CHECKLIST FOR CLOSING A LAW PRACTICE

This checklist is intended to provide a general checklist for closing a law practice. Because of the fact that lawyers may practice law through a variety of entities, such as sole proprietorships, partnerships, professional corporations, limited liability entities, etc., no single checklist can provide such exhaustive, detailed and comprehensive guidance which will apply to the closing of every law practice in every circumstance; however, general guidance is provided, and individual lawyers can adapt this checklist to the particular situation at hand, whether it involves closing the lawyer's own practice, or closing the law practice of another lawyer. As a general guide for a lawyer desiring to close the lawyer's own practice, the planning should begin at least two years prior to the projected closing date.

NOTE: If sale of the lawyer's practice is contemplated (instead of closing the practice), then the provisions of Rule 1.17, amended effective January 4, 2010, should be followed (See Rule 1.17 at Appendix A).

In closing a law practice, it is possible that a lawyer may do so under any of the following methods:

A. By being appointed by the Circuit Court as a Receiver in accordance with Virginia Code Sections 54.1-3900.01 or 54.1-3936.

B. By acting on behalf of another lawyer under an Agreement as described in the Virginia State Bar Ethics CLE program "Protecting Your and Your Clients' Interests in the Event of Your Disability, Death or Other Disaster".

C. By acting on his or her own behalf, or on behalf of another lawyer who has engaged him or her to do following this checklist.

D. By being engaged by the Administrator or Executor of a deceased lawyer to do so following this checklist.

This checklist is not intended to provide guidance for the closing of a law practice in those circumstances in which the Circuit Court has appointed a Receiver for the law practice of a lawyer. Specific guidance is provided to Receivers in the Virginia State Bar's Handbook for Receivers, which is available through the office of the Ethics Counsel of the Virginia State Bar.

There are references available, dealing with closing a law practice. The Lawyers Guide To Buying, Selling, Merging, And

Closing A Law Practice, edited by Sarina A. Butler and Richard G. Paszkiet, is available for sale by the American Bar Association.

INFORMATION CHECKLIST
BASIC INFORMATION:

Lawyer's Full Name_____
Lawyer's Social Security Number_____
Lawyer's Office Address (Physical and/or Post Office Address)

_____
Lawyer's Office Telephone No.'s_____
Lawyer's Office Fax No.'s_____
Lawyer's Home Address_____

_____
Lawyer's Home Telephone No.'s_____
Lawyer's Home Fax No.'s_____
Lawyer's Passwords for Computer Access_____

_____
Lawyer's E-mail Address_____
Lawyer's Website_____
Jurisdictions in which Lawyer is admitted to practice_____

_____
_____
Lawyer's Virginia State Bar No._____
Lawyer's Bar No.'s for other jurisdictions_____

_____
Name of Lawyer's Law Practice_____
What Type of Legal Entity is the Law Practice_____

_____
What is the Federal EIN for the legal entity_____
What is the State EIN for the legal entity_____
What is the State Employment Commission account No. for the legal entity_____
Name, Policy No., Term, Address, Telephone and Fax No.'s of Professional Liability Insurance Carrier_____

_____
_____
What Federal and State Tax Returns are required to be filed for the Law Practice_____

_____
Names, Addresses and Telephone No.'s for employees of Law Practice_____

_____
_____
_____
_____
Names of Banks, Addresses, Telephone No.'s, Account No.'s and Contact Persons for Law Practice's General Bank Accounts

_____
_____
_____
_____

Names of Banks, Addresses, Telephone No.'s, Account No.'s and Contact Persons for Law Practice's Trust Bank Accounts

_____
_____
_____
_____

List of All Client Property Being Held By the Law Practice_____

_____
_____
_____
_____

Names of Issuers, Account No.'s, Addresses, Telephone No.'s, Contact Persons, regarding Lawyer's Business Credit Cards

_____
_____
_____
_____

Names of Lenders, Account No.'s, Addresses, Telephone No.'s, Contact Persons, regarding Lawyer's Business Loans

_____
_____
_____
_____

Locations of Law Practice's Files, stored at the Law Practice and at other locations_____

