

Case Closed!!

Now What Do I Do with the File?

By Jim Calloway and Mark A. Robertson

EDITOR'S NOTE: This appeared in the January 8, 2000 Oklahoma Bar Journal. This was just a few days after we all learned we had survived the Y2K threat. It has not been edited and is provided here for historical reference. When discussing proper closing of client files, some things change, but many practices have remained the same.

So, our thoughts turn to seasonal activities - New Year's resolutions, Christmas bills, negotiating icy roads or ski slopes, the Super Bowl and other indoor activities. As lawyers facing a new year - decade - century - millennium - our resolutions and thoughts also turn to better organizing our practices, our collections and our files. Now that we have won the case, completed the deal and finished signing the wills and trusts, what do we do with those documents and files?

For too many lawyers, now is the time to wonder if you can shove another year's worth of closed files in the attic or storage building and to ponder the question of whether some of these old, closed files should be destroyed and what is the procedure for doing so. Let's break this down into manageable pieces.

Ethical Considerations

To answer the questions as to how to close a file and how long you should retain client files, one should first consult the Oklahoma Rules of Professional Conduct. There, the only guidance as to any record keeping requirements is contained in Rule 1.15. Safekeeping Property, which provides in conjunction with trust accounts and other client property held by lawyers:

“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 termination of the representation.”



Normally, this would be interpreted by most attorneys as relating to how long the trust account bank records and canceled checks must be retained. But it is not limited to trust account records and should include such things as receipts for property delivered to the attorney by the opposing side in a divorce case or abstracts. In addition, the trust account records would be of little use without the back-up documents contained in the lawyer's file. Should you ever be called on to produce records you would want to be able to produce copies of the bills you paid on behalf of the client, the settlement statement signed by the client when personal injury settlement proceeds were disbursed, the copy of the attorney-client contract outlining your payment and other items that were contained in the file and not in the bank records.

It appears then that the minimum time frame for retaining a file and related financial information is five years where any client property of any kind was held by the lawyer even briefly. Reasoning by analogy, one would conclude that all client files should be retained for at least five years after they are closed, and no more work is done.

Practical Considerations

When a discussion of this topic was posted on the OBA-NET, the five-year rule was greeted with an immediate response of “Oh, no. That’s not long enough. The files should be retained for 10 years.”

We would agree that keeping records for only the minimum requirement would not be sufficient to protect all of the business and personal interests of the lawyer. We merely state that if you don’t keep the files at least five years, you may violate Rule 1.15. So, we must next ask the question, “For what purpose are client records and files retained?” One can readily think of several reasons. Here are a few possibilities:

- To maintain a backup for the client in case the copies of the file documents given to the client are lost or destroyed,
- To allow the lawyer the evidence needed to defend against a claim of professional negligence,
- To allow the lawyer the evidence needed to defend against a claim of a violation of the Rules of Professional Conduct,
- To backup financial information as to income and expenses in case the lawyer is audited,
- To provide a marketing opportunity for the lawyer in case the client needs future legal services. (The client who seeks copies of documents in an old, closed file more than likely has a present legal situation where add vice may be needed. If the lawyer has the original wills, then a probate may be required. Also, when the lawyers move the office location or changes law firms, business logic would dictate mailing notice of the move to all of the clients represented in the last several years.)¹
- To assist heirs who are unfamiliar with the subject matter of the representation after the death of the client.

When one considers the reasons why client files are retained, claims of professional misconduct or negligence, IRS audits or death, one can certainly understand why some lawyers hate to even think about when they should destroy files that might be used to protect themselves. Many lawyers still retain every single closed file that they ever had.

There are also dangers associated with destruction of client files. What if there is some original documents in the file that should have been returned to the client like a filed deed or a last will and testament? Does the client have the right to be notified before you destroy your copy of the clients file? If so, how many of those old addresses are still good? Even for the lawyer, a closed file might contain certain items worth keeping - a prized brief or a photocopy of a huge settlement check.

So, we will not attack the logic or practice of the lawyers who have decided to keep every single file. Certainly, if properly advanced preparations have not been made, the files cannot be destroyed without at least some review by the lawyer. Spending hours going through decade old files is not only an appealing but is certainly a big investment of non-billable time period deciding to rent a larger storage building for the new files may be the best business decision.

