

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
No. 12-07

COMPLETE RECORDS OF ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE (5) YEARS AFTER TERMINATION OF THE REPRESENTATION.

QUESTION PRESENTED

Are the guidelines provided in Nebraska Ethics Advisory Opinion No. 88-3 still applicable?

What guidelines are applicable to files held by a trustee appointed pursuant to Neb. Ct. R. § 3-328?

What reasonable efforts should be made to contact clients whose files do not obtain updated contact information?

FACTS

An attorney was appointed as a trustee pursuant to Neb. Ct. R. § 3-328 for the protection of client interests for a deceased sole practitioner. Many of the files contained original documentation, such as birth certificates. However, many of the files also did not contain updated contact information. Prior Nebraska Ethics Advisory Opinion No. 88-3 provided that a client should be asked if they wanted delivery of such documents prior to disposal with no specific time guideline. However, due to the substantial number of people that lack updated contact information, that the trustee has been unable to contact, he seeks additional guidance regarding reasonable efforts to contact such individuals and for how long that file information should be kept.

Applicable Rules of Professional Conduct § 3-501.15 (a) states that a lawyer shall hold property of clients or third person that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and **other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.** (Emphasis added).

SECTION 3-501.16 (7)(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.

SECTION § 3-501.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

DISCUSSION

Nebraska Ethics Advisory Opinion for Lawyers No. 88-3 provided:

IT IS NOT POSSIBLE TO STATE A DEFINITE TIME AS TO WHEN CLOSED CLIENT FILES MAY BE DESTROYED. THE RETENTION OR DESTRUCTION OF CLIENT FILES IS PRIMARILY A MATTER OF GOOD JUDGMENT, WEIGHING THE CLIENTS' INTERESTS AND EXPECTATIONS IN THE RETENTION OF FILE MATERIALS, THE REASONABLY EXPECTED FUTURE USEFULNESS OF THE FILE CONTENTS, THE CAREFUL PRESERVATION OF CONFIDENTIALITY, AND THE AVAILABILITY OF STORAGE SPACE.

Nebraska has since adopted the Rules of Professional Conduct. Therefore, the applicability of the above has been questioned as the prior opinion was decided under the Code of Professional Responsibility. The relevant ethical rule is now as follows: § 3-501.15(a) (O)ther property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation.

While previous there was not a specific time period, the above section now presents one. Also, under 3-501.16(d), (U)pon 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.

Also of note is § 3-501.1, which provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation."

While not technically a part of the question asked, avoidance of the problem in the first place is most advisable. In "When a Lawyer Dies," June 2006, BIOFOCAL, Peter Geraghty outlines the relevant ethical opinions and obligations particularly of a sole practitioner. ABA Formal Opinion 92-369 (1992) states, "Although representation should terminate when the lawyer is no longer able to adequately represent the client, the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship." The opinion further notes, "The death of a sole

practitioner could have serious effects on the sole practitioner's clients. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discovery that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that will insure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death." Although sanctions on a deceased lawyer would certainly have no deterrent effect on that lawyer, it seems advisable to remind lawyers that their duty continues on even after death and to have a plan in place to take care of client interests. In this regard, Arizona State Bar Opinion 04-05 (2005) suggested that a lawyer should choose a means that is not only legally effective, but also fair to and expeditious for the clients who are entitled to funds in other matters in case of death or disability. The lawyer is ethically obligated to select someone who the lawyer reasonably believes is competent to discharge those duties upon his disability or death. Similarly, Florida Opinion 81-8M (1981) states that a lawyer anticipating termination of his practice by death should dispose of all files according to his clients' instructions. The files of those individuals who do not respond should be individually reviewed by the lawyer and destroyed only if no important papers belonging to the client are in the files... Important documents should be indexed and placed in storage or turned over to another lawyer who assumes control of the active files. 801 ABA-BNA Lawyers' Manual on Professional Conduct 2502. Numerous other ethical opinions stress that any lawyer reviewing client files must take steps to preserve client confidentiality and may not disclose client confidences without the client's consent. The principles in Nebraska Ethics Advisory Opinions for Lawyers 88-3 still should still be strongly considered as well as those contained in ABA Informal Opinion 1384. Opinion No. 88-3 lists the following factors in the decision for retention or destruction of client files:

1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.
2. An attorney must use care not to destroy or discard information that he 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 a statute of limitations has not expired.
3. An attorney must consider the reasonable expectations of the client for the preservation of files.
4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.

5. Disposition of client files must be made in such a manner as to protect full the confidentiality of the contents.

ABA Informal Opinion 1384 (1977) put forth eight basic considerations to keep in mind when considering whether to keep or discard a client file:

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).
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.
4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.
5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.
6. In disposing of a file, a lawyer should protect the confidentiality of the contents.
7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

CONTACTING THE CLIENT

If the attorney lacks updated information, it would seem appropriate to do a Google search, a public record search, or a Facebook search. If important or valuable materials are involved, hire a private investigator, and in the case of being unable to contact numerous people, to perhaps publish notice in a legal newspaper for that purpose.

CONCLUSION

Ethics Advisory Opinion No. 88-3 does not still control as the rules have changed, but many of the underlying reasons and conclusions remain sound. Client files may be destroyed after five years, but efforts should be put in place to make reasonable efforts to contact the client should be proportionate with the value or importance of the file materials which remain in the lawyer's possession after the file is closed.