



A Lawyer's Guide to Records Management Issues

*Important Considerations
When Establishing a Workable File
Retention and Destruction Policy*



It's Chubb. Or it's Chance.



**A LAWYER'S GUIDE TO RECORDS
MANAGEMENT ISSUES**

**IMPORTANT CONSIDERATIONS WHEN
ESTABLISHING A WORKABLE FILE
RETENTION AND DESTRUCTION POLICY**

Prepared by

.....
Anthony E. Davis and David J. Elkanich

Hinshaw & Culbertson LLP

for the Chubb Group of Insurance Companies

TABLE OF CONTENTS

Introduction	2
Ethical, Legal, and Practical Issues.....	3
Files: Who Owns Them? How Long Should They Be Kept?	5
Electronic Documents	8
Case and Information Management	10
Additional Considerations.....	11
Conclusion	13
About the Authors.....	14

INTRODUCTION

Lawyers would not be lawyers if they didn't "want it in writing." A law practice generates large quantities of documents—increasingly in electronic form—and lawyers face considerable pressure to find ways to store documents economically and efficiently, as well as to dispose of them when they are no longer necessary.

This booklet focuses on the issues facing lawyers with respect to their own files and documents. More than ever, in the wake of the Sarbanes-Oxley Act of 2002 and other reporting laws, lawyers need to develop and maintain appropriate records management policies or update existing policies.

The consequences of failing to develop a comprehensive records management policy are many. Lawyers and their clients may find themselves subjected to sanctions, adverse jury instructions, a mistrial or, in extreme cases, dismissal of claims if the court finds that documents were improperly destroyed or not produced on a timely basis.

No simple "silver bullet" exists for records management. The nature and significance of the material, the rules of professional responsibility governing lawyers, and legal requirements all play a part in determining which materials to retain and for how long.

ETHICAL, LEGAL, AND PRACTICAL ISSUES

Lawyer conduct is regulated in a variety of ways, creating obligations that are not always consistent.

Ethical obligations

A number of ethical rules are relevant to the concerns raised by records management policies. For example, ABA Model Rule of Professional Conduct 1.15 (2004) requires lawyers to safeguard the property of clients and keep records of client property. And ABA Model Rule 1.16(d) provides that, upon termination of representation, “a lawyer shall take steps . . . to protect a client’s interests . . . [and surrender] papers and property to which the client is entitled.”

Some jurisdictions also have specific ethical rules pertaining to certain types of client records. For instance, New York requires all financial records relating to clients to be kept for seven years, while California requires retention for only five years. Financial records may include bank account records, retainer (i.e., engagement) and compensation agreements with clients, and time and billing records, also depending on the jurisdiction.

Legal obligations

Your fiduciary relationship as a lawyer will define the consequences if you lose or destroy client property, and possession and destruction of materials may implicate discovery rules or the doctrine of spoliation of evidence. For example, the Federal Rules of Evidence are currently being revised to reflect which electronic documents must be disclosed and preserved, who bears the cost for production, and whether sanctions can be imposed for noncompliance. Applicable state and federal laws and regulations may also require retention of information, such as personnel files and payroll information, for a specified period of time. Care must be taken to stay abreast of new developments and to appropriately disseminate and train staff.

Practical considerations

Practical reasons also exist for establishing a records management policy. For example, the financial costs of indiscriminately storing and keeping track of large volumes of paper records, whether on site or at a remote location, cannot be ignored. Moreover, storing large amounts of computer data can leave insufficient hard drive or network space for current information, not to mention that large amounts of computer data can also slow a computer's speed and provide a tempting target for hackers.

FILES: WHO OWNS THEM? HOW LONG SHOULD THEY BE KEPT?

File ownership

The states do not uniformly agree on who—the client or the lawyer—owns files.

The rule in the majority of states, as stated in *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, is that a file belongs to the client, entitling the client open access to the entire file. In states where this is the case (subject to any lien rights if the client has not paid its legal bills), the lawyer who wishes to maintain either the original or a copy of the file must pay the expense of making copies. However, when a client cannot afford to pay the legal bill, and when surrender of the materials is necessary to avoid foreseeable prejudice to the client, any attorney's lien may yield to the fiduciary duty the lawyer owes the client.

In a minority of states where a file belongs to the client, the client has access only to “end product” documents, such as internal memoranda and preliminary drafts of pleadings and legal instruments. A client generally is not entitled to access end product documents unless the client can establish a need to understand the documents. (For example, see Illinois Ethics Op. No. 94-13; Alabama Ethics Op. No. 1986-02; North Carolina Ethics Op. No. RPC 178 (1994).)

