BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2015-F-160

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion as guidance for lawyers regarding the lawyer's responsibility with regard to client files.

OPINION

Lawyers have ethical obligations to preserve client files and to return them or permit access to them by the client if requested. There is no Rule of Professional Conduct in Tennessee that requires a lawyer to retain client files for more than five (5) years following termination of representation; however, the type of representation and file contents may require a longer retention time. *See discussion.*

The entire client file, for which the lawyer has been compensated, belongs to the client. If the lawyer wants a copy, the lawyer should bear that expense. If the lawyer has not been compensated, the lawyer may retain work product, but only if retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation.

When a lawyer retires from the practice of law, his or her responsibility for client files does not end with retirement. If the lawyer has been practicing in a law firm, those responsibilities are shared by the firm. A retiring lawyer does not necessarily have to notify former clients of the lawyer's retirement advising such clients of various safekeeping options, provided the lawyer has made arrangements for the safekeeping of files for an appropriate period of time. A lawyer retiring from a firm may satisfy the safekeeping requirement by the firm's keeping the files. Assuming a retiring solo practitioner has not changed his or her residence and can reasonably be contacted by former clients, such retiring solo practitioner may satisfy the safekeeping requirement by simply keeping the files in a location readily accessible to the retiring lawyer and/or client. This further assumes that confidentiality of the files can be maintained. The retiring lawyer may choose to notify the clients, and, if an agreement has not already been reached with regard to the client files, the lawyer may propose some alternatives: placing the files with a named attorney who will assist the retiring lawyer in closing out his or her law practice, or assist the client in transferring the files to an attorney chosen by the client, or return the files to the client.

DISCUSSION

The most common questions received by Ethics Counsel for the Board and therefore issues for consideration are:

1) How long does a lawyer have to retain client files?

2) Who owns the file—the lawyer or the client?

3) What constitutes the client file?

4) What are the lawyer's responsibilities with regard to client files when a lawyer retires?

HOW LONG DOES A LAWYER HAVE TO RETAIN CLIENT FILES?

This is the most common question received by Ethics Counsel and one of the most difficult to answer because it generates a host of other questions: Does the client file contain original client records? Were trust funds involved in the representation? Does the client file contain financial records of the client? Was a minor involved in the representation?

Tennessee Rule of Professional Conduct 1.15 is the foundation for the lawyer's obligation to maintain client records, which states in pertinent part:

> (a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.
> (b) ….property shall be identified as such and appropriately safeguarded. Complete records of such … property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (d) … Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client … any property that the client … is entitled to receive and, upon request by the client…, shall promptly render a full accounting regarding such….property.[1]

All lawyers are aware of the continuing economic burden of storing retired and inactive files.[2] Lawyers do not have a general duty to preserve permanently all files for their former clients. D.C. Bar Op. 206 (1989); ABA Informal Op. 1384 (1977).

Lawyers have ethical obligations (as well as in some cases legal ones) to preserve client files and to return them or permit access to the client if requested.[3]

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[1] Tenn. Sup. Ct. R.8. RPC R. 1.15 (2009).
[2] *See*, J.R. Phelps and Terri Olson, When May I Destroy My Old Files? Fla. Bar J. (1994)
[3] *See*, Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P., 91 N.Y. 2d 30, 689 N.E. 2d 879 (1997); ABA Comm. on Prof'l. Resp., Formal Op. 157 (2001) [hereinafter ABA Informal Op. 1384]; Cal. Bar Standing

To avoid uncertainty regarding the treatment of client files, it is sound law practice management for lawyers to make arrangements with their client for the disposal of clients' files either in the initial representation agreement or in an agreement terminating the attorney client relationship. *See* West Virginia Op. 2002-01 (3/8/02); Wis. Ethics Op. E-98-1(1998). In the absence of such agreement, however, the lawyer must be guided by the provisions of Rule 1.16(d). D.C. Bar Op. 283 (1998). Rule 1.16(d) provides in pertinent part:

> . . . (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect [sic]on the client with respect to the subject matter of the representation. . .

