

New York State Bar Association

Committee on Professional Ethics

Opinion 766 – 9/10/03

Topic: Disposition of files of former client

Overrules: N.Y. State 398 (1975)

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

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,”¹ 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 draft² 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*

¹ *See Lai Ling Cheng v. Modansky Leasing Co.*, 71 N.Y.2d 454, 458 (1989) (court recognized that discharged lawyer possessed a common-law retaining lien on client’s file in his possession securing his right “under New York law to the reasonable value of the services he performed”) (citation omitted).

² This section was ultimately published as §46. *See* Restatement Third, The Law Governing Lawyers §46 (2) and (3):

- (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
- (3) Unless a client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

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)