# SELECTED RPCs

## RPC 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons 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 a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. 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 seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.

## RPC 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the Rules of Professional Conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(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 that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b), (c), and (d) amended November 17, 2003 to be effective January 1, 2004; paragraph (d) amended March 25, 2013 to be effective April 1, 2013.

## RPC 1.17 Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in this jurisdiction.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the *New Jersey Law Journal* and the *New Jersey Lawyer* at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

Note: Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.

## RPC 5.1 Responsibilities of Partners, Supervisory Lawyers, and Law Firms

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or ratifies the conduct involved; or

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

## RPC 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.

## RPC 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

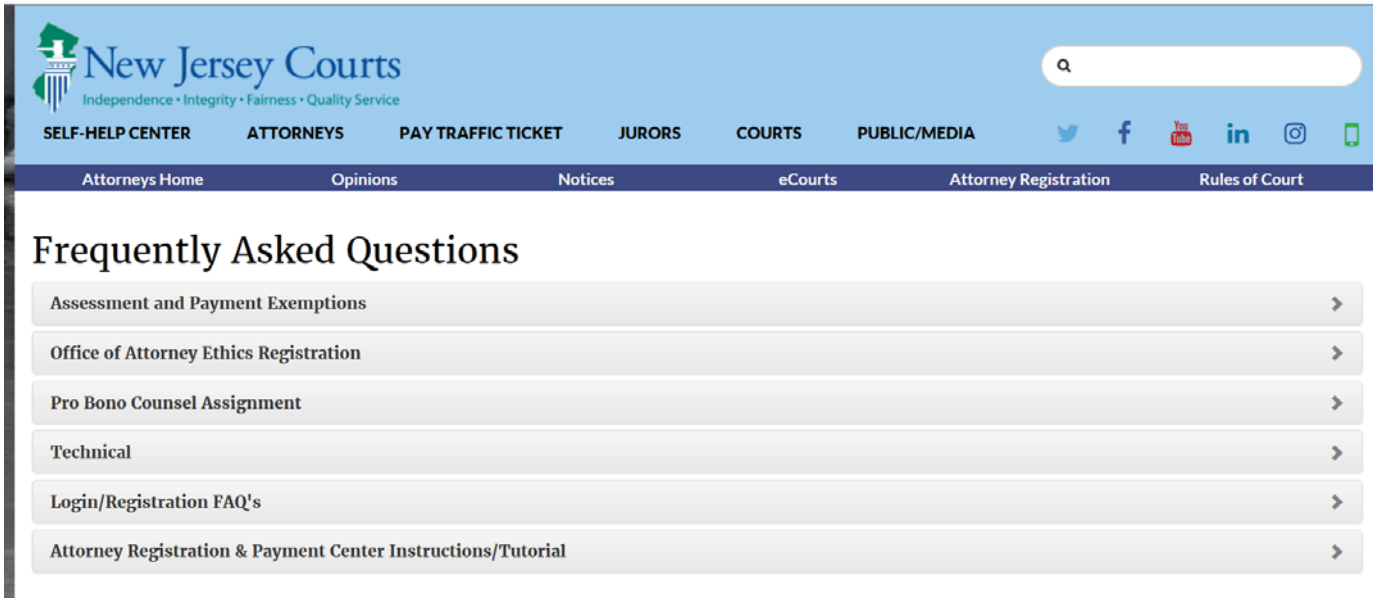
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or ratifies the conduct involved;

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.




Screenshot from https://www.judiciary.state.nj.us/attorneys/attregfaq.html

# New Jersey Lawyers' Fund For Client Protection

**P.O. Box 961**
**Trenton, NJ 08625-0961**

## Certification of Retirement
## For The Calendar Year(s)_____

**The retired exemption from payment is as defined, without alteration. We cannot grant the exemption if the language of this certification is altered or if "January 31" is deleted and a later date substituted.**

I, _____, Esq., of full age, say:

1. I am an attorney at law licensed to practice in the State of New Jersey;

2. I hereby request exemption from payment to the New Jersey Lawyers' Fund for Client Protection for the calendar year indicated pursuant to *Rule* 1:28-2 because I am "retired completely from the practice of law" in every jurisdiction. I understand that attorneys are not exempt from payment solely by virtue of being out-of-state or exempt from *pro bono* assignment;

3. I am either unemployed or the employment in which I engage is not in any way related to the practice of law. I do not draft or review legal documents, render advice on the law or legal assistance, teach law, or serve in a court system in any capacity, in any jurisdiction. This is an accurate description of my activities at least since January 31 of the year for which exemption is sought;

4. I understand that I have an ongoing duty to immediately inform the Fund if I no longer qualify for the exemption granted;

5. I understand that I will remain officially retired until I inform the Fund otherwise;

6. I understand that it is my obligation to keep my address current with the Fund and respond to the Annual Attorney Registration Statement and *Pro Bono* Assignment Questionnaire.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date_____ Signature_____

Form available online at https://www.njcourts.gov/forms/11620_cert_retire.pdf

# RESIGNATION WITHOUT PREJUDICE FROM THE BAR OF THE STATE OF NEW JERSEY

*[R. 1:20-22]*

To The Honorable Chief Justice and
Associate Justices of the Supreme Court

1. I, _____, presently residing at, _____
_____state that I was admitted to the Bar of the state of New Jersey in _____ and am admitted to the Bar of the following additional states:
_____.

2. I hereby submit to the Supreme Court of New Jersey my resignation without prejudice from the Bar of the state of New Jersey. In offering this resignation, I certify that:

(a) No disciplinary or criminal proceedings are pending against me in any jurisdiction; and

(b) I _____ practiced law in New Jersey in the preceding two years.

(c) If I have practiced law in New Jersey in the two years immediately preceding my impending resignation, I have notified all clients for whom I have performed any professional services or by whom I have been retained of my pending resignation and have complied with RPC 1.16.

3. I submit this resignation with full knowledge that its acceptance by the Supreme Court of New Jersey is in no way a bar to any disciplinary proceeding for any offense that may have been committed while I was a member of the Bar of the state of New Jersey, but which may be filed subsequent to this resignation.

4. This resignation is voluntarily given by me with full knowledge that upon its acceptance by the Supreme Court, my membership in the Bar of the state of New Jersey shall cease, and that any subsequent application for membership shall be in accordance with the provisions of *New Jersey Court Rules 1:24* and *1:25*, including passing the bar examination.

Sworn to and Subscribed to
before me this _____day
of _____, 20___.

_____
Notary Public

Form available online at https://www.judiciary.state.nj.us/attorneys/assets/attyreg/reswoprej.pdf

## Ethical Obligations for Lawyer's Selling, Merging, or Closing Practices

**Carol Johnston**

### Closing Practices:

- Update attorney registration with correct contact information
- Fee arb and other actions could be filed after closing practice
- Retirement status – if not practicing law in another jurisdiction, teaching law, reviewing legal documents, or working for the courts
- Close the bank accounts, notify IOLTA
- Trust fund accumulations, see Rule 1:21-6(j), and contact Trust Fund Unit
- Notify clients
- Notify courts
- Client files
    - ACPE Opinion 692, Opinion 692 Supplement, Opinion 701

ACPE 692 and 692 Supplement – client files must be returned to the client, disposed of pursuant to court order or agreement with the client, or preserved and maintained for a period of 7 years from the date the file was closed.

