



AttPro Ally

FILES

You've got to
know when to hold 'em
Know when to ~~fold~~ 'em
destroy 'em



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The (E)X-Files

When to Retain or Destroy Old Client Files

By: Kate Gould, Esq.

When it comes to file retention, you may feel as if you need a Scully and Mulder level investigation before you feel comfortable destroying old client files. Despite many law practices attempting to transition to paperless offices or just clean up the file room at the end of the year, many lawyers struggle to let go of those dusty Redwells for fear of violating the rules related to file retention and destruction. Setting sights on a new year and new clients, if you feel the urge to purge old files, first consider these tips regarding file retention.

Follow Your Policy

Does your firm have a file retention policy? If it doesn't, consider developing one utilizing the tips in this article in conjunction with your jurisdiction's rules. If your firm does have a policy, follow it! Understandably, at the end of a lengthy representation, you may have forgotten the file retention policy agreed to in the engagement letter (and hopefully reiterated in your closing letter!). Consult this correspondence when you pull the file to determine whether you need to retain the file or destroy it. If the time has come that destruction may be appropriate, see if you previously agreed to provide notice and opportunity for your client to retrieve their file prior to your destruction. By sending a destruction notice letter in accordance with your policy, you may prompt your client to pick up their file alleviating the need to further question whether you need to retain it.

No Policy? No Problem

If you do not have a firm policy for file retention or destruction, you might be at a loss as to where to start. The ABA Model Rules offer some helpful guidance concerning a lawyer's obligation to maintain client information to fulfill their ethical duties. Model Rule 1.16(d) provides 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." While not a hard and fast rule for file retention, this is instructive. First, it does not require a firm to keep all files indefinitely, and secondly, it contemplates the possibility of returning the file to the client (while at the same time clearing out old files).

Once the representation ends and it comes time to determine whether to retain, destroy, or return the file – and the timeframe in which to do so – consider the following:

What documents are in the file? – Original documents, such as wills, deeds, and certain contracts, should be maintained by the firm and their destruction will likely need to be evaluated on a case-by-case basis. Some states will dictate a minimum number of years to retain the document, but you

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should also consider the lifespan of the document as well. If the contract term has not expired, it would be premature to dispose of the document.

Is there pending litigation? – Perhaps one box to check before destroying a file should be whether a litigation hold exists. If you received a litigation hold letter, you should check the status of the litigation or any government investigation before evaluating the file for destruction. Maintain the file in its entirety because the violation of a litigation hold could have serious evidentiary consequences for your client.

What is the statute of limitations for legal malpractice? – Check your state's statute of limitations for legal malpractice claims as a minimum length of time to retain the file. Your entire file, including all of your notes and draft documents, may be your best defense in a malpractice action.

How Do States Address Client File Retention?

Not surprisingly, individual states and their bar associations have different opinions when it comes to file retention. Although California courts have not yet addressed the retention period, several California bar associations have provided guidance. For example, the Los Angeles County Bar Association opines that a civil attorney should retain potentially significant papers and property in the former client's file for at least five years. This is consistent with a California Rule of Professional Conduct which requires an attorney to maintain all records of client funds and other properties that the client provided to the attorney for at least five years.

In Alabama, an Alabama State Bar Association Advisory Opinion provides that a lawyer should maintain a copy of the client's file for a minimum of six years from the termination of the representation or conclusion of the matter. The Opinion cautions that six years is the "absolute minimum period," and certain circumstances may require a longer or even indefinite period of retention. Such circumstances could include files related to minors, probate matters, taxes, and transactional matters which require lawyers to maintain a file until its contents are rendered obsolete by the passage of time and serve no useful purpose to the client or lawyer.

The general rule for file retention in Illinois is seven years. Illinois Supreme Court Rule 769 provides that all financial records related to the attorney's practice, including bank statements, time and billing records, checks, journals, financial statements, and tax returns, among other financial documents, must be maintained in physical or electronic file for at least seven years. While the Rule does not encompass all potential components of a client file, most Illinois attorneys allow seven years to pass before considering whether they must retain or can destroy the file.

While state legislatures and bar associations perhaps do not offer the brightline rules we would like, they do provide helpful guidance to practitioners wanting to clear their file cabinets of old client files. As a rule of thumb, consider the

time frames provided by your jurisdiction as the minimum length of time to keep a client file. Then, exercise good judgment when considering questions of file retention or destruction. In addition to calculating applicable statutes of limitation and reviewing the file for original documents, take into consideration the client relationship. Was it difficult? Was the litigation contentious and what was the outcome? Do you anticipate representing the client again? Would it be difficult to reconstruct certain client materials if they were destroyed? Best to err on the side of caution and keep the file physically intact or maintain an electronic copy if your client does not retrieve it.

What Does the ABA Say About File Retention?

While ABA Model Rule 1.15 provides a timeline for retention of records of account funds and other property of five years after the termination of the representation, remember, that is a minimum requirement. In Informal Opinion 1384, the ABA offers further guidance to attorneys deciding how long to maintain former client files. These additional directives can be a helpful roadmap to letting go of those Redwells.

First, a lawyer should not destroy or discard items that clearly or probably belong to the client unless the client provides their consent. These items could be personal file materials furnished to the lawyer, such as journals or photographs, that are not available in the public record. In general, a lawyer should use care in not destroying any information the client may need which was not previously provided and for which the client may expect the lawyer to preserve.

With respect to the length of time a lawyer may retain a file, the ABA cautions that the attorney should use discretion. In addition to complying with any state or local rules and ensuring any applicable statute of limitations has expired, the nature and contents of the files may indicate a longer retention than other files. Evaluate file retention on a case-by-case basis. If the physical file contains records of your receipt and disbursement of trust funds, maintain these records in a separate file, along with an electronic copy.