_____
_____
_____
_____

Names of Files Management, Docket Control, Calendaring, and Client Database Systems and Password for each_____

_____
_____

Name of Bank, Address, Telephone No. and contact person, regarding Law Practice bank safe deposit boxes_____

_____

_____

_____

List of All Pending Cases and Active Matters, Including Those in Which Lawyer Is Counsel, Fiduciary, Co-Fiduciary, or Party_____

_____

_____

_____

Name, address, telephone and fax numbers, and e-mail address of assisting or backup lawyer_____

_____

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Other information_____

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CHECKLIST OF ACTIONS TO BE TAKEN

___Make arrangements with a backup or assisting lawyer.

___Inventory All Files, Take Appropriate Action Regarding Each File, and Make Appropriate Disposition of Each File (See Appendix B, "A Lawyer's Ethical Obligations Regarding Client Files", by James M. McCauley, Esquire, Ethics Counsel, Virginia State Bar, Published in "The Fee Simple" Newsletter of the Real Property Section of the Virginia State Bar, Volume XXVII, Number 1, November 2006, and See Appendix C, Virginia State Bar Legal Ethics Opinion 1305, November 21, 1989).

___Return to client all original client documents (such as Wills and Deeds) and obtain appropriate receipts.

___Write to clients with active files, advising them that lawyer is closing lawyer's practice and is unable to continue representing them and that they need to retain new counsel. The letter should inform them about time limitations and time frames important to their cases. The letter should explain how and where they can pick up their files and should give a time deadline for doing this.

___For cases that have pending court dates, depositions, or hearings, discuss with the clients how to proceed, including retention of new counsel if appropriate. Where appropriate, request extensions, continuances, and resetting of hearing dates. Send written confirmations of these extensions, continuances, and resets to opposing counsel and to your client.

___For cases before administrative bodies and courts, obtain the client's permission to submit a motion for an order to withdraw as attorney of record.

___In cases where the client has chosen a new attorney, be certain that a Substitution of Counsel is filed.

___Pick an appropriate date and check to see whether all cases either have a Motion and Order allowing your withdrawal as counsel or a Substitution of Counsel filed with the court.

___If lawyer is serving as a fiduciary under Court supervision, arrange for Court Order appointing Court Substituted fiduciary, deliver assets to new fiduciary, and file final account with Commissioner of Accounts of the Circuit Court.

___If lawyer is serving as a fiduciary not under Court supervision

(for example, as trustee under a trust agreement), arrange for successor fiduciary in accordance with the terms of the trust agreement, deliver assets to new fiduciary, and prepare final account.

___Notify Clerks of Court and Commissioners of Accounts for jurisdictions in which the lawyer practices.

___File all appropriate United States and Virginia tax returns, including income, employment, unemployment, fiduciary, pension and profit-sharing, and other information returns.

___File all required reports with the Virginia State Corporation Commission.

___Deliver to Client and Account for All Client Property and Obtain Proper Receipts under Rule 1.15.

___Take all appropriate actions regarding law practice bank general account(s).

___Take all appropriate actions regarding law practice bank trust account(s) and retain necessary records under Rule 1.15.

___Notify Professional Liability Insurance Carrier and obtain Tail Coverage.

___File Appropriate Change of Address notice with United States Postal Service and other courier and delivery services.

___Take appropriate action regarding any real estate leases and other property interests of the law practice.

___Safeguard and make appropriate disposition of electronic media, such as computers, computer disks, cards, internal and external hard drives, zip drives, flash drives, tapes, cell phones, personal digital assistants, smart phones, printers, fax machines and scanners. Remember that these may contain client confidences and secrets.

___Take appropriate actions regarding law practice's web site and e-mail address.

___Take appropriate actions regarding law practice's telephone services (including land line, cellular and mobile access, etc.)

and for providing forwarding of calls for a specified period of time.

___Take appropriate actions regarding law practice's internet service provider and e-mail accounts.

___Take appropriate actions regarding law practice's on-line and hard copy law publications and subscriptions.

___Take appropriate actions regarding law practice's credit cards, loans, suppliers, vendors, and other creditors.

___Take appropriate actions to collect law practice's accounts receivable.

___Dispose of furniture, fixtures and equipment of law office.

___Take appropriate actions regarding law practice's pension, profit-sharing or other qualified plans.

___Take appropriate actions regarding law practice's health insurance plans, disability plans, and other insurance coverages (such as general liability coverage, property insurance, etc.)

