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Creating a File Retention and Destruction Policy

A CNA PROFESSIONAL COUNSEL GUIDE FOR LAWYERS AND LAW FIRMS

The practice of law encompasses a continuous flow of information in and out of law firms. Lawyers and law firms must manage an increasing amount of data, both physical and digital, over a vast array of evolving devices and media. Managing the data includes determining:

- what information needs to be maintained
- what can or should be discarded
- what methods will be used to store and retrieve important data, and
- instituting safeguards so that client files and other information are protected.

In view of these responsibilities, lawyers and law firms cannot rely on *ad hoc* record-keeping methods. Instead, they should develop and follow a cohesive set of procedures for managing and maintaining the records used in their practice – both their own internal records and client files with which they are entrusted. Moreover, such procedures should apply to the entire record retention lifecycle, from creation to final disposition.

For the purposes of this guide, such a set of procedures will be referred to as a **Records Management Plan.**

Records Management Plans Help Manage Professional Liability Risk

A Records Management Plan ("**RMP**") represents a comprehensive set of procedures to manage a law firm's information and data. The scope of the RMP must be all-encompassing, applying to all information or data received and transmitted within the organization, as well as governing the conduct of every attorney and employee.

Formal RMPs provide guidance to firm personnel about their responsibilities and help manage risk by:

- protecting client confidences;
- preserving client property;
- reducing misunderstandings with clients about records maintenance;
- improving client communications by easily accessing relevant documents;
- delineating the end of work on a specified matter;
- protecting attorneys in the event of a claim or other adversarial actions;
- complying with applicable rules of professional responsibility; and
- fulfilling fiduciary obligations.

For these reasons, law firms must act responsibly and consistently in handling the information and records they create, use and exchange on a daily basis. A formal, written RMP provides clear direction to law firm staff about how records should be created and maintained, how long they should be preserved, how they should be destroyed, and who should oversee the process. It also provides guidance about implementation, enforcement, and communication with clients about document handling. Formulating a written policy requires an initial investment of time and effort. It also serves to establish a consistent approach to records management that becomes an integral part of the firm's quality control program and facilitates training of new employees.

RMPs Should Distinguish Records from Non-Records

Prior to developing rules addressing records management procedures, it is important to define what constitutes a "record" that should be maintained per the RMP and what does not comprise a "record". Not all information or data produced or used by lawyers is an actual record. While records must be maintained by a lawyer or firm beyond the termination of a representation, non-records need not be.

Non-records v. records. Some information or data produced or used by lawyers does not rise to the level of a record. These "non-records" include routine administrative data or communications, transient memoranda or notes, and unused or insignificant drafts or copies with limited and short-term value or usefulness do not need to be kept.

Appropriately classifying records and non-records according to their content and importance, rather than solely by format, is essential when developing the RMP. Non-records can be destroyed at any time, before or after termination of the engagement, unless subject to a discovery hold order. The most efficient approach is to encourage immediate disposal of non-records once they are no longer needed. This procedure will avoid cluttering the file with unnecessary data and make file review upon closure less time-consuming. At a minimum, non-records should be purged from the file before initial archiving.

Generally, records should be maintained sufficiently to preserve evidence in the event it is needed in defense of a professional liability claim. . . . While it is impossible to predict with certainty the applicable limitations period for each and every client matter handled by the firm, ***a good rule of thumb for an initial retention period for most files is ten years****.*

RMPs Need to Account for Client Files and Firm Records

Once non-records are identified and discarded, the remaining documents should fall into one of two categories: **client files** and **firm records**. While the majority of this guide will discuss how to manage client files, an effective RMP should address how to manage both categories of documents.

Client Files

Client files comprise many types of documents, many of which are generated by or exchanged between lawyer and client to facilitate the legal services rendered and documents generated through research or discovery performed on the client's behalf. One state bar ethics opinion has itemized client files into seven basic types of documents:

1. documents and other materials furnished by the client;
2. correspondence between the lawyer and client;
3. correspondence between the lawyer and third parties;
4. copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf;
5. copies of contracts, wills, corporate records and other similar documents prepared by the lawyer for the client's use;
6. administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's creditworthiness, time and expense records, or personnel matters; and
7. the lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including investigative reports, prepared for the lawyer for the use of the lawyer in the representation.[1]

During the pendency of a case or matter, lawyers rely on well-organized case files in order to represent clients in an efficient manner. Upon conclusion of a case or matter, however, questions arise as to what to do with the client file. An effective RMP will anticipate and provide answers to the questions posed below.

