NEW RULE ON CLIENT FILES WILL PROVIDE CLEAR GUIDANCE FOR LAWYERS (UPDATED)

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Disposing of client files is a leading cause of headaches for lawyers, whether working in large firms or as solo practitioners. The challenge has been due partly to the absence of a clear rule on the topic. But there is good news on the horizon. Effective September 1, 2018, the Supreme Judicial Court has promulgated a new rule on client files, Rule 1.15A of the Massachusetts Rules of Professional Conduct. The rule answers many questions about handling files on closed or old matters, including what constitutes a "file" and the period for which it must be retained.

The most significant change is that, for the first time, there are clear rules on the number of years that lawyers must keep closed files. In general, and unless the file has been transferred to successor counsel or the client, a lawyer must hold onto a client's file for **six years** after the matter has been completed or the engagement has been terminated. Mass. R. Prof. C. 1.15A(c). If the client has not requested the file within that time, or within six years after a minor client reaches the age of majority, the file may be destroyed without further notice.

Different rules apply in criminal and delinquency cases. Where a client has been sentenced to death or life imprisonment, the file must be retained for the client's life. In other criminal cases, the lawyer must retain the file for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated client's maximum period of incarceration.

There are, of course, exceptions for both civil and criminal cases requiring that documents or the file be retained beyond the otherwise applicable time period. The most obvious exception is for intrinsically valuable documents, such as wills, that must either be returned to the client or kept until they no longer possess intrinsic value.

Mass. R. Prof. C. 1.15A(d). Other exceptions include circumstances where there is pending or anticipated: a lawsuit or other claim relating to the client matter; a criminal or other investigation related to the client matter; or a disciplinary investigation or proceeding related to the client matter. Mass. R. Prof. C. 1.15A(e).

The first part of Rule 1.15A defines the "client file," then states that, upon request, the file must be made available to a client or former client within a reasonable time, conditioned on the client's paying out-of-pocket or copying costs for certain designated materials unless retention would unfairly prejudice the client. Mass. R. Prof. C. 1.15A(a) and (b). The definition and file return obligations largely mirror the requirements of former Mass. R. Prof. C. 1.16(e), now stricken, which dealt with a lawyer's duties at the time an engagement is terminated.

As defined in the new rule, the term "client file" includes items such as papers supplied to the lawyer by the client; correspondence (whether physical or electronic); pleadings; investigatory or discovery documents; intrinsically valuable documents such as wills, trusts, deeds and securities; and copies of the lawyer's work product. Work product is further defined as, "[d]ocuments and tangible things prepared in the course of the representation … ." Because the person making the request is the lawyer's own client or former client rather than an opposing party, the definition is different from, and the obligation to turn over work product is broader than, Rule 26(b)(3) of the Rules of Civil Procedure and case law.

Comments 1-5 explain further the items that fall within, and outside, the definition of client file. Very critically, comment 4 to the rule also clarifies that most documents (except those that must be physically preserved for legal effectiveness) may be stored electronically and the physical document discarded.

The comments further instruct that the lawyer need not provide multiple copies or drafts of the same document, unless the matter is unfinished and the client and successor counsel require the drafts to complete the representation. Similarly, the lawyer's personal notes are not part of the file unless the notes are the only record of an event, such as a witness interview or a negotiation. Internal administrative documents, such as conflicts checks, billing and time records, and matters of administration, fall outside the definition of the "client file." While these items may be subject to discovery, they ordinarily do not need to be supplied to the client or successor counsel who requests the file.

The rule does not change a lawyer's obligations with regard to trust property (including trust funds) under Rule 1.15, including valuables entrusted to the lawyer by the client under Rule 1.15(b)(4). The latter must be promptly delivered to the client or safeguarded indefinitely. Rule 1.15 also governs maintenance of records for trust property and for trust accounts such as IOLTA accounts. These records must be retained for six years after termination of the representation and distribution of the property.

With the arrival of the new rule, the following is some practical advice on retaining and disposing of files:

- No matter the type or size of practice, all lawyers and law firms should have file retention policies. The policy should cover trust property as well as the client files defined in the new rule and should spell out the file disposal procedures. In addition to a policy, lawyers and

law firms should institute a regular process for disposing of old files. For example, if files are organized and segregated chronologically, then old files without special retention issues that meet the criteria set out in Rule 1.15A(c)-(f) can be shredded at the end of each year. So, for example, many files closed in 2018 may be eligible for discarding in 2024.

- At least as to current and new files, most files can and probably should be scanned and stored electronically, a procedure that is now explicitly permitted by comment 4 to Rule 1.15A. Once the file is scanned, the physical file may be discarded. Similarly, lawyers should regularly send clients electronic or physical copies of documents as the engagement progresses. Doing so will avoid the need to send a copy of the entire file at its conclusion, although the lawyer must continue to hold onto the file for the required time. One key caveat on electronic storage: your system must remain up-to-date and capable of retrieval. It does no good to store information on an old floppy disk if you have no way to recover it.
- Lawyers optimally should inform clients of their record retention policies in the written fee agreement (now required in almost every matter, *see* Mass. R. Prof. C. 1.5(b)) or another document provided at the outset of the engagement. Including a statement about file retention and disposal also makes sense as part of a closing or disengagement letter at the conclusion of a matter. Comment 1 to Rule 1.15(A) expressly encourages this practice. 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].

- Except in the case of minors, lawyers and their clients may agree to alternate arrangements. For example, they may agree on a retention period of fewer than six years. These arrangements should be clearly set forth in writing.

- Originals should be copied and immediately returned to clients. This includes original wills, which are usually safer in the client's hands than a "will vault." The problem with retaining original wills is locating long-forgotten clients when the lawyer retires. The originals must be returned to the clients, a particular challenge when the last contact with the client was years or decades ago. If it is necessary to retain original items as evidence or otherwise, return them at the close of the engagement. The same holds true for tangible property that belongs to the client, such as securities, jewelry, art or photographs. Documenting the return will avoid the need for you or a representative to look for original or valuable items upon retirement, disability or death.

Remember, of course, that nothing in Rule 1.15A **requires** that a lawyer destroy a file. Unless the lawyer and client agree otherwise, the lawyer may retain a copy of the file or any document in it. In the ordinary case, however, where old files are just taking up space for no discernible purpose, lawyers, with the help of Rule 1.15A and the simple steps outlined above, can reduce their current storage costs and, ultimately (!), face retirement without the burden of addressing the disposition of thousands of old files accumulated over decades of practice.