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Document Management and Retention – Can I Throw It Away Yet?

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Document Management and Retention
Can I Throw It Away Yet?

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Introduction

Today, most business communication occurs digitally, and most information is stored in digital format. Lawyers are no exception. We use tools like Microsoft Outlook and text messages to communicate and other tools like Microsoft Word documents and PDF (Portable Document Format) files to create and save information. It is true that some information comes to us in paper form, but most of us process that information into electronic form via scanning.

If document retention were only about retention, this would be a shorter paper. Retention is only the beginning. While retaining files for as long as needed in an organized manner is critical, when most lawyers hear document "retention" they are thinking "how long do I need to keep something and how do I destroy it once I have met my obligation?" In other words, their primary focus is too often on destruction rather than retention. As we will see destruction is much more difficult without proper retention and organization.

How we store this digital information and how long we must keep it is the subject of this paper and its accompanying presentation.

Document Management

Why Document Management Is Critical

Personally, I have always defined document management as:

> *"A logical and consistent way of saving documents, so that we can find them later when we need them."*

Every lawyer uses some form of document management. Whether the system is a series of windows folders and subfolders, a feature of a practice management system or a stand-alone document management tool, we all use something and we always have. File cabinets, accordion folders and manila folders were a form of document management. Unfortunately, there are several issues that affect many document management systems. First, one person's logic is not always another person's logic. This means folder and naming conventions do not always work. Second, maintaining consistency is hard enough for one person, let alone a team of people. This means some people use the document management system in different ways or use a different system altogether. These issues often make it difficult to accomplish the real goal of document management – the ability to find documents when needed.

The ability to "find" documents when needed is critical. Too many lawyers waste too much time looking for documents. For example, they know they created a document several years ago that discussed a specific issue. They know the document would help them now with a similar issue if they could only find it.

Finding documents is also critical when it comes to document retention. Document destruction rules are typically based on a combination of content and time. If you cannot find documents that meet the criteria for destruction, how can you destroy/delete them? For this reason, no

document retention or destruction policy will succeed without an underlying document management system that is also successful.

Document Management, Retention and Destruction

Document management impacts document retention and destruction in several ways. Once again, consider that document retention rules are based on content and time. Almost any good document management system organizes documents by client and matter, providing the content component. The time component is either tracked automatically or, in some cases, manually with profiled date fields.

If your document management system is do-it-yourself, directory based, you will need another tool to help you with document retention and destruction. These types of systems included everything from Windows folders to OneDrive storage to any other system where you set up folders and subfolders as you go. Windows files and folders are date stamped with the date they were created and the date they were last modified. However, the search mechanisms that allow you to search files by those criteria leave a lot to be desired. If you use such a system, you need an independent list of matters where you track the date the matter closed and the date the files can be destroyed. This can be as simple as a spreadsheet or tracked in your practice management system. When documents are eligible for destruction, you can review and delete the entire folder and any subfolders.

Many firms "archive" files. This typically involves moving files for closed matters to another directory. The problem with this is twofold. First, someone must move the files. That sounds easy, but someone needs to know when to move them and move them correctly. This does not always happen. Second, placing files in an entirely different directory means that they are separated from the rest of your files. Finding files in this other location requires an additional search or, at the very least, browsing within a second structure. All of this can be a great waste of time as it takes time to both move the files and often takes longer to find a file if you need it. You do not really need to move files to an archive if you are properly tracking the date they are eligible for destruction.

If you use dedicated document management application such you may have other options. These systems have a variety of tools that make the task easier. For example, NetDocuments allows you to set a "Closed Date" value on every workspace. It also allows you to set specific document retention rules and automatically notify you when files match those rules. Systems like these also allow you to do things in bulk. You could set a destroy date on every related document when a matter closes and, later, delete files across multiple matters based on destroy dates.

As you can see, good document management is critical to any document retention and destruction. You need to know when files are eligible for destruction, and you need to be able to find those files. You need to track when files are eligible for destruction. When you reach that date, you need to find the files. Finally, you need to destroy the files. These things are

impossible without “a logical and consistent way of saving documents, so that we can find them later when we need them.”

Retaining Originals

Original Paper Documents

This article does not address systems for storing paper files. It will focus on electronic file storage and retention, but I do want to briefly address the specific rare occurrence when paper is still required. In other words, there may be a REQUIREMENT for the retention of an ORIGINAL signed document, as opposed to a copy/duplicate (hereinafter referred to as a “duplicate”). The general rule of thumb is that a duplicate (electronic copy or paper copy) is legally sufficient so long as it is a fair and accurate duplicate. There are two major exceptions that I will address. First, when a specific federal or state statute, rule or regulation requires the original signed document. Second, the Rules of Evidence may require the original.

