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Spring Cleaning: File Retention and Destruction

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With law firm files increasingly in electronic form, questions about file retention and destruction are also evolving from the days when paper reigned supreme. Even relatively recently, retention of paper files often involved some variant of in-office and off-site storage that could, depending on the venue, involve significant cost. Similarly, destruction of paper files often involved paying some combination of lawyer and non-lawyer time to cull through "bankers boxes." Although cloud-based electronic storage is not free, it is typically far less expensive than renting space for paper files. Destruction of electronic files, too, is less expensive than culling and shredding paper counterparts.

At the same time, retention and destruction of files—even in electronic form—remains an important element of law firm risk management. In this column, we'll examine both—but primarily from the electronic rather than paper perspective.

Retention

In an electronic practice environment, file "retention" is typically a blend of three related topics: (1) systematically closing files when work is complete; (2) returning client paper documents that have legal significance in their original form and other property clients have entrusted to the firm; and (3) securely

maintaining the remaining electronic file in a format that continues to be accessible to the client and the firm for a reasonable time period.

Closing Files. Systematically closing files when matters are complete can play a significant role in a firm's conflicts management and, in turn, its ability to take on new work. Under RPC 1.7, current clients typically have an unrestricted right to "veto" any representation a law firm proposes to take on adverse to them by refusing to waive conflicts. Under RPC 1.9, by contrast, former clients generally can only block an adverse representation by denying a conflict waiver when the proposed new matter for another client is the same or substantially related to the work the law firm handled earlier for the former client or would involve using the former client's confidential information adverse to the former client. Absent one of those two triggers, a law firm is permitted to oppose a former client without seeking a waiver.

Closing files can potentially open avenues for future work by turning current clients into former clients. In doing so, however, two practical steps are typically necessary.

First, the client involved should be informed—preferably in writing—that work performed has been completed and the firm is "closing its file" (or words to that effect). The standard for determining whether an attorney-client relationship

exists under, among others, *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), looks to the subjective belief of the client and whether that subjective belief is objectively reasonable under the circumstances. It is difficult for a client to claim later that the client subjectively believed the relationship continued in the face of a written file closing letter or email.[1]

Second, the firm should also close the file involved on its internal systems. It is difficult to argue that a client is a former one if the firm still lists the client as "current." In *In re Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004), for example, the Washington Supreme Court looked to a law firm's internal records in determining that a person was a current client of the firm.

Returning Paper Originals. Under RPC 1.15A(3), lawyers have a duty for "safekeeping" client property entrusted to them and, under RPC 1.16(d), they have a corresponding duty for "surrendering [client] papers and property" when a representation has concluded. Generally, therefore, prudent practice is to return any papers or other property clients have provided when we close their file.[2] Similarly, if we have created an original document that has legal significance in its paper form—such as an original will—we should also provide the client with that original. Returning client property and client originals holding legal significance when a file is closed will avoid putting the law firm in the position of

being the custodian of a former client's property indefinitely. This risk has sharpened as people have become more mobile—increasing the probability that a law firm may lose contact with former clients over time.

Securely Maintaining Files. Under RPC 1.6(c), we have a duty to protect client confidential information regardless of the format in which it is stored: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." WSBA Advisory Opinion 2215 (2012) discusses our duties to protect client confidentiality in the specific context of cloud-based electronic files and is a "must read" for lawyers and firms using this increasingly common method of file storage. ABA Formal Opinion 477R (2017) addresses related issues of securely transmitting electronic files and is also a "must read" for lawyers storing and accessing electronic files.

Our duty of confidentiality, however, does not end when we close a file. *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945), and *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998), for example, held that the attorney-client privilege even survives the death of the client. Similarly, RPC 1.9(c) generally extends confidentiality to former clients on

the matters we have handled for them. Therefore, as long as we maintain former clients' files, our duty of confidentiality remains as well.[3]

WSBA Advisory Opinion 2023 (2003) has long counseled that it is generally permissible to hold a former client's file solely in electronic form as long as client property and original documents of legal significance discussed earlier have been returned to the client. The RPCs, however, are relatively silent on how long files and related records must be maintained. RPC 1.15A(c)(3) requires that records relating to the return of client property must be retained "for seven years after return of the property." RPC 1.15B(a), in turn, requires that trust account records must be retained "for at least seven years after the events they record." Beyond that, the RPCs do not specify any particular period to retain files and related records.

