The Florida Bar Member Services
Practice Resource Institute (PRI)

When May I Destroy My Old Files?

This is among the most difficult questions that Bar ethics staff answers, because it breeds a number of other questions: Does the file contain original client records? If so, what are the ethical obligations to return originals to a client? Do the files contain transactions that were of a contingent nature? If so, what are the ethical obligations? Were trust funds involved? And, so on.

The answers are found in a variety of sources. There is no one right answer. The issues encompass considerations of malpractice, tax, ethics, business, and professional regulations. The Practice Resource Institute, Florida chapters of the Association of Legal Administrators, and representatives of the Association of Records Managers and Administrators have all contributed in some measure to the development of the policies covering this area.

This article is intended to answer the questions in a prospective sense. The basis for understanding the requirements of file retention resides in the Rules Regulating The Florida Bar, and certain Florida Bar Ethics Opinions.

Rule 5-1.2(e), related to trust account record retention, states that *"A lawyer or law firm that receives and disburses client or third-party funds or property shall maintain the records required by this chapter for 6 years subsequent to the final conclusion of each representation in which the trust funds or property were received.*" In addition, Rule 4-1.5(f)(5) requires that a copy of the written fee contract and closing statement in contingency fee cases be retained for six years after the execution of the closing statement, and Rule 4-1.8(j) requires that a copy of the signed statement of insured client's rights be retained for six years after the representation is completed. Thus, a six-year schedule for certain records following the conclusion of representation is the maximum contained within the rules.

A numeric guideline alone does not meet the spirit or the letter of what the Professional Ethics Committee historically has looked for in this area; however, a

review of the opinions of the committee over the years reveals a continuing desire that the client be notified and asked to pick up material or to give authority for disposal.

Opinion 63-3 states in part: *"With regard to the disposal of files, we believe that the length of time a file should be maintained depends largely on the contents of the file itself. However, if it is desired to dispose of a file, we believe that the client should be notified and asked to pick up the material or give authority to dispose of it in case there is any question. Where the client is not available, we believe it desirable to check the file for certainty that no important papers are being disposed of before destroying them."*

Opinion 71-62 states: *"In disposing of clients' files, the dominant consideration should be the instructions and wishes of the clients. Written inquiry should be sent requesting the clients' advice as to their wishes in disposing of their files."*

Opinion 81-8 states: *"A lawyer who intends to dispose of clients' files should make a diligent attempt to contact all clients and determine their wishes concerning their files. The file of any client who cannot be located must be reviewed individually and may be destroyed only after it is determined that no important papers of the client are in the file."*

The committee went on to reaffirm Opinion 63-3, noting, *"This committee has never attempted to delineate the specific period of time that a client's file must be kept by a lawyer; indeed, it is the contents of the file, not its date, that should dictate the length of time a file is to be retained."*

A review of relevant American Bar Association informal ethics opinions demonstrates an unwillingness to establish a bright-line length of time a file should be retained before disposal. ABA Informal Opinion 1384 states, in part:

"A lawyer does not have a general duty to preserve all of his files permanently but clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers' files, and not otherwise readily available to the clients, will not prematurely and carelessly be destroyed, to the clients' detriment. All lawyers are aware of the continuing economic burden of storing retired and inactive files. How to deal with the burden is primarily a question of business

management, and not primarily a question of ethics or professional responsibility."

Perhaps the best common sense advice on the subject is contained within that ABA Informal Opinion 1384, which goes on to provide:

"1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or on behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).

2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the clients position in a matter for which the applicable statutory limitations period has not expired.

3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.

4. In determining the length of time for retention or disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.

5. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.

8. A lawyer should preserve, perhaps for an extended time, an index or

identification of the files that the lawyer has destroyed or disposed of."

Giving due weight to each of the foregoing considerations, a lawyer, as a matter of ethical conduct contemplated by the precepts underlying the Rules Regulating The Florida Bar, should abide by the following general guidelines:

1. Length of time files are held is less material than contents of a file. There is no Florida Bar rule requiring retention greater than six years following the conclusion of the matter.

2. To forestall potential problems, at the time of engagement attorneys should explain the file retention policy and retention period. In Florida, client files are property of the attorney and not the client; however, when planning to destroy the contents of a client file, the lawyer should offer the file to the client.

3. An attorney should individually review files and be satisfied that no important papers of the clients (of a nature which would be classified as client property) are contained in the file before destruction.

4. Absent client authority to dispose of client originals from the files, a lawyer must hold those originals until returned to the client or other disposition instructions are obtained.

