

## THE SECRET LIFE OF CLIENT FILES

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Another subject they don't tell you much about in law school is client files – too boring. You don't learn much more when you start to practice – too busy. One day, however, you realize that client files have taken on a secret life of their own and are out of control all over the office. A lawyer told me at a CLE presentation that the file management policy in his firm was simple, "If you can find a file around here, it's yours!"

There are numerous examples of careless file management causing serious problems for lawyers. With surprising frequency lawyers upon being discharged by an irate client will in the heat of the moment give the client the entire file without keeping a copy. When the malpractice claim or bar complaint comes in there is no record in the office of how the matter was practiced. Another firm received a malpractice claim about a will that had been prepared forty years ago by a long deceased partner. Current firm members only had a vague recollection of him. No one had any idea where the client's file was and without it defending the claim was nearly impossible.

Before you conclude that these horror stories mean all files should be kept forever, consider this situation. A 50-year-old client file stored by outside counsel on a defunct mining company's banking relationship was obtained through discovery. It turned out to be the connection to a Wall Street brokerage house that proved its Superfund liability on a multimillion-dollar claim. The tendency of law firms to "file and forget" records means that discovery of client files can lead to highly useful evidence. This is true because lawyers are often insensitive to how much of a file is discoverable. Attorney-client privileged documents and attorney work product prepared in anticipation of litigation are excludable (with some exceptions), but most other information in a file is discoverable. The consequences are that a firm can be in the embarrassing position of explaining to a client why it was responsible for being the source of damaging evidence that the client thought was destroyed years ago – and this after an expensive firm effort to locate the file in the first place.<sup>1</sup>

This article addresses the secret life of client files by focusing on the duty of lawyers to maintain, preserve, and destroy client files consistent with the requirements of confidentiality, the property interest of clients in their files, and good malpractice risk management. It covers how long files should be retained, procedures for returning files to clients, when and how files may be destroyed, and special file disposition situations. It is an update and expansion of two short pieces I wrote on file retention and destruction that appeared in Lawyers Mutual's newsletter in 1996.

### **Professional Responsibility and Client Files**

The Restatement of the Law Governing Lawyers (Restatement) succinctly describes the responsibility of lawyers to safeguard client files. It provides:

The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client. Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files. A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice.<sup>ii</sup>

The key Kentucky Rules of Professional Conduct<sup>iii</sup> that apply to client files are RPC 1.6, Confidentiality of Information; RPC 1.15, Safeguarding Property; and RPC 1.16(d), Declining or Terminating Representation. They in effect implement the Restatement's standards for Kentucky lawyers. The foundation for client files professional responsibility is confidentiality buttressed by the fiduciary obligation to protect and return client property.

### **How Long Should You Keep Client Files?**

The first consideration in client file retention is to ascertain which records have a prescribed retention period. RPC 1.15, Safekeeping Property, provides that complete records of client trust account 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." It seems obvious that, if a lawyer is subject to producing this information on a representation for this period of time (presumably because of a bar complaint), the rest of the file will be needed as well. Accordingly, the minimum recommended file retention period for Kentucky lawyers is five years after termination of the representation. Also, remember that federal and state laws and regulations require that certain records be retained for specific periods of time (*e.g.*, IRS, SEC, and the recently enacted Sarbanes-Oxley Act of 2002). Be sure to know and comply with these requirements. When returning files to clients containing records with mandatory retention requirements, make sure they know what they are.

Some experts recommend five years as a rule of thumb for file retention. Others say 10 years if no other compelling considerations control. Lawyers Mutual recommends the more conservative 10-year retention period and longer if the statute of limitations has not run on the matter during the 10-year period. Certain files could require even longer retention to include permanent. Examples are:

- ✓ cases involving a minor or incompetent who is still a minor or incompetent ten years after the work is performed.
- ✓ estate plans for clients who are still alive ten years after the work is performed.
- ✓ wills and estate probate matters.

