EthicsOpinion

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File Retention Requirements for a Retiring Lawyer

Informal Opinion 18-01

A lawyer who is a sole-practitioner ("Lawyer") has asked for guidance as to the length of time Lawyer must retain closed client files,[1] and whether the "standards of practice" specified in the CBA File Retention Guidelines are applicable to her practice as a court-appointed attorney and/or Guardian Ad Litem for minor children.[2] Since 1988, Lawyer has been representing children as court-appointed attorney pursuant to C.G.S. § 46b-54(c) (as an attorney for minor child or AMC) or C.G.S. § 45-132 (as a Guardian Ad Litem or GAL) in family matters, P.B. § 44-20 in criminal matters, C.G.S. § 45-132 in Probate Matters, and C.G.S. § 46b-129 in Juvenile matters.

Generally, a lawyer's obligation to retain files related to representation of a client emanates from the Connecticut Rules of Professional Conduct ("the Rules"), Rules 1.15(b)[3] and 1.16(d).[4] This committee has provided guidance regarding the application of Rules 1.15(b) and 1.16(d) in Informal Opinion 2010-07, *Destruction of Inactive Client Files,* Issued September 15, 2010, and Informal Opinion 2012-09, *Retiring Attorney's Proposed Disposition of Client's Files,* Issued October 17, 2012. There is also useful information contained in the CBA File Retention Guidelines Including Commentary (1999) (available on the CBA website). However, as the CBA File Retention Guidelines state in the first sentence, they "cannot be considered a safe harbor for the retention or destruction of files." They are merely standards of practice prepared by the CBA Board of Governors to "aid firms and attorneys in the formation of their own retention policies."

Complete records of the client's account funds and other property "shall be preserved for a period of seven years after termination of the representation." Rule 1.15(b). While the seven year retention requirement applies to records related to client funds and certain financial transactions, the Rules themselves are silent as to the length of time that a lawyer is required to retain client files. Lawyer states that it has been her practice to retain files until seven years after the youngest child involved in the case has reached the age of majority. Although most attorneys would be grateful for a "bright line" rule, unfortunately the analysis is more complex and fact specific. As this committee made clear in its Informal Opinion 10-07, before destroying client files or portions thereof, a lawyer must analyze the files to determine whether they contain "critical documents." Critical documents are those "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." If the files do contain "critical documents," the lawyer must expend reasonable and diligent efforts to locate the former client, return the documents to them or continue to safeguard the critical documents for as long as is practicable. Informal Opinion 10-07, citing Informal Opinion 98-23.

We stated in Informal Opinion 10-07 that "[n]on-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. Old client files that contain only non-critical documents may be destroyed." A lawyer's analysis of whether documents are non-critical must be performed in the context of the circumstances of the client's matter. Under Rule 1.16(d), "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests."

On the other hand, there may be documents which should ordinarily be turned over to a client, but due to exceptional circumstances, cannot be disclosed or surrendered to the client. For example, there may be documents that are subject to a court-imposed confidentiality agreement, or there might be entries in file memoranda that contain confidential information concerning other clients, thus requiring redaction, or, material that might, in the attorney's reasonable judgment, cause significant harm to the client—for example, certain medical or psychiatric records that might be injurious to the client. See, Rule 1.4, Comment—Withholding Information.

Representation of a minor almost always includes sensitive information that could fall into one or more of the above categories. Even when the child reaches majority, it could still

be ill-advised to turn over such documents to the child. It should be noted that a Guardian Ad Litem does not have an attorney-client relationship with the "child." Rather the relationship is one of a guardian and ward.[5]

Finally, there are documents that would ordinarily not be critical documents or necessary to protect the client's interests, such as time and billing records, and internal firm documents for administrative purposes. Lawyer should keep in mind, however, that even if Lawyer determines that such documents need not be surrendered to the client, they should be retained for some reasonable period of time, as it is possible that a court might order such documents to be produced in a dispute between the lawyer and the client. Once the Lawyer has engaged in the above analysis, the Lawyer's practice of retaining files until the youngest child reaches the age of majority would constitute an abundance of caution on the part of Lawyer. Subject to the above analysis, when a client reaches the age of majority, the Lawyer could provide written notice to the client offering to transfer possession of any documents required to be surrendered to them, and of Lawyer's intent to destroy the files after a reasonable amount of time.

