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PROTECTIVE ORDERS AND THE FILE RETENTION RULE

THE NEW MISSOURI UNIFORM POWERS OF APPOINTMENT ACT (PART 2)

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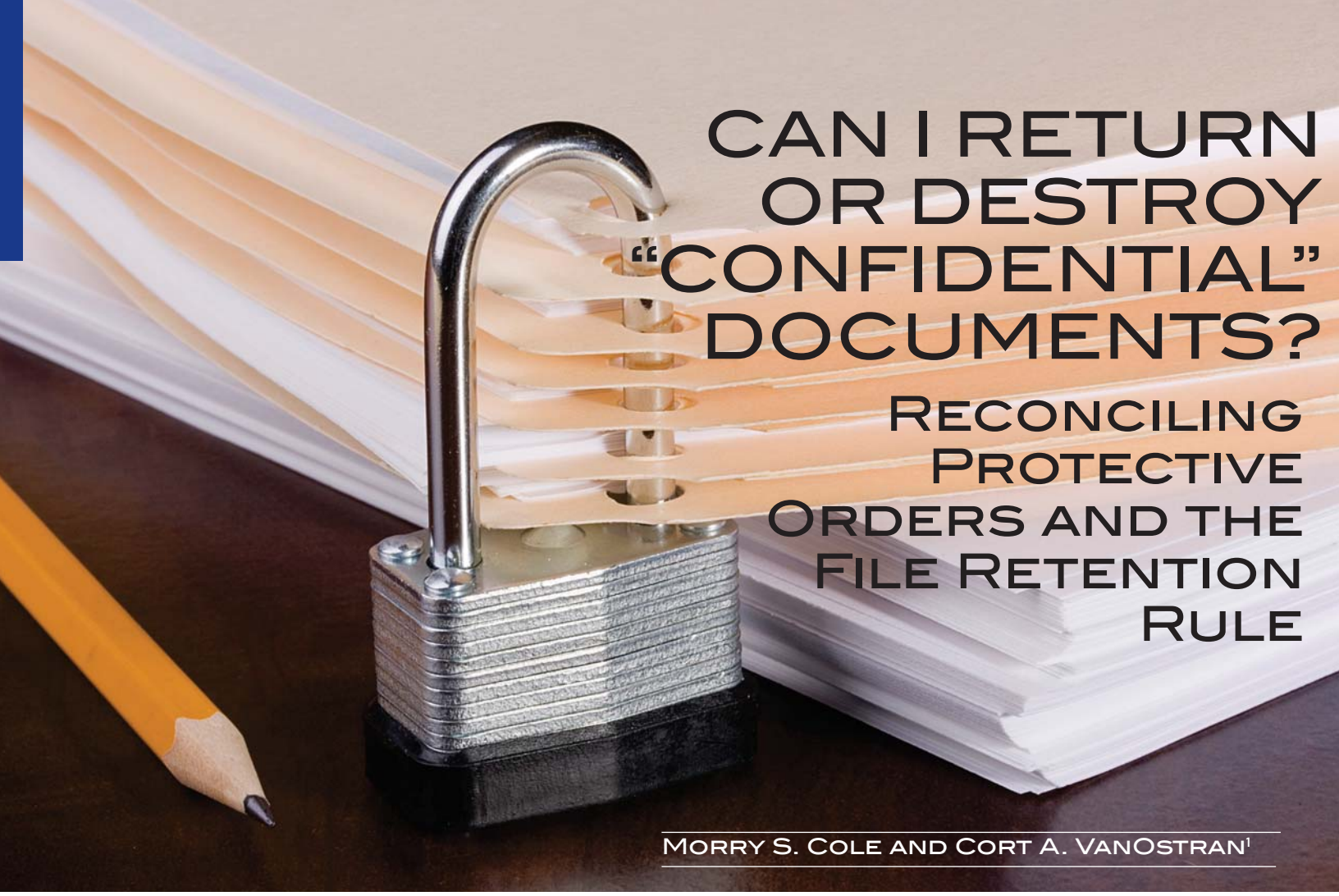


Can I Return or Destroy "Confidential" Documents?