This Board of Professional Responsibility opinion seeks to suggest reasonable guidelines to ensure the ethical disposition of closed client files. There is no one safe answer to the central question of how long must the closed files be kept before they are destroyed. Lawyers can use the following considerations to determine when a matter is concluded for purposes of RPC 1.15:

Contract actions -	satisfaction of judgment or dismissal of action.
Bankruptcy claims and filings -	discharge of debtor or discharge of trustee or receiver.
Dissolution of marriage -	final judgment or dismissal of action; except when child custody is involved, in which event the date of the last minor child's reaching majority.
Probate claims and estates-	entry of the order closing the estate.
Tort claims -	final judgment or dismissal of action; except when a minor is involved, in which event the date of the minor's reaching majority and expiration of the statute of limitations.
Real estate transaction -	settlement date of the transaction, judgment, foreclosure, or other completion of matter.
Lease -	termination of lease.
Criminal cases -	date of acquittal or length of the period of governmental control over defendant.[4]

A closed file should not be destroyed prior to the expiration of the statute of limitations. This is an obvious necessity for the protection of the lawyer from charges of malpractice.

Comm. on Prof'l. Resp. and Conduct, Formal Op. 157 (2001) [hereinafter Cal. Bar Formal Op. 2001-157]; Conn. Bar Ass'n, Informal Op. 98-23 (1998) [hereinafter Conn. Bar Informal Op. 98-23]; Ass'n of the Bar of the City of N.Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 4 (1986) [hereinafter N.Y. Formal Op. 86-4]; Restatement of the Law Governing Lawyers § 46 (2000).

[4] *See* J.R. Phelps and Terri Olson, When May I Destroy My Old Files? Fla. Bar J. (1994)

Clearly, under RPC 1.15 client property and financial records must be kept for a minimum of five (5) years following termination of representation. As set forth in Supreme Court Rule 9, section 35(a)(2), if the file contains trust account records (not maintained elsewhere), financial records of the client, contingent fee disbursement records and documents that the client has provided to the lawyer, five (5) years after termination of representation is required.

Some files should be retained longer. Files pertaining to minors should be retained until their majority and the expiration of any statutes of limitations. Certain tax files should be maintained until the client is no longer exposed to tax liability. A lawyer might also wish to consider retaining closed files for six (6) years, the usual statute of limitation period for contract claims in Tennessee, after the conclusion of the representation. Lawyers may also seek recommendations on file retention from their malpractice carriers.[5]

Many jurisdictions have opined that deeds, wills and settlement agreements constitute the "other property" referred to in RPC 1.15 because of their intrinsic value. *See* Wis. Ethics Op. E-98-1(1998); 58 Ala. Law 368 (1997); Mich. Ethics Op. R-12 (1991).

Before destroying any files, the lawyer must ensure that original wills, trust documents, deeds, and other non-replaceable documents have been removed. The best time to return them to the client is at or near the conclusion of the representation. The method of destroying the records must protect the confidentiality of the materials. W. Va. Op. 2002-01 (2002).

Based on the foregoing considerations and the guidance given by the Florida Bar[6] and the American Bar Association,[7] the following should provide general guidelines for how long a lawyer must retain client files:

1. There is no Tennessee Rule of Professional Conduct that requires a retention period of greater than 5 years following the termination of representation; however, the type of representation involved may mandate a longer retention time.

2. Authority to dispose of a file should be obtained from a client whenever possible, so the better practice would be to address file retention initially or contact all clients and determine their wishes.

3. Absent client authority to dispose of files, an attorney should individually review files and be satisfied that no important papers of the clients are contained in the file before destruction.

[5] W. Va. Op. 01 (2002)
[6] J.R. Phelps and Terri Olson, When May I Destroy My Old Files? Fla. Bar J. (1994)
[7] ABA Informal Op. 1384 (1977)

WHO OWNS THE FILE -- THE LAWYER OR THE CLIENT?

In a majority of the states the client file belongs to the client entitling the client open access to the entire file.[8] In states where this is the case, the rule is subject to any lien rights if the client has not paid its legal bills. However, when a client cannot afford to pay the legal bill and surrender of the materials is necessary to avoid materially adverse effect to the client, the lawyer cannot retain the file as security. If the lawyer wants to retain a copy of the file, the lawyer must bear the expense of the copy.[9] *See also* RPC 1.16 (d) and cmt 9.