"Property of the client" such as original wills, trusts, deeds, executed contracts, and the like must be maintained indefinitely, absent return to the client or agreement with the client

Client can agree to destruction of the entire file prior to passage of 7 years but the agreement should differentiate between items in the file that are "property of the client" and other items in the file; agreement to destroy "property of the client" can not be made in retainer agreement, must be made AFTER the property has been created

Lawyer is free to retain files for longer period; loss of file due to flood or similar disaster ordinarily does not result in discipline (absent gross negligence in storage)

Destruction of files should be done with care to protect confidentiality of information

- Law firm (not individual lawyer within firm) has obligation to make arrangements for disposition of client property, including client files, when firm dissolves or merges
- Sole practitioner has ethical duty to plan for disposition of files in the event of death or retirement

ACPE Opinion 701: digital storage permissible as long as "property of the client" (RPC 1.15) is properly safeguarded AND kept in original, non-digital form.

"Property of the client" includes original wills, trusts, deeds, executed contracts, and the like. These MUST be maintained in hard copy (though they can be copied into digital form). The remainder of client files (correspondence, pleadings, memoranda, briefs) can be maintained in digital form.

When maintaining documents in digital format, the attorney must take reasonable steps to guard against the risk of "inadvertent disclosure" or unauthorized access to client information. Reasonable care means:

- entrusting an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security (the outside party is aware of the lawyer's obligation of confidentiality and is itself obligated to assist in preserving it)

- make use of available technology to guard against reasonably foreseeable attempts to infiltrate the data.

**SUCCESSION PLANNING!**

- Please! Rule 1:20-19, Attorney-Trustee

**MERGING PRACTICES**

- Be aware of conflicts
- Need substitutions of attorney
- New retainer agreements
- Clients must consent to representation by "new" firm

**SELLING PRACTICES**

- Rule of Professional Conduct 1.17 revised in 1992
- Narrowly construed! "clients are not merchandise," Opinion 80 (1965)
- Lawyer can sell or purchase law practice, including good will IF:
    - Seller ceases to engage in private practice of law in NJ
    - Entire practice is sold to 1 or more lawyers or law firms
    - Written notice by seller to seller's clients not less than 60 days prior to transfer
    - Purchaser publishes announcement or notice of purchase in New Jersey Law Journal at least 30 days prior to transfer

- How to value a law practice and its good will
    - RPC 1.5(e), division of fee between lawyers not in same firm must be in proportion to services performed by each lawyer, so cannot pay fees to a lawyer who has not performed any legal services
    - Valuation and resulting price of a business and its good will ordinarily entails a projection of fees anticipated to be generated that is calculated in accordance with bona fide, accepted valuation principles
    - Can valuation or price of law practice be based on a percentage of actual fees generated within a period of time after the sale?
    - This valuation is not per se impermissible IF the percentage of fees paid after sale to the selling attorney can reasonably be attributable to the good will of the selling attorney's former practice, and not from the client's satisfaction with the efforts of the purchasing attorney

## RPC 1.17 Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

**(a)** The seller ceases to engage in the private practice of law in this jurisdiction.

**(b)** The entire practice is sold to one or more lawyers or law firms.

**(c)** Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

**(1)** If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

**(2)** In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

**(3)** The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the *New Jersey Law Journal* and the *New Jersey Lawyer* at least thirty days in advance of the effective date of the transfer.

**(d)** The fees charged to clients shall not be increased by reason of the sale of the practice.

**(e)** If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

**(f)** Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

**Note:** Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.

**Rule 1:21-6(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners.** When, for a period in excess of two years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of one year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

**184 N.J.L.J. 171**

**April 10, 2006**

**15 N.J.L. 897**

**April 24, 2006184 N.J.L.J. 171**

**April 10, 2006**

**15 N.J.L. 897**

**April 24, 2006**

**Advisory Committee on Professional Ethics**

**Appointed by the Supreme Court of New Jersey**

**Opinion 701**

**Advisory Committee on Professional Ethics**

**Electronic Storage And Access of Client Files**

The inquirer asks whether the Rules of Professional Conduct permit him to make use of an electronic filing system whereby all documents received in his office are scanned into a digitized format such as Portable Data Format ("PDF"). These documents can then be sent by email, and as the inquirer notes, "can be retrieved by me at any time from any location in the world." The inquirer notes that certain documents that by their nature require retention of original hardcopy, such as wills, and deeds, would be physically maintained in a separate file.

In Opinion 692, we set forth our interpretation of the term "property of the client" for purposes of *RPC* 1.15, which then triggers the obligation of a lawyer to safeguard that property for the client. "Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property." 163 *N.J.L.J.* 220, 221 (January 15, 2001) and 10 *N.J.L.* 154 (January 22, 2001). Such documents cannot be preserved within the meaning of *RPC* 1.15 merely by digitizing them in electronic form, and we do not

understand the inquirer to suggest otherwise, since he acknowledges his obligation to maintain the originals of such documents in a separate file.

On the other hand, we also noted in Opinion 692 that a client file will likely contain other documents, such as correspondence, pleadings, memoranda, and briefs, that are not "property of the client" within the meaning of *RPC* 1.15, but that a lawyer is nevertheless required to maintain at least for some period of time in order to discharge the duties contained in *RPC* 1.1 (Competence) and *RPC* 1.4 (Communication), among others. While traditionally a client file has been maintained through paper records, there is nothing in the RPCs that mandates a particular medium of archiving such documents. The paramount consideration is the ability to represent the client competently, and given the advances of technology, a lawyer's ability to discharge those duties may very well be enhanced by having client documents available in an electronic form that can be transmitted to him instantaneously through the Internet. We also note the recent phenomenon of making client documents available to the client through a secure website. This also has the potential of enhancing communications between lawyer and client, and promotes the values embraced in *RPC*1.4.

With the exception of "property of the client" within the meaning of *RPC* 1.15, therefore, and with the important caveat we express below regarding confidentiality, we believe that nothing in the RPCs prevents a lawyer from archiving a client's file through use of an electronic medium such as PDF files or similar formats. The polestar is the obligation of the lawyer to engage in the representation competently, and to communicate adequately with the client and others. To the extent that new technology now enhances the ability to fulfill those obligations, it is a welcome development.

This inquiry, however, raises another ethical issue that we must address. As the inquirer notes, the benefit of digitizing documents in electronic form is that they "can be retrieved by me at any time from any location in the world." This raises the possibility, however, that they could also be retrieved by other persons as well, and the problems of unauthorized access to electronic platforms and media (i.e. the problems posed by "hackers") are matters of common knowledge. The availability of sensitive client documents in an electronic medium that could be accessed or intercepted by unauthorized users therefore raises issues of confidentiality under *RPC* 1.6.

