

**ETHICS OPINION NUMBER 254
OF THE MISSISSIPPI BAR
RENDERED DECEMBER 8, 2005**

The Ethics Committee of The Mississippi Bar has been asked to render an opinion on the following question:

How long should Mississippi attorneys retain files before
either returning them to the client or destroying the files?

Almost thirty years ago, the American Bar Association Committee on Ethics and Professional Responsibility was asked a similar question and observed that how to deal with the burden of storing retired and inactive files “is primarily a question of business management and not primarily a question of ethics or professional responsibility.” Informal Op. 1384, ABA Comm. On Ethics and Prof. Resp. (March 14, 1977). ABA Informal Opinion 1384 also noted that questions about the ownership of or proprietary interests in the contents of lawyers’ files were usually questions of law. Nothing has occurred in the intervening years to undermine those observations. Yet questions persist.

The Preamble to the Mississippi Rules of Professional Conduct posits:

Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

ABA Informal Opinion 1384 recognized that the question of preservation of lawyers’ files presented such a need for a balancing of competing interests:

A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers’ files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the clients’ detriment.

Neither the rules of professional ethics then in effect nor previous opinions of the ABA committee directly dealt with the question, Opinion 1384 observed before going on to offer this general guidance:

We cannot say that there is a specific time during which a lawyer must preserve all files and beyond which he is free to destroy all files.

Good common sense should provide answers to most questions that arise.

Having said that, Opinion 1384 went on to suggest eight specific matters that lawyers should take into consideration in making decisions about preserving files. We will return to this list in due time.

The Mississippi Bar adopted ABA Informal Opinion 1384 a few years later when it issued advice in Opinion No. 98 (Oct. 5, 1984) to a lawyer who proposed to destroy old files of a deceased lawyer. Thus, and in a situation involving a lawyer dealing with the files of a deceased lawyer, a Mississippi lawyer must follow the guidelines adopted in Opinion No. 98 of the Mississippi Bar and suggested in ABA Informal Opinion 1384, at least insofar as such guidelines have not been superceded by subsequent rules changes or opinions.

The question presently posed to the Committee is much broader than that involving the files of a deceased lawyer addressed in Opinion No. 98. Rather than leaving lawyers to rely on “good common sense,” in the words of ABA Informal Opinion 1384, the Committee is asked to devise “bright line” rules fixing a time by which a lawyer should return a file to a client and a time by which the lawyer may destroy the file. These questions involve issues that go beyond the jurisdiction of the Committee to interpret the Mississippi Rules of Professional Conduct. Nevertheless, the Committee is bound to provide guidance on such matters to the extent that it can do so without exceeding its authority. The analysis, like the Committee’s authority, begins with the Mississippi Rules of Professional Conduct.

Only four provisions of the Mississippi Rules of Professional Conduct can be said to address the preservation of client files in any direct manner. Rule 1.6(a) requires lawyers to maintain the confidentiality of information related to clients. Rule 1.15 provides direction for safekeeping the property of others. Rule 1.16(d) addresses termination of representation and touches on disposition of files. Rule 1.17(b)(3) mentions files in the context of the sale of a law practice.

It is axiomatic that in carrying out decisions about preserving or destroying material in client files, a lawyer should strictly observe the confidentiality requirement of Rule 1.6. The lawyer's or law firm's policies and procedures concerning storage, access and method of destruction should be designed to maintain the confidentiality required by Rule 1.6(a). Of course, a file may contain material that is not subject to this rule, but good practice would suggest that the entire file be maintained in such a way as to satisfy Rule 1.6.

Maintaining the confidentiality of client information was a focus of the Mississippi Bar's guidance in Opinion No. 98 (Oct. 5, 1984) and Opinion No. 114 (Jan. 29, 1986) concerning destruction of files of a deceased lawyer. Those opinions require that a lawyer representing the estate of a deceased lawyer review the decedent's files, but only insofar as necessary to determine the identity of the client, and then give the client notice of the planned destruction. Opinion No. 98 holds that if the lawyer is unable to contact the client, the lawyer is then to "examine the contents of the file and remove therefrom any documents or other things that may be of value to the client or the client's estate in the future." This opinion does not suggest what is to be done with these "documents or things that may be of value." For that, one must return to the Rules.

Rule 1.15 concerns property of clients or others being held by a lawyer and sets out the only specific file preservation period in the Rules of Professional Conduct. Rule 1.15(a), familiar to most lawyers as the rule governing trust accounts, requires that a lawyer:

hold property of clients and 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.... 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 seven years after termination of the representation.

It should be noted that this rule applies not only to trust account records, but also to records of "other property" held by a lawyer. Thus, a lawyer has a duty to keep records of the property of others that the lawyer holds, and to keep such records for a period of seven years after termination of the representation. In providing for destruction of these records, the lawyer should review each matter individually because the time of "termination of the representation" can vary from case to case.