Reconciling Protective Orders and the File Retention Rule

Morry S. Cole and Cort A. VanOstran[1]

"The client's files belong to the client, not to the attorney representing the client."[2]

"The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[3]

Protective orders for sensitive client documents are a commonplace feature of litigation, particularly in cases involving corporate actors. Such orders can be a critical measure for protecting sensitive client documents. Often agreed upon by the parties and entered by the court following the parties' stipulation, protective orders frequently contain language that specifies the time, manner, and conditions under which "confidential" documents obtained in discovery must be destroyed, usually at the conclusion of a case. However, such a protective order may create a direct conflict with an attorney's obligations under the recently amended Rule 4-1.22,[4] which requires an attorney to securely store a client file for six years after termination of representation.[5] This conflict can leave a conscientious attorney unsure of how to proceed. In this article, we will explain the basis of the newly-amended Rule 4-1.22 and outline best practices for managing conflicts generated by protective orders at odds with the rule.

Preserving Client Files

While the new Rule 4-1.22 is reproduced in the endnotes, a general overview of the rule follows. Very generally, Rule 4-1.22[6] requires an attorney to store a client's file, following the conclusion of the attorney's representation, for six years.[7] Preserving client files following the conclusion of a case is not merely dictated by Missouri's Rules of Professional Conduct; it is also a best practice with benefits for clients and attorneys alike. First, retention of a client file ensures that, should any claim related to the case arise against the attorney – for malpractice or other attorney performance claims – the attorney will have the documentation necessary to successfully defend the handling of the case. Additionally, a client enjoys broad rights to the file, and may find himself in need of the file after litigation has ended. The Missouri Court of Appeals has explained:

> [T]he attorney must be required to turn over to his client any documents for which the client has bargained and

> paid. This simply is an obvious requirement to protect the interests of the client. Moreover, there should be no question that the client has a right of access to the attorney's work product for information needed to understand those documents. Likewise, if the attorney is hired to represent the client in processing or defending a claim, the client at a minimum must be entitled to those papers required by law to be filed in an appropriate tribunal and those related papers essential or necessary to make the former papers meaningful. These may include pleadings, depositions, interrogatories and the like.[8]

A client "file belongs to the client, from cover to cover, except for those items . . . for which the attorney has borne out-of-pocket expenses such as . . . transcripts."[9] The file has been specifically defined to include: documents brought to the attorney by the client or the client's agents; pleadings pertinent to the case; depositions or other discovery documents pertinent to the case for which the client was billed and has paid, and even "work product," including relevant attorney notes.[10]

The newly-amended Rule 4-1.22 shortens the required time period for file retention from 19 years to six.[11] The amended six-year requirement applies "where the completion or termination of representation occurs on or after July 1, 2016[;]" representations concluding before that date are still governed by the 10-year requirement.[12] Additionally, although the Rule allows attorneys to retain the files for a shorter period of time, doing so requires an "agreement between the lawyer and client through informed consent confirmed in writing."[13] The standards of "informed consent" and "confirmed in writing" are defined terms under Rule 4-1.0.[14]

Moreover, the Rule requires that if an attorney destroys a client's file before six years after the termination or completion of representation, the attorney must "maintain the written record of the client's consent of destruction for at least six years after completion or termination of employment."[15] Other exceptions to the general rule include cases where the attorney "knows or reasonably should know" that there is a malpractice claim; "a criminal or other governmental investigation is pending"[,]; a complaint under Rule 5, or "other litigation [that is] related to the representation."[16]

Frequency of Protective Orders

While Rule 4-1.22 seems straightforward, thorny situations arise when retention of documents is disfavored or prohibited by a protective order entered to guard confidential documents. In many cases involving sensitive corporate documents, medical records, design or materials specifications, customer lists, personal data, or other confidential materials, a protective order may be requested and entered.

Rule 56.01(c) gives a trial court the authority to issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" upon motion by the party and a showing of good cause.[17] Courts have "broad discretion to determine the appropriateness and terms of the protective orders."[18] A protective order may originate with one or both of the parties, who may each stipulate to an agreed-upon order, or may submit competing versions from which the court may select or reconcile in creating a final order.

Protective orders often include language akin to the following:

> Upon termination of this lawsuit by judgment, settlement or otherwise, Plaintiff shall return to Corporation, through its counsel of record, all of the documents and information subject to this Order, including all copies, prints, and other reproductions of such information, in the possession of Plaintiff, Plaintiff's counsel and staff, and Plaintiff's retained experts. Alternatively, at the option of counsel for Corporation, counsel for Plaintiff may destroy all documents and information subject to this Order, including all copies, prints, summaries, and other reproductions of such information, in the possession of Plaintiff, Plaintiff's counsel and staff, and Plaintiff's retained experts.

