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Professional Ethics And The Retention Of Closed Clients' Files

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When a legal matter has come to an end, an attorney has an ethical obligation to maintain the client's closed file for a reasonable period of time. An attorney also has an obligation to the client to safeguard property that belongs to the client. Some questions have been raised, however, as to exactly what file material is to be deemed "property of the client" and what is a reasonable time period for the retention of closed case files.

Retention Requirements Applicable To Client Property

The New Jersey Supreme Court Committee on Professional Ethics issued Opinion 692, on January 15, 2001, as guidance to practitioners with respect to the retention of a client file following the final disposition of a matter. The Advisory Committee held that "such portions of the file, which constitute "property of the client" must be either returned to the client, disposed of pursuant to court order or agreement with the client, or preserved and maintained for a reasonable period of time following the conclusion of the matter. Absent an express agreement . . . the client may assume availability of the file up to a date

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seven years after it has been closed, at which time it may be destroyed." Opinion 692(2001 WL 169771 (N.J. Adv. Comm. Prof. Eth.))

In reaching its decision, the Advisory Committee relied on RPC 1.15, which pertains to safekeeping property. RPC 1.15(a) states in pertinent part: "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . . Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record."

RPC 1.15(b) states: "Upon receiving funds or other property in which a client or third person has interest, a lawyer shall promptly notify the client or third person. 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 or third person any funds or other property that the client or third person is entitled to receive."

The Committee interpreted RPC 1.15(b) to imply that client property "may never be destroyed without the client's permission or some legal authority, such as a court order." Opinion 692. Therefore, client property must be held indefinitely, unless the attorney has an express agreement with the client or the attorney can rely on some other legal basis or go to court to obtain an order.

What Constitutes Property Of The Client?

The Advisory Committee defined "property of the client" as things, which the client has entrusted to the attorney such as original documents and photographs, other property created by the attorney as part of the representation such as original wills, trusts, deeds, executed contracts, due diligence documents, financial records and statements, copyrights and patents. *Id.* at FN2. The nature of the matter and of the representation itself also dictated what constitutes "property of the client." The Committee did refuse, however, to extend the definition to include documents such as correspondence, pleadings, memoranda and briefs. The definition was broad enough that it potentially encompassed anything in the file that would provide any substantive information about the case.

Opinion 692 resulted in a request for clarification from the New Jersey Bar as to (1) exactly what constitutes "property of the client"; (2) whether the seven year retention policy applies to the entire file or only that portion which falls within the definition of "property of the client"; and (3) whether separate agreements, to destroy file material, are

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required for what is deemed client property and the remainder of the file.

In an effort to clarify Opinion 692, the Advisory Committee issued Opinion Number 692 (Supplement) (2002 WL 31499177 (N.J. Adv. Comm. Prof. Eth.), on October 28, 2002. The Committee pointed out that determining what constitutes "property of the client" is fact sensitive and depends on the nature of the matter and the representation itself.

For instance, the Committee concluded that in most cases "medical records, x-rays, expert reports, deposition transcripts, and answers to interrogatories do not constitute property of the client." *Id.* These documents, however, may in certain circumstances constitute "property of the client" because of a client's foreseeable need for these documents in the future to protect an interest or defend a claim. The Committee stated that determining what constitutes client property in some cases is left to the discretion of practitioners on a case-by-case basis. Therefore, even a plaintiff personal injury or malpractice attorney may consider retaining the client's medical records, expert reports, deposition transcripts and answers to interrogatories if it is foreseeable that the former client will need these records in the future to protect an interest.

The Advisory Committee also addressed the issue of what part of the file needs to be retained for seven years. The Committee reiterated its conclusion in Opinion 692 and stated that property of the client "must be returned, or retained and maintained indefinitely" and that the remainder of the file must be maintained for seven years. *Id.* "At the end of the seven-year retention period, a lawyer has an obligation to examine the closed file to determine whether it contains property of the client. If a file contains such property, the lawyer should take reasonable steps to notify the former client." *Id.* In illustrating what reasonable steps include, the Committee stated that mailing a notice to the client's last known address and then waiting a reasonable period of time, approximately six months, before destroying property may be acceptable. *Id.* (citing D.C. Legal Ethics Comm., Opinion 283 (1998))

Additionally, if a file contains property of inherent value (i.e. bonds, stocks, jewelry, etc.) and the client cannot be found by the end of the seven year retention period, the attorney must dispose of the property under the New Jersey's Uniform Unclaimed Property Act, N.J.S.A. 46:30(b) - 1 to 109.