The Tennessee Supreme Court has made it clear that in Tennessee the file belongs to the client. In its comment to RPC 1.16 [cmt 9], when discussing the lawyer's duty to surrender contents of the client's file, the Court says that "The lawyer may, at the lawyer's own expense, make a copy of the client file materials for retention by the lawyer prior to surrender." Upon termination of a representation either by withdrawal or discharge of the lawyer by the client, RPC 1.16(d) mandates

> . . . (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect [sic]on the client with respect to the subject matter of the representation. . .

WHAT CONSTITUTES THE CLIENT FILE?

RPC 1.16(d) states that a lawyer who is discharged by a client, or withdraws from representation shall promptly surrender papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; and promptly surrender any other work product prepared by the lawyer for the client, provided however, that the lawyer may retain such work product to the extent permitted by other law but only if retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation. *Id.* at (4), (5).

The Tennessee Rules of Professional Conduct do not define the "papers and property to which the client is entitled," that the lawyer must surrender pursuant to Rule 1.16(d).

Jurisdictions vary in their interpretation of this obligation. A majority of jurisdictions follow what is referred to as the "entire file" approach.[10] The entire file approach assumes that the

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[8] Matter of Sage Realty Corp v. Proskauer Rose Goetz & Mendelsohn, L.L.P., 91 N.Y. 2d 30 (1997)

[9] Anthony E. Davis and David J. Elkanich, "Files: Who owns them?" A Lawyer's Guide to Records Management Issues, Chubb & Son, a division of Federal Insurance Company, (2005).

[10] ABA Formal Opinion 471 (2015). *See, e.g.,* Iowa Sup. Ct. Atty. Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); Alaska Bar Ass'n Ethics Comm. Op. 3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass'n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); or. Bar Ass'n Formal Op. 125 (2005); Va. State Bar Op. 1399 (1990). This approach is also advocated by the Restatement (Third) of The Law Governing Lawyers §46 (2000) ("on request, a lawyer must allow a client or former client to inspect and

client has an expansive general right to materials related to the representation and retains that right when the representation ends.[11]

N. Y. State Bar Op. 766 (2003) states that "a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access." The ALI Restatement of the Law Governing Lawyers Subpart 2 of section 46 states: "(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."

Other jurisdictions follow variations of an end-product approach, which has been defined as "…End product, under the foregoing minority view, includes such items as pleadings actually filed in an action; correspondence with a client, opposing counsel and witnesses; and other papers 'exposed to public light by the attorney to further [the] client's interests.' "[12] In Illinois clients are entitled to copies of the final versions of contracts, wills, corporate records and similar records prepared for the client's actual use, as opposed to the lawyer's drafts. *See* Ill. State Bar Assn., 94-13 at p. 4 (1995).[13]

Based on legal precedent and the Tennessee Rules of Professional Conduct, Tennessee follows the entire file approach. In the case of Saroff v. Cohen, No. E200800612COAR3CV, 2009 WL 482498 (Tenn. Ct. App. Feb. 25, 2009), the only file contents that the court found not to constitute part of the client file were the law firm invoices that were held to be accounts receivable records of the law firm. In further support of the premise that the client owns the entire file, is the Tennessee Supreme Court's comment [9] to RPC 1.16 which states that "The lawyer may, at the lawyer's own expense, make a copy of the client file materials for retention by the lawyer prior to surrender."

WHAT ARE THE LAWYER'S RESPONSIBILITIES WITH REGARD TO CLIENT FILES WHEN THE LAWYER RETIRES?

