Materials on Client File Retention

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The question of how long a lawyer must retain client files of cases that are closed is one that is regularly asked of ETHICSearch. The need for storage and record management is familiar to most attorneys; the expense of indexing and otherwise accounting for closed files adds to the cost of providing legal services.

Model Rule 1.16(d) states:
"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. The lawyer may retain papers relating to the client to the extent permitted by other law."

Model Code
DR 2-110(A)(2) provides that:
"In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules."

State Rule Variations

Of the states that have adopted new rules since the ABA's adoption of the Model Rules, the following have made significant changes in the recordkeeping requirements of Rule 1.15(a) or have specifically modified the rule's suggested time period for preserving records of account funds and property:

Alabama, Alaska, Colorado, Florida, Georgia, North Dakota, and South Carolina have a six-year records retention period.

Illinois, Mississippi, and Nevada use a 7-year records retention period.

Connecticut defers to applicable law as to the length of the retention period.

New Hampshire's rule incorporates the New Hampshire Supreme Court's rules with respect to required recordkeeping, and uses a retention period of six years after final distribution, rather than

measuring the period from the date of the conclusion of the representation.

New Jersey uses a records retention period of seven years after the event recorded, rather than measuring the period from the date of the conclusion of the representation.

New York specifies seven kinds of records that must be maintained, and uses a seven-year retention period. Production of records is required in certain enumerated circumstances, specifying that all books and records so produced shall be kept confidential, and members of dissolving firms are directed to make arrangements for maintaining the required records.

Wisconsin uses a six-year record retention period, and specifies six classes of required records. The records must be submitted to the Board of Attorneys Professional Responsibility at its request or upon direction of the state supreme court.

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State Bar Ethics Opinions

Many state ethics committees have also addressed this question, many of which post-date ABA Informal Opinion 1384. Digests of these opinions are from the ABA/BNA *Lawyers' Manual on Professional Conduct*, which carries thousands of state and local bar association ethics opinions as well as articles on current developments in professional responsibility. A copy of the Manual should be available at your local law library and is also accessible through Westlaw and Lexis.

An excellent article entitled "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," by Lee R. Nemchek, is available here.

The article cited above includes a comprehensive list of articles and ethics opinions on file destruction/retention. Below are summaries of opinions on retention and destruction of client files that were issued after the publication date of that article, reprinted with permission from the ABA/BNA *Lawyers' Manual on Professional Conduct*.

Flexible Guideline

Pennsylvania's Rule 1.15 (a) states that complete records of client funds and other property, which includes client files, must be held for five years after termination of the representation. An ethics opinion issued by the Pennsylvania State Bar further interprets this as a "flexible guideline" not read to establish a five-year holding period, but rather that a **record** of the property's

whereabouts and disposition be kept for five years. The Pennsylvania Ethics Committee advised that law firms adopt a strict policy on record retention and destruction, with decisions made by lawyers, not staff persons. The policy should be communicated to clients with the initial engagement letter.

Can *Anything* Be Thrown Out?

As to the question of what should be retained and when items may be destroyed, see California Opinion 2001-157 (undated) that states that a lawyer must retain original papers and property received from a former client , including estate planning documents, according to the law of deposits and the Probate Code. Other client papers and property in civil cases, including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, and experts' reports, may be destroyed, absent a prior contrary agreement, after the lawyer uses reasonable means to notify the client of their intended destruction and gives the client a reasonable time to respond. If the lawyer is unable to locate the former client the lawyer may destroy items whose retention is not required by law and is not reasonably necessary to the client 's future legal representation. Anything the former client will reasonably need to establish a right or a defense to a claim should be retained for an amount of time determined by the lawyer's "good common sense." Files in criminal cases should never be destroyed while the former client is alive without the former client 's express consent. The lawyer must protect client confidentiality when destroying any client files . Also, Maine Opinion 187 (11/5/04) requires that a lawyer must preserve and, upon request, deliver to the client all client property and any material not otherwise available to the client that another lawyer or the client would reasonably need to take up representation in the matter. Materials provided by the client such as money, securities, promissory notes, tax returns, the client 's own notes, and finished work product that the client has paid for constitute client property that must be preserved and returned on request. Items that are "valuable" to the client would include all pleadings, correspondence, research memorandums, notes, and drafts of documents that might still be used. Items that would not normally be valuable include time sheets and billing accounts, internal administrative papers such as conflicts-checking forms, internal memorandums revealing a lawyer's general impressions of the client and the matter or the options for staffing or handling a case, and drafts of documents that would not be useful in continued representation.

