Ethics
Informational Packet

CLOSED FILES

COURTESY OF
THE FLORIDA BAR
ETHICS DEPARTMENT

Table of Contents

Ethics in Practice

ANSWERS TO FREQUENTLY ASKED ETHICS QUESTIONS

QUESTION: How long must I retain closed files?

ANSWER: With the exception of trust accounting records (6 years), contingent fee contracts and closing statements in contingent fee cases (6 years), there is no specific number of years for which lawyers are required to keep closed files. Similarly, there is no set time period after which closed files may summarily be destroyed. The Professional Ethics Committee has stated that the appropriate length of time to keep a file depends on such factors as the nature of the case and the type of material found in the file.

The committee, however, has established guidelines for lawyers who wish to dispose of closed files. The lawyer should first attempt to contact the clients and obtain their directions regarding disposition of the files. If the lawyer is unable to contact a particular client, the lawyer should review that client's file and remove any original documents or important papers (e.g., wills, contracts) that might later be vital to the client's interests. Any such papers must be indexed and retained for a reasonable length of time. The lawyer may then dispose of the remainder of the file. When disposing of the file, reasonable care should be taken to protect client confidentiality. Opinions 81-8, 63-3.

[Note: Rule 5-1.2(f) of the Rules Regulating The Florida Bar requires that trust accounting records must be retained for at least six years after conclusion of the representation. 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.]

FLORIDA BAR ETHICS OPINION
OPINION 06-1
April 10, 2006

Advisory ethics opinions are not binding

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.

RPC: 4-1.5(f)(4), 4-1.6, 4-1.8(j), 4-7.7(h), 5-1.2(b)(3), 5-1.2(d)
Opinions: 63-3, 71-62, 81-8, 88-11 (Rec.), ABA Informal Ethics Opinion 1127 (1970), New York County Ethics Opinion 725 (1998), New York State Ethics Opinion 680 (1996), North Carolina Ethics Opinion RPC 234 (1996)

The Professional Ethics Committee has been directed by The Florida Bar Board of Governors to issue an opinion regarding electronic storage of law firm files. The bar has received many inquiries regarding electronic storage of law firm files in the wake of natural disasters, such as hurricanes. Some lawyers have asked whether they may store files exclusively electronically, without retaining a paper copy.

There are very few Rules Regulating The Florida Bar that address records retention. Rule 4-1.5(f)(4) requires that lawyers retain copies of executed contingent fee contracts and executed closing statements in contingent fee cases for 6 years after the execution of the closing statement in each contingent fee matter. Additionally, lawyers who are paid by insurance companies to represent insureds must retain a copy of the Statement of Insured Client's Rights that the lawyer has certified was sent to the client for 6 years after the matter is closed. Rule 4-1.8(j), Rules of Professional Conduct. Copies of advertisements and records of the dissemination location and dates must be retained for 3 years after their last use. Rule 4-7.7(h), Rules of Professional Conduct. Finally, trust accounting records must be retained for 6 years following the conclusion of the matter to which the records relate. Rule 5-1.2(d), Rules Regulating The Florida Bar.

The Rules Regulating The Florida Bar, with limited exception, do not specify the method by which records must be retained. As an example of an exception, Rule 5-1.2(b)(3) requires that lawyers retain original cancelled trust account checks, unless the financial institution they are drawn on will provide only copies. [Note: Rule 5-1.2(b)(3) has since been amended to allow either original cancelled checks or copies as long as they are legible and include all endorsements and tracking information.]

The committee has indicated in prior opinions that "the attorney must place primary emphasis on the desires of the client." Florida Ethics Opinion 81-8. The committee has further determined that lawyers should make diligent attempts to contact clients to determine their wishes regarding file retention before the lawyer destroys any closed files. Florida Ethics Opinions 63-3, 71-62, and 81-8. These opinions are silent as to the method of file retention.

Many opinions from other states address records retention issues and, more specifically, whether files may be stored electronically as opposed to paper copies. These opinions, too numerous to cite, raise issues specific to electronic document retention that the committee finds worthy of mention. The opinions generally conclude that, with appropriate safeguards, electronic document retention is permissible. See, e.g., ABA Informal Ethics Opinion 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the material is available only to the particular attorney to whom the files belong, the company has procedures to ensure confidentiality, and the lawyer admonishes the company that confidentiality of the files must be preserved); New York County Ethics Opinion 725 (1998) (Permissible for a lawyer to retain only electronic copies of a file if "the evidentiary value of such documents will not be unduly impaired by the method of storage"); New York State Ethics Opinion 680 (1996) (Client's file may be stored electronically except documents that are required by the rules to be kept in original form, but lawyer should ensure that documents stored electronically cannot be inadvertently destroyed or altered, and that the records can be readily produced when necessary); and North Carolina Ethics Opinion RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for "original documents with legal significance, such as wills, contracts, stock certificates").