However, keeping every single client file forever has significant drawbacks. File storage space rental charges are not cheap these days (although cheaper than keeping the files in your office).



Of even more significance is the size of legal files now. Twenty years ago, the entire file for a simple uncontested divorce might only be a dozen sheets of paper. A "simple DUI" file might have even less. Now with visitation schedules, child support guidelines, QUADROs and the like in divorce cases and documents like alcohol breath test results and administrative hearings for driver's license suspension in all DUI cases, client case files are much larger. Client files are much larger than they used to be.

All too many client "files" are actually one or more banker boxes as opposed to a file folder.

So, you cannot afford to discard old, closed files and you cannot afford to keep them either. Is that just one of the many interesting aspects of practicing law these days? No, you just have to develop a policy that contemplates and outlines the steps of file closing and destruction.

How long should you keep the file? Well, that depends on what kind of file it is and how the lawyer evaluates the retention needs. You might have a general six-year retention rule but have exceptions for certain types of files and clients - certain criminal files, minors as clients (or recipients of benefits or rights within a matter)



might require the file be retained until majority, adoption files may need to be retained forever, title opinions or legal opinions for a certain period past the transaction, lease or ownership termination or transfer. Criminal cases where the client went to prison are another area to be carefully examined. It is also important to note that there is no statute of limitations for the prosecution of ethical complaints.² More important than the exact retention. Is the requirement that the lawyer - not a staff member - makes the decision. After all, it is your license on the line!

Several other jurisdictions have examined this issue and agreed that it is impossible to draw a "bright line" date.³ In particular, ABA Informal Opinion 1384 (March 14, 1977) cites "the continuing economic burden of storing retired and inactive files" and states that "[a] lawyer does not have a general duty to preserve all of his client files permanently. The opinion states that "Good common sense should provide answers to most questions that arise."

A Sample Case Termination Policy

Case matter termination procedures and policies are important administrative systems in all law offices. The case/matter termination procedures should treat closed files consistently, generate a case/matter close file letter telling the client questionnaire, ask for referrals and send another card, rolodex, or brochure to the client. The termination policy should also docket future dates and deadlines in addition to marketing follow up calls or letters.

Some firms use the termination procedures to do an internal client retention review for additional work should new wills be prepared following the sale, divorce, etc.) Or a completion termination of the client (the lawyer does not want to do any kind of work from this client ever again). A sample termination procedure should include:

- A complete review of the file contents by the lawyer in charge should be done to remove originals, with the originals being returned to the client (or party that provided them). abstracts should be returned to the owner of the property or sent to a title company for safekeeping with a transmittal letter and receipt being kept in a firm file for abstract receipts.

The lawyer may also have a separate file for opinion letters and other documents that have a life longer than the file.

- Research and potential forms should be duplicated in placed in firm research inform files (and properly indexed under the firm's research informs systems).
- the attorney should determine the file destruction date and send the file to the appropriate storage box (with other files scheduled for termination at the same time). the secretary should change the file index to reflect that the file has been closed, scheduled for destruction, the date an where the file is located.
- Originals should be sent to the client together with a file or case termination letter which informs the client that the matter is concluded, the representation on it is ended (a bright line for possible claims) and when they destroy date is for the file. (See sample at end of story.)
- Electronic files and documents should be subject to a similar procedure whereby the electronic file and documents in the file are archived. Our firm uses zip drive disks to store closed client files. The file index for the hard files should also reflect the location of the stored electronic files. We do not have a destruction policy concerning electronic files.
- It is probably a good idea to identify a single date each year that files scheduled for destruction that year are destroyed. One firm always make it's the last day of the year selected. The firm stores the closed files in boxes by destroy date (i.e., 2005-A for the first box scheduled for destruction 12/31/2005) and index the files so a file can easily be retrieved if necessary. Some files that are closed and put in storage may not have a destroy date - in those cases, file boxes are labeled DND-1, DND-2, etc. (do not destroy) and these files are also indexed by box number.

