The Monster Called File Retention

by Wendy F. Inge

The question of how long a lawyer has to retain client files of closed cases is one I am still regularly asked by lawyers and their staff. The storage of files, whether physical or electronic, over a long period can be burdensome and expensive. The need for storage and record management is familiar to most attorneys. However, because indexing and otherwise accounting for and storing closed files is an additional business expense, many lawyers would like to destroy closed files as soon as possible. How long must a lawyer retain the files of former clients?

Ethical Requirements

The only express requirement regarding file retention in the Virginia ethics rules applies to trust account records. Rule 1.15(e) requires that all records 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. Virginia LEO 1305 states "a lawyer does not have a general duty to preserve indefinitely all closed or retired files." However, "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." LEO 1305 also provides detailed suggestions for the destruction of client files such as never destroying any client property or original legal documents, preserving confidentiality when the file is destroyed, continuing to comply with Rule 1.15(e) and creating an index of destroyed files.

Malpractice Considerations

The exact retention period for any file should be determined based on the area of law and nature of the particular matter. Also the statute of limitations for a malpractice claim and its accrual should be considered. In Virginia the legal malpractice statute is typically either five years for a written contract (engagement letter) or three years for an oral contract, and the accrual is typically from the date of the breach of the contract or at the latest when the representation is over. Based on these parameters, as a general rule of thumb malpractice carriers will encourage a lawyer to consider a ten-year retention period after closing the file. This can be shifted up or down depending upon the area of practice. For example, criminal matters and other litigation may appropriately have a shorter storage life of seven years after all appeals have expired. On the other hand, real estate matters and wills and trusts should often be kept twenty years or beyond because these files may contain useful information long after the file is closed. Clients may return long after the work is done and request copies or information from the file. Also, in these two areas of practice an error or mistake may not surface until long after the representation is over, and it is always better to have the file than not. Domestic matters fit well into the ten-year range unless there are outstanding issues such as pension and retirement provisions that will not come to fruition for many years.

Because there can be exceptions, the lawyer should thoroughly review each file before destroying it. Some situations require additional years in retention times. For example, you should not destroy a file in any of the following situations:

- Cases for which the malpractice statute of limitation has not yet run (and don't forget about the doctrine of continuous representation);
- Cases involving a minor client who still is a minor when the recommended file retention period ends;
- Estate plans for clients who still are alive;
- Agreements to be executed or fully paid off after the retention period expires;
- Files establishing a tax basis;
- Adoption files;
- Support or custody files with continuing support obligations;
- Cases with renewable judgments;
- Corporate books and records;
- Files of clients convicted of a capital crime; and
- Files of certain "problem clients."

File Retention Considerations

Your firm should create a file retention policy specific to your areas of practice. It should take into account your ethical obligations as set in Rules 1.15(e) and 1.16(d) and (e) and LEO 1305, and the malpractice statute of limitations. Notice of the firm's retention policy should be communicated to the client in the engagement letter and in the closing letter at the end of the representation. At the end of the representation, when the file is being closed the lawyer who handled the matter should review it to determine what the retention period is based on the firm's policy and whether any exceptions apply that would lengthen the period. The file can then go to staff for further handling; this would include things like indexing it as a closed

file, making sure all of the file is present (including printing any e-mails or other electronic documents that need to be added to the paper file), making sure all original documents were returned to the client, and creating a copy of any documents the firm may want to add to its forms library for future drafting use. The file should be stored in a safe (try to prevent water and moisture damage) and secure area that protects confidentiality. Based on the closed file index, when the destruction date arrives the file should be destroyed in a fashion that is consistent with protecting confidentiality. And the closed file index should reflect the date and manner of destruction.

Regarding electronic file storage the same rules for closing the file set out above apply, and firms should continue to have a file retention policy for electronic files. While accessing and storage may be easier and more affordable with electronic storage options, uncontrolled volume increases the costs of storage, and as the technology changes the ability to view older records beyond a reasonable period of time can become burdensome. Also, when using electronic storage methods for closed files, make sure all parts of the electronic file, including e-mail and anything that is on paper and needs to be scanned in are added to the electronic file at closing. Electronic storage media should be maintained under conditions that seek to prevent unintentional damage and confidentiality should continue to be protected.

Truth be told, the advice shared here is nothing more than a little common sense. The real problem is that it is too easy to overlook these issues in a desire to get to the next active matter. Once matters close, files can quickly move to the out-of-sight, out-of-mind category and the few final administrative/storage steps move into that "we'll get to it when we can" to-do list which too often never gets properly addressed. A little effort up front truly can prevent a major headache down the road.

Considerations for deciding whether to keep or discard a client file

1. Unless the client consents, a lawyer should not destroy or discard original items belonging 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 except will be preserved by the lawyer.

4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention 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. The lawyer should use reasonable means to notify the client of his or her intention to destroy a file and give the client a reasonable time to respond. If the lawyer is unable to locate the former client the lawyer may destroy items whose retention is not required by law and is not reasonably necessary to the client's future legal representation.

6. A lawyer should take special care to preserve, for five years after the end of the representation, accurate and complete records of the lawyer's receipt and disbursement of trust funds.(Rule 1.15)

7. In disposing of a file, a lawyer should protect the confidentiality of the contents.

8. 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.

9. A lawyer should preserve for an extended period an index or identification of the files that the lawyer has destroyed or disposed of.

See Virginia LEO 1305 and ABA Informal Opinion 1384.

Wendy Inge is the Virginia risk manager for Liability ALPS, the Virginia State Bar-endorsed legal liability insurer. She is available to answer risk management questions at no charge for all members of the VSB. She can be reached at (800) 367-2577.