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. *In other words, the file belongs to the client.*

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S. 2d 711, 713 (Sup. Ct. 1995) (citation omitted, emphasis added). Although *Bronx Jewish Boys* held that the "file belongs to the client", the Court of Appeals in *Sage* observed that both the lawyer and client have an interest in the "client's" file. *See also In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 944-45 (10th Cir.) ("So far as we can determine, it is a general principle of law that client files belong to the client ... the attorney's interest is only that of a retaining lien and his interest at best is a pecuniary one, not an interest of ownership, nor privacy"), *cert. denied sub nom, Vargas v. United States*, 469 U.S. 819 (1984); *Matter of Calestini*, 321 F. Supp. 1313, 1316 (N.D. Ca. 1971) ("In the instance of a legal file, the client has the right to the file. It is therefore 'property' of the client"). *But see* Michigan Ethics Committee Op. R-19 (2000) ("There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods.")

2 For instance, Nebraska adopted the rule that "a client is entitled to (1) the documents he gave the lawyer; (2) anything acquired in discovery; (3) all correspondence; and (4) all notes, memorandums, and briefs generated by the lawyer," although "*[t]he lawyer may retain copies of the file*, but may not charge for photocopying unless the fee agreement provided otherwise." Neb. Op. 2001-03 (2001), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1201:5501 (emphasis supplied). Similarly, Massachusetts demands that an attorney return to the client any "original documents supplied by the client," as well as "any investigatory or discovery documents for which the client has paid out-of-pocket expenses." Mass. Op. 92-4 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:4603. Massachusetts allows the firm to keep copies of those documents at its own expense. *Id.* A similar opinion

was reached by San Francisco, which recognized that although "[t]he lawyer must return all materials the client delivered to him ... the lawyer may copy a client's file before turning it over." S.F. Bar Op. 1990-1 (1990), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1851. San Francisco also concluded that the lawyer must copy the file at his own expense. *Id.* Alabama allows an attorney to retain a copy of a client's file so long as the attorney bears the cost of reproduction. Ala. Op. 88-102 (1988), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1048 ("A lawyer who previously served as counsel for a client and is replaced by other counsel may keep the client's files only if the client so directs because the files belong to the client. The lawyer may, however, retain copies of the client's file at her own expense").

Likewise, the Ohio State Bar Association requires an attorney to promptly deliver a file to a former client, but permits an attorney to retain copies of the file at the attorney's own expense. Ohio Op. 92-8 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:6856 ("A lawyer whose former client requests receipt of her case file and has paid the lawyer in full must promptly deliver the file to the client. The lawyer may keep a copy of the file but may not charge the client for the copying costs"). The Colorado Bar Association arrived at the same conclusion, requiring that, upon termination, lawyers "surrender papers and property to which the client is entitled." Colo. Op. 104 (1999), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1101:1902. Colorado permits a lawyer "to retain copies of documents surrendered to a client," but adds that the lawyer "may not charge the client for duplication costs." *Id.* Similarly, the Kentucky Bar Association opined, "When a lawyer is discharged, he should deliver to the client all property and files to which the client is entitled ... [t]he lawyer may wish to copy items in the client's file." Ky. Op. E-235 (1980), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:3902.

3 To maintain fair negotiations with a former client, a lawyer must adhere to the following conditions: "a client must be fully appraised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; the lawyer has been discharged or has withdrawn from the representation in accordance with DR 2-110; and the lawyer has advised the client to secure independent counsel in the negotiation and consummation of such an agreement." N.Y. State 591 (1988); N.Y. State 275 (1972). To maintain fair negotiations, an attorney may not retain a lien on a client's papers and documents. *Id.* ("Fair negotiations over a release are not possible while the lawyer retains a position of advantage by withholding the client's papers"). Although an attorney may retain a lien on a client's papers until the client compensates the attorney for any unpaid legal fees, N.Y. State 567 (1984), the attorney may not retain the file as a mechanism to secure a release from malpractice. N.Y. State 591 (1988) ("The lawyer may not retain the client's files as a bargaining chip to secure a release). *See also* Wis. Op. E-85-12 (1986), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:9117 ("A lawyer may not condition *the return of client documents* and the settlement of his related fees upon the client's release of any legal malpractice claims ... unless the client is advised in writing to secure independent counsel in the negotiation and consummation of such agreement") (emphasis supplied).

NY Eth. Op. 780 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2004 WL 3021155

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NY Eth. Op. 766 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 22379944

New York State Bar Association
Committee on Professional Ethics

TOPIC: DISPOSITION OF FILES OF FORMER CLIENT OVERRULES: N.Y. STATE 398 (1975)

Opinion Number 766
September 10, 2003

Digest: Former client and/or successor counsel is presumptively entitled to access all attorney files. Code: DR 2-106(A); DR 9-102(C)

QUESTION

***1** What is a lawyer's obligation to a former client who requests the files that were generated in the course of the prior representation? OPINION DR 9-102(C) provides: A lawyer shall: * * * (4) Promptly pay or deliver to the client... as requested by the client... the funds, securities, or other properties in the possession of the lawyer which the client... is entitled to receive. The question of which "funds, securities, or other properties in the possession of the lawyer" the client (or successor counsel) is entitled to receive is generally a question of law, not ethics. See N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."); Nassau Bar Op. 94-19 (funds in IOLA account); Nassau Bar Op. 96-13 (funds in escrow account). The duty to deliver "to the client all papers and property to which the client is entitled" is also a requirement of withdrawal from employment. See DR 2-110(A)(2). Accordingly, the Bar's attention is directed to Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y.2d 30 (1997), in which the Court of Appeals abandoned the distinction "between documents representing the 'end product' of an attorney's services, which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney," opting instead for the "majority" view wherein, "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively accord[ed]... full access to the attorney's file on a represented matter with narrow exceptions." 91 N.Y.2d at 34 (citations omitted). The Court cited the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers § 58 (proposed final draft No. 1, 1996), as follows: The draft Restatement provides that a former client is to be accorded access to "inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse" (id., § 58[2]) [emphasis supplied]. Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, "such originals and copies of other documents possessed by the lawyer relating to the representation as the... [former] client reasonably needs" (id., § 58[3], comment d). 91 N.Y.2d at 35. The Committee recognizes that, consistent with the now rejected "minority view," N.Y. State 398 (1975) suggested that "the client is not entitled to require delivery of the firm's work product" unless, in the context of the particular circumstances, the "firm's duty" to the former client or the "professional courtesy" to be accorded to successor counsel, "are necessary" to guard the client's interest" (citations omitted). To the extent that N.Y. State 398 thus reflects a presumption of non-accessibility that a former client must overcome with respect to a certain class of documents, that view has been plainly rejected by the Court of Appeals in Sage Realty and is no longer valid. See also Gamiel v. Sullivan & Liapakis, P.C., 289 A.D.2d 88 (2001); Getman v. Petro & Ingalsbe, 266 A.D.2d 688 (1999). With regard to who bears the cost of file assembly and delivery, we also note the Court of Appeals statement in Sage Realty that "as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement." 91 N.Y.2d at 38. Of course, the fee for such services may not be excessive. DR 2-106(A). See also Deane v. Skadden, Arps, Slate, Meagher & Flom, N.Y.L.J., Aug. 17, 1998 (Sup. Ct. N.Y. County). CONCLUSION As a matter of ethics, upon request by a former client, a lawyer must promptly turn over or provide access to the files which the former client is entitled to possess. As a matter of New York law, a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access. The lawyer may charge such former client reasonable fees for assembling and delivering such files, as reflected by customary fee schedules or any governing retainer agreement. (35-02)

NY Eth. Op. 766 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2003 WL 22379944

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NY Eth. Op. 724 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1999 WL 1756616

New York State Bar Association
Committee on Professional Ethics

TOPIC: WILLS; OBLIGATIONS OF LAW FIRM IN REGARD TO WILLS IN ITS CUSTODY

Opinion Number 724
November 30, 1999

DIGEST: A lawyer who drafts a client's will should agree in advance whether the lawyer will maintain the original will for safekeeping and, if so, what obligations the lawyer will thereby assume. At least absent agreement to the contrary, if the lawyer has maintained the client's original will, after the client's death the lawyer must assure that the executor and/or beneficiaries are aware of its existence, unless the lawyer knows of a later valid will. Absent agreement, the lawyer has no obligation to take steps to learn of the client's death or to file the original will with an appropriate court. However, the lawyer should clarify in advance whether or not the lawyer is to undertake these or other additional obligations and must comply with whatever agreement is made.

