



J. ANTHONY MCLAIN



Retention and Destruction of Client Files

QUESTION:

"I am seeking an ethics opinion from the Alabama State Bar regarding the retention, storage and disposing of closed legal files.

"My law firm is quickly depleting its in-house storage capacity. I have been asked to review methods of data storage and retrieval such as microfilm, off-site storage and electronic scanning. Before exploring these options, I am requesting your assistance in formulating a reasonable plan that complies with all applicable rules and statutes.

"I am aware of the requirement to retain a client's file for six years after the case has reached its conclusion. How may the file be stored? Must the file remain in 'hard copy' form or may it be transcribed to another medium? Please identify all statutes and rules of conduct relating to this process and any other ethics opinions.

"Once a file is closed, may certain portions of the file be returned to the client? What is an attorney's obligation regarding the portion of the file returned to the client? After the six-year interval, what is the appropriate method of disposing of a client's file?"

DISCUSSION:

A lawyer does not have a general duty to preserve all his files permanently.

However, clients and former clients reasonably expect from their lawyer that valuable and useful information in the client's file, and not otherwise readily available to the client, will not be prematurely and carelessly destroyed. ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 13384 (March 14, 1977).

While there are no specific rules in the *Alabama Rules of Professional Conduct* regarding the length of time a lawyer is required to retain a closed file or the disposition of that file after a lapse of time, the Disciplinary Commission established the following guidelines in Formal Opinion 84-91. The answers to the above questions depend on the specific nature of the instruments contained in the files and the particular circumstances in a given factual situation.

For that reason, the file should be examined and the contents segregated in the following categories: (1) Documents that are clearly the property of the client and may be of some intrinsic value, whether delivered to the lawyer by the client or prepared by the lawyer for the client, such as wills, deeds, etc.; (2) Documents which have been delivered to the lawyer by the client and which the client would normally expect to be returned to him; (3) Documents from any source which may be of some future value to the client because of some future development that may or may not materialize; and, (4) Documents which fall in none of the above categories.

Documents which fall into category one should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories two and three should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him or her. Documents which fall into category four could be appropriately destroyed. With regard to time, there is no specific period that constitutes "reasonable" time. It depends on the nature of the documents in the file and the attendant circumstances.

Since the file is the property of the client, theoretically it may be immediately returned to the client when the legal

matter for which the client is being represented is concluded. For a variety of reasons, lawyers and law firms usually maintain client files for some period of time ranging from a few years to permanent retention. The length of time is more a matter of the lawyer's or the firm's policy rather than any externally generated requirement. In establishing this policy, it would not be unreasonable for the lawyer or law firm to consider that the statute of limitations under the Alabama Legal Services Liability Act is two years and six years for the filing of formal charges in bar discipline matters. (In some cases the time period may be extended.)

At the expiration of the period of time established by the lawyer or law firm for file retention, the following minimum procedures should be followed for file disposition.

First, the client should be informed of the disposal plans and given the opportunity of being provided the file or consenting to its destruction. If the client cannot be located by certified mail or newspaper notice, the file should be retained for a reasonable time (absent unusual circumstances, it is the commission's view that six years is reasonable) and then destroyed, with the exception of those documents classified as category one above.

Second, prior to destroying any client file, the file should be screened to ensure that permanent type (category one) documents and records are not destroyed. Third, an index should be maintained of files destroyed.

With regard to storage, files may be stored in any facility in which their confidential integrity is maintained. This may be in the lawyer's 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 microfilm or by electronic scanning, is appropriate. [RO 1993-10] ▲▼▲

IN THE SUPREME COURT OF ALABAMA

April 23, 2008

ORDER

It is ordered that Rule 1(a)(2), *Alabama Rules of Disciplinary Procedure*, be amended to read as follows:

"(2) *Incumbent Judges*. Incumbent judges are subject to the jurisdiction of the Disciplinary Commission and the Disciplinary Board of the Alabama State Bar during their terms of office for misconduct occurring before they became judges."

It is further ordered that this amendment is effective immediately. It is further ordered that the following note from the reporter of decisions be added to follow Rule 1:

"Note from the reporter of decisions: The order amending Rule 1(a)(2), *Alabama Rules of Disciplinary Procedure*, effective April 23, 2008, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 2d."

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Bolin, and Murdock, JJ., concur. Parker, J., dissents.