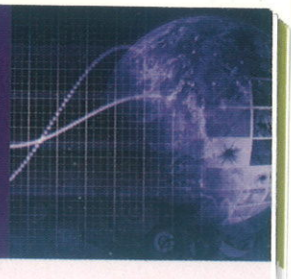

By **David A. Bamdad** & **Christopher J. Clarke**

Document Retention for the Modern Trusts and Estates Practitioner

Avoid malpractice claims and grievances

File retention and destruction policies are often overlooked by law firms, attorneys and the staff they employ. Much of this can be attributed to the absence of hard and fast rules on the subject. Nevertheless, a law firm's failure to develop and, more importantly, enforce internal policies with respect to the retention and destruction of client files can lead to malpractice claims and/or grievances. The focus of this article will be on the considerations and guidelines provided by the American Bar Association (ABA) and the Model Rules of Professional Conduct (MRPC), which have been adopted in one form or another by 49 states and the District of Columbia,[1] and their application to the representation of a fiduciary.

Ethical Duties and Considerations

Attorneys' obligations to retain files stem from their ethical duties to clients. MRPC 1.16(d) provides that: "[u]pon termination of a representation, a lawyer shall take steps, to the extent reasonably practicable to protect a client's interest, such as … surrendering papers and property to which the client is entitled …."[2] MRPC 1.15(a) also requires attorneys to maintain records relating to client and third-party funds and property for a period of five years.[3] Various states have expanded Rule 1.15 and have modified the period for which an attorney should retain client trust account documents after termination of the representation. For example, in Alabama, attorneys should retain such records for six years,[4] and in both New York and Illinois, attorneys should retain such records for seven years.[5] New York attorneys are also required to retain engagement agreements and billing records for seven years.[6]

While bright-line rules exist with respect to the retention of client trust account records, there's a paucity of authority concerning the retention of other documents contained in an attorney's file. Accordingly, the ABA's Committee on Ethics and Professional Responsibility has set forth eight considerations for attorneys to contemplate when deciding whether to retain or discard a file:

1. 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 [sic] 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).
2. 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.
3. 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 except [sic] will be preserved by the lawyer.
4. In determining the length of time for retention of [sic] disposition of a file, a lawyer

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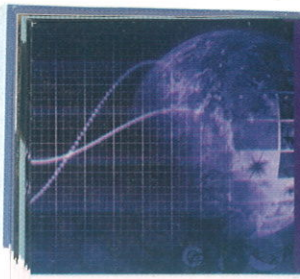


should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based on their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.
6. In disposing of a file, a lawyer should protect the confidentiality of the contents.
7. 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.
8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.[7]

Given the fact that the ethical considerations pertaining to file retention depend on the type of documents at issue and the potential need for the documents in the future, particular attention must be given to the type of client representation involved when deciding whether a file may be discarded.

In applying the ABA's guidelines, it's helpful to separate an attorney's file into two categories: (1) the client's property, and (2) the attorney's property, each of which implicate different considerations. A client's property includes, but isn't limited to, any documents the client provides to the attorney, such as original wills, trusts, powers of attorney and deeds. Because such documents belong to the client, it's recommended that the attorney contact the client prior to their destruction, regardless of the amount of time that's passed since the representation concluded.[8] If the client can't be contacted, "the lawyer should be guided by the foreseeable need for the documents in question."[9] However, certain jurisdictions, such as West Virginia, take the position that the failure of a client to request the file within five years after the termination of the relationship can be deemed implicit consent to destroy the file.[10] Nevertheless, the period for which an attorney is required to retain a client's estate-planning documents can be indefinite. As one commentator noted, "Rule 1.15 has a special significance for trust and estate lawyers who agree to store the originals of their clients' wills and related documents,"[11] because by their very nature, they're the clients' property. Furthermore, the digitization of a client's original wills, trusts, deeds or other important papers is insufficient to satisfy an attorney's ethical duties to preserve a client's property because the originals of such documents have legal significance.[12] Therefore, trust and estate attorneys should take special care in safeguarding a client's original will by using a safe deposit box or will vault to protect against loss or destruction.[13] With respect to documents that belong to the attorney or law firm (for example, work product, internal emails and notes), or when ownership is unclear, "the answer to the questions whether and how long to retain such files is primarily a matter of good judgment."[14]

