Originally published in the New Jersey Family Lawyer, Vol. 37, No. 1/August 2016

Ethical Considerations for the Family Lawyer

by Donna K. Legband

It seems as if the practice of family law becomes more complicated and more stressful each year. In addition to communications via regular mail and telephone, family lawyers receive a constant barrage of emails and text messages from adversaries and clients. Family lawyers are practicing in a system that includes not only litigation but mediation, collaborative divorce, and arbitration. On top of all this, practitioners must keep abreast of new case law and statutes that affect their practice. Family lawyers also need to conduct their practices in accordance with the Rules of Professional Conduct and advisory opinions.

This article addresses three areas the author believes pose possible ethical challenges:

1) the retention and destruction of closed client files;
2) The statements set forth in an affidavit or certification filed with a motion to be relieved as counsel; and
3) the requirement of written retainer agreements in family matters.

The Retention and Destruction of Closed Client Files

Many family law practitioners believe they are only obligated to maintain a client's closed file for a period of seven years, and after that time has elapsed the client's file can be destroyed without any notice to the client. This principle is rooted in the Rules of Professional Conduct, specifically RPC 1.15(a), which provides, "Complete records of such account funds and other property shall be preserved for a period of seven years after the event that they record."[1]

Although it would appear that RPC 1.15(a) only requires an attorney to maintain a closed file for seven years, there are certain instances where this may not be the case, or where a lawyer will want to retain his or her file for a period in excess of seven years. In addition, attorneys should be aware of certain other considerations before destroying a former client's file.

When considering whether to destroy a former client's file, an attorney must review not only the Rules of Professional Conduct and the Rules Governing the Courts of the State of New Jersey, but also the advisory opinions rendered by the New Jersey Advisory Committee on Professional Ethics. There are two advisory committee opinions that directly address the destruction of a former client's file: Opinion 692 (from 2001)[2] and a supplement to Opinion 692 rendered a little over a year later.[3]

In Advisory Opinion 692, the Advisory Committee on Professional Ethics (hereinafter the advisory committee) held that the "portions of the file which constitute 'property of the client' must be either returned to the client, disposed of pursuant to court order or agreement with the client, or preserved and maintained for a reasonable period of time following the conclusion of the matter."[4] The advisory committee further stated that "Absent an express agreement that the file be subject to destruction at an earlier point in time, the client may assume availability of the file up to a date seven years after it has been closed, at which time it may be destroyed."[5]

It would appear that after seven years an attorney could simply destroy the client's file without any further obligation to notify or communicate with the former client. This is not the case. In the Opinion 692 supplement, the advisory committee stated, "we emphasize again that

practitioners must use their judgment and apply discretion, and must consult substantive law requirements in particular practice areas to determine the appropriate retention period beyond the required seven years for files or portions of files in certain matters."[6]

Accordingly, in dissolution matters where, for example, there is a qualified domestic relations order (QDRO) addressing a defined benefit pension that will not be in pay status until a future date, a lawyer may want to retain his or her closed file until the QDRO enters in pay status. In addition, if an attorney's practice includes the preparation of pre-nuptial agreements, these files should be retained beyond the seven-year period, since any enforcement issues may not be raised until many years after the agreements are drafted.

If there are no issues, such as the ones set forth above, that may warrant a lawyer retaining the file, one must next address what requirements must be met in order to destroy the file. In the supplement to Advisory Opinion 692, the advisory committee held, "At the end of the seven-year retention period, a lawyer has an obligation to examine the closed files to determine whether it contains property of the client. If a file contains such property, the lawyer should take reasonable steps to notify the former client."[7]

Both opinions attempt to provide a definition of 'client property.'[8] It is clear in both opinions that a lawyer cannot simply destroy the former client's file upon the expiration of seven years if the file contains any 'client property.' The supplement to Opinion 692 defines 'reasonable steps' in returning client property as including mailing a notice to the former client by regular or certified mail.[9]

Advisory Opinion 692 and the supplement to Opinion 692 were rendered when most firms still used postal delivery as the primary means of communicating with clients. Neither opinion addresses whether a lawyer can notify a former client via email of their intent to destroy a file. Given that many practitioners now use email as the primary means of communicating with clients, it may be time for the advisory committee to revisit this issue, and whether the use of email to notify a former client would comply with Advisory Opinion 692 and the supplement to Opinion 692.

Moreover, the aforementioned opinions make clear that the lawyer must inspect and review the contents of the former client's file prior to destroying it, to determine if there is any "client property" in the file.[10] It is only after the lawyer conducts a thorough review that the file can be discarded or destroyed. It is also important to note that Opinion 692 requires destruction of the file (if permitted) in such a manner that protects the client's confidential information.[11]

The Statements Set Forth in an Affidavit or Certification Filed with a Motion to be Relieved as Counsel

Many family lawyers have been in the position where the attorney-client relationship has deteriorated to a point where a motion to be relieved as counsel must be filed. The deterioration of the attorney-client relationship may have occurred due to various factors, such as:

1. A client's failure to communicate with counsel;
2. A client's failure to keep current on his or her counsel fee invoice, resulting in a financial burden for the attorney;
3. The client has made a material misrepresentation; or
4. The client is attempting to perpetrate a fraud or crime.

