

Advisory Opinion 2005-01

March 18, 2005

TOPIC: Destruction of Closed Files

RULES IMPLICATED: NMRA (2005) 16-101, 16-104, 16-115 and 17-204

DISCLAIMER:

The Ethics Advisory Committee is constituted for the purpose of advising lawyers on the interpretation of the Rules of Professional Conduct, as applied to the inquiring lawyer's duties. The Committee's opinions are not binding. The opinions expressed in herein are the consensus of the members of the Committee who considered the request. These opinions are meant to assist lawyers in their course of conduct. The rules of procedure for the Ethics Advisory Committee further provide that the Committee is not to render opinions on matters of substantive law.

QUESTIONS PRESENTED:

1. How long must a lawyer retain client files after representation of a client is complete?
2. What are the lawyer's obligations to review the client files before they are destroyed?
3. What are the lawyer's duties to communicate with a client about the lawyer's intent to dispose of the client's file?

SHORT ANSWER:

Under most circumstances, a lawyer must retain a client's file for a period of five years after representation of the client is complete in order to meet obligations under the Rules of Professional Conduct. Before disposing of a file, the lawyer must review the file to determine which documents or other things are the client's property and the client would expect returned. The lawyer must return those items to the client. The obligation of file review may be delegated to a non-lawyer, provided the non-lawyer receives adequate instruction and supervision from the lawyer. Finally, a lawyer is not required to seek client instruction on file retention or disposition. Instead, the lawyer is obligated to return documents or things which are the client's property and the client would expect returned. Notwithstanding the fact that the lawyer does not have an obligation to seek client instruction on file retention or disposition, it may be necessary to explain to the client the importance of retaining certain documents or things returned to the client.

FACTUAL BACKGROUND:

The requestor has several closed client files and seeks guidance on the length of time a lawyer is required to retain files upon completion of representation of the client and the manner in which the lawyer may dispose of those files.

ANALYSIS:¹

Questions related to the disposition of client files raise three distinct issues for consideration by a lawyer intending to destroy or otherwise dispose of a client's file. First, a lawyer must establish the length of time the lawyer is required to retain client files following the completion of the representation. Second, the lawyer must determine the extent of the lawyer's obligation to review client files prior to their destruction. Finally, a lawyer planning to dispose of client files must determine the extent of the lawyer's duty to communicate with a client about the lawyer's intent to destroy that file.

1. Duty to Safekeep Property

a. Rules 16-115 and 17-204

Rule 16-115(A) imposes a duty upon a lawyer to hold and properly safeguard property of a client that is in a lawyer's possession. "Complete records of . . . account funds and other property shall be kept by the lawyer in a manner that conforms to the requirements of Rule 17-204 of the Rules Governing Discipline and shall be preserved for a period of five (5) years after termination of the representation of the client in the matter or the termination of the fiduciary or trust relationship." **NMRA** (2005) 16-115(A). Similarly, Rule 17-204 requires a lawyer to maintain "complete records of . . . other property received from or on behalf of a client which [has] at any time come into his possession." Furthermore, Rule 16-115(B) requires that a lawyer shall promptly deliver to the client, funds or other property that the client is entitled to receive. While Rules 16-115 and 17-204 deal primarily with client funds, it was the opinion of the Committee that their requirements to maintain complete records of "other property" for a period of five years following the termination of representation extends to client files or documents.

b. Advisory Opinion 1988-1

This Committee has previously interpreted Rule 16-115 in Advisory Opinion 1988-1. Advisory Opinion 1988-1 is based on current rules and remains good advice. Advisory Opinion 1988-1 recognizes a lawyer's duty, under Rule 16-115(B), to return all property to a client, including any client documents which have not already been returned. That opinion suggests, and the Committee agrees, that the contents of each file

¹ As noted in the Disclaimer, this analysis sets forth considerations under the New Mexico Rules of Professional Conduct and does not consider obligations or requirements that may exist under applicable substantive law.

should be reviewed and any original documents or documents which the client would expect to be returned should be removed and returned to the client in accordance with Rule 16-115(B).

The lawyer contemplating destruction of a client file should note, however, that some instances may require that files be retained for a period of longer than five years in light of the circumstances surrounding the case. *See*, Adv. Op. 1988-1. On occasion, further litigation or legal proceedings regarding the subject matter of the case are likely or imminent. The most obvious of these situations is the preparation of a will or a trust by a lawyer, the interpretation of which may become an issue many years after it was prepared. To accommodate such situations, the lawyer should identify the types of files which should be kept beyond the five year period required by Rule 16-115(B) and retain any such files.

2. Duty to Provide Competent Representation (16-101)

As the Committee identified in Advisory Opinion 1988-1, a second concern raised by the destruction of client files is a lawyer's obligation to review the file and return any original documents or documents which the client would expect returned. Frequently, because of the volume of material to be reviewed when destroying client files older than five years, lawyers delegate these duties to non-lawyer staff members. The review of a file to determine which items should be returned to a client implicates the requirements of Rule 16-101, which mandates that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. **NMRA (2005) 16-101**. It is the opinion of the Committee that the review of client files to be destroyed may be performed by a non-lawyer; however, the lawyer must insure that the non-lawyer is competent to recognize and determine which documents must be returned to the client or retained beyond the five year period, by providing adequate instruction and supervision.

3. Duty to Communicate with Clients (16-104)

Finally, a lawyer contemplating the destruction of a client file must consider his obligation to notify all former clients whose files are to be destroyed to seek their instructions on file retention and disposition. Rule 16-104 requires that a lawyer shall keep a client reasonably informed about the status of a matter, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. A lawyer had no obligation to send letters to clients for whom it held no original documents or other documents which are the client's property and the client would expect returned.

With regard to clients whose files contained original documents or other documents which are the client's property and the client would expect returned, the lawyer is obligated to return those documents to the client, as discussed above. *See NMRA (2005) 16-115(B)*. Therefore, it is unnecessary to seek instructions on file retention and disposition from these clients, as the documents should simply be returned

to the client. In some instances, however, it may be necessary to explain the importance of retaining such documents to the client. For example, the firm may wish to advise a client that he should retain his original will so that it may be probated upon his death.