Ethics Opinion No. 84-9

Providing Opposing Parties with Copies of Draft Documents; Record and File Retention Requirements.

The committee has been asked to determine:

1. The propriety of providing the buyer of a business with copies of draft agreements prepared by an attorney in the course of that attorney's representation of a seller, where the seller has since allegedly breached the contract; and

2. Requirements for keeping closed client files and records for more than one (1) year.

The committee concludes that an attorney may not provide an opposing party with draft documents prepared in the course of representing a client without the client's, or ex-client's, express consent. The committee further concludes that a uniform policy of discarding or destroying records after one (1) year is improper, and that retention of files, records and documents should be based on a case by case review of files and documents.

Attorney "A" was retained to represent the seller of certain property, and in the course of that representation prepared draft and final documents. The transaction was concluded and final documents signed, but the attorney apparently did not retain a copy of the final executed agreement. The attorney's files do contain copies of draft agreements prepared in the course of negotiations. Attorney "A" has now been contacted by the buyer, asserting that the seller, attorney "A's" client, or perhaps ex-client, has breached the contract and that buyer intends to sue. Buyer has asked Attorney "A" to provide buyer with a copy of the contract. Attorney "A" is unable to provide a copy of the executed final agreement, but could, if proper, provide buyer with copies of draft agreements contained in attorney "A's" files.

Alaska Canons of Professional Responsibility, DR 4-101 obligates a lawyer to preserve the confidences and secrets of a client. This ethical obligation involves no limitation on the source of the information and it must be invoked even in the absence of a judicial proceeding, a broader application than the evidentiary rules governing the attorney/client privilege and the work/product doctrine. AK Rules of Court, ER 503 and Commentary; *see also Upjohn Company v. United States*, 49 LW 4093, Jan. 13, 1981; *Hickman v. Taylor*, 329 U.S. 495 (1947). DR 4-101(B) provides that except where expressly

permitted, "a lawyer shall not knowingly during or after termination of the professional relationship to his client:

> 1. Reveal a confidence or secret of his client.
>
> 2. Use a confidence or secret of his client to the disadvantage of the client.
>
> 3. Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

The rule provides that a lawyer may reveal client confidences or secrets only with the consent of the client and only after a full disclosure, and in certain other circumstances not relevant to this inquiry.

The Model Rules of Professional Conduct, adopted August 2, 1983 by the American Bar Association, and under consideration in Alaska, would broaden the obligation:

> Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the [attorney-client] relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. ABA Model R. of P.C., Rule 1.6, commentary.

Because draft agreements may, and usually do, contain confidential information gained during the course of the attorney/client relationship, and because releasing such draft agreements may well disadvantage the client, especially given a subsequent apparent intent to file suit by the adverse party, attorney "A's" ethical obligation prevents him from releasing the documents, absent the express consent, after full disclosure, given by the present or former client.

The second inquiry, with respect to records retention, involves DR 5-105, Alaska Canons of Professional Responsibility, obligating an attorney to avoid representing clients with differing interests; DR 9-102, the attorney's obligation to preserve a client's funds and property; and DR 4-101, the obligation to preserve the confidences and secrets of a client.

Because an attorney must not accept or continue employment if the interest of another client, present or past, may impair the independent professional judgment of the attorney, the premature discarding or destruction of closed files may prevent an attorney from being able to adequately determine whether obligations to a prospective client would be impaired by representation of a past client. DR 5-105.

DR 9-101 requires an attorney to preserve the identity of funds and property of a client. The rule requires that the attorney maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer, and to render appropriate accounts to his client with respect to those items. While documents and drafts prepared by the attorney in the course of representing a client may not fall strictly within the definition of property, the attorney should consider the need to retain files and records for a period sufficient to be able to produce them to the client, or in connection with judicial proceedings, should that become necessary. Compliance with DR 4-101, obligating an attorney to preserve the confidences and secrets of a client, may be difficult if records, files and documents cannot be consulted where an apparent conflict of interest arises, or where requests such as the first inquiry arise.

It is unlikely that a uniform policy of destruction or discarding of records after one (1) year would satisfy these considerations in every case.

The committee recommends that the attorney consider such things as statutes of limitations, state and federal record keeping requirements, the requirements of the attorney's errors and omissions insurance policy, and a case-by-case review of files to determine appropriate retention periods. Law office management publications will provide suggestions for prudent record retention policies.

Adopted by the Alaska Bar Association Ethics Committee on August 16, 1984.

Approved by the Board of Governors on August 25, 1984.