*1 Code: DR 2-103(A), 4-101; EC 2-3, 4-6

QUESTION

If a lawyer keeps custody of a client's original will, absent agreement does the lawyer have an obligation to learn of the client's death and, upon the client' s death, to file the original will with an appropriate court?

OPINION

A lawyer who drafts a client's will has no obligation to maintain the original will for safekeeping. After the client executes the will, the lawyer may provide the original will to the client, along with appropriate advice concerning its safekeeping. The practice of safekeeping clients' wills appears to have become less routine over time, because clients increasingly believe themselves able to keep their own wills safe.1 Nevertheless, safekeeping the client's will remains an appropriate function for a lawyer to perform.

Whether the lawyer will maintain the original will and, if so, what additional obligations the lawyer will assume, are primarily matters to be agreed upon by the lawyer and client after consultation. Contractual obligations may arise if there are express or implied agreements or understandings between the client and the lawyer in regard to the lawyer's duties and responsibilities in relation to the will. Thus, the lawyer and client may agree that the lawyer will undertake the responsibility to learn of the client's death (*e.g.* , by reading death notices). They may also agree that, upon learning of the client's death, the lawyer will file the will with the appropriate court. Ordinarily, a lawyer would be obligated to carry out such contractual undertakings, as would the lawyer's firm in the event the lawyer was unable to carry out the undertaking personally. *Cf.* N.Y. County 709 (1995). Whether or not a lawyer undertakes a contractual obligation of this nature in a particular situation raises questions of fact and law about which the Committee cannot provide guidance, since our role is limited to interpreting the Code of Professional Responsibility.

*2 When the lawyer does agree to retain the client's original will, the lawyer obviously may not destroy it,2 but must keep custody of it until the client requests it or the lawyer is legally obligated to produce it.3 The lawyer should discuss with the client what, if any, additional obligations the lawyer will assume. At least absent agreement to the contrary, there will ordinarily be an implied understanding that after the client's death, if the lawyer has maintained the original will and, as far as the lawyer knows, there is no later valid one, the lawyer must take steps to ensure that the executor and/or beneficiaries are aware of the will's existence.4 Thus, as we have previously observed,

> where a client has requested his lawyer to retain the original will for safekeeping, and the lawyer later learns of the client's death ... it would appear that the lawyer has an ethical obligation to carry out his client's wishes, and quite possibly a legal obligation ... to notify the executor or the beneficiaries under the will or any other person that may propound the will ... that the lawyer has it in his possession.

N.Y. State 521 (1980) (citations omitted). Even though the duty of confidentiality under Disciplinary Rule ("DR") 4-101 ordinarily continues after the termination of the lawyer-client relationship and after the client's death, *see* Ethical Consideration ("EC") 4-6, disclosure of the will's existence is permissible in this situation, because the disclosure was impliedly, if not explicitly, authorized by the client.

Whether the lawyer who safeguards the client's will has additional obligations-- *e.g.*, whether the lawyer must take steps to learn of the testator's death, or whether the lawyer must file the will with the court upon the testator's death-- will be determined in the first instance not by the Code, but by the express or implied understanding between the lawyer and client at the time the lawyer agreed to safeguard the will or by any subsequent understanding. Therefore, the lawyer should make every effort to clarify precisely what the lawyer will and will not do in the event the lawyer maintains the original will. The lawyer has no ethical obligation to agree to read death notices, *see* Massachusetts Op. 76-7 (a lawyer "need not watch the obituary columns"), or to agree to file the original will with the court; the client may have good reason not to ask the lawyer to assume such obligations; and the lawyer generally has no ethical obligation later to undertake responsibilities vis-a-vis the original will in addition to those on which the lawyer and client agreed and those imposed by law. By clarifying the extent and limits of the lawyer's obligations, the lawyer will enable the client to make an informed decision whether the lawyer should safeguard the will and, if so, what additional steps the client should take (*e.g.*, whether to tell others, such as the executor or beneficiaries, where the will is to be found). Doing so will also reduce the risk that the lawyer will later fall to undertake a responsibility that, from the testator's perspective, the lawyer was obligated to undertake.

CONCLUSION

***3** The question is answered in the negative.

NY Eth. Op. 724 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1999 WL 1756616

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NYC Eth. Op. 1999-5 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1999 WL 1845749

The Association of the Bar of the City of New York
Committee on Professional and Judicial Ethics

TOPIC: LAWYER'S OBLIGATIONS REGARDING DISPOSITION OF ORIGINAL WILLS HELD FOR SAFEKEEPING WHERE THE TESTATOR CANNOT BE LOCATED AND THE LAWYER IS RETIRING OR THE FIRM IS DISSOLVING

Formal Opinion Number 1999-05
May, 1999

DIGEST : A lawyer who is retiring or whose firm is dissolving may not dispose of the original Will of a missing client, except by assuring its continued safekeeping indefinitely or in accordance with law.
*1 CODE: EC 4-6; EC 6-1; DR 9-102(C), 9-102(F).

QUESTION

A lawyer's files or safe deposit box may contain copies of original Wills of clients that were left with the lawyer for safekeeping when the Will was executed. When anticipating retirement or planning for law firm dissolution, what are the lawyer's obligations with regard to disposition of original Wills in the lawyer's possession if the testator cannot be located?

OPINION

It is a fairly common practice for a client to leave an executed original Will in the custody of the drafting lawyer for safekeeping. The issue addressed by this Opinion is the lawyer's duty regarding the disposition of such original Wills upon retirement or law firm dissolution if the testator cannot be located.

The Code of Professional Responsibility contains several provisions of relevance to the lawyer's duty with regard to property held for safekeeping. When the lawyer has custody of client "property," DR 9-102(C)(2) requires the lawyer to place that property in "a safe deposit box or other place of safekeeping as soon as practicable" and "[m]aintain complete records" of that property. Of course, if a client asks for the return of an original Will, the lawyer must return it "promptly." DR 9-102(C)(4).

Clearly, the lawyer may notify the client of the lawyer's impending retirement or law firm dissolution and request instructions for disposition of the original Will. *See* N.Y. State 460 (1977) ("Circumstances under which lawyers may dispose of closed files"). With regard to retiring lawyers, EC 4-6 suggests that the lawyer "might provide for the personal papers of the client to be returned to the client." The lawyer choosing to return Wills or request client instructions for disposition should make reasonable efforts to locate the client or the client's representative. *Cf., e.g.,* Fla. 81-8 (1981) (lawyer intending to dispose of clients' files can send "a letter to each client's last known address or, if there is no address available, by publication in the local newspaper, requesting the client either to pick up his files or to give permission for their destruction").

*2 Although DR 9-102(F) covers those situations in which a client cannot be located and the property held is "money," the Code does not address directly the lawyer's obligations when other types of property of missing clients, such as original Wills or documents, are held.

Massachusetts 76-7 (1976) considers the obligations of a successor lawyer who is acting as custodian of the predecessor's records and holds original Wills for clients who cannot be located. Viewing the matter as governed by EC 6-1 ("[T]he lawyer should act with competence and proper care in representing clients"), that Opinion states that an attorney who accepts a Will for safekeeping is obligated to "use reasonable care to keep it secure" and, if returning the Will to testator, must make sure it reaches the client safely. The Opinion refers to the attorney's alternative under Massachusetts law of depositing the will with the appropriate court. It adds that:

> If the lawyer cannot find the testator and does not wish to deposit the will with the court, he remains obligated to use reasonable care to keep it secure. While he need not watch the obituary columns, if he does learn of the testator's death, [Massachusetts law] requires him either to deliver the will to the executors named therein, or to file it, within 30 days after he receives notice of the testator's death, in the probate court having jurisdiction over the proceedings.

