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Are You Getting File Retention Right?

By Ed Finkel

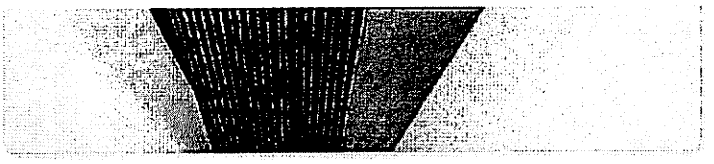
Ethics rules and opinions provide a (mostly) clear picture of file-retention best practices if you read them carefully. But cheap electronic storage is making discarding files a thing of the past.

How long should you keep client files after the case or matter is wrapped up? How should you store them while you have them? What parts of files should you give to clients and when? The answers to these questions are not entirely set in stone, although Illinois Supreme Court rules and ISBA ethics opinions provide many.

The digital storage revolution

ISBA general counsel Charles Northrup refers attorneys and firms with uncertainties to ISBA ethics opinions 12-06 for answers to the first two questions and both 94-13 and 94-14 for guidance on sending materials to clients. "Most requirements with respect to file retention are pretty straightforward," he says.

Before getting down to brass tacks, Paul



Unger, partner at Affinity Consulting, makes a couple of interrelated "gut-level" points that could apply to just about any attorney - with a simple bottom line. "The best defense to any type of malpractice claim is the file," he says. "To have the file is generally a good thing." **(See the sidebar on p. 24 for info about Unger's Nov. 8 file-retention webinar.)**

And while the cost of file storage and the voluminous space required traditionally has been the counterweight to keeping all files for an unlimited period, that calculus is changing rapidly because of electronic storage, Unger says. "Because the cost is so minimal, my advice is unless you really want [the file] to be gone, there's no reason to destroy it," he says.

Unger says that simple answer should have appeal to attorneys and firms, partly because retention rules always have been difficult and complex, varying based on practice areas and types of documents in the file.

"You could spend 30 hours trying to map that all out," he says. "At the end of the day, those rules were created because of physical file space limitations. Ultimately, those rules are going to go out the door.... If it costs a fraction of a penny to keep this information, why would we destroy anything? The best defense to malpractice is the file itself. [Electronic storage is] eventually where everything is going, so why not get ahead of it?"

And Unger is not exaggerating when he talks about a fraction of a penny. He says that a one terabyte hard drive costs less than $100 and can store 14,000 bankers boxes of searchable PDFs - about 30 million pages. "That's far less than a penny per box," he says. "At the end of the day, some lawyers really want to destroy the files, even electronically, which may not be good for them or their client. But most people want to keep them if they can."

Joseph Marconi, general counsel for ISBA Mutual and chair of both the business litigation and professional liability groups at Johnson & Bell, says his firm tries to store documents electronically wherever and whenever possible.

"That's the future," he says. "We take a lot of the surplus stuff out of the paper file, to get down to the smallest possible amount of paper and the minimum number of boxes.... A disc is a lot easier to store than five boxes. We've been keeping stamp-filed copies - we don't do it for federal court cases because the court stores them electronically - but for state court cases we keep stamp-filed copies of our notes, important medical information, and discovery items."

However, Unger is not under any illusion that the entire legal profession is going to move to electronic storage overnight. "Not everybody is there," he says. "A lot of folks have physical files. In that instance, I often come into the mix when they say, 'We really have a physical storage problem. We want to destroy stuff, but we don't know what we can destroy.'"

How long to keep files? The problem with the seven-year rule

Unger says lawyers and firms should ask their malpractice providers how long they need to keep files related to their particular practice area(s). But the broad, general rule in Illinois is stated in Supreme Court Rule 769, which says files must be kept for no fewer than seven years, he says.

The key information includes, at a minimum, the name and last known address of the client, an indication of whether the matter is ongoing or concluded, and the financial records such as bills paid, receipts, and expenses.

Financial records can include bank statements, time and billing records, checks, journals, ledgers, audits, financial statements, tax returns and tax reports, according to a short paper on file storage prepared by Marconi and colleague Brian Langs. Meanwhile, client trust account funds face the same seven-year requirement under Rule 1.15(a) of the Illinois Rules of Professional Conduct.

