

SAVE OR SHRED

The ethics of destroying closed client files.

BY FRED C. MOSS

Three recent phone calls were similar: “I just lost a longtime client. I’m paying to warehouse years of the client’s closed files. Can I shred them?” The second asked: “I retired from practicing law. My garage is full of old client files. Can I shred them?” And the third: “Is there an ethics rule that requires me to retain closed files for a certain period of time?”

Other questions naturally arose: What is a lawyer’s duty if some clients can’t be found? Must a lawyer review every file before destroying it? Finally, can the lawyer simply toss destroyable files in a landfill?

My suggestion to the first caller was to invite the former client to take possession of the files. (In Texas, the client owns the entire file. See Texas Ethics Op. 570 (2006)). If the client won’t take them, I advised asking for permission to destroy the files. If permission is denied, then bill the former client for the storage costs. If the client refuses to pay, can the lawyer destroy the files without the client’s permission?

All of these questions stem from the fact that while Texas Disciplinary Rule of Professional Conduct 1.14(a) requires Interest on Lawyer Trust Accounts records to be preserved for five years after the representation ends, no rule mandates a minimum retention period for closed client files. The only guidance Texas lawyers have is Texas Ethics Opinion 627 (2013), along with common sense and advice from their malpractice insurers.

Opinion 627 addresses the disposal of a former client’s file after the lawyer who represented the client leaves the firm. First, the opinion finds that Rule 1.14’s reference to “funds and other property belonging ... to clients ... in a lawyer’s possession” and Rule 1.15(d)’s reference to “papers and property to which the client is entitled” do not deal with client files. Nevertheless, the opinion states, a lawyer’s ethical obligations to former clients provide guidance regarding the proper handling of closed files.

First, the lawyer’s continuing duty of confidentiality prohibits a lawyer from disposing of a file in a manner that could give unauthorized persons access to the file. Consequently, you cannot toss old files in the dumpster.

Second, lawyers may not harm the interests of former clients in matters where they provided representation. Thus, if a former client’s important interests could be jeopardized by destroying the file, the lawyer must pre-

serve it.

Third, as to how long a lawyer must preserve closed files, the opinion refused to draw a bright line with a definite number of years. Rather, it says a closed file must be preserved as long as the lawyer “has reason to believe there is a reasonable likelihood that important interests of the former client would be harmed by destruction of information and documents contained in the file.” Factors to be considered include how long the file has been closed, the nature of the matter, and normal business practices. Prior agreements and explicit client instructions may be dispositive.

However, many authorities advise against ever destroying a closed file before the longest statute of limitations expires on all likely causes of action that might be brought against the lawyer by the former client or by third parties against the former client. Indeed, it may be an unconsentable conflict of interest for a lawyer to ask a former client for permission to destroy the file before the former statutes have run.

Finally, citing Rule 1.14(a), Texas Ethics Opinion 570, and a Texas court of appeals opinion, Opinion 627 notes that a lawyer is obligated to return property belonging to the client and, on request, to turn over the entire file. If the file contains property belonging to the client, it must be returned or destroyed only with the client’s permission.

Opinion 627 notes that clients often give their lawyers original documents and property such as deeds, contracts, jewelry, currency, stocks, and bonds. Original business records or documents that create or extinguish legal rights or obligations should never be destroyed without the client’s permission unless they are clearly and unequivocally no longer of consequence.

Must every file be combed through for valuable client property before destruction? “It depends,” Opinion 627 says. In some matters, it is highly unlikely that the client would have given the lawyer valuable documents or property. Or, the firm may have a rigorously followed practice of culling recently closed files and returning the clients’ valuables. In such instances, the lawyer would, according to Opinion 627, “have an adequate basis for assurance” that no such items are in the files, and a review before destruction would not be necessary.

But in other matters, such as estate planning, it is likely

that valuable client property, such as wills or trust papers, may remain in the closed file. In these situations, according to the opinion, there should be at least “a brief visual review” of the files to ensure that valuable client property is not destroyed.

Must every former client whose file the lawyer possesses be contacted and offered the file or be asked for permission to destroy it? Opinion 627 raises the question but dodges the answer. It certainly would be the best practice to try to do so, but it is doubtful that this is ethically required. Only when a lawyer has a former client’s valuable property or documents must the lawyer make a reasonable effort to contact the client and seek instruction on what to do with them.

What if the lawyer cannot find the former client? Opinion 627 does not address this. However, Texas Ethics Opinion 602 (2010) advises that lawyers may send abandoned client property to the state’s unclaimed property agency (Tex. Prop. Code §§ 72-76). Otherwise, the lawyer must segregate and preserve the property until the former client is found.

Based upon Opinion 627, other state ethics opinions and rules, and the recommendations of various malpractice insurers, here are some practical pointers:

1. Lawyers are not required to preserve closed files indefinitely.
2. Return the file to the client at the conclusion of the matter or after an agreed period of time.
3. If the lawyer retains the file when the representation ends, promptly return all valuables to the client.
4. State your file retention policy in all retainer con-

tracts and termination letters.

5. No matter how old the file, if destroying it could prejudice the former client, preserve it or return it.
6. Absent a law, rule, regulation, or court order requiring a longer retention period, closed files should be kept at least until all statutes of limitations on actions against the lawyer and the client have expired.
7. Never ask a client to consent to the destruction of his or her file before the pertinent statutes of limitation have run out.
8. In criminal matters, a convicted client’s file should be retained until the expiration of the sentence, all appeals, or any statute of limitation on actions against the lawyer, whichever is longest.
9. If you have a warehouse full of old files, schedule regular “file-culling parties” where the entire firm spends a weekend identifying files that can be destroyed.
10. Get file retention policy guidance from your malpractice insurer. Or, Google “lawyer file retention policy.” Several insurers have posted file retention guidelines for all to see. **TBJ**



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