



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

Opinion 1133 (10/3/17)

Topic Client Files: Lawyer’s Right To Contact Prospective Clients

Digest: A lawyer who is the transferee and solely a custodian of client files arising from a transaction other than a sale of law practice may communicate with the prior lawyer’s clients if the lawyer does not review confidential information in the files more than reasonably necessary to identify the contact information of the prior lawyer’s clients and complies with the rules governing advertising and solicitation of prospective clients.

Rules: 1.0(a), 1.6(a), 1.15(c), 1.17(c), 7.1 and 7.3

FACTS

1. The inquirer has custody of approximately eight hundred executed Last Will & Testaments, which the inquirer received when prior counsel, to accept employment elsewhere, closed his one-person private law practice. Before closing that practice, the prior attorney wrote to each affected client. In this letter, the prior attorney notified each client of the client’s “right to” the client’s files “in my possession,” which, the letter noted, might include “your original Last Will and Testament, Power of Attorney, and/or Trust.” The letter explained that the client had “the right to retrieve your files from my office – or to have them sent to another attorney of your choosing – at any time” up to a date approximately four months after the closing of the lawyer’s practice, the office of which, the letter said, would remain “staffed to respond to your inquiries.” The letter said that a failure to retrieve the files before this deadline would be deemed “consent to transfer of the files to” the inquirer.

2. In this same letter, counsel said that “arrangements” had been made with the inquirer “to assume responsibility for your files.” The letter said that the author was “confident” that the inquirer was able to “to continue to serve you with the same level of care and expertise you have come to expect.” The letter provided the address, telephone number, and email address of the inquirer. The letter also underscored that the client should retain a copy of the letter with the client’s estate documents.

3. The “arrangements” between the inquirer and prior counsel included no exchange of consideration between them. No financial or other thing of value was a part of the inquirer’s assumption of “responsibility” for the inquirer’s custodial role in maintaining possession of those files not earlier retrieved by recipients of the prior counsel’s letter, including, for instance, no arrangement for the prior counsel to share in future fees, if any, that the inquirer may receive from the prior counsel’s clients. The inquirer did no more than take physical possession of client files previously held by a lawyer who was required to close an office that had held the

documents and who notified clients both of their right to obtain their files and the location of the files once the prior counsel was no longer able to maintain them.

4. The inquirer now wishes to communicate with the individuals whose files the inquirer holds, and in doing so to offer the inquirer's legal services in such matters as the clients may desire.

QUESTION

5. May a lawyer write to a prior lawyer's clients offering legal services, after the prior lawyer (a) transferred the clients' estate planning documents to the inquiring lawyer and (b) informed the clients of the transfer?

OPINION

6. Comment is required on a number of issues that this inquiry raises.

7. One is whether the transfer of the files to the inquirer was the sale of a law practice within the meaning of Rule 1.17 of the New York Rule of Professional Conduct (the "Rules"), which regulates the transfer of a law practice through a sale. We conclude that, in the circumstances presented to us, no sale occurred. We note with approval that prior counsel's letter was consistent with various client-protection provisions of Rule 1.17, among them giving the clients the right to retain future counsel of their choosing or to take possession of their files, Rule 1.17(c)(1), providing that consent to the transfer to the second attorney would be presumed if not subject to objection within a comfortable period greater than that (90 days) set in Rule 1.17(c)(2), and providing, though incompletely, the identity and contact information of the inquirer, Rule 1.17(c)(5) (requiring information about bar admissions, years of practice, and disciplinary history). If the facts presented here amounted to a sale of a law practice, we would detect a failure of strict adherence to Rule 1.17.

8. That prior counsel complied, and in our view properly so, with many of Rule 1.17's provisions does not alter the character of the "arrangement" that prior counsel made with the inquirer. This was not a sale of a law practice but the creation of a custodial relationship. The inquirer was to hold the files pending further developments. Whether an attorney-client relationship exists is a mixed question of fact and law beyond our jurisdiction, but we can say with confidence that mere possession of files does not alone create one (a storage company does not become a person's lawyer by holding that person's client files).