The obligation to preserve client confidences extends beyond merely prohibiting an attorney from himself making disclosure of confidential information without client consent (except under such circumstances described in *RPC* 1.6). It also requires that the attorney take reasonable affirmative steps to guard against the risk of inadvertent disclosure. Thus, in Opinion 692, we stated that even when a closed client file is destroyed (as permitted after seven years), "[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties." 163 *N.J.L.J.* 220, 221 (January 15, 2001) and 10 *N.J.L* 154 (January 22, 2001). Similarly, in ACPE Opinion 694 and CAA Opinion 28 (joint opinion), we joined with the Committee on Attorney Advertising in finding that two separate firms could not maintain shared facilities where "the pervasive sharing of facilities by the two separate firms as described in the Agreement gives rise to a serious risk of a breach of confidentiality that their respective clients are entitled to." 174 *N.J.L.J.* 460 and 12 *N.J.L.* 2134 (November 3, 2003).

And in Opinion 515, we permitted two firms to share word processing and computer facilities without becoming "office associates" within the meaning of *R.* 1:15-5(b), but only after noting that "the material relating to individual cases of each attorney is maintained on separate `data' disks used only by their respective secretaries and stored (while not in use) in each of their separate offices." 111 *N.J.L.J.* 392 (April 14, 1983).

We stress that whenever attorneys enter into arrangement as outlined herein, the attorneys must exercise reasonable care to prevent the attorney's employees and associates, as well as others whose services are utilized by the attorney, from disclosing or using confidences or secrets of a client.

The attorneys should be particularly sensitive to this requirement and establish office procedures that will assure that confidences or secrets are maintained.

*Id.*

The critical requirement under *RPC* 1.6, therefore, is that the attorney "exercise reasonable care" against the possibility of unauthorized access to client information. A lawyer is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access. "Reasonable care," however, does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access. Such a guarantee is impossible, and a lawyer can no

more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.

What the term “reasonable care” means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure. Obviously, in this area, changes in technology occur at a rapid pace. In 1983, for instance, when Opinion 515 was published, the personal computer was still somewhat of a novelty, and the individual floppy disk was the prevailing data storage device. The “state of the art” in maintaining electronic security was not very developed, but the ability to prevent unauthorized access by physically securing the floppy disk itself satisfied us that confidentiality could be maintained. By implication, at the time we were less accepting of data stored on a shared hard drive, even one that was partitioned to provide for individual private space for use by different firms, because of the risk of breach of confidentiality under prevailing technology.

We are of course aware that floppy disks have now become obsolete, and that it is exceedingly unlikely in this day and age that different law firms would attempt to share hard drive space on a conventional desktop computer, given the small cost of such computers in today's market. New scenarios have arisen, however. It is very possible that a firm might seek to store client sensitive data on a larger file server or a web server provided by an outside Internet Service Provider (and shared with other clients of the ISP) in order to make such information available to clients, where access to that server may not be exclusively controlled by the firm's own personnel. And in the context originally raised by the inquirer, it is almost always the case that a law firm will not have its own exclusive email network that reaches beyond its offices, and thus a document sent by email will very likely pass through an email provider that is not under the control of the attorney.

We are reluctant to render an specific interpretation of *RPC* 1.6 or impose a requirement that is tied to a specific understanding of technology that may very well be obsolete tomorrow. Thus, for instance, we do not read *RPC* 1.6 or Opinion 515 as imposing a per se requirement that, where data is available on a secure web server, the server must be subject to the exclusive command and control of the firm through its own employees, a rule that would categorically forbid use of an outside ISP. The very nature of the Internet makes the location of the physical

equipment somewhat irrelevant, since it can be accessed remotely from any other Internet address. Such a requirement would work to the disadvantage of smaller firms for which such a dedicated IT staff is not practical, and deprive them and their clients of the potential advantages in enhanced communication as a result.

Moreover, it is not necessarily the case that safeguards against unauthorized disclosure are inherently stronger when a law firm uses its own staff to maintain a server. Providing security on the Internet against hacking and other forms of unauthorized use has become a specialized and complex facet of the industry, and it is certainly possible that an independent ISP may more efficiently and effectively implement such security precautions.

We do think, however, that when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using “reasonable care” against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then “reasonable care” will have been exercised.

**163 *N.J.L.J.* 220**
**January 15, 2001**

**10 *N.J.L.* 154**
**January 22, 2001**

**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**

**Appointed by the New Jersey Supreme Court**

**OPINION 692**

**Retention of Closed Clients' Files**

The Advisory Committee on Professional Ethics has been asked for advice concerning the length of time an attorney must maintain a client file following the final disposition of a matter. For the reasons discussed below, we hold that such 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. 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. In making this determination, the Committee considered, among other authorities, RPC 1.1 (Competence); RPC 1.4 (Communication); RPC 1.6 (Confidentiality of Information); RPC 1.15 (Safekeeping Property); RPC 8.4 (Misconduct), and *R*. 1:21-6.

RPC 1.15(a) directs a lawyer to safeguard the property of clients or third persons, and although "complete records of ... account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record,"See footnote 1 [1] neither the Rules of Professional Conduct nor the law of bailment prescribes or delimits the period of time the property itself need be maintained. Rather, RPC 1.15(b) compels the attorney to promptly notify clients or third persons of the receipt of property to which they are entitled and, except as otherwise permitted by law or by agreement with the client, promptly deliver the property to them. This requirement implies that "property" of the client may never be destroyed without the client's permission or some legal authority, such as a court order.

Clearly, that which the client has entrusted to the attorney, such as original documents, photographs or things, remains the "property of the client." Additionally, depending upon the nature of the representation, that which has been created or obtained by the attorney as part of the undertaking and for which the client retained the services of the attorney constitutes property of the client. Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property.See footnote 2 [2]

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As to the remainder of the file (correspondence, pleadings, memoranda, briefs, etc.), while some authorities consider most if not all such documents to be "property of the client" and therefore subject

to the provisions of RPC 1.15, we see no ethical or practical reason to adopt that broad a definition of "client property" and decline to do so.

We recognize that an attorney may wish to preserve the material for purely business reasons. The potential of further business from the client, the usefulness of the material for similar matters undertaken for others and the protection that may be afforded the attorney should there be a claim of professional malpractice, unethical conduct or a fee dispute are examples of why an attorney may, for such reasons, choose to retain file material. Publications are replete with suggestions on the best practices in that regard. The question posed to this Committee, however, is confined to the ethical constraints, and we therefore present no specific advice with regard to the practical business aspect of the matter. Attorneys are well advised to familiarize themselves with the practical issues and the many suggested means of dealing with them.

Another purpose for which an attorney may choose to preserve closed file material is based upon the duty of professional care arising out of the specific attorney-client relationship. Under such circumstances, the material is maintained not because it is the "property" of the client, but rather because it would be consistent with the professional responsibility of the attorney to anticipate the potential future need for such material by the client. Examples of such material would be medical records which might otherwise become unavailable, financial data obtained which may be useful to establish the basis of an investment for future tax purposes, etc.

Failure to retain a client's closed file will not necessarily result in discipline. Simple negligence does not equate with unethical conduct. Therefore, unless the destruction of the file material constitutes an act of gross negligence or, along with the destruction of other files, a pattern of negligence, RPC 1.1, or misconduct, RPC 8.4(c) and (d), it alone should not be considered an unethical act.

Accordingly, assuming that an attorney's destruction of a client file does not constitute fraud, dishonesty or misrepresentation, and that it is not done purposefully to prejudice the administration of justice, RPC 8.4(c) and (d); does not constitute gross negligence or a pattern of negligence, RPC 1.1; and does not violate the provisions of RPC 1.15 or *R*. 1:21-6, the destruction of a client file is ethically permissible subject to the admonitions below.

