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Client Files

Tennessee Ethics Opinion Got It Wrong: Rule 1.15 Doesn't Determine Client File Retention Requirements

By Brian S. Faughnan

In December, Tennessee's disciplinary authority, the Board of Professional Responsibility, published a formal ethics opinion aimed at addressing issues associated with client files. As was highlighted in a Dec. 21 article in the ABA/BNA Lawyers' Manual on Professional Conduct (see 31 Law. Man. Prof. Conduct 752), the opinion provides good guidance on a number of fronts.

Nevertheless, Tennessee Formal Ethics Opinion 2015-F-160 is seriously flawed in a very important respect. And it is a flaw that, no matter how well intentioned in the end, if not revisited and revised will have some detrimental unintended consequences.

The flaw in FEO 2015-F-160 is the declaration that Tennessee Rule of Professional Conduct 1.15 ''is the foundation for the lawyer's obligation to maintain client records'' and the accompanying conclusion that RPC 1.15(b) requires lawyers to maintain all client files for a minimum of five years after conclusion of a matter.

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As I will set out to explain in this space, no such requirement exists in our ethics rules. All that RPC 1.15(b) requires of lawyers is that they maintain records of the funds (or other property) they hold in trust for clients and third-persons for five years.

A Disingenuous Approach

Imposing a five-year retention period for client files, absent a different agreement with the client, might be a good idea (though decent arguments can be made for a slightly shorter or even slightly longer default period), and it might even make sense in Tennessee to pursue a revision to our ethics rules to impose such a requirement. But trying to create such a requirement through an FEO that implements highly questionable use of ellipses to justify its conclusion is a disingenuous approach to an issue that deserves sounder treatment.

What Tennessee's RPC 1.15 is actually is the foundation of the obligation of lawyers to keep safe funds and property belonging to others and to avoid commingling the lawyer's own money with money belonging to clients or third persons.

We even have language in Comment [2] to our RPC 1.15 making this nearly indisputably clear: ''Paragraph (b) of this Rule contains the fundamental requirement that a lawyer maintain funds of clients and third parties in a separate trust account.''

The three sub-parts of RPC 1.15 relied upon in the FEO, (a), (b), and (d), read, in their entirety, as follows:

 ISSN 0740-4050

> (a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.
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> (b) Funds belonging to clients or third persons shall be deposited in a separate account maintained in an FDIC member depository institution having a deposit-accepting office located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the required overdraft notification program as required by Supreme Court Rule 9, Section 29.1. A lawyer may deposit the lawyer's own funds in such an account for the sole purpose of paying financial institution service charges or fees on that account, but only in an amount reasonably necessary for that purpose. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
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> (d) 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such funds or other property.

A reader, presented with the complete versions of these provisions, should find it unsurprising that lawyers in Tennessee would never consider the five-year retention requirement of RPC 1.15(b) to apply to anything other than bank records or safety-deposit box records or the like. Yet, here is how the FEO attempts to convince a reader that the five-year retention requirement in RPC 1.15(b) applies to client files as a whole (all ellipses below are theirs not mine):

> Tennessee Rule of Professional Conduct 1.15 is the foundation for the lawyer's obligation to maintain client records, which states in pertinent part:
>
> (a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.
>
> (b) . . . property shall be identified as such and appropriately safeguarded. Complete records of such . . . property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
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> (d) . . . 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 . . . any property that the client . . . is entitled to received and, upon request by the client . . ., shall promptly render a full accounting regarding such . . . property.

Property vs. Records of Property

The truncated version of (b) presented by the BPR is, frankly, not too far removed from the kind of misleading implementation of ellipses that have been used by courts to justify imposing sanctions on lawyers in private practice. *See, e.g.*, *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1357, 19 Law. Man. Prof. Conduct 58 (Fed. Cir. 2003) (sanctioning lawyer who ''cropp[ed]'' certain quotations from opinions to distort what was said in such opinions); *Federated Mut. Ins. Co. v. Anderson*, 920 P.2d 97, 103-04 (Mont. 1996) (imposing a sanction for an alteration of a court holding through the use of ellipses that the court considered an attempt to mislead it).

Even as abridged though, the case presented by the FEO is less than compelling as (b) only imposes a requirement that records of property, not the property itself, be kept for five years. Given what RPC 1.15(b) actually means and is intended to cover, that requirement makes perfect sense as you don't have to hold the client funds in trust for five years but are required to keep the records of your handling of such funds for five years.

Unintended Consequences

Ultimately, the worst part of this FEO is the unintended consequences that flow if RPC 1.15(b) is treated as reaching the entire client file rather than just records of the handling of funds and property belonging to people other than the lawyer.

First, it means that a client and lawyer cannot reach a contractual agreement for something other than a five-year retention requirement for client files. There seems no good reason that a lawyer and client should not be able, in an engagement agreement at the beginning of a representation or even in an agreement at a subsequent time, to agree that the lawyer only has to hold on to the file for some shorter period of time or, for that matter, to agree that the lawyer will simply hand over the file to the client at the end of the representation and have it be the client's responsibility to retain the records.

I also suspect that the BPR would tend to agree and, if asked, would say that lawyers and clients can, as a matter of contract, make their own arrangements as to retention of client files. But what the BPR would not allow is for a lawyer and client to agree that the lawyer does not have to keep records regarding trust accounting records for five years. The problem though is that by saying RPC 1.15(b) imposes this requirement, you cannot allow a client and lawyer to contract around this requirement without also concluding that a client and lawyer could contract out of the lawyer's obligation to maintain trust account records for five years.

Another unintended consequence of treating RPC 1.15 as imposing obligations as to the contents of client files is that it expands an important prohibition on commingling funds into a provision that can now be applied to absurd situations.

For example, if the FEO's interpretation of property under RPC 1.15 as including the client file itself were accurate, then if a lawyer buys a novel at the airport and throws it into the accordion file where she has her client's file, intending to read each, on a flight, wouldn't that technically be commingling?

How to Fix It

Unlike the procedure in some jurisdictions, adoption of an FEO in Tennessee is not preceded by the publishing of a draft and a request for public comment. That means, unfortunately, that criticism like mine can only be made after an opinion has already been issued. Fortunately, FEOs stand just as the opinion of the BPR, and the Tennessee Supreme Court is free to reject them if its members disagree with the substance of the opinion.

That does not mean that the BPR cannot take action to fix this error. Many FEOs in Tennessee have been revised after publication through the issuance of an amended opinion.

  MOPC ISSN 0740-4050

There is much about Formal Ethics Opinion 2015-F-160 that amounts to good guidance for Tennessee lawyers and with which I would expect our Court would fully agree, but the claim that RPC 1.15(b) requires client files to be kept by lawyers for five years should be withdrawn and the FEO amended.