Other published Opinions on a lawyer's responsibilities regarding the disposition of ordinary closed files recognize that certain types of documents may require special treatment, such as "documents contained in the file that either the lawyer or the client is required by law to maintain or any documents that the client would foreseeably need to establish substantial or property rights ...." (N.Y. State 623 (1991) ("What procedures should a lawyer undertake when disposing of closed files and to what extent are those procedures affected by dissolution of the lawyer's firm?"). Absent instructions from the client, such material "should be further maintained by the lawyer according to law and/or the reasonably foreseeable needs of the client." *Id.*

In addressing lawyer obligations with respect to closed files in general, N.Y. State 460 (1977) concluded that:

> In the final analysis, whether and to what extent the closed files of a client must be preserved will be determined by applicable rules of law, the legitimate interests of the client in the preservation of his files and such instructions as he may issue in connection therewith, as well as the sound judgment of the lawyer who is duty bound to take into account both the mandate of the law and the foreseeable needs of his client.

***3** *See also* ABA Informal Opinion 1384 (Mar. 14, 1977) (an attorney should not destroy or discard original documents, the return of which "could reasonably be expected by the client," without the client's consent; retention of files is a matter of the lawyer's discretion, taking into account the nature of the file).

We agree with the principles set out in those authorities and believe that the lawyer -- whether the original drafter, her firm, or a successor lawyer or firm -- must keep the original Will of a missing testator secure, comply with any obligations of law regarding the original Will, or, if appropriate, employ procedures provided by law to deposit the Will with the court. However, this Committee does not opine on statutory or decisional law regarding the obligations of one in possession of an original Will or pertaining to the filing of Wills with the court and, therefore, does not address the legal requirements that may apply. We note that to the extent that such legal -- as opposed to ethical -- issues are implicated by the disposition of a testator's original Will, those issues are beyond the scope of this Committee's jurisdiction.

Upon retirement or dissolution, then, the lawyer should index the Wills of missing clients and place them in storage or turn them over to a successor lawyer who is assuming control of the lawyer's or firm's active files, while preserving the confidences and secrets of the testator/client. *Cf.* ABA Formal Opinion 92-369 (1992) (discussing the obligations of the sole practitioner to make arrangements for such indexing and turnover following the lawyer's death); DR 4-101 (regarding client confidences and secrets); DR 2-111(b) (preserving confidences in the context of sale of a law practice).

We note that the Nassau County Bar Association Opinion 89-43 (1989) addressed the potential burdensomeness to a successor law firm holding a client's original documents and concluded:

> It is no answer to the discharge of the custodial counsels' obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not flow solely from an attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent in the lawyer's enjoyment of his professional status, and his concomitant

obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any "client," those burdens must be fully discharged even if the benefits of the custody were minimal or non-existent.

CONCLUSION

For the foregoing reasons, we conclude that a retiring lawyer -- or one whose firm is dissolving -- may communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills. However, as to those clients who cannot be located, the lawyer's obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law. The original Wills remaining in the lawyer's possession could be placed in storage or in the custody of a successor attorney (indexed and stored in a manner that will protect client secrets and confidences), unless it is appropriate to use available procedures for filing original Wills with a court for safekeeping.

NYC Eth. Op. 1999-5 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 1999 WL 1845749

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NYCLA Eth. Op. 725 (N.Y.Cty.Law.Assn.Comm.Prof.Eth.), 1998 WL 707703

New York County Lawyers' Association Committee on Professional Ethics

TOPIC: RETENTION OF CLOSED CLIENT FILES/PAPERS

Opinion No. 725
1998

DIGEST: A Lawyer Should Take Reasonable Steps Under the Circumstances to Retain Closed Client Files in Light of (1) Legal or Ethical Rules Pertaining to Document Retention, and (2) the Client's Wishes Regarding the Files
*1 CODE: DR 1-102(A)(5); DR 4-101(B)(1); DR 5-105(E); DR 9-102(D); EC 1-5; EC 4-6

QUESTION:

When and how may a lawyer discard closed client files?

OPINION:

Inquirer is an attorney no longer representing private clients. He anticipates losing access to his current storage space for former clients' files, and he inquires how long he must keep the closed files, implying that he would prefer to discard them if possible.

Although Inquirer no longer represents private clients, he still is subject to ethical restraints on the length of time he should keep former clients' documents and on the manner of their disposal. Restatement (Third) The Law Governing Lawyers, § 58, cmt. b (Proposed Draft, May 1996). These restrictions are not rigid. They vary case-by-case in light of the concerns of lawyers, clients and the justice system. On the one hand, lawyers wish to avoid unreasonable burdens and expenses from storing closed files. On the other hand, clients and the justice system have an interest in preserving important documents in the event they are needed after a client's file has been closed. *See* N.Y. State Op. 460 (1977) (hereinafter, "Op. 460"). How these interests are balanced in a particular case usually depends on the type of documents in question.

The fewest ethical implications are raised by documents which belong to the lawyer. Unless the lawyer has an independent legal duty to retain such documents, he is free to discard them absent "extraordinary circumstances manifesting a client's clear and present need for such documents." N.Y. State Op. 623 (1991) (hereinafter, "Op. 623"). Note, however, that whether a document in a client's file "belongs" to the attorney, or instead belongs to the client, is a legal question beyond the scope of this Opinion. *See* N.Y. City, Formal Op. 1986-4 (1986)(hereinafter, Op. 1986-4); *Sage v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997).

At the other end of the spectrum are documents which are subject to a specific legal duty of retention. An attorney should not discard such documents. Ops. 460 and 623; DR 1-102(A)(5); EC 1-5. But whether the attorney or, instead, the client is responsible for keeping the documents depends on which person bears the legal duty.

*2 The lawyer may be subject to an independent duty of retention from several sources. For example, DR 9-102(D) requires lawyers to keep originals or copies of certain important records (*e.g.*, retainer and compensation agreements) for seven years. And DR 5-105(E) requires a law firm to maintain a system for checking potential conflicts of interest, which may necessitate retention of certain documents in closed client files. *See* Roy Simon, *Do I Have to Keep These Old Files?*, The N.Y. Prof. Resp. Rpt., pp. 1-2 (April 1988). Alternatively, a court might require a lawyer to retain certain records. *See, e.g.*, 22 N.Y.C.R.R. §§ 603.15, 691.12(b) (a New York Appellate Division's rules concerning lawyer's records). Other laws, rules or regulations may apply as well. Whatever the source, such duties are personal to the lawyer. The lawyer therefore cannot satisfy his ethical obligations by delivering such documents to the client for safekeeping along with the client's file. The lawyer should keep them himself. Ops. 460 and 623.

This is not necessarily so with respect to documents a client is obligated to keep. Like a lawyer, a client's duty to retain documents may arise from several sources, *e.g.*, accounting, securities, corporate or tax laws or regulations. The lawyer

ethically may deliver these documents to the client so long as the lawyer informs the client of the pertinent legal obligations. If, however, the lawyer cannot deliver the documents, then they should be kept on the client's behalf for at least the legally prescribed period, or for longer if the client might have a foreseeable need for the documents after expiration of the period mandated by law. *Id.*

Between these extremes are the remaining majority of documents likely to be found in a client's file. As a first principle, these client documents may be discarded at a time and in a manner consistent with the client's instructions, if any. *Id.*; N.Y. City No. 624 (1974)(hereinafter, "Op. 624"). Often, however, a client will not have issued instructions before the file is closed. In such cases, the attorney should make reasonable efforts to return the file to the client, preferably by sending a letter informing the client of the attorney's intent to discard the file, offering to return the file to the client, describing documents in the file that the client has a legal duty to retain, if any, and describing "any documents that the client would foreseeably need to establish substantial personal or property rights." Op. 623. Providing such information satisfies the attorney's duty to ensure the client is well-informed. EC 7-8. Among other things, a client's "foreseeable need" for a document may depend on whether the client has a copy of the document, although this may not be determinative.

***3** Despite an attorney's reasonable efforts, from time-to-time a client will not be able to be reached or will not respond to the attorney's letter. The attorney in such circumstances may discard the client's file, except for documents that the client has a legal duty to retain and documents that the client foreseeably might need. These should be retained as discussed above. Ops. 460 and 623. It will also happen from time to time that the client is incapacitated when the attorney attempts to contact the client. The lawyer then may deliver the closed files to the client's legal representative, if any. *Id.*; EC 7-11 and 7-12.

