

**NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

Formal Opinion 2015-6: DUTY TO NOTIFY CLIENTS WHEN THEIR FILES ARE ACCIDENTALLY DESTROYED

TOPIC: Ethical Duties when Client Files Are Accidentally Destroyed

DIGEST: When client files are destroyed in an accident or disaster, an attorney may have an ethical obligation to notify current and former clients. Where the destruction of a client file compromises the lawyer’s ability to provide competent and diligent representation to the client, the lawyer must take reasonable steps to reconstruct the file sufficiently to allow the lawyer to provide such competent and diligent representation or must notify the client if he is unable to do so. The lawyer must also notify the current or former client if an accident or disaster compromises the security of confidential information.

RULES: 1.1, 1.3, 1.4, 1.15, 1.16

QUESTION: What ethical obligations govern a lawyer’s duty to notify clients that their files have been destroyed?

Opinion

I. Introduction

Natural or man-made disasters may cause the inadvertent destruction of client files. In February 2015, for example, a fire raged through a Brooklyn warehouse, destroying sensitive legal and medical data and scattering documents around the area. Several law firms, government agencies and businesses stored documents at the affected warehouse.¹ In autumn of 2013, Hurricane Sandy surged through New York City and destroyed thousands of barrels of evidence housed in a warehouse in Red Hook, Brooklyn.² And on September 11, 2001, numerous New York firms saw documents destroyed in the wake of the terrorist attacks on the World Trade Center.

This opinion will address a lawyer’s ethical duties to his clients when files are destroyed by an unforeseen disaster or accident.³ We assume, for the purposes of this opinion, that the

¹ See Vivian Yee, Fire at a Brooklyn Warehouse Puts Private Lives on Display, *The New York Times*, Feb. 1, 2015, available at www.nytimes.com/2015/02/02/nyregion/large-warehouse-fire-continues-to-burn-in-brooklyn.html.

² See David Goodman, Flooding of 2 Police Warehouses Destroys Evidence Needed for Criminal Trials, Jan 1, 2013, available at www.nytimes.com/2013/01/02/nyregion/hurricane-destroyed-evidence-held-by-new-york-police.html.

³ This opinion addresses only those obligations that arise in the wake of a disaster or accident that results in the destruction of client files. Naturally, there are steps a lawyer can and should take before such a disaster occurs to minimize the risk of damage. See, e.g., NYSBA Op. 940 (2012) (discussing the use of off-site backup tapes to store client information); NYCBA Report on “The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations” (Nov. 2013) (discussing use of cloud storage). That topic is beyond the scope of this opinion. The

lawyer has no agreement with the client as to the disposition of client files after the representation ends. Specifically, the opinion will address the following questions:

1. When must a lawyer notify a client that files relating to its legal matter have been destroyed?
2. What must the lawyer do to continue providing competent representation to the client after files have been destroyed?
3. What is a lawyer's duty when he knows a client's confidential information may be compromised as the result of a disaster?

II. A Lawyer's Duty to Notify Current and Former Clients About Files Destroyed in a Disaster or Accident

A. The Duty to Preserve Client Files

Under the New York Rules of Professional Conduct (the "Rules"), a lawyer has certain obligations with respect to property and files belonging to clients and third persons both during and after the representation. For example, Rule 1.15(a) states that a lawyer who is "in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law" acts as a "fiduciary" to the property owner. Rule 1.15(c)(4) requires the lawyer to "promptly . . . deliver to the client or third person as requested by the client or third person the . . . properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e) states that a lawyer must deliver "to the client all papers and property to which the client is entitled" at the end of the representation. The question of whether files related to a client's matter are the client's "property" is a question of law on which we cannot opine, as our jurisdiction is limited to interpreting the Rules. *See* NYCBA Formal Op. 1986-4 (1986) (whether files belong to client or attorney is a legal question beyond the Committee's jurisdiction). New York case law suggests, however, that a client has a property interest in – or, at a minimum, free access to – most documents or other materials relating to the client's matters. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30 (1997) (client is "entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation").