Statute, Rule or Regulation Requiring Original

A handful of situations require that you maintain an original of signed documents. In other words, a duplicate (whether it be a paper copy or electronically scanned copy) may not be legally sufficient. One example of this is a will. In most states, if the original of a will cannot be found, there is a legal presumption that the reason the original cannot be found is that it was revoked by the testator, possibly by destroying it. For example, Wisconsin Statutes (Wis. Stat. § 853.11 (1m) includes several types of “revocation by act” such as burning, tearing, canceling, obliterating, or destroying the will, or part, with the intent to revoke, by the testator or by some person in the testator's conscious presence and by the testator's direction.

In the instance of a will, if the original cannot be located, the legal presumption of revocation carries the day unless it is rebutted by clear and convincing evidence that the testator did NOT revoke the will. Meeting that standard can be difficult.

In a situation like this where a statute, rule or regulation clearly indicates that a duplicate is not legally sufficient, it is incumbent upon the attorney to either maintain custody of the original (if he/she has contracted to do so) or clearly shift that burden to the client to do so. Remember, by agreement, an attorney can always shift rights to retain files to another party (often the client). Sometimes that is a good idea … sometimes a bad idea. In either case, I believe maintaining a duplicate electronically is still a good idea for convenience and reference.

Rules of Evidence

The Wisconsin Rules of Evidence, which closely parallel the Federal Rules in this regard, states that a duplicate is admissible to the same extent as the original, but with a couple exceptions. Many people read Wis. Stat. 910.02 (Requirement of Original) and stop their analysis and conclude the original must be kept. This is not necessarily true.

Wis. Stat. 910.02 states:

> To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.

A key phrase in Wis. Stat. 910.02 is “except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.” Wis. Stat. 910.03 regarding the Admissibility of Duplicates, provides one of those exceptions.

Wis. Stat. 910.03 states:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. No duplicate is inadmissible solely because it is in electronic format.

In summary, a challenge to the duplicate can be made only if the objecting party has a good faith basis to challenge the authenticity of the original. In practice, this means the objecting party is alleging a forgery, a fraudulently altered document, or something akin to that.

Wis. Stat. 910.01(3) and (4) also provide important definitions.

Wis. Stat. 910.01(3) states:

> For purposes of this chapter the following definitions are applicable:
>
> …
>
> Original. An “original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original".

Wis. Stat. 910.01(4) states:

> For purposes of this article the following definitions are applicable:
>
> ...
>
> Duplicate. A “duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

In summary, electronic (or paper) duplicates are acceptable unless there is not a fair and accurate duplicate or a genuine issue exists as to its' authenticity, such as when there is a forgery or fraudulent alteration.

Electronic Files Retention v. Paper File Retention

Outside the above outline situation(s) where statute, rule or regulation requires an original paper document (like an original signed last will and testament, stock certificates, etc.), it is safe to presume that the requirement to keep a client/matter file is no different whether kept in electronic form or paper form. In other words, outside the situations above, it does not matter if a lawyer maintains an electronic file or paper file (or both), the duration for which to keep that file in his or her custody is the same. Stated yet another way, if the requirement is to keep a file for 6 years, you must keep it 6 years, whether it be in electronic form or paper form.

To support the notion that an attorney can maintain a purely electronic file, we can also look to other helpful authoritative sources. For example, we know that the IRS permits electronic duplicates/scans (Rev. Proc. 97-22 § 3.04).

Now the issue truly becomes "How long do I have to keep it?" … or "Can I really throw it away or delete it?"

Wisconsin Document Retention Rules

Several sections of the Wisconsin Supreme Court Rules as well as Office of Lawyer Regulation Guidelines apply to document retention. In addition, an Ethics opinion provides specific guidance.

Rules Specific to Trust Accounts

Supreme Court Rule 20:1.15 concerns the safekeeping of client property. As most of us know, it must be kept in a separate account.

> **(b)(1) Separate account.** A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation. All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts.

Read further and you will find that it also requires records be retained.

> **(g) Record keeping requirements for all trust accounts.**
>
> **(1) Record retention.** A lawyer shall maintain and preserve complete records of trust account funds, all deposits and disbursements, and other trust property and shall preserve those records for at least six years after the date of termination of the representation. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for trust account record keeping.

While most of us are concerned with how long we must retain documents related to the client's matter, this record-keeping requirement is very important to note. For obvious reasons, trust records are a critical component of the client file. It makes sense that the six-year requirement in the Supreme Court Rules may have implications for other document retention.

Before we move on to client documents, be aware that the OLR has provided specific guidance on this rule.

OLR Guidelines for Trust Account Records

(1) **Draft accounts.** Complete records of a trust account that is a draft account should include a transaction register; individual client ledgers for IOLTA accounts and other pooled trust accounts; a ledger for account fees and charges, if law firm funds are held in the account pursuant to SCR 20:1.15(b)(3); deposit records; disbursement records; monthly statements; and reconciliation reports, as follows:

(Summarized with header only)

(a) Transaction register

(b) Individual client ledgers

(c) Ledger for account fees and charges

(d) Deposit records

(e) Disbursement records

(f) Monthly statement

(g) Reconciliation reports

Interestingly, the OLR guidance includes a paper requirement.

