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THE RISK MANAGER

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KBA ETHICS OPINION E-436 PROVIDES UPDATED GUIDANCE ON RETENTION AND DISPOSAL OF CLOSED CLIENT FILES

KBA E-436 (5/17/2013) addresses one of the more demanding management requirements of law practice – what to do with closed client files. The opinion includes ethics, policy, and practical advice on this issue. Key points are:

- A lawyer is not required to bear the expense of storing former client files permanently.
- A "… lawyer must provide the client anything in the file to which the client is entitled."
  - *The Committee suggests that this be covered in a letter of engagement and at the conclusion of the matter. (Editor's note: Presumably with a closing letter.)*
- If the file has not been provided to the former client upon request of the client or at matter closing, as a matter of good practice, the file should be retained for five years.
  - *The Committed noted that the rules governing client trust account records require a five-year retention period for trust account records and that it is logical to retain the entire file for that period of time.*
- Some files must be retained for longer than five years.
  - *The Committee gave as examples files of claims of minor children until the child reaches the age of majority, tax matters as long as client liability is possible, and files involving a representation in which a malpractice claim might be made.*
- As a matter of good practice clients should be informed of the firm's closed file retention policy to include the right to materials in their file; that the file will be maintained for only a specified time; and that the file will be destroyed at the end of that time.
  - *The Committee stressed that the letter of engagement should be clear that the client agrees to the firm's file retention policy by signing the letter of engagement.*
- Before disposing of a file, it must be screened for original documents or other documents that cannot be replaced. Examples are original wills, trust documents, and deeds.
  - *The Committee noted that such documents should be extracted from the file at the time the matter is concluded. (Editor's note: Presumably returned to the client at that time.)*
- The method of disposing of former client files must be done in a manner to protect client confidentiality. "The result must be complete destruction of the materials in the file as would be the case with incineration or shredding."

A Risk Management Perspective on KBA E-436

The promulgation of KBA E-436 is a good reason for a review of what Lawyers Mutual offers as risk management advice for managing the retention and destruction of closed client files keyed as much as possible to the opinion.

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I have found that making a "living" is not the same thing as making a "life."

Maya Angelou

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How long should a lawyer retain a closed client file?

We agree with the Ethics Committee that closed client files should be maintained for five years at a minimum. Our recommendation, however, is that a complete copy of the file be maintained for ten years and longer if the statute of limitations has not run on the matter within the ten-year period. Some files may require permanent retention. The following is our list of examples of files that may require retention longer than the recommended ten years:

- cases involving a minor or incompetent who is still a minor or incompetent ten years after the work is performed.
- estate plans for clients who are still alive ten years after the work is performed.
- wills and estate probate matters.
- contracts, notes, and bills paid over time still being paid off after 10 years.
- cases including a civil judgment that needs to be renewed.
- files establishing a real estate basis.
- title opinions and associated notes.
- criminal law files (at least as long as the client is alive).
- corporate books and records (*e.g.*, charters, stock certificates, minutes, bylaws).
- files of problem clients or cases.
- adoption, child support, alimony, and custody proceedings files.
- files concerning structured settlements.
- trust deeds.
- cases with recyclable work product.

What constitutes the client file that must be given to a client?

The KBA Ethics Committee in Ethics Opinions E-235 (1980) and E-395 (1997) provided the following guidance on what records must be given to a client:

- Notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, recommendations.
- Correspondence between attorney and client.
- Correspondence between the attorney and third parties.
- Material furnished by the client.
- Searches made at the expense of the client.
- Copy of pleadings and the like file in an administrative or court proceedings.
- Legal research embodied in memos or briefs.

At the time these opinions were rendered maintaining client files in electronic files was not a major consideration. It is now. Apply the applicable guidance above on what electronic files belong in a client's file. Be sure that you manage electronic files so that access to files kept on superseded systems can be retrieved when the firm changes computers, software, and backup procedures. More than one firm was embarrassed to find when trying to retrieve files on a superseded system that they had not retained the technology to find and open required files.