Putting aside technical arguments about whether client files constitute client "property," prior ethics opinions have established that lawyers have a duty to preserve documents relating to their client matters. *See, e.g.,* NYCBA Formal Op. 2010-1 (2010) (lawyers have a duty to preserve and safeguard documents relating to representation); NYSBA Op. 766 (2003) ("former client is entitled to any document related to the representation unless substantial grounds exist to refuse access"); NYCLA Op. 725 (1998) (lawyer should take reasonable steps to retain closed client files); NYCBA Formal Op. 1986-4 (guidelines for preserving and delivering client files); ABA Formal Op. 471 (2015) (detailing lawyer's obligations under the ABA Model Rules of Professional Conduct when responding to former client's request for papers and property in the lawyer's possession). The duty to preserve client files, however, does not extend indefinitely. *See* NYCBA Formal Op. 2010-1 ("lawyer need not permanently retain all files after an

destruction of client files may also trigger other duties that are beyond the scope of this opinion, such as notifying the lawyer's malpractice insurance carrier.

engagement is concluded”) (citing NYSBA Op. 623 (1991)); NYCLA Op. 725 (Under certain circumstances, attorney may discard a former client’s file). For certain records, the Rules specify a seven-year retention period. *See* R. 1.15(d) (requiring a lawyer to maintain certain “bookkeeping records” for “seven years after the events that they record”). Yet, for most client files, the Rules are silent as to the length of time they must be preserved. Because of this uncertainty, lawyers may have a tendency to keep old client files in storage either from an abundance of caution, or simply from inertia. Consequently, when client files are destroyed in a disaster or accident, lawyers may be uncertain as to their ethical obligations concerning those files.

B. The Duty to Notify Clients or Former Clients When Files Are Inadvertently Destroyed

Given that lawyers have a duty to preserve client files (at least for some period of time), it follows that an attorney may have a duty to notify the client or former client when such files have been inadvertently destroyed. This inference is supported by Rule 1.4, which requires an attorney to “promptly inform the client of material developments in the matter,” keep clients “reasonably informed about the status of a matter,” and “promptly comply with a client’s reasonable requests for information.” R. 1.4(a)(1)(iii), (a)(3), (a)(4). This duty also arises from the fiduciary duty that lawyers assume when they take possession of property belonging to clients or third parties. *See* R. 1.15(a) (lawyer who holds property of client or third party acts as a “fiduciary”).

There is no bright line rule to determine whether the inadvertent destruction of a document triggers a duty to notify the client or former client. Lawyers should make such determinations on a case-by-case basis, taking into account factors such as the relevance of the document to the matter, the type and age of the document, the status of the legal matter, and the ease of replicating the document. Although NYCBA Formal Op. 2010-1 addressed a different issue – when a lawyer *may destroy* client files after the representation ends – the Committee’s analysis is helpful in assessing when the duty to notify is triggered. The opinion suggested grouping files into three categories of importance:

- *Category 1*: Documents with “intrinsic value or those that directly affect property rights.” This includes documents such as wills, deeds and negotiable instruments.
- *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.” This is probably the broadest category of documents, and may include documents relating both to active and inactive client matters.
- *Category 3*: Documents with relatively little importance that would “furnish no useful purpose in serving the client’s present needs for legal advice.” (quoting *Sage Realty*, 91 N.Y.2d at 36).

Applying this framework, NYCBA Op. 2010-1 concluded that “Category 1 documents must be preserved or returned to the client, unless the client specifically directs a different disposition.” Similarly, if Category 1 files are inadvertently destroyed, we conclude the lawyer has an affirmative obligation to take reasonable steps to notify the client or former client, unless there is an agreement to the contrary. By contrast, NYCBA Op. 2010-1 concluded that “there is

no obligation to preserve or return Category 3 documents,” nor is express client consent necessarily required to destroy such documents. Accordingly, if – after conducting a reasonable inquiry – the attorney concludes that the documents fall into Category 3, he has no affirmative duty to notify the client of their inadvertent destruction, unless he and the client have agreed otherwise. The attorney is required, however, to comply with a client’s “reasonable request[.]” for information about those files, pursuant to Rule 1.4(a)(4). Thus, if the client or former client inquires about the status of Category 3 files, the attorney must promptly inform the client that the documents were inadvertently destroyed.

As NYCBA Op. 2010-1 notes, Category 2 documents must be analyzed on a case-by-case basis. The Committee suggested that, before destroying a Category 2 document at the end of the representation, the lawyer should determine 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.” We must emphasize, however, that NYBCA Op. 2010-1 dealt only with the disposition of client files *after* the representation ends. By contrast, our analysis must distinguish between Category 2 documents that relate to active matters, such as ongoing litigations or negotiations, and inactive matters, particularly those that have been closed for a significant period of time.