4. Electronic record retention.

(a) **Back-up of records.** A lawyer who maintains trust account records by computer should maintain the transaction register, client ledgers, and reconciliation reports in a form that can be reproduced to printed hard copy.

(b) **IOLTA account records.** In addition to the guidelines in sub. (4)a., the transaction register, the subsidiary ledger, and the reconciliation report should be printed every 30 days for an IOLTA account. The printed copy should be retained for at least 6 years.

Client Files

ABA Model Rule 1.16

In August 2012, The ABA passed a proposed amendment to Model Rule of Professional Conduct 1.16. In summary, the amendment suggests:

- Retain unless authorized or notified
- Destroy after ten years without notice
- Special circumstances for minors and certain convictions
- Fee agreement can contain notice
- Does not supersede court order

Wisconsin has not adopted this amendment. Wisconsin does what many states are still doing. It relies on a combination of specific rules as interpreted by an ethics opinion.

Wisconsin Formal Ethics Opinion EF-17-01

EF-17-01 reminds us that there is no magic number but that SCR 20:1.16(d) does require lawyers to take reasonable steps to protect a client's interest after termination of representation. That rule reads:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

EF-17-01 goes on to remind us that SCR 20:1.16(d) "has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients." With that as our basis, we must ask what is "reasonably practicable."

First, we must consider the reasonable expectations of the client.

> "The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage."

Second, we can look to the one clear rule regarding document retention.

> "In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here."
>
> "This six year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions, and for most matters, should provide a sufficient period of time to protect the interests of the client."

Is six years a hard and fast rule for all client documents? The answer is no because there are clearly situations in which the client's interests require their file be maintained for longer than six years.

> "While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer

> than six years, such as files involving claims of minor children, estate planning, and certain tax matters."

What about less than six years? While the rules clearly require lawyers to retain trust records for six years, can they, through agreement with the client, keep non-trust files for less time? Footnote 4 indicates that this is possible but should be used with caution.

> In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six year minimum retention period for closed client files.

Is notice required? Unlike some other states, the OLR guidelines do not require Wisconsin lawyers to notify clients of the pending destruction of their file.

> One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files." Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome.

Minimum Safeguards

After its helpful explanation of the why, EF-17-01 lays out specific guidelines they describe as minimum safeguards.

We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.
2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give

reasonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills7 or settlement agreements ordinarily should not be destroyed.

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.
4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.
5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files. This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.
6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

Guidelines for Your Firm

Preface – Longer or Infinite Retention of Digital Files is the Future

While most attorneys reading this article are interested in deleting and destroying their old files, it is worth noting that the future may look very different.

File retention rules were conceived in large part because of physical storage limitations. With digital information, we have few limitations. It costs a fraction of a penny to store thousands of pages of digital information. A one terabyte hard drive costs less than $100 and can store approximately 14,000 banker boxes of text-searchable PDFs (Portable Document Format). That is over 30 million pages. Because the cost is so minimal, there is little need to destroy the file. When you examine all the benefits of having the electronic file (defending potential malpractice claims, disciplinary complaints, benefits to the client, fast access to useful information, etc.), even long after the matter becomes less active or inactive, why would we destroy anything? This is likely the future, so why not get ahead of it? If you opt to keep everything electronically in an organized document management or archival system, and never destroy the client/matter file, you do not even have to comb through the statutes and rules. It is that simple.

With that preface, let us examine your current obligations. I am going to keep things simple by offering guidelines. If you apply these guidelines to each client/matter and err on the side of retaining the file, you should be safe.

Guideline 1 – By Agreement, Attorneys can Shift Burden of Retention/Custody to the Client

While EF-17-01 provides warnings about retaining files for less than six years, it also provides that it is possible in some circumstances.

Do this in writing and require that the client sign off on a clear and concise dedicated agreement or engagement letter. If you do this, advise the clients to either retain the file indefinitely or, at a minimum, for the same timeframe you would have retained the file. One word of caution here is that you may put yourself at risk in not being able to defend a malpractice or disciplinary action if you do not have a full copy of the client/matter file in your custody.

Guideline 2 – Provide Advanced Notice to Your Clients

While EF-17-02 does not require that you provide advanced notice before destroying client files, it does require that we inform the client of their right to the file and of our firm's retention policy. In your engagement letter, state your firm's retention policy clearly. For example, you could include language like the following:

> The firm will maintain an electronic copy of your file for ___ years after the date of the file closing letter. After such time, the file will be permanently destroyed. You will be provided a secure hyperlink to download your entire file electronically at the time of the closing letter so you may keep your file for as long as you desire. You may also request your file in paper form for $._____ per page before the date of destruction.

Finally, the closing letter to the client should then reiterate the firm's retention policy, include a secure link to download the file, and the date when the file will be destroyed.

Guideline 3 – Follow Specific Rules Where They Exist and Common Sense Where They Don't

Some specific rules, regulations or statutes may exist that make the retention expectations very clear.

In other situations, you should follow common sense. For example, representation of a minor may require you to maintain files until the minor reaches the age of majority. In a corporate practice, retention of the closed file may be required for the life of the corporation.

