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DAILY REPORT
IN PRACTICE

Closing files on concluded matters can head off potential conflicts with former clients. Set a deadline to get it done early in the year.

Avoid headaches; close old files

HOUSEKEEPING CAN HELP PREVENT ethical, financial and liability problems

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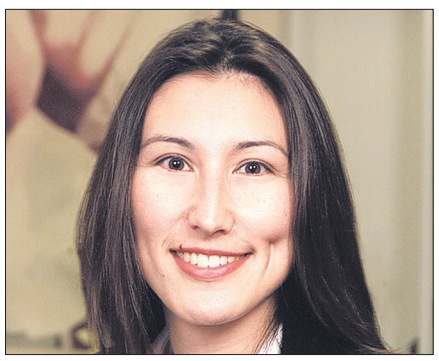

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BY NOW, MOST LAWYERS and law firms have a good sense of which clients are no longer clients and which matters should be closed. It could be old representations that were never closed, or clients who never paid.

The endless year-end spreadsheets of all open client matters with outstanding receivables often highlight these files and others. In this way, the arduous task of collecting outstanding fees in December surfaces the relationships that are over and the matters that need to be closed.

With all of this information fresh in mind, January becomes the best time for lawyers and law firms to do one of the most important tasks for effective legal malpractice prevention—close files that need to be closed.

Closing files is not an overly complicated task, but it is a very important task. It only happens if there is a concentrated effort with a deadline for getting it done. January 31, 2012 is a good deadline.

There are many reasons why the formal termination of an attorney-client relationship through a file closing is so important and has such a positive impact on risk management. For one thing, it has significant positive implications for the ethical, legal and professional obligations of a lawyer and the law firm.

For example, once the attorney-client relationship ends, clients move from being existing clients of the lawyer and the law firm to being former clients. For conflict of interest purposes, this is a significant distinction.

Existing clients are entitled to much greater protections than former clients under conflict of interest rules. Generally, if a new matter involves an existing client, the conflict of interest requires a two-tier analysis focused on both potential conflicts of interest and actual conflicts of interest.

If the latter exists (an actual conflict of interest), the new matter must be declined even if the involved clients consent. If the new representation involves only a potential conflict of interest involving multiple clients, there must still be full disclosure (preferably in writing) and written consent by the involved clients.

On the other hand, conflict rules for former clients are much less onerous. The critical test for a new representation involving a former client (as opposed to an existing client) is whether the new matter is substantially related to the representation of the former client. If not, nothing further need be done.

Even if the new representation is substantially related to the representation of a former client, the attorney or firm can still accept the new matter with the consent of the former client. Basically, there is real "ethics" value for lawyers to move inactive clients, or clients for whom the lawyer no longer works, from the existing client category to the former client category.

In addition to the ethics issues, there are liability reasons why this transition is so important. In recent years, there has been significant appellate activity regarding when the statute of limitations begins to run for legal malpractice claims. This flurry of appellate activity regarding the statute of limitations for legal malpractice claims, especially the trigger date for the statute of limitations, has made claim avoidance through risk management much more complicated. Often, these risk management issues are further complicated by the existence of an ongoing attorney-client relationship even though the representation itself has ended.

There are many reasons why the formal termination of an attorney-client relationship through a file closing is so important. It has significant positive implications for ethical, legal and professional obligations of a lawyer.

In legal malpractice lawsuits, clients often argue that an ongoing confidential relationship with their lawyer means the statute of limitations is tolled and that an ongoing attorney-client relationship lessens the clients' burden to show that they were deterred or debarred from filing a legal malpractice claim. Sometimes, all the clients need to make this argument is an open client-matter file. They argue that this alone reflects that they remain clients of the lawyer or the law firm.

There is an easy solution: Close the files where the representation ends. This simple step permits lawyers and their law firms to transition an existing client into a former client, as well as eliminate some of the questions about whether the statute of limitations has begun to run.

Generally, effective file closings involve three parts:

(i) a file closing letter;

(ii) an accounting of all funds received; and

(iii) administratively closing the matter.

It is the combination of ALL three that provide the most protection.

The file closing letter

The file closing letter should include:

(i) an accounting of all funds received;

(ii) confirmation that the representation has ended (typically, as of the date of the letter);

(iii) notice that the lawyer or law firm will no longer be providing any legal services absent a further retention; and

(iv) a description of the lawyer/law firm's document retention policies.

Depending on the document retention policies of the lawyer or law firm, the letter may attach originals and/or the file itself, or offer to make the files available for pick-up. Lawyers should always retain a copy of the file. If a legal malpractice claim is ever asserted by the client, the lawyers' file is one of the most important tools for defending. A copy of the file is almost always more helpful than not having a file at all. As a result, even if the practice is to return the file to the client, the lawyer should retain a copy.

Many lawyers "book-end" the essential parts of a file closing letter with sentences consisting of a "thank you for hiring us," and a "please do not hesitate to call on us again." Obviously, the content of the file closing letter will vary depending on the reasons for the termination of the attorney-client relationship.

If the lawyer is closing the file for non-payment of fees, or the client disappears, then the letter might be much more formal and direct. If the lawyer is closing the file because the representation has been successfully concluded, the file closing letter might include a marketing component inviting future representations.

Regardless of the reason, however, when the representation ends, the lawyer and/or law firm should send a file closing letter confirming the end of the attorney-client relationship. Indeed, effective audits of law firms randomly check closed files to see if file closing letters are in the files.

The accounting

The accounting must be accurate and complete. Open issues surrounding client funds always come up at the most inopportune time. Now, with the books for 2011 closed, is the best time to clean those issues up and create a final accounting. This includes an accounting of all funds received, the application of funds toward outstanding expenses and fees consistent with the fee agreement, and the return of any funds to which the client may be entitled.

Administratively closing the file

Lawyers and law firms continue to be surprised when a new client comes in and they discover that the computer system shows an old potentially conflicting representation is still open. The best way to avoid those unpleasant surprises is to close the old files now.

By closing files now, lawyers and law firms will start the new year with one of the most effective legal malpractice prevention techniques. There is no better time than January.