

Running Out of Space? Obligations and Suggestions Regarding Closed Client Files

As lawyers retire, consolidate offices, downsize, or just run out of room, I am often asked, "How much longer do I have to keep these files?" It would seem as though this would be a simple question to answer, but, as is often the case in ethics, it is not.

There is only one Vermont Rule of Professional Conduct that specifies how long a record of anything must be kept. Rule 1.15(b) states, in pertinent part: "Complete records of such [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation." This six-year rule applies only to accounting records, not client files.

It appears that there is no other legal guidance on this subject in Vermont save Vermont Advisory Opinion 97-08, issued by the Vermont Bar Association Professional Responsibility Committee in 1997.¹ It is very helpful and recommended reading. In researching the law of other states, I found that similar bar association advisory opinions are based largely upon ABA Informal Opinion 1384 issued in March 1977.² Despite its age, this ABA opinion remains the seminal authority on file destruction, and is worth revisiting.

ABA Informal Opinion 1384 sets forth eight factors that a lawyer should consider before making any decision to destroy a client file. Briefly summarized, they are:

1. return client property, particularly originals;
2. retain anything necessary for your own defense;
3. retain what the client expects you to preserve;
4. make decisions based on content, not just age;
5. preserve accounting records³;
6. protect confidentiality when destroying documents;
7. screen all files before destroying their contents; and
8. keep an index of the files destroyed.⁴

Vermont Advisory Ethics Opinion 97-08 adds two more factors:

9. heed government imposed rules; and
10. keep administration of estate records indefinitely.⁵

The opinion warns that there may also be applicable state statutes to consider or rules of the malpractice carrier that should be ascertained. Federal rules and laws should not be overlooked in such categories as bankruptcy, federal taxation, and environmental protection laws. Any lawyer familiar with government practice knows this is a daunting task.

These are broad guidelines and do not give the lawyer a specific time period. Many lawyers simply apply the six-year limit of Rule 1.15(b) by analogy to all records—including case files—and are done with it.

Blindly applying a six-year rule to all client files, however, without consideration of the content of the files, can be dangerous. Six years might not be enough to protect the interests of both the lawyer and the client. Instead, let file content dictate when it is time to destroy a closed file. *What material is retained is as important as how long it is retained.*

Before turning to guidelines that may assist in valuing various documents, the lawyer should be aware of two other relevant rules: VRPC rules 1.16(d) and 1.6(a). Rule 1.16⁶ advises that at the end of the representation, the lawyer must surrender all papers and property to which the client is entitled.⁷ The original file belongs to the client, not the attorney.⁸ Turning the client file over to the client without more, however, is generally not advisable. Many lawyers routinely make a copy of the file before releasing it because at some unforeseeable time it might be needed. A malpractice suit, a third-party action, or perhaps a disciplinary inquiry could make these documents essential. Client files contain considerable work product in the form of memos, pleadings, research material, and notes that still holds value for the lawyer. Whatever issue might arise later is rarely predictable, especially when the lawyer is trying to make that prediction just as the representation has ended.

Rule 1.6(a)⁹ advises the lawyer to protect the confidentiality of information relating to the representation. This is a broader requirement than that in the former Code of Professional Responsibility, which required that

the confidentiality of secrets and confidences of the client be maintained. The obligation to protect confidential information extends beyond the time during which the lawyer is actively representing the lawyer. The duties of loyalty and confidentiality may extend far into the future. Consequently, the lawyer has to use care in deciding where to put a closed client file. A locked file drawer, vault, warehouse, or rented storage space might be secure enough for the storage of physical files. The lawyer's basement, garage, or barn are usually accessible to other people and, therefore, not the best place to put client files.

Many lawyers are now scanning files into electronic format and discarding original files.¹⁰ If hard copies of confidential files are to be discarded, they should be shredded, burned, or otherwise destroyed in a way that will preclude access by unauthorized people. The person who does the data input or scanning should be a person who is also bound by confidentiality restrictions.