___Notify Virginia State Bar Membership Department of closing of practice and change of status.

___NOTE: ADD TO THIS CHECKLIST BELOW ANY ITEMS OR MATTERS WHICH YOU BELIEVE NECESSARY AND IMPORTANT.

Bank Safe Deposit
Keys to Law Office

_____

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APPENDIX A

EFFECTIVE JANUARY 4, 2010, THE SUPREME COURT OF VIRGINIA AMENDED RULE 1.17 (SALE OF A LAW PRACTICE), SECTION II, OF THE RULES FOR INTEGRATION OF THE VIRGINIA STATE BAR, PART SIX OF THE RULES OF COURT, TO READ AS FOLLOWS:

"SALE OF LAW PRACTICE:
Rule 1.17. Sale of Law Practice.
A lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted, except the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

© Actual written notice is given by the seller to each of the seller's clients (as defined by the terms of the proposed sale) regarding:

(1) the proposed sale and the identity of the purchaser;

(2) any proposed change in the terms of the future representation including the fee arrangement;

(3) the client's right to consent or to refuse to consent to the transfer of the client's matter, and that said right must be exercised within ninety (90) days of receipt of the notice;

(4) the client's right to retain other counsel and/or take possession of the file; and

(5) the fact that the client's refusal to consent to the transfer of the client's matter will be presumed if the client does not take any action or does not otherwise consent within ninety (90) days of receipt of the notice.

(d) If a client involved in a pending matter cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(e) The fees charged clients shall not be increased by reason of the sale.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by Seller

[2] The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not result in a violation. Neither does the seller's return to private practice after the sale as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon leaving the office.

[3] Comment [3] to ABA Model Rule 1.17 substantially appears in paragraph (a) of this Rule.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the

practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters.
Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice
[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice
[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or to make other arrangements must be made within 90 days. If nothing is heard from the client within that time, the client's refusal to consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other

disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interest will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards
[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to assure that the purchaser is qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be concluded in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by

representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer shall see to it that they are met.

[14] Admission to or retirement from a law partnership or

professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

VIRGINIA CODE COMPARISON
Ethical Consideration 4-6 states that a lawyer should not attempt to sell a law practice as a going business because, among other things, to do so would involve the disclosure of confidences and secrets.

COMMITTEE COMMENTARY
The Committee was persuaded to eliminate the prohibition of the sale of a law practice currently set forth in Ethical Consideration 4-6 by several arguments, the first being that sole practitioners and their clients are often unreasonably discriminated against when the attorney's practice is terminated. When lawyers who are members of firms retire, the transition for the client is usually smooth because another attorney of the firm normally takes over the matter. Such a transition is usually more difficult for the clients of a sole practitioner, who must employ another attorney or firm.
Another persuasive argument is that some attorneys leaving practice, firm members and sole practitioners alike, indirectly "sell" their practices, including its good will, by utilizing various arrangements. For example, firm members sometimes receive payments from their firm pursuant to retirement agreements that have the effect of rewarding the lawyer for the value of his/her practice. Sole practitioners contemplating leaving the practice of law may sell their tangible assets at an inflated price or bring in a partner prior to retirement, then allow the partner to take over the practice pursuant to a compensation agreement. Such

arrangements do not always involve significant client participation or consent.

In addition, an attorney's practice has value that is recognized in the law. Under Virginia divorce law, for example, a professional's practice, including its good will, may be subject to equitable distribution. (Russell v. Russell, 11 Va. App. 411, 399 S.E.2d 166 (1990}). Therefore, under the Virginia Code, an attorney in a divorce proceeding may be required to compensate his/her spouse for the value of the practice, yet be forbidden to sell it.

The Committee recommended, after considering all of these factors, that adopting a carefully crafted rule allowing such sales without resort to these alternate methods would be preferable and would assure maximum protection of clients. This recommended Rule is based on the ABA Model Rule 1.17 with several significant changes, the chief ones relating to consent and fees. Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective January 4, 2010."

