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Spring Cleaning: File Retention & Destruction

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When we open a new file we usually don't give much thought to when we will eventually close it and when we will dispose of it still later. Both, however, raise important issues for overall firm risk management. The first forms a key dividing line between whether a client is classified as "current" or "former" for conflict purposes. The second raises equally significant questions about both how long we should keep files and the means chosen to dispose of them. In this column, we'll look at both aspects of this version of "spring cleaning."

Closing Files

With most matters, we know when we have come to the end of a specific project—the advice sought has been given, the transaction has been closed or the final judgment has been entered. In many instances, the next work for a client flows seamlessly from the last. At least in some situations, however, we may not necessarily see the client again even if we got a very good result. For example, we might have done a great job in a case for an out-of-state company, but that firm might have only very occasional operations here. In that situation, it is important to document the completion of the representation and to close our file so that if circumstances change over time and another client asks us to take

on a matter against the company that in my example we represented in the past we aren't left wondering whether it is a current or a former client.

The distinction between classifying someone as a current or a former client is significant when it comes to the need for conflict waivers. *Current clients* have the right to object to any representation a lawyer proposes to take on adverse to them. This right flows from the broad duty of loyalty lawyers owe their current clients. *Former clients*, by contrast, have a much narrower right to object. Under RPC 1.9, former clients can only block an adverse representation by denying a conflict waiver when the new work is the same or substantially related to the work the lawyer handled earlier for the former client or would involve using the former client's confidential information adverse to the former client. Absent one of those two triggers, a lawyer is permitted to oppose a former client *without* seeking a waiver. If you have completed a project for a client and you think it is relatively unlikely that you may see the client again, a polite "end of engagement" letter thanking the client for the opportunity to handle the completed matter *and* letting the client know that you are closing your file may play a key role later in classifying the client as a former client.

Disposing Files

The Rules of Professional Conduct don't specify how long we need to keep a file once a matter is closed. RPC 1.15-1(a) and case law (*see, e.g., In re Spencer*, 335 Or 71, 58 P3d 228 (2002)), remind us that we have a duty to

safeguard clients' original documents that are entrusted to us. Assuming that we have returned the originals to the clients at the completion of the representation, the question then becomes: how long do we need to keep files and how do we dispose of them.

How Long? There is no uniform standard. The Oregon Professional Liability Fund has a very useful set of guidelines available on its web site at www.osbplf.org. The PLF generally recommends retaining most files for at least 10 years. That corresponds to the 10-year statute of ultimate repose for legal malpractice claims under ORS 12.115(1) (see, e.g., *Davis v. Somers*, 140 Or App 567, 915 P2d 1047 (1996)), and, in most circumstances, provides a practical measure for the outer boundaries of the continuing relevance of the material in the file concerned. The PLF's guidelines are also careful to note and give excellent practical examples of files (such as matters relating to minors) that should be kept for longer periods.

How to Dispose? Under RPC 1.9(c), our duty of confidentiality continues beyond the end of an attorney-client relationship and, indeed, even continues beyond a client's death. See OSB Formal Ethics Op 2005-23. Therefore, we need to take care in choosing the methods to dispose of files when the appropriate time comes. This generally means we should shred paper files and do the equivalent to electronic files. Firms are permitted to use outside services to handle the destruction (see OSB Formal Ethics Op 2005-141) as long as

appropriate steps are taken to ensure that the outside services understand and comply with the duty of confidentiality.

ABOUT THE AUTHOR

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