



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1094 (5/6/2016)

Topic: Client file - Access by lawyer to file of former client

Digest: Lawyer may not provide a copy of client's file to previous counsel if the client objects, unless an exception to the duty of confidentiality applies.

Rules: 1.2(g), 1.6(a) & (b), 1.15(c)

FACTS

1. The inquiring lawyer represents an alien who is attempting to reopen removal proceedings on the grounds of ineffective assistance by the client's former counsel. The client has brought an ethics complaint against the former counsel. The former counsel has asked the inquiring lawyer to give him access to the file in order to respond to the client's ethics complaint, but the inquirer's client has refused to grant consent. (The former counsel previously turned over the client file to the inquiring lawyer, apparently without retaining a copy of the file.)

QUESTION

2. May a lawyer give a client's former counsel access to the client's file so that the former counsel may defend against an ethics complaint by the client if client has refused consent to allow the inquiring lawyer to provide access?

OPINION

3. The question of a lawyer's access to a file is generally a question of law and not a question of ethics under the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. State 766 (1993); *Sage Realty Corp. v. Proskauer Rose Goetz and Mendelsohn*, 91 N.Y.2d 30 (1997). This Committee generally does not have jurisdiction to decide matters of law.

4. In New York State 780 (2004), which interpreted the former Code of Professional Responsibility, we stated, "Nothing in the Code prohibits a lawyer from retaining copies of the file." That proposition is still true under the Rules. Here, it appears that the previous lawyer did not retain a copy of the file.

5. A client's file ordinarily constitutes "confidential information" of the client within the meaning of Rule 1.6(a) because it consists of "information gained during or relating to the representation" of the client that the client "has requested be kept confidential." *See* N.Y. State 1032 (2014). The fact that the client's former counsel previously had access to the client's file does not take the file out of the definition of "confidential information."

6. The former counsel now needs access to the file to defend against an ethics complaint made by the former client. Under Rule 1.6(b)(5)(i), a lawyer may reveal or use confidential information to defend the lawyer against an accusation of wrongful conduct. “Implicit in that rule is the lawyer’s right to retain copies of the file ... to defend against an accusation of wrongful conduct.” N.Y. State 780 (construing former DR 4-101(C)(4)). Had the former counsel retained a copy of the file, there is no question that he/she would have had the right to access that file for purposes of defending against the ethics complaint. See N.Y. State 1032 (2014) (explaining limits of the “self-defense” exception to the duty of confidentiality). But Rule 1.6(b)(5) gives a lawyer only the right to *retain* the client’s file – it does not give a former counsel an independent right to *obtain* the file after relinquishing it.

7. Here, the client has refused consent to allow the former counsel access to the file. The situation thus falls squarely within the definition of “confidential information” in Rule 1.6(a), which includes information that the client “has requested be kept confidential.” Absent an applicable exception to confidentiality under Rule 1.6, the entire file remains confidential and the inquirer therefore may not turn over the file.

8. Rule 1.6(b)(6) articulates one of the exceptions to the duty of confidentiality: a lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary “to comply with other law or court order.” Thus, the inquirer could ethically allow access to the file, even over the client’s objection, if other law or a court order required him/her to do so. Because what is necessary to comply with other law or a court order raises questions of law beyond our jurisdiction, we will not speculate on whether a subpoena or other law would qualify for the exception in Rule 1.6(b)(6) and allow the inquirer to give previous counsel access to the file.

9. So far we have focused exclusively on Rule 1.6. For the sake of completeness, we add that no other provision of the Rules requires the inquirer to turn over the file without the client’s consent. Rule 1.2(g) provides “a lawyer does not violate these rules by . . . treating with courtesy and consideration all persons involved in the legal process,” but it does not obligate the inquiring lawyer to share the file in the face of the client’s refusal. Similarly, Rule 1.15(c)(4) requires a lawyer to “promptly pay or deliver to the client... properties in the possession of the lawyer that the client...is entitled to receive,” but it contains no reciprocal language requiring the client to deliver anything to the lawyer.

CONCLUSION

10. Nothing in the Rules of Professional Conduct permits or requires a lawyer to provide a client’s file to the client’s former lawyer in the face of the client’s instructions to the contrary, unless an exception to the duty of confidentiality applies.

(8-16)