APPENDIX B

A LAWYER'S ETHICAL OBLIGATIONS REGARDING CLIENT FILES

by James M. McCauley

This article covers a lawyer's ethical duties with respect to a client's file. More specifically, the article will consider the following questions:

1. What is the lawyer's obligation when the client discharges the lawyer in an ongoing legal matter, and demands the file?
2. May the lawyer charge the client for expenses incurred in producing a copy of the file?
3. May the lawyer withhold the file as security for unpaid legal fees?
4. May the lawyer withhold the file if the client refuses to pay for the costs of producing a copy of the file?
5. How long must a lawyer maintain a former client's closed file?
6. What procedures should a lawyer have in place regarding client file retention and destruction?

A lawyer's duty to maintain a client's file is based in part upon Rule 1.15 of the Virginia Rules of Professional Conduct. Specifically, Rule 1.15 (c)(2) requires the labeling and safekeeping of client property, while Rule 1.15 (c)(3) directs the lawyer to maintain complete records of all funds, securities, and other properties of the client coming into the possession of the lawyer and to render appropriate accounts to the client regarding them. Some jurisdictions hold that the "file" is the "property of the client," at least to the extent that the client has paid the lawyer's fees in full for the lawyer's work product.

In addition, Rule 1.16 defines an attorney's duties at the end of the attorney/client relationship. When the attorney-client relationship is terminated at the client's request, this rule requires that the attorney deliver to the client all documents in the file as outlined in Rule 1.16 (e).

Is a lawyer required to maintain a "hard" or "paper" file for the client?

According to the Virginia Standing Committee on Legal Ethics, the answer is "No." The Rules of Professional Conduct do not contain a provision specifically directing what items a lawyer must keep in the client's file or in what form. Rule 1.16's paragraphs (d) and (e) address what items in a client's file must be provided to the client, upon request at termination of the representation. However, they do not dictate the form in which such items must be kept. In Legal Ethics Opinion 1818 (2005), the Committee observed:

> In determining whether an attorney is meeting his ethical responsibilities for a

> particular client, it matters not generally what form the documents in the file take, but instead whether all the documents necessary for the representation are present in the file. This is not to say that there are not instances where a paper document might be required. There may be any number of circumstances where keeping an original paper document in the file is critical, for example, testamentary documents, marriage certificates, or handwriting exemplars, to name a few. Clients without access to computers would require the attorney to keep a paper file. As to file materials other than documents, such as physical evidence, an attorney must always safeguard, maintain and account for such items. Any other instances where lack of a physical item may prejudice the interests of the client would also mean that an exclusively electronic file would not be permissible. The committee opines that there is not a per se prohibition against electronic files in all instances. However, when making decisions as to what to keep in the file and in what form, while an attorney may consider storage expediency, those decisions must be made such that the attorney's duties of competence, diligence, and communication are not compromised. See Rules 1.1, 1.3, and 1.4. The preference for electronic storage cannot reduce a lawyer's obligation to fulfill these ethical duties for each client.

What if a client wants his file? Does it matter whether he's paid his bill or whether the matter has concluded?

Prior to the adoption of the Rules of Conduct, effective January 1, 2000, a lawyer had to go searching through the legal ethics opinions for advice on these file questions. However, on that date, Rule 1.16(e) went into effect; that provision directly addresses how to handle the client's file. Rule 1.16(e) breaks the file contents into three categories.

The first is "all original, client-furnished documents and any originals of legal instruments or official documents." Those documents are deemed to be the client's property, and the attorney must unconditionally return them to the client upon request.

The second category includes lawyer/client and lawyer/third-party communications, copies of client-furnished documents (unless the original has already been returned), working and final drafts of legal instruments, official documents, investigative reports, legal memoranda and other attorney work product documents, research materials, and copies of prior bills. For this second category, a lawyer may charge the client for the expense of making a copy of the items for his own retention. For both of these categories, an attorney must provide the requested items regardless of whether the client has paid his bill. The old common law lien on the client's file is, essentially, overruled by Rule 1.16 (e). A lawyer can certainly pursue all normal collection options against a former client for unpaid fees; however, the retention of the file must never be used by the lawyer as leverage for payment of the bill for fees, the copying cost, or other costs associated with the representation. That practice will result in discipline for the lawyer.

