RISK MANAGEMENT CORNER

Dealing with Client Property

by John J. Brandt

Lawyers frequently encounter questions about their clients' property. Issues include how long to maintain a client's file materials and disposition of a client's trust funds or property after the case is closed, when the client cannot be reached—or the client fails to cash the trust check forwarded by the attorney.

How long after a case is closed must an attorney maintain a client's file?

"All original, client-furnished documents and any originals of legal documents or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, *upon termination of the representation*, those items shall be returned within a reasonable time to the client or the client's new counsel upon request . . ." (Emphasis added.) Rule 1.16(e).

All trust accounting records of a closed case "shall be preserved for at least *five full calendar years* following the termination of the fiduciary relationship." Rule 1.15(e)(1)(v), *VSB 2007–2008 Professional Guidelines*. (Emphasis added.)

For purposes of any possible malpractice claim, the statute of limitations begins to run as of the time the case is concluded. The statute is five years for a written engagement and three years if there is no written agreement.

After a case is concluded, most attorneys write a closing letter and return to the client all original documents.

What should the lawyer do with the remainder of the file, such as copies of documents, memos to the file, and legal research? No rules require that these materials be kept, but many practice management consultants recommend that these files be maintained for at least five years—the statute of limitations for a written engagement.

The nature of the case may dictate shorter or longer file retention. For example, an attorney representing a criminal defendant sentenced to death should keep the file until the sentence is carried out. Estate attorneys typically maintain their client's files until after the death of a testator or grantor. Other factors, such as representing a person with a disability, may justify longer file retention.

Before a lawyer destroys a client's file, the lawyer should inform the client by letter that the documents remaining in the file will be destroyed within sixty days unless the client appears to claim them. The lawyer is never required to "provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interests, staffing considerations, or difficulties arising from the attorney-client relationship." Rule 1.16(e). Some attorneys inform a client in the closing letter that all remaining documents in the client's file will be destroyed "on or about [date]," and that the client should make timely arrangements to pick up any documents. Some lawyers also explain their file retention policies in their engagement letters.

Before destroying a file, a lawyer should record on an index card or computerized file the client's name, address, telephone number, type of case, court, names of persons deposed, contact information for the court reporter, a brief description of the outcome, and the date of termination of the case.

The attorney may decide how to destroy a file. It is not recommended that files be bagged and deposited in a trash bin or public landfill. (After a Virginia attorney bagged and disposed of a divorce file, it was posted on the Web by enterprising fraternity brothers.) Shredding is the preferred method of file destruction. Shredding companies will come to your office, shred quickly and economically, and certify their work in writing.

What should a lawyer do with client funds held in trust after repeated efforts to return the funds have failed?

Attorneys sometimes attempt to refund a client's trust account funds only to find the client has moved without a forwarding address, or the client simply fails to cash the check.

An attorney should exercise due diligence to locate the owner and promptly disburse those funds. If that fails, the attorney should file the unclaimed funds with the Virginia Department of the Treasury, Division of Unclaimed Property, P.O. Box 2478, Richmond, VA 23218-2478. The division can be contacted at (800) 468-1088 or **www.trs.virginia.gov** (unclaimed property link). The Web page has the forms necessary to submit the unclaimed funds. Virginia has adopted the Uniform Disposition of Unclaimed Property Act, § 55.210.1 Va. Code (1950), as amended. An attorney would be a "holder" as defined under § 55-210.2: "a person . . . who is (i) in possession of property belonging to another . . ." The attorney must first exercise due diligence, which includes but is not limited to "the mailing of a letter by first-class mail to the last known address of the owner as indicated on the records of the holder." *Id.*

Under § 55-210.2:1, the funds are presumed abandoned if the owner fails to

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claim them "for more than five years after it became payable . . ." Thus, if the lawyer closes a file and writes to the client with a check for $950 in trust funds remaining after the case is closed, and more than five years pass without success in distributing the funds, the attorney must presume the funds are abandoned and should remit a check for the unclaimed funds, less lawful charges, to the Division of Unclaimed Property, with the appropriate forms (AP-1 and 2). However, under § 55-210.10:2, the attorney "*may voluntarily* report the trust account funds *prior to the statutory due dates, whereupon the property shall be presumed abandoned* . . ." (Emphasis added.) The director of the unclaimed property division suggests six months as a reasonable period of time for an attorney to hold trust funds after trying to locate the owner. Then the attorney may simply send a trust account check in the amount remaining (less any lawful charges) to the division. There is no minimum amount that may be forwarded.

Although § 55-210.2:2 states that the commonwealth will not take custody of unclaimed property unless the owner's last known address, as shown on the attorney's records, is in Virginia, there are exceptions when the owner's address is unknown and when the owner is in a state without unclaimed property laws. The Virginia unclaimed property division then may accept unclaimed trust funds irrespective of the whereabouts of the owner. Attorneys should call the unclaimed property division if they have questions about the procedure.

Once the attorney has filed with the commonwealth, he is "relieved of all liability to the extent of the value of the property so paid or delivered . . ." § 55-210.15. That section appears to indemnify the attorney in case of legal proceedings against him.

Section 55-210.26:1 creates interest and penalty surcharges against at an attorney "who fails to pay or deliver property within the time [five years] prescribed by this chapter . . ." Fortunately, the Treasurer of Virginia can waive interest and penalties unless willfulness is obvious.

Attorneys should properly reconcile their trust accounts and remit funds to the clients. Clients should promptly collect any trust funds left in the attorney's account. If an attorney has followed the requirements and the client fails to accept the funds, the Virginia Uniform Disposition of Unclaimed Property Act offers the attorney a method to clear his trust account. ⚖