With regard to active matters, we conclude that the lawyer must take reasonable steps to notify the client if Category 2 documents are inadvertently destroyed. With respect to closed matters, however, the lawyer must determine – after a reasonable inquiry – whether the “client foreseeably may need” the documents. NYCBA Formal Op. 2010-1. For example, if the lawyer reasonably concludes that the “document relates solely to a claim fully and finally resolved through litigation,” he is not required to notify the client of the document’s destruction. By contrast, if there are open issues relating to the matter, such as related lawsuits, indemnification claims, subsequent negotiations, subsequent performance issues or contract breaches, or malpractice issues, the lawyer should take reasonable steps to notify the client that the file was destroyed. *See id.* (lawyer should consider whether “document in question is one a client foreseeably may need for pursuit of a claim following completion of the engagement”). Other factors that may be relevant to the decision to notify the client include:

- The amount of time that has passed since the matter was closed;
- Whether the firm previously gave the client reasonable notice that the files were available to be collected or delivered and whether the client responded to such notice;
- Whether the firm delivered copies of the files to the client at the conclusion of the matter or the client received copies of the files while the matter was ongoing;
- Whether the firm has previously made unsuccessful attempts to contact the client;
- Whether the contents of the file can be reconstructed from other sources.

Naturally, the most prudent option is to notify the client when any Category 2 documents are inadvertently destroyed. In our view, however, if the lawyer has evidence that the client retained copies of the documents at the end of the representation, he has no duty to notify the client that the lawyer’s copies of the documents were destroyed. In addition, if the lawyer has advised the client in writing at the end of the matter that her files will be destroyed without further notice if

not retrieved by a certain date, and those files are inadvertently destroyed in an accident after that date, the lawyer is not obligated to notify the client.

III. Fulfilling the Duties of Competence and Diligence After Client Files Are Inadvertently Destroyed

Lawyers are required to “provide competent representation to a client,” defined as possessing the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” R. 1.1(a). A lawyer must also “act with reasonable diligence and promptness in representing a client,” and “not neglect a legal matter entrusted to [him].” R. 1.3(a), (b). The destruction of client files may significantly impact the lawyer’s ability to competently or diligently represent his client. Upon learning that client files have been destroyed, the lawyer must first assess whether any of those files are needed to continue providing competent and diligent representation on open matters. If so, the lawyer must make reasonable efforts to reconstruct the destroyed file. This may include seeking copies of records from other sources, such as the court, government agencies, opposing counsel, co-counsel or the client herself.⁴ If the lawyer is unable to reconstruct the file to the extent necessary to provide competent and diligent representation, he must promptly disclose this fact to the client.

IV. Duties with Respect to Confidential Information in the Wake of a Disaster or Accident

Under Rule 1.6, “a lawyer shall not knowingly reveal confidential information” belonging to a client, and must “exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client.” R. 1.6(a), (c). The comments to Rule 1.6 explain that a lawyer must take precautions to prevent confidential information relating to the representation of the client “from coming into the hands of unintended recipients.” R. 1.6, Cmt. [17]. Furthermore, special circumstances may warrant special precautions to protect confidential information, depending on the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. *Id.* The duty of confidentiality continues after the attorney-client relationship has ended. *See* R. 1.9(c)(2) (lawyers may not “reveal confidential information of [a] former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client”).

In the wake of a disaster or accident, confidential information may be compromised. For example, in the Brooklyn warehouse fire, papers were strewn about the immediate area. Although the lawyer may not be able to prevent the dissemination of confidential information in such a situation, the fact that confidential information is no longer secure would be a material development in the representation. Consequently, the lawyer has a duty to notify his clients – not only that client files may have been destroyed – but also that confidential information may have been compromised. R. 1.4(a)(1)(iii). As indicated above, the extent of a lawyer’s duty to take affirmative steps to protect confidential information in *anticipation* of a disaster is beyond the scope of this opinion.

⁴ We recognize that reconstructing a client’s file may, in certain instances, come at a substantial cost. We do not opine on whether it is permissible for the lawyer to charge his client for reconstructing the file. Such a determination is at least in part a question of law on which we cannot opine and is also beyond the scope of this opinion.

V. Conclusion

When client files are destroyed in an accident or disaster, an attorney may have an ethical obligation to notify the client or former client. Where the destruction of a client file compromises the lawyer's ability to provide competent and diligent representation to the client, the lawyer must take reasonable steps to reconstruct the file and must notify the client if he is unable to do so. The lawyer must also notify a client or former client if an accident or disaster compromises the security of the client's confidential information.

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