A third category presented in Rule 1.16(e) includes copies of billing records and documents

intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising with the attorney/client relationship. A lawyer is not required to provide those items to the client. It is important to note that attorney work product is not in this category. An attorney must provide copies of items like his research notes, drafts of documents, and outlines of case strategies to the client upon request, as those items are within the second category discussed above.

May the attorney require, as a condition for representation, that each client consent to an "electronic-only" file?

In Legal Ethics Opinion 1818, the Committee's answer is generally "yes," so long as the client's interests are not prejudiced by such a condition for representation. The Committee concludes that there is no per se prohibition against such a condition; nevertheless, if the choice to destroy a hard copy of a particular item would prejudice that client, then in that instance, the attorney should not require the client to agree to that destruction as a condition to the client obtaining legal representation.

Upon termination of the representation, may the client demand that the file, if maintained by the lawyer in electronic format, be delivered to the client in electronic format?

Virginia's Rules and ethics opinions have not addressed this issue. At least one jurisdiction has concluded that electronic documents are part of the former client's file that must be turned over if requested. When a former client asks for its file, a law firm must include any electronic documents or components of the file as well as whatever may be on paper. The cost of locating and compiling the electronic records has no bearing on the law firm's duty in this regard. See N.H. Bar Ass'n, Ethics Op. 2005-06/3 (Jan. 2006). Lawyers who maintain client files in electronic format should consider delivering such documents in PDF, TIFF, or other formats that do not allow clients or third parties to alter the contents of the document. This is particularly important if the termination of the professional engagement occurred under circumstances that were not amicable.

File Retention: How long must an attorney retain the files of former clients?

A lawyer does not have a general duty to preserve all former client files. See ABA Informal Op. 1384. The only express requirement regarding file retention found in the ethics rules applies to trust account records. Rule 1.15 (e) requires that all records (trust account) required to be maintained under that rule should be retained for five years after the end of the fiduciary relationship. For all other files, the ethics rules do not direct an exact time period; however, Rule 1.16 does establish a general duty not to prejudice a client upon termination of the relationship. Thus, an attorney should not destroy a former client's file so quickly that the client's interests are prejudiced. Legal Ethics Opinion 1305 provides detailed suggestions for the destruction of client files. Some considerations to keep in mind are whether files still contain any client property or original legal documents. Also, consider which documents are worth retaining for malpractice

protection and which documents are necessary for conflicts checks. Certainly, any relevant statute of limitations must be kept in mind. The exact retention period for any file will depend on the area of law and nature of the particular matter.

For example, a criminal defense lawyer may want to retain the client's file for a considerable length of time after the representation has ended because of potential habeas claims made by the former client. Legal Ethics Opinion 1418 indicates that delivery, and therefore retention, of a former client's file may be necessary to protect the client's interests in the event of post-conviction proceedings such habeas proceedings alleging ineffective assistance of counsel.

In addition, disposition of a former client's files does not include throwing the client files into the garbage. Such an approach presumably would not protect client confidentiality. On the other hand, shredding, incinerating, or employing a commercial service that guarantees confidential disposal of documents would be sufficient. *See* Montana*, Retention and Destruction of Client Files in a Law Firm*, 25 COLO. LAW. 47, 48 (Apr. 1996); Thar*, How Long Should You Retain Client Files?*, 83 ILL. BAR J. 649, 650 (Dec. 1995).

Rule 1.16 (d) requires an attorney, upon termination of the representation, to take steps to the extent reasonably practicable to protect a client's interests. This duty includes the obligation to return to the client all original documents and property which the client has entrusted to the lawyer. Thus, a lawyer needs to exercise care not to destroy original documents provided by the client, without notice and consent from the client. A lawyer should consider notice to a former client, if the client's whereabouts can be readily determined, that the former client's file will be destroyed unless the client makes arrangements to pick up the file. Some jurisdictions require advance notice to the former client of the lawyer or firm's retention or destruction policy; however, if the client is made aware of and agrees with the policy, no further notice is required if the lawyer or firm destroys the file. The lawyer can include a document/retention policy in the written representation agreement and have the client agree to the terms and conditions under which the client's file will be maintained by the lawyer or destroyed.

