BEST PRACTICES FOR CLIENT FILE CLOSING AND DESTRUCTION

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One of the most frequent topics for calls I get on the PBA hot line concern client files. Everything from engagement agreements to file retention rules, and all sorts of management issues in between. No doubt about it, this is an area of concern for all lawyers. And it should be. Because Rule 1.15 (Safekeeping Client Property) and Rule 1.6 (Confidentiality) require attorneys to maintain client files for a minimum length of time, and then destroy them in a manner which preserves confidentiality.

This may sound odd at first, but the proper time to begin the process of file retention and closing is upon establishing the client relationship. Based on the type of matter, PBA Formal Opinion 2007-100 provides guidance for minimum retention periods. With the caveat that lawyers must also be guided by the individual interests, needs or requests of their clients, any court orders applicable to the file, along with any other legal standards, such as tolling standards which may apply, the Opinion provides the following guidelines:

- CRIMINAL— Retain until all appeals and post-conviction habeas periods have expired.
- DIVORCE— Following order of dissolution, retain until time periods for performance of any terms under court order or any settlement agreement have expired.
- PERSONAL INJURY— Retain until all claims against potential defendants are exhausted. Retain files containing settlements for minors until two years following attainment of age of majority.
- REAL ESTATE— Retain five years after closing on sale or foreclosure.
- ESTATE PLANNING— Retain until client's death plus probate period.
- PROBATE— Retain until estate is settled and all IRS audit periods expired.

- IRS TAX RECORDS— Retain for seven years. IRS regulations give 6 years to pursue any omission of more than 25 percent of income. Add one year for cushion.
- CONTRACT LITIGATION— Retain five years after satisfaction of judgment or five years after filing if not brought to trial.
- BANKRUPTCY— Retain five years after discharge or payment or discharge of trustee or receiver.

With these guidelines in sight, the engagement letter to the client can and should include language regarding anticipated file retention for the matter at hand. That way the client's expectations at the outset are clear that the firm will not maintain the client's file for an indefinite period of time.

I advise attorneys to always get back a signed copy of the engagement letter. Believe me, the only time you will need it is when a dispute arises, at which point the lack of a signed copy will always weigh in favor of the client and against the firm. However, in the case of file retention, the fact that the client signs and returns the agreement or letter does give the firm a unilateral right to destroy the file in accordance with the estimated retention period stated in the letter. It's been determined that it is not binding to ask a client to agree in advance to future destruction of materials, when the client cannot know at the time of signing what materials might ultimately be included in the file.

Since the individual facts and circumstances of the matter may wind up extending the retention period, the reality is that you cannot know exactly how long the file will need to be retained upon inception of representation. You can only provide a general guideline.

Another issue which can affect the ultimate retention period relates to the actual contents of the file. Original documents of the client, or non-original items which may be difficult to replace and which the client may consider valuable, (such as handwritten correspondence, business records, photos etc.) cannot be destroyed without written consent from the client. So even if the file is aged far beyond the retention guidelines offered by Opinion 2007-100, if there are these types of documents or items in the file, you still cannot destroy them.

The best practice, therefore, is to copy such documents for the file, and return originals and other valuable items to the client as soon as practicable. Try to get in

the practice of not keeping them at all. If you *must* keep such items, include a "file closing note" inside the file, listing such items, and where they are located. Note that Opinion 2007-100 reinforces this by stating, "In general, items such as original client business records, deeds and other real estate records, estate papers, insurance policies, and personal papers should be returned to the client unless there is a specific agreement or other reason for the lawyer to retain custody."

If the types of matters your office handles requires you to retain original or valuable items during representation, then each file should have a document inside which lists each item, and where it is, so that they can be managed appropriately when the matter is being closed. For firms which do a significant number of wills, trusts, and estate plans, special considerations apply. For these practice areas it is standard practice to retain the original signed documents, hoping the client, or the client's heirs, will return at some future date. It's critical that the firm maintain a complete and current index of each such original retained, along with the contact information for the client.

