

Maintenance of Closed Client Files: No Need to Rent a Warehouse

By Kathleen Baxter, Esq.

One of the most frequent questions asked by lawyers contacting our Committee on Professional Ethics is “Do I have to maintain my clients’ closed files?” The short – and not particularly helpful – answer is, “It depends.” Below are some of the general guidelines lawyers should consider in maintaining or disposing of client files.

1. *Who owns the closed file – the client or the lawyer?*

DR 9-102(C)(4) requires a lawyer to deliver to a client at the client’s request “propert[y] in the possession of the lawyer which the client ... is entitled to receive.” If there is material in a file that belongs to the client, it should be turned over to the client at the client’s request.* The question of what belongs to the client and what belongs to the lawyer is not always easy to answer; as a general rule, material in the file that is not the lawyer’s work product belongs to the client.

If material belongs to the client, and there is no need for the lawyer to preserve the material (as discussed below), the lawyer should contact the client and request instructions regarding the disposition of the material. The question of when and under what circumstances the lawyer should contact the client is a matter for the lawyer’s judgment; it may be appropriate to discuss disposal of the file with the client at the conclusion of the lawyer’s representation. If the client authorizes the lawyer to dispose of the material, or the client fails to respond to the lawyer’s inquiry after a reasonable period of time, the lawyer may dispose of the material.

2. *Is there material in the file that the lawyer is required to maintain?*

Clients’ files may contain records that the lawyer may be obligated to retain. As an example, DR 9-102(D) requires a lawyer to maintain for seven years escrow account records, retainer agreements, billing statements, records showing payments to persons (other than the lawyer’s employees) for services rendered, and retainer and closing statements filed with the Office of Court Administration. Before discarding a file or turning the file over to the client, the lawyer should be certain that the file does not contain records the lawyer is required to keep.

3. *Are there documents in the file that the client would be required to maintain or that the client foreseeably may need to establish substantial personal or property rights?*

* It is assumed that the lawyer does not have a lien on the client’s file, a topic outside the scope of this article.

If the lawyer has custody of client records that the client has a duty to maintain, it would be improper for the lawyer to dispose of such records. Similarly, a lawyer should not dispose of records for which the client may have a foreseeable need. While these records certainly can be delivered to a client, the lawyer should make certain that the client is advised of the need to preserve the records. The question of whether the client may have a foreseeable need for the records may depend on factual matters such as the nature of the materials, whether there are relevant time frames (such as a statute of limitations), or whether the client previously was provided with duplicates of the materials.

4. *When a lawyer retires from practice or a law firm dissolves, what steps should be taken with respect to closed files?*

The dissolution of a firm or a lawyer's retirement from practice does not change the lawyer's obligation regarding client files. A retiring lawyer may deliver files to another attorney to hold as custodian, taking care to preserve the client's confidences and secrets as required by DR 4-101. As set forth in EC 4-6 of the Code of Professional Responsibility, a lawyer's obligation to preserve the confidences and secrets of the lawyer's clients continues after the termination of the lawyer's representation of the client.

A more difficult question is presented by the dissolution of a law firm. Unless there is agreement otherwise, the clients of a law firm have employed the firm as an entity – not an individual attorney. Consequently, when the firm dissolves, the members of the firm remain responsible to every client of the firm. The members of the dissolving firm should therefore make appropriate arrangements by one of them or a successor firm to maintain records which the firm would be required to maintain.

5. *If a lawyer is entitled to dispose of material from closed client files, are there any steps that should be taken in effecting the disposal?*

In disposing of client files, a lawyer should be cognizant of the need to preserve clients' confidences and secrets in connection with the disposal process. In many communities, paper waste is subject to recycling regulations. The lawyer should be familiar with local recycling practices; if materials containing confidences and secrets could be viewed by persons outside the lawyer's office, it may be necessary to shred documents before recycling them.

Three opinions issued by the Association's Committee on Professional Ethics – Opinions 460 (1977), 623 (1991), and 641 (1993) – set forth these guidelines in greater detail. Copies of these opinions are available upon request.

In conclusion, the need to preserve client files is dependent upon (1) the instructions of the client; (2) the lawyer's obligation to preserve materials; and (3) the client's foreseeable need for materials in the file. Disposal of closed files requires a lawyer to exercise good judgment and common sense in reviewing files and in advising clients concerning the disposition of those files. However, as the Committee on Professional Ethics stated in Opinion 460:

Lawyers are advocates and advisers. They are not warehousemen or perpetual repositories for the files of their clients. A good lawyer need not retain ... clients by holding on to their files and a poor one will soon learn that such tactics avail [the lawyer] nothing but additional expense.

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