An even smaller minority of states holds that the lawyer, not the client, owns the file. For instance, in Michigan (Michigan Ethics Op. No. R-019), since the client pays for the professional's skill and expertise, and not a physical product, the file belongs to the lawyer. These jurisdictions allow the client varied rights of access to the file, but expenses associated with allowing a client access to or copies of the file must be borne by the client.

As you develop a records management policy, you will want to become familiar with the file ownership rules in your state.

How long should files be kept?

An important variable in determining how long lawyers must keep files is the need, with respect to each “closed” file, to establish whether a file is “dead” or “alive.” That is, does the file need to be kept open indefinitely because of the type of work involved or the information contained in the file, or has the file “died” because there is no further work left to do and no information needs to be retained after the matter is completed?

Many documents—sometimes entire files—remain “alive” after all work on the matter is finished because the possibility exists that the file may later need to be reopened as a result of subsequent developments. In these situations, the document(s) may need to be saved, perhaps indefinitely, even after the conclusion of the original business.

The most common documents that need to be retained include original estate planning documents such as wills and powers of attorney, real estate documents such as deeds and deeds of trust, and financial documents such as securities and promissory notes. Similarly, any documents evidencing a basis cost that may be required for tax calculation purposes, often many years after acquisition of the property, may need to be held almost indefinitely.

Whenever the possibility exists that a file may later have to be reopened or become relevant in a chain of transactions, such as with a real estate file, the file is, at least for some purposes, “alive” even after the conclusion of the original transaction. Lawyers must consider whether and how to preserve any documents or information contained in the transaction records file, independent of issues of ownership, and for how long.

Statutes of limitation

Just because work on a case is finished, it does not follow that the case file may be safely destroyed as soon as the matter is closed, even if the client declines to take the file. As the lawyer, you should evaluate the statutes of

limitation for legal malpractice cases and consider retaining these files for at least as long as anyone could conceivably make a claim in connection with your work. If any aspect of a matter remains open for any reason, retain the file for as long as the matter remains open plus the length of any applicable statute of limitations that may relate either to the transaction itself or to any possible malpractice claims against you.

Even if a file looks “dead,” it may yet be alive and kicking. For instance, principles of continuous representation in many jurisdictions provide that statutes of limitation will toll if a client is a minor or incapacitated.

The consistent use of matter-closing letters can be an important part of a records management policy. Although a client-lawyer relationship often ends without the need for a closing letter, such a letter provides a concrete start date for calculating the statute of limitations.

ELECTRONIC DOCUMENTS

Paper records and electronic records must be treated consistently. Any policy the firm establishes must be structured so that either retention or destruction are consistent, regardless of the media in which the material exists.

Electronic records raise several distinct and unique issues:

- Email communications are often short and cryptic, and they may provide incomplete and inaccurate records of events.
- Email has proliferated so that there are now many more electronic files than paper records.
- Computer networks and servers can be hacked into and important information can be stolen. Also, viruses can destroy networks, servers, and backup tapes, erasing firm and client information.
- Storage capacity issues on the network or server may affect systems speed and reliability.
- Electronic records may exist outside the firm's network—e.g., when you work on your home computer, it can be difficult to achieve consistency between hard-copy and electronic materials.
- Voice mail is often stored digitally and should therefore be considered an electronic document for purposes of a records management policy.

In a system that periodically backs up data, it is likely that multiple copies of a document exist on backup storage materials. For example, electronic records could exist on a user's hard drive on the company's server, on the company's backup tape, on an Internet service provider's server, or on an employee's home computer if he or she works remotely. An effective records retention policy should ensure that documents are stored only in identifiable

locations, appropriately backed up, and treated consistently wherever they are located and in whatever media they exist.

Be aware that “deleting” an electronic record from a hard drive does not mean that a record is destroyed in the same way that paper can be destroyed. With appropriate tools, “deleted” data that has not been overwritten can be accessed. Thus, a component of proper records management planning requires an exploration of “shredding” or “scrubbing” software that is used in a manner that is consistent with the firm’s policy and practice with respect to paper records.

A number of effective cleaning software programs are available that erase information by reformatting the hard drive. Some programs enable the user to permanently erase data on a hard drive by overwriting the data so that the data can’t be recovered. Most programs are inexpensive and include upgrades and support.

These programs are different from, but related to, programs that permanently erase the metadata from actual electronic documents or files. The benefit of using such a program is that it avoids the risk of revealing confidential information when the user forwards a Microsoft Word document to a third party, as well as the extra step of converting the document to PDF format.

CASE AND INFORMATION MANAGEMENT

Organization of the case file is also an important element of effective records management. Key organization issues include:

- Knowing where all documents, both electronic and paper, are located.
- Having “ticklers”—reminders—to send letters to clients regarding future file destruction dates.
- Entering closed client files into a centralized conflict-checking system, regardless of whether the file has been retained or destroyed.

