

**L.E.I. 2002 – 01**  
**RETENTION AND DESTRUCTION OF CLOSED CLIENT FILES**

The Office of Disciplinary Counsel frequently receives requests for advice from attorneys seeking to destroy files of former clients' concluded legal matters. The Lawyer Disciplinary Board issues this formal opinion to provide guidance on this issue. The Lawyer Disciplinary Board also intends to seek a change to the Rules of Professional Conduct to clarify lawyers' obligations in this area.

**How Long to Maintain Client Property**

In prior formal opinions of this Board, it has been impliedly recognized that files are the property of the client, not of the attorney. L.E.I. 89-02 and 92-02. The client paid for the contents of the file to be created by paying attorneys fees and other expenses, and thus owns the file. Also, some documents, photographs, records and other such property in the file were likely provided by the client him or herself. Therefore, when a lawyer destroys a file from a concluded representation, that lawyer is destroying someone else's property.

Rule 1.16(d) of the West Virginia Rules of Professional Conduct provides:

(d) 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

(Emphasis supplied.)

The best practice is for lawyers to obtain explicit client consent prior to destroying

files. One easy way to obtain this consent is to include language in every representation agreement or retainer letter which sets forth the firm's file retention policy. When the client signs a representation agreement, he is agreeing to that policy. Furthermore, many lawyers follow the recommended practice of sending final letters to clients at the conclusion of every representation. Among other things, this letter should reiterate the firm's file retention policy. The language to be included in these documents should clearly establish that: files will be maintained only for the specified period of time; the client may have the file if he/she wishes; and that if the file is not obtained by the client, it will be destroyed at the expiration of this time period.

However, it must also be recognized that clients are not entitled to store their documents on a permanent basis at their lawyer's expense. At some point in time, even absent explicit consent to destroy, it is no longer reasonable for a client to expect that the lawyer will still maintain the client's property. At that point in time, the client's consent to destroy the file is implicit. ABA Informal Opinion 1384, "Disposition of a Lawyer's Closed or dormant Files Relating to Representation of or Services to Clients" [March 14, 1977], advises that lawyers do not have a general duty to preserve all files permanently. However, 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 be not be prematurely and carelessly destroyed, to the clients' detriment." *Id.*<sup>1</sup>

Determining the point in time when implicit consent exists can be difficult to ascertain. Rule 1.15(a) of the West Virginia Rules of Professional Conduct, "Safekeeping

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<sup>1</sup>ABA opinions are not binding in West Virginia, but are generally persuasive. ABA informal opinions are not as persuasive as formal opinions.

property”, provides a mandatory five year time period for maintaining certain records including trust account records, but it is not clear whether this rule also applies to portions of a client’s file such as pleadings, correspondence, discovery, etc. Rule 1.15(a) provides:

(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 designated as a “client’s trust account” in an institution whose accounts are federally insured and maintained in the state where the lawyer’s office is situated, or in a separate account 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 the termination of the representation.*

(Emphasis supplied.) Importantly, the five year time period begins upon the *termination* of the representation.

To be consistent with Rule 1.15(a), the Board advises that closed files either be provided to the individual clients or be maintained for a *minimum* of five years after the termination of the representation. For many files, holding the file for five years with no request for it by the client can be deemed implicit consent to destroy the file. However, some files must be maintained well beyond five years. How long to maintain an individual file should be determined by the nature of the case and the information included within the file. For example, files pertaining to the claims of minor children ought to be maintained until the child is beyond the age of majority and any statute of limitations has expired. Files of certain tax matters should be maintained as long as the client is exposed to further liability for those issues. There are undoubtedly other examples.

Each lawyer should also check with his/her malpractice insurance carrier to determine the minimum time period it recommends. A lawyer may be exposed to a

malpractice claim beyond the five years. To protect themselves, many lawyers wisely retain closed files for a period of ten years after the representation has ended, as ten years is the usual statute of limitations for contract cases. This legal ethics opinion in no way changes any applicable statute of limitations or standard of care for legal malpractice cases.

### **What To Provide The Client Who Obtains His/Her File**

Formal opinion L.E.I. 92-02 sets forth what must be provided to a client when the client receives the file:

. . . all material provided by the client; all correspondence; all pleadings, motions, other material filed and discovery, including depositions; all documents which have evidentiary value and are discoverable under the Rules of Civil Procedure, such as depositions and business records. The above-described material must be released regardless of any outstanding fees or costs.

Should the client clearly owe attorney fees or expenses, L.E.I. 92-02 permits a lawyer to only withhold work product as defined by the civil discovery rules. If the client does not owe money, then the lawyer must also provide the work product.

With some obvious exceptions set forth in L.E.I. 89-02, the original file goes to the client, as it is the client's property. Of course, the lawyer may retain a copy of the file for the lawyer's use. If a lawyer makes a copy of the file, that copy is deemed to be for the lawyer's benefit.<sup>2</sup>

### **The Mechanics of Disposing of Files**

Before destroying files, the lawyer or some capable firm employee must look

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<sup>2</sup>For information on when the lawyer may charge the client for this copy of the file, see L.E.I. 89-02.

through every file to ensure that no original wills, trust documents, deeds, or other non-replaceable documents are forever lost. These documents must be removed and properly handled before disposing of the file. The Board recommends that the most efficient way to accomplish this would be to look through the file at or near the conclusion of the representation – the matter is fresh in the lawyer’s memory, and this avoids the necessity of searching dozens or hundreds of files at once.<sup>3</sup>

Additionally, Rule 1.6 of the Rules of Professional Conduct mandates that a lawyer maintain client confidentiality. Rule 1.6 broadly defines client confidences as “information relating to [the] representation”. Rule 1.6 protection is more extensive than either the attorney-client privilege or work product doctrine. The confidentiality must be protected even after the representation ends.

Any destruction of client files must be done in such a way as to protect this confidentiality. The Board recommends that any destruction be accomplished by burning, shredding, or some similar manner which results in complete destruction. There are also bonded companies which specialize in destroying documents in a secure manner. Local financial institutions would be a good referral source to locate these companies.

**APPROVED** by the Lawyer Disciplinary Board **March 8, 2002.**



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Allan N. Karlin, Chairperson  
Lawyer Disciplinary Board

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<sup>3</sup>Lawyers need to be careful when maintaining original wills, trust agreements, and similar documents. By maintaining these original documents, the lawyer may owe an ongoing obligation to the client to advise of applicable changes in the law.