Further, Missouri Opinion 2004-0052 (undated) mandates that after a lawyer has returned a client 's file to the client , the lawyer

must retain records of funds and property held for the client, until five years have passed since the representation ended. While the lawyer and client may alter the time period for which the lawyer holds the client file, the minimum retention period for records of client funds and property cannot be altered by agreement.

Put File Retention Policy in Representation Agreement

West Virginia Opinion 2002-01 (3/8/02) The best practice concerning disposal of closed files of former clients is to set out a file retention policy in every representation agreement and to reiterate it in the final letter sent to the client at the conclusion of the representation. Even without a client 's explicit consent to destroy documents, however, a lawyer cannot be expected to retain them permanently; at some point in time, the client 's consent to destroy the file is implicit. To be consistent with the rule on keeping client property safe, the board recommends a minimum retention period of five years. Particular files should be retained longer. For example, files pertaining to claims of minors should be retained until their majority and the expiration of any statutes of limitations, and certain tax files should be maintained until the client is no longer exposed to liability. Lawyers should seek recommendations on file retention from their malpractice carriers; many lawyers retain closed files for 10 years (the usual limitation period for contract claims) after the conclusion of the representation. Before destroying any files , the lawyer must ensure that original wills, trust documents, deeds, and other nonreplaceable documents have been removed. The best time to do this is at or near the conclusion of the representation. The method of destroying the records must protect the confidentiality of the materials.

Electronic Storage

The volume of papers and cost of file retention have given rise to electronic file storage systems. For general ethical issues in this arena see Maine Opinion 185 (4/1/04) permitting a lawyer to operate an electronic file-storage business for other lawyers and law firms. As part of the business, the lawyer may destroy files after culling them for documents that should be retained and scanning the remainder onto an electronic format that will remain accessible. Culling is itself a legal service, so the business will be governed by the Code of Professional Responsibility. Maine Opinion 183 (1/28/04) finds that a lawyer may store client correspondence and documents in electronic format without keeping a paper copy, but must retain them in a way that permits the client and the lawyer to access them in the future. For example, the lawyer may need to retain old versions of software

in order to ensure access to particular documents. Missouri Opinion 20010147 (11/01-12/01) advises that a lawyer who wants to scan closed client files onto a CD-ROM may not then dispose of the hard copy of the files without the clients' permission. The hard copy of a file belongs to the client . It is advisable for the lawyer to discuss file retention with the client during the representation and inform him that the client may retrieve his file at any time, but that after a specific number of years the lawyer will dispose of it. In determining the number of years the lawyer should retain the file, the lawyer should consider the nature of the case and the recommendations of the lawyer's malpractice carrier.

The State Bar Ethics Committee of Virginia found no per se ethical prohibition against maintaining paperless client files, the panel concluded that lawyers generally may destroy paper copies of documents if the client consents and may retain only scanned electronic copies, except for items that have independent legal significance such as testamentary documents and marriage certificates. Subject to the need to preserve such documents, lawyers may even require clients to consent to electronic files as a condition for representation in the first place, the panel advised. Virginia Ethics Opinion 1818 (9/30/05).

Perpetual Storage Not Required

As to the eventual right to destroy old files see Maryland Opinion 2005-01 (10/13/04) A lawyer should determine which part of the file constitutes property of the client . If five years have passed since termination of representation of the client , no originals are in the files , and the lawyer has offered to return the file to the client but has received no response from the client , the lawyer may dispose of the files . If five years have not passed since termination of representation, the lawyer must retain the files for a period of five years and should use reasonable efforts to deliver the property to the client or third party. Pennsylvania Ethics Opinion 2002-27 (3/22/02) states that a lawyer is not required to pay storage costs for retaining the files of a competent former client who has refused to respond to the lawyer's requests to take responsibility for the files , and who has been notified that the records will be destroyed unless removed within a reasonable time period.

The ABA Ethics Committee addressed this topic in its Informal Opinion 1384 (Copy attached below). More recently, ABA Formal Opinion 92-369 (1992) discusses the disposition of closed and dormant client files.

ABA Comm. on Ethics and Professional Responsibility
Informal Op. 1384
American Bar Association

DISPOSITION OF A LAWYER'S CLOSED OR DORMANT FILES RELATING TO REPRESENTATION OF OR SERVICES TO CLIENTS

March 14, 1977

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You have asked for advice concerning a lawyer's professional responsibility with respect to disposition of his files relating to representation of or services to clients after the matters have terminated and the files have been closed or retired.