Unger says attorneys tend to take a one-size-fits-all approach to contents of files. "What's happened in Illinois, and I know this is true in other states as well that have that seven-year rule, is that a lot of lawyers just have a carte blanche rule that, 'We're going to keep records for seven years because it's too complicated to figure out [what they can junk sooner],'" he says.

And certain very specific types of documents need to be kept even longer, including the need for "physical retention of an originally signed document, for instance a will, or a stock certificate," he says. "The client's situation changes frequently. Every couple of years, that information usually gets updated. They come back in, there's certain types of files, estate planning in particular, that are unique and go on for a long time."

And others can be shorter. For example, Marconi's groups at Johnson & Bell send out a letter to tort clients saying the firm will keep the paper file for two years and then destroy it, based on the statute of limitations for the type of work they handle on behalf of lawyers, accountants, and other professionals.

"So far, we haven't had any problems," he says. "By agreement, you can shorten it.... We just say that, 'Unless we hear otherwise from you, after two years we're going to destroy this file. If you want we can keep it longer, but not forever.' One of our mounting expenses is what storage warehouse companies charge."

Other types of practices need to keep them longer, Marconi says. He's heard that tax attorneys hold on to client records for as much as a decade, for example, while matrimonial lawyers "tend to keep files because there's always the post-petition things that come up."

ISBA Professional Conduct Advisory Opinion 12-06, which Northrup cites, reflects the provisions of Rules 769 and 1.15 and then goes on to acknowledge that "there is little guidance with respect to a lawyer's duty to preserve those portions of a lawyer's file that are neither client property nor financial records."

The opinion suggests: "For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period for most lawyers of at least seven years."

In their paper, Marconi and Langs cite the Attorney Registration and Disciplinary Commission in writing that parts of a file not directly covered by Rule 769 or Rule 1.15 do not have specific rules on how long they must be kept.

With that in mind, they write: "The lawyer should exercise prudent judgment in determining how long to retain the client file, taking into consideration such things as when the statute of limitations for legal malpractice has expired, any particular difficulties in the relationship with the client or the representation, if the client was a minor or incompetent that might extend the period of limitations, whether the file contains any original

documents that the client might want back, and whether any documents if destroyed would be difficult to reconstruct from other sources."

And finally, Marconi and Langs write, "The prudent lawyer should always err on the side of caution when deciding whether to destroy client files or records, especially considering the wide availability of reliable, cost-effective electronic file storage options."

The real and imagined perils of digital storage

While you're storing those files, when do you need to keep hard copies and when can you scan and shred? Some attorneys hesitate to destroy paper files and turn them electronic because they're afraid of violating rules of evidence, Unger says.

Litigators in particular think they face "original document" requirements for trial, for purposes of presenting evidence, he says. Most realize otherwise but not everyone - older attorneys who haven't gone the electronic route, for example, and early-career lawyers who might not have, either.

"A lot of lawyers still get caught up on thinking, 'Gosh, we've got to keep this document because we might need to present this in court, and we would need the original.' And that's just not so," Unger says. "'Copy' is defined so broadly that it includes electronic. At the end of the day, unless there is a genuine issue about authenticity, and you have a good basis to allege that a document from the other side has been forged, 'duplicate' is broadly defined to include the electronic version."

Unger says he has never seen an original document used as an exhibit or admitted into evidence during 20 years of practice. "It is always a duplicate," he says, "usually in the form of a PowerPoint on a screen."

If lawyers decide to store electronic files in the online "cloud," they have ethical obligations to ensure that those files are kept safe from hacker tampering, Unger says. "It's not directly a retention issue, but ethical rules apply because they're keeping these documents even long after representation has ended," he says.

Cybersecurity is a particular concern for certain types of documents, like healthcare information protected under HIPAA, which have specific statutory requirements around confidentiality, Marconi says. "That's the big issue now, whether or not you can be hacked. Anybody can be hacked," he says. "If you can hack the Secretary of State, you can hack anybody. It's one of the problems with electronic storage. It's kind of hard to hack a box of paper."