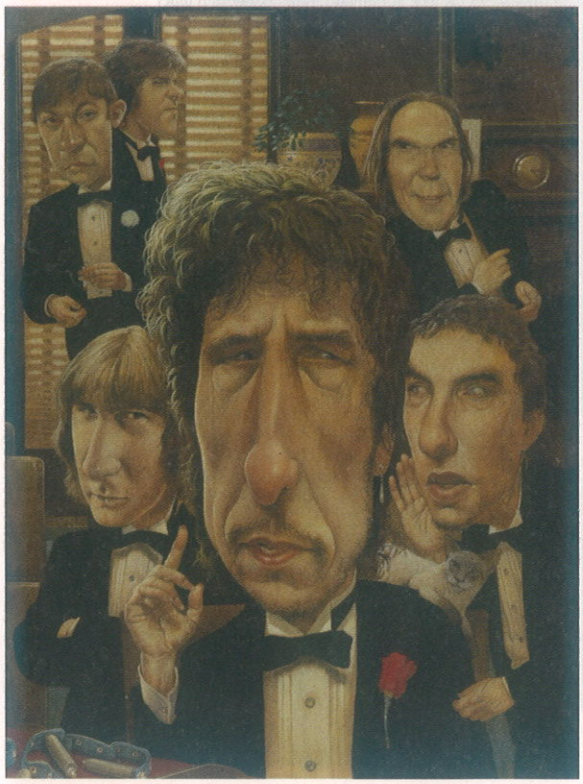
Files Pertaining to Fiduciaries

Given the fact that the ethical considerations pertaining to file retention depend on the type of documents at issue and the potential need for the documents in the future, particular attention must be given to the type of client representation involved when deciding whether a file may be discarded. For example, a fiduciary of a trust or estate has a duty to report and/or account to the beneficiaries thereof and, thus, can be held liable for breaches of trust and fiduciary duties if he's unable to render a complete report.[15] However, there are typically time limitations on such claims. Therefore, an attorney representing a fiduciary must be aware of the limitations period for a fiduciary's liability in his jurisdiction, as well as any factors that may toll the limitations period. In New York, for example, claims for breach of fiduciary

duty carry a 6-year statute of limitations. However, the 6-year period doesn't begin to run until the fiduciary openly repudiates his obligations by, for example, resigning.[16] This means that a fiduciary can be liable well beyond any limitations period that might exist for other common types of civil lawsuits if he doesn't openly repudiate his obligations. For instance, in New York, an action based on negligence can be commenced within a 3-year limitations period,[17] and an action based on contract can be commenced within six years.[18] In this regard, an attorney may be able to destroy documents that are related to the subject matter of a negligence or contract claim after the 3- or 6-year limitations period expires without liability. However, an attorney who represented a fiduciary in the administration of a trust or estate may be responsible for retaining a file, or at least a portion of it, for a longer period if the fiduciary didn't resign or otherwise repudiate his obligations on the termination of the representation. Thus, it's important to understand the types of documents and information a fiduciary may require in the future.

A fiduciary is required to provide beneficiaries with information concerning the entirety of his administration of the estate or trust, including assets collected, income received, distributions made to beneficiaries and expenses paid. Therefore, to render a complete and accurate account, a fiduciary must have in his possession documents such as bank and brokerage account statements, canceled checks, receipts, deeds, repair invoices, tax returns and any other documents that will evidence and support a fiduciary's actions. An attorney who represents a fiduciary in the administration of a trust or estate may be in possession of such documents and information—such as trust/estate financial account statements, assignments, deeds, ledgers, tax returns and/or correspondence relating to the administration—which can be voluminous. If the fiduciary is unable to render a complete report or support the information contained therein, serious consequences, such as personal liability, loss of commissions, surcharge or sanctions, may result.[19]

An attorney who represents a fiduciary knows or should know the potential exposure. Therefore, if the attorney's representation doesn't culminate in a judicial or non-judicial (that is, informal) release of the fiduciary, based on the ABA's guidelines, it may be incumbent on



SPOT LIGHT

The Times They Are A-Changin'

Dylan is The Godfather of Rock by C.F. Payne, sold for $1,375 at Swann Auction Galleries Illustration Art auction on Dec. 6, 2018 in New York City. *Rolling Stone* commissioned this caricature of Bob Dylan, but Payne didn't limit his cartoons to magazines; he illustrated a series of stamps of famous singers for the U.S. Postal Service.

