

DISPOSITION OF CLIENT FILES

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“How long do I have to keep a client file after the representation has ended?”

This is one of the most frequently asked questions of the Ethics Helpline. So what is the answer? It depends. Unfortunately there is no clear-cut answer for how long you must keep your files. Each matter is different. That is why it is so important to have a record retention policy in place in your office and to follow that policy.

I. Ethical Issues with Regard to File Retention/Destruction

The ethical issues involved in file retention and destruction will be the focus of this article.

What ethical duties do lawyers have regarding file retention?

A. Michigan Rules of Professional Conduct (MRPC)

The Michigan Rules of Professional Conduct set forth lawyers' ethical obligations. The MRPC place many duties on lawyers with respect to their clients which relate to the issue of file retention. Among these duties are: the lawyer shall act with reasonable diligence and promptness (MRPC 1.3); the lawyer shall communicate with a client and comply promptly with all of a client's reasonable requests for information (MRPC 1.4); the lawyer shall keep a client's confidences and secrets (MRPC 1.6); the lawyer shall safeguard client funds and property that come into the lawyer's possession and shall keep records of such funds and property for at least five years after termination of representation and shall promptly deliver client funds or property upon request (MRPC 1.15(b)); the lawyer shall, upon termination of representation, take reasonable steps to protect a client's interests including surrendering all papers and property to which the client is entitled (MRPC 1.16(d)).

These Rules apply to individual lawyers, as well as law firms and also to nonlawyer employees of lawyers or law firms pursuant to MRPC 5.1 and 5.3.

B. State Bar of Michigan Ethics Opinions

The State Bar of Michigan Standing Committee on Professional and Judicial Ethics issues written ethics opinions on various topics. The Committee has issued several opinions with regard to client files.

1. R-5

R-5 is a formal opinion, which means the State Bar of Michigan Board of Commissioners has adopted it as the official position of the State Bar. R-5 requires that lawyers have a record retention policy. The opinion holds that the record retention policy should include the following:

- (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy;
- (2) information concerning the location of storage facilities;
- (3) methods for the eventual disposition of records and files;
- (4) information concerning retention periods and the establishment of retention periods; and
- (5) a system for monitoring lawyer and nonlawyer employee compliance with the plan.

R-5 goes on to discuss what is client property and what belongs to the lawyer. It states:

Some documents in the possession of a lawyer or law firm may have the status of client “property” e.g., a real estate title abstract provided by the client for use in a transaction. If documents do fall into this “property” category, they must be treated in accordance with the segregation and record keeping provisions of MRPC 1.15 and they must be offered to the client before they can be destroyed.

Some documents in files assembled for the representation of clients “belong” to the law firm or lawyer, e.g., attorney work product. The law firm and

lawyer may properly maintain and destroy the documents which “belong” to the lawyer or law firm without consultation with the client. The important ethical consideration is that the lawyer examine the issue of whether the client must be consulted and whether the provisions of MRPC 1.15 are triggered.

2. R-12

R-12 is another formal opinion. The opinion does not determine what constitutes “client property” or what papers the client is entitled to receive, finding those to be questions of law, not ethics. R-12 states that notice must be given to a client regarding disposition of the client file either at the time of formation of an attorney-client relationship or at the conclusion of representation and that files may not be destroyed without reasonable notice to the client. The opinion also stated that the lawyer must have “safeguards for permanently protecting certain client property such as stock certificates, original wills and contracts and unrecorded deeds.” Within the body of the opinion the Committee carves out an exception to the rule regarding notice to clients before destruction of files by stating:

If an entire file is comprised of pleading and other documents which are wholly available as permanent records of the presiding court, the lawyer need not notify the client prior to destroying the file in the lawyer’s possession.

3. R-19

R-19 is the last and most recent formal opinion issued by the State Bar of Michigan on the topic of client files. R-19 reevaluates R-5 and R-12 as well as many informal opinions issued by the Ethics Committee. R-19 discusses ownership of a client file. While the opinion does not determine who owns the file, again finding that to be a question of law not ethics, it does discuss the client’s right to access the material in the file. The opinion holds that the

client is entitled to access information contained in the file “to the extent consistent with legal holdings, ethical opinions related to file retention, and any contractual agreements between the lawyer and the client.”

C. Practical Considerations

Having reviewed the ethical requirements regarding file retention, what are the practical considerations for establishing and maintaining a record retention policy?

1. Protect Yourself.

There are many legal issues with regard to file retention/destruction such as: statutes of limitations, appeals periods, grievance and malpractice concerns, IRS or other statutory guidelines, etc. While this article will not delve into those areas, you should be mindful of those concerns. Retention of files for a period of time will allow you easy access to information to defend against any grievance or malpractice claim. After a certain period of time, which will vary depending on the circumstances, you should reasonably be able to destroy or image your files, but in the disposition of files you must adhere to the requirements of the formal opinions cited above. Implicit in having a retention policy is formulating a destruction policy, as a way of reducing what is maintained. The method of destruction should insure, to the extent possible, the confidentiality of the clients' information.

2. Storage.

Many lawyers pay fees to store old files in storage facilities or store old files in their homes indefinitely. With the advent of new technology it is easier (and cheaper) than ever to create an electronic copy of your old files. Rather

than store boxes full of files, those files can be reduced to disk and stored easily in your office.

3. Client Communication/Notification.

The Michigan Rules of Professional Conduct require lawyers to communicate with their clients and to protect client interests. R-12 requires that clients be notified prior to the destruction of their files. This can be particularly difficult with very old files, as clients may have moved, changed names as a result of marriage or divorce, or died between the time representation ended and the time you decide to destroy your file. In such a situation, locating the client to provide notice of your intent to destroy the file can be very difficult, and sometimes impossible. If you are unable to locate the client, certain documents can never be destroyed and must be held indefinitely. Having a sound record retention policy in place, and following it, will resolve that problem. You can, and should, include a paragraph in your retainer agreement or in an engagement or disengagement letter that provides information regarding your record retention policy. By doing so, you have already notified the client of the circumstances under which the file will be destroyed, and no further notice is required. It is also a good idea to maintain a repository strictly for the purpose of storing copies of the retainer agreements, or other documents through which you communicate your record retention policy to your clients.

4. End of Practice Issues.

Lawyers who do not have, and follow, a good record retention policy may find themselves up to their ears in client files when they decide to retire or

close their practice. They may be facing 30 or more years of files with absolutely no way to contact clients on those long closed files. This can often be an overwhelming hurdle. For lawyers who do not have the opportunity to voluntarily close their practices, for those who die or become disabled, this leaves an arduous burden for the surviving family members, a significant hurdle for the lawyer who steps in to handle closing the practice and can result in additional costs to the lawyer's estate.

D. Suggestions for a Good Record Retention Policy

1. Write it down and put it somewhere everyone in your office has access to it.
2. Follow it.
3. Include all essential information, including timelines, location of storage facility, methods of storage, etc.