That cybersecurity concern also applies to files that a lawyer or firm decides to scrap. ISBA Professional Conduct Advisory Opinion 12-06 simply states: "Any method of disposal must protect the confidentiality of client information."

Electronic storage also can cause long-term problems if you're not using up-to-date digital storage methods. Marconi and Langs note that the Supreme Court Committee Comment to Rule 769 signs off on use of digital media like CDs and DVDs but says that "certain other storage media, such as floppy disks, tapes, hard drives, zip drives, and other magnetic media are not sufficient to meet the requirements of Rule 769 because they have normal life spans of less than seven years."

In addition, both Rule 769 and Rule 1.15 say electronic copies are only permissible if the attorney or firm can easily print them at the client's request.

When should you send files to clients?

So how can lawyers and firms triage what they need to keep themselves and what they can safely and ethically send to clients?

Unger suggests scanning all paper documents and then either shredding them if they're not important or sending back to the client if they are. "If it's something important and the attorney doesn't want to keep it, put the burden on the client to maintain those records," he says. That is, unless "you need to keep the blood-signed original for some reason, for instance an originally signed will or some document where there's a statutory or regulatory requirement to keep it."

Once you complete that exercise, you might not be able to toss every single one of those bankers boxes, but "you end up with very small [storage closets] and very few documents," Unger says. "If you can't sleep at night knowing you don't have the blood-signed document, you keep it just for your mental health."

But fewer and fewer attorneys are experiencing that sleeplessness, he says. "Even with originally signed wills - I know many law firms have, for years, kept a safe in their practice and stored that for a fee - a lot of firms have gotten away from that completely. They say, 'Look, I am maintaining a copy of that, it requires an original signed copy, and we are putting this in your [the client's] possession.' They're putting the burden back on the client to maintain those records. Those are some pretty doggone important documents."

Once representation ends, the lawyer must return anything received from the client but may keep copies at the lawyer's expense; and the lawyer should send copies of anything else the client requests, but at the client's expense, according to ISBA Advisory Opinion on Professional Conduct 94-14. The only circumstance under which the lawyer is entitled to keep client property is if the client still owes fees, the opinion states.

A related ISBA Advisory Opinion on Professional Conduct 94-13 holds that the lawyer can refuse a client's request to investigate materials prepared by or for the lawyer if said materials are the lawyer's property and if disclosure might cause harm to the client or others. The opinion breaks down the types of materials typically contained in a client file into seven categories and provides guidance on each:

- *Documents and other materials furnished by the client,* which must be delivered promptly unless the lawyer has a valid retaining lien.
- *Correspondence between the lawyer and client,* which the client presumably already would have but is entitled to ask for again, provided they are willing to pay any expenses involved in producing new copies.
- *Correspondence between the lawyer and third parties,* which the lawyer should be providing during the course of representation but again, the client is entitled to ask for provided they pay expenses.
- *Copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf,* which should be treated essentially the same as correspondence.
- *Copies of contracts, wills, corporate records, and other similar documents prepared by the lawyer for the client's use,* which also should be treated like correspondence.
- *Administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's credit-worthiness, time and expense records, or personnel matters,* which the opinion states are not relevant to the status of the client's matter, usually prepared for internal use only and thus not something the client is entitled to receive.
- *The lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including*

investigative reports, prepared by or for the lawyer, which the opinion also says are the lawyer's property and need not be delivered, while acknowledging that "various courts and ethics committees have taken differing positions on the nature of such materials."

Certain parts of client files do not properly belong to the client once a matter or case is finished, Marconi agrees. "I don't send them notes," he says. "Notes are work product. We save those ourselves. Technically, we own our work product."

But Marconi says his firm sends as much back to the client as possible. "I try to talk them into storing [most documents] themselves," he says. "With 100 lawyers here, the paper accumulates. It's just crazy, especially with old-timers like me. The young lawyers put it right into the computer and don't make copies of anything."

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