



FILE RETENTION POLICIES AND REQUIREMENTS

BY KENNETH L. JORGENSEN

As a law practice matures and the number of clients increases, so does the number of closed or dormant client files. Storing every client file forever is not an option that is economically feasible for most law firms. Consequently, sooner or later most lawyers are forced to consider file retention (and destruction) policies and requirements.

File retention is a frequent subject of inquiry by lawyers seeking advisory opinions from the Director's Office. Many lawyers are surprised to learn that the ethics rules do not contain a statute-of-limitations-like deadline after which files can be discarded without fear of client retribution.¹ Even more are astounded at the complexity of the ethical issues associated with file retention and destruction procedures.

ETHICS RULES AND THE ABA

The obligation to retain client files emanates from Rules 1.15 and 1.16, Minnesota Rules of Professional Conduct. Rule 1.15 obligates lawyers to maintain complete records of all properties of the client coming into the possession of the lawyer and to promptly deliver when requested those properties that the client is entitled to receive. Likewise, Rule 1.16 requires lawyers, upon termination of the attorney-client relationship, to surrender all property that the client is entitled to receive. Neither of these rules, however, provides any guidance or insight about the duration of the obligation to return client property or whether it is ever appropriate to dispose of client files.

In 1977, the ABA first tackled this issue when it issued Informal Opinion 1384 entitled *Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients*. Without citing any specific authority, the ABA stated unequivocally that lawyers were not obligated to preserve client files permanently. The ABA rationale for this pronouncement was that permanent file retention would undoubtedly increase the overall cost of legal services and therefore was not in the *public interest*.

However, in advising lawyers just how long client files should be retained,

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the ABA muddied the waters. Lawyers were advised that items in client files that had been furnished by the client should not be destroyed without first obtaining client consent. Other documents deemed necessary to preserve from destruction were those that the client may need, but had not been previously provided to the client, as well as those *which the client may reasonably expect will be preserved by the lawyer*. In addition to grounding parts of the standard in individuals' subjective judgment, the ABA created a new classification of documents within files that could not be destroyed without obtaining client consent and therefore might have to be retained indefinitely.

For many lawyers, the prospect of having to cull documents from closed files before destroying them undoubtedly made permanent file retention more attractive. In addition, obtaining client consent to destruction years after the representation has terminated is in and of itself problematic in today's mobile society. Although the advice was well-intended, it proved unworkable for many lawyers.

THE RESTATEMENT POSITION

More recently, the American Law Institute (ALI) addressed file retention obligations in its *Restatement of the Law: The Law Governing Lawyers* (1998). Section 46 of the *Restatement* requires lawyers to take *reasonable steps* to safeguard documents relating to the represen-

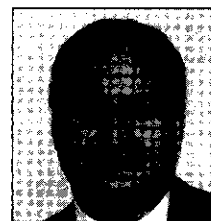
tation of a former client. The comment to this section explains that ALI's *reasonable steps* standard does not require lawyers to preserve client documents indefinitely. The obligation to safeguard client documents continues only as long as there is a reasonable likelihood that the client will need the documents. More importantly, it advises that documents that are outdated or no longer of consequence can be destroyed. Lawyer license to destroy outdated client documents is also referenced in connection with a former client's right to retrieve, inspect or copy file documents. Failure by the client to assert the right to inspect or copy files during the representation does not bar later enforcement of that right unless "the lawyer has properly disposed of the documents."

The *Restatement* position strikes a more preferable balance between the lawyer's obligation to safeguard client documents and the likelihood of the client's continuing need for a particular document. The *Restatement* replaces the ABA's "documents the client may reasonably expect will be preserved by the lawyer" standard with one that is less subjective in nature, and permits lawyers to gauge a client's continuing need for a document on more objective factors such as the applicable statute of limitations, tax and other governmental regulations, as well as the lawyer's experience with other similar clients.

RETENTION POLICIES AND PRACTICES

The safest and most conservative file retention policy is one that retains all client documents indefinitely. Advances

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PROFESSIONAL RESPONSIBILITY

in document imaging and indexing, as well as the comparatively inexpensive cost of electronic document storage, have caused a number of firms to institute such policies. The decision of many of these firms to permanently store at least an electronic image of all client documents has been driven more by their own need for client document access or to provide a needed service to clients, than the ethical obligation to safeguard client files.

Obviously, electronic imaging and permanent storage of all client documents is not an option for every lawyer, nor is it ethically necessary. For these lawyers, the goal is to determine retention periods for client files that meet or slightly exceed a client's reasonable anticipated need(s) for the file documents. Criteria warranting consideration include statutes of limitations and other substantive law deadlines or time periods relating to the file, tax laws and other governmental regulations applicable to the client, and whether the file includes original documents that are intrinsically valuable (e.g., stocks, bonds, notes, deeds, wills and trusts). Lawyers must recognize that a prescribed retention period for files in one area of the law may be insufficient for another. Retention periods should reflect lawyer experience and practice in accessing closed file information in a particular area of law.

Client originals, especially those with intrinsic value, always pose complications in formulating file retention policies. These problems can be minimized by file organization procedures that account for client originals. (See e.g., Frans & Kopka, "Records Management & Retention Policies for Law Firms," 55 *Bench & Bar* 29 (April 1998), which recommends developing a process for separately maintaining client originals.) The originals can either be returned to the client at the conclusion of representation, or if necessary, retained when the remainder of the file is destroyed, without having to undertake an entire review of the file(s). File organization policies also simplify the administration of file retention programs in their differing retention periods. A comprehensive sample file retention policy can be found at Nemchek, "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," 93:1 *Law Library Journal* 7, 41 (2001).

Another critical component of file retention policies is notice to the client.

Notice can be provided to the client in the retainer agreement² or at the conclusion of the representation in the form of a disengagement or termination letter. Clients should be apprised of the retention period applicable to the client's file and the firm's policy with respect to original client documents. Client notice of the firm's file retention period may render client demand for documents after expiration of the retention period unreasonable, or at least less reasonable.

Finally, all file retention policies need to take into account the lawyer's own need for the file in the event of a malpractice claim. In order to provide an adequate defense, most malpractice carriers insist that the lawyer retain a copy of the client's file for a prescribed minimum period of time. Insurer experience and insight into the life expectancy of a closed client file can be a valuable yardstick in developing a file retention policy.³ □

NOTES

1. A few ethics opinions establish a set retention period for client files. See e.g. Wisconsin State Bar Opinion E-98-1 (06/04/98) (six-year retention period) and Los Angeles County Bar Formal Opinion 475 (09/20/93). These opinions represent the minority view and advocate retention periods that are substantially shorter than the minimum ten-year period recommended by a local malpractice carrier for its insureds. See e.g., Minnesota Lawyers Mutual, "Sample File Retention/Destruction Policy" (2002), www.prolegia.com/Documents/SiteContent/dad4670c-47b6-4df5-bd4a-5e18827f59ee.pdf.

2. Sample retainer agreement language can be found at Frans & Kopka, "Records Management & Retention Policies for Law Firms," supra at page 33. However, the 90-day period suggested by the authors may have unintended consequences. Ordinarily most clients do not take their files or their documents at the conclusion of the representation. Telling clients their files are authorized for destruction after only 90 days could increase client demand for files at the conclusion of the representation, regardless of whether the client has any particular need for the file. Unnecessary requests for files or file copies are likely to increase legal costs. To avoid this problem, clients could simply be advised of the retention period applicable to their files.

3. Some carriers also go so far as to offer sample file organization and retention policies as part of their loss prevention efforts.

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