

**ETHICS OPINION NUMBER 257  
OF THE MISSISSIPPI BAR  
RENDERED APRIL 8, 2010**

**CLIENT FILES OF A DECEASED ATTORNEY**--If an attorney is asked to handle the client files of a deceased attorney, the attorney must inventory the files, avoid conflicts of interest, maintain client confidentiality, determine any matters which require immediate action, contact clients and the courts so that clients' rights may be protected, protect any original documents or other important papers for safekeeping, and return any funds held on behalf of clients.

CAVEAT: This opinion is limited strictly to the facts set forth in the hypothetical submitted and is limited to the question of whether the proposed conduct is permissible under the Mississippi Rules of Professional Conduct. The Ethics Committee is prohibited from rendering opinions on questions of law by Article 8-15(c) of the Bylaws of The Mississippi Bar. Any incidental reference to legal authorities is informational only and should not be taken as the Committee's interpretation of such authorities or of the legal issues arising from the hypothetical presented or of the legal ramifications of the proposed conduct. The Committee's opinion is limited to ethical issues only.

The Ethics Committee of The Mississippi Bar has been asked to render an opinion on the following question:

Besides strongly advising the family members and/or relatives to hire an attorney to open an estate, what specifically are the duties of an attorney not connected with an estate who is asked to handle client files of a deceased attorney?

Because there is no attorney-client relationship, the assisting attorney has no legal duty toward the deceased attorney's clients. Should the attorney undertake to assist in the closing of the practice, however, he or she must inventory the files, ascertain any issues that require immediate action, contact the clients to determine their wishes, maintain client confidentiality, protect any original documents or other important papers (including client files) for safekeeping, and return any funds held on behalf of clients.

The American Bar Association recommends that all lawyers should plan for incapacitation or death. The plan should minimally include the designation of another lawyer who would have authority to look over the sole practitioner's files and make

determinations as to which files need immediate attention and provide for clients' notification of the lawyer's death. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-369 (1992)(discussing the disposition of a deceased sole practitioner's client files and property). Sometimes, however, an attorney does not plan for the closing of the law office in the event of death. For whatever reason, the deceased attorney's family does not want to open an estate and asks another attorney to assist in closing the practice. How should the assisting attorney proceed?

As an initial matter, it should be noted that the assisting attorney does not represent the family of the deceased attorney or the clients of the deceased attorney in any official capacity, and therefore, has no legal duties to either party. *Id.*, Miss. State Bar Op. No. 114 (1986), Conn Informal Op. 99-36 (1999). The formation of a lawyer-client relationship requires the consent of both the client and the attorney for its formation and continuation. Conn. Informal Op. 92-10 (1992). However, because the deceased attorney and the assisting attorney are both attorneys, the Mississippi Rules of Professional Conduct (MRPC) are inevitably implicated in the decisions the assisting attorney must make.

If the attorney volunteers to assist with the closing of the deceased attorney's law practice, several Rules of Professional Conduct should guide the assisting attorney's actions. The assisting attorney should be mindful that he or she must be diligent (Rule 1.3, MRPC), maintain client confidences (Rule 1.6, MRPC) and safely keep a client's property (Rule 1.15, MRPC). In carrying out these duties, the attorney should be cognizant of any conflicts of interest as they relate not only to the deceased attorney's clients but also his or own clients. (Rule 1.7, MRPC). ABA Formal Op. 92-369 (1992).

The Committee offers the following guidelines for the assisting attorney:

1. The assisting attorney should first inventory the files. The initial review of a client's file should focus solely on obtaining the client's identity and the identity of the opposing parties, if any. If this preliminary review suggests that a more substantive review of a particular file may generate a conflict because of any obligations to a client or former client, the assisting attorney should (with permission of the deceased attorney's family) transfer the responsibility of reviewing the file to another attorney. The Committee recommends that the assisting attorney and the deceased attorney's family make arrangements for such a transfer prior to undertaking the preliminary review.
2. If the initial review of a file does not identify a conflict, the assisting attorney should perform a more substantive review of the file limited to determining whether any immediate action is required in order to protect a client's interest. If the assisting

attorney determines that prompt action is necessary, the attorney must contact the client without delay and inform the client of the status of the file. If the assisting attorney finds that no immediate action is needed with regard to a particular file, the assisting attorney should notify the clients in a timely fashion. The notification should inform the client of the death of the attorney and advise the client that the client should seek another attorney. ABA Formal Op. 92-369 (1992), Miss. State Bar Op. No. 98 (1984). The assisting attorney should focus first on notifying clients with active files and then notify clients with inactive files. Miss. State Bar Op. No. 114 (1986) advises that the assisting attorney should advise not only the clients, but also the courts where pending cases are filed.

3. The files must be maintained for a period of time in the event the lawyer is unable to locate certain clients of the deceased. In ABA Formal Op. 92-369 (1992), the ABA Committee on Ethics and Professional Responsibility noted that a lawyer does not have a general duty to preserve all of his files permanently. (citing ABA Informal Op. 1384 (1977)). However, clients and former clients reasonably expect their attorneys to preserve valuable and useful information. [For guidance on how long client files should be maintained and when client files may be destroyed, see Miss. State Bar Op. No. 254 (2005).] The attorney should not destroy or discard items that clearly or probably belong to the client, including original documents or documents furnished to the lawyer by the client. The attorney should not destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable limitations period has not expired. A lawyer should not destroy or discard information which the client may need; which has not been previously given to the client; which is not otherwise readily available to the client; and which the client may reasonably expect will be preserved. In Miss. State Bar Op. No. 98 (1984), an attorney who did not practice law with his attorney father sought the Bar's advice as to whether he could destroy his father's former clients' files and what notice procedures should be provided to the former clients. The Ethics Committee advised using "good common sense" and listed the considerations set forth in ABA Formal Op. 92-36- (1992) and Informal Op. 1384 (1977). A lawyer should preserve for an extended period of time an index of the files destroyed or discarded. Miss. State Bar Op. No. 98 (1984). See also, Miss. State Bar Op. No. 114 (1986).

4. With regard to unclaimed funds in the deceased attorney's trust account, the assisting attorney must make reasonable efforts to contact the clients and to return the funds. Miss. State Bar Op. No. 98 (1984) states that a lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyers receipt and disbursement of trust funds. ABA Formal Op. 92-369(1992) advises that reasonable efforts must be made to contact the clients and that, if efforts fail, the lawyer should

maintain the funds in the trust account. Whether the lawyer should follow the State's procedures for unclaimed property is a question of law which this Committee cannot address. [See Miss. Bar Op. No. 243 (1998) and comments to Rule 1.15, MRPC, for more information.]

5. At all times during the process, the assisting attorney must maintain and protect any client confidences. ABA Formal Op. 92-369 (1992), Miss. State Bar Op. No. 98 (1984). "Despite the fact that the clients involved were never your clients, it is our opinion that once you assume custody or control over the files you must ensure confidentiality as if they were your clients." Miss. State Bar Op. No. 98 (1984).

The Ethics Committee of The Mississippi Bar believes that these guidelines will assist an attorney to handle properly a deceased attorney's client files.