When a lawyer retires, the quandary about what to do with his or her closed files is a common question asked of Ethics Counsel. 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 Bar Op. 460 (1977). Of course, whether or not the lawyer is a sole practitioner is a critical fact. If the lawyer has been practicing in a law firm, responsibility is shared with the other members of that firm.[14]

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copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."); Ala. Bar, Formal Op., 02 (2010); Ariz. Bar Op. 02 (2008)

[11] ABA Formal Op. 471 (2015)

[12] Fed. Land Bank of Jackson in Receivership v. Fed. Intermediate Credit Bank of Jackson, 127 F.R.D. 473, 479 (S.D. Miss. 1989)

[13] *See* Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y. 2d 30, 689 N.E. 2d 879, 881 (1997)

[14] N. Y. State Bar Op. 623 (1991); N.C. Formal Ethics Op. 13 (2012).

There are several state and local bar association ethics opinions that have discussed lawyers' and law firms' obligations with regard to client files when the lawyer either retires from his or her firm or the firm with which he or she was associated dissolves. In general these opinions state that a lawyer has joint and several responsibilities with the firm to ensure that the files are disposed of properly. *See e.g.*, N. Y. State Bar Op. 623 (1991).

A retiring lawyer does not necessarily have to notify former clients of the lawyer's retirement advising such clients of various safekeeping options, provided the lawyer has made arrangements for the safekeeping of files for an appropriate period of time. A lawyer retiring from a firm may satisfy the safekeeping requirement by the firm's keeping the files. Assuming a retiring solo practitioner has not changed his or her residence and can reasonably be contacted by former clients, such retiring solo practitioner may satisfy the safekeeping requirement by simply keeping the files in a location readily accessible to the retiring lawyer and/or client. This further assumes that confidentiality of the files can be maintained. The retiring lawyer may choose to notify the clients, and, if an agreement has not already been reached with regard to the client files, the lawyer may propose some alternatives: placing the files with a named attorney who will assist the retiring lawyer in closing out his or her law practice, or assist the client in transferring the files to an attorney chosen by the client, or return the files to the client. *See* Fla. Bar Op. 77-1 1977 (Revised, 1992). Similarly the Ohio Bar Association advises consumers that "Lawyers who are retiring, or who can anticipate suspension of their right to practice, will generally have time to notify clients and return files and property or obtain permission to provide them to a lawyer approved by the client.[15]

CONCLUSION

Lawyers have ethical obligations to preserve client files and to return them or permit access to them by the client if requested. There is no Rule of Professional Conduct in Tennessee that requires a lawyer to retain client files for more than five (5) years following termination of representation; however, the type of representation and file contents may require a longer retention time. *See* RPC 1.15 and 1.16. Particular files should be retained longer due to the type of representation, such as cases involving minors, and those files whose contents cannot be replaced, such as original wills.

The entire client file, for which the lawyer has been compensated, belongs to the client. If the lawyer wants a copy, the lawyer should bear that expense. *See* RPC 1.16(d) and [cmt 9]. If the lawyer has not been compensated, the lawyer may retain work product to the extent permitted by other law but only if retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation. *See* RPC 1.16(d)(5).

When a lawyer retires from the practice of law, his or her responsibility for client files does not end. If the lawyer has been practicing in a law firm, those responsibilities are shared by the firm. A retiring lawyer does not necessarily have to notify former clients of the lawyer's retirement advising such clients of various safekeeping options, provided the lawyer has made arrangements for the safekeeping of files for an appropriate period of time. A lawyer retiring from a firm may

[15] Mark H. Aultman, What Happens When a Lawyer's Practice Closes? Ohio State Bar Ass'n (2013)

satisfy the safekeeping requirement by the firm's keeping the files. Assuming a retiring solo practitioner has not changed his or her residence and can reasonably be contacted by former clients, such retiring solo practitioner may satisfy the safekeeping requirement by simply keeping the files in a location readily accessible to the retiring lawyer and/or client. This further assumes that confidentiality of the files can be maintained. The retiring lawyer may choose to notify the clients, and, if an agreement has not already been reached with regard to the client files, the lawyer may propose some alternatives: placing the files with a named attorney who will assist the retiring lawyer in closing out his or her law practice, or assist the client in transferring the files to an attorney chosen by the client, or return the files to the client.

This 11th day of December, 2015

ETHICS COMMITTEE:

Joe G. Riley

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APPROVED AND ADOPTED BY THE BOARD