The analysis of this issue as an ethical matter should not obscure the reality that some records need to be retained for a variety of other reasons. For example, carefully evaluate whether information that might be destroyed would be useful in the prosecution or defense of a malpractice action. The Code of Federal Regulations alone contains more than 1,200 separate sections on records retention. These are found in a one-volume Guide to Record Retention Requirements available from several sources, such as Amazon.com and the Government Printing Office. Another valuable resource is ARMA (Association of Records Managers and Administrators), which has a subgroup for legal organizations.

At some point ethical rules, professionalism, and good common sense come together to state that a lawyer cannot keep everything forever. This conclusion leads us to the prospective nature of this article. Do law firms need to have a

written policy in place for retention and destruction of files? Of course they do. Any firm, no matter how small or with how few clients, needs to dispose of closed files in a systematic and ethical fashion.

What does a good file retention policy contain? Although it is not possible to design a policy that will serve the needs of all firms everywhere, a few generalities can be made. First, the client should be made aware in the initial agreement what will happen to client documents and client files, and under what circumstances. Second, the policy should provide the person responsible for closing out a file clear guidance on what information should be kept and what information may be discarded. Finally, the policy should specify the length of time the remaining material will be kept, as well as where materials will be stored.

The first step in any file retention process occurs, oddly enough, before the file is created. The attorney should set out, in writing, a detailed explanation for the client of the disposition of any documents in the case before those documents are created. This explanation may be in a general retainer agreement, representation engagement letter, or in a specific fee agreement; the important thing is that the client must see (and agree to through signing) the firm's plans for the file. In addition, in order to better protect itself, the firm should have a policy of returning original client documents unless those documents must be presented later as exhibits. If the documents are needed only as reference material, the firm should photocopy them, place the copies in the file, return the originals to the client and note the date of return.

PRI recommends that the firm’s new matter intake form include the question, ”What is the retention period for this file once the matter is concluded?”

Before any decision can be made concerning how or whether to dispose of the file, the file must actually be closed. What determines when to close the file? Many matters are, as they say, open and shut. For others, however, considerable judgment must be exercised in determining whether the file can properly be considered closed.

The first consideration is generally a practical one—no matter is closed until full payment has been received for it! Therefore, the file must pass in some way

through the firm's bookkeeping or accounting department for a status report.

Other factors are tied to the nature of the case. The following list may serve as a starting point in developing a firm's guidelines for a definition of “completion of the matter.”

• Contract actions—satisfaction of judgment or dismissal of action.

• Bankruptcy claims and filings—discharge of debtor payment of claim or discharge of trustee or receiver.

• Dissolution of marriage—final judgment or dismissal of action, or date upon which marital settlement agreement is no longer effective; except when child custody is involved, in which event the date of the last minor child reaching majority.

• Probate claims and estate administration—acceptance of final account.

• Tort claims—final judgment or dismissal of action except when a minor is involved, in which event the date of the minor's majority controls.

• Real estate transactions—settlement date, judgment, foreclosure, or other completion of matter.

• Leases—termination of lease.

• Criminal cases—date of acquittal or length of the period of control.

An important step in the file closing process is the final review by the attorney. Once the file is closed, it should be “stripped” or “culled." In other words, the attorney on the case should review the file and approve the removal and destruction of unnecessary material. Some candidates for “unnecessary material” are: duplicate copies (only one need be retained); copies of published material that could be located again *(e.g.,* court opinions); draft versions of memoranda, briefs, pleadings, etc., except when highly significant or contested changes were made between the original and final versions; informal notes; depositions; and purely extraneous material.

After the culling has taken place, the stripped-down version of the file should then be analyzed document-by-document. It is often helpful to look at individual documents in terms of ownership: They belong either to the attorney (or to the firm), or they belong to the client. If the documents are those that have been generated by the attorneys on the case, they are the property of the firm (TFB Ethics Opinion 88-11 rec.). Client-provided tax records, expense statements, bank records, and so forth belong to the client, as do important originals, such as trust documents or deeds. Once the attorney has determined what category a given document falls into, the attorney can deal with the document.

Client Originals Any documents in the file that belong to the client should be returned. Ideally, none of this will be left to chance as there will be specific provisions in the firm's retainer agreement with the client that stipulate exactly what will be done with any client material in the file once the case is closed, what steps will be taken to locate the client so that these materials will be returned, and whose will be the primary responsibility for ensuring that this is done. When a document is returned to the client, the firm should get a receipt so that there can be no dispute later about whether it was retained or returned. Ideally, however, the firm will have photocopied material whenever possible at the outset of the case, so there should be few originals to return.

