

# The Story of Stuff

**A few fortunate lawyers might have completely paperless, stuff-free workplaces. Here are tips for the rest of us: deciding how to store clients' files, how long they must be kept, and what to do with them when the retention period has ended.**

BY STACIE H. ROSENZWEIG

In 1981, comedian George Carlin released his ninth album, titled “A Place for My Stuff.”<sup>1</sup> The title track was about exactly that – an astute and sometimes vulgar commentary about people’s relationship with their possessions. A house, he said, was just a “pile of stuff with a cover on it.”<sup>2</sup>

If that’s the case, then a law office is piles and piles of stuff sorted under small covers, big covers, and maybe even a bigger cover over all of that. Much of the “stuff” is actually information and the infrastructure required to store and access it – papers, file folders, and cabinets; computers, hard drives, and servers. Maybe there are even old backup tapes and mainframe punch cards in a long-forgotten basement cabinet.

Despite lawyers’ best efforts at going paperless (you were going to do that by the year 2000, along with buying a flying car, right?), much of our stuff is paper. Many lawyers in practice for more than a few years have boxes of long-closed files in a storage unit or their own basement. Even “digital natives” who can run an entire federal trial with an iPad and a subscribe-and-save shipment of energy drinks end up with paper everywhere – some clients prefer it, and anyone with a practice involving estate planning, entity formation, or similar may be asked to hold on to the originals for safekeeping.

“Stuff” itself isn’t the problem. There will always be stuff. Law is an information-based profession, and our brains lack the capability to store and recall all the information required to do our jobs, so we need that infrastructure.

What to do with the stuff – both when you need it and when you don’t – is the problem. Most of this stuff is the client’s property, not the lawyer’s,<sup>3</sup> so lawyers need to keep and dispose of it carefully.<sup>4</sup>

## What Should I Do with All This Stuff?

First, lawyers should think about how to accept and maintain this stuff. Clients provide the

information we need to do our jobs, and the format varies. Sometimes, clients have all the information neatly organized on a flash drive or available for secure file transfer. Sometimes, a client gives a lawyer a shopping bag of receipts and notes. In almost all cases, lawyers receive information orally and store that information on a legal pad or in a Word document.

Nothing in the Supreme Court Rules requires lawyers to use paper instead of electronic information storage or vice versa. Lawyers do need to make sure they are aware of the benefits and risks of the methods they use<sup>5</sup> and that whatever they choose, the information is protected from unauthorized access or disclosure.<sup>6</sup>

Although astute observers of the condition of my desk will challenge this contention, I prefer to keep everything in electronic form. My own firm uses a cloud service,<sup>7</sup> so information is readily available everywhere with an internet connection and appropriately backed up. Electronic storage (whether in the cloud or in the office) is no longer the exceedingly



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## ETHICS

expensive engineering marvel it was in the mid-1990s.<sup>8</sup> A drive capable of storing millions of documents and hundreds of thousands of high-resolution photographs now fits in one hand and costs less than \$100. Go ahead and scan the receipts and the notes on the legal pads — make sure you have a good backup, and go ahead and return the shopping bag to the client and shred your handwritten notes.

Lawyers should communicate the firm's document retention policy to clients when the representation begins, within or alongside the fee agreement, and again at termination of representation. Lawyers should make clear to clients how long they intend to keep files and whether the clients will receive separate notice before files are destroyed.

Occasionally, a client may ask a lawyer to hold on to tangible property — for example, jewelry, photographs, or an original of a will. A good practice here

is to determine whether it is necessary to possess this property in the first place — perhaps the photographs can be scanned and returned or the will deposited with the court<sup>9</sup> for safekeeping.

If you do determine that accepting tangible property is necessary, or you otherwise decide to take possession, the property should be secured in a manner appropriate to its nature — somewhere it will be protected from loss or damage, typically a safe or a safety deposit box. Securities in bearer form *must* be kept in a safety deposit box at a bank or similar institution authorized to do business in Wisconsin, unless the client expressly directs a different mechanism in writing.<sup>10</sup>

Whew. All your stuff has its place.

### When and How Can I Get Rid of This Stuff?

Nobody wants to be responsible for all that stuff for eternity, and most of us lack the space and funds to do so. We can get

rid of it, but we need to do so carefully.<sup>11</sup>

As stated, the file belongs to the client. At termination of representation, lawyers are required to “take steps to the extent reasonably practicable to protect a client's interests,” including “surrendering papers and property to which the client is entitled”<sup>12</sup> (that is, their stuff). This means that upon request of the client or successor counsel, the lawyer must provide the file (except for certain materials such as internal firm communications, notes containing mental impressions of the client, and so on) and in a format the client can utilize. Lawyers can keep a copy for their own records.

Realistically, however, when representation ends because a matter is over, many clients do not want their files and there is no successor counsel to request it. What then?