If you work in multiple areas and are going to destroy files, a separate retention period should be identified for each practice area or type of matter. In some cases, you may have to break

this down further based on the situation. For example, a personal injury case involving an adult would have a different retention period than a personal injury case involving a minor.

Guideline 4 – When in Doubt, Retain the File for a Minimum of Six Years or the Malpractice Statute of Limitations

Barring a separate agreement with the client, your best path is to follow the clear guidance set out in EF-17-01.

> The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

Guideline 5 – Retain Files for at Least a Period Applicable to Legal Malpractice Actions

Never destroy a file before the statute of limitations has expired for a legal malpractice claim arising from the work performed for the client. The best defense to a legal malpractice claim is the client matter file.

Guideline 6 – Maintain a Destruction Log

If you decide to destroy a file, maintain an index as required by EF-17-01. While the opinion does not provide specifics a similar opinion in Ohio recommends the following:

- Client name, organized in alphabetical order
- Client and matter number, if any
- The file open date
- The file closing date
- The date representation was terminated
- A copy of or a link to the electronic engagement letter
- A copy of or a link to the electronic notification of the pending destruction of the file
- The name of the lawyer that reviewed the file at closing, prior to destruction, and authorized the destruction
- A copy of the receipt for file transferred to the client or subsequent lawyers at the end of representation.

Conclusion

Document retention and destruction is not always easy. There are specific rules that apply to specific situations and there are quite a few of them. However, it is not impossible. The first step is to use an organized system when saving documents. One critical component of this system is some method of tracking the destroy date. Now you can apply various rules. Use these guidelines for determining the destroy date for matter related documents, add it to your tracking system and periodically review the tracking system for eligible files. With these steps, you can finally get a handle on document retention and destruction.

EF-17-01
Retention and Destruction of Closed Client Files
February 28, 2017

There is no one answer to the central question of how long a lawyer must keep closed files before they may be destroyed. As a general rule, if the former client has not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer. While six years is a floor, it is not a ceiling. A lawyer should carefully consider whether the file contains items that the lawyer should retain for a longer time or whether special circumstances exist such that the file should be retained for a longer time. Certain practice areas, such as estate planning, normally create those circumstances that require the lawyer to preserve closed files for a longer period of time. Before closed client files are destroyed, a lawyer must ensure that important original client property is returned and that steps are taken to preserve the confidentiality of client information. Lawyers should inform clients both of their right to the file and of the firm's file destruction policy in the engagement agreement and in any letter terminating or completing the relationship or engagement. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

Wisconsin Ethics Opinions E-84-5 and E-98-1 are withdrawn.

Introduction

How long must a lawyer retain closed client files? This question arises in several contexts: many times, a lawyer has former client files that are twenty or thirty years old, and the lawyer no longer has room to store them; sometimes, a lawyer is closing his or her office or retiring; and sometimes, a lawyer has died. This question is also difficult to answer because it often depends on a host of other questions, such as: whether the client files contain original client documents or records; whether a minor is involved in the representation; and what type of representation was involved.

This opinion addresses the questions of how long closed client files should be kept by the lawyer and what steps the lawyer should take before destroying closed client files. This opinion also addresses the responsibilities of the lawyer or law firm that represented the client in the matter. This opinion does *not* address the responsibilities of a lawyer who is winding up the practice of another lawyer, such as when a lawyer is appointed as a trustee under Supreme Court Rules Chapter 12.

Lawyers may choose to close client files in physical or electronic format, provided that the closed files are secure, accessible by the lawyer, and reproducible in a format that is usable by the client. The guidance provided by this opinion applies equally to physical files and files stored in an electronic format.

How long after the end of the representation must a lawyer keep closed client files?

The Wisconsin Rules of Professional Conduct (the "Rules") do not provide a required retention time for closed files, and thus there is no "magic number" to be found in the Rules. SCR 20:1.16(d) does, however, require lawyers to take steps to the extent reasonably practicable to protect the interests of the client upon termination of the representation. That Rule has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients.

In Wisconsin Formal Ethics Opinion E-84-5, the State Bar's Standing Committee on Professional Ethics (the "Committee") considered the question of dealing with closed client files in the lawyer's possession. While the Committee opined that lawyers did not have a duty to preserve all client files on a permanent basis, the opinion concluded, relying on ABA Informal Opinion 1384 (1977), that "former clients reasonably expect that valuable and useful information in their attorney's files, not otherwise readily available to the clients will not be prematurely and carelessly destroyed." The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage.

In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here. This six year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions,[1] and for most matters, should provide a sufficient period of time to protect the interests of the client.

While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer than six years, such as files involving claims of minor children, estate planning, and certain tax matters.[2] In determining how long to retain closed client files, the lawyer must be mindful of relevant statutes of limitations as well as the needs of the client in the particular matter. A lawyer's own interest may also cause a lawyer to retain closed files for more than six years.[3] Many firms have written file retention policies that specify different

[1] See Wis. Stat. § 893.52. Note, however, that in actions for legal malpractice the date of injury, rather than the date of the negligent act, commences the period of limitation. *Auric v. Continental Casualty Co*., 111 Wis. 2d 507, 331 N.W.2d 325 (1983). Moreover, the "discovery rule" could extend the period even further.