Your question does not involve a lawyer's retaining lien or a lawyer's right to withhold contents of a file from a client or another lawyer representing a client.

Questions can arise as to ownership of or proprietary interests in the contents of a lawyer's file. These are usually questions of law, and this Committee has no jurisdiction to determine or give opinions on questions of law.

All lawyers are aware of the continuing economic burden of storing retired and inactive files. How to deal with the burden is primarily a question of business management, and not primarily a question of ethics or professional responsibility.

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the clients' detriment.

The Code of Professional Responsibility does not set forth particular rules or guidelines on the subject. This Committee had not previously issued an opinion that deals directly with the subject.

We cannot say that there is a specific time during which a lawyer must preserve all files and beyond which he is free to destroy all files.

Good common sense should provide answers to most questions that arise.

With the foregoing limitations in mind, we suggest the considerations set forth below.

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to 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 statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably except will be preserved by the lawyer.

4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

ABA Informal Op. 1384

ABA Comm. on Ethics and Professional Responsibility
Formal Op. 92-369
American Bar Association DISPOSITION OF DECEASED SOLE PRACTITIONERS' CLIENT FILES AND PROPERTY

December 7, 1992

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To fulfill the obligation to protect client files and property, a

lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer's death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer's death.

A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

The Committee has been asked to render an opinion based on the following circumstances. A lawyer who has a large solo practice dies. The lawyer had hundreds of client files, some of which concern probate matters, civil litigation and real estate transactions. Most of the files are inactive, but some involve ongoing matters. The lawyer kept the active files at his office; most of the inactive files he removed from the office and kept in storage at his home.

The questions posed are two:

1) What steps should lawyers take to ensure that their clients' matters will not be neglected in the event of their death?

2) What obligations do lawyers representing the estates of deceased lawyers, or appointed or otherwise responsible for review of the files of a lawyer who dies intestate, have with regard to the deceased lawyer's client files and property?

I. Sole Practitioner's obligations with regard to making plans to ensure that client matters will not be neglected in the event of the sole practitioner's death

The death of a sole practitioner could have serious effects on the sole practitioner's clients. See Program: Preparing for and Dealing with the Consequences of the Death of a Sole Practitioner, prepared by the ABA General Practice Section, Sole Practitioners and Small Law Firms Committee, August 7, 1986. Important client matters, such as court dates, statutes of limitations, or document filings, could be neglected until the clients discover that their lawyer has died. As a precaution to safeguard client interests, the sole practitioner should have a plan in place that

will ensure insofar as is reasonably practicable that client matters will not be neglected in the event of the sole practitioner's death.

Model Rules of Professional Conduct 1.1 (Competence) and 1.3 (Diligence) are relevant to this issue, and read in pertinent part:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Furthermore, the Comment to Rule 1.3 states in relevant part:

A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety....

According to Rule 1.1, competence includes "preparation necessary for the representation," which when read in conjunction with Rule 1.3 would indicate that a lawyer should diligently prepare for the client's representation. Although representation should terminate when the attorney is no longer able to adequately represent the client, [FN1] the lawyer's fiduciary obligations of loyalty and confidentiality continue beyond the termination of the agency relationship. [FN2]

Lawyers have a fiduciary duty to inform their clients in the event of their partnership's dissolution. [FN3] A sole practitioner would seem to have a similar duty to ensure that his or her clients are so informed in the event of the sole practitioner's dissolution caused by the sole practitioner's death. Because a deceased lawyer cannot very well inform anyone of his or her death, preparation of a future plan is the reasonable means to preserve these obligations. Thus, the lawyer ought to have a plan in place which would protect the clients' interests in the event of the lawyer's death. [FN4]

Some jurisdictions, operating under the Model Code of Professional Responsibility, have found lawyers to have violated DR6-101(A)(3) when the attorneys have neglected client matters by reason of ill-health, attempted retirement, or personal problems. [FN5] The same problems are clearly presented by the

attorney's death, thus suggesting that a lawyer who died without a plan for the maintenance of his or her client files would be guilty of neglect. Such a result is also consistent with two of the three justifications for lawyer discipline. [FN6] Sanctioning of lawyers who had inadequately prepared to protect their clients in the event of their death would tend to dissuade future acts by other lawyers, and it would help to restore public confidence in the bar. [FN7]