In order to avoid uncertainty regarding the treatment of client files, it is sound law practice management for lawyers to make arrangements with their clients for the disposal of clients' files either in the initial representation agreement or in the agreement terminating the attorney-client relationship. See Wis. Ethics Op. E-98-1 (1998). Such an agreement may provide for the immediate delivery of the client's files upon termination of the representation, storage of the closed files for a specified period of time and then destruction of the files, or the immediate destruction of the files following completion of the representation. Similarly, the parties' respective obligations regarding delivery, storage, or destruction costs may be set forth in this agreement.

In the absence of such an agreement, however, the lawyer must be guided by the provisions of Rule 1.16(d). Upon termination of representation, the lawyer should make a reasonable, good-faith effort to notify the former client of the existence and contents of the client's files and follow

the client's instructions whether to hold, return, or destroy the files. This process is obviously easiest to implement if undertaken immediately following the termination of the representation, but there may be circumstances where this is not possible.

More difficult problems associated with the disposal of former clients' files arise when some period of time has passed since the end of the representation and either the client cannot be located or the client simply declines to respond to the lawyer's request for instructions regarding the disposition of the client's closed files. Because the ethical responsibility to do what is "reasonably practicable to protect a client's interests" persists even in the case of a former client, see Rule 1.16(d), there is no hard and fast rule that resolves this issue in all cases. Many jurisdictions, however, have recommended a minimum time period in which a lawyer should maintain the closed files belonging to his former client.

Michigan Bar Op. RI-109 (Dec. 17, 1991) validates the practice of creating a file retention policy, stating that when a law firm establishes a record retention plan which protects the client's right and advises the client of the plan, and the client has either retrieved their file or the time to exercise that option has expired under the plan, the firm has no further duty to notify clients of damaged or lost files.

Illinois State Bar Op. 94-19 (Mar. 1995) uses a blanket time limit for file retention and approves the destruction of legal aid files after five years, excluding wills and conflicts information. Iowa Bar Op. 91-20 (Nov. 14, 1991) approves the destruction of legal aid files, including conflict information, after five years.

Michigan Bar Op. RI-240 (June 26, 1995) approves the destruction of client files without notification to the client, provided the file contains no client property, or after reasonable notice about client property has been given. New York State Bar Op. 623 (1991) reaches a similar conclusion.

Arizona Bar Op. 98-07 (June 3, 1998) recommends indefinite file retention for probate or estate matters, homicide cases, life sentence cases, and lifetime probation matters. File retention for five years is appropriate in most other types of matters. The appropriate retention period will vary depending upon the lawyer's judgment of the client's reasonable need for the file materials after the representation has ended. That judgment should include consideration of applicable statutes of limitations, the length of the client's sentence or probation, and the anticipated possible uses of the materials by the former client.

Establishing a Law Firm Record Retention/Destruction Policy

Lawyers have an obligation to implement an effective document retention/destruction system for their law practices. The increased use and focus on e-mail and other electronic documents in discovery makes it important that lawyers learn how to how to manage their electronic documents before litigation ensues. How long should e-mail and electronic documents be stored?

Generally, the experts say that whatever rules apply to hard documents should apply to electronic documents.

Steps in Developing an Electronic Document Retention Policy

No one-size-fits-all approach exists for developing an electronic document retention policy. Following the steps outlined below, however, can help with the process.

(a) Firms must develop their own plan based on the following:

Identify the types of data and documents the firm receives, uses, and stores.
Define all records and media the firm uses for record keeping, payroll, accounts receivable, accounts payable, client databases, etc. Consider e-mail, web page files, text files, sound and movie files, spreadsheets, PowerPoint presentations, PDF documents, etc.
Establish retention schedules for each type of document or data.
Establish uniform standard file naming and storage protocols.
Follow statutes or rules regarding required record retention for various types of records such as employment records, accounting records, client files, business records (i.e., trust account records must be kept for 5 years from the date the attorney-client relationship was terminated).

