

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS**

FORMAL OPINION 2010-1

**USE OF CLIENT ENGAGEMENT LETTERS TO AUTHORIZE THE RETURN
OR DESTRUCTION OF CLIENT FILES AT THE CONCLUSION OF A MATTER**

TOPIC: Agreements for the disposition of client files at the end of an engagement.

DIGEST: Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions.

RULES: 1.0(j), 1.15, 1.16(e)

QUESTION: May a lawyer and client at the outset of a representation agree to the disposition of the client's files upon conclusion of the engagement?

OPINION

I. Background

Lawyers routinely face questions regarding the disposition of client files upon completion of an engagement.¹ In addressing these questions, ethics opinions have focused almost exclusively on an attorney's obligations absent an express agreement with, or directive from, the client. There appears to be little, if any, guidance regarding consensual arrangements for the final disposition of client files.

Plainly, upon termination of the attorney-client relationship, the client is "presumptively accord[ed] . . . full access" to the lawyer's files on a represented matter. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34 (1997) (hereinafter, *Sage Realty*). And to provide that access, a "lawyer may simply deliver [the files] to the client" at the end of an engagement. ABCNY Formal Op. 1986-4. But if the client does not seek access or makes no provision for delivery, her attorney may have an obligation to retain certain documents, although the lawyer need not permanently retain all files after an engagement is concluded. *See* N.Y. State 623 (1991) (citing N.Y. State 460 (1977) and

¹ Lawyers have sought to address these questions by, among other things, preparing and implementing records retention and destruction policies ("RRD policies"). This Opinion does not address the ethical, legal and other issues presented in drafting RRD policies. We note, however, that there are a number of helpful guides regarding the proper construction and implementation of those policies. *See, e.g.,* Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 L. LIBR. J. 7 (2001).

ABA Informal Op. 1384 (1977)); *see also* RESTATEMENT (THIRD) OF LAW: THE LAW GOVERNING LAWYERS § 46 (1998) (lawyers' obligation to take reasonable steps to preserve and safeguard documents relating to a representation of a former client does not require lawyers to preserve documents indefinitely).² Nevertheless, over time, the burden of dealing with closed files may be substantial as the volume of paper and electronic data mounts, and the cost of storage increases. Lawyers understandably wish to minimize this burden and expense consistent with their obligations to their clients and former clients upon completion of a matter or engagement.

This opinion addresses the use of engagement letters to provide a practical and ethical solution for handling client files at the conclusion of a matter. We find that an attorney may include a provision in retainer agreements and engagement letters authorizing the lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents (other than original deeds, wills or similar documents with intrinsic value). Prior to discarding any documents, however, the attorney must take reasonable steps to preserve all documents that she has an obligation to retain or return to the client.

II. A Lawyer's Obligation to Retain Client Files

The New York Rules of Professional Conduct provide little guidance on what a lawyer must do with client files upon completion of a matter. Rule 1.16(e) addresses, among other things, the handling of client files, but only in the context of transferring an ongoing matter to another attorney. The rule provides that

[u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled*, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

N.Y. Prof'l Conduct R. 1.16(e) (2009) (emphasis added).

Other than Rule 1.16(e), there are no Rules specifically applicable to the retention or disposition of client documents.³ Nevertheless, prior ethics opinions and case law establish

² This Opinion addresses ethical considerations bearing on the disposition of client files. It does not address obligations to retain files imposed by applicable law or other specific circumstances, including statutory obligations imposed upon certain financial institutions, requirements to preserve electronic and other data upon notice of a potential claim, or retention periods imposed by an attorney's malpractice insurance carriers.