It is well settled that the entire file belongs to the client and must be provided upon request.See footnote 3 [3] *Cf*. Opinion 554, 115 *N.J.L.J.* 565 (1985) (a client or the client's new attorney is entitled to receive the file with everything which is or was essential for the completion of the litigation); Opinion 203, 94 *N.J.L.J.* 298 (1971) (a client has the right to be represented at all times by counsel of the client's choosing and the file should be delivered to the attorney selected by the client). The question presented here, however, deals with the situation where no specific request has been made. Inherent in the attorney-client relationship is an expectation on the part of the client that the attorney may be called upon to and will provide requested information which is necessary to the client's needs. RPC 1.4 (Communication). Therefore, at the close of the file, it is presumed that for some reasonable period of time a client may assume that the entire file would be available if it were requested.

In establishing a fair and reasonable period of time, reference may be made to the *New Jersey Administrative Code* which reflects state policy.See footnote 4 [4] The retention period required by the vast majority of licensed professions is seven years. That being the case, in providing a safe harbor to the attorney who has conformed to the ethical requirements discussed above, we conclude that absent an express agreement to the contrary, the client should not reasonably expect the attorney to retain the file for the client's benefit more than seven years after the conclusion of the representation.See footnote 5 [5] After a period of seven years has passed, such file material may ethically be destroyed.

Additionally, we see no reason why a client may not expressly agree to the destruction of a closed file at any earlier time. A general retention policy adopted by the firm or a specific understanding with regard to retention in the given case may be expressly agreed upon in any one of a number of ways, such as within a retainer agreement or by written acknowledgment at a point in time before or after the file has been closed. If such written agreement is intended to be made applicable to "client property" as defined above, RPC 1.15, the agreement should be executed only after the property is in the attorney's possession and should specifically describe the property intended to be destroyed or otherwise disposed of.

Lastly, the manner in which client files are destroyed must conform to the confidentiality requirements of RPC 1.6. Simply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties.

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Footnote: 1 [1]

*See also R. 1:21-6(b)(9) which provides that "copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining [to the event which they record]" must be retained for a period of seven years.*

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Footnote: 2 [2]

*Depending on the nature of the representation and the matter, the list of such documents may include appraisals, banking records, real estate and transactional closing documents, employee benefit plans, due diligence documents and reports, governmental authorizations or permits, governmental notices of violations or compliance, policy and procedures manuals, environmental site investigation reports, fiduciary accounting, financial records or statements, insurance policies, lease records, loan documents, securities filings, tax determinations, tax filings or returns, original trademarks, copyrights and patents, etc. This listing is illustrative only and does not serve to limit the types of documents that may be the property of the client.*

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Footnote: 3 [3]

*An exception is data relating solely to the attorney-client relationship and data taken from another unrelated file.*

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Footnote: 4 [4]

*NJAC 13:30-6.5(b) (Medical Examiners - Seven Years) ; NJAC 13:30-8.7(c) (Dentistry - Seven Years); NJAC 13:34-7.1(d) (Marriage and Family Counselors - Seven Years); NJAC 13:34-18.1(g) (Professional Counselors - Seven Years); NJAC 13:33-1.29(a) and 39-7.14(f) (Ophthalmic*

*Dispensers/Ophthalmic Technicians - Six Years); NJAC 13:35-9.11(b) (Acupuncturists - Seven Years); NJAC 13:36-1.8(b) (Mortuary Science - Six Years); NJAC 13:38-2.3(a) (Optometrists - Seven Years); NJAC 13:39A-3.1(c) (Physical Therapy - Seven Years); NJAC 13:42-8.1(g) (Psychologists - Seven Years); NJAC 13:44-4.9(b) (Veterinarians - Five Years; Three Years if patient has died); NJAC 13:44E-2.2(b) (Chiropractic Examiners - Seven Years); NJAC 13:44F-8.2(a) (Respiratory Care - Seven Years); and NJAC 13:44G- 12.1(e) (Social Worker Examiners - Seven Years).*

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*Footnote: 5* [5]

*Although concerned primarily with confidential communications, to the extent that Opinion 542, 114 N.J.L.J. 387 (1984) d eems it appropriate to destroy a file based upon a contract between the insured and the insurance company, it is now here rejected.*

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**11 *N.J.L.* 2117**
**170 *N.J.L.J.* 343**
**October 28, 2002**

**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**
**Appointed by the New Jersey Supreme Court**

**OPINION 692 (Supplement)**
**Retention of Closed Clients' Files**

The ACPE has been asked to clarify Opinion 692, in which the Committee responded to a request for advice concerning the length of time an attorney must retain a client file following the final disposition of a matter. There the Committee held that, absent specific instructions or express agreement, and excepting "property of the client," attorneys are required by applicable ethics rules and principles to retain and maintain closed files for seven years. The Committee noted in Opinion 692 that *RPC* 1:15(a)(b) may, by implication, require that "property of the client" be maintained indefinitely. The opinion defined such property as (1) "…that which the client has entrusted to the attorney, such as original documents, photographs, things …" and (2) "…that which has been created or obtained by the attorney as part of the undertaking and for which the client retained the services of the attorney…" By way of example of the latter category, Opinion 692 refers to original wills, trusts, deeds, executed contracts, corporate bylaws and minutes, and, in a footnote, points out that what may be included in this category of property depends on the nature of the representation and the matter. *See* Opinion 692, fn 2.

The first of the two inquiries before the Committee seeks clarification of Opinion 692 in the following respects:

(a) provision of a more specific explanation of what constitutes "property of the client," including whether medical records, x-rays, expert reports, deposition transcripts, and answers to interrogatories constitute property of the client;

whether the entire file or only that portion falling within the definition of "property of the client" must be retained for seven years; and

whether there must be separate agreements concerning destruction, prior to the expiration of the seven-year period, of the "property of the client" and the remainder of the file.

In responding to this inquiry, the Committee takes this opportunity to provide guidance to the bar on a related issue, namely, (d) who bears the responsibility to retain and maintain closed client files under certain circumstances.

The second inquiry seeks the Committee's clarification in cases where the insurer hires counsel to represent its insured, (e) as between the insurer and an insured, who is the client for purposes of providing instructions on file retention or destruction.

(a) <u>Definition of Property of the Client</u>

As Opinion 692 emphasized, determining what constitutes property of the client is fact sensitive and depends on the nature of the matter and of the representation itself. We note that the definition adopted and examples referenced in Opinion 692 are consistent with definitions adopted and examples used in other states. *See*, for example, Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion 2001-157 (2001) (finding that a lawyer has an obligation to permanently safeguard original materials and materials of inherent value); Mich. Ethics Comm., Opinion R-5 (1989) (requiring record

retention plans to include safeguards for permanently maintaining client property such as stock certificates, original wills, and unrecorded deeds); ABA Comm. on Ethics and Prof'l Responsibility, Informal Opinion 1384 (1977) (stressing that a lawyer should not discard or destroy property of the client or information that the client may foreseeably need).