Such language obviously conflicts with the file retention requirements of Rule 4-1.22. Ideally, a careful attorney will take steps at the outset of a case to ensure that no conflict arises. However, even if a protective order conflicts with Rule 4-1.22, a conscientious attorney can mitigate the conflict and ensure ethical handling of client files.

Handling a Conflict

1. Contemplate Rule 4-1.22 in protective orders. The single best way to resolve conflict between protective orders and the requirements of Rule 4-1.22 is to eliminate any conflict in the first place. If parties attempt to agree to a protective order for joint submission to the court, the proposed language should recognize and respect the parameters of Rule 4-1.22, as in the following exemplar language:

> Upon termination of this lawsuit by judgment, settlement or otherwise, **Plaintiff's counsel shall retain for six (6) years, or for such other time period agreed to by Plaintiff's counsel and Plaintiff (via consent confirmed in writing), all of the documents and information subject to this Order, pursuant to Missouri Supreme Court Rule 4-1.22**. Upon the expiration of Plaintiff's counsel's obligations under Missouri Supreme Court Rule 4-1.22, Plaintiff's counsel shall return to Corporation, through its counsel of record, all of the documents and information subject to this Order, including all copies, prints, summaries, and other reproductions of such information, in the possession of Plaintiff, Plaintiff's counsel and staff, and Plaintiff's retained experts. Alternatively, upon the expiration of Plaintiff's counsel's obligations under Missouri Supreme Court Rule 4-1.22 and at the option of counsel for Corporation, counsel for Plaintiff may destroy all documents and information subject to this Order, including all copies, prints, summaries, and other reproductions of such information, in the possession of Plaintiff, Plaintiff's counsel and staff, and Plaintiff's retained experts.

While the language used may vary and should obviously be adapted to the circumstances of the specific case, it should specify the six-year retention requirement and reference counsel's duties un-

der the file retention rule. If the parties do not agree on language and jointly move for a protective order, a lawyer should ask the court to enter an order that is not at odds with Rule 4-1.22.

2. Ask the court to modify an existing protective order. Although protective orders that are in harmony with Rule 4-1.22 are the best way to avoid any conflict, many attorneys may already have active cases where the protective order fails to adhere to the requirements of Rule 4-1.22. Similarly, opposing counsel may object to the retention of confidential documents for the full six years required by Rule 4-1.22. If a protective order at odds with Rule 4-1.22 is already in place or otherwise unavoidable, the following steps may serve to minimize any conflict.