Advances in technology have led to software that allows lawyers to dispense with traditional paper files and opt instead to create electronic case files that can be managed through the firm’s network. These files collect and store all documents, records, and work product in one place so that anyone who needs to access the information may do so. In addition, the software allows easy denial of access to those who should be screened from the information.

Litigation support software allows the user to integrate an entire case file to electronic form—including handwritten notes, audio files, and emails—and to access them anytime, anywhere in the world through the Internet. Such a program provides for detailed search parameters so that the information can be effectively and efficiently organized and located when needed.

Some software programs are specially developed for smaller firms. Those firms with special needs may find it more useful to contact an organization that works with clients to provide litigation support, discovery services, and matter management. Firms that have electronic discovery issues often turn to experts who can provide electronic evidence collection, processing, review, and production services.

ADDITIONAL CONSIDERATIONS

When developing a records management policy, a number of additional issues should also be considered.

- ***Gaining client consent***—Keep a file for as long as directed by the client. Also, use the initial engagement letter and the closing letter to inform the client of the firm’s records management policy and to seek the client’s consent to it.
- ***Alternative means of storage***—You may wish to investigate alternate means of documentation storage. Some firms have moved to electronic storage, no longer wishing to pay storage fees for their clients’ files and papers.
- ***Client notification and final review***—At the end of the retention period set forth in the records management policy and in accordance with client agreement (or at least client notification), a further review of the materials slated for destruction will help ensure no materials are required to be retained longer.
- ***File destruction***—Keep in mind the duty of confidentiality imposed by rules of professional responsibility. Whether contracting with a recycling (or shredding) company to dispose of paper, or a computer expert to clean the firm’s hard drives, take extra care to ensure that disposed documents are not reviewed by third parties. If there are applicable recycling or other laws with which a lawyer must comply, the lawyer must do so in a way that protects the confidences and secrets of clients. The same concern should be taken when donating, recycling, or disposing of firm computers.
- ***Index***—A records management index serves as an important reference tool by noting whether a file has been returned to a client, retained (and in what form or location), or destroyed.

-
- **Responsibility**—Someone should be responsible for enforcing, monitoring, and updating the records management policy.
 - **Policy suspension**—Should the records management policy ever be suspended, such as when an investigation is underway or a lawsuit is anticipated, plans should be in place for doing so.
 - **Required reading**—The policy ought to be required reading for all employees. One suggestion: Place the policy in the firm's employee handbook, have employees confirm in writing that they have read the policy, and send updates to all employees when necessary.
 - **Training**—Conduct training on the records management policy, including during new-hire orientation and at regular intervals for all employees.

CONCLUSION

This booklet has raised many of the important issues surrounding records management. It was written to aid lawyers who are developing a records management policy or evaluating an existing policy. However, it is not a substitute for the legal advice you can only receive from a qualified attorney with expertise on this subject. If you are developing or reviewing such a policy, we strongly urge you to seek that professional advice.

ABOUT THE AUTHORS

Anthony E. Davis

Anthony Davis, a partner in the Portland, Oregon, law firm Hinshaw & Culbertson LLP, advises attorneys and law firms on legal professional and ethics issues, law firm creation, merger and dissolution, and issues relating to risk management and loss control. He is author of *Risk Management: Survival Tools for Law Firms* and *The Essential Formbook: Comprehensive Practice Management Tools for Lawyers*, published by the ABA, and he writes a bimonthly column on professional responsibility in the *New York Law Journal*. He received his law degree from Cambridge University and an LL.M. from New York University School of Law.

David J. Elkanich

David J. Elkanich is a member of the Hinshaw & Culbertson LLP law firm, which provides a wide range of litigation and risk management services to law firms and lawyers. He regularly speaks and writes about professional responsibility and risk management and he is currently co-editing the Oregon Ethics Opinions to reflect the change from the *Code of Professional Responsibility* to the *Rules of Professional Conduct*. He is co-author of the quarterly publication *The MPC Risk Manager*, and he is also co-author of a regular column on the Oregon State Bar Litigation Web site entitled "American Legal Ethics." He received his law degree from University of Oregon School of Law.



Chubb Group of Insurance Companies

Warren, NJ 07059

www.chubb.com

This document is advisory in nature. It is offered as a resource to be used together with your professional insurance and legal advisors in developing a loss control program. This guide is necessarily general in content and intended to serve as an overview of the risks and legal exposures discussed herein. It should not be relied upon as legal advice or a definitive statement of law in any jurisdiction. For such advice, an applicant, insured, or other reader should consult their own legal counsel. No liability is assumed by reason of the information this document contains.

For promotional purposes, Chubb refers to member insurers of the Chubb Group of Insurance Companies underwriting coverage.

Form 14-01-0825 (Rev. 3/07)