



Guidelines for Closing and Purging Files

The Alabama Rules of Professional Conduct do not contain any specific regulations regarding the length of time client files must be retained or the method by which they must be disposed of. While there is no obligation to preserve client files forever, your clients and former clients reasonably expect that you will not prematurely or carelessly destroy any of the valuable or useful information in their files. Likewise, they reasonably expect that when you do dispose of their files it will not be in a manner that results in the release of confidential information. Disposition of instruments from a file depends on the specific nature of the instrument and the particular circumstances of the situation.

The best approach is to include information about your file retention and destruction procedures in your engagement letter or employment contract. This will let the client know up-front when to expect to receive the contents of the file. Then, when closing a file at the conclusion of the representation, you should make immediate contact with each affected client to determine at once whether the client wants the file returned. This is the most convenient time to resolve this issue because you should be able to easily contact the client, and you can incorporate this process into your file closing procedure. If you fail to address the issue in your engagement letter or to contact the client about file disposition at the end of the representation, you will have to do so later, when contacting the client will probably be much more difficult, time consuming, and expensive.

As soon as a matter is completed, the file should be stripped. The responsible attorney should review it and place everything of value at the front or otherwise mark these items to make certain that they are not accidentally destroyed when the file is later purged and finally disposed of. Stripping also involves the removal of all extraneous material such as pads, pencils, and clips, and the removal and destruction of multiple identical copies of documents. Some firms remove message slips, drafts of briefs, case lists and copies of cases, and other materials of this sort at this time. Whether or not you remove an item at the conclusion of the case should turn on whether or not you reasonably anticipate that either the client might need it at a later date or you might need to produce it for your own protection.

If the client wishes for the file to be returned at the conclusion of the matter, you should copy it before releasing it and retain the copy for a reasonable period of time, for both your own protection and that of the client. If the client does not want the file returned, you should document that fact and diary the file, in accordance with your firm's file retention policy, for final review and disposition on a date certain. If you did not resolve the issue of return of the file at the conclusion of the case, you must attempt to contact the client prior to the destruction of a file which has been stored for an extended period of time.

The General Counsel has established minimum guidelines for file retention and destruction, and they are found in Formal Opinion No. RO-93-10. A copy of this opinion is available from the Office of the General Counsel. Although the major points of the opinion, and some additional suggestions, are contained herein, you must contact the Office of the General Counsel if you wish to obtain an informal opinion, which you may later rely on, regarding a specific fact situation.

- With respect to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer or law firm's office or at some secure off-site location.
- Any medium that preserves the integrity of the documents in the file, whether by maintaining the original paper file, microfilming the file, or by electronically scanning the file, is appropriate.
- When reviewing files to be closed, the contents should be segregated into the following categories:
 - Documents which are clearly the property of the client and which may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client. Examples would be wills, promissory notes, deeds, bills-of-sale, children's birth certificates, etc.
 - Documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned. Examples would be original tax returns, bank statements or other original financial or business records.
 - Documents from any source which may be of some future value to the client because of some future development that may or may not occur.
 - Documents which do not fall into any of the other categories. Examples would be phone message records, drafts of briefs or pleadings, copies of cases, etc.
- If the client does not want the file at the conclusion of the representation, those documents which fall into the first category above should be retained for an indefinite period of time or, preferably, should be recorded or deposited with a court, if appropriate.
- Those documents falling into the second and third categories should be retained for a reasonable period of time, at the end of which, if you do not have an agreement with the client to the contrary, reasonable attempts should be made to contact the client and deliver

the documents to him or her. Reasonable attempts to locate a client can, and often do, involve certified mail and newspaper notice.

- Documents which fall into the fourth category can normally be destroyed unless you feel that there is some good reason to retain them, either for the client's protection or your own.
- There is no specific length of time which constitutes a reasonable retention period for all files. It depends on the nature of the documents in the file and the attendant circumstances. The length of time is more a matter of the specifics of the case and the lawyer or firm's policy rather than any external requirement. Certain types of files may need to be retained for longer periods of time than others. In establishing a policy on retention, remember that the statute of limitations under the Alabama Legal Services Liability Act is two years. The statute for filing formal charges in Bar discipline matters is six years. Thought should also be given to the nature of the underlying matter, and what constitutes a reasonable length of time to retain a file in that type of case. What are the chances that the matter will be re-opened at a later date, and what are the client's reasonable expectations?
- Absent unusual circumstances, it is the Disciplinary Commission's view that six years is a reasonable time to maintain a file after the case is completed, although certain types of matters, such as those which deal with the rights of minors, may call for longer file retention times. The following are some factors to consider when establishing your minimum retention periods for particular types of files:
 - IRS Records - Retain for seven years. IRS Regulations give six years to pursue any omission of more than 25% of income. Add one year for cushion. Clients should be advised to keep tax returns permanently.
 - Estate Planning - Retain until death of the client plus probate period.
 - Probate - Retain until the estate is settled and all IRS audit periods have passed. Remember to consider statutes which may be based on fiduciary duties.
 - Criminal - Retain until all appeals and post-conviction relief time periods, including habeas corpus, have expired.
 - Divorce - Retain until all designated time periods for support or performance of any terms under court order or settlement agreement have expired. Be sure to consider the dates children reach majority, potential post majority support situations, and retirement issues.
 - Personal Injury - Retain until paid in full or all sources of recovery have been exhausted and payments (including liens) have been fully resolved. Be sure to consider special circumstances, such as rights of minors after reaching majority.
 - Real Estate and Commercial Transactions - Consider potential for future activity, such as exercise of options, extension of leases, etc.

- Administrative Cases - Many agencies have rules concerning disposition of files; check is the agency or review it's regulations for the appropriate time period, and then add a reasonable cushion.
- Before destroying any file, it should always be reviewed again, just to be sure nothing has changed that would cause you to deviate from the schedule for final disposition. It is a good idea to have files microfilmed, microfiched, or scanned and stored on disc, if you feel that issues related to the file, or the client, may continue to arise. The cost to do so is relatively nominal, this reduces storage costs to almost nothing, and you never have to worry that you made a mistake in purging a file too soon.
- Always maintain a complete index of all files destroyed including the date on which they were destroyed. It can sometimes be helpful to maintain a list of items destroyed.
- For protection against claims that you destroyed a file to hide evidence of malpractice or misfeasance, never destroy a file except in strict conformance with your written file destruction policy.
- Remember that, even in the course of destruction, client confidentiality must be maintained. Use appropriate methods for file destruction, such as shredding or incineration.
- Pursuant to Rule 1.15 of the Alabama Rules of Professional Conduct, trust account records and records regarding receipt and release of other client and third party property *must* be maintained for a minimum of six years.