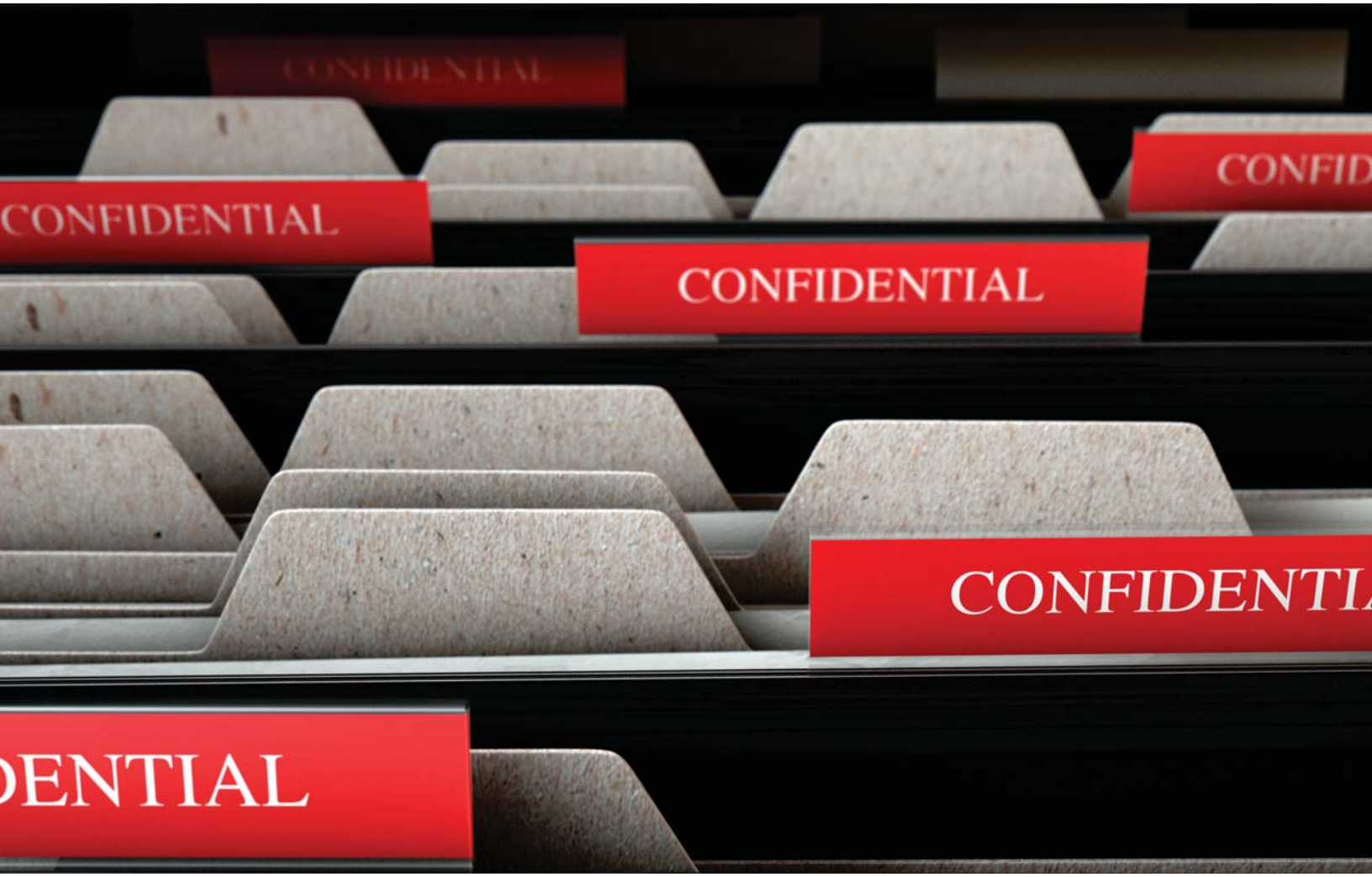
In *State ex rel. Ford Motor Co. v. Manners*,[19] the Supreme Court of Missouri explained that a "trial judge [enjoys] broad discretion to determine the appropriateness and terms of the protective orders for documents produced during discovery[;] . . . the decision to modify the terms of the protective order after it has been issued is also left to the discretion of the trial court."[20] Thus, even if a protective order has already been entered, it is not too late to seek a modification of the order to make it compliant with Rule 4-1.22.

3. Obtain informed written consent from the client to return or destroy confidential documents at the earliest possible juncture. When a protective order in compliance with Rule 4-1.22 cannot be achieved – either because opposing counsel refuses to agree to its terms, or because a non-complying protective order has already been entered in the case and the judge will not modify it – the next best step is to obtain written consent from the client to comply with the strictures of the protective order. Consent to an alternative arrangement is contemplated by the Rule, which notes that its parameters apply only "absent other agreement between the lawyer and client through informed consent confirmed in writing."[21]

Ideally, a client will provide consent to destroy or return confidential files at the outset of a case, or before any protective order is signed. This timing acknowledges that the client, not the attorney, is the ultimate driver of the case and is entitled to make decisions concerning the objectives of representation.[22]

Even if client consent was not obtained at the outset of the case or prior to signing any protective order, an attorney should still seek the client's consent prior to returning or destroying confidential documents that constitute part of the client file. Suggested consent language is as follows:

> 1. I am aware of the provisions of the Protective Order entered by this Court on [date], (a copy of which is attached hereto) which requires destruction of confidential file materials produced by the Defendants in this case at the conclusion of my lawsuit.
>
> 2. It has been explained to me that, pursuant to Missouri Supreme Court Rule 4-1.22, my attorneys are generally obligated to preserve my file from this



case for six years following the termination of representation. That stated, there is a conflict between the Missouri Rule and the Protective Order entered by the _____ Court in this case. My attorneys explained to me that the file materials could be returned and/or destroyed pursuant to the Protective Order upon my written informed consent. They further explained that, once they are destroyed, I will have no further access to the documents should they be needed for any purpose whatsoever.

