

TALKING TRASH RECYCLED (AGAIN):  
Guidelines for Retention and Destruction of Client Files

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In 2001, bar counsel posted an article on this website entitled “Talking Trash—Recycled,” <http://www.mass.gov/obcbbo/trash2.htm>, which itself was an update of a 1998 article called “Talking Trash.” The 2001 article began as follows:

"How long do I have to keep those closed client files stored in the attic of my garage?" A lawyer in fear of an imminent collapse of the garage rafters recently posed this question to bar counsel. Some of the boxes of closed files had been in that attic for years. The lawyer was planning to start to dump the oldest of the files in the town recycling bin each week to lighten the load for the garage. This plan might keep the garage standing, but it could create a new problem with the lawyer's former clients or bar counsel.

More than twelve years after that 2001 article, the problem is still a frequent source of inquiries to the Office of Bar Counsel, not only from active or retired lawyers seeking to dispose of old files, but, more problematically, from personal representatives of lawyers' estates and from landlords or storage companies saddled with files of deceased attorneys for whom there is no estate.

The advice given in the earlier article still stands. A lawyer who is entrusted with the property of a client has the following obligations with respect to its disposition: (1) valuable client property must be promptly delivered to the former client or safeguarded indefinitely; (2) complete records of the receipt, maintenance, and disposition of clients' or other trust funds and property must be kept from the time of receipt to the time of final distribution and preserved for a period of six years “after termination of the representation and after distribution of the property” as required by Mass. R. Prof. C. 1.15(f), and (3) other client property may, based on the client's direction, be delivered to the former client, stored, or destroyed. In addition, Mass. R. Prof. C. 1.5(c) requires that an executed copy of a contingent fee agreement be kept for seven years.

To reduce the problem of file storage on the back end, a lawyer should take steps up front. In addition, a lawyer's duty of competence and to preserve client confidentiality includes planning ahead to safeguard clients' interests in the event of unexpected illness, incapacity or death. What follows is a list of practical steps lawyers can and should take to alleviate the burden of preserving client files.

1. Institute a clear file retention policy for your firm that includes returning all trust property promptly to the client. Trust property includes funds and other property held in connection with the representation, including property held as a fiduciary, except for documents or other property received by the lawyer as investigatory material or potential evidence. Trust property includes wills, contracts, drawings, and the like that belong to the client. The file retention policy should spell out the firm's obligations under Mass. R. Prof. C. 1.15(f) and the firm's file disposal procedures.

2. Communicate your standard file retention policy to clients at the outset of the case as a standard paragraph in a written fee agreement or fee letter.

Alternatively, provide the policy as a stand-alone document to all new clients at the time you are retained. A sample communication to the client might say something along the following lines:

[Lawyer] will maintain [Client's] file for [6] years after this matter is concluded. [Client] may request the file at any time during, upon conclusion of, or after conclusion of, this matter. [Six] years after the conclusion of this matter, the file may be destroyed without further notice to [Client].

Massachusetts lawyers in most circumstances are already required by Mass. R. Prof. C. 1.5(b) to communicate the scope of the representation and the basis or rate of the fee and expenses to the client in writing. See "Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Agreements To Be In Writing," <http://www.mass.gov/obcbbo/WriteItUp.pdf>. It is therefore a relatively simple matter routinely to include an additional paragraph on file retention in the fee arrangement or to provide a separate policy statement at the same time. If there is any doubt about whether the client wants the lawyer to return a document, be sure to

discuss the matter with the client and note that the client wants the document returned at the end of the representation.

Certain types of files will, of course, have special retention issues and need to be retained beyond the period specified in your file retention policy. Examples might include estate planning files where the client is still alive, files involving a divorce with minor children who have not reached majority or where alimony was awarded, or criminal cases in which the client is still incarcerated. Use your professional judgment as to whether there is any issue in a file that would require you to hold onto it beyond your standard file retention policy period or if you have reason to believe that the client might be unhappy with the outcome of the case and is considering a claim against you.