This preservation of a lawyer's records of the property the lawyer holds is, however, only a secondary focus of Rule 1.15. The heart of the rule is the requirement that the lawyer "appropriately safeguard[]" the property of others. The Comment to Rule 1.15 begins with the sentence: "A lawyer should hold property of others with the care required of a professional fiduciary." As noted above, Opinion No. 98 recognized that a lawyer has no duty to maintain files permanently. But, focused as it was on maintaining the confidentiality of client information, Opinion No.98 may have appeared to suggest that the lawyer has a duty to determine what items the client "may reasonably expect" the lawyer to preserve, and then preserve those items indefinitely. Opinion No. 114 attempted to clarify this issue and in so doing set out what we described in Opinion No. 234 (Sept. 19, 1996) as "[t]he general rule of an attorney's obligation to maintain a client's file:"

Certainly the files must be maintained by someone so long as there is unfinished business relating to the representation. Beyond that, there is a balancing between the client's expectations that valuable and potentially useful materials in the file will not be destroyed and the costs that storage imposes on the lawyer.

Further elaborating the limitations on the lawyer's duty to safeguard client property, Opinion No. 234 derived from Opinion No. 98 and Rule 1.15 the principle that once unfinished business regarding the representation is concluded the attorney only has an obligation to preserve and protect the client's original documents and such "valuable and useful information [that is] not otherwise available to the [client]."

Opinion No. 234 goes on to provide a clear and direct answer for most of the cases presented the question under consideration, an answer that also synthesizes earlier ethics opinions of the Mississippi Bar:

...So long as the attorney gives the client all of the original documents that belong to the client and gives originals and/or copies of all other documents, the attorney has complied with the [Mississippi Rules of Professional Conduct]. An attorney is not required to store a client's file after a case has been concluded if he can give the file to the client. The attorney may require his client to acknowledge receipt of the file and to relieve the attorney of responsibility for maintaining the file.

Not addressed in Opinion 234 is the situation in which the lawyer has lost contact with the client and therefore cannot return the file once unfinished business regarding the representation is concluded. Moreover, the Comment to Rule 1.15 states:

Unclaimed Property. Any lawyer holding property or monies belonging to clients with whom he has lost contact must retain and account for said funds subject to the Mississippi Uniform Disposition of Unclaimed Property Act.

Again, the Comment addresses only what should be done with “funds,” and the Act, Miss. Code Ann. § 89-12-1, et seq., makes no provision for dealing with unclaimed tangible personal property in the hands of anyone not a part of the federal government.

Since all of these authorities have had the opportunity to consider the question under review, and none have found a principle way to relieve the lawyer of the obligation to safeguard a client’s property when the property cannot be returned to the client, the Committee also declines to do so today. In the Committee’s view, the tangible personal property in a client’s file that is the property of the client, must, except as provided below, be returned to the client or safeguarded indefinitely by the lawyer in accordance with the Mississippi Rules of Professional Conduct.

The practical and sound advice in Opinion No. 234 and the Comment to Rule 1.15 raise the question of what documents “belong to the client.” This question is also presented by Rules 1.16(d) and 1.17(c). Each of these rules, in a different context, mentions the right of a client to obtain material from the client file maintained by a lawyer. For more than forty years, the ownership of specific items contained in a file has been considered to be a question of law. American Bar Association Informal Opinion No. 790 (Oct. 26, 1964). After reviewing the various authorities, we concluded in Opinion No. 144 (March 11, 1988) that:

to the extent that the client has a right to his file, then his file consists of the papers and property delivered to him by the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client and the investigative reports which have been paid for by the client. [Citation omitted.] However, the lawyer’s work product is generally not considered the property of the client....

We have elsewhere addressed the very limited circumstances under which a lawyer may withhold from the client the portions of a file that belong to the client. See

Opinion No. 105 (Sept. 9, 1985); Opinion No. 144 (March 11, 1988); Opinion No. 234 (Sept. 19, 1996). We need not revisit those questions here.

In Summary, once unfinished business regarding the representation has been concluded, all parts of the file that belong to the client should be returned to the client. If the client cannot be located, the parts of the file that belong to the client must be safeguarded in accordance with the Mississippi Rules of Professional Conduct.

The Committee further holds that there is no violation of the Mississippi Rules of Professional Conduct when a lawyer follows and abides by the precepts quoted in Opinion No. 98 from ABA Informal Opinion 1384 (Oct. 5, 1984), at least to the extent that such principles have not been overruled by subsequent opinions. The guidelines set out in that opinion are:

- Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).
- A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.
- A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.
- In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.
- A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.
- In disposing of a file, a lawyer should protect the confidentiality of the contents.
- A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
- A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

Obviously many factors outside the Mississippi Rules of Professional Conduct should be taken into account when a lawyer or law firm develops a file retention policy and practice. Among these factors are the limitation periods for claims against the lawyer and for claims that the client might choose to advance against others. In any case in which the client terminates representation by a lawyer, the lawyer should use caution in destroying any files that might be relevant.

Another option for file retention is for the lawyer to consider implementing an electronic storage system for those materials that can be maintained in that medium. Any lawyer who implements such a storage system is encouraged to keep abreast of the changes and advances in electronic storage so that they will be able to successfully retrieve their older electronically stored materials in the years that follow.