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Standing Committee on Professional Ethics

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Opinion 2021-01
Maintaining Client Files and Original Wills When a Partner Departs

The Committee received an inquiry from an attorney, as partner in a law firm (“Requesting Partner”) regarding the ethical obligations owed to clients and former clients about the client’s files and original executed Wills when a partner leaves the firm (“Departing Partner”). The Requesting Partner provided the following facts: (1) the Departing Partner left the law firm to practice elsewhere; (2) at the time of departure, the Departing Partner sent “ballot” letters to clients soliciting consent to transfer the active clients’ files to the Departing Partner’s new firm; (3) some clients did not return the “ballot” or otherwise consent to transfer their active files to the Departing Attorney; and (4) the firm maintains clients’ files and former clients’ original executed Wills.

The Requesting Partner asked whether:

1. the Departing Partner is entitled to take the active clients’ files from the firm at the time of departure where the clients did not return the “ballot” or otherwise consent?
2. the Departing Partner is entitled to take former clients’ original executed Wills and estate planning documents from the firm at the time of departure without notice to the former clients or client consent?

Rule 5.1(a) of the Rules of Professional Conduct (the “Rules”) requires attorneys with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all attorneys in the firm will conform to the Rules.

Rule 1.15 of the Rules imposes the affirmative duty upon an attorney to safeguard client property in the attorney’s possession. While this duty is most frequently applied in the context of an attorney’s handling of client funds or tangible property, the Rule extends to *all* forms of client property, including a client’s file and/or original executed Will. *See* CBA Informal Opinion 98-23 (concerning reasonable steps to safeguard file documents and original Wills).

The questions presented here underscore the importance of attorneys in a firm creating a file and record retention policy. Implementing and enforcing such a policy helps every attorney safeguard client confidences and organize information to permit effective representation and compliance with the Rules. Properly maintaining client files during representation and for an established time-period thereafter benefits the attorney, the law firm, and client. Ideally, attorneys inform their clients of the retention policy in the retainer agreement or file closing letter. *See* CBA Informal Opinion 10-07.

Rule 1.4(a)(3) of the Rules provides, in pertinent part, that “a lawyer shall . . . keep the client reasonably informed about the status of the matter,” which includes the attorney’s status and the location of the client’s file.



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See CBA Informal Opinions 88-23, 97-14, 97-15 and 00-25 (confirming that an attorney’s departure from a law firm is sufficiently noteworthy to warrant notice to the client).

In the Committee’s view, the size of the firm, the sophistication of the client, and the nature of the client matter are relevant to the client’s reasonable expectation with respect to who will act on the client’s behalf when an attorney leaves the firm. For example, the reasonable expectation of a corporate client retaining a mid-size firm for representation in multiple contract matters may differ significantly from that of an individual client retaining an attorney in a two-attorney firm for representation in a custody dispute. In every situation the client’s reasonable expectation under the circumstances is an important consideration in determining the timing, content, and method of notification.

Where a client engages the law firm and the firm advises the client that its professional staff will provide representation in the client’s matter, the client may understand that no particular lawyer in the firm will handle every aspect of the client’s matter. However, where a client reasonably expects that a particular lawyer will handle the client’s matter, the departure of that attorney is a significant development that triggers the duty to inform the client. Timely notification to the client regarding the departure of an attorney involved in the client’s matter is critical to assist the client to decide who will represent him. *See* CBA Informal Opinion 00-25 (quoting ABA Formal Opinion 414 (1999)).

When fulfilling this duty to inform the client, partners at the law firm or the Departing Attorney may solicit the client’s consent (in the form of a “ballot” letter) for transfer of representation and delivery of the former client’s original Will and file to the Departing Attorney. If a client responds to a “ballot” that directs the transfer of the client’s file, then the client’s direction controls. Both the Requesting Attorney and the Departing Attorney must comply with the client’s instruction. *See* ABA Formal Opinion 489 (12/4/19).

In response to Question #1 presented about the Departing Attorney’s “ballot” sent to active clients about their files, if a client fails to return the “ballot” or otherwise respond with consent to transfer the client’s file in an active or pending matter, neither the Requesting Attorney nor the Departing Attorney can assume consent to the transfer representation of the client (and the client’s file) to the Departing Attorney. The client’s silence cannot be construed as acquiescence under these circumstances.

If no “ballot” is received, it’s equally important for the Requesting Partner who has managerial and/or supervisory authority, to ensure that the law firm’s remaining attorneys are capable and sufficiently competent to continue representation in the client’s active or pending matter. *See* Rule 1.1. Without a reasonable means to competently handle the client’s active matter, the Requesting Partner may consider an arrangement with the Departing Partner to provide or assist in the provision of legal services to the firm’s client in the active, pending matter.

In response to Question #2 presented about the former client’s executed Will in the possession of the law firm, the Will is the property of the client. Under Rule 1.15, the law firm must safeguard it until the firm’s client gives different instructions. If a Departing Attorney takes the client’s Will from the law firm without notice to the client or the client’s consent, then in most instances, the Departing Attorney would be frustrating a material purpose of Rule 1.15.



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When an attorney leaves a law firm, the original Will and estate planning documents in the client's file should remain with the law firm, unless the client's reasonable expectation under the circumstances manifestly warrant transfer. For example, if the Departing Partner exclusively represented the client in preparation and execution of the Will, and was specifically entrusted with possession of the client's original Will, the Requesting Partner may transfer the Will to the Departing Partner provided the Requesting Partner is satisfied that the Departing Partner will preserve and safeguard the original Will, and Requesting Partner notifies the former client of the transfer, and the client does not object to the arrangement.

While the Rules do not precisely answer the questions presented, the Committee concludes that the Departing Partner is not automatically entitled to take the active clients' files from the firm at the time of departure where the client does not return the "ballot" or otherwise consent. The Departing Partner is not entitled to take a former client's original executed Will from the firm at the time of departure without notice to the former client or client consent. The Requesting Partner may transfer to the Departing Partner a former client's original executed Will and estate planning documents where the arrangement conforms to the reasonable expectations of a particular client, and the firm advises the client of the transfer to the Departing Partner, and the client does not object to the arrangement.

THE COMMITTEE ON PROFESSIONAL ETHICS

Kim E. Rinehart

BY Kim Rinehart, Chair