This committee concludes that the main consideration in file storage is that the appropriate documents be maintained, not necessarily the method by which they are stored. Therefore, a law firm may 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.

The committee agrees with other jurisdictions that have noted practical considerations involved in electronic file storage. The committee cautions lawyers that electronic files must be readily reproducible and protected from inadvertent modification, degradation or destruction. The lawyer may charge reasonable copying charges for producing copies of documents for clients as noted in Florida Ethics Opinion 88-11 Reconsideration. Finally, lawyers must take reasonable precautions to ensure confidentiality of client information, particularly if the lawyer relies on third parties to convert and store paper documents to electronic records. Rule 4-1.6, Rules of Professional Conduct.

The committee encourages the use of technology, such as electronic file storage, to facilitate cost-effective and efficient records management. However, the committee is of the opinion that a lawyer is not required to store files electronically, although a lawyer may do so.

FLORIDA BAR ETHICS OPINION
OPINION 81-8
January 16, 1981

Advisory ethics opinions are not binding.

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. A lawyer who is closing his practice should place files containing important papers in storage or turn them over to the attorney who assumes control of his active files.

CPR: EC 4-6
Opinions: 63-3, 71-62

Vice Chairman Mead stated the opinion of the committee:

This is an unusual inquiry from a young lawyer who has been diagnosed as having terminal cancer and who, in view of his limited life span, has requested advice as to the disposition of his client files. Specifically, the attorney asks if, after sending a letter to his clients advising them of his proposed course of action, he can destroy the files of those clients who do not respond (or who express no desire to retrieve their files) after a period of 90 days.

In disposing of clients' files, for whatever reason, the attorney must place primary emphasis on the desires of the client. The only provision of the Code of Professional Responsibility dealing specifically with the subject of the maintenance of client files is EC 4-6, which states in part:

> A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

It is incumbent upon the attorney to make an attempt to contact all clients whose files are in his possession. As this Committee stated in Opinion 71-62, "written inquiry should be sent requesting clients' advice as to their wishes in disposing of their files." This communication can be made by sending a letter to each clients' last known address or, if there is no address available, by publication in the local newspaper, requesting the client either to pick up his files or to give permission for their destruction.

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. There may be some original documents in the file that

are vital to a client's interests and which must be preserved regardless of when they were prepared or executed. We adhere to the statement of this Committee in Opinion 63-3 that "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."

After a diligent attempt to contact all clients whose files are subject to destruction, the attorney should then dispose of all files in accordance with his clients' directives. The problem, of course, arises in connection with those clients who cannot be reached. We have a deep feeling for the inquiring attorney's situation and we appreciate his desire to proceed in accordance with the guidelines established in the Code; however, it is our opinion that client files cannot be automatically destroyed after 90 days, but that the files of those clients who do not respond must be reviewed individually by the attorney and can be destroyed by him only after he is satisfied that no important papers of the clients are contained in the file. If the attorney does find any such papers, he should have them indexed and either placed in storage or turned over to any attorney who assumes control of his active files.

Obviously, this is the first inquiry of this nature to be considered by the Committee, and we are not attempting to set forth hard and fast rules in making our determination. However, we note that the inquiring attorney has been in practice only slightly more than seven years and his closed files are not so old as to obviate the need for review.

FLORIDA BAR ETHICS OPINION
OPINION 71-62
January 25, 1972

Advisory ethics opinions are not binding.

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.