The WSBA's Practice Management Assistance Program has a useful set of retention guidelines available on the WSBA web site. Many malpractice carriers have similar guidelines available for their insureds.[4] These guidelines typically blend general retention periods applicable to most files with suggestions for longer treatment of particular files such as those involving minors. The guidelines also implicitly blend reasonable client need for files with possible law firm need to rebut malpractice claims in fashioning practical retention periods.

With the accelerating change from paper to electronic files, the practical dynamics of file retention are also changing. When the ABA issued an ethics opinion on file retention in 1977, it noted the cost of storing paper files as a primary driver for establishing practical retention guidelines.[5] Electronic files, by contrast, have reduced the cost of storage considerably. With the switch to electronic files, however, firms should also give consideration—and seek advice from their carriers and IT consultants—on appropriate formats for long-term storage. Having electronic files will do little good if they are not saved in a reasonably accessible format.

Destruction

File destruction usually involves two principal considerations: notice and security.

Notice. In addition to returning client originals and property, prudent practice during a representation is to provide clients with contemporaneous copies of correspondence, pleadings and the like so that, in effect, the client has the functional equivalent of "the file" along the way.[6] In addition to the benefits of clear communication during the representation, it also simplifies the eventual destruction of the law firm's electronic copy because the client was already provided with all material elements of "the file" during the representation or at

closing. Assuming those qualifiers, notice is not required in Washington by the RPCs before destroying files.[7] Nonetheless, it often makes practical sense to provide clients with advance notice so that the firm's practice has been clearly articulated. Given the mobility of clients today and the corresponding probability that a firm may have lost contact with a former client by the time it is reviewing files for destruction, prudent practice also suggests giving the notice during or at the conclusion of the representation or some combination.

Security. Just as we have a duty to maintain client confidentiality when we are storing client files, we also have a responsibility for destroying them securely. If paper has been converted to electronic form for long-term storage, the paper can be recycled as long as the firm does so in way that comports with the duty of confidentiality—such as shredding it internally if the volume is small or particularly sensitive or using a reputable outside firm that offers secure document shredding.[8] Similarly, although destruction of electronic files themselves is often a matter of relatively simple deletion from a storage data base, old hardware that contains the same information should also be securely "scrubbed" before recycling. Again, outside vendors offer secure "wiping" of data before recycling the remaining components and, like their paper counterparts,

typically provide certificates attesting to the secure destruction of the data involved.

ABOUT THE AUTHOR

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[1] *See also Hipple v. McFadden*, 161 Wn. App. 550, 559-60, 255 P.3d 730 (2011) (essentially applying the *Bohn* test to determine the end of the attorney-client relationship).

[2] Any remaining funds held in trust after payment of the final bill should also be refunded to the client when a file is closed. *See* RPC 1.16(d). Although comparatively rare, lawyers have been disciplined for improperly destroying client original documents. *See, e.g., In re Spencer*, 58 P.3d 228 (Or. 2002).

[3] *See also* WSBA Advisory Op. 175 (rev. 2009) (discussing the continuing duty of confidentiality following a client's death). "The [attorney-client] privilege may be asserted or waived by a client's personal representative after the client's death." Robert H. Aronson and Maureen A. Howard, *The Law of Evidence in Washington* 9-19 (rev. 5th ed. 2018).

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[4] *See, e.g.,* Oregon State Bar Professional Liability Fund File Retention and Destruction Guidelines, available at www.osbplf.org.

[5] ABA Informal Op. 1384 (1977); *see also* ABA Formal Op. 92-389 (1992) (citing Informal Opinion 1384 and further discussing file retention considerations).

[6] WSBA Advisory Opinion 181 (rev. 2009) discusses the concept of "the file" extensively.

[7] *See* Sandra Schilling, *How Long Do You Need to Keep Closed Files?* WSBA NWSidebar Post, Nov. 17, 2017, available on the WSBA web site.

[8] *See generally* Oregon State Bar Formal Op. 2005-141 (rev. 2015) (discussing secure recycling of paper client files).