[2] Similarly, the Tennessee Supreme Court Board of Professional Responsibility in Op. 2015-F-160 concluded that the type of representation is relevant because files should not be destroyed before the expiration of applicable statutes of limitations, which also vary from matter to matter. Accordingly, files "pertaining to minors should be retained until their majority," and certain tax files "should be maintained until the client is no longer exposed to tax liability," the board said. "A lawyer might also wish to consider retaining closed files for six (6) years, the usual statute of limitation period for contract claims in Tennessee, after the conclusion of the representation," it added. The Tennessee board's guidance aligns for the most part with advice in Kan. Bar Ass'n Ethics Advisory Comm., Op. 15-01, 9/28/15. The Kansas committee emphasized that "no hard-and-fast rule can be declared" regarding how long lawyers must retain client files. Like the Tennessee board, it said the "nature and contents of some files may indicate a need for longer retention" because applicable statutes of limitations in client matters will vary.

[3] For example, SCR 21.18 establishes the time limitation for action by the Office of Lawyer Regulation: "(1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within 10 years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is later, or shall be barred from proceedings under this chapter and SCR chapter 22."

retention periods for different types of files. For example, some firms may have policies mandating longer retention periods for estate planning files than for criminal defense files.[4]

While Wisconsin Ethics Opinion E-98-1 recognized that maintaining former clients' files forever was not practicable and that lawyers should not be burdened by the attendant economic costs, it also recognized that certain safeguards should be followed before a file is destroyed. While we agree with most of the safeguards recognized in E-98-1, we do not agree with all of them. One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files."[5] Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome.

We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."[6]

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[4] In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six year minimum retention period for closed client files.

[5] E-98-1 recognized the following safeguards:

> 1. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15. The lawyer must be satisfied that the files have been adequately reviewed. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed.
> 2. The existence of client property, or information that could not be replicated from other sources if necessary, and the age of the materials in the files are all factors that should be considered in determining the reasonableness of the decision to destroy the file. For example, client property or original documents such as wills or settlement agreements ordinarily should not be destroyed under any circumstances, and the level of effort to locate a missing client should be more diligent where there is actual client property involved than where, for example, the file is a long resolved collection file. *See* S.C. Ethics Op. 95-18, ABA/BNA Man. Prof. Conduct 45:1208.
> 3. At a minimum the files should not be destroyed until six years have passed after the last act that could result in a claim being asserted against the lawyer. *Cf.* Kaap, *The Closed File Retention Dilemma*, 1 Wis. B. Bull. 25 (Jan. 1988).
> 4. In the ideal situation, the lawyer would have discussed the issue of file retention/destruction in either the engagement letter with the client or in the letter terminating or completing the relationship or engagement. Absent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files. *See* Los Angeles County Ethics Op. 475 (1993), ABA/BNA Man. Prof. Conduct 1001:1703.
> 5. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time. *See* ABA Informal Op. 1384.

[6] Tenn. Supreme Court Bd. of Prof'l Responsibility, Op. 2015-F-160 (12/11/15). The Tennessee Supreme Court Board reviewed authorities from other jurisdictions and distilled three "general guidelines" for lawyers to consult when assessing how long they must retain a client's file:

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give reasonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills[7] or settlement agreements ordinarily should not be destroyed.

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.[8]

4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.

5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files.[9] This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.

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1. There is no Tennessee Rule of Professional Conduct that requires a retention period of greater than 5 years following the termination of representation; however, the type of representation involved may mandate a longer retention time.
2. Authority to dispose of a file should be obtained from a client whenever possible, so the better practice would be to address file retention initially or contact all clients and determine their wishes.
3. Absent client authority to dispose of files, an attorney should individually review files and be satisfied that no important papers of the clients are contained in the file before destruction.

[7] For example, Wis. Stat. § 856.05(1) states that a person having the custody of any will shall, within 30 days after he or she has knowledge of the death of the testator, file the will in the proper court or deliver it to the person named in the will to act as personal representative. If a lawyer cannot determine whether the testator has died, the lawyer must deposit the original will with the register of the probate court pursuant to Wis. Stat. § 853.09(1).

[8] Such a clause need not be lengthy and should state the firm's policy in plain language, such as:

> [Firm] will retain your client file for ten years from the conclusion of the matter. After ten years, your file will be destroyed, without further notice to you, in a manner which preserves the confidentiality of your information. Should you wish to receive your file, please notify [Firm] before ten years have elapsed and we will promptly provide your file.

[9] See SCR 20:1.6(d).