CPR: EC 4-6

Chairman Clarkson stated the opinion of the committee:

A member of The Florida Bar seeks our advice concerning procedures to be followed upon change in the membership of a professional association. His letter of inquiry details the following factual background:

> The firm was comprised of six members, two associates and an affiliated counsel. One of the members announced his withdrawal and acceptance of a position with another law firm. A second member thereupon indicated an intention to withdraw in order to practice as a sole practitioner. Several days later two more members announced their decision to withdraw from the firm intending to practice together. Several days after the latter decision was announced, the four members agreed to create their own law firm upon withdrawal.
>
> The four withdrawing members owned 52 percent of the outstanding stock of the professional association under which organization the attorneys practiced law. The remaining members of the firm own the remaining 48 percent.
>
> As a result of negotiations between the withdrawing and remaining partners, the following matters were agreed upon:
>
> 1. The withdrawing members took with them, after signing receipts therefor, a number of client files, both open files on which they were working and closed files that they had worked on.
>
> 2. A number of other files were to stay with the firm until a letter was produced signed by the client directing the firm to turn over the files to the withdrawing members.
>
> 3. Original wills for clients whose files were taken by the withdrawing members were also taken by them after signing receipts therefor. These wills have been held by the firm in safety deposit boxes owned by the firm, such custody at clients' direction.

4. It was agreed that mail directed to a withdrawing member at the firm address would be opened by the firm unless marked personal and that on matters relating to files taken by the withdrawing members, mail would be delivered to the withdrawing members.

5. The firm established a policy for answering telephone calls to the firm where the calling party requests to speak to one of the withdrawn members. Such policy was to advise the caller that the member had withdrawn from the firm, inquire of the caller as to whether he would like to speak to a remaining member. The telephone number of the withdrawing member was given upon request of the caller. Any remaining member who speaks with the caller would also furnish the number for the withdrawn partner.

The opinion of your committee is requested as to the propriety of each of the foregoing procedures, the first four of which were agreed upon by remaining and withdrawing members, while the fifth was not.

We perceive some conceptual difficulty in treating this inquiry as a routine withdrawal by one or more members of a law firm because (1) the law practice is carried on by a corporation and (2) it appears that most of the members are "withdrawing" rather than "remaining." We must assume that it is the corporation which will continue to practice at the same location with such name change as may be appropriate.

The Committee has concluded that the procedures as outlined, particularly paragraphs 1 and 3, should be supplemented to afford existing clients an opportunity to direct disposition of their files or other legal papers. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. EC 4-6, CPR. Ideally, this can best be accomplished by a written notice to these clients advising of the change in the membership of the professional association and requesting the clients' advice as to their wishes in disposing of their files.

Subject to the foregoing comments, the Committee finds nothing objectionable in the proposal set forth above.

FLORIDA BAR ETHICS OPINION
OPINION 63-3
June 25, 1963

Advisory ethics opinions are not binding.

The length of time a lawyer's files should be maintained depends largely on the importance of a file's contents. If the client is available, he should be requested to pick up the contents or authorize the attorney to dispose of the material. There is no obligation to invest funds of clients who cannot be located, but they should be deposited in a trust account where they would be insured and draw interest. When a settlement was effectuated on behalf of a wife, and both husband and wife executed the release, it is doubtful that it would be proper to issue a check to the wife alone.

Note: See Rule 5-1.1(f) regarding "Unidentifiable Trust Fund Accumulations and Trust Funds Held for Missing Owners."

Canons: 11, 37

Chairman Holcomb stated the opinion of the committee:

The Professional Ethics Committee has considered the matters presented by a member of The Florida Bar relative to disposal of old files and other matters.

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.

As to funds held on behalf of a client who cannot be located, we find no obligation to invest the funds, but believe it would be advisable to deposit the same in a trust account in the name of the client, with the lawyer as trustee, with some bank or savings and loan association where the funds would be insured and would draw interest.

With regard to the third question, we are somewhat in doubt as to the propriety of issuing a check solely to the wife because, if the husband had some interest in the funds, he might thereby be precluded.

When is it acceptable to discard old files?

Law Office Management Assistance Service Staff Report
Florida Bar News October 1, 2014

When may I destroy my old files?

This is among the most difficult questions that Bar ethics staff answer, 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.

No One Right Answer

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 Law Office Management Assistance Service, Florida chapters of the Association of Legal Administrators, and representatives of the American Records Management Association have all contributed in some measure to the development of the policies covering this area.

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 six 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.

Client Notification

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."*

No Bright Lines

A review of relevant ABA 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."

Common Sense

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

* *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).*

* *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 client's position in a matter for which the applicable statutory limitations period has not expired.*

* *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.*

* *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.*

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

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

** 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.*

** A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.*

Ethical Conduct

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:

* 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.

* 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.

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

* 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 asAmazon.com and the Government Printing Office. Another valuable resource is ARMA (Records Management Association), which has a subgroup for legal organizations.

Need for a Written Policy

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.

Intake Forms

LOMAS 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.

