

ABA Comm. on Ethics and Professional Responsibility Formal Op. 92-369 American Bar Association

DISPOSITION OF DECEASED SOLE PRACTITIONERS' CLIENT FILES AND PROPERTY

December 7, 1992

To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.

A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

The Committee has been asked to render an opinion based on the following circumstances. A lawyer who has a large solo practice dies. The lawyer had hundreds of client files, some of which concern probate matters, civil litigation and real estate transactions. Most of the files are inactive, but some involve ongoing matters. The lawyer kept the active files at his office; most of the inactive files he removed from the office and kept in storage at his home.

The questions posed are two:

- 1) What steps should lawyers take to ensure that their clients' matters will not be neglected in the event of their death?
- 2) What obligations do lawyers representing the estates of deceased lawyers, or appointed or otherwise responsible for review of the files of a lawyer who dies intestate, have with regard to the deceased lawyer's client files and property?

I. Sole Practitioner's obligations with regard to making plans to ensure that client matters will not be neglected in the event of the sole practitioner's death

The death of a sole practitioner could have serious effects on the sole practitioner's clients. See Program: Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner, prepared by the ABA General Practice Section, Sole Practitioners and Small Law Firms Committee, August 7, 1986. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Model Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence) are relevant to this issue, and read in pertinent part:

Rule 1.1 Competences

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligences

A lawyer shall act with reasonable diligence and promptness in representing a client.

Furthermore, the Comment to Rule 1.3 states in relevant part:

A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety....

According to Rule 1.1, competence includes "preparation necessary for the representation," which when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client, [FN1] the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship. [FN2]

Lawyers have a fiduciary duty to inform their clients in the event of their partnership's dissolution. [FN3] A sole practitioner would seem to have a similar duty to ensure that his or her clients are so informed in the event of the sole practitioner's dissolution caused by the sole practitioner's death. Because a deceased lawyer cannot very well inform anyone of his or her death, preparation of a future plan is the reasonable means to preserve these obligations. Thus, the lawyer ought to have a plan in place which would protect the clients' interests in the event of the lawyer's death. [FN4]

Some jurisdictions, operating under the Model Code of Professional Responsibility, have found lawyers to have violated DR6-101(A)(3) when the attorneys have neglected client matters by reason of ill-health, attempted retirement, or personal problems. [FN5] The same problems are clearly presented by the attorney's death, thus suggesting that a lawyer who died without a plan for the maintenance of his or her client files would be guilty of neglect. Such a result is also consistent with two of the three justifications for lawyer discipline. [FN6] Sanctioning of lawyers who had inadequately prepared to protect their clients in the event of their death would tend to dissuade future acts by other lawyers, and it would help to restore public confidence in the bar. [FN7]

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death. [FN8]

II. Duties of lawyer who assumes responsibility for deceased lawyer's client files

This brings us to the second question, namely the ethical obligations of the lawyer who assumes responsibility for the client files and property of the deceased lawyer. Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files,

the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer.

At the outset, the Committee notes that several states' rules of civil procedure make provision for court appointment of lawyers to take responsibility for a deceased lawyer's client files and property. [FN9] Since the lawyer's duties under these statutes constitute questions of law, the Committee cannot offer guidance as to how to interpret them. [FN10]

A. Duty to inspect files

Many state and local bar associations have explored the issues presented when a lawyer assumes responsibility for a deceased lawyer's client files. [FN11] The ABA Model Rules for Lawyer Disciplinary Enforcement also address some aspects of the question. [FN12] A lawyer who assumes such responsibility must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer and to request instructions, in accordance with Rule 1.15. [FN13] Because the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention. [FN14]

B. Duty to maintain client files and property

Questions also arise as to how long the lawyer who assumes responsibility for the deceased lawyer's client files should keep the files for those clients he or she is unable to locate. ABA Informal Opinion 1384 (1977) provides general guidance in this area. We believe that the principles set out in that opinion are applicable to the instant question. Informal Opinion 1384 states as follows:

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed to the clients' detriment.

Informal Opinion 1384 then lists eight guidelines that lawyers should follow when deciding whether to discard old client files. One of these guidelines states that a lawyer should not "destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, and original documents." Another suggests that a lawyer should not "destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."

There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions. [FN15]

Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of law that this Committee cannot address. [FN16]

FN1. See Model Rule of Professional Conduct 1.16 ("... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client....")

FN2. See *Murphy v. Riggs*, > 213 N.W. 110 (Mich.1927) (fiduciary obligations of loyalty and confidentiality continue after agency relationship concluded); *Eoff v. Irvine*, > 18 S.W. 907 (Mo.1892) (same.)

FN3. See *Vollgraff v. Block*, > 458 N.Y.S.2d 437 (Sup.Ct.1982) (breach of fiduciary duty if partnership's clients not advised of dissolution of partnership). A state bar association is considering creating an "archive form"--indicating the location of client files--which lawyers would complete and file with the state bar association in the event they terminate or merge their practice, thus enabling clients to locate their files. See ABA ETHICSearch, September 1992 Report. Such a form would be consistent with the duty discussed in *Vollgraff*, as simply informing a client of a firm's dissolution without telling the client where the client's files are located would be tantamount to saying "your files are no longer here."