- ✓ contracts, notes, and bills paid over time still being paid off after 10 years.
- ✓ cases including a civil judgment that needs to be renewed.
- ✓ files establishing a real estate basis.
- ✓ title opinions and associated notes.
- ✓ criminal law files (at least as long as the client is alive).
- ✓ corporate books and records (*e.g.*, charters, stock certificates, minutes, bylaws).
- ✓ files of problem clients or cases.
- ✓ adoption, child support, alimony, and custody proceedings files.
- ✓ files concerning structured settlements.
- ✓ trust deeds.
- ✓ cases with recyclable work product.<sup>iv</sup>

Physical security of files is an important, but often overlooked, part of preserving confidentiality. The Law Society of British Columbia in a self-assessment guide for its members poses these questions:

- ✓ Is office and building security adequate?
- ✓ Do only authorized persons have access to files?
- ✓ Are files placed in locked cabinets/drawers at the end of the day?
- ✓ Is the physical layout of the office such that visitors do not have an opportunity to see confidential documents (*e.g.*; on lawyers' or legal assistants' desks or word processor screens)?

Don't forget that RPC 1.15 requires that client property be "appropriately safeguarded." Fireproof cabinets or safes should be used for irreplaceable documents and other valuable client property. Original photographs and negatives should be filed in separate locations. Firms should have a fire prevention program, readily available fire extinguishers, and should consider insurance that covers valuable papers loss that includes all costs of rebuilding a file.

### **How To Properly Close, Return, and Destroy Client Files**

In Kentucky we are fortunate to have a series of KBA Ethics Committee opinions that cover the major issues of file closure. These opinions are synthesized in the following paragraphs by considering the questions of what records constitutes a client file, what disposition procedures are permitted, and what the duty is to return a file when the client discharges the lawyer or the lawyer withdraws.

***What constitutes the client file that must be given to a client?*** KBA Ethics Opinions E-235 (1980) and E-395 (1997) adopt an ABA opinion listing what records must be given to a client as guidance for Kentucky lawyers. The list includes:

- ☞ Notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, recommendations.
- ☞ Correspondence between attorney and client.

- 📁 Correspondence between the attorney and third parties.
- 📁 Material furnished by the client.
- 📁 Searches made at the expense of the client.
- 📁 Copy of pleadings and the like.
- 📁 Legal research embodied in memos or briefs.

***How should lawyers dispose of client files on closed matters no longer necessary to retain?*** KBA Ethics Opinion E-300 (1985) provides guidance for the disposition of closed or nonessential client files. The basic policy is:

- 📖 Storing retired and inactive files is a law practice economic burden.
- 📖 A lawyer does not have a general duty to preserve all files permanently.
- 📖 Clients reasonably expect that valuable and useful information will not be prematurely and carelessly destroyed.

Based on this policy the opinion lists these considerations in managing file closing and destruction:

- 📁 Unless the client consents, do not destroy items that belong to the client (*e.g.*, original documents and items furnished by the client).
- 📁 Do not destroy items useful in the defense of a client on a matter in which the statute of limitations has not run.
- 📁 Do not destroy or discard information the client reasonably may expect preserved (*e.g.*, information the client may need, was not previously given, is not otherwise readily available).
- 📁 A lawyer should ordinarily attempt to contact the client by mail for file disposition instructions before destroying files.

The opinion contains the advice that the lawyer should in destroying files:

- ✓ Protect the confidentiality of the contents.
- ✓ Screen the file to assure destruction complies with good practice.
- ✓ Maintain a closed file register or index of files that have been destroyed or otherwise retired.

From a risk management perspective the first time to think about file closing is at the time you take the matter. Get client agreement in your letter of engagement on how the client file will be managed. A specific time and procedure for claiming files after the representation should be fixed including a warning that the files are subject to destruction if not claimed as stipulated. Include in letters of engagement who pays for file copying. Be sure that the firm's records destruction practices are coordinated as much as possible with those of business clients. When feasible, the firm should not retain client records that the client's record destruction program would eliminate. Keep track of what has been sent to a client during the course of the representation. Often at the conclusion of a matter the client will have most, if not all, of the file. If this is the case, duplication of effort and expense can be avoided by sending only those records the client lacks. The

firm's retained copy of a file should be complete. Always consider the possibility of a malpractice claim when stripping a file. Better to keep too much than inadvertently destroy crucial exonerating evidence.