³ Certain local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases. *See, e.g.*, N.Y. Ct. App. 1st

that attorneys may have continuing obligations with respect to documents in closed client files depending on the nature and contents of the documents in question. *See, e.g., Sage Realty*, 91 N.Y.2d 30 (1997); ABCNY Formal Op. 2008-1; ABCNY Formal Op. 1986-4; N.Y. State 460 (1977); N.Y. State 623 (1991); D.C. Bar Op. 283 (1998). These authorities categorize client documents as follows: Category 1: documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments. *See* D.C. Bar Op. 283 (1998). Category 2: documents that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired. *See* N.Y. State 460 (1977). Category 3: documents that need not be returned to the client because they “would furnish no useful purpose in serving the client’s present needs for legal advice,” *Sage Realty*, 91 N.Y.2d at 36, or are “intended for internal law office review and use.” *Id.* at 37.

III. The Use of Engagement Letters to Specify the Disposition of a Client’s File Upon the Conclusion of a Matter

The foregoing categories provide a useful framework when drafting a provision in an engagement letter governing the disposition of a client’s file at the end of a matter. Category 1 documents must be preserved or returned to the client, unless the client specifically directs a different disposition. In contrast, there is no obligation to preserve Category 3 documents. Consequently, an engagement letter may provide for their destruction at the end of the engagement, although express permission of the client may not be required. *See* N.Y. State 623 (1991) (documents belonging to the attorney may immediately be destroyed without consultation or notice, absent “extraordinary circumstances manifesting a client’s clear and present need for such documents.”).

With regard to documents in Category 2, there must be an analysis to determine the appropriate disposition of this material. For example, the lawyer needs to consider whether the document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement, or whether no such need exists because the document relates solely to a claim fully and finally resolved through litigation. This determination, however, cannot in all cases be made prospectively, *i.e.*, at the beginning of the engagement. At that juncture, the attorney may not have seen or be able to anticipate all of the documents that will become part of the client file, much less anticipate the need, if any, the client may have for such documents at the end of the matter. The determination, therefore, most likely will have to be made when the representation has ended, before any such documents are discarded. And the client may authorize the lawyer at the outset of the engagement to undertake a final review of the closed file and determine in her sole discretion which of the Category 2 documents, if any, should be retained by the lawyer or returned to the client.

An engagement letter therefore may stipulate to the procedure governing disposition of client documents upon conclusion of a matter. In that connection, with client consent, the

Dept. R. 603.7(f) (2009). And New York Rule of Professional Conduct 1.15 provides detailed requirements for the preservation of an attorney’s own financial records.

engagement letter may authorize an attorney to take one of the following steps after the file is closed: discard all documents in the file (apart from Category 1 documents), return all documents to the client, or return only those documents requested by the client and discard the balance of the file. This approach has support in a number of ethics opinions finding or suggesting that a lawyer and her client may agree on the final disposition of the client's documents at the outset of an engagement. *See* ABCNY Formal Op. 2008-1 (suggesting the use of engagement letters to define obligations regarding preservation of e-data at the conclusion of the matter); N.Y. State 623; Ariz. State Bar Op. 08-02 (“[a] lawyer *may* fulfill the lawyer’s ethical obligations [regarding file retention] by tendering the entire file to the client at the termination of the representation”) (italics in original); Cal. State Bar Standing Comm. On Prof’l Responsibility & Conduct, Formal Op. 2001-57 (stating that written fee agreements may provide “that following the termination of the representation the contents of the file [excluding Category 1 documents] may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client”); D.C. Bar Op. 283 (retainer agreement may provide for the immediate delivery, temporary storage, or immediate destruction of files following completion of the representation).⁴

This approach raises the question of whether it is permissible to agree in advance to the disposition of Category 2 documents at a time when it may be difficult, if not impossible, to fully foresee the client’s need, if any, for any particular document(s) after the matter has been concluded. We believe that such an agreement is permissible under the Rules provided that at the outset of the engagement, the lawyer obtains the informed consent of the client.⁵ As we previously have noted, “a client’s sophistication is an important determinant of the degree of disclosure required to obtain informed consent . . .” ABCNY Formal Op. 2008-2. Thus, depending on the sophistication of the client and the other pertinent circumstances affecting the representation, to obtain informed consent, the lawyer may need to explain to her client the likely categories of documents anticipated to comprise

