NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1192 (06/09/2020)

TOPIC: Retention and disposition of lawyer's closed files

DIGEST: With certain important exceptions**,** a lawyer has no ethical duty to retain closed client files (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.

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?

OPINION

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.

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.
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> 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.

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.

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. One commentator 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 these kinds of documents and, if the law 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 1.15(d) means that a law firm must segregate these documents for saving if the client file is otherwise discarded.

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. Rule 1.10(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.

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