Although there is no specifically applicable requirement of the rules of ethics, it is fairly to be inferred from the pertinent rules that lawyers should make arrangements for their client files to be maintained in the event of their own death. Such a plan should at a minimum include the designation of another lawyer who would have the authority to look over the sole practitioner's files and make determinations as to which files needed immediate attention, and provide for notification to the sole practitioner's clients of their lawyer's death. [FN8]

II. Duties of lawyer who assumes responsibility for deceased lawyer's client files

This brings us to the second question, namely the ethical obligations of the lawyer who assumes responsibility for the client files and property of the deceased lawyer. Issues commonly confronting the lawyer in this situation involve the nature of the lawyer's duty to inspect client files, the need to protect client confidences and the length of time the lawyer should keep the client files in the event that the lawyer is unable to locate certain clients of the deceased lawyer.

At the outset, the Committee notes that several states' rules of civil procedure make provision for court appointment of lawyers to take responsibility for a deceased lawyer's client files and property. [FN9] Since the lawyer's duties under these statutes constitute questions of law, the Committee cannot offer guidance as to how to interpret them. [FN10]

A. Duty to inspect files

Many state and local bar associations have explored the issues presented when a lawyer assumes responsibility for a deceased lawyer's client files. [FN11] The ABA Model Rules for Lawyer Disciplinary Enforcement also address some aspects of the question. [FN12] A lawyer who assumes such responsibility must review the client files carefully to determine which files need immediate attention; failure to do so would leave the clients in the same position as if their attorney died without any plan to protect their interests. The lawyer should also contact all clients of the deceased lawyer to notify them of the death of their lawyer

and to request instructions, in accordance with Rule 1.15. [FN13] Because the reviewing lawyer does not represent the clients, he or she should review only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention. [FN14]

B. Duty to maintain client files and property

Questions also arise as to how long the lawyer who assumes responsibility for the deceased lawyer's client files should keep the files for those clients he or she is unable to locate. ABA Informal Opinion 1384 (1977) provides general guidance in this area. We believe that the principles set out in that opinion are applicable to the instant question. Informal Opinion 1384 states as follows:

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed to the clients' detriment.

Informal Opinion 1384 then lists eight guidelines that lawyers should follow when deciding whether to discard old client files. One of these guidelines states that a lawyer should not "destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, and original documents." Another suggests that a lawyer 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 statutory limitations period has not expired."

There is no simple answer to this question. Each file must be evaluated separately. Reasonable efforts must be made to contact the clients and inform them that their lawyer has died, such as mailing letters to the last known address of the clients explaining that their lawyer has died and requesting instructions. [FN15]

Finally, questions arise with regard to unclaimed funds in the deceased lawyer's client trust account. In this situation, reasonable efforts must be made to contact the clients. If this fails, then the lawyer should maintain the funds in the trust account. Whether the lawyer should follow the procedures as outlined in the applicable Disposition of Unclaimed Property Act that is in effect in the lawyer's state jurisdiction is a question of

law that this Committee cannot address. [FN16]

FN1. See Model Rule of Professional Conduct 1.16 ("... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client....")

FN2. See Murphy v. Riggs, > 213 N.W. 110 (Mich.1927) (fiduciary obligations of loyalty and confidentiality continue after agency relationship concluded); Eoff v. Irvine, > 18 S.W. 907 (Mo.1892) (same.)

FN3. See Vollgraff v. Block, > 458 N.Y.S.2d 437.

Additional articles on this topic include:

1) "File Retention Policies and Requirements" Kenneth L. Jorgensen, 61-DEC Bench & B. Minn. 12 (2004)

2) "Ask ETHICSearch", Peter Geraghty 12 NO. 2 Prof. Law. 24 (2001) (ethical obligations of lawyers to safeguard client files in the event of the merger or dissolution of law firm)

3) "Focus on Professional Responsibility--Ownership of Lawyer's Files About Client Representations; Who Gets the 'Original'? Who Pays for Copies?" John W. Allen, 79 Michigan Bar Journal 1062-65 (2000).

4) "Who Owns the File--The Attorney or the Client?" 7 Law Office Administrator 6-7 (August 1998).

5) "Client Files: Handle with Care," Pamela Phillips and Merri A. Baldwin, 18 California Lawyer 66-68 (May 1998).

6) "How Long Should You Retain Client Files?" 83 Illinois Bar Journal 649-50 (1995).

7) "Ethical Considerations in the Retention of Law Firm Client Files," John C. Montana, 1 The ISG Update 5-7 (June 1999).