3. Based upon the above and the Protective Order, I hereby authorize my attorneys [insert firm name(s)] to destroy "confidential" file materials produced by the defendants in my case by deletion of computer files and shredding of paper files. All other portions of my file will be preserved in accordance with Rule 4-1.22 for six years.

A client should be fully advised as to the implications of the consent, and the consent should be notarized.

4. Place the burden on opposing counsel to retain confidential documents constituting part of the client file. In addition to securing the client's consent, a lawyer can seek cooperation with opposing counsel in retaining documents that have become part of the client file. Although such an arrangement is not contemplated by the Rules, it would appear to be in keeping (although not directly analogous) with Missouri courts' admonitions for handling client documents when an attorney departs from a law firm. In that context, the Missouri Court of Appeals has explained that "the withdrawing attorney and the law firm have a mutual duty toward each other to act in good faith . . . and to act in a professional and competent manner in handling the clients' files in accordance with the clients' directions."[23] Similarly, opposing counsel may have a good faith obligation to assist an attorney in meeting her obligations under Rule 4-1.22 by retaining confidential client documents that constitute part of the attorney's client's file, but must be destroyed or returned pursuant to a protective order. Any agreement should be put in writing.[24]

Even if opposing counsel is unwilling to voluntarily assume responsibility for maintaining confidential documents that constituted part of a client file, a court may be willing to order opposing counsel to do so. If requests to opposing counsel go unheeded, a short motion explaining the conflict may serve to both alert the court to efforts to ameliorate the issue, and could result in an order that opposing counsel assist in preserving confidential material until the six-year retention period has expired.

5. Address an inadequate protective order upon settlement. In *Manners*, the Supreme Court of Missouri clarified that if a case ends in settlement, "[t]he parties [can address] the future application and terms of the . . . protective order in the settlement agreement."[25] Other Missouri courts have also suggested that deference will be afforded to the parties' agreements regarding post-settlement handling of confidential documents.[26] Therefore, settlement provides a final opportunity to utilize the above suggestions and ensure that documents are handled in a way that respects both Rule 4.1-22 and any governing protective order.

6. As a last resort, destroy the confidential documents after obtaining – and documenting – an informal advisory opinion from the Legal Ethics Counsel.[27] When a protective order is irreconcilable with Rule 4-1.22, a court will not modify the order, a client refuses to provide consent to comply with the order, opposing counsel cannot be persuaded or ordered to maintain documents that were part of a client's file, and the matter cannot be resolved as a part of any settlement agreement, a final option is to explain the issue to the Legal Ethics Counsel and seek an informal opinion. Rule 4-1.16 explains that "upon termination of representation . . . [t]he lawyer may retain papers relating to the client to the extent permitted by *other law*."[28] When a lawyer has no other options available, this "other law" exception suggests that an attorney may be justified in complying with the protective order, even if it means a deviation from the requirements of Rule 4-1.22. However, authority to so deviate should be sought from the Legal Ethics Counsel. Of course, the client should be kept apprised that his attorney is seeking permission from the Legal Ethics Counsel. The opinion from Legal Ethics Counsel should be documented.

A lawyer must always remember that "[t]he client's files belong to the client, not to the attorney representing the client."[29] Although conflicts between protective orders and Rule 4-1.22 arise, the straightforward approach set forth herein serves to ensure compliance with the ethical rules and protect the confidential documents of all involved parties.

Endnotes

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2 *In re Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997).

