

FILE RETENTION

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These guidelines are informational only and are not to be construed as legal advice or precedent. Compliance with the suggestions herein does not guarantee that an attorney will not be faced with a claim or demand as a result of a destroyed file or document. Decisions regarding file retention and destruction should be made on a case-by-case basis. For specific legal advice, it is recommended that an independent attorney be consulted.

To speak with Loss Prevention Counsel, contact: Judy Cannella Schott, Johanna G. Averill, Cynthia O. Butera or Lindsey M. Ladouceur at the Office of Loss Prevention, Gilsbar, Inc., phone (985)898-1785, 800-455-7227 Ext. 785; fax: (985)898-1636; E-mail: lossprevention@gilsbar.com; Website: www.gilsbar.com.

OFFICE OF LOSS PREVENTION

The Loss Prevention Program is available to assist Louisiana State Bar Association members in the prevention of legal malpractice and the improvement of office practices and procedures.

Most services are free to members of the Louisiana State Bar Association. Other services are free to those insured through the LSBA-sponsored malpractice program. Among the services provided are:

- Workshops for attorneys on preventing malpractice and office management (CLE credit)
- Workshops for non-attorney staff members
- Louisiana Loss Prevention Newsletter
- Sample Forms and Sample Forms Diskettes
- Louisiana Prescription Quick Reference Card
- Lawyers Helping Lawyers article in each issue of the LSBA Journal
- CLE ethics and professionalism presentations for organizations, universities and local bar associations
- Law School skills course instruction

Whether you are a solo practitioner or work with a small firm, a large firm or a corporation, please do not hesitate to ask for assistance. You can contact the Office of Loss Prevention any of the ways listed below. We look forward to assisting you with your practice!

Phone: (985)898-1785 or 1-800-Gilsbar, Ext. 785

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RETENTION AND DESTRUCTION OF CLIENT FILES

In response to the frequently asked question: How long do I need to keep a file?

1. Rules of Professional Conduct 1.15 Safekeeping of Client Property
 - Complete records of account funds and other client property shall be kept for a minimum of 5 years (we recommend 10 years) after termination of the representation.
2. Before destroying, review the file. Remove and return to the client all original documents received from the client. Notify the client that you intend to destroy the file and ask for written authorization to do so.
3. Do not destroy if:
 - the matter is not closed (ongoing)
 - there is a fee dispute or unpaid costs or fees
 - a mistake has been alleged or discovered
 - a client requests that you keep it open
 - the matter was extremely controversial
 - there might be a claim of malpractice
 - there is an allegation of fraud or other intentional misconduct
 - there might be a disciplinary complaint filed against you
4. Before you destroy:
 - Send notice to client (and client's new attorney) by certified mail to the last known address to obtain authorization to destroy
 - If client requests the file, keep a copy of what is given to the client (at least for several years)
 - Review all material in the file to determine what must be kept
 - These items should not be destroyed without a further investigation. These should be indexed and filed in a safe place:
 - bonds
 - wills
 - original deeds
 - promissory notes
 - unrecorded deeds
 - original contracts
 - exculpatory documentation
 - all original documents of the client should be returned to him.
 - Consider microfilm, computer diskette, or CD transfer of file materials (obtain client consent)
 - Maintain a master list of destroyed files, including name, file number, date opened, date closed, and date destroyed
 - Maintain a file of client consents/authorizations/return receipts
5. Method of destruction
 - incineration or shredding to assure confidentiality

Rule 1.15 Safekeeping property

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a bank or similar institution in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (d) A lawyer shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:
 - (1) No earnings from such an account shall be made available to a lawyer or firm.
 - (2) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.
 - (3) An interest-bearing trust account shall be established with any bank or savings and loan association or credit union authorized by federal or state law to do business in Louisiana and insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.
 - (4) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, non-lawyer depositors.
 - (5) Lawyers or firms depositing client funds in a trust savings account shall direct the depository institution:

- A. To remit interest or dividend, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;
 - B. To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and
 - C. To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.
- (6) Any account enrolled in the program which has or may have the net effect of costing the IOLTA program more in bank fees than earned in interest over a period of time may, at the discretion of the program's administrator, be exempted from and removed from the IOLTA program. Exemption of an account from the IOLTA program revokes the permission to use the administrator's tax identification number for that bank account. Exemption of a pooled clients' trust account from the IOLTA program does not relieve an attorney or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest bearing account.

Amended Dec. 13, 1990, eff. Jan. 1, 1991; Amended and eff. June 29, 1995; Amended May 24, 2001.

RETURN OF CLIENT FILES

*In response to the frequently asked question:
What is my obligation to surrender the client's file
upon termination of the legal representation?*

1. Upon termination of the legal representation at the will of either the attorney or the client, the attorney nevertheless maintains a certain duty of continued loyalty to the client. See Rules of Professional Conduct 1.16(d).
2. The client file, although created and maintained by the attorney, is and remains the property of the client.
3. The attorney may not refuse to return the file to the client or “hold the file hostage” in order to collect an unpaid legal fee or unpaid legal costs.
4. Instead, the attorney must return the file to the client, including all original documents tendered to him by the client, upon the client’s request.
5. The attorney is allowed to retain a copy of the file.
6. If the attorney was discharged “without cause,” then the attorney may charge the client for his actual out-of-pocket expense for copying the file. However, the attorney may not withhold the original of the file from the client until those reproduction costs have been paid.
7. On the other hand, if the attorney was discharged “with cause,” then the attorney may not charge the client for reproducing the file, since the copy is desired merely for the convenience of the attorney or to assist him in defending claims by the client or attempting to collect his fee.
8. In the event of a dispute over whether the termination was “with cause” or “without cause,” the court must settle the matter, including the issue of whether the attorney may recoup the cost of reproducing the file.

Rule 1.16. Declining or terminating representation

- (a) Except as stated in Paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) The representation will result in violation of the rules of professional conduct or other law;
 - (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) The lawyer is discharged;
- (b) Except as stated in Paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
 - (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (2) The client has used the lawyer's services to perpetrate a crime or fraud;
 - (3) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
 - (4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (6) Other good cause for withdrawal exists.
- (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.