

# OCDL SPOTLIGHT

## Rule 4-1.15(h) — A Definitive Answer to the Question, “How Long Am I Ethically Required to Retain Closed Client Files?”

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With storage space becoming more and more expensive and the size of law firms continuing to grow, a question often asked by attorneys has been, “How long am I ethically required to retain closed client files?”

### PRIOR INFORMAL ADVISORY OPINIONS

Previously there was no rule of professional conduct specifically addressing the issue. As a result, lawyers had to look to the informal advisory opinions issued by the Chief Disciplinary Counsel for guidance.<sup>1</sup> The applicable informal advisory opinions provided that an attorney was prohibited from destroying an item within a file which had inherent value if it was left with the attorney for safekeeping.<sup>2</sup> The informal advisory opinions also stated that the file belonged to the client and could not be destroyed without the consent of the client.<sup>3</sup> As a result, the Chief Disciplinary Counsel opined that an attorney could not scan closed files onto a CD-Rom and then dispose of the hard copies unless the client consented.<sup>4</sup>

Informal Advisory Opinion 20010018 addressed the various ways in which an attorney could obtain consent from a client to destroy a closed file. The opinion stated that an attorney could obtain consent by setting forth the attorney’s file-destruction policy in the attorney-client fee agreement and having the client sign the agreement at the

beginning of the representation. The opinion also provided that if the attorney had not addressed the issue in the fee agreement, the attorney could contact the client and obtain the client’s actual permission immediately before destroying the file or use implied consent as authorization to destroy the file. In order for the attorney to use implied consent, the attorney had to attempt to notify the client of the attorney’s intent to destroy the client’s file. As long as the attorney had a reasonable belief that the client had received the notice and the client did not object to the destruction of the file, the attorney could destroy the file. However, Informal Advisory Opinion 20010018 prohibited an attorney from destroying a file if the attorney had reason to believe the client had not received notice of the attorney’s intent to destroy the file. Thus, if the attorney sent a letter to the client by mail outlining his intention to destroy the file and the letter was returned to the attorney, the attorney could not destroy the file, even if the files had been closed for 20 years or more.<sup>5</sup> With today’s mobile society, this standard imposed a fairly significant burden on attorneys who had not previously included their file destruction policies in their fee agreements and who could no longer contact their former clients.

### RULE 4-1.15(H)

On August 24, 2004, the Supreme Court of Missouri adopted subdivision (h) of Rule 4-1.15. The subsection

addresses file retention/destruction by attorneys. It became effective on January 1, 2005, and replaces the Chief Disciplinary Counsel’s prior informal advisory opinions on the subject to the extent the opinions contradict the rule.<sup>6</sup>

Subsection (h) of Rule 4-1.15 offers relief to attorneys who are unable to contact their former clients about file destruction and provides more guidance to attorneys than the prior informal advisory opinions concerning file retention/destruction. However, even with the adoption of subsection (h) to Rule 4-1.15(h), an attorney should still carefully examine and consider his or her file retention/destruction practices and procedures.

### The Ten-Year Time Frame of Rule 4-1.15(h)

Subsection (h) of Rule 4-1.15 generally allows an attorney to destroy a client’s closed file 10 years after completion or termination of the representation without obtaining consent from the client. While this is different than the recommendations set forth in the Chief Disciplinary Counsel’s informal advisory opinions, subsection (h) of Rule 4-1.15 does not change the underlying premise of the opinions that the file belongs to the client.<sup>7</sup> Subsection (h) states that if the client does not request the file within 10 years after completion or termination of the representation, the file is deemed abandoned by the client and may be destroyed.

Does Rule 4-1.15(h) prohibit an

attorney from reaching a different agreement with the client about file retention than the 10-year retention period? No, subsection (h) explicitly allows the attorney and client to contract concerning the retention or destruction of the file.<sup>8</sup>

Because retaining closed files for a 10-year period is a relatively long period of time, an attorney may want to set forth in his or her fee agreement a shorter time frame for retention/ destruction of the files. A policy determination on retaining a particular file must be based upon a reasonableness standard. When deciding what is an appropriate time period for the retention of files, an attorney should consider factors such as the statute of limitations, the nature of the particular case or matter handled by the attorney, and the client's particular needs rather than arbitrarily setting a uniform file destruction period for all clients and all files.

