

Ethics Opinion

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QUESTION PRESENTED: How long must client's files be preserved before they can be destroyed?

ANSWER: For a reasonable time. See analysis.

ANALYSIS: Rule 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

Rule 1.15 of the Rules of Professional Conduct provides, in pertinent part:

(a) 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 or third person. 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.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

The Montana Rules of Professional Conduct do not set forth particular rules on the preservation of client files once representation has terminated or a case has been closed. Rule 1.15(a), cited above, state that a client's property should be preserved for five years after termination of representation. However, this rule applies to a client's funds or other personal property held by the attorney. It has not been interpreted by this state or by other states to apply to client case files. Nevertheless, the policy behind Rule 1.15 is often cited as support for the notion that before client files may be destroyed the client should be notified. In addition, the confidentiality provisions of Rule 1.6 are relevant to the disposal of client case files. Any method of storage or disposal should take into consideration the maintenance of the confidential relationship between the attorney and client.

The ABA Committee on Ethics and Professional Responsibility issued an opinion on this question in March, 1977. Informal Opinion 1384 is entitled "Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients." The opinions suggests that the decision of how to deal with the burden of storing retired or inactive files is primarily a question of business management, and not a question of ethics or professional responsibility. The opinion goes on to state:

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.

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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.

The Committee suggested that attorneys consider the following factors in adopting a procedure for the disposal of client files:

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 expect will be preserved by the lawyer.
4. In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention periods 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.

As is stated in the ABA opinion, the guidelines are not based on specific Rules of Professional Conduct, although guideline numbers one and five are suggested by Rule 1.15, and guideline number six is required by Rule 1.6. Most bar associations that have issued ethics opinions on the question of destruction of client files have offered guidelines similar to those suggested above. See, for example, Nebraska Opin. 88-3 (1988), New Mexico Opin.

1988-1 (1988), Maine Opin. 74 (1986), Maryland Opin. 85-77 (1985), Alabama Opin. 84-91 (1984). Some associations require in addition that the client be notified of impending destruction and that consent be given before the documents are disposed of. See, for example, Iowa 87-21 (1987). Other jurisdictions simply recommend that the client participate in the decision to destroy files. Michigan Opin. R-5 (1989). Generally, the rule should be that the files may be destroyed if the client so directs or they should be returned to the client if that is preferred. Otherwise, the files should be preserved as long as necessary to protect the client's interest. Philadelphia Opin. 88-17 (1988). Some law firms have adopted their own procedures consistent with the ABA opinion cited above. An Arizona firm sent each client a letter as soon as representation had terminated or the case had closed, stating that the files would be retained for two years, moved to a storage facility for two more years, and finally destroyed, except for documents still needed, at the end of the sixth year. Ariz Opin. 82-5 (1982).

The question of who owns the files is one ultimately to be decided by the courts, according to most ethics opinions that have addressed this issue. See, for example, New York City Opin. 86-4 (1986), Maryland 82-11 (1982). Attorney work product is usually considered to belong to the firm, whereas documents such as a real estate title abstract provided by the client would be treated as client property, required to be returned to the client under Rule 1.15. The important ethical consideration is that the attorney examine each file as to the nature of the contents to determine whether the client's property is included and must be returned to the client and to determine what documents must be retained for a longer period of time because they may be relevant to a future action or they are reasonably expected to be preserved. Michigan Opin. R-5 (1989), Kentucky Opin. E-300 (undated).

Guidance as to what kinds of documents should be retained for a longer period of time is offered in several ethics opinion. Wills, deeds, and other property of intrinsic value should be indefinitely retained or deposited with the court. New Mexico Opin. 1988-1 (1988). Copies of court orders believed to be in effect at the time of disposal should be preserved. Arizona Opin. 82-5 (1982).

A law firm should exercise discretion in determining how long client files should normally be kept before the firm's disposal procedure is triggered. A reasonable amount of time is determined by the circumstances of the case. Alabama Opin. 84-91 (1984). Obviously, this necessitates an examination of each file on an individual basis.

Off-site retrieval services may be used to store client files so long as confidentiality is maintained. New Hampshire Opin. 1989-90/2 (1989), South Carolina 86-23 (1986). And an attorney may charge a client a reasonable charge for the time and expense involved with a request to return files. Maryland Opin. 82-11 (1982).

There are no specific statutes or Rules of Professional Conduct which address a retention schedule for client files. The following guidelines are suggested by the ABA committee on Ethics and Professional Responsibility, Informal Opinion 1384 (1977). See also Michigan Formal Opinion R-5 (1989) for a thorough discussion of this issue.

As a general rule, a law firm must not dispose of client files until it has first been determined whether the files contain property that belongs to the client, as opposed to firm property. If client property is involved, Rule 1.15 of the Rules of Professional Conduct, which requires returning the property to the client, applies.

A retention schedule should be decided upon by the firm. When the time for disposal of a file occurs, the file should be analyzed to determine whether it includes any client property, as noted above, as well as whether there are any documents which the firm should reasonably be expected to retain in order to protect the client's interests.

It is suggested that clients be notified before destruction of any file occurs. Any storage or destruction of files should be handled with care to preserve the confidentiality required by Rule 1.6 of the Rules of Professional Responsibility.