Committee Opinion
November 13, 1989

LEGAL ETHICS OPINION 1307

CONFIDENTIALITY – FILES/PROPERTY OF A CLIENT – DISABLED LAWYER: DISPOSITION OF CLIENT FILES IN POSSESSION OF DISABLED LAWYER – AVAILABILITY OF FILES TO THIRD PARTY.

You have written regarding an attorney engaged in the active practice of law from 1910 until shortly before his death in 1953, during which time he represented individuals, corporations, municipal bodies, and educational institutions. In addition, the attorney served on boards of directors of corporations, educational boards of governance and on city council. You have further indicated that, at his death, the attorney bequeathed to his son, who subsequently became a lawyer, his law books, office furniture, equipment and supplies. The son continues in possession of the material, although he no longer practices law because of a debilitating illness which, among other things, has rendered him incapable of making any decision with regard to the disposal of his father's papers. A grandson of the deceased attorney is a member of the Virginia State Bar, and a daughter of the deceased attorney is a trained historian. The daughter seeks access, as primary source material for a history being prepared, to the deceased attorney's correspondence which is not related to the practice of law. Finally, you have represented that the contents of the files are clearly identified either as legal files or as related to the institution to which it relates. For purposes of this opinion, it will be assumed that those files which are identified as institutional-related contain material which was not accumulated during an attorney-client relationship.

You have asked the Committee to opine as to any potential violation of the attorney-client privilege if the deceased attorney's daughter were to be allowed to review all of the files for the purpose of determining (1) which files are readily identifiable as “law files” by their style or name (and, therefore, of no interest to the daughter/historian) and (2) which files are of a civic, municipal or institutional nature (and, therefore, legitimate objects of interest to a professional historian). You have further requested the Committee's opinion as to whether a trained historian may review legal, attorney-client files, even though she represents that such material will not be used either to verify or to amplify the history in process but will be set aside, apart from the material that will be used.

The appropriate and controlling rule to the issues you have raised is DR:4-101(B) which provides, in pertinent part, that a lawyer shall not knowingly (1) reveal a confidence or secret of his client or (2) use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure. Further guidance is provided through Ethical Consideration 4-4 [EC:4-4], which instructs that “the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client,” and Ethical Consideration 4-6 [EC:4-6] which urges that:

> The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. . . . A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. . . . In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

The determination of whether the activities you describe would violate the attorney-client privilege so as to render the family liable to a client of the attorney is a legal question, the resolution of which is beyond the purview of this Committee.

The Committee has earlier opined that it is not proper, post-death, for an attorney's files to be turned over to an institution since the wishes of the client are still a dominant consideration. (LE Op. 928) Furthermore, the Committee has more recently opined that the attorney's responsibility to protect the client's secrets and confidences survives the death of the client. Thus, a lawyer may not reveal secrets and confidences of a deceased client unless, in the attorney's professional judgment, to do so would be in the best interest of the deceased client who would have wanted the information revealed if he were alive. (LE Op. 1207)

Thus, in the circumstances you have presented, the Committee is of the opinion that, if the files are clearly marked as to their legal or non-legal nature, it would not be improper for the daughter/historian to review all file jackets for purposes of separating them into the two categories, with the intent of utilizing in her preparation of a history those which are of a civic, municipal or institutional nature. It would not be proper, however, for a nonlawyer, or for a lawyer who is not affiliated with the same firm or practice as the lawyer to whom the clients' 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. (See LE Op. 956) It is the Committee's view that since those files were bequeathed to a lawyer who is now unable to personally review and dispose of them (presumably as well as his own law practice files), the appropriate procedures, as articulated in Virginia Code § 54.1-3900.01, should be undertaken so that another lawyer may be appointed to inventory all such files in the possession of the disabled lawyer. Such a procedure would continue to protect all clients' confidentiality as required under the Code of Professional Responsibility.