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Spring Cleaning Revisited: Electronic File Retention and Destruction

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The notion of a lawyer's "file" has changed markedly over the past decade. "Redweld" folders and "bankers" boxes have increasingly given way to records that are solely (or at least mostly) electronic. Regardless of the medium used for files, however, questions regarding file retention and destruction once we have completed a matter for a client remain as real for electronic files as their paper counterparts. The Oregon State Bar recently revisited this topic in the electronic file context so we will, too. In this column, we'll look at three primary areas of electronic file management: (1) how can we store closed files? (2) how long do we have to keep them? and (3) how do we eventually destroy them?

Storing Closed Files

RPC 1.15-1(a) and case law (*see, e.g., In re Spencer*, 335 Or 71, 58 P3d 228 (2002)), remind us that we have a continuing duty to safeguard original documents that clients have entrusted to us that have legal significance in and of themselves—such as original wills or contracts. Therefore, in closing a matter, it is usually wise to return any such originals to the client concerned.

In Oregon, "files" have long been construed (principally by Oregon State Bar Formal Opinion 2005-125, now superseded by 2017-192) to include both their paper and electronic components. Last year, the Oregon State Bar in

Formal Opinion 2016-191 concluded that lawyers may generally use electronic media or systems to store closed files as long as the media or system chosen has the same security to protect client confidentiality that applies to current files. In the same vein, Opinion 2016-191 reasoned that unless prohibited by an engagement agreement or the equivalent, lawyers could also convert paper files to electronic records for long-term storage. An earlier Oregon State Bar ethics opinion, 2011-188, generally approved use of cloud-based file storage—again as long as storage and retrieval were sufficiently secure to meet our duty to make "reasonable efforts" in the vernacular of RPC 1.6(c) to protect client confidentiality. Opinion 2011-188 also counsels that lawyers need to continue to evaluate a third-party storage provider's security measures over time in light of changes in the technological "state of the art." All of the OSB opinions are available on its web site at www.osbar.org.

How Long?

There is no uniform standard for the length we need to store closed files. In fact, file retention is not addressed directly in the Rules of Professional Conduct beyond client originals discussed earlier under RPC 1.15-1(a). Rather, the length involved will usually turn instead on risk management considerations.

The Oregon State Bar Professional Liability Fund has a very useful set of guidelines available on its web site at www.osbplf.org. The PLF generally recommends retaining most files for at least 10 years. That corresponds to the 10-year statute of ultimate repose for legal malpractice claims under ORS 12.115(1) (*see, e.g., Davis v. Somers*, 140 Or App 567, 915 P2d 1047 (1996)), and, in most circumstances, provides a practical measure for the outer boundaries of the continuing relevance of the material in the file concerned. The PLF guidelines, however, are very careful to note and give practical examples of files that should be kept for longer periods—such as those relating to minors. The PLF guidelines should also be viewed through the prism of a firm's particular practice focus—with an estate planning firm likely having more files triggering exceptions to the 10-year general norm than an insurance defense firm.

File Destruction

Under RPC 1.9(c), our duty of confidentiality continues beyond the end of an attorney-client relationship and, under Oregon State Bar Formal Opinion 2005-23, extends even beyond the death of a client. Therefore, we need to take care in choosing the methods to dispose of files when the appropriate time comes. This generally means that we should shred paper files and do the equivalent with electronic files. The PLF file management guidelines discussed

earlier also note that lawyers should verify that no client original documents (covered by RPC 1.15-1(a)) remain before destroying a file and recommend that firms maintain a log of files destroyed reflecting the matters involved and the destruction date.

Assuming that a lawyer returned originals at the conclusion of a matter and the client was copied on documents as the matter involved progressed, what a firm is essentially destroying later is the firm's copy of the client's file. Nonetheless, it can be prudent to advise the client in either an engagement or closing letter about the firm's file retention and destruction policies.

Firms are permitted to use outside services to handle file destruction provided the service selected understands the firm's confidentiality obligations. Oregon State Bar Formal Opinion 2005-141 puts it this way (at 3): "As long as Law Firm makes reasonable efforts to ensure that the recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed contract is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately."

Summing Up

Although technology has changed the form of lawyers' files, both the ethical duties and the risk management considerations developed when paper was the medium of choice remain equally applicable to newer electronic file storage.

ABOUT THE AUTHOR

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