(b) Involve a person trained in computer technology from the outset. Know what data is being stored and where it ends up.

© Decide if the firm will implement a "manual" system or implement an automated document retention and storage system.

(d) Know the physical limitations of your equipment. Can your system's memory accommodate the retention policy and the applications to run it? You may need to consider a third party vendor for storage or purchase new equipment.

(e) Make sure the policy is claims or litigation neutral. There should be no distinctions or exceptions drawn in the policy as to treatment of documents that may be helpful or damaging in future litigation or claims.

(f) Identify the method by which the retention system is monitored and enforced.

(g) Include provisions for updating procedures when the firm implements technological advances. Records should be kept that document the design, development, implementation, and enforcement of the policy.

(h) Procedures should be forward looking for disaster planning, power outage, virus attack, interception, fire, flooding, and other casualty risks.

(I) Procedures must include a provision for excluding from destruction documents that

are relevant or may be potentially relevant to claims, accidents, complaints, or other events that could lead to litigation in the future.

Plan Execution: Make Enforcement Consistent

Centralize execution of the retention policy in one person. This person should also be responsible for testifying regarding the policy should that be necessary.
Conduct periodic internal audits to ensure that the policy is working as designed. Make any necessary changes. If the firm becomes subject to litigation, the existence of a plan, consistent enforcement of it, and a history of adjusting it as needed will more likely be viewed as reasonable.
Include a compliance requirement and monitoring method. For example, establish a system of random checks of a limited number of computers to monitor compliance.

Communication: Ensure that all firm members and staff know about the policy and understand it

Inform staff as to the firm's document retention policy. Make them a part of the planning and review process.
Review with staff the legal ramifications of destroying or overwriting information if the firm is involved in, or has notice of, a lawsuit, audit, or investigation.
Inform staff of any notice of claim, investigation, audit, or lawsuit in order to avoid spoliation or accidental destruction of electronic evidence.

Endnotes:

*James M. McCauley is the Ethics Counsel for the Virginia State Bar and has served the Bar in that capacity since 1995. Mr. McCauley and his staff support the Virginia State Bar's Standing Committees on Legal Ethics, Unauthorized Practice of Law and Lawyer Advertising and Solicitation. They also operate the "Legal Ethics Hotline," which members of the Bar can call to get informal guidance on legal ethics and other regulatory issues. Mr. McCauley serves on the Board of Governors and on the Ethics and the Technology Subcommittees of the Real Property Section of the Virginia State Bar.

[1] *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994). A former counsel for a defunct insurance company was resisting turning over files on the company to special counsel for the state insurance department as statutory liquidator. They asserted a work-product defense, but the Commonwealth Court (an intermediate appellate court specially created to hear cases involving the state) rejected that, saying, "We therefore believe that once a client pays for the creation of a legal document, and it is placed in the client's file, it is the client, rather than the attorney who holds a proprietary interest in that document. When a client requests that its property held by an attorney be turned over, under Rule 1.15(b) the attorney must comply." In New York, unless otherwise governed by agreement between the lawyer and client, a client is presumptively entitled to the entire file upon request. The lawyer may impose a reasonable charge for assembling and delivering the file, but bears the expense of retaining copies for his or her own file. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997); *Bronx Jewish Boys v. Uniglobe*, 166 Misc. 2d 347 (N.Y. Sup. Ct. 1995) (an "attorney retains his client's files in a representative, not possessory capacity; that is, the files belong to the client, with the attorney only having a lien thereon for payment of legal fees"); *see also* N.Y. State Bar Ass'n Comm. on Prof'l

Ethics, Op. 780 (2004); *id.* op. 766 (2003).

[2]*Stevens v. Sparks*, 205 Va. 128, 133, 135 S.E.2d 140 (1964) (An attorney may have a common law possessory lien which is his right to retain the property or money belonging to his client until his fees are paid.); *King v. Beale*, 198 Va. 765, 812 (1957) (recognizing common law retaining lien).