Unfortunately, there are occasions when, try as the firm might, it cannot locate the client in order to return documents. What is proper for the firm to do in this case? Most authorities agree that the attorney has an ethical duty to retain important documents permanently if, for some reason, they cannot be returned to the client. Such documents include: recorded deeds; accountants' audit reports; tax returns (including all related documents and worksheets); year-end financial statements and depreciation schedules; accounting journals; bills of sale (for important purchases); certificates of incorporation (along with bylaws and minute books); capital stock and bond records; insurance policies and records; property records and property appraisals; copyright, trademark, and patent applications and registrations; major contracts and leases; and actuarial reports. The firm should go online to the Florida Department of Financial Services, Division of Accounting and Auditing, Bureau of Unclaimed Property at www.fltreasurehunt.org, to determine if, after the state-required dormancy period, the firm may remit certain client property to the care of the State.

Firm Research A final and useful step is for the attorney to distinguish opinions and research items that might be reused for similar cases in the future, and for those items to be cross-referenced and stored in a centralized "reference file" available to all attorneys.

The file should now be in proper form to be removed to a centralized "closed file" location, or scanned into the closed file drive on the firm's network. Inactive or closed files should never be interfiled with active ones, because this will result in a system clogged with files that typically will be examined, if at all, only once every few years.

Scanned Files Given the above complexities, many firms are turning to scanning files as a means of avoiding the question of what to retain and for how long. The Florida Bar Ethics Opinion 06-1 addresses this issue. *"Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction."*

Permanent storage of digitized files is space efficient and prevents any future disputes over file contents, but it can be time intensive. While scanning files has an important role in law firm file retention policies, it should not be regarded as a panacea. It is still necessary, for example, to examine the file to see what must be returned to the client. In addition, it is not physically possible to scan some client property into one's files. And, finally, someone has to scan the documents. So, while it is tempting to construct a policy that consists mainly of "scan everything and keep it forever," this is generally not practical or wise when an additional factor is the labor dollars to "scan everything."

When dealing with digital documents, and sharing them outside of the firm, keep in mind the problematic impact of metadata. Ethics Opinion 06-2 touches on the problem: *"A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata. A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended*

for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt. The opinion is not intended to address metadata in the context of discovery documents."

Cloud Storage The Florida Bar Ethics Opinion 12-3 formalizes the use of cloud computing. "*Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.*" When coupled with firm policies supporting document scanning and digital storage of client files, a cloud-based storage solution provides effective business continuity through the back-up of data, and the automatic storage of data back-ups off-site.

We must return, then, to the central question in any law firm file retention policy: How long must the closed files be kept before they are destroyed? While there is no one safe answer for all types of cases, firms can use the following to establish their own timelines for retention and destruction.

In no circumstances should a closed file be destroyed before the statute of limitations has run on the action. This is an obvious necessity for the attorney to protect himself or herself in case of charges of malpractice. It is important to remember that this protection element should be the prime consideration in file retention, since, if a reference file as discussed above has been established, there will no longer be a need to retain files for research purposes. This minimum time will, of course, vary by case type, so it is entirely likely that a firm may have different retention and destruction schedules for different categories of files.

The prudent firm will then add in a cushion of a few extra years, just in case. The grand total for file retention has been put by experts at anywhere from seven to 15 years; clearly, there is much room for subjective judgment on the part of the firm, although a conservative interpretation is probably called for. In addition, files for some matter types often are retained permanently, such as tax and estate planning files.

If the firm follows a file closing checklist that includes an attorney's final review of

the file, and this process is documented, there should not be any reason to review the file again when the retention period has expired and it is time to destroy the file.

How the actual destruction takes place must also be determined. Will files be shredded, pulped, buried or burned? Will that be done by employees of the firm or by an outside agency? However the files are disposed of, the confidentiality of any sensitive material remaining in the files must be preserved, and the means of destruction should be consistent. In other words, it is not good practice to hand over half of the 1991 files to ACME Shredders, Inc., and then dispose of the remaining ones in the city dump incinerator. The firm should retain documentation of which files were destroyed and how they were destroyed, on what date and by whom. Again, since one of the primary reasons for having a policy is to prevent even the appearance of wrong-doing in case of a malpractice action or grievance, destruction should always be carried out in accordance with a written firm policy.