9. We turn, then, to the inquirer's duties going forward. To start, ordinarily, a lawyer who comes into possession of the property of a third party has an ethical obligation under Rule 1.15(c) promptly to notify the third party; here, the prior counsel already did so, but the inquirer still has an ongoing duty to preserve that property. N.Y. State 1002 (2014). Thus, the inquirer must maintain the files unless and until a client retrieves them or the inquirer gives notice to the affected clients of some other disposition. The question remains whether the inquirer may contact these persons to offer the inquirer's legal services.

10. We conclude that the inquirer may do so if the inquirer complies with Rule 1.6(a) on protecting client confidential information, and with Rules 7.1 and 7.3, which govern, respectively, advertising and solicitation of prospective clients.

11. We have previously concluded that Rule 1.6(a), which dictates a lawyer's obligations to preserve confidential information, does not prohibit the inquirer from inspecting estate documents, but only as may be reasonably necessary to contact the affected person(s). N.Y. State 1035 (2014) (a lawyer who received wills in the sale of a law practice previously held by prior counsel, but who had not contacted the affected persons in accordance with Rule 1.17, could review the files only as reasonably necessary to communicate with those persons for directions on the disposition of the files); N.Y. State 1002 ¶ 9 (2014) (a lawyer who received wills as executor of an estate could "access or disclose the confidential information in the wills insofar as reasonably necessary to dispose of the wills"); *see* N.Y. State 341 (1974) (an "attorney who retires from practice may transfer executed Wills and other files to another attorney, but the receiving attorney holds them only as a custodian," it being "generally unethical" for the lawyer "to examine the Wills or files without the client's consent"). Hence, the inquirer, as custodian, may examine the files as may be reasonably necessary to ascertain the identity and addresses of the individuals who should be contacted about the files, but the inquirer may not, absent informed consent from the prior lawyer's clients or successors, review the files to recommend, for example, unsolicited advice about improvements in or updates to the estate planning.

12. Here, the inquirer wishes to go beyond merely contacting the prior lawyer's clients – the prior lawyer, after all, had already provided the inquirer's information to those clients – and wishes in addition to offer the inquirer's legal services. Because the purpose of the communication would be to promote the inquirer's legal services, the communication would be an "advertisement" within the meaning of Rule 1.0(a), which defines the term to mean "any public or private communication made by or on behalf of a lawyer" about that lawyer's services, "the primary purpose of which is for the retention of the lawyer." By reason of Rule 7.1, an advertisement may not contain statements that are "false, deceptive or misleading" or otherwise violate the Rules. Among these is Rule 7.1(f), which requires that any written advertisement identify itself as "Attorney Advertising," Rule 7.1(h), which requires that the advertisement contain the name of the lawyer and the lawyer's principal office address, and Rule 7.1(k), which requires that the advertisement be maintained for a period of three years. Other components of Rule 7.1 may also apply.

13. The inquirer's proposed communication would also fall within the meaning of "solicitation" under Rule 7.3, which defines the term to mean an advertisement "directed to, or targeted at," a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer" and "a significant motive for which is pecuniary gain." Rule 7.3 sets forth various requirements on solicitations, among them the obligation to file the written solicitation with the disciplinary committee having authority over the lawyer (Rule 7.3(c)(1)), and to retain the names and addresses of all recipients for at least three years (Rule 7.3(c)(3)). If the inquirer abides by these Rules, together with those set forth above, then we conclude that the inquirer may proceed with the proposed communication with the prior lawyer's clients.

14. This opinion is intended to address only the obligations of a lawyer who receives client files in a custodial capacity other than in the course of a sale of a law practice. Nothing we say here is meant to alter the prescriptions of Rule 1.17 on such sales.

CONCLUSION

15. A lawyer who is solely a custodian of client files arising from other a transaction than from a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review the confidential information in the files more than reasonably necessary to contact those prior clients and complies with the rules governing advertising and solicitation of prospective clients.