Culling

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.). 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 who will be primary responsible 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 , 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."*

Digital Docs

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 06-02 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.

Final Resting Place

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 wrongdoing 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.

You can obtain a complete copy of this LOMAS white paper, which includes a model File Retention Policy, online, free of charge, at under the "Records Information Management" *heading. You can also find sample file closing checklists, closing file letters, and disengagement letters in the*

LOMAS Administrative Forms Handbook Online*, which is listed under the heading "*Forms and Checklists*."*

You may also find more information on the subject of file retention in the Closed Files Informational Packet *produced by the Bar's Ethics Department.*

(Revised: 10-07-2014)

MODEL FILE RETENTION POLICY

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

Files of closed matters will be held in storage for the appropriate retention period and each file will be culled according to the following guidelines:

GUIDELINES FOR CULLING FILES

1) Legal memoranda, briefs, pleadings, 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) Copies of published opinions and other available published material should be destroyed.

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

5) Other than first and last, drafts are destroyed.

DESTRUCTION OF INACTIVE FILES

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 the law imposes 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 partner in charge or for _____ years from the date of the conclusion of the matter, whichever period is longer.

The firm's file room has been directed to destroy certain files as to which 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 10 years, it is destroyed after the affirmative approval of the partner in charge.

2) If a file has seen no activity for 15 years, it is destroyed unless the partner in charge specifically indicates that is should not be destroyed.

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

IMPLEMENTATION OF POLICY

The policy will be implemented as follows:

1) Our standard retainer 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. We will hold these records for you during the pendency of your action and for six months thereafter. At the conclusion of your matter, we will contact you and make arrangements for the return of the records you provided, We will retain the balance of your file for an appropriate time period, It is your responsibility to secure the return of your records. If arrangements are not made for the return of your records within six years following the conclusion of your matter, they will be destroyed.

2) All final bills will be accompanied by a notice regarding file retention *(see Exhibit A),* Copies of said notice will go to the following people for the following purposes:

a) Records Department—To indicate that, at the convenience of the records department, the file may be stripped of duplicate documents; *and*

b) Attorney in charge of the case—To be calendared for follow-up with the client in five months.

3) Under most circumstances documents will not be released to a client or destroyed unless the client has paid their bill or made suitable arrangements for payment. The attorney Involved must therefore *always* contact the accounting department before the release or destruction of documents, At such time as a client retrieves documents or they are eligible for destruction, the records department will be informed and a notation will be made in the file and destruction form will be completed, if necessary.

4) An index will he made of documents returned to clients, The detail of said index will be in 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) If the client documents have not been retrieved by the client within five months after the initial notice, the attorney on the case will send a final reminder letter to the client regarding client documents using the form attached as Exhibit B, Copies of this notice will go to the following persons for the following purposes:

a) Records Department—To indicate:

(i) that the (<u>final judgment. etc.</u>) together with the standard file retention form, should be sent to the appropriate attorney so that the retention period may be assigned. The retention period should run until the *latest* of the following events: (a) The termination of any obligation under *(the final judgment) (b)* The expiration of 10 years from the date of judgment.

(ii) that the client documents should be destroyed two months from the date of the letter.

b) Billing Coordinator—To determine whether the bill has been paid or suitable arrangements have been made for payment. If the bill has not been paid, the billing

coordinator shall immediately notify the records department and attorney by metro attached as Exhibit C. Documents will not be destroyed or returned to clients if a billing problem exists.

6) Unless the file room is notified to the contrary within two months of the *(final judgment)*, the client documents will be destroyed and the balance of the file will be sent to storage for the assigned retention period.

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

[Updated: 11/15/2010]

RULE 3-7.16 LIMITATION ON TIME TO BRING COMPLAINT

(a) Time for Inquiries, Complaints, and Reopened Cases. Inquiries raised or complaints presented by or to The Florida Bar under these rules shall be commenced within 6 years from the time the matter giving rise to the inquiry or complaint is discovered or, with due diligence, should have been discovered.

A reopened disciplinary investigation shall not be barred by this rule if the investigation is reopened within 1 year of the date on which the matter was closed, except that reopened investigations based on deferrals made in accord with bar policy and as authorized elsewhere in these Rules Regulating The Florida Bar shall not be barred if reopened within 1 year of the conclusion of the civil, criminal, or other proceedings on which deferral was based.