At the conclusion of a matter:

- ✓ Assign the file a closed file index number.
- ✓ Check for outstanding fees and proper client trust account documentation.
- ✓ Return client property such as original documents being sure to copy any returned documents necessary for the firm to have a complete file.
- ✓ Strip the file of duplicate documents, *etc.* – do not remove work product such as drafts, phone messages, or research notes.
- ✓ Send a closing letter to the client.
- ✓ Assign a file destruction date and calendar it in the office closed file index.

At the time a file is calendared for destruction notify the client by certified mail. Advise that in the absence of instructions to the contrary the file will be destroyed after the date indicated in the notice. If the client cannot be located, files may be destroyed in the lawyer's sound discretion. KBA E-300, however, advises that these files should be destroyed only if they contain no important papers. In destroying files client confidentiality must be preserved. Firms in states with paper recycling laws failing to shred documents or disposing of files in clear plastic bags have had problems. Literal destruction of the file is recommended – shred or burn.<sup>v</sup>

***What is the duty to return client files when the client discharges the lawyer or the lawyer withdraws from representation?*** The answer to this question is easy if the lawyer has been paid – return the complete file to the former client just as in any other matter. The rub is that lawyers are often owed fees when they are discharged or withdraw. They are naturally reluctant to give up documents representing considerable work without being paid. Under these circumstances may a lawyer withhold those documents when returning the rest of the file to the now former client?

Even if the lawyer has not been paid, the majority of jurisdictions require lawyers to return the complete file.<sup>vi</sup> Section 46 of the Restatement adopts this view by providing, “On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.” Unpaid fees are not considered substantial grounds for withholding files from clients.<sup>vii</sup> This view is consistent with the principle that the client's interests must be protected when terminating representation. Lawyers have a duty to protect these interests to their own detriment. This principle is reflected in Kentucky's RPC 1.16, Declining Or Terminating Representation. The rule provides that:

- Paragraph (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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comments (9) and (10) to the Rule add this guidance:

- Comment (9): Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. A lawyer must return the client's file, papers, and property after termination if the client requests the file. The lawyer may retain a copy of the file. A lawyer may charge a reasonable copying charge, but may not condition return of a client's files, papers, and property upon payment of the copying charge, unless the lawyer has previously provided a copy, either during the representation or after cessation of the representation. A lawyer must make one copy of the file and materials available to the client even without payment if the client's interests will be substantially prejudiced without the documents.
- Comment (10): The lawyer may not condition return of the client's file, papers, and property upon payment of a fee. KRS 376.460 gives a lawyer the right to have payment of fees secured by a judgment the client recovers as a result of the lawyer's efforts. However, a lawyer may withhold uncompensated work product from the client's returned files (*e.g.*, draft of pleadings, agreements and the like), unless the client's interests will be substantially prejudiced without the uncompensated work product. Documents or other relevant evidence, the original or its equivalent that may be required for trial preparation or as evidence for trial or in other legal proceedings, must be surrendered in their original form. See Rule 1.15 for guidance on resolving disputed claims for client funds.

### **Special Issues**

It is surprising how many unusual issues can crop up when dealing with such a prosaic matter as returning files to clients. What follows with one exception is information on some of the more significant questions that have arisen in other jurisdictions for which I can find no comparable Kentucky guidance:

***Returning Client Files in Computerized Disk Format:*** There is no direct reference to computerized client files in the Kentucky Rules of Professional Conduct. Computerized information, however, is recognized in RPC 1.0, Terminology, in the definition of "Writing":

- (n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Computerized documents are also referred to as “documents” covered by RPC 3.4(a) that prohibits obstructing access to evidence.<sup>viii</sup> Additionally, the ABA Model Rule on Financial Recordkeeping cited in RPC 1.15 provides:

- Records required by this rule may be maintained by electronic, photographic, computer or other media provided that they otherwise comply with this rule and provided further that printed copies can be produced. These records shall be located at the lawyer's principal office in the jurisdiction or in a readily accessible location.