How should the files be physically destroyed? The lawyer should find a service in their community that will destroy (i.e., shred or bum) confidential files by the box. If you don't know of such a service, call your bank and find out who they used to destroy confidential and sensitive files and documents. The boxes should be sealed before delivery and the lawyer should get assurances that the boxes are not opened before they go in the jumbo shredder or incinerate. I suppose that if one were really paranoid about it, you could accompany your files to the shredder and observe.

Original Document Retention

In some instances, the client (or the lawyer) may want original documents to be retained by the lawyer - wills comment trusts, powers of attorney, antenuptial agreements, adoption records, abstracts, etc. In these instances, it might be appropriate to create separate files (using a different colored file to make them readily identifiable) to keep originals. Originals should be stored separately such as in a safe or fireproof file cabinet, and they should be indexed in the lawyers file system.

Where originals are kept by the lawyer, the copies that go to the client and copies in the lawyer's case files should clearly reflect where the originals are located and any special instructions that applied to the original documents.



Conclusion

If you only intend to practice a few more years and have lots of storage space, you may not be that concerned about the subject matter of this article. In discussing this with other lawyers more than one has had the comment that “their executor can handle it.” But no one knows about your files like you do. A small amount of extra work in your file closing system now can save you, your staff or your executor a lot of work in the future. Unfortunately, the client files that you would really enjoy burning maybe those you will have to designate DND anyway.

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Endnotes

1. We will not address here the ethical and contractual ramifications of law firm disillusions in partnership agreements. There are numerous issues when a lawyer changes employment in both the former employer/firm and the departing lawyer want to continue representing the client.
2. State Ex. Rel. Oklahoma Bar Ass'n v. Braswel, 975 P.2d 401, 1998 OK 49 '11'11 41 “This court has not considered whether a statute of limitations can be invoked in a disciplinary proceeding. Neither the ORPC nor its predecessor, the Code of Professional Responsibility, contains an express statute of limitations governing disciplinary proceedings, and we decline to create one. This court's responsibility to protect the interests of the public and of the legal profession require flexibility. A hard and fast rule establishing a time limitation on investigating attorney misconduct and an imposing discipline where warranted what interfere with this responsibility. Unless from the circumstances of the particular case it appears that it would be unjust or unreasonable to require a lawyer to respond to a grievance, we hold that no time period will per say bar a proceeding against a lawyer.”
3. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Op. 99-120 (10/6/99); Wisconsin State Bar Comm. On Professional Ethics, Formal Op. E-98-1 (5/22/98); American Bar Association Informal Opinion 1384 (March 14, 1977).

Lawyer and Lawyer
Attorneys and Counselors at Law
Address, Fax & Phone
[date]

[Client Name]
[Client Address]
[Client City, State and Zip]

Re: Final Statement for Service and Termination Letter for [matter description]

Dear [salutation]:

Enclosed you will find the final statement for the above referenced matter our firm is handling for you. If you have any questions concerning the statement, please call at your earliest convenience. The matter is now closed. Thank you for the opportunity to represent you in this matter.

As a reminder, you still need to _____.

We are also returning all of your original documents that we have in our possession concerning this matter. If you believe we still have some documents you provided us, please let us know immediately so that we might look for them before we put the file in storage. You should keep all your copies of the file and the various documents in a place where you can easily locate them.

We are now closing the file and consider the representation as to this matter to be terminated. Our file in this matter is scheduled for destruction in _____years so it is important that you let us know if there is anything in this file that you want or need and direct us in writing where you want documents sent.

As you may be aware, most of the law firm's business comes from the referral of the firm by satisfied clients to their friends and relatives. We would appreciate such referrals if others ask you about a lawyer.

If there is anything else we can do for you, please do not hesitate to call. Our firm would like to continue to serve as your legal counsel. With this position comes the responsibility to advise and counsel you on matters we are competent to handle an if requested, to assist you in obtaining suitable representation from outside lawyers and areas we cannot handle for you. We look at ourselves as an asset to our clients by providing timely, accurate legal services that are affordable to both the client and the firm. I have enclosed some additional information on **Firm Name** for your information. I have also enclosed a short questionnaire and would appreciate you taking a few minutes to fill it out and mail or fax it back to us.

Please call if you have any questions.

Very truly yours,

Signature