

LEGAL ETHICS OPINION 1305

CONFIDENTIALITY – FILES/PROPERTY OF A
CLIENT: DISPOSITION OF CLIENTS' CLOSED
FILES.

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 Legal Ethics Opinion No. 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 Legal Ethics Opinion 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 Legal Ethics Opinion 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

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described above, suggests the following guidelines as indicated in ABA Informal Opinion No. 1384. (See also Maine Ethics Opinion 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.

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