What Is to Be Retained?

With these ethical considerations in mind, it is possible to take a few prophylactic steps at the beginning of the representation that may minimize the eventual burden of retaining closed files.

At the beginning of the representation, the lawyer should advise the client as to how the client file will be treated when it is within the lawyer's possession, what the client's obligations are to retrieve it, and how and when retained client files will be destroyed. This informed consent might be obtained as part of the fee agreement.

The lawyer should consider creating and implementing a written policy on record retention. These policies often include information such as use of model initial fee agreements regarding inactive files, guidelines for culling files, schedules for destruction of inactive files, and assignment of specific tasks to specific lawyers and staff members in order to avoid confusion and ensure accountability.¹¹

When the representation has

concluded, a notice of destruction policy and a statement of the client's right to take the file should be sent to the client, perhaps along with the last bill or a letter of termination. Regardless of whether these recommended steps are taken, copying files eventually becomes a priority. The end of the representation is a time when the lawyer has a significant opportunity to control the size of an inactive file. The lawyer should make an initial examination of the file, page by page, and designate what material will not be copied and saved. Making this preliminary purge of documents will probably be annoyingly burdensome, but it will save the lawyer far more money, time, and trouble in the long run. It is the ideal time for this task because, fresh from ending a representation in a particular case, the attorney is best able to recognize what materials are irrelevant and unimportant.

There are a few basic steps in culling the client files for the purpose of making a copy to be retained and stored until a more particular examination and decision can be made. First, all original documents should be identified, copied for the lawyer's file where lawful and practicable, and returned to the client. When the client takes delivery of these originals, a signed receipt or other documentation of when and how delivery occurred should be placed in the retained client file. Second, all extraneous material should be removed. Material that may not be necessary to retain include: duplicates; research notes; message slips; first drafts; boilerplate pleadings based on a retained form; copies of public records; filed pleadings that are, therefore, available elsewhere; and published material downloaded or copied from places where another copy is available. Third, remove all the research material and file it in a more readily accessible place, such as a legal reference file maintained according to subject.

The lawyer is then in a position to give the full client file to the client while retaining the copy that has been purged. Eventually there will come a time, sometimes specified in a file retention policy, when there will be a second review. At this point the attorney will exercise experience and judgment to decide how long the file should be kept based upon its contents.

General Time Lines

Below are suggested voluntary guidelines, developed in other states,¹² which may be worth the Vermont lawyer's consideration. These are only guidelines, suggested by other writers who often contradict each other. The guidelines are offered here only because they are, hopefully, better than nothing.

Criminal Defense

Client files should be retained for at least six years after the end of the client's sentence. Some commentators recommend retaining these files as long as the client is alive.

Personal Injury

Client files should be maintained for five years after final judgment or dismissal, or six years after a minor comes of age.

Guardianship and Trusts

Financial records should be maintained indefinitely. Other documents should be retained for six years after the guardianship or trust terminates.

Other Probate Matters and Estates

Client files should be retained for ten years after final judgment. Tax records should be maintained indefinitely.

Family Law

Client files should be maintained for six years after final resolution. Files should be retained for five years after a marital settlement expires. Permanent electronic records are recommended before file is destroyed.

Real Estate

Except as to tax requirements, files should be retained for six years after closing, foreclosure, or other completed events.

Leases

Client files should be maintained for five years after termination of the lease.

Tax matters

Client files should be retained for at least six years and indefinitely if there is a hint of possible fraud.

Contracts, Notes, Any Other Matters with Long Statutes of Limitation

Files should be retained for fifteen years. Another suggestion for contract actions is five years after satisfaction of judgment, one year after dismissal, or

five years after filing if not brought to trial.

Bankruptcy

Files should be retained for five years after discharge, payment, or any other event in which there is no reasonable expectation of payment.

