

# ADVISORY ETHICS OPINION 97-08

## **SYNOPSIS:**

A lawyer must exercise discretion in determining the necessary length of time for the subsequent retention or disposition of a client's file. The contents of certain files may indicate the need for a longer retention period than do the contents of files of similar age based on their relevance and materiality to situations which may foreseeably arise. Moreover, in disposing of a client's files, a lawyer should protect the confidentiality of its contents.

If possible, notice may be given the client as to the date of disposition, affording the client the opportunity to take possession of all or part of the material in the file.

## **FACTS:**

The inquiring lawyer has indicated that his firm's files have grown beyond his firm's reasonable storage capacity. He has asked for advice concerning the firm's professional responsibility in connection with the disposition of files which relate to the representation of or services rendered to clients once the matters then considered were resolved or terminated and the files are considered to be "closed" and/or retired.

The inquiring lawyer also asks whether the client should be informed if a file is to be destroyed and, if so, what the proper method of notice should be.

## **DISCUSSION:**

First, it should be clearly understood that the questions posed do not involve a lawyer's retaining lien or the right to withhold contents of a file from a client or another lawyer later representing the said client. These are questions of law and this Committee has no jurisdiction to give opinions on questions of law.

It is our opinion that all lawyers continually face the economic burden of storing retired and inactive files. This problem is primarily a matter of business judgment and not strictly one of ethics or professional responsibility. Having stated this position, the Committee would indicate that a lawyer does not have a general duty to keep all files permanently. The public interest will not be served by unnecessary and unavoidable costs for legal services generated by substantial storage fees. Conversely, clients can reasonably expect that valuable and useful information in the lawyer's files will not be prematurely or carelessly destroyed.

The Code of Professional Responsibility, and the Model Rules presently under consideration by the Vermont Supreme Court, do not set forth any guidelines on this subject, nor has this Committee previously issued an opinion directly dealing with this issue. Inquirers have generally been referred to Informal Opinion I384 of the American Bar Association issued March 14, 1977, which dealt with the same subject matter.

## **CONCLUSION:**

We cannot state that there is a specific time during which a lawyer must preserve files and, beyond which, he or she is free to destroy them. The sound exercise of good professional and business judgment should provide answers to most storage and/or retention questions that may arise. The Committee, having the foregoing limitations in mind, suggests the following non-exhaustive considerations:

1. Without prior notice and client consent, a lawyer should not destroy or discard items that clearly belong to the client, the return of which could reasonably be expected by the client, including original records.
2. Care should be taken not to destroy or discard any materials that may still be necessary or useful in the assertion or defense of the client's position in a factual situation where the applicable statute of limitations has not expired.
3. Attention should also be paid to governmental or law-imposed requirements, e.g., federal tax preparation requirements [IRC §6107 (b)].
4. A file should not be destroyed without being screened so as to determine that consideration has been given to the matters set forth above.

5. In disposing of a file a lawyer should always protect the confidentiality of its contents, as proscribed by DR 4-101.
6. An index of destroyed files should be retained by the lawyer.
7. Files on the administration of estates should be kept indefinitely.

In response to the inquiring lawyer's question relative to informing the client of the intent to destroy a file, we understand that some lawyers follow a policy of retaining files for a stated period, and then mailing a letter to the last known address of the client advising that the file is going to be destroyed after a stated number of months. The client is invited to come to the office to pick it up or otherwise to take possession of all or part of the materials in the file. Failure of the client to accept the invitation results in the file being destroyed at the scheduled time. The Committee believes this procedure, among others, is worthy of consideration.

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We also note that the Ethics Advisory Committee of the South Carolina Bar in its Opinion 92-19 stated that "An appropriate period for retention of records of any client property in the files is six years after the representation ends."<sup>1</sup> The Ethics Advisory Panel of the Rhode Island Supreme Court in its Opinion 94-9 stated that "A lawyer may dispose of closed client files after seven years."<sup>2</sup>

Lawyers seeking further advice relative to record retention/destruction procedures will find helpful suggestions in the following articles:

Dimitriou, "Client Files/To Destroy Or Not To Destroy?--That Shouldn't Be The Question", **LEGAL ECONOMICS**, Jan/Feb 1981, Vol. 7, No. 1, p. 17.

Cullivan, "Problems & Solutions In Records Management", **LEGAL ECONOMICS**, Sept/Oct 1983, Vol. 9, No. 5. p. 45.

Lupinacci, "Miles of Files", **LAW PRACTICE MANAGEMENT**, September 1989, Vol. 15, No. 6, p. 41.

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<sup>1</sup> Rule 1.15.

<sup>2</sup> R.I.G.L. 1956 sec. 8-14-2:Rule 1.16.