



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

Opinion 1249 (01/05/2023)

Topic: Confidentiality; joint clients; return of clients' files when there has been joint representation

Digest: In a joint representation, there is a presumption that the lawyer will share confidential information received from each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the inception of the joint representation.

Rules: 1.6(a), 1.7, 1.9, 1.15(c)(4), 1.16(e)

FACTS:

1. The inquirer, a New York attorney, has represented the husband (“Husband”) with respect to estate planning matters since 2006. In 2019, Husband asked inquirer to also represent his wife (“Wife”), with respect to estate planning matters and the inquirer prepared a new, joint engagement letter which Husband and Wife both signed. The 2019 engagement letter contains language which states that because the inquirer is representing both Husband and Wife, no communication that each has with the inquirer can be kept confidential from the other. Husband and Wife are now getting divorced, and Husband has instructed the inquirer not to render any more professional services on his behalf. He has also asked the inquirer to send him copies of all documents in his file, which would include Wife’s communications with the inquirer and documents the inquirer received from Wife. Shortly after receiving Husband’s communication, the inquirer received a request from Wife asking the inquirer to send her all documents in the file, which would include Husband’s communications with the inquirer and documents received from Husband.

QUESTIONS:

2. Upon termination of a joint representation, may an attorney provide to each co-client copies of communications exchanged with, and documents received from, the other co-client?

3. Upon termination of a joint representation, may an attorney provide to a co-client copies of communications exchanged with the other co-client, and documents received from the other co-client, prior to the onset of the joint representation?

OPINION:

4. Rule 1.15(c)(4) of the New York Rules of Professional Conduct (Rules”) provides that “a lawyer shall...promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.” Rule 1.16(e), which addresses termination of representation and the client’s file, provides that “a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including ... delivering to the client all papers and property to which the client is entitled.”

5. We have previously held that determining whether a client is entitled to specific property is a question of law. N.Y. State 1070 (2015), citing N.Y. State 766 (2003). Although the committee’s jurisdiction does not extend to questions of law, we have noted that the Court of Appeals held, in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 34 (1997), that “upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding,” a lawyer must “presumptively accord [the client] full access to the entire attorney’s file on a represented matter with narrow exceptions.” Under *Sage Realty*, those narrow exceptions require a “substantial showing...of good cause to refuse.” *Id.* at 37. A possible basis for a “good cause” refusal to turn over documents in a client’s file that the client would otherwise be entitled to receive is where a document constitutes confidential information of another person who has not consented to its release. See N.Y. State 970 (2013) (if an executor of a decedent’s estate is legally entitled to the same access that the decedent had when alive, then the decedent’s former attorney should ordinarily provide the executor access to all the decedent’s files).

6. Rule 1.6 addresses an attorney’s ethical obligation to protected confidential information and provides in pertinent part:

(a) A lawyer shall not knowingly reveal confidential information as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j).

7. “Confidential Information” is defined in Rule 1.6 as consisting of:

information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed or information that the client has requested be kept confidential.

8. “Informed Consent is defined in Rule 1.0(j) as denoting:

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.

9. In N.Y. State 1070 (2015), we said, “[I]n a joint representation, there is a presumption that the lawyer will share material information disclosed by one co-client in the matter with the other co-clients.” See also, Restatement Third, The Law Governing Lawyers § 60 cmt. 1 (“Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.”); N.Y. City 2017-7 (even in the absence of a conflict of interest that would require an attorney to obtain informed consent to represent joint clients, “the attorney must be satisfied that the clients understand that, at least to the extent relevant to the representation, information disclosed to the lawyer by one joint client may be shared with the other joint client”).

10. In joint representations, a lawyer owes each client an equal duty of loyalty and an equal duty of communication. Comment [31] to Rule 1.7 highlights this principle by stating that “the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client’s interests and the right to expect that the lawyer will use that information to that client’s benefit....At the outset of the common representation and as part of the process of obtaining each client’s informed consent, the lawyer

should advise each client that information will be shared...” Comment [33] to Rule 1.7 similarly provides: “[E]ach client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client.”

11. Accordingly, based on each client’s consent to disclosure contained in the joint engagement letter, as well as the presumption that the lawyer will share confidential information with each co-client during a joint representation, Husband and Wife are each entitled to receive copies of the communications the other has exchanged with the inquirer, as well as documents the other has provided to the inquirer during the period of joint representation. See N.Y. State 761 (2003) (the attorney for co-clients must share all material information relating to the representation with the co-clients, unless the co-clients have consented to an alternative agreement).

12. However, we do not see any basis to conclude, on these facts, that Husband has given informed consent for the inquirer to disclose to Wife his communications with inquirer, or the documents he submitted to inquirer, prior to the inception of the joint representation. We are not told of any language in the joint engagement letter supporting that conclusion, and we do not believe that the presumption that co-clients in a joint representation have agreed to share confidential information with each other during the joint representation should be retroactively applied to incorporate separate and discrete confidential information obtained by the inquirer prior to the joint representation from one of the clients who was at that point not yet a co-client.

13. Our conclusion here conforms with our holding in N.Y. State 1070 (2015), where a joint client requested that the inquirer (Lawyer A) deliver the client file to successor counsel (Lawyer B) but not tell Lawyer A’s other joint clients. We pointed out that there are exceptions to the presumption requiring disclosure of confidential information to joint clients, including where disclosure would violate an obligation to a third party or where the lawyer has promised confidentiality with respect to disclosure. We concluded that if Lawyer A were to comply with the client’s request not to disclose delivery of the client file, he would breach a duty to the other joint clients to keep them informed of material developments, and that breach of the duty of communication would violate the Rules. In the instant matter, if the inquirer provides Wife with Husband’s communications and with documents that Husband provided to inquirer prior to the inquirer’s joint representation of Husband and Wife, the inquirer will similarly breach the duty of confidentiality owed to Husband.

CONCLUSION:

14. In a joint representation, there is a presumption that the lawyer will share confidential information received from one client with each co-client with the other co-client, but that presumption does not extend to confidential information the lawyer received prior to the inception of the joint client representation.

(21-22)