



MALPRACTICE ALERT!

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WHAT DO I DO WITH CLOSED CLIENT FILES?

This is one of the most frequently asked questions I receive at OBLIC as Director of Loss Prevention. There is not a simple answer to the question. This entire issue of **Malpractice Alert** is dedicated to providing guidance on the topic.

My thanks to Jonathan Coughlan, Disciplinary Counsel, Supreme Court of Ohio, Michelle Hall, Senior Staff Counsel at the Supreme Court Board of Commissioners on Grievances and Discipline, and Gene Whetzel, OSBA General Counsel, for their review and comments on this issue.

Gretchen Mote, Editor
MALPRACTICE ALERT

HOW LONG MUST I KEEP CLOSED CLIENT FILES?

There is no “magic number” of years to retain closed client files. No record retention rubric is included in the Ohio Rules of Professional Conduct or in the Model Rules of Professional Conduct.

Only two Rules in the Ohio Rules of Professional Conduct mention record retention requirements. One is found in Rule 1.4, which specifies at (c), that if a lawyer at the time of the client’s engagement or any time subsequent to the engagement does not maintain legal malpractice insurance of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate, the lawyer must notify the client on the form set out in Rule 1.4 and maintain a copy of the notice signed by the client, for five years after termination of representation of the client.



The other time requirement is found in Rule 1.15 of the Ohio Rules of Professional Conduct, which requires that the lawyer shall hold property of clients or third persons in a lawyer’s possession, separate from the lawyer’s own property. The rule specifies that records of such account funds (IOLTA accounts, etc.) and other property shall be kept by the lawyer for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. This rule requires that the lawyer maintain a copy of any fee agreement with each client for the seven-year period, as well as records for each client on whose behalf funds or property are kept, including bank reconciliation documents.

WHERE DO I BEGIN?

Since there is no “magic number” for client file retention, the commencement of representation is a good time to address what the lawyer will do with the client’s files. Ideally, when the client signs the fee agreement and the engagement letter is sent, the issues of file ownership, method of file storage and destruction should be addressed. If the office is paperless, the client should be informed of that.

The fee agreement should indicate that the lawyer will provide copies of relevant documents, as necessary during the representation (Rule 1.4) and at the conclusion of the representation, return all original documents to the client. The client can also be informed at the time of the engagement that the lawyer will keep a copy of the client's original file in accordance with the lawyer's record retention policy.



CLOSING FILES UPON WITHDRAWAL FROM REPRESENTATION

Representation of a client may end prior to the conclusion of the lawyer's services. If that occurs, Rule 1.16, at (d) requires that the lawyer deliver to the client all papers and property to which the client is entitled, complying with applicable laws and rules. Client papers and property, which may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation, shall be promptly delivered to the client.

What the client is entitled to receive from the file is sometimes a question. Further guidance on this is found in Opinion 92-8 of the Board of Commissioners on Grievances and Discipline, and in their Opinion 2010-2. Note, the client should not be charged for providing the file or for making copies of the file to be retained by the lawyer. These closed files should not present a challenge when culling closed files. The file should be returned with a letter listing the contents of the file. The client should sign this letter as a receipt for receiving the file. This signed receipt should be kept by the lawyer to avoid later disputes whether the client received the file.

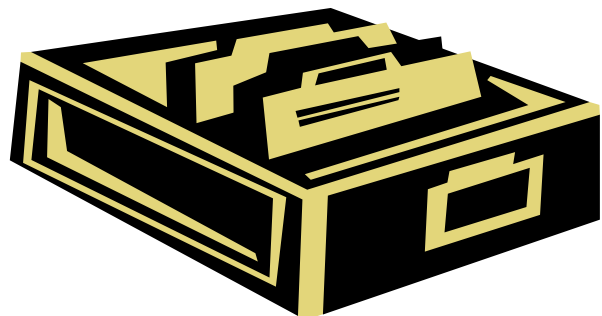
CLOSING FILES AT CONCLUSION OF REPRESENTATION

Other client files may be closed at the conclusion of representation. There should be an established procedure the lawyer follows when closing files. This may include going through the file and determining what original documents to return to the client. These would include documents such as original photos, wills, deeds, stock certificates, birth/death certificates, promissory notes and any other documents belonging to the client. If correspondence, pleadings, exhibits, etc., have not already been given to the client during the representation, they may be sent along with the original documents.

This information should be sent to the client with a file closing letter, listing what is being sent, reminding the client again of the lawyer's retention policy and telling the client if there is anything additional they wish to obtain from the lawyer, that they contact the lawyer immediately.

It is a good idea to have the client sign and date a receipt that they have received the file from the lawyer, as previously discussed. A Client Survey can follow the file closing letter. This will let the lawyer know how the client perceived the representation and continue to implement changes to be more responsive for future clients. (See OfficeKeeper for a sample Client Survey.)

With the file culled and original documents returned, the file can be sent to storage. Ideally, the file would be scanned at that time and stored electronically or to a disc. The original paper file, if any, can then be scheduled for destruction.



CLOSED FILE CONSIDERATIONS

When the file is closed, it should be listed in a closed file register or other database that will track its disposition. If the file is stored off-site, exactly where it is stored and how to locate it must be listed. If it is kept electronically, be sure that as the office systems are upgraded, ability to access the electronic records will be maintained. For example, if the files were stored on microfiche years ago, the firm will need to keep a microfiche reader and printer.