(b) Exception for Theft or Conviction of a Felony Criminal Offense. There shall be no limit on the time in which to present, reopen, or bring a matter alleging theft or conviction of a felony criminal offense by a member of The Florida Bar.

(c) Tolling Based on Fraud, Concealment or Misrepresentation. In matters covered by this rule where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter giving rise to the inquiry or complaint, the limitation of time in which to bring or reopen an inquiry or complaint within this rule shall be tolled.

(d) Constitutional Officers. Inquiries raised or complaints presented by or to The Florida Bar about the conduct of a constitutional officer who is required to be a member in good standing of The Florida Bar shall be commenced within 6 years after the constitutional officer vacates office.

Rule 4-1.5(f)(4)(C):

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer must provide the client with a copy of the statement of client's rights RRTFB April 15, 2021 and must afford the client a full and complete opportunity to understand each of the rights as set forth in it. A copy of the statement, signed by both the client and the lawyer, must be given to the client to retain and the lawyer must keep a copy in the client's file. The statement must be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

Rule 4-1.5(f)(5):

(5) In the event there is a recovery, on the conclusion of the representation, the lawyer must prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement must be executed by all participating lawyers, as well as the client, and each must receive a copy. Each participating lawyer must retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement must be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

Rule 4-1.8(j):

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based on tortious conduct, including product liability claims, the Statement of Insured Client's Rights must be provided to the insured at the commencement of the representation. The lawyer must sign the statement certifying the date on which the statement was provided to the insured. The lawyer must keep a copy of the signed statement in the client's file and must retain a copy of the signed statement for 6 years after the representation is completed. The statement must be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights augments or detracts from any substantive or ethical duty of a lawyer or affect the extra disciplinary consequences of violating an existing substantive legal or ethical duty; nor does any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

Rule 4-7.19(j):

(j) Maintaining Copies of Advertisements. A copy or recording of an advertisement must be submitted to The Florida Bar in accordance with the requirements of this rule, and the lawyer must retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical advertisements are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical advertisements and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the advertisement was sent.

Rule 5-1.2(b), (c), (d) & (f):

(b) Minimum Trust Accounting Records. Records may be maintained in their original format or stored in digital media as long as the copies include all data contained in the original documents and may be produced when required. The following are the minimum trust accounting records that must be maintained:

(1) a separate bank or savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a "trust account";

(2) original or clearly legible copies of deposit slips if the copies include all data on the originals and, in the case of currency or coin, an additional cash receipts book, clearly identifying the date and source of all trust funds received and the client or matter for which the funds were received;

(3) original canceled checks or clearly legible copies of original canceled checks for all funds disbursed from the trust account, all of which must:

(A) be numbered consecutively

(B) include all endorsements and all other data and tracking information, and

(C) clearly identify the client or case by number or name in the memo area of the check;

(4) other documentary support for all disbursements and transfers from the trust account including records of all electronic transfers from client trust accounts, including:

(A) the name of the person authorizing the transfer;

(B) the name of the recipient;

(C) confirmation from the banking institution confirming the number of the trust account from which money is withdrawn; and

(D) the date and time the transfer was completed;

(5) original or clearly legible digital copies of all records regarding all wire transfers into or out of the trust account, which at a minimum must include the receiving and sending financial institutions' ABA routing numbers and names, and the receiving and sending account holder's name, address and account number. If the receiving financial institution processes through a correspondent or intermediary bank, then the records must include the ABA routing number and name for the intermediary bank. The wire transfer information must also include the name of the client or matter for which the funds were transferred or received, and the purpose of the wire transfer, (e.g., "payment on invoice 1234" or "John Doe closing").

(6) a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least:

(A) the identification of the client or matter for which the funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred;

(7) a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing:

(A) the identification of the client or matter for which trust funds were received, disbursed, or transferred;

(B) the date on which all trust funds were received, disbursed, or transferred;

(C) the check number for all disbursements; and

(D) the reason for which all trust funds were received, disbursed, or transferred; and

(8) all bank or savings and loan association statements for all trust accounts.

(c) Responsibility of Lawyers for Firm Trust Accounts and Reporting.

(1) Every law firm with more than 1 lawyer must have a written plan in place for supervision and compliance with this rule for each of the firm's trust account(s), which plan must be disseminated to each lawyer in the firm. The written plan must include the name(s) of the signatories for the law firm's trust accounts, the name(s) of the lawyer(s) who are responsible for reconciliation of the law firm's trust account(s) monthly and annually and the name(s) of the lawyer(s) who are responsible for answering any questions that lawyers in the firm may have about the firm's trust account(s). This written plan must be updated and re-issued to each lawyer in the firm whenever there are material changes to the plan, such as a change in the trust account signatories and/or lawyer(s) responsible for reconciliation of the firm's trust account(s).

