

Closing Matters

Closing Files is as Much About Loss Prevention as Ethical Considerations

What should you do, and what if anything do you have to do, when a matter is finished?

Whether it's a completed transaction, an estate administration, a civil trial, a settlement, or a family court hearing, there are some suggestions for communications with your client that are probably more in the nature of loss prevention techniques than ethical requirements.

Begin by considering some sort of "file closing" or disengagement letter. This is somewhat similar to a writing that confirms the declining of representation, but instead recites the conclusion of the matter and your cessation of continued representation, but, perhaps from a marketing standpoint, expresses your willingness to remain available for questions or future needs.

Make sure that the client has copies of relevant documents, such as a closing binder for a transaction, a fully executed release or settlement agreement, if applicable, the most current court order and the like. Of course, an agreement can be set forth in the initial engagement letter relative to disputes between the lawyer and client as to the file. It is prudent to advise that copies of all documents will be given to the client by the lawyer during the course of the representation, and any request thereafter will incur copying costs. Otherwise, the file is said to belong to the client, and if an attorney wants to keep copies it must be at the lawyer's expense.

If the matter is executory, such as calling for installment payments or future acts (document disclosure or exchange for examples), set forth the timetable to remind the client to diary. State or point to events of default so the client continues to be aware of deadlines and issues to monitor.

If a statute of limitations would bar pursuit of a claim, it might be wise to



opine as to that so, again, the client can monitor the matter diligently and contact you when necessary.

A question arises as to whether a lawyer has a duty to contact a client when a change in the law would seem to make it favorable to take action, such as a request to modify sometime after the entry of a support or custody order. No ethical rule appears to mandate this; therefore, doing so would be helpful only from a marketing or risk management approach. However, if you do contact a client about taking such action, you must be sure to avoid any misunderstanding with the client about taking action on the matter. Make it clear that without a new

representation agreement (which would include a fee arrangement), that you are not representing the client in further support or custody proceedings.

For space considerations, many lawyers utilize outside storage facilities. Others retain files in-house for easy reference. Many are now scanning pertinent file documents for electronic storage, and either destroying the balance or offering them to the client for retention, but certainly advising the client in the closing letter of the lawyer's intention. Cost issues attendant to that, if any, should be addressed in the initial engagement letter or contract. Normally, storage of closed files is an overhead

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cost that is not chargeable to clients. In addition, as technology progresses, more practitioners are “digitizing” files in order to eliminate the cost of hard file storage. In this regard, it is important to be cognizant that while “cloud storage” rental is inexpensive and makes your closed files (and any other documents stored there) accessible from any location where there is an Internet connection, recently issues have been raised about the security of such types of shared storage as well as the location and access to the servers on which your specific confidential information is stored. (This issue may be addressed in further depth in a future column). Remember that confidentiality must continue to be protected after the termination of representation.

What to do with each file depends upon the nature of the matter, the substantive law, and the perceived future need, with the instruction and direction of the client as the dominant consideration, based upon informed consent.

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has addressed some of these questions in Formal Opinion 2007-100, and even given suggested minimum retention periods in various kinds of matters. It would be helpful to read it, and to keep these closing considerations in mind when entering into an engagement and when creating firm policies and procedures. ■

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