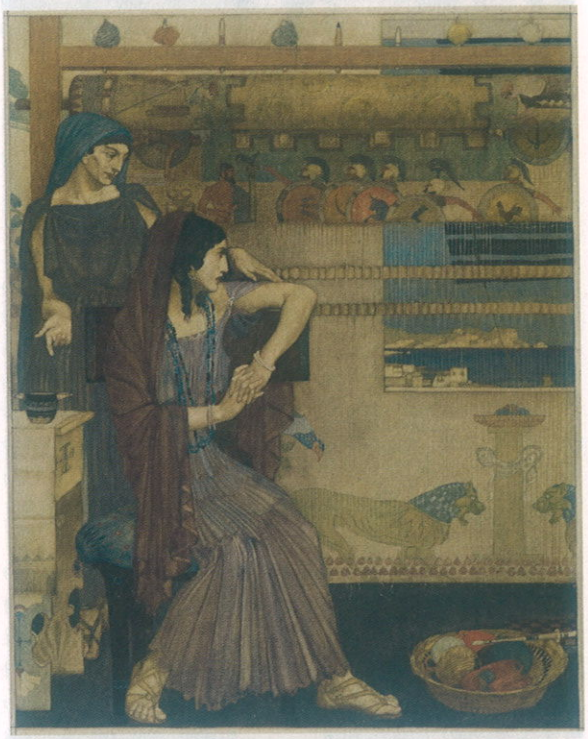
While the simple answer seems to be for the attorney to obtain a release for the fiduciary/client prior to the termination of the relationship, any attorney who's handled such matters understands it's easier said than done.

the attorney to retain the records for long periods of time provided the attorney wasn't able to turn over the file to the client or obtain his informed consent to discard it. While the simple answer seems to be for the attorney to obtain a release for the fiduciary/client prior to the termination of the relationship, any attorney who's handled such matters understands it's easier said than done. First, not all beneficiaries are willing to sign off on a release on presentment of an informal report/account. A beneficiary may have concerns regarding the administration of the trust or estate or may simply not respond to the request for a release. While the latter may be addressed by holding all distributions until a release is signed, that isn't always practical. Second, if the attorney is unable to obtain an informal release, the client may not want to expend the time and money necessary to prepare, file and potentially litigate a judicial proceeding, which can cost tens or hundreds of thousands of dollars, depending on the litigiousness of the parties involved, and take several years to resolve. Therefore, the attorney may be placed in a position in which he has to retain the file for a period of time and, ultimately, determine if and/or when it's appropriate to discard the file.

Although ABA Informal Opinion 1384 provides guidance for attorneys to consider when making that determination, each attorney and/or law firm should carefully study and consider their state and local bar association ethics opinions and any other applicable rules and case law when formulating their firm's file retention policies.

Endnotes

1. Although California's Rules of Professional Conduct are similar to the Model Rules of Professional Conduct (MRPC) in many respects, they have not adopted the American Bar Association's (ABA) MRPC.
2. ABA MRPC Rule 1.16(d).
3. ABA MRPC Rule 1.15(a).
4. Alabama Office of General Counsel Formal Opinion 2010-02 (2010).
5. New York Rules of Professional Conduct Rule 1.15(d); Illinois Rules of Professional Conduct Rule 1.15(a).
6. New York Rules of Professional Conduct Rule 1.15(d).
7. ABA Comm. on Ethics and Prof'l Resp., Informal Op. 1384 (1977), *www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_informal_opinion_1384.authcheckdam.pdf.*
8. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1986-4 (1986).
9. *Ibid.; see also supra* note 7.
10. West Virginia Bar Opinion 2002-01 (2002).
11. Karen E. Boxx, American College of Trust and Estate Counsel, "Commentaries on the Model Rules of Professional Conduct: History, Revisions, and Recent National Case Law and Ethics Opinions Involving Trust, Estate and Guardianship Issues," at p. 5 (August 2016).
12. N.J. Adv. Comm. on Prof'l Ethics, Op. 701 (2005).
13. *See supra* note 11, at p. 171.
14. *See supra* note 8.
15. *See, e.g.,* Uniform Trust Code Section 813(c); NY SCPA Section 205.
16. *Estate of Benenson,* 4882/08, *New York Law Journal,* at p. 26, col. 3 (Sur. Ct., Kings County Oct. 30, 2009), *citing Spallholz v. Sheldon,* 216 N.Y. 205, 209 (1915) (citations omitted); *see* CPLR 213.
17. CPLR Section 214.
18. CPLR Section 213(2).
19. *See, e.g., In re JP Morgan Chase Bank N.A,* 2013 N.Y. Slip. op. 51946(U) (Sur. Ct., Monroe County Nov. 26, 2013) (surcharging trustee for, among other things, failing to maintain records to justify action taken concerning investment of trust assets, as well as denying commissions and fees).



SPOT LIGHT

Wistful Waiting

Then in amaze she went back to her chamber, for she laid up the wise saying of her son in her heart by Sir William Russell Flint, sold for $22,500 at Swann Auction Galleries Illustration Art auction on Dec. 6, 2018 in New York City. This image of Penelope and her unfaithful servant appeared in a 1924 version of Homer's epic, *Odyssey.*