In the normal course of business, best practices dictate that the firm send a letter to each such client once a year. Consider this a marketing opportunity. A general letter can remind the client that you have their Will, POA, or whatever, and remind them that they may need to review it for appropriate updates. This might generate more business. More importantly, however, it gives you a good chance of finding out whether the client has moved, while there is still a chance of obtaining forwarding information. In some cases the client may have passed away, and you may not know.

Most firms stray the farthest from best practices when it comes to the end of the matter, and closing of the file. Most closed files are sent off to storage without much thought at the time.

It used to be that storage costs were relatively cheap, most offices had attics and/or basements, and the labor cost to properly purge the file was more expensive than the cost to store it. Files weren't as large. Attorneys usually remained at the firm until death or retirement; sometimes a simultaneous event.

Times have changed. Files are much larger than they used to be. Even the simplest matter seems to require multiple gusset files. Storage costs are expensive. New office buildings rarely offer basement storage. And even more importantly, with lawyer mobility a common occurrence, no one wants to be responsible for a room full of files left behind by a former, deceased or retired attorney.

I'm reminded of a disciplinary action in New York regarding a firm which dissolved. The few partners who remained to complete the orderly shutdown were left with a mountain of old closed files. Some belonged to former attorneys of the firm, many of whom were in practice elsewhere, and some of whom had died or retired long ago. The partners wanted all of those who were partners at dissolution to share the costs for storage of the files. Departed partners refused. The debate went on for some time.

Eventually, the frustrated remaining partners took it upon themselves to throw away all of those files. They were not properly destroyed in a manner which preserved confidentiality. They were discarded. I don't recall the particular circumstances leading to the discovery of this fact, or how disciplinary proceedings started. I do remember reading the outcome: all of the partners of the firm at time of dissolution were found responsible, and were disciplined.

So even before we talk about the best practices related to closing of the file, let's step back and take a moment to consider what safeguards your firm has in place regarding client files in the event of dissolution or attorney departure. Many firms have no partnership or shareholder agreement. Ok, don't even get me started about that disaster waiting to happen. That's the topic for a whole other article. However, for firms which do have agreements, most are usually silent when it comes to issues related to client files. That's a big mistake.

Let me strongly suggest that you take a look at your partnership agreement, and if it is silent in this area, create an amendment which 1) requires departing attorneys who take active client files (upon written instruction of the client) to also take all other closed files for the same client; 2) requires departing attorneys who joined the firm as lateral hires to take such client files as they brought to the firm from any former firm, unless the client chooses to stay with the firm; 3) requires attorneys who retire to attend to the disposition of their closed files for former clients, meaning that each file is properly reviewed and marked for appropriate date of destruction; and 4) requires all who were partners of the firm in the year of dissolution to pay their share of file storage fees until such time as all of the files of the former firm have been transferred to clients, or destroyed.

Note that the firm must keep a permanent record of each client/matter, along with the eventual disposition of the client file noting method and date. Method may be transfer to another attorney upon client written request, in which a copy of the client's signed instructions should be permanently kept, along with the date of transfer. Method may be return to client, in which case the client should sign a

receipt for the file(s), a copy of which should be permanently kept. Or the method may be proper disposal of the file.

Proper disposal can be accomplished one of two ways: shredding or burning. Garbage bags of files tossed in the dumpster does ***not*** constitute disposal in a manner suitable to protect confidentiality. Again, whether files are shredded or burned, be sure to keep a permanent record of the date and manner of destruction.

I mentioned earlier that most firms stray the farthest from best practices when it comes to the end of the matter, and closing of the file. So true. When it comes time to close the file there are some specific steps to follow. I suggest your firm create a checklist by type of matter, and train a couple of qualified staff people (paralegals or secretaries, with oversight of an attorney) to properly prepare the file for closing. Here are the steps to take:

1. Remove any client original or valuable items from the file or wherever else they may be in the firm, and send them to the client with an end of engagement letter. List each item being returned in the letter. State that the matter is concluded.