It seems a reasonable extrapolation from this recognition of computerized documents in the rules to conclude that lawyers may maintain client files in electronic format and clients have the same interest in their computerized client files as paper files. That is the way state bars addressing this question have uniformly come down. A Wisconsin Bar ethics opinion answers the question in a sensible way that is consistent with the guidance of KBA E-395:

📖 “... when the client requests documents be provided on a computer disk which the lawyer has maintained electronically, the lawyer should provide those documents in the requested format, so long as it is reasonably practicable to do so.”

📖 Work product need not be provided.

📖 The client may be charged for the staff and professional time required to search databases, but the charges must be reasonable and not impair the client’s access to the file.

📖 Software contracts and copyright law may inhibit the lawyer’s ability to comply with a request for computer disk files, but the ethics rules govern the lawyer’s professional responsibility to surrender client information in electronic disk format.

📖 Lawyers should anticipate that clients will often want files on computer disks. Accordingly, law firm computer systems should be configured to facilitate access, retrieval, and disk duplication of client files.<sup>ix</sup>

Consider updating engagement letters to cover client requests that files be returned on computer disks. Be sure to cover who pays the cost. With client agreement in writing there is nothing to argue about provided the terms are reasonable and in compliance with the guidance of KBA E-395. As a practical matter it may be good policy to obtain in all letters of engagement client agreement that the firm has the option to return files, other than original documents, on computer disks.

***Disabled Client Files:*** The Los Angeles County Bar ruled that a lawyer who obtained a client’s mental health records must give them to the client, if asked, even though the mental health provider warned not to give them to the client because they could be detrimental to the client or others. Without a court order the lawyer has no discretion to deny the client his file.<sup>x</sup>

***Departing Lawyers and Client Files:*** What right to client files does a departing lawyer have? ABA Formal Ethics Opinion 99-414 ambitiously takes on these questions by offering this guidance:

- A lawyer may take copies of files ... to the extent these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain. Otherwise get firm consent.
- A departing lawyer not continuing representation of a client may retain copies of documents relating to the representation of the former client, but must be diligent in protecting client confidential information.

***Client Requests to Destroy Files:*** What do you do if a client instructs you to destroy your copy of his file? A North Dakota ethics opinion permitted a lawyer so instructed to retain a copy of the file apparently because the client was trying to destroy evidence in a disputed real estate deal.

Recall that RPC 1.15, Safekeeping Property, requires preservation of complete records of client trust account funds and other property for a period of five years after termination of the representation. Additionally, Comment (9) to RPC 1.16 specifically provides "The lawyer may retain a copy of the file." I think this guidance necessitates that a lawyer, as a matter of professional responsibility and good risk management, maintain a complete copy of the client file for at least five years. After its expiration a client who wants the file destroyed might be accommodated at the lawyers option. Care must be taken to not unwittingly become involved in criminal conduct by the client. If the circumstances of the requested destruction suggest a general release for all potential claims on the completed representation is appropriate, see RPC 1.8 (h) for guidance.

Insurance companies sometimes request defense counsel to destroy files of their insureds. In Kentucky the client is the insured and not the insurance company. The file is, therefore, the insureds and should be destroyed only with the approval of the insured and consistent with the preceding paragraph.<sup>x1</sup>

***How Hard Do You Have to Search for Lost Files?:*** A New York court ruled that a client has the right to insist that a firm continue searching for unreturned files until all files are located and returned. This obligation exists even though virtually all files have been returned and further search is difficult and costly. The firm claimed it had made a good faith effort, but could not find seven files that might be commingled with files on unindexed backup tapes using a superseded computer storage system. The court ruled that the issue is returning client property -- not responding to a discovery request. Therefore, a good faith effort to find client property is not a valid excuse to stop searching if the client insists. The court was clear that the client must pay for the additional search.<sup>xii</sup>