In responding to the current request for clarification, we apply the Opinion 692 definition of "property of the client" and conclude that in most cases, including those involving personal injury or malpractice claims, medical records, x-rays, expert reports, deposition transcripts, and answers to interrogatories do not constitute property of the client. That does not mean, however, that there is no case in which such materials and documents could ultimately fall within the definition of property of the client. It may well be that, depending on the nature of the matter or the representation itself, it would be foreseeable that the former client will need such documents in the future to protect an interest or defend a claim. In such a case, the types of documents specifically referenced in the inquiry (medical records, x-rays, expert reports, deposition transcripts, and answers to interrogatories) could constitute "property of the client"

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and, as such, be subject to the retention requirement applicable to client property. *See* Opinion 692 and below. Practitioners will need to apply discretion to these matters on a case-by-case basis.

(b) What Portion of the File Must be Retained for Seven Years

Absent specific written instructions or an express agreement or other legal authority, such as a court order,

(1) property of the client must be returned, or retained and maintained indefinitely (*see* Opinion 692, finding that *R.P.C*. 1.15(b) "implies that 'property' of the client may never be destroyed without the client's permission or some legal authority such as a court order"); and

(2) the remainder of the file must be retained and maintained for seven years (*see* Opinion 692, concluding that a client can reasonably expect an attorney to have a file available for seven years after the conclusion of representation).

At the end of the seven-year retention period, a lawyer has an obligation to examine the closed file 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. Reasonable steps include, but are not limited to, mailing a notice to the client's last known address by regular or certified mail and waiting a reasonable period for a response. *Cf.* D.C. Legal Ethics Comm., Opinion 283 (1998) (holding that an attorney must make a reasonable effort to reach the former client by sending a letter to the client's last known address and waiting an appropriate period of time (perhaps six months)). See footnote 1

Some files may contain client property that has inherent value, such as bonds, stocks, or jewelry. Where a file contains inherently valuable property and the client cannot be found at the end of the seven-year retention period, the lawyer should dispose of the property in accordance with New Jersey's Uniform Unclaimed Property Act, *N.J.S.A*. §§ 46:30B-1 to -109.

While the inquiry here at issue did not include a specific question on retention of criminal files, the Committee takes this opportunity to provide guidance to the criminal bar by noting that it will generally not be prudent to dispose of criminal files after seven years. That is because criminal convictions can have significant consequences long after the final judgment, sentencing, and closure of the case. See footnote 2 Thus, absent an express agreement, a lawyer should not discard or destroy files relating to criminal matters while the client is alive.See footnote 3 Accord, State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Opinion 2001-157 (2001) (holding that client files in criminal cases cannot

be destroyed without the client's authorization while the client is alive).

Finally, 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. For example, where the matter involves a minor, materials in the file may affect the client's rights well beyond the seven-year retention period. *See*, for example, *N.J.S.A*. § 2A:14-21 (providing that the statute of limitations for claims brought by minors tolls until the minor reaches majority). Thus, a lawyer may need to retain file records relating to the representation of a minor until the minor reaches majority and thereafter until the statute of limitations runs. *Cf.* D.C. Legal Ethics Comm., Opinion 283, fn. 10 (1998) (explaining that files relating to matters involving a minor may need to be kept beyond the minimum five-year retention period established in that jurisdiction).*See also N.J.S.A*. § 2A:14-7 (providing for a twenty year statute of limitations for actions relating to real estate).

Other extended retention requirements may apply by operation of state and federal laws that require particular information to be retained for more than seven years. While these requirements may not specifically apply to attorneys, to the extent an attorney has these types of records in a client file, and absent an agreement with the client, the attorney may be required to maintain them for the period specified in the applicable law. *See*, for example, 29 *U.S.C.* § 1059 (a)(1) (ERISA) (requiring indefinite retention of documents essential to the determination of benefits payable to employees); 29 C.F.R. § 1910.1020(d) (OSHA) (requiring that medical records pertaining to an employee's exposure to toxic or hazardous substances in the workplace be retained for the duration of employment plus thirty years).

Before destruction, whether based on the client's consent or at the end of the seven-year retention period, the attorney should carefully review the file's contents to make certain that documents that the lawyer is required by law to maintain or that the client may foreseeably need are not destroyed. Once again, the Committee notes that counsel must exercise reasonable discretion in these matters, based upon the particular facts, and as may be required by applicable law.

As Opinion 692 emphasized, when destroying client files, the manner in which they are destroyed must conform to the confidentiality requirements of *RPC* 1.6. *See* Opinion 692 (stressing that "simply placing the files in the trash would not suffice"). Accordingly, a lawyer must take appropriate measures to ensure that confidential and privileged information remains protected from improper disclosure.

(c) Agreements to Destroy Client Property

The inquirer has asked for clarification whether there must be separate agreements concerning destruction of property of the client in less than seven years. Specifically, the inquirer seeks guidance whether, in the case where there is a general agreement with the client on the destruction of the entire file (in a retainer agreement or otherwise), a specific agreement is required for the destruction of "property of the client" that may be contained in the file.

As Opinion 692 makes clear, an agreement to destroy property of the client should be executed only after the property is in the attorney's possession, and should specifically describe the property intended to be destroyed or otherwise disposed of. *See* Opinion 692 (holding that if a general retention policy calling for the destruction of a closed file "is intended to be made applicable to 'client property' . . . the agreement should be executed only after the property is in the attorney's possession"). Therefore, unless the attorney is in possession of the client property before a retainer agreement is signed, generally an agreement to destroy a file contained in a retainer agreement is insufficient to permit destruction of client property.

(d) Responsibility For Retention and Maintenance of Closed Client Files Under Certain Circumstances

From time to time the Committee has been asked for guidance on the question of who has responsibility for the retention and maintenance of client files, including property of the client, in circumstances where a sole practitioner retires or dies, the attorney who worked on the matter leaves the firm, or when the firm dissolves. The Committee takes this opportunity to provide guidance to the bar on this issue.

Ordinarily, clients of a law firm employ the firm as an entity rather than employing a particular member of the firm. *See State v. Belluci*, 81 *N.J*. 531, 541 (1980) (reasoning that the access to confidential information among members of a firm and the shared economic interest of the entire firm support "treating a partnership as one attorney"); *Staron v. Weinstein*, 305 *N.J. Super*. 236, 242 (App. Div. 1997) ("When a client retains a lawyer [associated with a law firm] the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise . . . .") (citing Restatement (Third) of Law Governing Lawyers § 26, cmt. h (Proposed Final Draft No. 1, 1996)). Accordingly, under *RPC* 1.16, a law firm has an ethical obligation to protect the interests of former clients. Where a client employs a firm, it is the firm that has the obligation to comply with the procedures for disposition of client files set forth in Opinion 692 as clarified in this opinion. *See* N.Y. State Bar Assoc. Comm. Prof'l Ethics, Opinion 623 (1991) (holding that a law firm, and not just the member of the firm who actively represented a client, has a professional obligation to maintain that client's closed files). Likewise, in the event that a firm dissolves, the former partners or members of the firm have a professional and ethical obligation to make arrangements for the disposition of client property in a manner consistent with this opinion and Opinion 692. This requirement conforms with the ethical obligations imposed on many of New Jersey's licensed professionals to establish procedures for retrieval of records following the cessation of their practices. *See*, for example, *N.J.A.C*. 13:30-8.7(f) (Dentists); *N.J.A.C*. 13:35-6.5(h) (Physicians); *N.J.A.C*. 13:42-8.1(h) (Psychologists); *N.J.A.C*. 13:44E-2.2(g) (Chiropractors).