6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.[10]

Lawyers are reminded that they must maintain records of trust account funds and property for at least six years after the termination of the representation.[11]

Conclusion

Lawyers have a responsibility to take reasonable steps upon termination of the representation to protect the interests of the client, and preservation of client files for a minimum of six years is an important part of that duty. Lawyers must ensure, both in the storage and eventual destruction of closed files, that client information is protected. Lawyers should also include the firm's file retention policy in engagement agreements and closing letters. Maintaining files in an orderly fashion with clear records of where they are and what is in them will assist lawyers in fulfilling their duty to protect client interests upon termination of the representation.

Wisconsin Formal Ethics Opinions E-84-5 and E-98-1 are withdrawn.

[10] See ABA Informal Op. 1384.

[11] SCR 20:1.15(g)(1).

DOCUMENT MANAGEMENT AND RETENTION

Can I Throw It Away Yet?

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1

INTRODUCTION

Affinity CONSULTING

2

Jeffrey S. Krause

Wisconsin Attorney

Senior Document Management Consultant with Affinity Consulting

25 Years Helping Other Attorneys Choose the Right Technology and Use It the Right Way

3

Agenda

Document Management Systems
Document Management and Retention Requirements for Original Paper or Electronic
Wisconsin Rules
Retention Guidelines

4

DOCUMENT MANAGEMENT

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5

Document Management Defined

"A logical and consistent way of saving documents, so that we can find them later when we need them."

6

Types of Document Management

Types of Document Management
- Filing Cabinets
- Folders and Subfolders
- Practice Management Software
- Document Management Software

7

Document Management Problems

Problems with Document Management

One person’s logic is not always another person’s logic

Consistency is difficult to maintain

8

Finding Documents

Issues with document management make it difficult to accomplish the real goal

Finding documents when you need them

9

"I Don't Need Document Management"

The ability to find the right documents is critical to any document retention and destruction plan

10

DOCUMENT MANAGEMENT AND RETENTION

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Retention Rules and Document Management

Retention rules are based on content and time

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Content

The content component of document retention and destruction is often the basis of the document management system:

- Directory Based
  - —Folders by Client
  - —Subfolders by Matter
  - —Subfolders by Document Type
- Practice Management Clients and Matters
- Document Management Profile Fields

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Time

Time is the difficult part:

- Directory Structures:
  - —Create a list (more later)
- Practice Management
  - —Set a closed date
  - —Run reports
- Document Management System
  - —Set a closed date
  - —Run the search

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RETAINING ORIGINALS

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Original and Duplicates

In general, a paper or electronic "duplicate" is legally sufficient as long as it is a fair and accurate duplicate:

Exceptions:

- When a statute, rule or regulation requires the original signed document
- When the Rules of Evidence require an original

16

Statute or Rule Requiring Original

In most states, if the original will cannot be found, there is a presumption that it was revoked by the testator.

Deeds and Stock Certificates are other examples where the original may be required.

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Rules of Evidence – Part I

Wi. R. Evid. 910.02 **Requirement of original**

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.

Wi. R. Evid. 910.03 **Admissibility of duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. No duplicate is inadmissible solely because it is in electronic format.

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Rules of Evidence – Part II

Wi. R. Evid. 910.01 **Definitions**
For purposes of this article the following definitions are applicable:

…

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

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Paper or Electronic?

Other than a few specific situations it does not matter whether files are retained on paper or electronically

The requirements are the same

The duty is the same

20

Keep it Digital

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22

Onsite Paper Storage

100 banker boxes

400 square foot (20 x 20) File Room

$15/sq

$6,000 per year or $30,000 over 5 years

How long does it take you to find it?

How much more can you fit in the room?

23

Offsite Paper Storage

$300 per month

$3,600 per year or $18,000 over 5 years

How long does it take to find it?

How long does it take to retrieve it, etc.?

How much will additional storage cost you?

24

Outsourced Scanning

100 Banker Boxes

360,000 pages

.03 per page

$150 per Banker Box

$10,000 - $15,000

25

Internal Scanning

100 Banker Boxes

360,000 pages

$15/hour employee

$50-$60 per Banker Box

$5,000 to $6,000

26

Digital Storage

1TB Hard Drive = $70

1TB Cloud Storage included with Microsoft 365

14,000 Banker Boxes

30 Million Pages

Electronic document management

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WISCONSIN RULES

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SCR 20:1.15(b)(1)

SCR 20:1.15 Safekeeping property, trust accounts and fiduciary accounts

(b) **Segregration and separation**

(1) **Separate account.** A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation.

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SCR 20:1.15(g)(1)

(g) **Record keeping requirements for all trust accounts.**

(1) **Record retention.** A lawyer shall maintain and preserve complete records of trust account funds, all deposits and disbursements, and other trust property and shall preserve those records for at least six years after the date of termination of the representation. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for trust account record keeping.

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OLR Guideline for Trust Account Records

(1) Draft accounts. Complete records of a trust account that is a draft account should include a transaction register; individual client ledgers for IOLTA accounts and other pooled trust accounts; a ledger for account fees and charges, if law firm funds are held in the account pursuant to SCR 20:1.15(b)(3); deposit records; disbursement records; monthly statements; and reconciliation reports, as follows:

(a) Transaction register

(b) Individual client ledgers

(c) Ledger for account fees and charges

(d) Deposit records

(e) Disbursement records

(f) Monthly statement

(g) Reconciliation reports

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OLR Guideline for Trust Account Records

4. Electronic record retention.

(a) Back-up of records. A lawyer who maintains trust account records by computer should maintain the transaction register, client ledgers, and reconciliation reports in a form that can be reproduced to printed hard copy.

