

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #460 - 2/28/77 (12-77)

Topic: Preservation of closed files

Digest: Circumstances under which lawyers may dispose of closed files

Code: EC 1-5, 4-6, 7-1, 7-8, 7-11, 7-12; DR 1-102(5), 4-101

QUESTION

Under what circumstances may a lawyer properly dispose of closed files relating to his client?

OPINION

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.

To the extent that the lawyer may impose a duty upon the lawyer to preserve certain records relating to his client, obviously, it would be unethical for the lawyer to dispose of them prior to the time mandated by law. EC 1-5; DR 1-102(5); also see, e.g., 22 NYCRR 603.15, 691.12(b), and 1022.7(a) (Rules of the Appellate Divisions which provide for the preservation of certain records relating to the recovery of funds on behalf of a client).

Similarly, to the extent that the law may impose a duty upon the client to preserve certain records, where custody of those records has been given over to his lawyer, it would be improper for the lawyer to dispose of such records during the period for which the client is required to maintain them. See, EC 7-1 After the period mandated by law for the preservation of these records, the lawyer may still be ethically bound to preserve them where the client foreseeably will have need to use such records; however, the period of preservation mandated by law will often provide a reasonable standard by which to assess future need. Of course, these records may at any time be delivered to the client, but care should be taken by the lawyer to advise his client of the need to preserve them. See, EC 7-8; cf., EC 7-11 and EC 7-12 (relating to incapacitated clients).

As to those kinds of records that the law does not require be preserved, the length of time for which they should be retained may be determined simply on the basis of the client's instructions or, absent such instructions, on the basis of foreseeable need. See, N. Y. County 624 (1974); also see, Fla. Op. No. 63-3 (1964), 38 Fla. B.J. 209 (1964), indexed at 715, 0. Maru, Digest of Bar Association Ethics Opinions (1970).

Where the client is deceased or otherwise incapacitated to the extent that he cannot handle his affairs, the lawyer may properly deliver his closed files to his legal representative.

Those files and records that do not contain material for which the client or his estate foreseeably will have need, may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.

Even in those instances where it is necessary to preserve the closed files or records of a client, original documents may, under certain circumstances, be destroyed provided suitable arrangements have been made to copy them and the legal effect or evidentiary value of such records is not thereby

impaired. In this connection, N.Y. County 624, supra, discusses the relevant ethical principles which bear upon the microfilming of a client's file and concludes that the lawyer should satisfy himself "that microfilmed copies may be introduced into evidence or otherwise used in place of the originals if the need therefore should ...arise."

A lawyer, upon termination of his practice may properly cause the closed files of his client to be delivered to another lawyer, but the receiving lawyer will hold them only as custodian. See, N.Y. City 803 (1955); also see, Ill. Op. No. 180 (1960), indexed at 940, 0. Maru, Digest of Bar Association Ethics Opinions (1970). Throughout, care should be taken by the lawyer to preserve the confidences and secrets of his client. DR 4-101. Thus, EC 4-6 explains:

"The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. *** A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration."

In the final analysis, whether and to what extent the closed files of a client must be preserved will be determined by applicable rules of law, the legitimate interests of the client in the preservation of his files and such instructions as he may issue in connection therewith, as well as the sound judgment of the lawyer who is duty bound to take into account both the mandate of the law and the foreseeable needs of his client.

Whenever possible, the client should be consulted concerning the disposition of his files and encouraged to preserve them on his own. Lawyers are advocates and advisers. They are not warehousemen or perpetual repositories for the files of their clients. A good lawyer need not retain his clients by holding on to their files and a poor one will soon learn that such tactics avail him nothing but additional expense.