Under *RPC* 1.3, a sole practitioner has an ethical duty to plan for disposition of files in the event of his/her death or retirement. *See* Model Rules of Prof'l Conduct R. 1.3 cmt. 5 (amended 2002) ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."); ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 92-369 (1992) (noting that the Model Rules on diligence and competence require a sole practitioner to plan for death); Fl. State Bar Assoc. Comm. of Prof'l Ethics, Opinion 81-8 (1981) (holding that when planning for death, a lawyer must make a diligent effort to contact all clients, review each file for documents that must be safeguarded, and index such documents before putting them in storage or turning them over to the attorney who assumes control of the practice). *RPC* 1.3 specifically requires a lawyer to act "with reasonable diligence and promptness in representing a client." We conclude that "reasonable diligence" requires a sole practitioner to make arrangements for disposition of client files in the event of death or retirement. This is an obligation which all law firms and sole practitioners must prepare for now.

When a sole practitioner has not arranged for file disposition in the event of death or disability, New Jersey Court Rule 1:20-19 provides for the disposition of the practice, including client files [See footnote 4]. Pursuant to Rule 1:20-19, an interested party may petition the Assignment Judge in the vicinage where

the attorney maintained a practice to appoint a member of the bar to perform an inventory of the practitioner's files and take actions necessary for the protection of the attorney's clients. N.J. Ct. *R*. 1:20-19(a). *Cf.* Model Rules for Lawyer Disciplinary Enforcement, 28 (1989). When dealing with retention and disposition of client files and client property, the appointed attorney must comply with the seven-year time period established in Opinion 692 and clarified in this opinion. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 92-369 (1992) (concluding that ABA Informal Opinion 1384 regarding the duty to preserve client files applies to lawyers who assume responsibility for a deceased practitioner's clients).

(e) As Between the Insurer and the Insured, who is the Client for Purposes of Complying with the Requirements set forth in Opinion 692, as Clarified Herein

Concerns about the disposition of closed client files multiply in the conflict-ridden tripartite relationship among a law firm, an insurance company, and the insured party. Based on *RPC* 1.6 and 1.8 and legal precedent, the Committee reaffirms that the insured, and not the insurer, is the client for the purposes addressed in this opinion and in Opinion 692. To the extent that Opinion 542 conflicts with this holding, we now reject it.

In Opinion 542, we addressed whether an attorney for an insured breached his duty of confidentiality by delivering closed files to the insurer without retaining copies. N.J. Advisory Comm. on Prof'l Ethics, Opinion 542 (1984). We explained that the insured and insurer could agree to the disposition of claims files. However, we emphasized that the attorney must return all materials unrelated to the claims at issue to the insured, unless the insured authorized other means of disposal. Although we held that the attorney's procedure described in that inquiry for disposing of claims files was proper, we limited our response to files that contained no confidences of the insured. Opinion 542 did not address whether the attorney's duty to safeguard client property limited the attorney's ability to transfer the entire claims file to the insurer. However, to the extent that Opinion 542 does permit destruction of a file based on a contract between the insured and the insurance company, it is rejected.

Although this is an issue of first impression in New Jersey, prior decisions regarding the relationship between the attorney, an insurance carrier, and the insured support a finding that the file and all "client property" belong to the insured. [See footnote 5] In New Jersey, courts have concluded that an attorney's primary duty is to the insured. *Prevratil v. Mohr*, 145 *N.J*. 180, 194 (1996); *Lieberman v. Employers Ins. of Wausau*, 84 *N.J*. 325, 338 (1980) (emphasizing that the relationship between defense counsel and the insured should be treated as if the insured had hired and paid for the attorney's services); *Montanez v. Irizzary-Rodriquez*, 273 *N.J. Super*. 276, 286 (App. Div. 1994) (concluding that defense counsel cannot ethically attack the credibility of the insured given the undivided loyalty that the attorney owes to the insured); *Longo v. Am. Policyholders' Ins. Co.*, 181 *N.J. Super*. 87, 92 (App. Div. 1981) (holding that an attorney has an ethical obligation to represent the insured with undivided loyalty); N.J. Advisory Comm. on Prof'l Ethics, Opinion 542 (1984) ("We first observe that in the situation where an attorney is employed by an insurance company to represent the interests of the insured party to an action, that attorney's client is the insured."). Similarly, the New Jersey Supreme Court has held that an attorney owes undivided loyalty to the insured. *Lieberman, supra*, 84 *N.J.* at 338-39. Based on the existence of an attorney-client relationship between the attorney and the insured, the *Lieberman* Court stressed that "there is no diminishment of ethical obligations and standard of care applicable to insurance defense counsel." *Id*. Accordingly, as a baseline, the attorney owes all ethical obligations, including the obligations to safeguard client property and protect client interests, to the insured and not the insurer.

*RPC* 1.8, Conflict of Interest, makes clear that an attorney has an ethical obligation to preserve the insured's confidentiality. Pursuant to *RPC* 1.8, an attorney can only accept compensation from a third party if "there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship," and the client's confidential information is protected. *See also*Restatement of the Law (Third) Governing Lawyers § 134, ill. e (2000) (directing an attorney to maintain the confidentiality of the insured). Documents that an insured delivers to the attorney in the course of representation, such as medical records or financial statements, constitute "property of the client" as that term is defined in Opinion 692 and clarified in this Opinion. These materials may contain client confidences that, under *RPC* 1.8, cannot be disclosed to the insurance carrier without the informed consent of the insured. Therefore, concerns over maintaining client confidences support a finding that the insurer cannot control the disposition of closed client files.

Because the attorney's employment by the insurer does not limit the attorney's ethical obligations to the insured, the Committee holds that materials contained in a claims file that clearly fall within the meaning of "property of the client" must be disposed of in accordance with the insured's instructions, or maintained indefinitely under *RPC* 1.15(b). The insured may consent to the destruction or retention of a claims file by the insurer, but such consent must be fully informed. Therefore, the insured must be aware of the materials contained in the file at the time the insured gives consent.*See In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 346-47 (2000) ("[F]or an insured to make fully informed consent to disclosure of detailed professional billing statements, the consent must be contemporaneous with the facts and the circumstances of which the insured should be aware."). Accordingly, in most cases, an insured may not consent to disposal of client property by way of a provision to that effect in a liability policy executed before any claims materialize.

In sum, legal precedent in this State makes clear that the insured is the client of the attorney, even where the insurance carrier hires and pays for the attorney's services. All resulting ethical obligations, including the obligation to retain closed client files and property of the client, apply to the insured. Thus, the Committee concludes that, where a claims file contains materials delivered by the insured to the attorney or prepared or obtained for the insured in the course of representation, the attorney must obtain the insured's instructions or consent regarding the disposition of the property in accordance with Opinion 692 and this opinion.