Use letters of engagement and closing letters to notify a client of firm procedures for returning client files and disposition of client files

A letter of engagement should get client agreement on how the client file will be managed. A specific time and procedure for claiming files after the representation should be fixed including a warning that the files are subject to destruction if not claimed as stipulated. Include in letters of engagement who pays for file copying and whether files may be returned in electronic format. The following is a sample engagement provision for disposition of files at the termination of the engagement:

> Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within sixty (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that "materials" include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense,

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"You must have long-term goals to keep you from being frustrated by short-term failures."

Major General Charles C. Noble

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certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process.

Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement. *(From The Association Of The Bar Of The City Of New York Committee On Professional And Judicial Ethics Formal Opinion 2010-1)*

At the conclusion of a matter:

- Assign the file a closed file index number.
- Check for outstanding fees and proper client trust account documentation.
- Return client property such as original documents being sure to copy any returned documents necessary for the firm to have a complete file.
- Strip the file of duplicate documents, *etc*. – do not remove work product such as drafts, phone messages, or research notes.
- Send a closing letter to the client. (*See the article in this newsletter: Closing Letters: When Does A Client Become a Former Client?*)
- Assign a file destruction date and calendar it in the office closed file index.
- At the time a file is calendared for destruction notify the client by certified mail. Advise that in the absence of instructions to the contrary the file will be destroyed after the date indicated in the notice.

Other risk management considerations

Files of Missing Clients: KBA Ethics Opinion E-433 (5/19/2012) is a recent comprehensive treatment of how lawyers should deal with missing clients including records retention. We recommend it for your file on records management.

Lawyer Copy of Closed Client Files: Sometimes clients ask lawyers to destroy all copies of their file. It may not be prudent for the lawyer to comply with this request for purposes of malpractice claim defense or to avoid complicity in questionable conduct of a client. SCR 3.130 (1.16), Comment (9) covers return of a client file including language that expressly allows a lawyer to retain a copy of the file.

Sources for Review of Firm File Retention and Destruction Procedures: This article relies substantially on KBA *Bench & Bar* articles *The Secret Life of Client Files* and *The Amazing Client Electronic Files*. They are available on Lawyers Mutual's Website at *lmick.com* – click on Resources, Subject Index, Files, and then on the articles.

Closing Letters: When Does A Client Become a Former Client?

Does it Matter? You Bet it Does!!

Too many lawyers do not like to send closing letters upon the conclusion of a representation. Some consider them an unnecessary administrative burden while others engage in what is known as passive marketing. The idea is that lawyers want clients to think of them as "their lawyer" who will return whenever they have new legal matters. A closing letter might discourage future contact. The risk in both approaches is that these lawyers may find long after thinking a representation was over that they have a client and don't know it. It seem that the quiescent or straggler client always surfaces just after the statute of limitations has run. In an ensuing malpractice suit, if an attorney-client relationship is found, the client is usually an automatic winner. This article considers the risk management importance of closing letters both for completed representations and disengagement from representations. (*Sample lawyer closing and disengagement letters are readily available on Google.*)

Quiescent Clients

We covered the classic quiescent client malpractice case in a previous newsletter as follows:

In *Jones v. Rambanco Ltd.* (2006 WL 2237708, W.D. Wa 2006) The GTH law firm represented a subsidiary of a company in 2002 that it was now suing on behalf of its employees. The company moved to disqualify GTH claiming to still be a client from the representation of its subsidiary. GTH argued that the company was a former

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client because the subsidiary's matter had settled in 2002 and the firm had not provided any legal services to the subsidiary since that time which was now over three years. The Court reasoned that some event inconsistent with an attorney-client relationship is necessary to conclude that a representation is terminated. The facts showed that GTH had never sent a closing letter to the subsidiary, had three inactive subsidiary files that GTH considered completed but had never been closed, was paying for storage of dozens of boxes of documents relating to the subsidiary's dispute, had not notified the subsidiary when several lawyers who had worked on its matter left the firm, and assigned a new billing partner at that time for the subsidiary. Furthermore, the settlement agreement named GTH as the contact for any issues regarding the settlement agreement that did not expire until 2011. The Court ruled that these circumstances showed that GTH had the intention of a continuing representation of the subsidiary that required disqualification from representing the plaintiffs in the case against the parent.