A review of the relevant ethical considerations regarding records retention amply demonstrates a reluctance to designate a number of years as an indicator that a closed file may be discarded. A well-designed and implemented records retention and destruction policy will address the issue in a prospective manner, detailing up front in a fee agreement the intent of the firm not to hold original documents and the offer to return them to the client. The policy must address the overriding concern that in all instances the firm follows the expressed instruction of the client. Whatever policy a firm finally develops must also be internally consistent and adhered to by all firm personnel in order for the firm to gain any protection from having such a policy in place.

*** Sample file closing checklists, closing file letters, and disengagement letters can be found in the PRI *Administrative Forms Handbook Online,* which is located on-line, free of charge, on the PRI homepage at www.floridabar.org/PRI.

You can also find more information on the subject of file retention in the Closed Files Informational Packet produced by the Bar's Ethics department. See all the Ethics Informational Packets.

MODEL FILE RETENTION POLICY

Effective _____, this firm will begin implementation of a file retention policy. Client-provided documents will be returned to the client promptly at the conclusion of the matter. Client Files will be held by (firm name) for a specific retention period.

Files of closed matters will be held in storage [or scanned and held in digital form] for the appropriate retention period, and prior to storage [or scanning] each file will be culled according to the following guidelines:

Guidelines for Culling Files

1) Legal memoranda, briefs, pleadings, orders, opinions, agreements, corporate documents, and other original or signed documents can be kept in final (not draft) form.

2) Notes and memoranda recording nonpublic information regarding a client or its adversary should be destroyed.

3) Duplicates, unless they are bound or printed (up to a maximum of three), should be destroyed.

4) Drafts are destroyed, unless they are critical to the history of the matter and/or contain important client directives.

Retention

No attorney should be obligated to retain any documents relating to any client's matter beyond _____ years from the date of completion of the case or matter, except in cases where law, or accepted best practice, impose on the attorney a duty to preserve records for a longer period of time. For purposes of this policy, "completion of the case or matter" shall depend upon the type of matter and shall be determined by the partner in charge.

Files will be held until a specific date determined by the attorney in charge or for _____ years from the date of the conclusion of the matter, whichever period is longer.

The firm's Records Manager or Custodian has been directed to destroy certain files when there has been no activity for a prolonged period of time. Our policy is as follows:

1) If a file has seen no activity for ____ years, it is destroyed after the affirmative approval of the attorney in charge.

2) Original documents (contracts, wills, consent orders, etc.) are not destroyed under any circumstances.

3) Files in which there is a minor child involved will be held to the child's age of majority plus the firm's normal retention time.

4) Files regarding matters wherein there are agreements, judgments or orders containing clauses that will be effected, or come to fruition, in the future, will be held until all provisions are satisfied plus the firm's normal retention period.

Implementation of Policy

The policy will be implemented as follows:

1) Our standard retainer letter, fee agreement, or representation letter, will include the following language:

During the course of your matter, you may be required to provide to us documents such as tax records, expense records, bank records, deeds, etc. Unless we need these original documents for evidence or during the case discovery process, we will make copies of these records and return these original documents to you. If we must retain the original documents, we will make arrangements for the return of the records you provided. We will retain our file of your matter. During the retention period you may request copies of documents in your file at your expense.

2) All final bills will be accompanied by a notice regarding file retention *(see Exhibit A).* Copies of said notice will go to the Records Manager or Custodian to give notice that the file should be culled.

3) Under most circumstances, documents will not be released to the client until amounts due the firm have been satisfied or until suitable arrangements for payment have been made. The assigned attorney should contact the accounting department before the release or destruction of documents. At the time the client retrieves documents, or they are eligible for destruction, a notation will be made in the file, and on the Master File List. A destruction form will be completed by the assigned attorney, if appropriate at that time, and provided to the Records Manager or Custodian.

4) An index will be made of documents returned to clients. The detail of said index will be at the discretion of the attorney, depending upon the likelihood that the review of said documents by the firm may be an issue. A receipt from the client will be required for the documents returned.

5) Records Manager or Custodian will send the (final judgement, etc.) together with the standard file retention form, to the appropriate attorney so that the retention period set at intake may be confirmed as the file is closed.

6) Billing Coordinator will determine whether amounts due the firm have been paid or suitable arrangements have been made for payment. If the bill has not been paid, the billing coordinator shall immediately notify the attorney. Documents will not be destroyed or returned to clients if a billing problem exists.

7) Unless the Records Manager or Custodian is notified to the contrary, within two months after the end of the (appeal period), the closed file will be sent to storage for the designated retention period.

8) Upon the expiration of the assigned retention period the file will be automatically destroyed.