(b) IOLTA account records. In addition to the guidelines in sub. (4)a., the transaction register, the subsidiary ledger, and the reconciliation report should be printed every 30 days for an IOLTA account. The printed copy should be retained for at least 6 years.

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Client Files

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ABA Model Rule 1.16 Proposed Amendment

In August 2012, the ABA passed a proposed amendment to model Rule of Professional Conduct 1.16

- Retain unless authorized or notified
- Destroy after ten years without notice
- Special circumstances for minors and certain convictions
- Fee agreement can contain notice
- Does not supersede court order

Wisconsin has not adopted this amendment

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SCR 20:1.16(d)

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."

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Wisconsin Formal Ethics Opinion EF-17-01: Retention and Destruction of Closed Client Files

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No Magic Number

"The Wisconsin Rules of Professional Conduct (the "Rules") do not provide a required retention time for closed files, and thus there is no "magic number" to be found in the Rules. SCR 20:1.16(d) does, however, require lawyers to take steps to the extent reasonably practicable to protect the interests of the client upon termination of the representation. That Rule has consistently been interpreted to require lawyers to preserve closed files for a period of time sufficient to protect the interests of the clients."

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Reasonable Expectations

…

"The Committee, also relying on ABA Informal Opinion 1384, recognized the reasonable expectations of the former client, cautioned lawyers to maintain files for at least the duration of any applicable statute of limitations that might pertain to a client's claim, and instructed lawyers to return important documents to the client or to maintain them in storage."

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Six Years

"In Ethics Opinion E-98-1, the Committee took the position that, if the former client had not requested the file, the lawyer should, at a minimum, retain the closed files until six years have passed after the last act that could result in a claim being asserted against the lawyer, and we reaffirm that guidance here."

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Consistent with Other Rules

"This six year minimum is consistent with SCR 20:1.15(g)(1), which requires lawyers to preserve complete records of trust account funds and other trust account property for at least six years after the date of termination of representation. It is also consistent with the statute of limitations for most malpractice actions, and for most matters, should provide a sufficient period of time to protect the interests of the client."

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More Than Six Years?

"While six years is a floor, it is not a ceiling. The interests of the client may require that the lawyer retain a closed client file for longer than six years. A lawyer should carefully evaluate whether the file contains items that the lawyer should retain for a longer time or whether circumstances exist such that the file should be retained for a longer time. Some files must usually be retained longer than six years, such as files involving claims of minor children, estate planning, and certain tax matters."

41

Less Than Six Years?

Footnote 4.
In some circumstances, it is possible for a lawyer to obtain the client's express agreement to keep files for a lesser period. The client's agreement must meet the informed consent standard, as set forth in SCR 20:1.0(f), meaning the lawyer must fully describe the material risks of and alternatives to the lesser retention period to the client. The lesser retention period must still be reasonable under the circumstances (e.g. routine traffic cases). In most circumstances, lawyers should observe six year minimum retention period for closed client files.

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Is Notice Required?

One of the safeguards with which we disagree required that "[a]bsent an express agreement with the client, the lawyer should at a minimum try to reach the client by mail at the client's last known address, should advise the client of the intent to destroy the file absent contrary client instruction, and should wait a suitable period of time (perhaps six months) before taking action to destroy the files." Although some practitioners may choose to follow this or a similar practice, such a requirement, regardless of the age of the file or the type of the matter, is not required by the Rules of Professional Conduct, nor by any Wisconsin case and can be unduly burdensome.

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Dispose of Properly

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

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Minimum Safeguards

We, therefore, adopt the following minimum safeguards that should be followed before closed client files may be destroyed. In doing so, we stress, as other ethics opinions have done, that there is "no one safe answer to the central question of how long must [a lawyer's] closed files be kept before they are destroyed."

45

Six Years

1. The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

46

Client Property

2. The lawyer has specific responsibility to hold client property in trust under SCR 20:1.15, and important documents or other materials given to the lawyer by the client should not be destroyed without consent of the client. The lawyer must be satisfied that the files have been adequately reviewed or that the firm's established procedures give reasonable assurance that the file does not contain client property. To do otherwise, such as a spot check, would run the risk that client property or original documents would be destroyed. Client property or original documents such as wills or settlement agreements ordinarily should not be destroyed.

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Inform the Client

3. Lawyers should review their firm's policies and ensure that the firm's engagement letters and closing letters contain a statement informing the client of the right to the file and the firm's file retention policy. While this is not explicitly required by the Rules, it is an important and relatively easy way to protect the client's interests upon termination of the representation.

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Protect Confidentiality While Stored

4. Likewise, the lawyer must take reasonable measures to ensure that the method by which closed client files are stored, whether the files are in physical or electronic format, protects the confidentiality of those files.

