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INFORMAL OPINION 2010-07

**DESTRUCTION OF INACTIVE CLIENT FILES**

You have requested the Committee's opinion concerning the proposed destruction of inactive client files that have remained in your possession following your retirement from the practice of law in 2008.<sup>1</sup> You state that all of your active client files have been turned over to a partner and that you would like to destroy inactive client files because it has become too costly for you to store the files. You state these client files have been inactive for more than 10 years. You have a file destruction procedure for handling more recently closed or inactive files whereby you send form letters to clients offering several options: (1) you send the file to the clients at their expense; (2) the clients pick the file up in person; or (3) you receive permission from the clients to destroy the files. The procedure provides for assumed permission to destroy the files in the event that the client does not respond within 6 weeks of the mailing of the form letter. You believe that this procedure is neither economical nor efficient as it relates to the older inactive files because the last known addresses are contained in the files that are in storage and are not likely to be

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<sup>1</sup> A retired lawyer remains a member of the bar. See, Practice Book sec's. 2-55, 2-52.

current addresses. You do not have any provision in your retaining agreements with your clients setting forth how documents will be retained or destroyed upon conclusion of the matters for which they hired you.

The quandary is that clients often have an unrealistic expectation that once you have represented them you will keep and safeguard their files forever. Lawyers may reinforce that expectation by failing to discuss with clients the disposition of files. According to ABA Informal Opinion 1384 (1977), “[a] lawyer does not have a general duty to preserve all of his[her] files permanently.” Ideally, the best way to deal with this issue is to include a paragraph in the retaining agreement, file closing letter, or other communication explaining the retention and destruction policy of the lawyer. Understandably, you do not want to incur the costs of maintaining closed files in storage indefinitely. Specifically, you seek ethical guidance concerning the appropriateness of simply destroying all of your older, inactive files without following your file destruction procedure. For reasons stated more fully below, the Committee holds the opinions that (1) a lawyer cannot simply destroy client files that contain critical documents which may have particular legal significance to your clients, such as wills, codicils, trust agreements, contracts, promissory notes, stock certificates, or documents of that type (“critical documents”) without at least expending reasonable and diligent efforts to locate former clients for the purpose of returning any portions of the files that belong to them; and (2) a lawyer has an obligation to return to the client or to continue to safeguard such “critical documents” for as long as is practicable. See Informal Opinion 98-23.

The inquiry presents a mixed question of ethics and property law. Additionally, although the Board of Governors of the Connecticut Bar Association adopted “The File Retention Guidelines” on December 6, 1999, the guidelines explicitly state that they “cannot be considered a safe harbor for the retention or destruction of files” as they merely set forth the “standards of practice . . . [that] hopefully will aid firms and attorneys in the formation of their own retention policies.”<sup>2</sup> The Committee has had the occasion to take up questions of document retention in three Informal Opinions (83-10, 95-13, and 98-23) in different, but related contexts and perspectives.

The Rules, as always, serve as a good starting point. Rule 1.15 provides in relevant parts that:

(b) 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 lawyers and shall be preserved for a period of seven years after termination of the representation. [Emphasis supplied]

Rule 1.16 provide;

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to

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<sup>2</sup> See Connecticut Association’s File Retention Guidelines, at <http://www.ctbar.org/filemanager/download/526/FileRetentionGuidelines.pdf>.

protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled* and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. . . . [Emphasis supplied]

The overarching obligation is for the lawyer to take steps reasonably practicable to protect and safeguard a client's interests and property.

Accordingly, the first step in the analysis is to ascertain whether the files contain "critical documents." If so, you should use reasonable efforts to ascertain the names and addresses of the clients whose "critical documents" you are storing and notify such clients that you are holding their documents. In your request, you highlight that it would cost a considerable amount of time and expense in requesting the files from storage, determining appropriate addresses and contact information, locating and communicating with former clients about file destruction versus delivery of file to client. As the Committee explained in Informal Opinion 98-23, "you are obligated to employ those methods which have the greatest chance of success with that specific client or group of clients in a reasonable attempt to locate them and inform them that you are holding documents which they may wish to take possession of." The Committee further noted that "current technological advances provide additional means to locate missing individuals beyond mail or telephone contact, e.g., Internet, or Lexis-Nexis/Westlaw public records and name searches." Id. While the undertaking can involve some expense, you are generally required to

use reasonable efforts to locate and communicate with your former clients about disposition of their files. Second, if you are unable to locate or communicate with your former clients, you are obligated to take reasonable steps to protect the “critical documents” of such former clients. The importance of a document may depend on the nature of the representation and the needs *of a client*. “Critical documents” may also include documents or portions of the file that the client owns. A lawyer has an obligation to continue to safeguard any “critical documents which may have particular legal significance to your clients” for as long as is practicable “under such circumstances reasonably calculated to keep the documents safe and recoverable.” Informal Opinion 98-23. See, Restatement of the Law Governing Lawyers sec. 46, Comment *b*.

Non-critical documents may consist of notes, pleadings, research, and materials that may be found in permanent public records, etc. Non-critical documents can be stripped or weeded out from your inactive files and destroyed.<sup>3</sup> Old client files that contain only non-critical documents may be destroyed.

Lawyers should discuss the disposition of file contents with their clients at the conclusion of representation, when the client remains in contact with the lawyer. Once representation is ended, lawyers are required to turn over to clients original

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<sup>3</sup> We do not opine as to whether other considerations [e.g., office management or risk management procedures] might compel the prudent practitioner to adopt document retention policies which exceed such practitioner’s ethical obligations regarding the same.

documents and other documents that a client reasonably needs. See Restatement of the Law Governing Lawyers, sec. 46(3).

Therefore, we conclude that, absent your clients' permission, it would be inappropriate for you to simply destroy your inactive files containing critical documents without engaging in diligent efforts to locate and communicate with your clients regarding their interest in the files. If you are unable to locate your clients after reasonable efforts, you are required to safeguard critical documents of your clients for as long as practicable.

THE COMMITTEE ON PROFESSIONAL ETHICS

By: \_\_\_\_\_  
Wick R. Chambers, Chair