***Retiring Lawyers' Client Files:*** Retirement does not relieve a lawyer of the professional responsibility duties or the malpractice risks of past practice. A retiring lawyer should safeguard, return, and destroy files in compliance with the rules, procedures, and risk management guidelines described in this article. It may be necessary for a sole practitioner to arrange for long-term storage of files and take several years of winding up before all files are safely returned to clients or destroyed. At time of retirement lawyers should advise clients in writing of the status of their files and the arrangements made for their safekeeping.

***Disposing of Deceased Lawyer Files:*** See KBA E-405 (1998) and authorities cited therein for a comprehensive treatment of client file professional responsibility upon the death of a lawyer. Much of this guidance applies to a disabled or missing lawyer situation.

### Summing Up

Well, there you have it – more than you ever wanted to know about client file professional responsibility and risk management. It always surprises me how the simplest aspects of the practice of law always seem to blossom into multi-faceted issues that never occurred to me before I dug into the subject. How to properly deal with client files proved to be no exception to this phenomenon. In the final analysis it is my opinion that the only way to think about client files is that they belong to the client. When they ask for their file just “give it all to ’em” without any hassle and absorb the cost except in unusual circumstances. That is the policy of most states, while we in Kentucky may withhold work product in fee dispute situations. This lawyer friendly rule is inconsistent with our own professional conduct rules and is a less principled approach than the majority view. Nothing but the best for Kentucky Bar clients should be our motto even when it hurts.

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<sup>i</sup> Smith and Cooke, “Forgotten Documents Can Be Treasure or Time Bomb,” U.S. Business Litigation, p. 8, Vol. 1 No. 5, Dec.1996.

<sup>ii</sup> § 60, Cmt. e, Restatement of the Law Governing Lawyers.

<sup>iii</sup> The Kentucky Rules of Professional Conduct are contained in SCR 3.130.

<sup>iv</sup> Sources for this list include “Keeping Client Files,” Oregon State Bar Professional Liability Fund In Brief, January 1996; and Malpractice Prevention Guidebook, Lawyers Mutual Liability Insurance Company of North Carolina.

<sup>v</sup> Sources for risk management guidance are Smith and Mallen, Legal Malpractice (5<sup>th</sup> ed. 2000), §§2.10, 2.28; “Keeping Client Files,” Oregon State Bar Professional Liability Fund In Brief, January 1996; Malpractice Prevention Guidebook, Lawyers Mutual Liability Insurance Company of North Carolina; and my general research.

<sup>vi</sup> See Bowden, “Do You Really Have to Turn Over Everything in Your Clients’ Files?”, Lawyers Weekly USA, 98 LWUSA 200 (3/9/98).

<sup>vii</sup> See § 46, Cmt. c, Restatement of the Law Governing Lawyers for a discussion of substantial grounds.

<sup>viii</sup> See Cmt. (2), RPC 3.4.

<sup>ix</sup> Wisconsin State Bar Comm. on Professional Ethics Formal Op. E-00-3, 7/10/00, Current Reports, p.436, Vol. 16, No. 15, 8/16/00, ABA/BNA Lawyers’ Manual On Professional Conduct.

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<sup>x</sup> L.A. County Bar Assoc. Op. 509 (6/17/02), p. 1201:1701 ABA/BNA Lawyers' Manual On Professional Conduct.

<sup>xi</sup> *Cf* New Jersey Advisory Comm. on Prof. Ethics Op. 692 (1/22/01), p. 1201:5801 ABA/BNA Lawyers' Manual On Professional Conduct.

<sup>xii</sup> Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, N.Y. Sup. Ct. App. Div. 1<sup>st</sup> Dept., No. 827, 5/16/02; case extract at Current Reports, Vol. 18, No.13, p. 375, 6/19/02, ABA/BNA Lawyers' Manual On Professional Conduct.