3. Advise (or remind) the client of your file retention policy in a closing or disengagement letter at the conclusion of the case. Even if you had already given notice of the policy when first retained, it is good practice to do so again when closing the file, if for no other reason than that it may well be years after the initial engagement when the matter is finished.

4. Make a practice of copying and immediately returning original documents (especially wills) to the clients, rather than holding them in the file or even in a “will box.” If it is necessary to retain original items as evidence or otherwise, return them at the close of the case. Send any original deeds or other recorded real estate documents to the client when received back from the registry. Of course, you are required to return any tangible property belonging to the client or owner (securities, for example, or items such as jewelry, art, or photographs) at the close of the case. If you document that these steps have been taken, it will not be necessary for you, your personal representative, or any other authorized person to comb through your files looking for original items upon your retirement, death or disability.

5. Provide clients with copies of file documents on an ongoing basis while the file is open. Send the clients copies of pleadings or of correspondence between

counsel. Technology makes this undertaking much easier than it would have been even a decade ago and doing so makes it much less likely that the clients will come looking for copies of items from your files years later.

6. Make sure your IOLTA and other trust accounts are maintained contemporaneously and are up to date. In particular, prior to closing a file, ensure that all liens and other obligations have been paid and, where applicable, that discharges are secured and recorded. It is good practice to have a second signatory on these bank accounts so that the accounts can be accessed, and funds disbursed, upon your death or disability. Finally, and most obviously, maintain trust account records that comply with the requirements of Mass. R. Prof. C. 1.15; upon your death or disability, the owners of funds on deposit can then be readily identified by a personal representative or other person charged with closing out the accounts.

7. Whenever feasible, every lawyer without a partner to carry on his or her law practice should also arrange, preferably in writing, for another lawyer to be the “backup attorney” who, at a minimum, will contact clients with active matters, ensure the return or transfer of files, and see to or assist with the refund or transfer of trust funds.

8. Organize your files and carry out your file retention policy. In order for any file retention/destruction policy to work, the closed files have to be organized in a chronological order that will permit them to be pulled for shredding at the appropriate time. One such method might be that, at the end of each year, the lawyer should separate any files that were closed in that year into a designated group, i.e., 2012 CLOSED FILES. Review the files as you group them and put an external label on any files that have special retention issues –for example, use a sticker such as “REVIEW BEFORE SHREDDING.” Then shred files without retention issues that have been held for the time period provided in your fee agreement. Thus, if your fee agreements provide that you will hold files for six years after closing the case and distribution of funds, you could have shredded any 2006 closed files that didn’t have

special retention issues at the end of 2012. Files marked as having special retention issues should be segregated at that point and reviewed periodically to determine if there remains any need to continue to hold them.

Critical to this discussion, it is obvious that much of the age-old problem of file retention—mainly storage—can be addressed with new-fangled technology. Mass. R. Prof. C. 1.15 requires, among other matters, that attorneys maintain for all trust accounts a chronological check register, a ledger for each individual client matter, and reconciliation reports; these records can, and generally should, be kept electronically. A file that does not contain original documents can be scanned to an electronic file at the close of the case and the physical file discarded. Similarly, documents can be retained or scanned to an electronic case folder as the matter progresses, making it unnecessary to retain paper copies of all or most of the file once the case is concluded.

The electronic case information on your computer can be saved to a disc, backup drive, the cloud or other secure electronic storage medium at the end of the case and retained indefinitely without causing garage rafters to buckle. Off-the-shelf document and case management systems also make these tasks reasonably straightforward. Just be sure to update your electronic storage system so that the information remains accessible and that older information gets transferred to your current storage medium. A floppy disc is not of much use these days.

Assuming no problems with original documents, then whether or not there are special retention issues, you can shred the physical file when the case is over if you retain a complete electronic copy. And isn't that a lovely thought.