

Client Files Part II:

How to Properly close and Destroy client Files

KBA Ethics Opinion E-300 (1985) provides guidance for the disposition of closed or dormant 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 (other examples are listed in Part I of this article in our last newsletter).
- Do not destroy or discard information the client reasonably may expect preserved (e.g., client may need, not previously given, 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 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 will be destroyed if not claimed as stipulated. At the conclusion of the 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.

- Strip the file of duplicate documents, etc. - do not remove work product such as drafts, phone messages, 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. However, KBA E-300 indicates that such 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 who failed to shred documents or disposed of files in clear plastic bags have had problems. Literal destruction of the file is recommended - shred or burn.

What do you do if a client terminates the representation, demands the file, but has not paid your fee?

The short answer is "give it to'em." Kentucky RPC 1.16 Declining Or Terminating Representation requires that:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

A comment to the rule adds that "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. The lawyer may retain papers as security for a fee only to the extent permitted by law." Kentucky law has an attorney charging lien which is the right of the lawyer to have payment of fees secured by a judgment the client recovers (Ky. Rev. Stat. 376.460). But Kentucky does not have a retaining lien which allows a lawyer to hold client property when fees are owed.

What do you do if a client instructs you to destroy your copy of the client's file? We can find no Kentucky authority on point.

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. As pointed out in the first part of this article in our last newsletter:

Kentucky Rule of Professional Conduct 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." Pretty clearly if a lawyer is subject to producing this information on a representation for five years (presumably because of a bar complaint) the rest of the file will be needed as well.

We think this rule necessitates that a lawyer as a matter of professional responsibility maintain a complete copy of the client file for five years. After five years a client who wants the file destroyed may be accommodated. 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.

Sources: Keeping Client Files, Oregon State Bar "In Brief," January 1996 and "Malpractice Prevention Guidebook," Lawyers Mutual Liability Insurance Company of North Carolina.

When to Do Conflict Checks

"Do them early; do them often; do them accurately."

At the Fall 1995 National Legal Malpractice Conference Carol N. Cure of O'Connor Cavanagh , Phoenix, Arizona offered the following list of times to do conflict analysis:

- Before promoting a specific new client.
- Before the initial consultation about a new matter.
- After the initial consultation, whenever new names are obtained.
- When opening a new matter, whether for an old or new client.
- Before any pleading is filed that names new parties.
- Before naming a non-party at fault, where required to do so.
- Before noticing formal discovery on a non-party (e.g., a subpoena).
- Whenever new experts are identified by any party.
- Before any new transaction is undertaken.
- Before a major business transaction by a firm attorney.