BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 13-04

Topic:	Confidential Information; release of file of former client to new attorney
Digest:	With the consent of the former client, a lawyer must turn over the former client's file to that client's new attorney
Rules:	1.4; 1.6; 1.9; 1.14; 1.15; 1.16

QUESTION

[1] (a) Must a lawyer turn over the file including an executed Will of a former elderly client to that client's new attorney if so instructed by the former client, even if the lawyer believes that the former client is being influenced to change the Will in favor of the client's caretaker?

[2] (b) May a lawyer disclose non-confidential adverse information about a former client to the client's new attorney?

[3] (c) May a lawyer disclose confidential information of another client to the former client's new attorney?

FACTS

[4] A lawyer received a request from an attorney advising the lawyer that he was the new lawyer for a former elderly client and that all the former client's files including Wills should be turned over to the new lawyer. It is not clear whether the new attorney has furnished a written authorization from the client authorizing the turning over of all the files including the Wills or whether the inquirer has had any direct communications with the former client about any of the issues raised.

[5] The former lawyer has learned from "concerned persons" on a non-confidential basis that the client's caretaker has "allegedly" influenced the client to change the existing 2008 Will held by the lawyer. The caretaker has a history of substance abuse and a long history of criminal convictions. In the past the lawyer represented the caretaker in Family Court and in local criminal courts, but no longer represents the caretaker.

[6] The lawyer has also learned from non-clients that the caretaker in the past has stolen money from the client, has used the client's credit cards and is presently in possession of the client's check book. The lawyer is also aware of other wrongdoings of the caretaker as well as orders of protection issued by the Erie County Court requiring both the caretaker and his spouse requiring the both to "stay away from the client."

APPLICABLE RULES

[7] The answer to the questions based upon the facts are found in Rules 1.4, 1.6, 1.14, 1.15 and 1.16 of the Rules of Professional Conduct (the "Rules"). Rules 1.4(a)(4), 1.15(c)(4) and 1.16(e) require a lawyer to turn of to the client that which belongs to the client. Rules 1.6 and 1.9 prohibit a lawyer who possesses *confidential information* learned during a consultation with a client from disclosing that information without the client's informed consent or the disclosure is impliedly authorized to advance the best interest of the client. Rule 1.14 permits a lawyer that reasonably believes the client has diminished capacity and is at risk of substantial physical, financial or other harm unless action is taken, to take reasonably necessary protective action.

OPINION

Summary

[8] This inquiry raises several issues. First, the lawyer is required to turn over the entire file including an executed Will the former client to his new attorney *if he is* so *instructed* by the former client in writing, assuming the former client does not have diminished capacity. Instruction from the attorney alone is not sufficient. This is a mixed question of law, beyond the jurisdiction of the Committee, and ethics. Second, the lawyer may discuss non-confidential information concerning the caretaker learned from concerned persons. Third, the lawyer may not reveal information learned by the lawyer during the course of the representation of the caretaker, without the caretaker's consent.

Files and Will

[9] This phase of the inquiry is normally straightforward and controlled by N.Y. State 766 (2003), which concluded that a former client is presumptively entitled to access to all his files possessed by his former attorney. The opinion was influenced by *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30,34 (1997), which adopted the majority rule 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."[1]

[10] N.Y. State 766 was based on two provisions in the Code of Professional Responsibility, DRs 9-102(c) and 2-110(A)(2), which are now comparably set forth in Rules 1.15(c)(4) and 1.16(e). Rule 1.15(c)(4) provides that "a lawyer shall: ... promptly pay or deliver to the client or third person the funds, securities, or other properties in the possession of the lawyer that client or third person is entitled to receive." Rule 1.16(e), which addresses termination of representation, provides, in relevant part:

> A lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including ... delivering to the client all papers and property to which the client is entitled....

These provisions of the current Rules support the conclusion in N.Y. State 766 just as did the corresponding provisions of the prior Code. Thus, the former client is presumptively entitled to access to the former client's files possessed by the inquirer, subject only to the inquirer's ability, as to particular materials, to make a substantial showing of good cause to refuse client access.

According to the facts described by the inquiring attorney, the request for the former client's files came not from the former client directly but from a new lawyer claiming to be acting on behalf of the former client. To the extent that the inquiring attorney has reason to question whether the new lawyer's statements accurately reflect the former client's actual wishes regarding the file or the engagement of the new lawyer, the inquirer may and should require adequate confirmation of the former client's instructions. (Rule 1.6)

[11] In addition, if the lawyer for the former client reasonably believes that such client has diminished capacity or that the instructions to turn over the files to a new attorney may not be fully understood by that client by reason of diminished capacity, Rule 1.14(b) becomes applicable. That Rule provides:

> "(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonable necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

[12] On the other hand, if the lawyer does not reasonably believe that the former client has diminished capacity, the requirements of paragraphs 9 and 10 above are applicable.

Non-Confidential Information

[13] The information received from concerned persons presumptively was given to the lawyer for the purpose of protecting the former client. Assuming that it was not learned in the course of the representation of the former client, it would not fall within the definition of confidential information contain in Rule 1.6(a) and may be disclosed to the new lawyer and to the authorities involved in enforcing the orders of protection or otherwise protecting the interests of the former client.

Confidential Information

[14] The more difficult question is the confidential information learned from the caretaker who is also a former client. The lawyer's professional responsibilities are more complicated. Rule 1.9(c)(2) addresses a lawyer's obligation to refrain from revealing confidential information of a former client.

[15] Rule 1.9(c)(2) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: ... reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client."

[16] Rule 1.6 defines "confidential information" as consisting of

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's knowledge of legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

[17] As to confidential information, Rule 1.6(a)(2) allows for disclosure that is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." Comment [5] to Rule 1.6 notes, for example, that in some situations, "a disclosure that facilitates a satisfactory conclusion to a matter" may be impliedly authorized. Here we focus on the caretaker. It appears clearly that the disclosure of confidential information learned from the representation of the caretaker would not advance the best interests of the caretaker but on the contrary, would be detrimental to the caretaker if disclosed. According, any confidential information the lawyer learned in his representation of the caretaker may not be disclosed. However, it is not clear from the facts described by the inquiring attorney whether his prior representation of the caretaker related to incidents involving the other former client or only to unrelated incidents.

[18] **A**lso, as noted in paragraph 14 above, "Confidential Information" does *not* include information that is generally known in the local community. It very well may include the criminal convictions of the caretaker as they would be a matter of public record in Erie County and thus may be disclosed if generally known. Comment [4A] to Rule 1.6 notes that information is not "generally known" simply because it is available in a public file. More must be shown.

CONCLUSION

[19] A lawyer must turn over the files including executed Wills to a former client's new attorney pursuant to the former client's instructions and to the extent required by law, unless the lawyer reasonably believes that because of the client's diminished capacity the client is not aware of the consequences of his instructions. The lawyer may disclose to the new attorney non-confidential information learned from concerned persons, but may not disclose confidential information gained during or relating to the representation of the caretaker as a former client.

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1 Exceptions arise when the attorney can make "a substantial showing ... of good cause to refuse client access." 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." 91 N.Y.2d at 37.