

## Retention and Destruction of Client Files

Unfortunately, there is no one specific rule in Texas regarding the requirements for retention and destruction of client files.

### Texas Disciplinary Rules of Professional Conduct

However, Texas Disciplinary Rules of Professional Conduct give us some guidance:

TDRPC 1.05 requires that confidential information of current and former clients not be disclosed outside the law firm except in specific, narrowly defined circumstances set forth in Rule 1.05.

TDRPC 1.09 and 1.10 provide that a lawyer may not act adversely to a former client on a matter for which the lawyer provided legal services.

TDRPC Rule 1.15(d) of the Texas Disciplinary Rules of Professional Conduct states:

*(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, 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. The lawyer may retain papers relating to the client to the extent permitted by law only if such retention will not prejudice the client in the subject matter of the representation.*

### ABA Committee on Ethics and Professional Responsibility

Informal Opinion 1384 provides:

“4. 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.

...

“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.”

A lawyer or law firm is permitted to destroy closed files when circumstances including the passage of time, the nature of the files and the absence of client instructions to the contrary, justify a reasonable conclusion that destruction of the file is not likely to harm material interests of the client concerned. But, reasonable steps must be taken to avoid destruction of the client's property such as currency, bonds, and original deeds.

## **Create Internal Procedures**

Create internal procedures for the retention and destruction of client files:

1. Start with your employment contract. Be sure to have a provision in your contract that outlines your file retention and destruction policies.
2. Send a letter to the client when representation has been concluded (i.e., termination letter).
3. Along with the final bill or the termination letter, include a copy of the firm's file retention and destruction policy.
4. When closing the file:
  - a. Send a letter to the client reiterating the firm policy on destruction of their file.
  - b. Review the file and return all of the client's property to the client (i.e., currency, bonds, pictures, deeds, titles or other original documents).
  - c. Give client the opportunity to retrieve the file.
5. Prior to the expiration of the time limitation for keeping the file as outlined in your employment contract, send the client another letter that the file will be destroyed and give him an opportunity to retrieve their file.
6. After the expiration of the time limitation for keeping the file as outlined in your employment contract, destroy the file.

## **Destruction in Compliance with FACTA**

The U. S. Department of Defense created the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). Within this Act, is a "Disposal Rule" which states that any person who maintains or possesses "consumer information" for a business purpose must properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. An attorney is specifically included as an individual that is required to comply with the Rule. "Reasonable Measures" is defined as:

“Reasonable Measures” taken to protect consumer information as required by FACTA Disposal Rule:

1. Burn, pulverize, or shred papers containing consumer report information so that the information cannot be easily read or reconstructed;
2. Destroy or erase electronic files or media containing consumer report information so that the information cannot be easily read or reconstructed; or
3. Conduct due diligence and hire a document destruction contractor to dispose of material.

Additional rules may apply depending on the nature of the records as both state and federal laws apply to methods of disposing of personally identifying information.