

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No: *10-06*

Topic: Retention and Disposal
of Client Matter Files

Digest: A lawyer should retain
records in accordance with
the instructions of the client,
the Rules of Professional
Conduct, and any other
applicable rules or laws.

Rules: 1.15; 1.16; 3.4; 7.1; 7.3; 22
NYCRR 603.7 and 691.20

QUESTION

The inquiring lawyer proposes to send to clients, following the settlement of their personal injury claims, the following notice:

We will retain any file materials in connection with your personal injury case in our possession for thirty (30) days. You may pick these materials up at any time during office hours by calling in advance to make arrangements. If we have not received instructions from you regarding these materials within thirty (30) days, the file materials will be destroyed due to space limitations.

The inquiring lawyer requests an opinion concerning whether the furnishing of such a notice, and the destruction of the clients' file in accordance therewith, is ethically permissible.

OPINION

The Rules of Professional Conduct contain a number of provisions specifically requiring lawyers to retain for various periods particular types of records described in those provisions. For example, Rule 1.15(d), entitled "Required Bookkeeping Records," states as follows:

- (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, pre-numbered canceled checks and duplicate deposit slips.

Other relevant provisions in the Rules of Professional Conduct include Rule 1.10(e) [Records of Engagements]; 1.15(a) [Property Belonging to Another]; 1.15(c)(4) [Property that a Client or Third-Person Is Entitled to Receive]; 1.16(e) [Papers and Property to which the Client Is Entitled]; 7.1(k) [Advertisements]; 7.3(c)(3) [Solicitation Information]. To the extent that an attorney's file includes the types of records referenced in these provisions, the lawyer's destruction of the file before the expiration of the period stated in the rules would violate those rules, notwithstanding the express or implied consent of the client.

As reflected in Rules 1.15 and 1.16, a client will normally expect the lawyer to return whatever papers and things were originally entrusted to the lawyer by the client for use in the matter, rather than unilaterally destroy them along with the rest of the file.

In addition, lawyers who handle lawsuits in the First or Second Departments involving personal injuries and other specified claims should heed the court rules found in 22 NYCRR § 603.7 (First Department) and § 691.20 (Second Department). Those rules direct attorneys for both plaintiff and defendant to preserve, for seven years after any settlement or judgment, the pleadings and other papers pertaining to the claim. The inquiring lawyer did not specify whether any of the personal injury claims he handles are in the First or Second Department. To the extent that any claims are subject to those rules, the proposed early destruction of those files would appear to violate the court rules cited above, and would thus also violate Rule 3.4(c), again regardless of whether the client consented to the destruction of the file.

Additional issues are raised by the inquiring lawyer's proposal to destroy files by relying on the lack of any instructions from the client during the specified thirty-day period. The New York Court of Appeals addressed the client's rights in the lawyer's file in Sage Realty Corporation v. Proskauer Rose Goetz and Mendelsohn, 191 N.Y.2d 30 (1997). In that decision, the Court of Appeals held that a client has the right to inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse access. The court further stated that, even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, such documents relating to the representation as the client reasonably needs. The client's right of access has been described as a "property right" in the subject files. Sage Realty Corporation v. Proskauer Rose Goetz and Mendelsohn, 294 A.D.2d 190 (1st Dep't 2002).

Since the client has a property right to the lawyer's files, it is the opinion of this committee that the proposal to destroy the file a mere thirty days after the conclusion of the matter, based only on the client's failure to respond within that brief period, is not consistent with the lawyer's ethical obligations to the client. If the client gives express informed consent (preferably in writing) to the destruction by the lawyer of file materials that are not required to be retained by any laws or rules such as those referenced above, the lawyer would then be free to destroy those particular records.¹ Also, even without express consent, it may be reasonable in some circumstances to infer that a client has given implied consent to the destruction of a file (e.g., when many years have passed since the conclusion of the representation, during which the client has not requested any materials, and the lawyer has determined that the file does not contain any materials the client would reasonably require in the future). However, the thirty day unilateral destruction proposal made by the inquiring lawyer here does not present such circumstances.

Not all clients will be capable of giving informed consent to the disposition of the file. Some clients may be minors or may lack sufficient mental or emotional capacity to appreciate the ramifications of the various alternatives, notwithstanding conscientious explanations by the lawyer. The individual differences that exist among clients and cases weigh against the type of blanket destruction policy proposed by the inquiring lawyer here.

There have been several published opinions by other ethics committees on issues related to the question raised here. See e.g., ABA Committee on Ethics and Professional Responsibility in formal Opinion 1384 (1977) ("A lawyer should use care not to destroy or discard information that the client may need"); NYSBA Opinion 780 (2004) ("When a lawyer's employment by a client ends . . . the lawyer is required to deliver to the client property, including files, which the client is entitled to receive as a matter of law"); NYSBA Opinion 766 (2003); NYSBA Opinion

¹ The lawyer should, however, be mindful of the risk that he himself may have need for the records (e.g., to defend against a malpractice claim, to justify a fee, etc.) The premature destruction of the lawyer's record of his work on a matter may be contrary to the lawyer's own interests, as well as those of the client. The lawyer should also make sure that the disposal of the file is consistent with whatever record retention requirements may be imposed by the lawyer's insurance carrier.

623 (1991); NYSBA Opinion 460 (1977); Association of the Bar of the City of New York Ethics Opinion 2008-1; Nassau County Opinion 2006-02 (“There is strong support for a recommended period of seven years for the general preservation of files”); Nassau County Opinion 81-10 (1981) (“An attorney should retain all files for a period of seven (7) years from the time a particular matter is closed.”) These ethics opinions should be consulted in connection with the development of any record retention policy by a law firm.

As an alternative to either retention or agreed-upon destruction, the lawyer may also wish to consider transferring physical possession of the file to the client upon completion of the legal services.

CONCLUSION

The file destruction policy proposed by the inquiring lawyer does not conform to established ethical responsibilities because (1) it does not take into account the requirements in the Rules of Professional Conduct or other rules governing the particular types of records described therein, (2) it does not require the client’s informed consent before the destruction of other types of records, and (3) it contemplates the unilateral destruction of the entire file by the lawyer after a waiting period far shorter than the periods recommended in the ethics opinions that have addressed this subject.