Other considerations for closed files include:

- ✓ Have all liens been satisfied?
- ✓ Have documents been filed or recorded (Dismissal Entries or Deeds)?
- ✓ Have UCC, security interests, judgments been perfected/filed and calendared for renewal?
- ✓ Can a criminal matter be expunged?

RECORD RETENTION POLICY

Every law office should have a written record retention policy. Such a policy is beyond the scope of this article. The discussion here is limited to client files and the applicable Ohio Rules of Professional Conduct. If a lawyer practices in other jurisdictions, the applicable practice rules of that jurisdiction should be consulted. (See OfficeKeeper on Record Retention.)

There are other record retention requirements concerning financial and tax records, personnel files, and contract issues which may determine other parameters for record retention. No attempt is made here to address retention requirements of various government agencies. These considerations should be addressed and included in a firm's comprehensive record retention policy.

SO WHEN MAY I DESTROY CLOSED CLIENT FILES?

The date for file destruction must be determined by the lawyer reviewing each file to make that decision. From a malpractice standpoint, the lawyer should consider the

applicable statute of limitations. Ohio has a discovery statute for legal malpractice. The one year statute of limitations runs from the date of the termination of representation or the cognizable event, by which the client discovers or should have discovered that the injury was related to the lawyer's act or non-act. (See *Zimmie v Calfee, Halter & Griswold*, (1989) 43 Ohio St 3d 54)

What does this mean? If the representation involved minors in any area of law, child custody and/or support, estate planning, real estate transactions or any other area of law where it may take years for any alleged act, error or omission to surface, then the file will need to be kept past that potential discovery date. In thinking what to keep from a closed file, a lawyer should ask, "What would I want from this file to defend a potential malpractice allegation." This information might include written authority from the client to settle the case, discussion of the lawyer's recommendations in a case and the documentation that the client chose not to follow it.

It is the view of the Board of Commissioners on Grievances and Discipline that it is impossible to establish record retention schedules for client files that are appropriate and applicable in all circumstances. This is another good reason to review each file upon closing.



WHAT IF I HAVE AN ATTIC, BASEMENT, SHED OR GARAGE FULL OF FILES?

The first question is whether these files are adequately stored? Are the files protected from the elements? Could they be subject to flooded floors, leaking roofs, chewing rodents? If any of these apply, the files should immediately be moved to a safe location.

Then the file review process can begin. Here are suggested steps to follow:

- ✓ Decide where and how to store the files the lawyer will retain
- ✓ If it is decided to scan files for future storage, purchase appropriate equipment and learn how to operate it or hire competent persons to handle it.
- ✓ If using cloud storage, be certain data is adequately protected (Rule 1.6).
- ✓ Consider how to dispose of the files and purchase appropriate equipment. Files CANNOT be thrown in a dumpster or landfill. If shredded, they must be shredded beyond any recognition, usually by cross-shredding, not just “ribbon” shredding.
- ✓ Inventory the files to know what files exist. This should include all locations and how many files at each location.
- ✓ Organize or list the files by year closed.
- ✓ Set aside a particular day of the week and make it “Closed Client File Day.” Set a specific goal for what will be accomplished. For example, “We will go through one entire file box.”
- ✓ Establish a review process by which:
 - extraneous materials are removed from files (paper clips, legal pads, pens)
 - original documents are set aside to return to clients (wills, deeds)
 - documents are scanned or copied to be kept in perpetuity (releases)
 - relevant file portions are copied or scanned for duration of file retention
 - a date is determined for file destruction.

After files are checked to be sure documents to be retained in perpetuity are safe and the file to be kept is actually on the scanned disc or in the retained file, THEN AND ONLY THEN, can the discarded file be shredded.

If a lawyer is reviewing long-closed files, it may be useful to consider newspaper notice that any former clients can contact the office to arrange to pick up files. A note of caution here: the file belongs to the client and disclosure of confidential lawyer-client information must be in accordance with Rule 1.6. Questions of who owns the file of a deceased client will require careful consideration. When releasing the file, proper identification that the person is who they purport to be and a signed and dated receipt for the file is also prudent.



WHAT TO DO WITH FILES OF DECEASED, DISABLED, DISAPPEARED, DEPORTED, DISBARRED LAWYERS?

Rule V, Section 8(F) of the Supreme Court Rules for the Government of the Bar provides that when there is no partner, executor, or other responsible party capable of conducting the attorney’s affairs and willing to assume appropriate responsibility, the Disciplinary Counsel or Chair of a Certified Grievance Committee may appoint an attorney or attorneys to inventory the files of the attorney and take action to protect the interests of the clients.

TAKE ACTION...

Solo practitioners should look at Comment [5] of Rule 1.3 and prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there needs to be immediate protective action. That way the lawyer will know the clients are protected and the lawyer's spouse or significant other will not have to face those closed files!

Whatever the firm size, implement closed client file procedures NOW that will

- ✓ take care of any closed file backlog
- ✓ schedule responsible record retention and file destruction
- ✓ plan at the outset of representation for the eventuality of closed files.

Using the suggestions in this article can remove scary closed client files lurking in your office and make it safe to open the storage room door!

If you have additional questions about closed client files, please feel free to contact OBLIC.



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