LEO: Confidentiality — Files/Property of a LE Op. 1305

Confidentiality — Files/Property of a Client: Disposition of Clients' Closed Files.

November 21, 1989

You have advised that you have slightly over 700 closed files in storage, a majority of which concern cases where you were the court-appointed defense counsel in criminal matters which took place between April 1, 1981 and May 15, 1989. You indicate your concern with costs of rental of storage space and of sending notices or complete files to former clients.

You have asked that the Committee consider first the length of time that clients' records need to be retained by an attorney who is no longer engaged in the private practice of law, and second, the propriety of disposal of files by shredding, incineration, or landfill burial.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-108(D) which enumerates actions which must be taken upon the termination of a lawyer's representation of a client and DR:4-101(B) which mandates that a lawyer shall not knowingly reveal a confidence or secret of his client. Under the former, the lawyer must take reasonable steps for the continued protection of a client's interests, including, among other tasks, delivering all papers and property to which the client is entitled. The lawyer is permitted to retain papers relating to the client to the extent permitted by applicable law. With regard to the lawyer's trust account information, DR:9-103(A) instructs that such records (including reconciliations and supporting records) be preserved for at least five years following completion of the fiduciary obligation and accounting period. Further guidance as to a lawyer's responsibilities is available through EC:4-6 which instructs that a lawyer must continue to preserve a client's confidences and secrets even after the termination of his employment and also should provide, for example, for the personal papers of the client to be returned to him.

The Committee has previously opined that the mere passage of time does not affect the ongoing requirement of an attorney to preserve the confidentiality of his client. (See LE Op. 812) Furthermore, the Committee has also opined that it is not proper, post-death, for an attorney's files to be turned over to an institution since the wishes of the client are still a dominant consideration. (See LE Op. 928) Finally, it has been the view of the Committee that the attorney's responsibility

to preserve such confidentiality survives the death of the client. (See LE Op. 1207)

In addressing the issue you have raised, the Committee assumes that no questions have been raised with respect to a lawyer's retaining lien which has arisen as a result of unpaid legal fees or with respect to ownership of the contents of the files you describe. Such questions, if applicable, would raise legal matters beyond the purview of this Committee.

It is the opinion of the Committee that a lawyer does not have a general duty to preserve indefinitely all closed or retired files. Since neither the Code of Professional Responsibility nor any specific Virginia statute apparently sets forth specific rules addressing the retention of such files by private practitioners, the Committee, in applying DR:2-108(D) and DR:4-101, as described above, suggests the following guidelines as indicated in ABA Informal Opinion No. 1384. (See also Maine Ethics Opinion No. 74 (10/1/86), Nebraska Ethics Opinion No. 88-3 (undated), New Mexico Ethics Opinion No. 1988-1 (undated), and New York City Bar Association Ethics Opinion No. 1986-4 (4/30/86))

Although not required, the Committee suggests the following procedures as cautionary guidelines. Since they are merely cautionary, failure to follow these procedures would not result in any ethical impropriety. The lawyer should screen all closed files in order to ascertain whether they contain original documents or other property of the client, in which case the client should be notified of the existence of those materials and given the opportunity to claim them. Having culled those materials from the closed files, the lawyer should use care not to destroy or discard materials or information that the lawyer knows or should know may still be necessary or useful in the client's matter for which the applicable statutory limitations period has not expired or which may not be readily available to the client through another source. Similarly, the lawyer should be cognizant of the need to preserve materials which relate to the nature and value of his legal services in the event of any action taken by the client against the lawyer. Having screened the files for the removal of any materials as indicated, the lawyer may at the appropriate time dispose of the remaining files in such a manner as to best protect the confidentiality of the contents.

In determining the appropriate length of time for retention or disposition of the remaining materials in a given file, a lawyer should exercise discretion based upon the nature and contents of the file. As instructed in DR:9-103(A), however, all trust account and fiduciary records should be maintained for a period of five years following completion of the fiduciary obligation and accounting period. Finally,

the Committee is of the opinion that the lawyer should preserve for an extended period of time an index of all files which have been destroyed.

Committee Opinion November 21, 1989

LEO: Confidentiality - Files/Property of a, LE Op. 1305 (1989)