3 Rule 4, *Preamble: A Lawyer's Responsibilities*, [14] Scope.

4 Throughout the article, "Rule" refers to the Missouri Supreme Court Rules.

5 In substantial part, Rule 4-1.22 provides:

> A lawyer shall securely store a client's file for six years after completion or termination of the representation absent other agreement between the lawyer and client through informed consent confirmed in writing. Such informed consent confirmed in writing may be made between the lawyer and the client at any point during the six years after completion or termination of the representation. If the client does not request the file within six years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed.
>
> The six year client file retention requirement shall apply to all client files where the completion or termination of the representation occurs on or after July 1, 2016. All client files where the completion or termination of the representation occurs prior to July 1, 2016, shall be governed by the previously required 10 years.
>
> A lawyer shall not destroy a file pursuant to this Rule 4-1.22 if the lawyer knows or reasonably should know that:
>
> (a) a legal malpractice claim is pending related to the representation;
>
> (b) a criminal or other governmental investigation is pending related to the representation;
>
> (c) a complaint is pending under Rule 5 related to the representation; or
>
> (d) other litigation is pending related to the representation.
>
> Items in the file with intrinsic value shall never be destroyed.
>
> . . . .
>
> A lawyer destroying a file pursuant to this Rule 4-1.22 shall maintain the written record of the client's consent of destruction for at least six years after completion or termination of employment.
>
> Client files, except for items of intrinsic value, may be maintained by electronic, photographic, or other media provided that printed copies can be produced. These records shall be readily accessible to the lawyer.
>
> . . . .
>
> A lawyer's obligation to maintain trust account records as required by Rules 4-1.145 to 4-1.155 is not affected by this Rule 4-1.22.
>
> (Adopted Oct 30, 2012, eff. July 1, 2013. Amended Mar. 7, 2016, eff. July 1, 2016.)

6 While this article focuses on the Missouri Rule, an equivalent rule is common in many states. *See, e.g.*, Illinois Supreme Court Rule 769; Oklahoma Rules of Professional Conduct 1.15(a). A similar rule has been proposed in other states. *See, e.g.*, Arkansas Proposed Rule of Professional Conduct Rule 1.19.

7 The amendment changed this obligation from a 10-year retention to only six years; *see generally* Melinda J. Bentley, Ethics, *Updated Timeframes for Holding Client Files and Client Trust Account Records Starting July 1, 2016: What You Need to Know*, 72 J. Mo. Bar 91 (2016).

8 *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92, 98 (Mo. App. E.D. 1992).

9 *See* Missouri Bar Administration Advisory Committee Formal Opinion 115, adopted March 4, 1988, *available at* https://www.courts.mo.gov/file.jsp?id=44620.

10 *See id.*; Missouri Bar Informal Advisory Opinion 980141, *available at* http://www.mobar.org/ethics/InformalOpinionsSearch.aspx.

11 Rule 4-1.22 identifies certain situations where a client file cannot be destroyed even following the required retention period. Attorneys should review the full text of the rule for a complete understanding of their ethical obligations regarding file retention.

12 Rule 4-1.22.

13 *Id.*

14 Rule 4-1.0 defines the terms as follows:

> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> . . .
>
> (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

15 Rule 4-1.22.

16 *Id.*

17 Rule 56.01(c).

18 *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586 (Mo. banc 2007) (citing *State ex rel. General Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76, 78 (Mo. banc 2006); and *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002)).

19 239 S.W.3d 583 (Mo. banc 2007).

20 *Manners*, 239 S.W.3d at 586.

21 Rule 4.1-22.

22 Rule 4-1.2; *see also Cupples*, 952 S.W.2d 226, 234 (Mo. banc 1997) ("Clients are not the 'possession' of anyone, but, to the contrary, control who represents them.... The client's files belong to the client, not to the attorney representing the client. The client may direct an attorney or firm to transmit the file to newly retained counsel.")

23 *Welman v. Parker*, 328 S.W.3d 451, 456 (Mo. App. S.D. 2010) (citing *Cupples*, 952 S.W.2d at 236).

24 Note, however, that such an arrangement may create issues with the portion of the rule addressing storage of client materials: "Client files, except for items of intrinsic value, may be maintained by electronic, photographic, or other media provided that printed copies can be produced. These records shall be readily accessible to the lawyer." Rule 4-1.22. Thus, any arrangement with opposing counsel should ensure that the files are appropriately maintained and are "readily accessible."

25 *Manners* at 589 (citing *Lavelock v. Cooper Tire & Rubber Co.*, 169 S.W.3d 865, 866–67 (Mo. banc 2005)).

26 *Lavelock v. Cooper Tire & Rubber Co.*, 169 S.W.3d 865, 867 (Mo. banc 2005) ("The parties clearly contemplated the handling of the confidential documents post-settlement, but did not include maintenance or indexing requirements as part of their written agreement.").

27 Attorneys can contact the Missouri Ethics Counsel at 3335 American Avenue, Jefferson City, Missouri, 65109, 573-638-2263. *See also* http://molegalethics.org/ requesting-an-informal-advisory-opinion/ for additional information about obtaining an advisory opinion generally.

28 Rule 4-1.16(d) (emphasis added).

29 *Cupples*, note 2 at 234.