

## **Destroy, destroying and destruction: what to do when you don't have written consent to destroy your client's file?**

Where you have a retainer containing a file destruction clause and that agreement is accepted by further oral instructions, you will have proper instructions to destroy the file even though you have nothing in writing from the client or signed by the client. But what if you don't?

If you did not get these instructions to destroy a file at the outset of the engagement and the space containing the archive of your clients' files is heaving and you would like to just destroy everything over 7 years old, then you will probably be considering obtaining specific written instructions to destroy the files (see "Destroying client files? Not without proper instructions!" in Proctor, December 2008, p14).

But why stop there when there are a few other instructions you could seek to obtain which do not involve your firm taking a match to the files.

These options include writing to the client to obtain instructions:

1. to make the files available for collection by the client;
2. for you to forward the files to the client;
3. for the files to be transferred to another lawyer;
4. for the files to be forwarded to some other third party;
5. lastly, to destroy the files.

So it's been 3 months and still no response from some of the clients you wrote to... There are many reasons not to be surprised by this. Then what do you do? The answer is that you have an obligation to retain possession of the documents until consent is obtained from the client to do something with the files.

But what if my client has passed away and I have no idea who their executor is? Then the files stay with you and when you pass away the files go to your executor. This is not likely to be an issue for files opened today – because after you read the Proctor article in 2008 your client engagement letter contains the appropriate clause.

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11 June 2014