If the client does not want their file and you have determined it can be destroyed, be sure to protect the confidentiality of the documents when disposing of the file. Many vendors offer such shredding services. And, if you return the client file or destroy it, make sure you maintain an index of those files.

As always, check your state rules and consult with the local bar association for specific guidance concerning file retention and destruction. With these tips in mind, you can fulfill your ethical obligations concerning file retention – and keep that haunting theme song from running through your head.

¹ ABA Model Rule of Professional Conduct 1.16(d).

² California Rule of Professional Conduct Rule 4-100(B)(3).

³ Alabama Ethics Opinion 2010-02.

⁴ Ill. Sup. Ct. R. 769.

⁵ ABA Model Rule of Professional Conduct 1.15(a).

*'Tis the
Season for
Closing Cases:*

Tips for Properly Closing a File

By: Seth L. Laver, Esq.



As we approach the holiday season, instead of sugarplum fairies, many lawyers have visions of closed cases dancing in their heads. After all, there is nothing sweeter than the sound of a closed file- especially one that has been lingering for years. But before sending the file to the shredder or pushing boxes into a dusty warehouse, consider your firm's file closure policy. Best practices mandate that all professionals, notably attorneys, engage in a series of important tasks when closing a file. Poor practices at the end of an assignment can lead to conflicts issues, document retention woes, client confusion or worse.

How and when to close a file is a component of best practices. Most professionals follow some document retention protocol (and if you don't, you should). But an interesting wrinkle arises when it's not entirely clear when the engagement has come to an end. Some cases are withdrawn, some clients sign an engagement letter but do not pursue the claim, and some clients decide to retain new counsel without documenting the decision. To take into account these uncertainties, professionals must implement safeguards to monitor each client relationship and, when necessary, to document that the professional relationship has ended. By keeping files up-to-date, both old and new, professionals can help to avoid many hazards and ethical dilemmas.

The closing process begins once a professional determines that a client or case is inactive. Effective closing of a file involves three critical steps: (a) drafting a closing letter to the client, (b) taking an account of any outstanding payments, and (c) initiating an administrative closing of the matter.

The closing letter serves to confirm that the case is complete and to reiterate core principles of the representation. For instance, a closing letter should restate the nature and scope of the representation, confirm how the matter was resolved, provide documentation as to why particular aspects of the case were handled in a certain way, and include a request to the client to provide notice if there is any aspect of the case that potentially remains unfinished. A properly drafted closing letter will help to establish that the representation is concluded and that the client consented to the resolution. Closing letters should be sent as soon as you've concluded a case or when you've decided to stop representing the client. The letter should also be clear and easy for the client to read. So try to keep the letter concise and avoid unnecessary legal jargon.

During the accounting process, the firm should analyze all expenses, bills, and funds paid to the firm. Identifying any outstanding payments from the client early will help to resolve any payment issues and facilitate a collection lawsuit if the client fails to pay. Lastly, firms must complete an administrative closing of the file. When a case has ended, or a client relationship is no longer active, it should be marked closed within the professional firm's administrative system.

The key is to establish a sound case-closing protocol with collaborative input from colleagues tasked with closing cases. Some tips include:

- **Promptly close files.**
Failure to do so could

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result in problems during conflict check procedures.

- **Check the box.** Develop a “file closing checklist.”
- **Get paid.** Only close a file after the final action has been completed and the bill has been paid in full. Don’t forget to refund any fees or advances that have not been earned.
- **Get the memo.** Consider a “closing file memo” requirement. Such a memo will provide a concise summary of the case, and creates a permanent record of your representation.
- **Sign off.** Confirm in writing any oral communications with clients regarding file closings.
- **Keep tabs.** Implement a system wherein the closed matter is flagged for review in a few months, to ensure there are no loose ends remaining.
- **Remember the client.** The client owns the file, even after the case is closed. Similarly, the duty of client confidentiality continues after files are closed.
- **Go paperless.** This will save time and space. Consider using a “closed” stamp and/or other system to indicate closed matters, and then mark the planned destruction dates on the folders. Strip the file of extraneous papers. Keep an index of all closed files as well as their locations. Consider converting the paper file to electronic format.
- **Recycle.** Develop a system where the briefs, research and other information from closed cases can be easily accessed for use in future cases.
- **Create a closed case “purgatory”.** Reportedly, since 95% of all references to closed cases occur within a year of the closing date, you may decide to create an “interim” status for those files for a few months after they close.

Closing a file can bring a sense of accomplishment and satisfaction. But timely closing of a file has ethical and practical incentives for lawyers as well. On the ethical side, the rules of professional conduct applied to current clients impose additional obligations than those applied to former clients. Thus, the failure to close old files can create unwanted conflict issues that prohibit representation of new clients. On the practical side, closing a client matter can help to establish a clear statute of limitations deadline and avoid equitable tolling claims that could expose the professional to prolonged liability. So, while the end of the year is a great time to focus on file closures, it is also a practical time to revisit your firm’s closing policy.

Need an example of a Closing Letter?
www.attorneyprotective.com/sample-forms

Join Us For an Upcoming Free CLE Webinar Wrapping Up Loose Ends: Ethical Considerations for Stepping Away From Your Practice



November 15, 2023

12:00-1:00 CT/ 1:00-2:00 ET/ 10:00-11:00 PT

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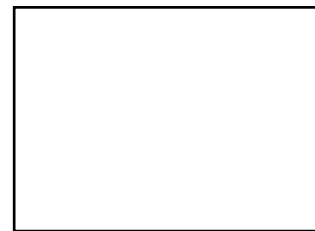
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