⁴ A number of ethics opinions and other authorities have observed that a written arrangement with the client may help define the attorney’s obligations regarding the handling of client files during and at the end of the representation. *See, e.g.*, Pa. Bar Ass’n Comm. on Legal Ethics, Op. 2007-100, at 5 (2007); Neb. Advisory Op. 2001.3 (the scope of the “file” to which the client is entitled depends in part on the agreement between the client and the lawyer and engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct); *see also* John Allen, *Focus on Professional Responsibility: Ownership of Lawyer’s Files About Client Representations—Who Gets the “Original”? Who Pays for the Copies?*, 79 MICH. B. J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter).

⁵ Rule 1.0(j) of the New York Rules of Professional Conduct provides that “[i]nformed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

the file, the lawyer's obligation to retain or return Category 1 documents, the lawyer's obligation to identify and retain or return documents the lawyer knows the client will need following completion of a matter or engagement, and the risk that the lawyer may discard certain documents that may prove useful to the client in light of developments occurring only after the documents have been discarded.

We address two additional practical questions. First, what must a lawyer do at the end of a matter if she is directed by her client to discard the entire file (including Category 1 and 2 documents), even after she has advised the client to retain some or all of the documents? In such circumstances, the lawyer is obligated to provide competent advice on the matter and to follow the client's instructions regarding the pursuit of any lawful course of action: "once the client is fully informed (taking into consideration the client's level of sophistication) as to the legal consequences" of the decision, the lawyer should abide by the client's instruction. N.Y. State 713 (1999) (lawyer should comply with client's instructions so long as fully informed and client is not directing lawyer to engage in illegal activity).

Second, there may be instances where the lawyer is unable to locate her client at the conclusion of an engagement, precluding the lawyer from returning files as directed by the client. In such circumstances, prudence will dictate that the lawyer retain Category 1 and 2 documents for some period of time. This approach has been adopted in a number of ethics opinions from other jurisdictions, some of which prescribe the length of time that such files should be retained. *See, e.g.*, Conn. Bar Ass'n Informal Op. 98-23 (1998) (retain Category 1 records for "as long as is practicable"); D.C. Bar Op. 283 (five year retention period beginning at time of termination); Ala. Bar Op. 93-10 (1993) (six year retention period). Special circumstances may require a longer preservation period than others, including for example, representations involving clients who were minors during a period of the engagement or matters involving estate planning.

Below, we include a sample engagement letter provision, but the facts and circumstances of any particular engagement may require that it be modified.

IV. Sample Engagement Provision For Disposition of Files at the Termination of the Engagement

Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within sixty (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend

claims. You should understand that “materials” include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process.

Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.

Some additional caveats should be noted here:

1. At the end of the engagement, the attorney and firm should develop a process whereby the attorney and other assistants at the firm cull through the various documents to ensure that Category 1 and 2 documents are reviewed and preserved or, where authorized and appropriate, discarded.
2. While not required, it may be prudent for the lawyer, when sending a closure letter advising that the engagement is concluded, to describe the category of documents contained in her files that will be discarded. From a risk management standpoint, use of closure letters that more specifically describe what steps are to be taken with regard to a client’s files may be the best practice.
3. A lawyer may charge the client “customary fee schedules” for gathering and producing records to a client.⁶ ABCNY Formal Op. 2008-1 applied this principle to e-data retrieval and production, finding that the reasonableness of such fees will depend on the circumstances, including the need for engaging third parties to assist in the work and the accessibility of the e-data. Lawyers should use their good judgment as to what a reasonable, customary fee is and disclose the charges to the client in an engagement letter.

⁶ *Sage Realty*, 91 N.Y.2d at 38.

4. An attorney must ensure that the client's confidences are maintained during this process, including the use of third-party services regarding e-data and the destruction of e-data.
5. If a client can no longer be found, reasonable efforts should be made to locate the client to return the documents, as previously requested by the client.
6. An attorney should keep a record describing the disposal of any client documents for a reasonable period of time.