Lesson Learned: As tempting as it is for the purpose of new business to foster the idea that a relationship continues once a matter is concluded, the best practice is to use closing letters to make crystal clear that the representation is over and that no further duties are owed the now former client. Had GTH followed this practice it would not have been disqualified because the subsidiary would have been a former client and there was no substantial relationship between the two cases. You are at the mercy of quiescent clients when you leave the situation dangling – and don't expect mercy when accused of malpractice or a conflict of interest.

Lawyer Mobility, Law Firm Breakups, and Lateral Hiring Often Lead to Straggler Clients

Statute of Limitations Defense Lost Because of Failure to Clearly Close Representation

Gotay v. Breitbart (58 AD 3d 25 (2008)) is a good example of how law firm breakups, lateral hiring, and lawyer mobility can create a continuing representation leading to malpractice liability long after the statute of limitations would have run. *Gotay* involved a client's medical malpractice case being handed off from one firm to a second firm and then to a third firm that made a lateral hire of the lawyer responsible for the case in the second firm. The third firm declined representation because of apparent error in bringing the suit. Gotay sued the first and second firm for malpractice. The upshot of the confusing facts of this case was that the second firm lost a statute of limitations defense because they had not clearly terminated their representation of Gotay when the lateral hire moved to the third firm. The following language from the opinion is instructive:

> The Court of Appeals has recognized it as "essential that the terms of [attorney-client] representation . . . be set down with clarity." …. Although the need for such clarity has most often been remarked upon in connection with fee disputes, it is no less critical to have an explicit and accurate understanding of any other fundamental issue pertaining to the attorney-client relationship, including, obviously, the elemental issue of whether there is a relationship at all. There is no room for uncertainty on these matters, especially where, as here, attorneys deal with laypersons unversed in the nuances and intricacies of legal practice and expression; what may seem crystal clear to a lawyer may be utterly lost upon the client. If the attorney-client relationship has come to an end, that fact should be absolutely clear to all parties involved. (*citation omitted*)

Lesson Learned: One of the most important risk management benefits of closing disengagement letters is that they often establish the time for a malpractice statute of limitations to begin to run. This can be critical for withdrawing lawyers because the reason for withdrawal often involves the risk of a malpractice claim. A closing letter should be sent by a lawyer substituted in a litigation action even if the substitution is a matter of record. Without a closing letter, exposure to a malpractice claim can be virtually indefinite in some representations.

Disqualifying Conflict of Interest Found When Lawyer Failed to Affirmatively End Representation Before Joining Firm Representing Client's Opponent

In *Krutzfeldt Ranch LLC v. Pinnacle Bank* (272 P.3d 635 (2012)) Hoskins advised Harris on tax matters in Harris' representation of Krutzfeld who was suing Pinnacle. Hoskins then moved to the Crowley law firm that was representing Pinnacle in the suit. Some time prior to moving to Crowley, Hoskins sent a letter of engagement to Harris regarding the Krutzfeldt representation indicating the prospective nature of the services and a bill for services rendered. Subsequently Hoskins notified Harris of his move to Crowley in a letter that contained this language: "[w]e feel we will be more responsive and efficient to your needs and the ever changing tax and regulatory

"If we're growing, we're always going to be out of our comfort zone." *John Maxwell*

world by utilizing the resources that Crowley … has to offer." Hoskins took no affirmative steps to terminate his representation with Harris of Krutzfeldt prior to his move to Crowley. A motion to disqualify Crowley for a current client conflict of interest was promptly made.

