



GUIDELINES FOR CLOSING AND PURGING FILES

It seems relatively easy to set up a filing system and add files to it. But what do you do when you absolutely run out of room to store any more files? Which ones do you get rid of? When do you dispose of them, and how do you go about doing it? And what ethical obligations do you have with respect to file storage and disposition?

What seems, at first glance, like a simple clerical task can spiral into an ethics nightmare if you're not careful. Every lawyer needs to understand the professional obligations related to file maintenance, production, retention, storage and destruction, and to have a good system in place to make sure that those obligations are properly met at every stage of the process.

While the Alabama Rules of Professional Conduct do not contain any specific requirements regarding the methods for maintaining client files, the length of time those files must be retained (other than financial records as set forth in Rule 1.15), or the method by which they must be disposed of, **the Disciplinary Commission of the Alabama State Bar issued Formal Opinion 2010-02 on October 27, 2010, giving guidance on many of these issues as well as issues relating to file ownership and production, and the need for backup of electronic data.** All lawyers should consider the opinion mandatory reading, because it makes explicit as ethical requirements many activities that previously would have simply been considered best practices.

Opinion 2010-02 requires that lawyers:

- develop a system for dealing with client files;
- keep individual client files organized contemporaneously and with an orderly index system;
- establish a file retention schedule;
- notify clients in writing of the firm's retention practices and schedule when the matter is accepted;
- remind clients of the retention schedule at matter close;
- produce and turn over the "entire" client file (as defined in the opinion) when required;
- preserve document having intrinsic value even after the rest of the file is destroyed; and
- handle disposition of their client files confidentially, according to the requirements of the opinion and the lawyer's file management system.

This article deals with issues lawyers must consider to make an orderly and ethical disposition of client files. Please see the opinion and other materials available from the Practice Management Assistance Program for additional information on managing files and your ethical obligations regarding production of the file and turnover to the client upon request.

What is the client file?

The opinion adopts the “entire file” approach, which holds that everything in the file belongs to the client. This includes client intake sheets, conflict of interest review sheets, copies of cases, phone message slips, notes you wrote to yourself about the screaming need to check out parts of the client’s story or to get paid up-front, and even the cute little bunny rabbits you doodled on the margin of your notes as you defended a deposition. The entire file means just that, although the opinion sets out limited exceptions to the requirement to produce the entire file.

According to the opinion, the “entire file” approach fosters “...open and forthright lawyer client relations.” The fiduciary relationship between the lawyer and client requires that the lawyer be candid with the client and not withhold documents without good cause. This may cause you to rethink your business processes, redefine operating business records of your practice and where they are stored, and make different decisions on what items are to be placed in an individual client’s file, in light of both the spirit and the letter of the opinion.

The vast majority of documents created in law firms are now created electronically, although they are often also printed out. The opinion includes all electronically created or stored materials in the definition of the client file, and imposes the same obligations to segregate and organize materials for specific matters and to protect the confidentiality, security and integrity of such materials as is required for paper-based files. The opinion also requires that such materials be backed up in some way to prevent loss. While the opinion does not explicitly state it, because electronic documents constitute a part of the client’s file, it follows that they should not be destroyed (deleted) except in accordance with the firm’s file retention and destruction policy.

How long must client files be kept?

While there was, and continues to be, no overall obligation to preserve all 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. In support of this idea, the opinion states that “...special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer or the administration of justice.”

Disposition of instruments from a file depends on the specific nature of the instrument and the particular circumstances of the situation. The Disciplinary Commission has made an effort to balance the needs of the client with the problems that the lawyer will face when meeting those needs. Under Formal Opinion 2010-02, lawyers are still prohibited from destroying documents with intrinsic value, and are required to maintain valuable and useful information, not otherwise available to the client, for a reasonable period of time. And they must continue to prevent the premature or inappropriate destruction of client files. While the opinion states that you do not have to maintain client files forever, it clearly states that there may be circumstances in which files must be maintained indefinitely.

According to the opinion, all files and other materials must be kept for a minimum of six years after termination of the representation, and it further explicitly sets forth that failure to do so is presumptively unreasonable based on the statutes of limitations for the Legal Services Liability Act (§6-6-574, Code of Alabama 1975, as amended) and the period for filing formal charges in lawyer discipline matters under the Alabama Rules of Disciplinary Procedure. Retention policies may vary from lawyer to lawyer, client to client, and matter type to matter type within the same firm, but they must always be appropriate to the type of matter and the client's level of "education, sophistication, resources and other relevant circumstances."

How does a file retention and destruction policy work in real life?

You should develop file retention and destruction procedures for each of the types of matters that you handle, and include information about those 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 or someone from your office 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. Failure to address the issue in your engagement letter and to contact the client about file disposition at the end of the representation is now unethical, and doing so later, when contacting the client will probably be much more difficult, is both time consuming and expensive.

As soon as a matter is completed, the file should be stripped in accordance with the "entire file" approach set forth in the formal opinion. The responsible attorney should review it and place everything of intrinsic 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.

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 in accordance with your retention schedule, for both your own protection and that of the client. This copy can be either a hard copy or an electronic copy which is backed up. 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 on a date certain and disposition thereafter. If for any reason 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 close of the matter is also a good time to determine whether any of your electronic documents from the matter can be reused in the future. If so, identifying information for the current client should be removed from both the file and the file's metadata, and the resulting form document should be saved with a new, descriptive name in a folder containing forms. You should then transfer all electronic files in the matter to an inactive folder, and either place a reminder in the paper file or create a calendar tickler to delete the electronic file on the same date that the paper file is finally destroyed. If electronic documents are to be retained for a very long period of time, it may be beneficial to "archive" them to a format, such as PDF-A, which may be useful beyond the life of the native format in which they were created.

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, and includes internet or "cloud based" solutions for electronic file storage, provided you have done adequate due diligence on the confidentiality and security measures of the provider. Any medium that preserves the integrity of the documents in the file, whether by maintaining the original paper file or by electronically scanning the file, is appropriate.

The Practice Management Assistance Program has prepared a sample firm file retention procedure, including sample forms and client letters, which is available upon request. It should not be relied on as legal or ethical advice, but can be used as a guide to help you draft suitable policies and procedures for your firm.