Lawyer states she was never "hired" by the parents or child, and did not enter into any retainer agreements with either the parents or children she represented. This fact has no bearing on Lawyer's obligation to maintain client records and protect the client's property. It does, however, indicate that such obligations were not modified by agreement between Lawyer and client.

Lawyer notes in her inquiry that court-appointed attorneys under C.G.S. § 46b-54 as well as GALs have absolute quasi-judicial immunity for actions taken during or activities necessary to the performance of functions integral to the judicial process. *See, Carrubba v. Moskowitz,* 274 Conn. 533 (2005). However, the *Carrubba* Court, in determining that a court-appointed attorney for a minor child has absolute quasi-judicial immunity, also noted that an "attorney for the minor child, just as any other attorney, is subject to discipline for violations of the Code of Professional Conduct." *Carrubba,* 274 Conn. at 543. While a GAL may be an attorney, a GAL is not necessarily an attorney. The duties and functions of a GAL are separate and distinct from those of an attorney to her client. *Carrubba,* 274 Conn. at 538–39; *see also,* Commentary to Rule 1.15.[6] Lawyer's file retention obligations when having served as GAL may be governed by other rules. But where a GAL is also a lawyer, the distinction becomes blurred. A lawyer must act in accordance with the Rules of Professional Conduct, but where the lawyer is acting as a GAL, the lawyer must follow the rules applicable to GALs. Indeed, the State of Connecticut Judicial Branch has promulgated a Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem (the"Code"). The Code provides that "[i]f the GAL is an attorney, he or she acts in the capacity of a guardian, rather than as an attorney, and the information he or she receives is not subject to attorney-client confidentiality." On the other hand, under the Code, both the GAL and the AMC are required to "[m]aintain documentation to substantiate recommendations and conclusions and keep written records of all interviews and investigations for six years from the date of completion of services rendered by counsel or a GAL."

In conclusion, the CBA File Retention Guidelines cannot be considered a safe harbor for the retention or destruction of files. They are merely standards of practice prepared by the CBA Board of Governors to aid firms and attorneys in the formation of their own retention policies. Lawyer's obligations as GAL are separate and distinct from her obligations as AMC. We express no opinion regarding the length of time a GAL must retain documents and files pertaining to her appointment as GAL. In order to determine the length of time Lawyer must retain her client files, lawyer must analyze and decide what parts of such files are critical and what parts are non-critical. Non-critical documents may be destroyed. Critical documents require the Lawyer to use reasonable efforts to locate the client, or other person with decision-making authority for the client, return files to the client or such other person, or seek the advice of an appropriate judicial forum as to disposition of such documents.

Notwithstanding the recommendations and guidelines that this opinion provides, there is no ethical rule that prohibits an attorney from contracting with a client, whether an individual, business entity, or city, town, or other governmental agency, to provide legal services under terms that include a provision establishing, by agreement, the period of time that an attorney will retain a client's file. It is, in fact, a good practice to set forth that time period in the initial engagement agreement or engagement letter. **CL**

Notes

1. For the purposes of this inquiry, we have assumed that the question pertains to files already closed.
2. For a thorough analysis and discussion of the contents of a client's file, what must be maintained by the attorney and what a client is entitled to receive from the attorney, See, Informal Opinion 2010-07; See also, *Guidance Concerning the Contents of the Client File that the Client is Entitled to Receive,* Maine Board of Bar Overseers Opinion #187, Issued November 5, 2004.
3. (b) A lawyer shall hold property of clients or third persons that is in a lawyer's 3 possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. 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 termination of the representation.
4. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to 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 the fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. If the representation of the client is terminated either by the lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation.
5. See, Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem, Section I (b)(v).
6. "The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule." See, Commentary to Rule 1.15.