An attorney should also be mindful that Rule 4-1.15(a) requires an attorney to keep complete records of trust funds for five years after the termination of the representation. Accordingly, an attorney would not want to set forth a file retention/ destruction policy of less than five years in his fee agreement unless the attorney retained from the file documentation of receipts and expense such as settlement checks, transcript fees, or court filing fees that should have "run through" the attorney's trust account.

Furthermore, for client relations purposes it is also a wise practice for the attorney to remind the client of the attorney's file retention/destruction policy at the conclusion of the representation and perhaps immediately before destroying the file.

### ***Exceptions to the Ten-Year Time Frame***

Like most rules, subsection (h) of Rule 4-1.15 contains some caveats. An attorney does not have the right to destroy all files after 10 years. First and most importantly, *items of intrinsic value in a file can never be destroyed*. Besides items with obvious value – such as stock certificates, bonds, and notes – this exception would also include original documents such as abstracts, title insurance policies, original wills, unrecorded deeds, tax returns, bills of sale, certificates of incorporation, minute books, and insurance policies.

To avoid potential problems with the return of items of intrinsic value, an attorney may want to establish a policy of not retaining original client documents or items of intrinsic value unless it is absolutely necessary for the representation. If the client's documents or valuables are needed as reference materials by the attorney, the attorney may want to photocopy them, place the copies in the file and return the originals to the client.<sup>9</sup> In addition, when returning a document or item of intrinsic value to the client, an attorney should obtain a receipt from the client so that there is no dispute later about whether the item or document was actually returned.<sup>10</sup>

What is an attorney to do if he or she has items of intrinsic value belonging to the client and the attorney can no longer locate the client? The prior informal advisory opinions did not address the issue except to state that the attorney could not destroy the items. Subsection (h) offers two options to the attorney. The attorney can continue to securely store<sup>11</sup> the items until the client can be located and the items returned. In the alternative, if more than 10 years have passed since the completion or termination of the representation, the attorney may deliver the items to the state's unclaimed property agency. In Missouri, the State Treasurer is responsible for the disposition of

unclaimed property. Before delivering any such items to the State Treasurer, an attorney should check with the Treasurer's office to ascertain what procedures the Treasurer will require the attorney to follow.

Rule 4-1.15(h) also addresses four other situations whereby an attorney is required to retain client files longer than 10 years. If there is a legal malpractice claim pending, a criminal or governmental investigation pending, a complaint pending with the Chief Disciplinary Counsel, or there is other litigation pending relating to the representation, Rule 4-1.15(h) prohibits the destruction of the files. The reason for requiring the attorney to retain the files in these situations is obvious.

### ***Destruction of All Files That Meet the Requirements of Rule 4-1.15(h)***

After reading Rule 4-1.15(h), most astute attorneys will probably ask, "Should an attorney destroy all files permitted by Rule 4-1.15(h) without further analysis?" The answer is a resounding "NO." There are many situations whereby an attorney should retain files longer than the time period required by Rule 4-1.15(h) to ensure that the client's rights are protected. For example, an attorney will probably want to maintain files indefinitely for probate or estate matters, homicide cases, life sentence cases or lifetime probation cases.<sup>12</sup>

Likewise, while it may not be necessary for an attorney to maintain a file indefinitely, he or she may want to retain the file for longer than 10 years for certain clients or matters. For example, in a dissolution matter involving child custody when the child or children have not reached the age of majority at the end of the 10-year period, the attorney may want to delay destroying the file. The same is true when an attorney has represented a minor in a tort action and the client has

not reached the age of majority by the end of the 10-year time frame set forth in Rule 4-15(h).