(2) Every lawyer is responsible for that lawyer's own actions regarding trust account funds subject to the requirements of chapter 4 of these rules. Any lawyer who has actual knowledge that the firm's trust account(s) or trust accounting procedures are not in compliance with chapter 5 may report the noncompliance to the managing partner or shareholder of the lawyer's firm. If the noncompliance is not corrected within a reasonable time, the lawyer must report the noncompliance to staff counsel for the bar if required to do so pursuant to the reporting requirements of chapter 4.

(d) Minimum Trust Accounting Procedures. The minimum trust accounting procedures that must be followed by all members of The Florida Bar (when a choice of laws analysis indicates that the laws of Florida apply) who receive or disburse trust money or property are as follows:

(1) The lawyer is required to make monthly:

(A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and

(B) a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons for these differences.

(2) The lawyer is required to prepare an annual detailed list identifying the balance of the unexpended trust money held for each client or matter.

(3) The above reconciliations, comparisons, and listings must be retained for at least 6 years.

(4) The lawyer or law firm must authorize, at the time the account is opened, and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399- 2300, in the event the account is overdrawn or any trust check is dishonored or returned due to insufficient funds or uncollected funds, absent bank error.

(5) The lawyer must file with The Florida Bar between June 1 and August 15 of each year a trust accounting certificate showing compliance with these rules on a form approved by the board of governors. If the lawyer fails to file the trust accounting certificate, the lawyer will be deemed a delinquent member and ineligible to practice law.

* * *

(f) Record Retention. A lawyer or law firm that receives and disburses client or third-party funds or property must 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.

(1) On dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance and retention of client trust account records specified in this rule.

(2) On the sale of a law practice, the seller must make reasonable arrangements for the maintenance and retention of trust account records specified in this rule consistent with other requirements regarding the sale of a law firm set forth in Chapter 4 of these rules.

Practice Tips – Proper Disposal of Client Records
By the Staff of PRI

An attorney's discarded files are found in a dumpster by the owners of another local business. The discarded files contain clients' pay stubs, medical records, Social Security numbers, and a raft of otherwise confidential information. The question has often been asked of practice management advisors in PRI, "Do the Rules of The Florida Bar require that client records be shredded?" Actually, the Rules Regulating The Florida Bar do not address a method of destruction. Ethics opinion 81-8 only states they may be destroyed and no manner is addressed.

Opinion 81-8: "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."

However, members of the Bar are expected to abide by federal law.

The Fair and Accurate Credit Transactions Act (FACTA), which was enacted in 2003, directed the FTC, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Securities and Exchange Commission to adopt comparable and consistent rules regarding the disposal of sensitive consumer report information. On June 1, 2005, the Federal Trade Commission published in the Federal Register [69 Fed. Reg. 68,690] the disposal rule under the Fair and Accurate Credit Transactions Act.

In an effort to protect the privacy of consumer information and reduce the risk of fraud and identity theft, this new federal rule requires businesses to take appropriate measures to dispose of sensitive information held in records. The disposal rule applies to: consumer reporting companies; lenders; employers; landlords; government agencies; mortgage brokers; automobile dealers; attorneys or private investigators; debt collectors; individuals who obtain a credit report on prospective nannies, contractors, or tenants; and entities that maintain information in consumer reports as part of their role as service providers to other organizations covered by the rule.

The disposal rule requires disposal practices that are reasonable and appropriate to prevent the unauthorized access to – or use of – information in a consumer report. For example, reasonable measures for disposing of consumer report information could include establishing and complying with policies to:

- Burn, pulverize, or shred papers so that the information cannot be read or reconstructed;
- Destroy or erase electronic files or media containing information so that the information cannot be read or reconstructed;

- Conduct due diligence and hire a document destruction contractor to dispose of material. Due diligence could include:
    - Reviewing an independent audit of a disposal company's operations and/or its compliance with the rule;
    - Obtaining information about the disposal company from several references;
    - Requiring that the disposal company be certified by a recognized trade association; and
    - Reviewing and evaluating the disposal company's information security policies or procedures.

To obtain additional information on FACTA's disposal guidelines, visit www.ftc.gov.