FN4. The Fla.Bar, Professional Ethics Comm., Op. 81-8(M) (Undated) discussed the obligations of a lawyer who was terminally ill with regard to client files:

After diligent attempt is made to contact all clients whose files he holds, a lawyer anticipating termination of his practice by death should dispose of all files according to his client's instructions. The files of those clients who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the clients are in the files. Important documents should be indexed and placed in storage or turned over to any lawyer who assumes control of his active files. In any event, the files may not be automatically destroyed after 90 days.

FN5. See *In re Jamieson*, > 658 P.2d 1244 (Wash.1983) (neglect due to ill- health and attempted retirement); *In Re Whitlock*, > 441 A.2d 989 (D.C.App.1982) (neglect due to poor health, marital difficulties and heavy caseload); *Committee on Legal Ethics of West Virginia State Bar v. Smith*, > 194 S.E.2d 665 (W.Va.1973) (neglect due to illness and personal problems).

FN6. See *In Re Moynihan*, > 643 P.2d 439 (Wash.1982) (three objectives of lawyer disciplinary action are to prevent recurrence, to discourage similar conduct on the part of other lawyers, and to restore public confidence in the bar).

FN7. Obviously, sanctions would have no deterrent effect on deceased lawyers.

FN8. Although the designation of another lawyer to assume responsibility for a deceased lawyer's client files would seem to raise issues of client confidentiality, in that a lawyer outside the lawyer-client relationship would have access to confidential client information, it is reasonable to read Rule 1.6 as authorizing such disclosure. Model Rule of Professional Conduct 1.6(a) ("A lawyer shall not reveal information relating to representation of a client ... except for disclosures that are impliedly authorized in order to carry out the representation.") Reasonable clients would likely not object to, but rather approve of, efforts to ensure that their interests are safeguarded.

FN9. See, e.g., Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases:

Appointment of Receiver. When it comes to the attention of the circuit court in any judicial circuit from any source that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting that lawyer's affairs is known to exist, then, upon such showing of the presiding judge in the judicial circuit in which the lawyer maintained his

practice, or the supreme court, may appoint an attorney from the same judicial circuit to perform certain duties hereafter enumerated ...

Duties of Receiver. As expeditiously as possible, the receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer, and to take whatever other action is indicated to protect the interests of the attorney, his clients or other affected parties.

FN10. Lawyers who act as administrators of estates have fiduciary duties to all those who have an interest in it, such as beneficiaries and creditors. Questions involving the lawyer's fiduciary responsibility to the estate of a deceased lawyer are also questions of law that this Committee cannot address. See, e.g., *In Re Estate of Halas*, > 512 N.E.2d 1276 (Ill.1987); *Aksomitas v. Aksomitas*, > 529 A.2d 1314 (Conn.1987).

FN11. See, e.g., *Md. State Bar Ass'n, Inc., Comm. on Ethics*, Op. 89-58 (1989); *State Bar of Wis., Comm. on Professional Ethics*, Op. E-87-9 (1987); *Miss.State Bar, Ethics Comm.*, Op. 114 (1986); *N.C. State Bar Ass'n, Ethics Comm.*, Op. 16 (1986); *Ala. State Bar, Disciplinary Comm'n.*, Op. 83-155 (1983); *Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics*, Ops. 89-43 and 89-23 (1989); *Ore.State Bar, Ethics Comm.*, Op. 1991-129 (1991).

FN12. ABA Model Rules for Lawyer Disciplinary Enforcement (1989), Rule 28 states in relevant part:

APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS WHEN RESPONDENT IS TRANSFERRED TO DISABILITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS, OR DIES.

A. **Inventory of Lawyer Files.** If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. **Protection for Records Subject to Inventory.** Any lawyer so appointed shall not be permitted to disclose and information contained in any files inventories without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

FN13. Model Rule of Professional Conduct 1.15(b) ("Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.")

FN14. Again, while issues of client confidentiality would appear to be raised here, a reasonable reading of Rule 1.6 suggests that any disclosure of confidential information to the reviewing attorney would be impliedly authorized in the representation. See note 8, *supra*.

FN15. Responding to a recent inquiry, the Committee on Professional Ethics of the Bar Association of Nassau County suggested that an attorney assuming responsibility for a deceased attorney's client files has an ethical obligation to treat the assumed files as his or her own. *Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics*, Op. 92-27 (1992).

FN16. There are at least 27 state and local bar opinions that discuss a lawyer's obligations when the lawyer cannot locate clients who have funds in lawyer trust accounts. See, e.g., State Bar of S.D., Ethics Comm., Op. 91-20 (1991); State Bar of Ariz., Comm. on Rules of Professional Conduct, Op. 90-11 (1990); R.I.Sup.Ct., Ethics Advisory Panel, Op. 90-21 (1990); Alaska Bar Ass'n, Ethics Comm., Op. 90-3 (1990); Md.State Bar Ass'n, Inc., Comm. on Ethics, Op. 90-25 (1990); Bar Ass'n of Nassau County (N.Y.), Comm. on Professional Ethics, Op. 89 (1990).

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