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Spring Cleaning:
File Retention and 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 closed or the final judgment has been entered. In many instances, the next work for a client flows seamless 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 only have 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 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 (or the lawyer's firm) 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.

Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992), remains the standard for determining whether a current attorney-client relationship exists. In *Bohn*, the Supreme Court outlined a two-part test. The first element is subjective: does the client subjectively believe that the lawyer is representing the client? The second element is objective: is that subjective belief objectively reasonable under the circumstances. Both elements of the test must be met.

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. Under *Bohn*, it would be difficult for a former client to argue later that the attorney-client relationship had not, in fact, come to an end.

Oxford Systems, Inc. v. CellPro, Inc., 45 F. Supp.2d 1055 (W.D. Wash. 1999), offers a good illustration of this last point. In *Oxford*, a law firm had handled periodic work for an out-of-state corporation over the years but had nothing open when it was approached about representing a new client adverse to the corporation. The law firm concluded that the corporation was a former client because it had been roughly a year since it last worked for the corporation. But, there was no "end of engagement" letter. The corporation moved to disqualify the firm, arguing that it was a current client. The court analyzed the issue under the *Bohn* test and found that the corporation was indeed a current client of the firm. Disqualification followed.

Disposing Files

RPCs 1.15A and 1.15B require lawyers to safeguard clients' original documents, other property and funds that are entrusted to us. Therefore, prudent practice suggests returning original documents, other property and any unearned funds to clients in conjunction with closing their files upon completion of the work involved. RPC 1.15A(c)(3) also requires us to maintain our records

relating to handling client property for seven years. Copying clients on correspondence, pleadings and the like while handling a matter effectively means that the client has already been provided a copy of the file. Assuming that we have returned originals and other property to clients at the completion of the representation and refunded any unearned fees, long term file retention usually focuses on three primary considerations: (1) how long do we need to keep files? (2) how should they be stored? and (3) how do we eventually dispose of them?

How Long? The RPCs don't specify how long we need to keep a file once a matter is closed and there is no uniform standard of practice either. There are two broad reasons to maintain files for a reasonable period of time following the completion of work.

First, unless the client has been provided with copies of materials during the representation (or is given a copy of the file at closing), the client may have a need for file materials later. The WSBA's Law Office Management Assistance Program has developed a very useful set of guidelines balancing the practical needs of both clients and lawyers. They are available on the LOMAP page of the WSBA's web site. The LOMAP guidelines vary by practice area and type of document, but generally recommend retention periods ranging from six to 10 years. The LOMAP 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.

Second, it is prudent to keep a file until the expiration of the malpractice limitation period so that the file is available to assist with the defense. Most malpractice carriers, therefore, also have recommended file retention periods. The statute of limitation for legal malpractice in Washington is three years—extended by both a "discovery rule" (extending the limitation period from the point the claimant learned of the facts giving rise to a cause of action) and a "continuous representation rule" (extending the limitation period while the firm continues to represent the client in the matter involved). (*See Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 120 P.3d 605 (2005)); *Janicki Logging & Const. Co, Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 37 P.3d 309 (2001).)

With both considerations, it is usually wise to have the lawyer who handled the matter involved make the final "call" on file destruction rather than simply rely on a predetermined schedule as that lawyer may have insights on the matter or the client that counsel longer retention of the file than the norm.

How to Store? Again assuming that originals have been returned to clients at file closing, storage of firm files can be either in electronic or paper form. (*See* WSBA Informal Ethics Op. 2023 (2003).) Similarly, storage can be on-site or off-site. With both, our duty of confidentiality does not end at either the close of a matter or even the death of a client. (*See* WSBA Formal Ethics Op. 175 (1982; amended 2009).) Security in this context can range from physical

"lock and key" to electronic "encryption key." Whatever form and location we use to store files, however, must comply with our ethical and fiduciary duties to maintain client confidentiality.

How to Dispose? The method chosen for eventual file destruction will vary with the format chosen for preservation. This can vary from scrubbing electronically stored files to shredding paper files. Again, the primary ethical obligation is to destroy files in a way that preserves client confidentiality.

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