Old Original Files

While much of this may be helpful to a new attorney dealing with new files, it is not of much value in the situation where many older lawyers now find themselves: the client never took the original file, or perhaps it was never proffered, and the lawyer has been keeping it for many years. Some of these files can be very old indeed and the location of the client long since lost. Nevertheless, all lawyers (or their heirs) eventually get to the point where enough is enough and it is time to destroy documents.

If the lawyer never received the client's consent to destroy what is essentially client property, a good faith effort must be made to obtain it. Typically, letters are sent out to the last known address of the client. The letter states that it is time to come retrieve the file, that the file will be held for a certain number of days, and that it can be retrieved from the lawyer at a specified location.

These letters often come back undeliverable. The client has relocated with no available forwarding address or is deceased, heirs unknown. In a final effort to provide notice, the lawyer could publish this information in the newspaper. In all probability, these actions will satisfy the lawyer's due diligence obligation.

Eventually the lawyer may have to destroy original files containing original documents. If left with that alternative, hopefully the lawyer will do so in a way that will preserve the confidential contents. Ultimately, as the VBA ethics opinion advised a decade ago, whether or not boundaries are crossed will depend upon "sound exercise of good professional and business judgment."¹³

Wendy S. Collins, Esq., is Bar Counsel with the Vermont Professional Responsibility Program. She is available to consult with you confidentially regarding your ethics questions and can be reached at 802-859-3000 or 802-828-3204.

¹ Advisory Ethics Opinion 97-08, available at <http://69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/>

Advisory%20Ethics%20Opinions/Conflict%20of%20Interest/97-08.pdf

² Some of the most helpful opinions are: Maine Opinion 183, 185 (2004); Missouri Ethics Opinion 2002-0147 (2001); Virginia Ethics Opinion 1818 (2005); New York State Ethics Opinion 680 (1996); North Carolina Ethics Opinion RPC 234 (1996); and ABA Informal Ethics Opinion 1127 (1970).

³ The subsequently enacted ABA Model Rule 1.15(b) took care of that issue.

⁴ ABA Advisory Ethics Opinion 1384 (1977), available at <http://www.abanet.org/cpr/ethicsearch/lawyer.html>.

⁵ VBA Ethics Opinion 97-08, *supra* note 1.

⁶ VRPC Rule 1.16(d) states:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

⁷ The rule does not apply to lien papers. Exactly what the client is entitled to and the applicability of the attorney retaining lien will not be discussed here. For purposes of this article, it is assumed that there is no dispute between lawyer and client about these issues.

⁸ See Wendy S. Collins, *Ethics Matters: Ethical Handling of Client Files*, Vt. B.J., Spring 2006, at 24.

⁹ VRPC Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ... " See also Arizona Ethics Op. 07-02, June 2007, available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=694> (if client requests rightful access to documents which attorney has digitalized, attorney is obliged to provide them in a readable form, even if it means making hard copies).

¹⁰ The lawyer should also consider what medium is used for storage as technology continues to evolve rapidly. Today's technological cutting edge may be obsolete by next year. Lawyers who formerly transferred files to microfiche and floppy disks find they must now keep obsolete software and hardware in order to access the electronic files.

¹¹ See J.R. Phelps & Terri Olson, *When May I Destroy My Old Files?*, Fla. B.J., Jan. 1994, available at <http://www.floridabar.org/tfb/TFBMember.nsf/840090c16eedaf0085256b61000928dc/f48127510e77e68b85256f800050dc30?OpenDocument>, for suggested form letters and destruction policies.

¹² These guidelines are based on other resources cited here and especially Mittman, *Spring Cleaning: A Dozen Pointers for Purging Files*, THE YOUNG LAWYER, April 1997, reprinted in J. KAN. B. ASS'N, May 1997, at 18; and Demetrios Dimitriou, *Client Files: To Destroy or Not to Destroy? That Shouldn't Be the Question*, Wis. B. BULL., July 1981, at 54.

¹³ Advisory Ethics Opinion 97-08, *supra* note 1.