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Protect Confidentiality When Destroyed

5. Lawyers must take reasonable steps to ensure that closed client files are destroyed in a manner that preserves the confidentiality of the information contained in the files. This applies to files stored both physically and in electronic format. Normally, the retention of a professional shredding service that gives contractual promises of confidentiality will suffice for the destruction of physical files. With respect to electronic files, the lawyer must take steps to ensure that any information protected by SCR 20:1.6 is no longer retrievable from any hardware, software, or device that is no longer in the lawyer's control.

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Keep an Index

6. The lawyer should keep a record or index of files that have been destroyed for a reasonable period of time.

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DOCUMENT RETENTION GUIDELINES

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Preface: Infinite Retention May Be The Future

Digital storage is cheap and easy

Adding more storage is also cheap and easy

PDFs are universal and (for the foreseeable future) timeless

No rules to worry about

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Guideline 1: Shift the Burden

By agreement with the client, you can shift the burden to the client to retain the file.

Do this in writing

Advise the client how long they should keep it

Cautions:
Handing over the file can be a bit risky if there is ever a malpractice issue

In some cases, you cannot shift the burden

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Guideline 2: Provide Notice in Advance

Establish a File Retention policy

Notify clients of your policy

Stick to your policy

The firm will maintain an electronic copy of your file for _____ years after the date of the file closing letter. After such time, the file will be permanently destroyed. You will be provided a secure hyperlink to download your entire file electronically at the time of the closing letter so you may keep your file for as long as you desire. You may also request your file in paper form for $._____ per page before the date of destruction.

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Guideline 3: Follow Rules and Common Sense

Follow a rule if there is one:

"In addition to the guidelines in sub. (4)a., the transaction register, the subsidiary ledger, and the reconciliation report should be printed every 30 days for an IOLTA account. The printed copy should be retained for at least 6 years."

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Guideline 3: Follow Rules and Common Sense

Follow common sense if there isn't:

"A lawyer's own interest may also cause a lawyer to retain closed files for more than six years. Many firms have written file retention policies that specify different retention periods for different types of files. For example, some firms may have policies mandating longer retention periods for estate planning files than for criminal defense files."

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Guideline 4: When In Doubt, 6 Years

The lawyer must preserve the file for a length of time sufficient to protect the client's reasonably foreseeable interests. As discussed above, this should normally be a minimum of six years.

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Guideline 5: When in Doubt, Malpractice Statute of Limitations

Never destroy a file before the statute of limitations has expired for a legal malpractice claim arising from the work performed for the client.

The best defense to a legal malpractice claim is the client matter file.

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Guideline 6: Maintain a Log

Maintain a Case Log:

- Client name, organized in alphabetical order
- Client and matter number, if any
- The file open date
- The file closing date
- The date representation was terminated
- A copy of or a link to the electronic engagement letter
- A copy of or a link to the electronic notification of the pending destruction of the file
- The name of the lawyer that reviewed the file at closing, prior to destruction, and authorized the destruction
- A copy of the receipt for file transferred to the client or subsequent lawyers at the end of representation.

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WRAP UP

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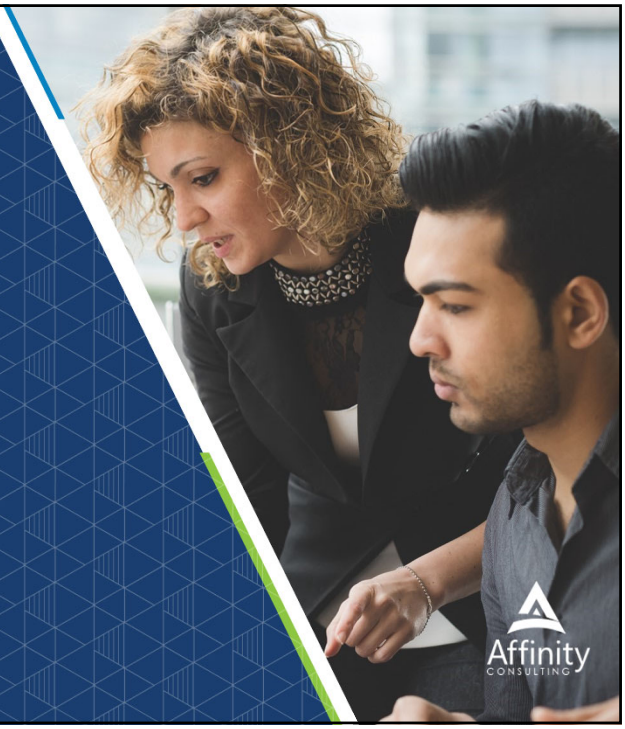
Takeaways

Improve your document management
Move to digital
Know the rules
Follow the guidelines



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Guidelines

1. Shift the burden
2. Provide advance notice
3. Follow the rules/common sense
4. When in doubt, six years
5. Malpractice protection
6. Maintain a log

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Alternatively

Keep it in digital format - forever

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