Finally, two further points should be noted. First, an attorney always should discard documents in a manner consistent with the attorney's duty to maintain client confidences. Ops. 460 and 623; DR 4-10(B)(1) and (D); EC 4-6. Second, in some circumstances it may be appropriate for an attorney to record the contents of a client's file electronically or on microfilm instead of retaining the physical file, so long as the evidentiary value of such documents will not be unduly impaired by the method of storage. Op. 624.

CONCLUSION:

Before discarding his former clients' files, Inquirer should consider his obligations to his clients and to the legal system with respect to the documents in the files, as outlined above. Only if he has satisfied these duties should he discard the files.

NYCLA Eth. Op. 725 (N.Y.Cty.Law.Assn.Comm.Prof.Eth.), 1998 WL 707703

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NY Eth. Op. 641 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1993 WL 57239

New York State Bar Association
Committee on Professional Ethics

TOPIC: FILES; DISPOSITION PROCEDURES; COMPLIANCE WITH RECYCLING REGULATIONS

Opinion Number 641
February 16, 1993

DIGEST: A lawyer must comply with an ordinance that requires recycling of all office paper. Confidences and secrets of clients must be given appropriate protection.

*1 CODE: Canon 4, DR 4–101(A), DR 4–101(B), DR 4–101(C)(1), DR 4–101(C)(2), EC 4–6.

QUESTIONS

(1) Does the Code of Professional Responsibility exempt lawyers from compliance with a recycling law?

(2) If not, what duties does the Code impose upon lawyers when complying with a recycling law?

OPINION

The New York Solid Waste Management Act of 1988 required all municipalities to adopt a local law or ordinance by September 1, 1992, requiring separation of recyclable and reusable material from other solid waste. Paper is one of the categories of waste that must be recycled.

A lawyer's representation of a client always must be performed within the bounds of the law. Canon 7. Lawyers have no special license to violate the law. Cf. former Canon 32. Accordingly, lawyers are required to comply with laws of general applicability, including recycling laws in the locality in which they practice. Laws of general applicability, however, do not override the Code. Thus, a lawyer who is subject to a recycling law must ensure that compliance with that law does not entail violation of the lawyer's obligation to maintain the confidentiality of client information under Canon 4.

One of the hallmarks of the lawyer-client relationship is the preservation of the confidences and secrets of the client. Canon 4. Except when permitted under DR 4–101(C), a lawyer may not knowingly reveal confidences or secrets of the client. DR 4–101(B). This obligation continues after the termination of employment. EC 4–6. Some lawyer workpapers are clearly covered by the definition of confidences (information protected by the attorney-client privilege under applicable law) or secrets (information that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client). DR 4–101(A). Other papers are not. The manner in which the lawyer must dispose of papers belonging to the lawyer or the client depends upon the content of the papers.

DR 4–101(C)(2) allows a lawyer to reveal confidences and secrets of a client when revelation is required by law. Recycling ordinances, however, do not require the revelation of confidential client information; they merely prevent the disposition of workpapers in an ecologically unsound manner. Accordingly, we do not believe that DR 4–101(C)(2) exempts a lawyer from otherwise applicable recycling laws.

*2 In N.Y.State 623 (1991), we discussed the procedures a lawyer should undertake when disposing of closed files. In general, we stated that client papers in closed files should be "destroyed" or "discarded, respecting the obligation to maintain confidentiality." The care with which the lawyer must dispose of client papers depends upon the sensitivity of the papers. The degree of sensitivity of the papers depends upon whether disclosure would be detrimental or embarrassing to the client. Naturally, a paper which may have been sensitive at the time of the representation may not possess the ability to harm or embarrass the client years after the representation has ended.

It follows that a lawyer must be careful as to how workpapers containing confidences and secrets are disposed. Thus, a lawyer must be familiar with any applicable recycling laws, and should know what will happen with discarded papers placed

in the trash or into recycling containers. If these papers will be open to inspection by those outside the lawyer's office, it would be unacceptable for the lawyer to place the papers in the container in their original form. For example, if the papers are placed in opaque containers, such as black plastic bags, and are not sorted before they are combined with other papers for recycling, the lawyer may place workpapers in the bags. If, however, the papers are collected and sorted or are placed in clear plastic bags and the lawyer believes that the contents could be viewed, then the lawyer will have to shred the documents or make other arrangements to comply with the recycling law.

The lawyer must screen all papers either at the time of filing or the time of disposition to determine whether disposal and recycling in their original form is appropriate or whether shredding or another form of disposition is required.

CONCLUSION

A lawyer must comply with an ordinance requiring recycling of office paper in such a way to protect confidences and secrets of clients.

NY Eth. Op. 641 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1993 WL 57239

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NY Eth. Op. 623 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1991 WL 341388

New York State Bar Association
Committee on Professional Ethics

TOPIC: CLOSED FILES; DISPOSITION PROCEDURES; DISSOLUTION OF LAW FIRM.

Opinion Number 623
November 7, 1991.

Digest: Procedures for disposing of closed files; partners' ethical obligations are joint and several notwithstanding dissolution.

*1 Code: DR 1–102(A)(5), 4–101(B)(1), 4–101(D), 9–102(B), 9–102(D), 9–102(G); EC 1–5, 4–4, 4–6, 7–1, 7–8, 7–11, 7–12.

QUESTION

What procedures should a lawyer undertake when disposing of closed files and to what extent are those procedures affected by dissolution of the lawyer's firm?

OPINION

In N.Y.State 460 (1977), this Committee addressed the circumstances under which a lawyer properly may dispose of closed files. What follows elaborates our earlier opinion and considers in greater detail the procedures which should be undertaken by an ethically sensitive lawyer.

Where a file has been closed, except to the extent that the law may require otherwise, all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents. Cf., e.g., N.Y.State 398 (1975); N.Y. City 1986–4 (1986). Absent a legal requirement or extraordinary circumstances, the lawyer's only obligation with respect to such documents is to preserve confidentiality. See DR 4–101(B)(1) and (D); also see EC 4–4, EC 4–6. Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact. See, e.g., 7 N.Y.Jur2d § 169.

With respect to documents that belong to the client, as a first step of general application, the lawyer should offer to make them available to the client. Preferably, that offer should be in writing and announce the lawyer's intent to dispose of the file. If the client fails to respond within a reasonable period of time or cannot be contacted (after reasonable efforts to do so have been undertaken by the lawyer), the lawyer may dispose of the file, including such documents as may belong to the client, subject to the qualifications and procedures hereinafter discussed.

*2 If the lawyer has no reason to believe there are either any documents contained in the file that either the lawyer or the client is required by law to maintain or any documents that the client would foreseeably need to establish substantial personal or property rights (documents in need of salvaging, hereinafter collectively referred to as "DINS"), and the client fails to respond or provide instructions to the lawyer within a reasonable period of time, the file may be destroyed without further action on the part of the lawyer. In destroying the file, the lawyer should use means that will reasonably assure that whatever confidential material may be contained therein will not be compromised. See e.g., DR 4–101(B)(1) and (D); EC 4–6.

As we explained in Opinion 460:
The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients.

***

Those files and records that do not contain material for which the client ... foreseeably will have need [and which are not

required by law to be further maintained], may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.

If the client responds to the lawyer's notice, and the lawyer has reason to believe that there are no DINS in the file, disposition of the file may be in accordance with the client's instructions. See, e.g., N.Y. County 624 (1974); also see, e.g., Fla.Op. No. 63–3 (1964), 38 Fla.B.J. 209 (1964), indexed at 715, O. Maru, Digest of Bar Association Ethics Opinions (1970) (hereinafter "Maru's Digest").

Where the lawyer has reason to believe that DINS might be in the file, the file should be inspected prior to communicating with the client concerning its disposition. Upon inspection of the file, all DINS should be identified. Any communication with the client concerning disposition of the file should note the existence of such documents and the need to preserve them. See, e.g., EC 7–8; compare EC 7–11 with EC 7–12 (relating to clients under a disability).