The motion was contested *inter alia* on the basis that the Krutzfeldt representation was over because when Hoskins moved to Crowley all his clients became former clients; that a final bill had been paid; and that Crowley had imposed a screen as soon as they learned of the conflict of interest issue. The Supreme Court of Montana found that the attorney-client relationship is not automatically terminated when a lawyer joins another firm; that the paid bill did not indicate that it was a final bill; and that the screen did not effectively protect Krutzfeldt from prejudice because Krutzfeldt was a current client of Hoskins when he joined Crowley. In disqualifying Crowley for a current client conflict of interest the Court reasoned as follows:

> The critical fact here is that, even if grounds for withdrawal existed under the terms of his engagement letter, Hoskins did not withdraw from his representation of the Krutzfeldts prior to accepting his new position. He never informed the Krutzfeldts that his work for them had concluded, never terminated his representation of them, and never advised them he was contemplating joining Crowley. The "Dear Client" letter gave no indication the Krutzfeldts were no longer Hoskins's client. To the contrary, the letter contemplated future legal services ….

Lesson Learned: Firms making lateral hires must make a detailed conflict of interest review of all the incoming lawyer's current clients and former clients matters and cases. Even if Crowley had won on the basis that a current client conflict of interest did not exist because the representation was terminated, Crowley would have faced a disqualification motion because the substantial relationship test for disqualification under the former client conflict rule (in Kentucky SCR 3.130(1.9)) would appear to apply under the facts of this case.

A Closing Letter Checklist for a Completed Representation

Naomi C. Fujimoto in his article "How to Close a Case" (ABA General Practice, Solo and Small Firm Division Magazine, July/August 2010) offers this useful checklist for closing letters upon the completion of a matter:

- A reiteration of the things that you were engaged to do and a confirmation that those things were in fact done.
- A statement that the client should let you know by a certain date if the client thinks any part of the case remains unfinished, and that if the client does not so inform you, then the case will be closed.
- A statement that upon the date the case is closed and the attorney-client relationship is ended, all forward-going communications with the client will no longer be covered by attorney-client privilege. This may seem to be a self-evident result of terminating the attorney-client relationship. However, this issue has actually arisen in a colleague's case and, as a result, a specific statement to this effect is now included in that lawyer's closing letter.
- An IRS Circular 230 legend or language to comply with Circular 230 if the letter contains tax information or tax advice.
- A listing of documents given to the client. You may wish to note whether the documents are originals, copies, or file-marked copies. Also consider having the client acknowledge receipt of the documents in writing.
- A confirmation that the client has received money from you if you have given money to the client or are giving money to the client with the termination letter (such as settlement funds or a reimbursement of the remainder of a retainer fee). You may wish to have the client acknowledge in writing the receipt of specific amounts of money and the date when the money was received.
- Documentation about why things were done or not done in the case, especially for matters you think your client may not recall or may not accurately recall, for matters that may have diverged from your normal way of handling similar cases, or for matters that may have had a negative result or may result in something negative in the future.

Editor's Note: We recommend that the closing letter also include the firm's file retention and destruction procedures.

A Disengagement Closing Letter Checklist for Withdrawing from Representation

Editor's Note: An update from the KBA Bench & Bar article "How To Fire A Client – The Client From Hell, Dog Cases, and Escape Clauses" available on Lawyers Mutual's Website at lmick.com – click on Resources, Subject Index, Termination of Representation, and then on the article.

Whenever possible withdrawal should be a clean break – a clear-cut decision with the client's agreement in

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www.lmick.com

Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

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writing. Use a disengagement letter that:

- Is addressed to the client and confirms that the relationship is ending on a specific date with a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.
- Avoids imprudent comment or advice on the merits of the case.
- Indicates whether payment is due for fees or expenses.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with a successor counsel.
- Identifies important deadlines for the matter.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.

After sending the disengagement letter carefully follow through on the duty to take necessary actions to protect the client's interest and comply with the representations in the disengagement letter. This avoids a malpractice claim over the manner of withdrawal.

Finally, a complete copy of the file should be retained. A fired client or one that fired you has a high potential to be a malpractice claimant. The first line of defense is a complete file with a comprehensive disengagement letter. This is the best evidence for showing competent and ethical practice in terminating a client.