

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 92-11

September 16, 1992

The Ethics Committee received the following request for an opinion from [REDACTED], Attorney at Law, [REDACTED], North Dakota:

As we understand the situation, you and your partner are in the process of closing your office, and you currently have in your possession closed client files going back to 1981. You have requested the guidance of the Ethics Committee as to what to do with these files; specifically, whether or not you could turn them over to another attorney.

Neither the Century Code nor the Rules of Professional Conduct directly address the issue. Rule 1.16(e) of the Rules does provide in part that upon termination of representation a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled. The Rule goes on to provide that the lawyer may retain papers relating to the client to the extent permitted by law.

We also note that the Standards for Imposing Lawyer Sanctions in Standard 4.1 directs that a lawyer can be subject to certain sanctions including a reprimand when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client, or admonition when a lawyer is negligent in dealing with client property and causes little or no actual potential injury to a client.

In 1977, the American Bar Association issued its Informal Ethics Opinion 1384 which has served as precedent for subsequent opinions on this issue by various state bar associations. In the opinion, the attorney asked for advice concerning a lawyer's professional responsibility with respect to disposition of client files after the matter has been terminated and the file closed. It was stated that there is no specific time during which a lawyer must preserve all files and beyond which he or she is free to destroy them. It was said that good common sense should provide answers to most questions that arise. The following considerations were suggested:

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items includes those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially ones not filed or recorded in the public records).
2. The lawyer should use care not to 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.
3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, in which a client may reasonably expect will be preserved by the lawyer.
4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based on their obvious relevance and materiality to matters that can be expected to arise.
5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.
6. In disposing of a file, the lawyer should protect the confidentiality of the contents.
7. A lawyer should not destroy or disclose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

It has been stated that reasonable efforts must be taken to locate the client, which include the minimum efforts of notice by regular and certified mail sent to the client's last known address. (State Bar of Michigan Formal Opinion R-12, 9/27/91.)

With respect to your question of whether or not you could turn these closed files over to another attorney, again, the Rules do not specifically provide direction. It would appear that such cannot be done without obtaining the client's consent to the successor counsel. (Michigan Bar Association Opinion R1-100, 9/30/91.)

[REDACTED]

[REDACTED]

[REDACTED]

August 18, 1992

Murray G. Sagsveen, Esq.
P.O. Box 1695
Bismarck, ND 58502

Re: Disposition of Closed Files

Dear Mr. Sagsveen:

[REDACTED] and I are in the process of closing our office. We have closed client files going back to October of 1981.

[REDACTED] is taking a job with the Trust Department at First National Bank and I am moving to [REDACTED] so we need to resolve the question of what to do with these files.

I called Vivian Berg to seek her guidance on the ethics of whether or not we could turn them over to another attorney. She suggested I contact you in your capacity as Chairman of the SBA ND Committee on Ethics.

We are closing the office on October 1, 1992, so your expedited response would be much appreciated if that will be possible.

Thank you.

Very truly yours,

[REDACTED]

[REDACTED]

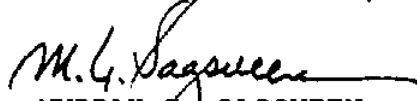
[REDACTED]

With respect to documents which belong to a client, it has been stated that a lawyer must offer to make them available to the client and may follow the client's instructions as to disposal. However, if the client fails to respond within a reasonable period of time, the lawyer should review the files to determine which must be saved because of legal requirements or because the documents establish client rights. The remainder of the files may then be destroyed in a manner that preserves client confidentiality. If delivery to a client or his representative is not possible, the lawyer must retain the files until expiration of the legal retention period or a period reasonably foreseeable by the client. It was stated that the lawyer may charge the client for the cost of maintaining the files. (New York State Opinion 623, 11/7/91.)

This opinion is consistent with a prior Ethics Committee informal opinion on this same subject dated June 27, 1990 [REDACTED]. It was suggested in the informal opinion that if some of the clients cannot be personally notified, that the attorney may consider some type of public notice in a local newspaper.

The Ethics Committee recommends the foregoing guidelines to you in disposition of your closed files.

This opinion was drafted by Brian R. Bjella and unanimously approved by the Ethics Committee on September 16, 1992.


MURRAY S. SAGSVEEN
Chairman