The obligation to inspect closed files is especially important where the lawyer is personally responsible for the preservation of the documents in question. Where such documents exist, ordinarily the lawyer will not be able to discharge the legal obligation to maintain them by transferring their possession to the client. In this connection, it is noted that lawyers occasionally are required by law to maintain certain documents for stated periods of time. See, e.g., DR 9–102(B) (formerly, in relevant part, 22 NYCRR §§ 603.15[a], 691.12 [a] [Rules of the First and Second Departments prescribing the preservation of certain records required to be maintained by lawyers]; DR 9–102(D) (requiring retention of escrow account records for seven years). A lawyer should not deliberately or recklessly destroy such documents during the period that they are required to be retained; to do so would both violate the law and offend the ethics of our profession. See, e.g., DR 1–102(A)(5); EC 1–5. Hence, where the lawyer has reason to believe that such documents may be contained in a closed file, the lawyer has an obligation to examine the closed file for such documents before destroying it; and, absent specific judicial authorization, the lawyer may not deliver such documents to the client for safekeeping during the period that the lawyer is required to maintain them. See, e.g., EC 7–1.

***3** If the client fails to take possession of the file or to provide the lawyer with appropriate instructions concerning its disposition within a reasonable period of time after being notified of the lawyer's intention to dispose of it, any DINS which the lawyer knows are contained in the file should be further maintained by the lawyer according to law and/or the reasonably foreseeable needs of the client. The balance of the file may be discarded, respecting the obligation to maintain confidentiality.

Documents that the law requires the client to maintain—as distinguished from those that the lawyer is required to maintain—present a different problem. If the lawyer is or becomes aware of the fact that such documents are contained in the file, the client should be so informed. If the client fails, refuses or is unable to recover the documents, the lawyer should attempt to forward same to the client. If that is not possible, the lawyer ethically may be obliged to retain the documents for the period prescribed by law.

Moreover, if the DINS are those which the client (as distinguished from the lawyer) is required by law to maintain or which the client will need to establish substantial personal or property rights, the lawyer may charge the client with the cost of further maintaining such documents, provided the lawyer has given the client notice of the lawyer's intention to do so. Upon expiration of the period of retention mandated by law or perceived need (as the case may be), the remaining DINS may be destroyed by the lawyer without further notice to the client.

In determining whether material should be classified as DINS on the basis of foreseeable need, the lawyer may consider whether the client previously has received duplicate originals. Although not necessarily dispositive of the issue, such prior receipt on the client's part will militate strongly against a finding of foreseeable need. Similarly, although not dispositive, where the document is required to be maintained by law, the period of retention prescribed may be regarded presumptively as the period of foreseeable need. N.Y.State 460, supra ("the period of preservation mandated by law will often provide a reasonable standard by which to assess future need").

Where the client is deceased or otherwise incapacitated to the extent that he cannot handle his or her affairs, the lawyer may deliver the closed file to the client's legal representative. N.Y.State 460, supra. Under such circumstances, it may be

considered sound practice for the lawyer to instruct the client's representative concerning the breadth of the evidentiary privilege attaching to such documents. See, e.g., Fisch, New York Evidence, § 530 (and cases cited therein). Even where the representative has been discharged, it may still be legally and ethically appropriate for the lawyer to consult with the representative concerning the disposition of closed files. Cf., e.g., Willets v. Haines, 96 App.Div. 5 (1st Dep't 1904), aff'd 182 N.Y. 543 (1905).

***4** When a law firm dissolves or a lawyer retires from practice, additional questions arise concerning the disposition of closed files. Dissolution or retirement from practice clearly does not relieve the lawyer of a professional obligation to maintain closed files. See e.g., N.Y.State 460, supra; see also, EC 4–4, EC 4–6.

If the lawyer does not have personal knowledge of the closed files (so that the lawyer might reasonably be said to be in a position to know whether DINS are contained in any given file), on dissolution of the firm, it may be necessary to examine all closed files. Compare, e.g., N.Y. City 1986–4 (1986), N.Y. City 82–15 (1982 [published 2/6/85]), and ABA Inf. 1384 (1977) (general guidance on disposition of closed files) with Wis.Mem.Op. April 6, 1971, Wis.B.B. 58 (1974), indexed at 10250, 1975 Supplement to Maru's Digest (1977) (upon dissolution of law partnership, closed files should be examined to determine if there are documents or papers of value that should be returned to the clients, and insofar as possible, all past clients with files should be notified when they may reclaim such files); Fla.Op. No. 71–62 (1972), 1972 Fla.Op. 12, indexed at 8138, 1975 Supplement to Maru's Digest (1977) (when changing membership in professional association practicing law, instructions of client should be dominant consideration in disposition of files, whether open or closed; written inquiry should be sent requesting client's instructions).

The professional obligation to maintain closed files or to arrange for their disposition is not limited to those members of the firm who worked on the file when it was active. In N.Y.State 398 (1975), we held that, absent a special agreement to the contrary, the clients of a law partnership employ the firm as an entity and not a particular member of the firm. Consistent with that holding, the ethics committee of the Nassau County Bar Association determined that both partners of a two-member firm in dissolution were fully responsible to every client of the firm, and the lawyers' separate agreement to the contrary could not diminish each lawyer's responsibility to the clients of the firm. Nassau County 40–88 (1988). The recently amended provisions of DR 9–102(G) are also consistent with this principle of joint and several responsibility in requiring that "the former partners or members [of the firm in dissolution] shall make appropriate arrangements" for the maintenance of the records which the firm was required by law to maintain. Cf., e.g., Matter of Dahowski, 103 A.D.2d 354, 479 N.Y.S.2d 755 (2d Dep't 1984).

It is ethically immaterial that the economic burden of disposing of closed files may be far in excess of any practical benefit to the parties involved. As recently observed by the ethics committee of the Nassau County Bar Association, referring to a custodial attorney's release of files to the client of a deceased attorney:

> ***5** It is no answer to the discharge of custodial counsels' obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not follow solely from the attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent in the lawyer's enjoyment of his professional status, and his concomitant obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any "client," those burdens must be fully discharged even if the benefits of the custody are minimal or non-existent.

Nassau County 43–89 (1989); see also, e.g., N.Y.State 398 (1975); N.Y.State 341 (1974); N.Y. City 87–74 (1988).

It should be emphasized that this opinion is not intended to create an ethical obligation to preserve files where none exists in law. Ultimately, the disposition of closed files is a matter which will come to rest on the sound judgment of counsel. Absent controlling principles of substantive law, when and under what circumstances clients ought to be consulted are essentially matters of judgment. Good practice, common sense and courtesy should remove as much uncertainty from the process as

feasible, but the ethics of our profession suggest that a considerable amount of flexibility in articulating specific procedures is necessary. As noted by the ethics committee of the Association of the Bar of the City of New York:

> We do not believe that there is any hard and fast rule as to when the client should be contacted, and good judgment should govern in making this decision. While an attorney is not ethically obligated to do so, the Committee believes that it is good practice to discuss with the client the retention and disposition of the files at the time of the termination of the matter, or, in appropriate circumstances when there is a continuing client relationship, at the conclusion of the representation. N.Y. City 1986–4, supra.

Consistent with the preceding statement and our desire to avoid hard-edged rules, this Committee offers this opinion for the general edification of the bar.

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NY Eth. Op. 460 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1977 WL 15688

New York State Bar Association
Committee on Professional Ethics

TOPIC: PRESERVATION OF CLOSED FILES

Opinion Number 460
February 28, 1977

DIGEST: Circumstances under which lawyers may dispose of closed files.

*1 CODE: EC 1-5, 4-6, 7-1, 7-8, 7-11, 7-12 DR 1-102(5), 4-101

QUESTION

Under what circumstances may a lawyer properly dispose of closed files relating to his client?

OPINION

The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients. Indeed, the Code of Professional Responsibility is remarkably silent on this subject. What is required of lawyers must for the most part be determined in the light of common sense and certain general principles of considerably broader application.

To the extent that the law may impose a duty upon the lawyer to preserve certain records relating to his client, obviously, it would be unethical for the lawyer to dispose of them prior to the time mandated by law. EC 1-5; DR 1-102(5); also see, e.g., 22 NYCRR 603.15, 691.12(b), and 1022.7(a) (Rules of the Appellate Divisions which provide for the preservation of certain records relating to the recovery of funds on behalf of a client).

