LEGAL ETHICS OPINION 1664

AGREEMENT BETWEEN ATTORNEY AND UNIVERSITY FOR MAINTENANCE AND ARCHIVING OF CLOSED CLIENT FILES WHICH WOULD BE AVAILABLE ON A LIMITED BASIS FOR RESEARCH.

You have presented a hypothetical situation in which an attorney has in storage many closed files which may have historical significance. The entity which employed the attorney to represent various clients during the time he handled these files has an agreement with a university to archive and maintain certain files. The attorney would like to have his files included with those maintained at the university. Under the agreement with the university, access to the attorney's files for research would be granted only after a written request is made and approved. Under the facts you have presented, you have asked the committee to opine as to the propriety of this arrangement.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:4-101. DR 4-101 governs a lawyer's duty of confidentiality to clients. DR:4-101(A) establishes two distinct categories of confidential information: 1) "confidences," which are information protected by the attorney-client evidentiary privilege; and 2) "secrets," which are other information gained in the professional relationship "that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

In the absence of a client's request to hold secrets inviolate, DR:4-101(A) entails a subjective analysis of whether disclosure would be embarrassing or likely detrimental to the client. In contrast, ABA Model Rule 1.6(a) prohibits disclosure of "information relating to or gained in the course of a representation of a client."

The committee has previously opined that the passage of time does not affect a lawyer's ongoing duty of confidentiality (LE Op. 812), and that the duty survives the client's death (LE Op. 1207). The Committee also has opined that it is not proper for a lawyer's files to be turned over to an institution following his death since the client's wishes remained the dominant consideration. LE Op. 928. See EC 4-6 [EC:4-6] (upon lawyer's death, disability or retirement, clients' instructions and wishes are dominant consideration in whether clients' personal papers are to be returned and lawyer's papers to be delivered to another lawyer or destroyed.) See also LE Op. 956.

In LE Op. 1307, the Committee was asked whether it was permissible for a deceased lawyer's daughter, who was a trained historian, to review his attorney-client files where she represented that information from those files would not be used to verify or amplify her historical work, but would be set aside from the materials being used. The Committee concluded that the daughter/historian properly could review the file jackets to categorize them, but that she could not review the contents of attorney-client files.

[I]t would not be proper . . . for a nonlawyer, or for a lawyer who is not affiliated with the same firm or practice as the lawyer to whom the client's information was originally entrusted, to review the contents of the legal, attorney-client files for any purpose regardless of any representation that the material will be set aside . . .

DR:4-101(B) is subject to rule of reason exceptions. Hence, a lawyer may disclose client confidences/secrets to employees or professionals whose service form part of the representation. Even then, however, DR:4-101(E) requires a lawyer to exercise

reasonable care to prevent those persons from disclosing or using client confidences/secrets. See LE Op. 1628.

Similarly, unless a client otherwise directs, a lawyer may give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing or other legitimate purposes. There, too, the lawyer must exercise due care in the selection of the agency and warn the agency that the information must be kept confidential. EC:4-3. See LE Op. 859 and LE Op. 1300.

In the hypothetical presented, scholars wishing access to the lawyer's case files would be required to represent that their work would not involve any use of former clients' names or other identifying data. On the facts presented, the Committee believes that LE Op. 1307 is controlling, and that scholar access to former client's case files is not permissible under DR:4-101(B) without client consent if the case files contain client confidences or secrets.

The Committee previously opined that once information has become a matter of public record, it is no longer confidential "unless the attorney should have known or it is obvious that such information may be construed to constitute a 'secret' under DR:4-101 and should remain confidential." LE Op. 1147. In LE Op. 1300 the Committee opined that identifying data about a client of a legal aid office was a secret since it might be an embarrassment to the client to have it revealed that he received legal aid services. ACLU legal assistance to the general public and prisoners likewise might be construed to constitute a client secret. The Committee observes, however, that if no attorney-client relationship resulted from a request for legal assistance, then DR:4-101(B) is not applicable; bearing in mind, however, that an implied (though not formal) attorney-client relationship can arise whenever a lawyer receives confidences or secrets from a person who had an expectation of confidentiality even if no representation resulted. See LE Op. 452; ABA Formal Op. 90-358. With respect to the retention/destruction of client files, the Committee directs your attention to LE Op. 1305.

In the facts you present, the committee believes that before turning over any former client's case file to the university, you must either obtain client consent to release the file to the university or ascertain whether the file contains information which constitutes client confidences or secrets. DR:4-101(A); DR:4-101(B)(1).

Committee Opinion
February 9, 1996