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*Footnote: 1 The New Jersey Administrative Code provisions regulating other licensed professionals provide guidance on the scope of "reasonable efforts." Pursuant to the Code, when preparing to retire or terminate their practices, psychologists, chiropractors, dentists, and physicians must establish procedures by which patients may obtain treatment records. See N.J.A.C. 13:30-8.7(h) (Dentists); N.J.A.C. 13:35-6.5(h) (Physicians); N.J.A.C. 13:42-8.1(h) (Psychologists); N.J.A.C. 13:44E-2.2(g) (Chiropractors). These procedures and a notice of cessation of the practice must be published in "a newspaper of general circulation in the geographic location of the licensee's practice, at least once each month for the first*

*three months after the cessation." Id.*

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*Footnote: 2 See, for example, N.J.S.A. § 2C:7-2 (providing that a registered sex offender who has not committed an offense within fifteen years after conviction or release, whichever is later, can apply for termination of the registration obligation); N.J.S.A. § 2C:43-7.1 (authorizing extended sentencing for repeat violent offenders).*

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*Footnote: 3 The New Jersey Public Defender maintains files for 50 years pursuant to a departmental policy that was approved by the State Records Committee pursuant to N.J.S.A. § 47:3-20 in 1983.*

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*Footnote: 4 The Court Rule alternative is unlikely to be as practical and effective as advance planning by the responsible firm or practitioner.*

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*Footnote: 5 Neither the courts nor the legislature in this State has addressed whether the insured and the insurer are, in some circumstances, both clients of the attorney. See Paradigm Ins. Co. v. Langerman Law Offices, 200 Ariz. 146, 154 (2001) (holding that "when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide"). Because we find that this is a question of substantive law, we do not address it.See N.J. Ct. R. 1:19-2 (granting the Committee jurisdiction over inquiries concerning the proper conduct for members of the New Jersey bar). However, if, in the future, the courts or legislature determine that an attorney owes a duty of loyalty to both the insurer and the insured, the Committee will have to revisit the question of retention and destruction of the insured client's files and property.*

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New Jersey Courts
Independence • Integrity • Fairness • Quality Service

# PRACTITIONER'S GUIDE

**Superior Court Trust Fund**

Superior Court Clerk's Office

www.njcourts.com

## OVERVIEW

The Superior Court Trust Fund is a temporary depository for funds claimed in connection with litigation in the New Jersey Superior Court or of funds to be deposited under the jurisdiction of the New Jersey Supreme Court.

This guide is provided to assist individuals or attorneys seeking to deposit into and withdraw funds from court. Attorneys and self-represented litigants who have interaction with the Trust Fund should be familiar with and comply with all applicable rules, statutes and regulations.

The general rules applying to the deposit of funds into Court and withdrawal of funds from Court are found in R. 4:57. If the funds being withdrawn are surplus funds from a foreclosure action, R. 4:64-3 also applies, as does R. 4:64-9 if the motion is being filed with the Office of Foreclosure. In condemnation actions, consult R. 4:73-9 as well as R. 4:57.

**Trust Fund Unit Mailing Address:**
All correspondence should be directed to the

Superior Court Clerk's Office
Attn: Trust Fund Unit
Richard J. Hughes Justice Complex
25 Market Street
Sixth Floor, North Wing
P.O. Box 971
Trenton, NJ 08625 - 0971

Questions regarding the processing of Trust Fund work may be directed to the Trust Fund Unit at SCCOTrustfund.Mailbox@njcourts.gov or (609) 815-2900.

# DEPOSIT OF FUNDS

The general rules applying to the deposit of funds into Court are found in R. 4:57 and R. 4:57-2. A court order is required to deposit funds into Court unless the funds deposited are unclaimed funds from an attorney trust account or are funds deposited into court in lieu of a construction lien claim.

## GENERAL REQUIREMENTS FOR DEPOSITS

**Required Documents:** In order to deposit money into court, the following documents must be submitted to the Trust Fund Unit's mailing address noted above:

1. Two copies of a signed Court Order authorizing the deposit of funds.
2. A check made payable to the order of "Superior Court of New Jersey" in the exact amount specified in the order (the check does not have to be certified).
3. A self-addressed stamped envelope for mailing the receipt.

## DEPOSITS OF UNCLAIMED FUNDS IN ATTORNEY TRUST ACCOUNTS

Rule 1:21-6(j) authorizes an attorney to deposit certain funds which are in his or her trust account that may not otherwise be disbursed to a client or on behalf of a client. The rule establishes a three-step process that must be completed prior to submitting the funds for deposit:

1. **Step One:** The attorney must identify those funds which have been unclaimed or in which ownership is unidentified or which are held for a missing owner. The funds must have been in the attorney trust account for more than two years, after which they may be designated by the attorney as suitable for deposit with the Court.
2. **Step Two:** The attorney must maintain the designated funds for a period of one (1) year during which time he/she must conduct a reasonable search for the beneficial owner(s) of the funds. If the ownership of the funds is in question, a diligent effort must be made to determine ownership. If the owner(s) of the funds is known, a diligent search of their whereabouts must be conducted.
3. **Step Three:** If the funds remain unidentifiable, are unclaimed, or the owner(s) cannot be located, they may be deposited into the Superior Court Trust Fund. The attorney must complete a detailed affidavit setting forth the amount and nature of the funds, the name(s) of the owner(s) and the attorney's efforts to identify or to disburse the funds to them. The affidavit must include all known addresses and any other information regarding the transaction which gave rise to the trust account deposit that may be helpful to identify ownership of the funds in the event that a claimant subsequently makes application for them

**Required Documents:** In order to deposit unclaimed funds into Court, the following documents must be submitted to the Trust Fund Unit's mailing address noted above:

1. An original and one copy of the notarized affidavit or certification required by R. 1:21-6(j).
2. A check made payable to the order of "Superior Court of New Jersey" in the exact amount specified in the order (the check does not have to be certified and no starter checks).
3. A self-addressed stamped envelope for mailing the receipt.

## CONSTRUCTION LIEN DEPOSITS

Funds deposited into court in lieu of a bond for a construction lien claim are paid into the Superior Court Trust Fund pursuant to R. 4:57-1.

**Required Documents:** In order to deposit construction lien funds into Court, the following documents must be submitted to the Trust Fund Unit's mailing address noted above:

1. Two copies of the recorded lien claim.
2. A certified or bank check made payable to "Superior Court of New Jersey" in the amount of 110% of the construction lien claim.
3. A separate check, which need not be certified, in the amount of $25.00 made payable to "Treasurer, State of New Jersey."
4. Two self-addressed stamped envelopes for transmittal of (a) a recordable "notice of receipt of cash in lieu of bond for a construction lien claim" for filing with the county recording officer and (b) a non-recordable Trust Fund receipt.

## SURETY BONDS

The general rules applying to surety bonds are found in R. 1:13-3. Any Surety Bond, including Supersedeas Bonds, must be submitted to a Judge for approval and should stay with the court's case file in the trial court. **Surety Bonds are not sent to the Trust Fund Unit.**

**Cash in lieu of a Surety Bond:** Cash (in the form of a check) deposited in lieu of a Surety Bond is sent to the Trust Fund Unit. However, with the exception of cash posted in lieu of a Surety Bond for a Construction Lien Claim, there must be a court order specifically directing that cash may be posted in lieu of a bond. An Order directing a bond to be posted is insufficient as it does not specifically allow cash in lieu thereof.