Similarly, to the extent that the law may impose a duty upon the client to preserve certain records, where custody of those records has been given over to his lawyer, it would be improper for the lawyer to dispose of such records during the period for which the client is required to maintain them. See, EC 7-1. After the period mandated by law for the preservation of these records, the lawyer may still be ethically bound to preserve them where the client foreseeably will have need to use such records; however, the period of preservation mandated by law will often provide a reasonable standard by which to assess future need. Of course, these records may at any time be delivered to the client, but care should be taken by the lawyer to advise his client of the need to preserve them. See, EC 7-8; cf., EC 7-11 and EC 7-12 (relating to incapacitated clients).

As to those kinds of records that the law does not require be preserved, the length of time for which they should be retained may be determined simply on the basis of the client's instructions or, absent such instructions, on the basis of foreseeable need. See, N.Y. County 624 (1974); also see, Fla. Op. No. 63-3 (1964), 38 Fla. B.J. 209 (1964), indexed at 715, O. Maru, Digest of Bar Association Ethics Opinions (1970).

*2 Where the client is deceased or otherwise incapacitated to the extent that he cannot handle his affairs, the lawyer may properly deliver his closed files to his legal representative.

Those files and records that do not contain material for which the client or his estate foreseeably will have need, may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.

Even in those instances where it is necessary to preserve the closed files or records of a client, original documents may, under certain circumstances, be destroyed provided suitable arrangements have been made to copy them and the legal effect or evidentiary value of such records is not thereby impaired. In this connection, N.Y. County 624, supra, discusses the relevant ethical principles which bear upon the microfilming of a client's file and concludes that the lawyer should satisfy himself "that microfilmed copies may be introduced into evidence or otherwise used in place of the originals if the need therefor

should . . . arise."

A lawyer, upon termination of his practice may properly cause the closed files of his client to be delivered to another lawyer, but the receiving lawyer will hold them only as custodian. See, N.Y. City 803 (1955); also see, Ill. Op. No. 180 (1960), indexed at 940, O. Maru, Digest of Bar Association Ethics Opinions (1970). Throughout, care should be taken by the lawyer to preserve the confidences and secrets of his client. DR 4-101. Thus, EC 4-6 explains:

> "The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment * * * A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration."

In the final analysis, whether and to what extent the closed files of a client must be preserved will be determined by applicable rules of law, the legitimate interests of the client in the preservation of his files and such instructions as he may issue in connection therewith, as well as the sound judgment of the lawyer who is duty bound to take into account both the mandate of the law and the foreseeable needs of his client.

Whenever possible, the client should be consulted concerning the disposition of his files and encouraged to preserve them on his own. Lawyers are advocates and advisers. They are not warehousemen or perpetual repositories for the files of their clients. A good lawyer need not retain his clients by holding on to their files and a poor one will soon learn that such tactics avail him nothing but additional expense.

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IV

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ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

Creating a File Retention and Destruction Policy

A CNA PROFESSIONAL COUNSEL GUIDE FOR LAWYERS AND LAW FIRMS

The practice of law encompasses a continuous flow of information in and out of law firms. Lawyers and law firms must manage an increasing amount of data, both physical and digital, over a vast array of evolving devices and media. Managing the data includes determining:

- what information needs to be maintained
- what can or should be discarded
- what methods will be used to store and retrieve important data, and
- instituting safeguards so that client files and other information are protected.

In view of these responsibilities, lawyers and law firms cannot rely on *ad hoc* record-keeping methods. Instead, they should develop and follow a cohesive set of procedures for managing and maintaining the records used in their practice – both their own internal records and client files with which they are entrusted. Moreover, such procedures should apply to the entire record retention lifecycle, from creation to final disposition.

For the purposes of this guide, such a set of procedures will be referred to as a **Records Management Plan.**

Records Management Plans Help Manage Professional Liability Risk

A Records Management Plan ("**RMP**") represents a comprehensive set of procedures to manage a law firm's information and data. The scope of the RMP must be all-encompassing, applying to all information or data received and transmitted within the organization, as well as governing the conduct of every attorney and employee.

Formal RMPs provide guidance to firm personnel about their responsibilities and help manage risk by:

- protecting client confidences;
- preserving client property;
- reducing misunderstandings with clients about records maintenance;
- improving client communications by easily accessing relevant documents;
- delineating the end of work on a specified matter;
- protecting attorneys in the event of a claim or other adversarial actions;
- complying with applicable rules of professional responsibility; and
- fulfilling fiduciary obligations.

For these reasons, law firms must act responsibly and consistently in handling the information and records they create, use and exchange on a daily basis. A formal, written RMP provides clear direction to law firm staff about how records should be created and maintained, how long they should be preserved, how they should be destroyed, and who should oversee the process. It also provides guidance about implementation, enforcement, and communication with clients about document handling. Formulating a written policy requires an initial investment of time and effort. It also serves to establish a consistent approach to records management that becomes an integral part of the firm's quality control program and facilitates training of new employees.

RMPs Should Distinguish Records from Non-Records

Prior to developing rules addressing records management procedures, it is important to define what constitutes a "record" that should be maintained per the RMP and what does not comprise a "record". Not all information or data produced or used by lawyers is an actual record. While records must be maintained by a lawyer or firm beyond the termination of a representation, non-records need not be.

Non-records v. records. Some information or data produced or used by lawyers does not rise to the level of a record. These "non-records" include routine administrative data or communications, transient memoranda or notes, and unused or insignificant drafts or copies with limited and short-term value or usefulness do not need to be kept.

Appropriately classifying records and non-records according to their content and importance, rather than solely by format, is essential when developing the RMP. Non-records can be destroyed at any time, before or after termination of the engagement, unless subject to a discovery hold order. The most efficient approach is to encourage immediate disposal of non-records once they are no longer needed. This procedure will avoid cluttering the file with unnecessary data and make file review upon closure less time-consuming. At a minimum, non-records should be purged from the file before initial archiving.

Generally, records should be maintained sufficiently to preserve evidence in the event it is needed in defense of a professional liability claim. . . . While it is impossible to predict with certainty the applicable limitations period for each and every client matter handled by the firm, ***a good rule of thumb for an initial retention period for most files is ten years.***

RMPs Need to Account for Client Files and Firm Records

Once non-records are identified and discarded, the remaining documents should fall into one of two categories: **client files** and **firm records**. While the majority of this guide will discuss how to manage client files, an effective RMP should address how to manage both categories of documents.

Client Files

Client files comprise many types of documents, many of which are generated by or exchanged between lawyer and client to facilitate the legal services rendered and documents generated through research or discovery performed on the client's behalf. One state bar ethics opinion has itemized client files into seven basic types of documents:

1. documents and other materials furnished by the client;
2. correspondence between the lawyer and client;
3. correspondence between the lawyer and third parties;
4. copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf;
5. copies of contracts, wills, corporate records and other similar documents prepared by the lawyer for the client's use;
6. administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's creditworthiness, time and expense records, or personnel matters; and
7. the lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including investigative reports, prepared for the lawyer for the use of the lawyer in the representation.[1]

During the pendency of a case or matter, lawyers rely on well-organized case files in order to represent clients in an efficient manner. Upon conclusion of a case or matter, however, questions arise as to what to do with the client file. An effective RMP will anticipate and provide answers to the questions posed below.

When should the client be informed as to how the client file will be handled?

Law firms should proactively approach the issue of file retention and destruction with clients at the outset of the attorney-client relationship. A specific file retention and destruction provision in the engagement letter that encapsulates the relevant portions of their RMP should be incorporated. Such a provision in the engagement letter provides the opportunity for the law firm to explain what documents will be returned to the client, what materials the law firm will retain, and how long the file will be maintained until it is destroyed.

Having the client agree to these terms upfront saves the law firm from acting without client consent if the client disappears or dies during or after the attorney-client relationship. Similarly, law firms may wish to inform clients on how their data will be stored, especially if they are employing cloud computing services or other newer technologies. The CNA *Lawyers' Toolkit 3.0* contains sample engagement letter language on these topics that lawyers may wish to use when crafting their own engagement letter provisions.