The Supreme Court Rules do not specify how long lawyers should keep their closed files.<sup>13</sup> A common suggestion,



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incorporated into Formal Opinion EF-17-01, is six years following the last event that could give rise to a claim against the lawyer. The statute of limitation for legal malpractice is three years,<sup>14</sup> but grievances have a six-year limit, and discovery rules apply in both cases.<sup>15</sup> And, remember, the event giving rise to a claim might not be clear or appear quickly.<sup>16</sup>

Many lawyers, even those with well-written and well-communicated document retention policies, even those who advise their own clients on document retention, keep things indefinitely. It might not be a big deal to hang on to digital files (particularly if the hardware is paid for and doesn't take up too much space), but those file cabinets, boxes, and storage units of physical files add up. This can be a problem, particularly when solo lawyers with a basement or barn full of boxes contemplate retirement.

In the absence of a document retention policy stating otherwise, it is a best practice for lawyers to contact each affected former client and advise them that their file will be destroyed after a certain date. But, some lawyers have rooms and rooms of files representing decades of work and no reasonable way to sort through it all, let alone contact thousands of former clients, most of whom have moved and changed phone

numbers and perhaps names and many of whom are long deceased.

This best practice may be unfeasible or as impossible as going back in time to 1981 and letting your then-clients know when in the future their files might be destroyed. These situations have no good or pat answers. If there is any chance that tangible property or intrinsically valuable documents are within those boxes, lawyers should make reasonable efforts to locate the property or documents and return them to their rightful owners (or to the state's unclaimed property program).<sup>17</sup> But there is no real reason to hold on to all those pleadings and notes from decades ago. They may be shredded or otherwise securely disposed of.<sup>18</sup>

For those feeling overwhelmed by the tasks, please seek assistance. It is acceptable to hire a secure disposal company or enlist the services of a trusted friend or colleague.<sup>19</sup> The State Bar's Practice Management Program may be able to offer suggestions as well.<sup>20</sup>

### Conclusion

George Carlin died in 2008. Although we don't know what happened to the physical items in his home, nearly 16 years later Carlin's estate must wrangle with some of the stuff he left behind: In

January 2024, the Carlin estate filed a lawsuit against individuals who allegedly used Carlin's copyrighted material and generative AI technology for a new comedy special.<sup>21</sup>

Lawyers, even ones who are celebrities, likely don't need to worry about client files being used as comedy-special fodder by human creators and AI. But unlike most celebrities, lawyers have ethical obligations regarding clients' files and property. Whomever a lawyer has designated to take over the lawyer's practice or inherit the lawyer's property will appreciate it if the lawyer does the hard work of dealing with clients' "stuff" while the lawyer is alive and leaves for survivors only what is valuable, personally or professionally. **WL**

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### ENDNOTES

<sup>1</sup>George Carlin, *A Place For My Stuff*, Atlantic (1981).

<sup>2</sup>I get away with breaking just about every one of the *Wisconsin Lawyer* writers' guidelines, but I'm pretty sure my editor will not let me link directly to a Carlin video. Versions of this routine are easily found on YouTube.

<sup>3</sup>Wis. Formal Ethics Op. EF-16-03. (Ethics opinions and related information are available at State Bar of Wis., *Ethics Opinions*, <https://www.wisbar.org/ethop> (last visited Feb. 7, 2024).)

<sup>4</sup>You can fold, spindle, or mutilate those punch cards if you want to, though - those are all yours.

<sup>5</sup>SCR 20:1.1 (Comment 8).

<sup>6</sup>SCR 20:1.6(d).

<sup>7</sup>Wis. Formal Ethics Op. EF-15-01.

<sup>8</sup>"This, in my hands, is a gigabyte. It's \$10,000. Don't touch it." (Source: an IT friend of mine, who was gleefully holding a shiny object the size of a shoe box, while we were undergrads.)

<sup>9</sup>Wis. Stat. § 853.09.

<sup>10</sup>SCR 20:1.15(b)(4).

<sup>11</sup>Wis. Formal Ethics Op. EF-17-01.

<sup>12</sup>SCR 20:1.16(d).

<sup>13</sup>SCR 20:1.15 does require lawyers to keep trust account records for six years following termination of representation, but that is a separate issue.

<sup>14</sup>Wis. Stat. § 893.53.

<sup>15</sup>SCR 21.18.

<sup>16</sup>See, e.g., *Bleecker v. Cahill*, 2017 WI App. 28, 375 Wis. 2d 282, 895 N.W.2d 72.

<sup>17</sup><https://www.revenue.wi.gov/Pages/UnclaimedProperty/home.aspx>.

<sup>18</sup>Even files dating to when Carlin made his observations, during the Reagan administration, need to be disposed of in a manner that protects confidentiality. See SCR 20:1.6, SCR 20:1.9.

<sup>19</sup>Take care when supervising nonlawyer services and individuals who help you, to ensure work is in accordance with the rules. See SCR 20:5.3, particularly Comment 3.

<sup>20</sup><https://www.wisbar.org/formembers/practicemanagement/Pages/Practice411-LOMAP.aspx>.

<sup>21</sup>See, e.g., Andrew Dalton, *George Carlin Estate Sues Over Fake Comedy Special Purportedly Generated by AI*, AP News (Jan. 26, 2024), <https://apnews.com/article/george-carlin-artificial-intelligence-special-lawsuit-39d64f728f7a6a621f25d3f4789acadd>. **WL**