

FO #1989-90/2

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1989-90/2
Confidentiality: Off-Site Storage of Closed Client Files
November 9, 1989

RULE REFERENCES:

*Rule 1.6(a)

*Rule 5.3

SUBJECTS:

*Client Funds and Property

*Confidentiality

*Files of Client

ANNOTATIONS:

The duty to preserve client confidence continues even after a file is closed, and the client-attorney relationship has ended. (Rule 1.6; Rule 5.3)

An Attorney may use outside, off-site storage retrieval services to store and maintain closed client files, provided the attorney uses due care in selecting the provider and takes all reasonable measures to insure provider does not disclose or use client confidences. (Rule 1.6; Rule 5.3)

QUESTIONS:

Does use of an off-site storage and retrieval service to store and maintain closed client files violate the New Hampshire Rules of Professional Conduct.

BRIEF ANSWER:

Rules 1.6 (a) and 5.3 do not prohibit the use of an off-site storage and retrieval service to store and maintain closed client files provided the inquiring attorney exercises due care in selecting the provider and takes all reasonable measures to insure that the provider does not disclose or use client confidences.

RESPONSE:

The applicable rules are Rule 1.6 (a) which states a lawyer shall not reveal information relating to representation unless the client consents after consultation and Rule 5.3 which enumerates the attorney's responsibilities in regard to non-lawyer employees, retainees and associates.

Although the question presented refers to closed files, Rules 1.6 and 5.3 apply since the duty to preserve client confidences continues even after the client attorney relationship has ended. Practical Ethics Article, "When a Law Firm Splits Up," NHLW 9/10/86.

The inquiring attorney is not required to notify the clients in advance of the use of the storage facility, but where the client lacks business sophistication sufficient to realize that modern methods require the use of such technology, such notice may be advisable. See NH Op 82/3-16. NHLW 6/2/83.

The inquirer must exercise due care in selecting outside providers and in taking all reasonable measures to ensure that they do not disclose or use client confidences. In a 1982 opinion on the confidentiality issues raised by a law firm's use of an outside word processing company, the Ethics Committee stated the law firm must exercise due care in the selection of a firm and take reasonable measures to ensure that the firm does not disclose or use the confidences of a client. At a minimum, the attorney should confirm on a regular basis that the outside organization understands and implements its obligations with respect to confidentiality. The Committee suggested but did not find to be mandatory the posting of a bond. See NH Op 82/3-16. NHLW 6/2/83.

This 1982 opinion was issued under the old code but there are no substantial differences in the current rules to render it obsolete. The Ethics Committee believed the use of an outside agency's services for the microfilming of client files was permitted so long as similar steps were taken to preserve confidentiality. See NH Op 1986/7-8.

One additional suggestion to help preserve confidentiality is to have a contract clause that restricts further dissemination of attorney-client information and grants the lawyer the right to an injunction.