1 Illinois State Bar Association Adv. Op. No. 94-13 (January 1995)

In addition, when a law firm concludes a matter for a client, a closing letter should be sent to the client that, in part, reiterates the relevant language in the file retention and destruction provision of the engagement letter. The CNA *Lawyers' Toolkit 3.0* contains a sample closure letter. Some law firms wait to inform the client of their file retention and destruction policy at the matter's conclusion. However, waiting may result in some clients may object to the law firm's policy. The client also may demand different and more generous terms or may have disappeared or died prior to the matter's conclusion. Securing the client's consent at the outset of the attorney-client relationship avoids these problems and provides for a more orderly implementation of the RMP.

When and how should the client file be organized for closing?

Once a matter or case is concluded, the client file should be organized for storage. As noted earlier, a closure letter should be sent to the client, informing the client that the matter or case has concluded. The closure letter provides the client with an opportunity to inform the lawyer if, in the client's view, the client expects the lawyer to perform additional legal services with respect to the matter. In some jurisdictions, a closure letter also can help to delineate the commencement of any applicable limitations period for the filing of professional liability lawsuit regarding the particular matter or case.

All legal assistants, secretaries and attorneys who worked on the matter will likely possess relevant material in either electronic or paper formats. An individual most familiar with the work performed and the staffing of the matter (often a legal assistant or paralegal) should be designated to compile this material for review and preparation for retention or destruction.

What about electronically stored information?

Electronic documents may exist in several formats and may be duplicated in the ordinary course of their creation and distribution. Copies may reside on central servers, employee smart phones, desktop or laptop hard drives, tablets, USB flash drives, and email file folders. All legal assistants, secretaries and attorneys who worked on the matter will likely possess relevant material in either electronic or paper formats. An individual most familiar with the work performed and the staffing of the matter (often a legal assistant or paralegal) should be designated to compile this material for review and preparation for retention or destruction. Electronic documents should be catalogued and identified to facilitate retrieval in the later stages of the process.

Another issue not to be overlooked is retention of legacy hardware and software – or conversion of records to updated technology – in response to technological upgrades or advances during document storage periods that could threaten to render the existing records obsolete. Law firms may wish to contract with third-party vendors that specialize in providing off-site document storage, retrieval and destruction services based upon client needs.

The initial investment to establish an electronic document management system to archive and retrieve electronic copies of files can be substantial depending on the technology used. Over time, however, storing records electronically is typically easier and less expensive than maintaining paper records. Electronic storage also can make record retrieval easier if file naming and filing conventions are instituted. Of course, law firms must exercise due diligence in selecting such vendors, enter into confidentiality agreements with them, and communicate to their clients that such vendors may be used to store their data. The CNA *Lawyers' Toolkit 3.0* contains a sample Electronic Data Communication and Storage provision.

How should client files be stored?

Firms should develop general policies regarding where and in what format archived files will be maintained. Paper records can be converted to electronic documents through use of digital scanners, permitting these records to be stored electronically. This method saves space and also serves to integrate electronic documents and paper portions of a client file. *See e.g., Missouri Sup. Ct. Adv. Comm.*, Formal Op. 127 (05/19/09) ("Except for intrinsically valuable or legally significant items, law firms are allowed to maintain a client's file exclusively in electronic format.")

While law firms may choose to convert paper documents to electronic documents, they also should consider the needs of their clients. Some clients of limited financial resources may prefer paper copies rather than electronic documents. One ethics committee recommended that lawyers employ a balancing test and seek the input of their clients in determining the format to use in producing a client file. *Id.*

Regardless of the format selected to store closed client files, paper or electronic documents or a combination of both, law firms must retain control of the records to the extent necessary to ensure their safety, security, confidentiality and overall integrity. A growing number of law firms are storing electronic documents via cloud computing services. Those state and local bar ethics opinions that have addressed the issues of cloud storage have stated that, in general, lawyers may use cloud computing services as long as they are reasonable in selecting a cloud vendor and employ reasonable precautions when utilizing such services.[2] All the opinions referenced ABA Model Rule 1.6, the confidentiality rule, or their respective state's corollary rule. ABA Model Rule 1.6 states, in relevant part:

> "(c) A lawyer shall make *reasonable efforts* to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." *(emphasis added)*

The Comments to ABA Model Rule 1.6 indicate that reasonableness will be determined by various factors, including the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.[3] Therefore, law firms must weigh these factors in deciding how they will store client files irrespective of whether using their own storage space or that of a third-party vendor and whether the files are in paper or electronic format.

Recent weather-related events such as hurricanes, tornadoes, storms, fires, and floods have damaged law firms and destroyed client files in the process. Criminals are also launching cyber attacks against law firms in an attempt to mine valuable client data. All law firms should have a business continuity plan addressing the exposure to internal and external threats and synthesizes assets to provide for an effective recovery process in the event such a threat manifests. Off-site storage of both paper and duplicate electronic records must be considered as a means to expeditiously recover records and to prevent client service disruptions in the event of a disaster. A frequently updated redundant record server in an off-site location may ensure the safety of electronic records if the law firm office becomes uninhabitable. See CNA's *The Big Picture: Enterprise Risk Management for Law Firms*.

2 See *Caution in the Cumulus: Lawyers Professional & Ethical Risks and Obligations Using the "Cloud" in Their Practice* at www.cna.com.
3 See ABA Model Rule 1.6, Comment 18.

What if the file is for a long-term continuing client?

If a completed case or matter was performed for a continuing client, some of the data and documents in the closed file may be needed for future reference in other legal matters being performed by the law firm for this client. In these instances, such information should be moved at the closing of the matter from the case file to a firm-wide active knowledge management system where it can be accessed as necessary. A note should be placed in the client file indicating the new location for the removed materials.

How long should client files be maintained?

While lawyers do not have a general duty to preserve all client files on a permanent basis, they are obligated to prevent the premature or inappropriate destruction of client files.[4] Preserving everything forever, however, is neither practical nor appropriate. When establishing retention schedules, law firms should consider ethical and legal recordkeeping requirements as well as the need for records to defend professional liability claims. Also, some records may have historical value to the firm or be useful in assisting future clients. Law firms should be realistic about the time and costs associated with implementing and maintaining multiple record retention periods. In most cases, the costs of reviewing a closed client matter file several times due to the existence of differing retention periods for various types of records far outweigh the costs associated with retaining some records longer than actually needed.

Generally, records should be maintained sufficiently to preserve evidence in the event it is needed in defense of a professional liability claim. The initial retention period, therefore, should be adequate to cover most professional liability statute of limitations periods, including statutes of repose, in the states in which the law firm practices. While it is impossible to predict with certainty the applicable limitations period for each and every client matter handled by the firm, **a good rule of thumb for an initial retention period for most files is ten years.** Ten years should exceed the statutes of limitations and statutes of repose applicable to most professional liability claims in most states.

Nevertheless, as significant differences exist among law firms with respect to both the nature of their practice and the jurisdictions in which they practice, each firm must analyze this issue and decide for itself an appropriate initial retention period, taking into account such factors as the jurisdictions in which they practice and their clients reside, and the specific practice areas the matters address. Longer initial retention periods may apply to certain matters and clients. For example, estate planning matters, the RMP might call for an initial retention period that considers the expected lifespan of the client. Importantly, limitations periods for such representations will likely probably not begin to run until after the client's death. For criminal law matters, some ethics committees and boards have advised that client files should not be destroyed while the client is alive.[5] For matters involving minor clients, initial retention periods should be set relative to when the minor reaches the age of majority.

4 D.C. Bar Ethics Opinion 283 (July 1998)
5 Advisory Committee on Professional Ethics Appointed by the New Jersey Supreme Court, Opinion 692 (Supplement) (October 28, 2002).

While not exhaustive, the following list contains examples where the law firm may consider maintaining the client file for more than 10 years:

- cases involving a minor;
- cases involving problem clients or where the law firm believes it may face liability;
- contractual matters where the contract is in effect for more than 10 years;
- corporate matters involving articles of incorporation, partnership, or limited liability agreements;
- criminal law matters;
- family law matters involving ongoing custody, child support, or alimony issues; and
- wills, trusts, and estate matters.

In addition, if the law firm has agreed in the engagement letter or by other contract with the client to maintain the client file for a time period longer than its customary RMP, that time period should be clearly noted and adhered to by the law firm.