Regardless of the reason, if an attorney decides to file a motion to be relieved as counsel, the application will typically include an affidavit or certification from the attorney of record providing a basis for withdrawal from the pending matter. RPC 1.16(b) provides that a lawyer may withdraw from representing a client if "(1) withdrawal can be accomplished without material adverse effect on the interests of the client."[12]

In many instances, the affidavit submitted by counsel in support of a motion to withdraw will include facts that may affect a client negatively in the ongoing litigation. For example, affidavits that provide the following information would likely run afoul of RPC 1.16(b):

1. Damaging descriptions of the client's behavior toward the attorney and his or her office staff;
2. Examples of a client being non-responsive;
3. A statement regarding a client's failure to take reasonable legal positions; and
4. A statement that a client failed to follow the attorney's legal advice.

In addition to the above circumstances, many attorneys file a motion to be relieved as counsel when the client has violated the terms of the retainer agreement by failing to pay counsel fees.

What an attorney can do to seek the court's permission to withdraw as counsel depends on the status of the litigation and the timing of an application to withdraw as counsel. In *In re Simon*, the New Jersey Supreme Court held that an attorney cannot intentionally or unintentionally create an adversarial situation with a client that would ultimately force the court to grant an attorney's motion to be relieved as counsel.[13] This matter involved the filing of a motion to withdraw as counsel by an attorney who also filed a lawsuit against the client for unpaid legal fees.[14] *In re Simon* examines the actions of an attorney with regard to his suit for unpaid legal fees against his then-current client.

In light of *Simon*, an attorney should be careful in drafting an affidavit or certification in support of a motion to be relieved as counsel, or pursuing fees from a current client by filing an action against the client for unpaid counsel fees. An attorney should avoid creating an adversarial relationship with the client while still the attorney of record, as the court may find the attorney *intentionally* created the conflict in order to force the court to grant the motion to be relieved as counsel. In an effort to avoid such a situation (and avoid violating RPC 1.16(b) and RPC 1.7(a)(2)) an attorney's certification in support of a motion to be relieved should be diplomatic, to avoid prejudicing the client in the eyes of the court, providing the adversary with fodder in the litigation, or violating RPC 1.16(b).[15]

It may be prudent for the attorney to certify in his or her affidavit that the basis for the request for withdrawal is "there has been a breakdown in the attorney client relationship." This language should be sufficient to permit withdrawal of the attorney from the pending litigation, and to avoid any negative inference to the client. Alternatively, counsel may wish to ask the court's permission to submit a more detailed *ex parte* certification to a judge other than the one assigned to the litigation.

It is important for judges to recognize that attorneys are prohibited by the Rules of Professional Conduct from providing specific details supporting their request to be relieved as counsel in a pending matter. In addition, given *In Re Simon*, an attorney should not file a complaint or petition to compel the payment of unpaid counsel fees prior to being relieved as the attorney of record.

The Requirement of Written Retainer Agreements in Family Matters

Most attorneys are familiar with the provisions of RPC 1.5, which delineates the factors for determining the 'reasonableness' of a fee being charged by an attorney, as these factors are addressed in affidavits filed in support of requests for the payment of counsel fees.[16] In addition to setting forth these factors, RPC 1.5(b) specifically requires that in nearly all cases the fee being charged must be provided to a client in writing.[17]

RPC 1.5(b) should be read in conjunction with New Jersey Court Rule 5:3-5(a), which requires a written retainer agreement in all family law matters.[18] Contingent fees are prohibited in family law matters, except where there is an allegation of "tortious conduct,"[19] as are non-refundable retainers.[20]

At a recent mediation training, some lawyers professed to performing mediation without written retainer agreements. Rule 5:3-5(a) specifically provides that "Except where no fee is to be charged, every agreement for legal services to be rendered in a civil family action shall be in writing signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client."[21] Although mediation can be performed by non-lawyers, when attorneys serve as mediators a strict interpretation of the RPCs and Rule 5:3-5(a) may be understood to require a written fee agreement. As such, it would be wise for any attorney who serves as a mediator to make it part of his or her practice to have a written retainer agreement in all of their mediation cases in order to insure the requirements of the RPCs and Rule 5:3-5(a) are met.

Conclusion

Attorneys who practice family law would be well advised to make sure they are familiar with the Rules of Professional Conduct to avoid any inadvertent non-compliance and the ensuing ethical problems that could arise as a result.

Donna K. Legband is a partner with Altman, Legband and Mayrides, which has offices located in Skillman and Basking Ridge.

Endnotes

1. RPC 1.15(a).
2. N.J. Advisory Comm. on Professional Ethics, No. 692, 163 N.J.L.J. 220 (Jan. 15, 2001).
3. N.J. Advisory Comm. on Professional Ethics, No. 692 Supp., 170 N.J.L.J. 343 (Oct. 28, 2002).
4. Opinion 692, 163 N.J.L.J. 220.
5. *Ibid.*
6. Opinion 692 Supp., 170 N.J.L.J. 343. Note that in criminal matters the committee held that, "absent an express agreement, a lawyer should not discard or destroy files relating to criminal matters while the client is alive."
7. *Ibid.*
8. Opinion 692, 163 N.J.L.J. 220 and Opinion 692 Supp., 170 N.J.L.J. 343. A client's 'property' is defined as original documents, photographs or things. Other types of documents could constitute property of a client depending on the nature of a particular case.
9. Opinion 692 Supp., 170 N.J.L.J. 343.
10. *Ibid.*
11. Opinion 696, 163 N.J.L.J. 220.
12. RPC 1.16(b).
13. *In re Simon*, 206 N.J. 306, 319 (2011).

14. *Id*. at 307.
15. Rule 5:3-5(d)(2).
16. RPC 1.5(a).
17. RPC 1.5(b), stating "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation."
18. RPC 1.15(a).
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*