### ***Procedures For the Destruction of Files***

Rule 4-1.15(h) does not address the specific actions an attorney must undertake when destroying a file except to say that the attorney must take steps to preserve a client's confidentiality. Thus, subsection (h) clearly prohibits an attorney from dumping the files in the trash without first shredding them.<sup>13</sup> It also prohibits an attorney from leaving files in rented storage space, then defaulting on the payment of the rent and abandoning the files.<sup>14</sup>

However, besides requiring an attorney to maintain the confidentiality of the information in the files, subsection (h) allows an attorney to develop and implement his or her own procedures for the destruction of the files. Obviously, before shredding a file, the file should be reviewed to determine whether it contains documents of intrinsic value unless the file has been carefully reviewed at the time the matter was closed. In addition, the attorney will want to maintain an index of files destroyed or returned to the client and the date the files were closed to document his or her compliance with Rule 4-1.15(h).

### **CONCLUSION**

In conclusion, by adopting Rule 4-1.15(h), the Supreme Court of Missouri has provided attorneys with a definitive answer regarding how long they are ethically required to retain closed client files and what ethical procedures they are required to take

when destroying a file. However, before destroying a file an attorney should consider whether there is a reason to retain the file for a period of time longer than required by Rule 4-1.15(h) or whether an attorney should take extra precautions when destroying the file than those set out in Rule 4-1.15(h).

### **FOOTNOTES**

<sup>1</sup>Currently informal advisory opinions are issued by the Legal Ethics Counsel. Prior to January 1, 2003, the Chief Disciplinary Counsel issued informal advisory opinions. The author of this article did not find any written informal advisory opinions issued by the Legal Ethics Counsel addressing file retention/destruction. The Chief Disciplinary Counsel, however, did issue Informal Advisory Opinions 950151, 99024, 20010018 and 20010147 addressing file retention/destruction. These opinions can be found on The Missouri Bar's website under the "Lawyer Resources" subsection.

<sup>2</sup> See Informal Advisory Opinion 950151.

<sup>3</sup> See Informal Advisory Opinions 950151, 990241, and 20010147.

<sup>4</sup> See Informal Advisory Opinion 20010018.

<sup>5</sup> Informal Advisory Opinion 20010018 provided, "If Attorney knows that Attorney's notice [to client about attorney's plan to destroy the file] did not reach the client, Attorney may not destroy the file based upon implied consent based on the lack of a response."

<sup>6</sup> See August 24, 2004, Order of Missouri Supreme Court regarding Rule 4-1.15.

<sup>7</sup> The premise that the file belongs to the client also comes into play when a client terminates the attorney's

representation without paying the fees owed to the attorney. Formal Advisory Opinion 115 provides that the file belongs to the client, cover to cover, and the file must be provided to the client except for things in the file such as depositions or transcripts for which the attorney has borne unreimbursed out-of-pocket expenses. Formal Advisory Opinions are binding upon attorneys. See Missouri Supreme Court Rule 5.30(a).

<sup>8</sup> Subsection (h) of Rule 4-1.15 states, "A lawyer shall securely store a client's file for 10 years after completion or termination of the representation absent other arrangement between the lawyer and client." (underlining added.)

<sup>9</sup> J. R. Phelps & Terri Olson, *When May I Destroy My Old Files?*, 68 Fla. B. J. 58 (1994).

<sup>10</sup> *Id.*

<sup>11</sup> Rule 4-1.15(a) requires an attorney to appropriately safeguard the client's property when the attorney is holding the property. Consequently, items of intrinsic value such as stock certificates, bonds and notes should be stored in a fire proof locked vault.

<sup>12</sup> David D. Dodge, *Retention of Client Files Involves Ethical Considerations*, 36 Ariz. Att'y 17, 17 (2000).

<sup>13</sup> If the attorney hires an outside entity to shred or destroy the files, the attorney should assure that the entity maintains the confidentiality of the information in the files.

<sup>14</sup> Unfortunately, the Chief Disciplinary Counsel has recently received several complaints about attorneys abandoning their files in rented storage spaces.