   Note that anything you are returning which might be necessary if the firm had to defend a malpractice action should be copied for the file. The firm is permitted to do so, but must do it at its own expense.

   At this point the retention time should be known precisely, since the facts and circumstances of the matter have been uncovered. State the certain file destruction date in the closing letter, and let the client know they may claim their file at any time beforehand. Enter the date into your computer system.

   Sending an end of engagement letter serves many purposes. It starts the clock on file retention, as well as the filing of a malpractice claim. It puts an end to the fee agreement in effect, so that if the client returns later, a new agreement will be executed. This can be particularly helpful when work was done on a contingent or flat fee basis. Returning clients who have not received an end of engagement letter often conclude subsequent work is included in the fee previously paid.

   An end of engagement letter also presents a marketing opportunity for the firm. Now that you've impressed the client with your service, they

will be more likely to keep you in mind for referrals. Remind them of all the areas of law you practice besides the area in which you represented them. Let them know that the highest praise they can provide you is by way of referral. Include a few business cards.

2. Purge the file of duplicate copies of the same documents, notepads (minus the pages used), pens, markers, post-it pads, binder clips, etc.

3. Return any unused checks to accounting for proper disposal and accounting adjustments.

4. Your firm should decide whether it wants to keep only a "final" copy of documents, or a copy of each iteration, to show intention as versions changed along the way. Attorneys feel very strongly one way or another. Document what you agree to do, so it can be carried out consistently. It's ok to make this decision by attorney or by type of matter.

At this point, the file has been properly purged, and there should be nothing remaining in the file which will prevent the firm from destroying it when the retention period has tolled. Now there is one final determination for you to make. Will you store the file in electronic format, paper format, or both?

Nowadays, when so much of what constitutes the file is generated or received electronically, I think it makes most sense to keep the file electronically. Especially since disk space is so cheap, and getting cheaper all the time.

If you get in the habit of scanning in hard copies of documents as they are received, and of requesting depositions and medical records in electronic format which you copy onto your computer system, and of receiving your faxes electronically, you will find that there is little if anything left to digitize when the matter closes. Using Adobe you can print the entire contents of a client's email folder (assuming you've been putting all their emails in a single folder, which is another best practice) into a single PDF "conversation" in one fell swoop. At this point every single file ever created for the client (except perhaps the billable records), regardless of origin, can be stored in one folder in Internet Explorer.

Some firms struggling with hard disk space may decide to burn the contents of the folder onto a disk. That's fine if you want to give it to the client as a courtesy.

But for retention purposes, you have to take into consideration that the lifespan of a CD is about 10 – 15 years if stored under ideal conditions. You want to make sure that the CD outlives the retention period. It's simpler by far to keep the file on your hard drive, subject to regular back-up. If your hard drive crashes, you can restore all from back-up. If your back-up system becomes outdated, you implement a new one and create a new back-up. When the reminder pops up on the computer, the entire file can be deleted in a keystroke.

Ok, many of you are scratching your head and wondering about all the files which have already accumulated. Some of you have 50 years of files. Or a basement, attic, and garage already filled with box after box of files. What about them? If you decide to do electronic storage, do you have to go back and purge and scan all those files? Heck no!!!

Implement your best practices today. Don't just let things continue to pile up and become someone else's nightmare someday – whether that's your younger partners, or your children or spouse – someday someone has to deal with it. I know, because I get those distraught calls all the time. So stop making it worse. Implement best practices now, going forward.

Once you've done that, take a look at how many files you've already accumulated which were never properly purged. Pull out the oldest and have someone take a quick look for any original or valuable client items. Make sure there are no special facts which would lengthen the retention period. Destroy everything you can. Keep plugging away, until what you're left with are files which are not old enough to destroy. Even if it takes several years to get to this point, so that it doesn't interfere with anyone's current workload, or even if it means giving a college student a summer job for a few years, it's the proper thing to do.

A version of this article originally appeared in the October 3, 2011 issue of The Pennsylvania Bar News. *© Ellen Freedman – all rights reserved.*

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