## WITHDRAWAL OF FUNDS

The general rules applying to the withdrawal of funds from Court are found in R. 4:57-2 and R. 4:57-5. A Court Order is required in order to obtain a release of funds. This is done by making a motion or submitting a consent order to withdraw funds. **You must submit a proposed motion package or consent order to the Trust Fund Unit for verification of the amount on deposit and compliance with the court rules BEFORE filing it with the court**.[1]

### GENERAL REQUIREMENTS FOR WITHDRAWALS

### STEP 1: Send Motion Package with Proposed Order to the Trust Fund Unit for Review

Mail the entire motion package to the Superior Court Trust Fund Unit for verification of the amount on deposit. The Trust Fund Unit will verify the funds on deposit and review the proposed order for compliance with court rules. Once verified, the motion package, verified order, and the transmittal letter will be returned to you for filing with the court.

**Order Requirements:** In order to qualify for payment, the payout order must clearly include the following:

1. **It must direct payment of funds from the Superior Court Trust Fund.** The language used in payout orders varies, but it must be clear that the intent is to pay funds from the money on deposit with court in the Superior Court Trust Fund. Some examples of the many variations are: "The Clerk of Superior Court shall pay ____"; "The Superior Court Trust Fund shall pay_____"; "____shall be paid from the funds on deposit with Court".
2. **It must specify the amount of the funds to be paid:** Most commonly this will be recited as a specific amount (e.g., pay $50,000) but can also be couched in generic terms as long as the reference is clear, such as, "Pay all funds on deposit'; "Pay the balance of funds after payment of $10,000 to ____".
3. **It must identify the party(ies) to whom the funds are to be paid:** The proposed order must clearly specify to whom the funds should be released, as well as specifying the address to which the payment is to be sent.

**Required Documents:** The following documents must be submitted to the Trust Fund Unit's mailing address noted above.

1. **Motion Package**: The motion must include the following: (1) *Notice of Motion,* (2) *Certification of Service,* (3) *Certification in Support of the Motion,* and (4) *Proposed Order.*
2. **Child Support Judgment Certification** (if applicable -- see "Additional Required Documents" below)

[1] The Supreme Court's July 25, 2014 amendments to the Rules of Court, which became effective September 1, 2014, requires proposed orders to pay out and their accompanying motion papers to be submitted to the Superior Court Trust Fund Unit for review and verification of the amount on deposit prior to the submission to the Judge in the appropriate vicinage. R. 4:57(2)(a).

3. **IRS W-9** (if applicable -- see "Additional Required Documents" below)
4. **Return envelope**: The motion package or proposed consent order should be accompanied by a self-addressed stamped envelope sufficient for its return once verified.

**Additional Required Documents:** In addition to the motion package you may need to provide a Child Support Judgment Certification showing that the recipient of funds is not a child support judgment debtor and/or an IRS W-9 if the below requirements are applicable.

1. **Child Support Judgment Certification:** Provide a certification from a private judgment search company if an individual who is not a minor is receiving more than $2,000.00 either directly or through an attorney. See *N.J.S.A.* 2A:17-56.23b. If the recipient has been known by any other name(s), a child support judgment search must be done for each name.

    - **Certification of Arrears**: If the recipient of the funds is in fact a child support judgment debtor, provide a certification from the appropriate probation officer showing current child support arrears and the amount of post-judgment interest due so that the Clerk may pay the full arrears (to the extent available on deposit in the Trust Fund).
    - **Warrant of Satisfaction**: If all child support arrears have been paid and there are no current obligations, a copy of a filed warrant of satisfaction must be submitted to the Trust Fund Unit. The appropriate probation division should be contacted for help in obtaining a warrant of satisfaction**.**

2. **IRS W-9:** Provide a completed IRS form W-9 if accrued interest is being paid to anyone other than a corporation or a government entity in excess of $10.00, either directly or through an attorney. If the interest is being paid to more than one person, the percentage of interest each person is to receive should be indicated. If the recipient of the funds is not a U.S. citizen or is a resident alien, the appropriate W-8 form may be required.

    - **Note:** The Trust Fund has not earned interest as of June 2009, therefore funds deposited after this date will not have accumulated interest to be paid and it is therefore unnecessary to include an IRS W-9 for these cases.

**STEP 2: File Motion, Verified Order, and the Transmittal Letter with the Court**

Once you receive the motion package, verified order, and the transmittal letter back from the Trust Fund Unit, you must file it at the county courthouse where the case started. When filing the motion in the county courthouse, include the original motion and one copy along with the $50.00 filing fee. The filing fee must be in the form of a check or money order made payable to "Treasurer, State of New Jersey." In addition to filing the motion with the county courthouse, you must serve the motion on ALL parties to the original case.

**STEP 3: Submit Executed Order to the Trust Fund Unit**

**Once the verified order is SIGNED by the judge**, **you must submit a certified copy of the order bearing the court seal to the Trust Fund Unit to process the signed payout order.** A certified copy is a plain copy with a stamp affixed with the Superior Court Clerk/Deputy Clerk's signature attesting to the authenticity of the document. A seal may be affixed to a certified copy. (See https://www.judiciary.state.nj.us/courts/superior/copiesrecords.html).

If a Child Support Judgment Certification, Certification of Arrears, Warrant of Satisfaction, or W-9 is required and was not previously submitted, payment will be delayed until these are received.

**SURPLUS MONEY MOTIONS**

To obtain release of surplus money after a foreclosure sale you will need to obtain a Court Order. This is done by filing a motion to withdraw surplus money. The general rules applying to the withdrawal of surplus money from Court are found in R. 4:64-3 and R. 4:64-9. Motions made by original parties to the foreclosure action are to be filed with the Office of Foreclosure. All non-parties must make their application to the Chancery Judge in the County where the foreclosed property is located. For detailed instructions on how to file a surplus money motion, please refer to http://www.njcourts.gov/forms/11529_surplus_money_app_info.pdf and http://www.njcourts.gov/forms/11901_notice_foreclosure_office_forclosure.pdf.

**WITHDRAWAL OF CONSTRUCTION LIEN DEPOSITS**

Pursuant to R. 4:57-1 and N.J.S.A. 24:44A-31(c), construction lien deposits may be returned without a court order. The request may be made by the owner, community association, contractor or subcontractor (or the attorney for any of these) by submitting any of the following:

1. A duly acknowledged certificate
2. An order of discharge
3. A judgment of dismissal or other final judgment against the lien claimant
4. A true copy of a stipulation of dismissal, with prejudice, executed by the lien claimant or its representative in any action to foreclose the lien claim

**PROCESSING TIME AND SPECIAL DELIVERY ARRANGEMENTS**

It usually takes about 4 weeks from the time the order is received by the Trust Fund Unit until the check is sent but it may take longer depending on the volume of work. Checks are sent out by regular mail unless arrangements are made to have the check picked up or sent overnight. Special delivery arrangements must be made in writing. If you wish to pick the check up in person, specify your name and phone number – you will be notified by phone the day before the check is ready for pickup. Checks can be sent overnight by Federal Express or UPS if a completed air bill is supplied.