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Developing a File Retention Policy

BY ELLEN FREEDMAN

What to do with client files for matters that have been concluded and closed is a thorny issue in law office management.

It may sound strange, but the right time to think about destruction of a client's file is before you create the file or begin work for the client. And the right place to notify a client about your policy for disposition of client files is within the engagement agreement.

Lawyers need ways to minimize storage requirements and expenses while at the same time protecting clients' confidential documents—and preserving information that would help them in defense of a malpractice claim. Without forethought and planning, a lawyer may have to store copious files indefinitely.

How Broad Is the Duty to Preserve?

The problem is stated succinctly by the American Bar Association Committee on Ethics and Professional Responsibility: "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 costs of legal services. But clients and former clients reasonably expect from their lawyers that valuable and useful information in the lawyer's files and not otherwise readily available to the clients will not be prematurely and carelessly destroyed, to the client's detriment."

In order to ensure that the firm does not become a permanent repository for client files, nor face possible

legal repercussions for haphazard destruction of files, each firm should develop and scrupulously follow a file retention policy.

Essentially, there are three broad categories of property to be considered:

1. Documents and other property which belong to, or would be of some intrinsic value to, the client and subject to Rule 1.15 (Safekeeping Property). This category would include such documents as original wills, original deeds, photographs, original birth certificates and so forth. Category 1 documents need to be returned to the client. If a file is going to be placed into storage, the attorney should return Category 1 items before storing the file. Of course, the better approach would be to find a way to avoid having any original documents in the file at all. To accomplish this, photocopy all original documents upon receipt and return the originals to the client as soon as possible thereafter. In this way, the attorney will have the necessary document for future reference without having to worry about the location (i.e., possible loss or permanent storage) of the original document.

2. Documents or property which the client might expect to be returned. This category would include items such as the client's only copy of tax returns, bank statements or other business records. These are documents which can usually be retrieved again from an agency or business, but at some effort and expense.

3. Non-client documents or property which belong to the attorney or a third party. This category would include the attorney's draft of pleadings, briefs, file copies of correspondence and generally documents which would be for the attorney's use in representing the client. The documents in Category 3 are the documents which

are most necessary when defending a malpractice claim. This property is recognized to be part of what clients have purchased when they retain legal counsel. Accordingly, Category 3 property does not need to be turned over to the client prior to destruction of the file, but must be turned over to the client upon request, under Rule 1.15(b).

Consider Timing Issues

The ABA has issued guidelines for disposition of files in Informal Opinion 1384. Although the opinion does not answer the question of specifically when a lawyer may dispose of a file, it does provide guidance for developing a file retention program.

Generally speaking, Rule 1.15 of the Rules of Professional Responsibility requires that a client's property be preserved for five years after the representation is terminated. However, there may be occasions when it is advisable to retain documents for a longer period. For example, consider if the statute of limitations has run out on a potential malpractice action. There are reasons that may prevent a legal malpractice claim from being time-barred, such as a delay until the client knows or should know that damage has been caused by malpractice. In cases where the client has expressed dissatisfaction with a matter's conclusion, it may likewise be prudent to retain the documents longer. Similarly, the length of time a document should be retained may depend on the document and type of law involved.

It is not reasonable to simply establish a flat period of time after which all contents of all files should be destroyed. And above all else, a file retention policy must be reasonable. A base period of five to seven years from the conclusion of a particular matter is adequate, with longer periods established for specif-

ic and narrowly defined areas of practice. Individual exceptions should not be incorporated directly into a file retention policy except to include a statement saying that exceptions will occur only when the facts dictate. Exceptions should never shorten a file's life cycle.

Shield the Firm

To insulate the firm from allegations of failing to surrender documents or, worse, of purposely destroying documents to keep them from discovery, it is vital to uniformly implement a retention policy. It is equally important that any exceptions be carefully recorded as to facts that necessitated the exception. Firms should maintain a detailed, accurate index of all files destroyed or returned to clients. The firm must permanently retain the index, as well as copies of the engagement agreement (signed by the client to signify written consent), which notifies the client of the records retention policy. The firm must also retain subsequent letters notifying clients of file destruction dates. For clients that engaged the firm before the records policy was established, the firm needs to provide separate notice and obtain the client's written acknowledgement and consent.

Whatever the required period for keeping the documents, the question next becomes how and when to notify the client. The engagement letter or fee agreement should include provisions with regard to disposition of property after a certain length of time, as well as the client's responsibility to retrieve the file if desired. This practice establishes the client's expectations correctly, at the onset of the relationship.

However, stating the records retention policy in the engagement agreement is not sufficient notice prior to actual destruction. To ensure that clients have the option of exercising their right to have the file



contents returned to them, the lawyer should notify the client and allow 30 days to respond.

Remember that even if the client cannot be located, all Category 1 documents must be kept indefinitely unless the firm has obtained the client's advanced written consent to destroy these documents in accordance with the firm's policy.

Assume Final Responsibility

Lawyers cannot divorce themselves from policy merely by establishing the policy and leaving its execution to staff members. The lawyer must decide how and when to destroy part or all of a file. As a practical matter, each file that is closed should have a tickler made for the lawyer's final review at the appropriate future date as specified under the retention policy. At that time, the lawyer can make a final determination of whether any documents within the file warrant an exception to timely destruction. If not, the client should be given final notification, following which the file can be destroyed if the client has not requested its return.

Although there is some measure of guidance provided by an ABA opinion and several professional liability insurers, it is still up to each firm to develop its own file retention program. The most important thing is that it be well thought-out, communicated clearly to clients and consistently followed and documented by the firm and its staff.

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