

OPINION 2011-3

SYNOPSIS:

Lawyer may retain papers relating to a former client to the extent permitted by other law, provided that the former client is informed.

FACTS:

Lawyer has been asked by a recent former client in a criminal case (resolved by *nolo* plea in open court) to destroy a portion of his file. After completion of the representation, Lawyer had forwarded a copy of the file to the former client. Within a short time thereafter, the former client requested that one piece of his file be destroyed or removed from Lawyer's file and kept in a separate location in the office.

Lawyer's practice is to destroy a client's entire file seven years after the same has been closed.

Lawyer is reluctant to abide by the former client's request given that the former client may seek post judgment relief at some point in the future and may need testimony from Lawyer, or former client may make a claim against Lawyer for which Lawyer would want the complete file readily available.

QUESTION PRESENTED:

Whether a former client can require Lawyer to destroy a portion of his file.

APPLICABLE RULES:

The relevant provision of the Vermont Rules of Professional Conduct that is applicable to the question presented includes Rule 1.16.

Rule 1.16 addresses declining or terminating representation and provides in relevant part as follows:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 1.16(d).

DISCUSSION:

The Question as presented to us – the destruction of a portion of a former client’s file at the client’s behest – appears to be one of first impression. The Vermont Rules of Professional Conduct do not set forth particular rules or guidelines on the subject.

In the past, the focus of inquiries with respect to the disposition of a client’s files and property have been centered on the issues of preservation, retention or destruction of the files and property of a former client. See, e.g., *Opinion No. 1999-07* (upon request, lawyer must deliver to former client all property in his/her possession to which client is entitled to receive); *Opinion No. 1997-08* (discussing necessary length of time for retention or disposition of client’s file); *Opinion No. 1995-05* (obligation to turn over client’s papers and property only to Executrix of client’s estate); *Opinion No. 91-3* (lawyer is obligated to return: (1) all property delivered to lawyer by client; (2) the “end product” of lawyer’s work; and (3) all other material useful to the client in fully benefiting from the services of lawyer); see also *ABA Formal Opinion 92-369* (discussing the disposition of deceased solo practitioner’s client files and property); and *ABA Informal Opinion 1384* (1977) (listing eight guidelines relating to the retention or destruction of old client files).

We believe that two of the principles set out in *ABA Informal Opinion 1384* provide some guidance in addressing the instant question. Those guidelines read as follows:

2. A 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, and which the client may reasonably expect will be preserved by the lawyer.

ABA Informal Opinion 1384 (1977).

Further, Rule 1.16(d) of the Vermont Rules of Professional Conduct allows a lawyer “to retain papers relating to the client to the extent permitted by other law.” See VERMONT RULES OF PROFESSIONAL CONDUCT Rule 1.16(d).

In the present case, Lawyer has articulated concerns that the former client’s file in its entirety may be needed in the case of any future post judgment relief proceeding, or in defending a claim against Lawyer. Accordingly, the complete file will likely be necessary or useful in the case of either eventuality. In the circumstances, it is permissible for Lawyer to retain the client’s file in its entirety in one location, subject, of course, to the attorney-client privilege; provided, however, that Lawyer shall promptly inform the former client of the intention not to comply with the former client’s request to destroy or otherwise segregate a portion of the file. See VERMONT RULES OF PROFESSIONAL CONDUCT Rule 1.4.

CONCLUSION:

In summary, Lawyer is not obligated to comply with the request of the former client that a portion of his file be destroyed or otherwise be segregated. The former client shall be promptly informed of Lawyer's intention to retain the complete file.