What if a law firm receives a litigation hold order on a client file?

The most common basis for suspending destruction of a client file is the existence of a litigation hold order. A litigation hold order may be necessary due to a dispute between the client and another party about the underlying matter, or an actual or potential legal malpractice claim against the lawyer or firm. In such circumstances, the firm should follow established procedures to preserve the records according to applicable jurisdictional rules. In most cases, the litigation hold order will require that the *status quo* of the records subject to the hold be maintained and undisturbed.

The failure to initiate, enforce or comply with the terms of a litigation hold can result in the destruction of records that could have continued importance to the firm or to third parties. Therefore, it is critical for lawyers to be able to suspend their retention or destruction schedules, when necessary, to avoid tampering or destroying such records. Designated procedures for suspending or modifying regular record retention or destruction processes pursuant to a litigation hold or some other order or request are critical. Such a protocol will help to avoid allegations of spoliation and their associated consequences, as well as avail themselves of the safe harbor provisions under civil procedure rules. Lawyers also should review their legal malpractice insurance policies to determine if their insurance carrier offers coverage for subpoena assistance.

What steps should a law firm take prior to destroying a client file?

Once a file has been closed and the initial file review has been completed, the law firm should be able to continue to safely and consistently keep the client file without the need for constant review or re-assessment during the time period dictated by the RMP. At the end of the stated time period, however, the client file must be reviewed and its status re-examined before any records can be safely approved for destruction. The purpose of re-examining the client file at the end of the initial retention period is to create an added safeguard against the inadvertent, or even unlawful, destruction of critical or relevant records. These safeguards could mean the difference between compliance and potentially harmful sanctions or penalties. The review of the client file at this stage should be conducted by the lawyer originally responsible for the matter or, if that is not possible, by another attorney. During this review, the designated reviewer should confirm that the client file is accurately marked for destruction and that there is no overriding reason to suspend the destruction process at that time.

The RMP should provide guidance to the file reviewer about proceeding with destruction while permitting discretion on whether to continue maintaining the file. If records must be retained due to a special circumstance, the reason and approval for this exception should be documented in the stored file. The scheduled date for subsequent file review should be noted in the file and recorded in the law firm's calendar system. The RMP should include a definitive schedule to re-evaluate the need for continued retention of files beyond the initial retention period specified in the RMP. In addition, the RMP should designate a time limit for performing the file review prior to the scheduled time for destruction.

Should the law firm keep records of destroyed client files?

Before any client file is destroyed, a written file destruction log should be prepared, and retained as a permanent firm record. The log should include:

- the client name,
- a brief description of the content of files destroyed,
- the individual who authorized destruction,
- the date of destruction, and,
- if an outside vendor was used, the vendor that performed the service.

The description of file materials destroyed should be sufficiently detailed to be easily understandable to any reviewer. While a staff person can prepare the index, attorney approval should be required prior to document destruction, preferably the original responsible attorney. Moreover, if the law firm intends to employ a third-party vendor to destroy client files, the vendor should be thoroughly reviewed. Use of the vendor also should be communicated in writing to the client prior to any file destruction.

Some states, such as Illinois, require that lawyers maintain a permanent record of the name and last known address of all former and current clients. See *Ill. Sup. Ct. Rule 769.* Lawyers also may wish to add the client file information to such mandatory records so that all of the relevant information is easily accessible.

What if the client disappears but the client file contains valuable documents or personal property?

When the file destruction deadline nears, lawyers sometimes face the quandary of how to handle valuable documents within the file when the former client cannot be located. Valuable documents may include such items as stocks, bonds, securities, or an original will or deed. Lawyers must first make a diligent effort to locate the former client. Assuming such a search is unsuccessful; lawyers should examine the relevant jurisdictional law on unclaimed property.[6] Some states allow a lawyer to deposit an original will with the appropriate state agency.[7] If the governing property laws offer no solution as to unclaimed valuable documents or personal property materials, the lawyer may be required to petition an appropriate court for an order on how to resolve the issue. Under no circumstances should lawyers or their staff members destroy such property simply because they do not know what to do with it.

6 See, e.g., Advisory Committee on Professional Ethics Appointed by the New Jersey Supreme Court, Opinion 692 (Supplement) (October 28, 2002).
7 See, e.g., 15 ILCS 305/5.15.

How should old client files be destroyed?

The methods used to destroy records should be specified in the RMP. Methods for all record types (e.g., paper, electronic files, microfiche, CDs and other data storage devices) should be described. The firm is obligated to maintain client confidentiality, and destruction methods should reflect that obligation.

Paper files should be shredded or incinerated. Data storage devices specific to a file such as tapes, CDs, floppy disks, and USB flash drives should be physically destroyed rather than overwritten with other data to ensure that the data is irretrievable. Destruction of electronic files requires careful attention. They will probably require the use of special software to ensure that files are permanently erased. In destroying electronic files, it is important to identify and eliminate all duplicate files, which may exist on network servers, personal computers and data storage devices such as tapes, hard drives, flash drives, tablets, and smart phones. If law firms utilize third-party vendors to assist in destroying client files, they should enter into confidentiality agreements with such vendors to ensure that client confidences are protected. Clients also should be informed in writing of the use of such third-party vendors.

Commercial software is available that is designed to overwrite selected computer data files and e-mails to render them unrecoverable even through the use of forensic methods. Investigate the background, experience and reputation of the software developer and obtain information on how the software works before obtaining it. Test the software on different types of files before using it to comply with the RMP.

Do sole practitioners have any special duties with respect to RMPs?

Since, by its very nature, a sole practice does not lend itself to another lawyer having automatic access to the sole practitioner's client files, such lawyers must take proactive measures in order to diligently represent and protect their clients. Comment 3 to ABA Model Rule 1.3 states, in relevant part:

> To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Sole practitioners should enter into an agreement with another local attorney who will agree to follow the guidelines set forth in comment 3, above, should the sole practitioner die or become disabled. Once the sole practitioner has such an agreement with a local attorney, the sole practitioner should include a preemptive client consent clause in all engagement letters, so client consent to such an arrangement is obtained. Sample language for a preemptive client consent clause can be found in the CNA *Lawyers' Toolkit 3.0*. Instituting a preemptive client consent clause will not only protect the interests of the sole practitioner's client but will also spare family members of the lawyer who dies, disappears, or becomes disabled from the burden of determining what to do with the client files left in the office or storage facility.

Firm Records

Firm records are the internal documents and data a lawyer or firm generates or uses to manage the law practice that are unrelated to any specific client or matter. They include items such as the firm's charter and by-laws, organizational or administrative directives and communications, general accounting and tax records, employee compensation and payroll records, and internal time-keeping records. They are essential to the firm's management and on-going existence. While not typically shared externally, firm records can be important to the defense of a malpractice or disciplinary action.

In devising a **Records Management Plan ("RMP"),** law firms should establish separate retention schedules for firm records and client files, as these documents are separated early in the retention process and the information they contain is of varying importance to the law firm. Firm records are often retained longer than client files, usually because they have relevance to more than one matter or concern (examples include conflicts checking guidelines, which may be significant for matters relating to more than one client, or docketing system procedure manuals). Some firm records should be kept indefinitely, as in the case of a firm's corporate charter or partnership agreement. Also, some states impose mandatory retention periods for certain firm records. For example, virtually all jurisdictions have a corollary rule to ABA Model Rule 1.15: Safekeeping Property, which dictates that lawyers maintain financial records of bank accounts in which client funds are maintained. Lawyers must review their own jurisdiction's rules on precisely what records must be preserved and the minimum retention period.

Conclusion

Developing a **Records Management Plan** to manage client files and firm records is a significant and important aspect of firm practice management. While implementing and managing a RMP can be a daunting task for law firms that have handled records on an ad hoc basis, it will provide long-term benefits in the form of reduced storage costs, improvement in the ease of researching existing records and retrieving research previously performed within the firm, responding to and resolving client questions and disputes, and producing records when required in litigation or civil, criminal, regulatory or licensing investigations. As the state of the law with respect to lawyer obligations in this area varies by state and federal jurisdiction and is evolving, lawyers should regularly consult local rules, regulations and resources for current guidance.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.

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