Extended Retention Requirements

Unfortunately, the seven-year retention period is not a hard and fast rule that can be followed blindly. The Committee stressed repeatedly that practitioners, in addition to using their judgment, need to be cognizant of the substantive law within their particular practice areas to determine whether or not the seven-year retention period needs to be extended. For instance,

a case involving a minor will extend the seven-year retention requirement because the statute of limitations for claims involving minors tolls until the minor reaches the age of majority, N.J.S.A. 2A:14-21.

Therefore, at the end of at least the seven-year retention period a lawyer has an obligation to examine the contents of the closed file to determine if it contains property of the client. Attorneys must be careful, however, with respect to identifying client property, the substantive law applicable to that particular practice area and the possibility of future claims that the client may have or have to defend associated with that matter. If client property is discovered in the file, absent an agreement with the client, attorneys should take reasonable efforts to notify the client prior to taking any further action.

Client Agreement To Destroy Property

If there is an agreement with the client regarding destruction of client property, the agreement "should be executed only after the property is in the attorney's possession and should specifically describe the property intended to be destroyed or otherwise disposed." Opinion 692 (Supplement). For these reasons, a general agreement for the destruction of a file found in a retainer agreement may not suffice. "[U]nless the attorney is in possession of the client property before a retainer agreement is signed, generally an agreement to destroy a file contained in a retainer agreement is insufficient to permit destruction of client property." *Id.*

Dilemmas

While providing guidance to practicing attorneys on the proper guidelines for retention of closed client files is helpful, there are some practical considerations worth noting.

First and foremost is the amount of resources that attorneys will have to divert to storing, calendaring and analyzing file material. In keeping with Opinion 692 and Opinion 692 (Supplement), attorneys must store closed client files for seven years, absent an agreement with the client for earlier destruction. Depending on the size and volume of business for that firm, a firm will have to factor in the cost of renting space to store closed files for an extended period of time. Solo practitioners will also bear the burden of this retention policy, as they may not have the physical space to store the closed files or the manpower needed to analyze the files before considering destruction.

Attorneys will have to take time away from active files to review the closed files scheduled for destruction. In order to ensure that client property contained in the file is properly preserved, attorneys will be forced to undertake this review themselves. The definition of "property of the client" is very broad and is fact sensitive. Therefore, an attorney will have to

make determinations relevant to destruction on a case by case basis.

Due to the fact that other considerations, such as statute of limitations and substantive law in specific practice areas, affect the length of retention, it would be difficult to entrust the review and destruction of closed client files to paralegals or file clerks. Therefore, attorneys may have to devote valuable time and effort to the review process to make a substantive legal analysis on the contents of client files.

Additionally, while the Opinions mainly address the obligations of attorneys in private practice, they do not address the obligations of in-house corporate counsel. The Opinions are silent as to how long files must be retained or more importantly, what obligations in-house counsel may have if the attorney leaves the company. The Opinion (Supplement) stresses that upon the dissolution of a firm the "former partners or members of the firm have a professional and ethical obligation to make arrangements for the disposition of client property in a manner consistent with [the Opinions]." Further, the Committee noted that RPC 1.3 provides that a "sole practitioner has an ethical duty to plan for disposition of files in the event of his/her death or retirement." The Opinions, however, do not provide any guidance to in-house corporate counsel on the disposition of files upon departure from the corporate entity or retirement. Another question that remains unanswered is under what guidelines should closed corporate legal files be maintained? Do Professional Ethics Opinions or the file retention policies of individual corporations govern the retention of closed clients' files?

The recently published Professional Ethics Opinions may also have an impact on future disciplinary actions and lawyer professional liability claims. The mere failure to retain closed files should not result in discipline. Simple negligence does not equate with unethical conduct. If the destruction of the file material, however, is found to be an act of gross negligence or part of a pattern of negligence, then the lawyer may face disciplinary action pursuant to RPC 1.1 or RPC 8.4 (c) and (d). Moreover, if an attorney is unaware of these opinions or errs in his determination of what is or what isn't client property when reviewing closed files which results in harm to the client, the attorney may be exposed to a malpractice claim.

In sum, attorneys must use their judgment, apply discretion and consult substantive law requirements in certain practice areas to determine the appropriate retention period and what constitutes property of the client. Most importantly, after the attorney determines that the destruction of a closed file is appropriate, the manner in which it is destroyed must conform to the confidentiality requirements of RPC 1.6. Hence, the attorney must ensure that the confidential and privileged information remains protected and shielded from third parties.