

HOW TO HANDLE FILES UPON RETIREMENT

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Retirement means ending attorney-client relationships. When contemplating ending any attorney-client relationship, an attorney should first read Hawaii Rule of Professional Conduct (“HRPC”) 1.16 (termination of representation).

HRPC 1.16(d) provides that upon termination of representation, an attorney must take steps to the extent reasonably practicable to protect a client’s interest, including surrendering papers and property to which the client is entitled. It is beyond cavil that in this jurisdiction, the client is entitled to the file.

What constitutes the file? Comment [10] to HRPC 1.16(d) provides some codified guidance. It provides that the papers to which a client is entitled may include all documents in the attorney’s files except documents which were only for review and use by the attorney and persons in the attorney’s office and which the attorney reasonably believes will not be of material use or benefit to the client or successor counsel. In addition, documents which would violate a duty of confidentiality owed to a third party, documents which cannot be copied or disclosed pursuant to other law, and documents which may cause the client or a third party physical or psychological harm may also be excepted. The financial books and records pertaining to the representation would not normally be in the file, except perhaps invoices, bills, and statements. Accordingly, the books and records are not required to be given to the client either, as they are kept by the attorney in accordance with other ethical rules.

If a client has been provided with courtesy copies throughout the representation but desires copies of previously provided documents in the file, the matter should be handled pursuant to the terms of the attorney-client fee agreement regarding costs.

Thus, the retiring attorney must return all active files to the client or the client’s designee (confirmed in writing), and should keep a record of all returned files. The retiring attorney should consult with the client regarding whether the client wants the file in a hard or electronic format.

With regard to closed files, the attorney should contact former clients, and ask whether they wish their files to be returned. If the former client does not want the file or cannot be located after diligent effort, the file may be destroyed after a careful examination to ensure that the file contains no original documents or materials which might prove helpful to the client at some future date or the destruction of which might harm the client. The attorney should keep a record of file destruction and distribution.

The method of file destruction must preserve client confidentiality which, of course, continues after the representation ends. HRPC 1.6(a). The files should not be put out with the trash or tossed into a dumpster. If original or client-helpful materials are present, then the attorney cannot destroy them. These types of documents may include wills, trusts, deeds, powers of attorney, renewable judgments, client corporation books, minor and adoption papers, support or custody papers, and any document evidencing continuing legal and other obligations. They must be safely and securely stored or placed in an appropriate depository, such as the probate court if permitted.

The length of time that this continuing duty lasts underscores the fact that it is best practice never maintain originals in client files. An attorney should return originals to the client as soon as practicable after the attorney-client relationship ends. Otherwise, the attorney will be storing documents for a long time after retirement at the attorney's own expense.

Finally, the retiring attorney must retain his or her books and records regarding funds and property of all clients or third persons for at least six years after completion of the employment to which they related or the last transaction of the account whichever occurs last. Hawaii Rules Governing Trust Accounting Rule 4(c) (effective January 1, 2014). See *a/so* HRPC 1.15(a) (a period of six years after the termination of representation) and Rule of the Supreme Court of Hawaii 11(f)(2) (a period of not less than six years subsequent to the completion of the employment to which they relate or the last transaction on the account whichever occurs last).