



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1070 (10/9/15)

Topic: Confidentiality; joint clients; client's file

Digest: In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the attorney's file on the matter, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request for the file unless the requester authorizes disclosure to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

Rules: 1.4, 1.7(a) & (b), 1.15(c)(4)

FACTS

1. Lawyer A represents four defendants in a litigated contract matter involving real property. One of the joint clients has requested, in writing, that Lawyer A provide to Lawyer B (who is advising the requestor) copies of the client file, including billing statements and records of payments. The written request directed Lawyer A to keep the request in confidence and not to disclose the request to the other joint clients in the matter. There is no express agreement, in the retainer agreement or otherwise, addressing the confidentiality of communications from any joint client vis-à-vis the others.

QUESTIONS

2. Is a client who is one of several joint clients in a matter entitled to copies of the client file upon request?

3. May lawyer A provide the requested file to the requesting client without advising the other joint clients?

OPINION

4. The New York Rules of Professional Conduct (the “Rules”) specifically contemplate that a lawyer may represent multiple clients in the same matter, as long as the representation will not involve the lawyer in representing differing interests (unless each client consents to the conflict under Rule 1.7(b)). The potential benefits of multiple representation include reduced legal fees, avoidance of future conflicts, and, in litigation, the opportunity to present a united front.

Confidentiality Among Joint Clients

5. There is a presumption that information disclosed by one co-client in a joint representation matter will be shared by the lawyer with all other clients represented jointly. *See* Rule 1.7, Cmt. [31]:

[31] . . . [T]he lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients.

See also N.Y. State 761 (2003) (stating that the attorney for co-clients must share all material information relating to the representation with the co-clients, unless the co-clients have consented to an alternative arrangement); N.Y. State 778 (2004) (concluding that, in seeking consent to a joint representation, the lawyer should explain the lawyer’s obligation, absent each client’s agreement to other arrangements, to disclose to one client any confidences and secrets communicated to the lawyer by the other client); *Restatement Third, The Law Governing Lawyers* §60 cmt. 1 (sharing of information among co-clients with respect to the matter involved in the representation is normal and typically expected), §75 cmt. d (2000) (presumed intent that there should be no confidentiality between co-clients but co-clients may agree otherwise).

6. The presumption that confidences will be shared among co-clients in a matter is subject to exceptions. For example, in N.Y. State 555 (1984), we noted that disclosure to all joint clients was part of the duty of the lawyer, as a fiduciary, to impart to the client information that the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client’s conduct with respect to such affairs. We warned, however, that there was a recognized exception to this duty of disclosure where disclosure would violate a duty to a third person, citing the *Restatement (Second) of Agency* § 381 (1957). We found that exception applicable where disclosure would violate a duty undertaken to another client in the same representation. In that case, the lawyer jointly represented two clients, A and B, in connection with partnership affairs. B, in a conversation with the lawyer, advised the lawyer that B was breaching the partnership agreement, but preceded this disclosure with the statement that

he proposed to tell the lawyer something “in confidence.” The lawyer did not warn B that the lawyer could not receive information from B in confidence. We therefore found that the lawyer had a duty of confidence with respect to the disclosed information.¹ *See also* N.Y. State 761 (2003) (discussing lawyer’s obligation when lawyer receives from one co-client “relevant information that the lawyer is unable to share”).

7. In this case, the inquirer apparently did not warn the clients either orally or in the retainer agreement or in a separate consent to joint representation that all confidences would be shared. Since the request for confidentiality of the request for the file was made in writing, the lawyer had no opportunity to prevent the client from giving the information. Consequently, we believe the lawyer is obligated to maintain the confidentiality of the request, unless the communicating client agrees otherwise.

The Client’s File

8. Rule 1.15(c)(4) provides that “a lawyer shall . . . promptly . . . deliver to the client . . . the funds, securities or other properties in the possession of the lawyer that the client . . . is *entitled* to receive.” (Emphasis added.) Regarding the property to which the client is entitled, N.Y. State 766 (2010) noted that this is a question of law, but pointed out that, in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson*, 91 N.Y. 30, 34 (1997), the Court of Appeals held that, upon termination of an attorney-client relationship, a client is “presumptively accord[ed] . . . full access to the entire attorney’s file on a represented matter with narrow exceptions.” *See also* N.Y. State 970 (2013) (right of executrix of the estate of a deceased client to the client’s files). The cost of copying the file is to be borne by the client. *Sage Realty*, 91 N.Y.2d at 38. The exceptions to entitlement to particular documents in the file are a question of law about which we do not opine.

9. Although N.Y. State 766 was based upon a request from a former client and N.Y. State 970 was based upon a request from a representative of a deceased client, the reasoning is equally applicable to a request from a current client.

10. Under *Sage Realty*, however, an exception to the general rule of full access to the file arises when the attorney can make “a substantial showing . . . of good cause to refuse.” *Sage Realty*, 91 N.Y.2d at 37. For example, the attorney “should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law,” or “firm documents intended for internal law office review and use.” *Id.* *See also* ABA 471 (2015)(although a client normally is not entitled to papers and property that the lawyer generated for the lawyer’s own purpose in working on the client’s matter, when the lawyer’s representation of the client in a matter is terminated before the matter is completed, protection of the former client’s interest may require that certain materials the lawyer generated for the lawyer’s own purpose be provided to the client).

11. Here, one joint client has requested that Lawyer A deliver the client file to Lawyer B,

¹ N.Y. State 555 also found an exception where disclosure to a co-client “would obviously be detrimental to the communicating client.” In N.Y. State 778 n.4 (2004), however, we expressly overruled N.Y. State 555 on that point.

and that the request not be disclosed to the Lawyer A's other joint clients.

12. We concluded in the preceding section that, where the lawyer accepted information from one co-client on the condition of non-disclosure to other co-clients, the lawyer must honor that condition. However, if the requesting client asked the lawyer not to disclose the request that a copy of the file be sent to another lawyer, and the lawyer in good faith believes that the request for the file is information that would be material to the remaining co-clients (so that not disclosing the request to them would entail a breach of loyalty to those clients), then the requesting client is no longer entitled to a copy of the file. Complying with the request would entail a breach of a duty to the other joint clients to keep them informed of material developments. Rule 1.15(c)(4) applies only to property to which the client is *entitled* and the communicating client is not entitled to cause a breach by the lawyer of duties to the other co-clients. Thus, we conclude that the inquirer would not be obligated to comply with the request for the file if the request were conditioned on the lawyer's not disclosing the request to the other clients.

13. Consequently, the inquirer should inform the requesting client that, if he or she does not withdraw the request for confidentiality, the lawyer will not be able to provide a copy of the file, but that, if the client authorizes the lawyer to disclose the requesting client's request for the file to the co-clients, the lawyer will provide the file to the requester.

CONCLUSION

14. In a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients. But there are exceptions to this presumption, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to a disclosure. Normally, a client is entitled to full access to the client file, with narrow exceptions. However, if the co-client requesting the file asks the lawyer not to disclose the request to the co-clients, and the lawyer believes the request for the file is material to the other co-clients, then the lawyer may not comply and should counsel the requesting client that the lawyer may not honor the request unless the lawyer is permitted to disclose it to the co-clients. Keeping the request confidential is inconsistent with the expectation of joint clients that the lawyer will keep all of them informed of material developments in the case and with the lawyer's duty of loyalty to the other joint clients.

(11-15)