

# KENTUCKY BAR ASSOCIATION

## Ethics Opinion KBA E-436

Issued: May 17, 2013

***The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.***

Subject: Proper Retention of Closed Client Files

Question: How long must a lawyer retain a closed client file, paper or electronic?

Answer: The Kentucky Rules of Professional Conduct provide no set time that a lawyer must retain a closed client file.

As a matter of good practice, a lawyer should retain a paper or electronic file for at least five years after the file has been closed. Even then, a lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether special circumstances exist such that the file should be retained for a longer time.

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### References

SCR 3.130 [Kentucky Rules of Professional Conduct](1.15(a)), (1.16(d)); KBA E-300(1985); Az. Eth. Op. 08-02 (2008); W. Va. L.E.I. Op. 2002-01(2002); Ill. Adv. Op. 12-06 (2012); N.J. Eth. Op. 692 (2001).

### Discussion

#### *File Retention Policy*

A closed client file may contain items of importance to the client. Yet, a lawyer should not be required to bear the expense of storing the closed file forever. The question that lawyers often have is how long they must retain paper or electronic closed client files.

Kentucky Supreme Court Rule 3.130(1.16(d)) provides:

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.

This provision makes clear that the lawyer must provide the client with anything in the file to which the client is entitled. Ideally, the lawyer makes the client aware of this right in the engagement agreement and again at the conclusion of the matter.

The Kentucky Rules of Professional Conduct do not provide a required retention time for closed files. If the client does not request the file and the lawyer has not provided the file to the client or former client, the lawyer, as a matter of good practice, should retain the closed file for five years. *See also* Az. Eth. Op. 08-02 (2008)(five-year minimum retention); W. Va. L.E.I. Op. 2002-01(2002)(five-year minimum retention); Ill. Adv. Op. 12-06 (2012)(seven-year minimum retention in light of seven-year retention requirement for trust account records); N.J. Eth. Op. 692 ( 2001) (seven-year minimum retention).

Kentucky Supreme Court Rule 3.130(1.15(a)) provides a five-year retention requirement for certain representational records such as trust account records. Rule 1.15(a) states:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client, third person, or both in the event of a claim by each to the property. The separate account referred to in the preceding sentence shall be maintained in a bank which has agreed to notify the Kentucky Bar Association in the event that any overdraft occurs in the account. Other property shall be identified as such and appropriately safeguarded. *Complete records of such 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.*

(emphasis added). Since some of the closed file is the property of the client, although perhaps not the kind of property contemplated by Rule 1.15(a), a logical approach is for a lawyer to retain a closed file for a time equal to or longer than the five-year retention requirement for trust account records and such. A lawyer who has retained a closed client file for five years has given the client ample time to claim the file and, in most situations, has retained the file past any point of usefulness or importance.

Some files, however, must be retained longer than five years. The exact retention period depends on the nature of the matter and the information and materials that make up the file. As West Virginia L.E.I. Opinion 2002-01(2002) notes, files involving claims of minor children should be maintained until the child reaches the age of majority and relevant statutes of limitations have run. Files relating to tax matters should be maintained as long as client liability is possible. Other situations in which a lawyer should retain a file longer than five years undoubtedly exist.

A lawyer's own interest may lead a lawyer to apply a longer retention time. For example, a lawyer's malpractice insurer may require retention of closed files for a longer time. Also, a lawyer may desire to retain files for a longer time to be certain that any possible claims against the lawyer have expired.

Though the ethical propriety of destroying closed client files is not dependent on notice to the client, as a matter of good practice, lawyers should inform clients of their right to the materials in the file in the

engagement agreement and at the conclusion of the matter. Likewise, as a matter of good practice, lawyers should inform clients of their closed file retention policy. Clients should be informed of their right to the materials in the file, that the lawyer will maintain the file only for the stated time, and that the lawyer will destroy the file at the end of that time. The engagement agreement should be clear that the client is agreeing to the five-year retention policy or other mutually agreeable policy when the client signs the engagement agreement. Having been so informed, no client can claim a reasonable belief that the lawyer would retain the file longer than the lawyer stated as the retention policy.

#### *The Disposal of Closed Client Files*

Before a file is destroyed, a lawyer must ensure that the file contains no original wills, trust documents, deeds, or other documents that cannot be replaced. As a matter of good practice, a lawyer should extract such items from the file at the time the matter is concluded. At that time the lawyer has knowledge of what is in the file and the task of extracting important materials is less burdensome.

The actual disposal of the materials must be done in a manner that protects the duty of confidentiality every lawyer owes to every client and former client under Rules 1.6 and 1.9. The result must be a complete destruction of the materials in the file as would be the case with incineration or shredding.

#### *This Opinion Replaces KBA E-300(1985)*

This opinion replaces KBA E-300 (1985) and that opinion is hereby withdrawn.

KBA E-300 provided guidance appropriate for its era about the disposition of closed files under the Code of Professional Responsibility in effect at the time. The Code has been replaced by the Kentucky Rules of Professional Conduct. The current opinion relies on the current standards of professional responsibility and also provides guidance more suited for and beneficial to lawyers in this day and time.

#### ***Note to Reader***

*This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.*