When should the client be informed as to how the client file will be handled?

Law firms should proactively approach the issue of file retention and destruction with clients at the outset of the attorney-client relationship. A specific file retention and destruction provision in the engagement letter that encapsulates the relevant portions of their RMP should be incorporated. Such a provision in the engagement letter provides the opportunity for the law firm to explain what documents will be returned to the client, what materials the law firm will retain, and how long the file will be maintained until it is destroyed.

Having the client agree to these terms upfront saves the law firm from acting without client consent if the client disappears or dies during or after the attorney-client relationship. Similarly, law firms may wish to inform clients on how their data will be stored, especially if they are employing cloud computing services or other newer technologies. The CNA *Lawyers' Toolkit 3.0* contains sample engagement letter language on these topics that lawyers may wish to use when crafting their own engagement letter provisions.

1 Illinois State Bar Association Adv. Op. No. 94-13 (January 1995)

In addition, when a law firm concludes a matter for a client, a closing letter should be sent to the client that, in part, reiterates the relevant language in the file retention and destruction provision of the engagement letter. The CNA *Lawyers' Toolkit 3.0* contains a sample closure letter. Some law firms wait to inform the client of their file retention and destruction policy at the matter's conclusion. However, waiting may result in some clients may object to the law firm's policy. The client also may demand different and more generous terms or may have disappeared or died prior to the matter's conclusion. Securing the client's consent at the outset of the attorney-client relationship avoids these problems and provides for a more orderly implementation of the RMP.

When and how should the client file be organized for closing?

Once a matter or case is concluded, the client file should be organized for storage. As noted earlier, a closure letter should be sent to the client, informing the client that the matter or case has concluded. The closure letter provides the client with an opportunity to inform the lawyer if, in the client's view, the client expects the lawyer to perform additional legal services with respect to the matter. In some jurisdictions, a closure letter also can help to delineate the commencement of any applicable limitations period for the filing of professional liability lawsuit regarding the particular matter or case.

All legal assistants, secretaries and attorneys who worked on the matter will likely possess relevant material in either electronic or paper formats. An individual most familiar with the work performed and the staffing of the matter (often a legal assistant or paralegal) should be designated to compile this material for review and preparation for retention or destruction.

What about electronically stored information?

Electronic documents may exist in several formats and may be duplicated in the ordinary course of their creation and distribution. Copies may reside on central servers, employee smart phones, desktop or laptop hard drives, tablets, USB flash drives, and email file folders. All legal assistants, secretaries and attorneys who worked on the matter will likely possess relevant material in either electronic or paper formats. An individual most familiar with the work performed and the staffing of the matter (often a legal assistant or paralegal) should be designated to compile this material for review and preparation for retention or destruction. Electronic documents should be catalogued and identified to facilitate retrieval in the later stages of the process.

Another issue not to be overlooked is retention of legacy hardware and software – or conversion of records to updated technology – in response to technological upgrades or advances during document storage periods that could threaten to render the existing records obsolete. Law firms may wish to contract with third-party vendors that specialize in providing off-site document storage, retrieval and destruction services based upon client needs.

The initial investment to establish an electronic document management system to archive and retrieve electronic copies of files can be substantial depending on the technology used. Over time, however, storing records electronically is typically easier and less expensive than maintaining paper records. Electronic storage also can make record retrieval easier if file naming and filing conventions are instituted. Of course, law firms must exercise due diligence in selecting such vendors, enter into confidentiality agreements with them, and communicate to their clients that such vendors may be used to store their data. The CNA *Lawyers' Toolkit 3.0* contains a sample Electronic Data Communication and Storage provision.

How should client files be stored?

Firms should develop general policies regarding where and in what format archived files will be maintained. Paper records can be converted to electronic documents through use of digital scanners, permitting these records to be stored electronically. This method saves space and also serves to integrate electronic documents and paper portions of a client file. *See e.g., Missouri Sup. Ct. Adv. Comm.*, Formal Op. 127 (05/19/09) ("Except for intrinsically valuable or legally significant items, law firms are allowed to maintain a client's file exclusively in electronic format.")

While law firms may choose to convert paper documents to electronic documents, they also should consider the needs of their clients. Some clients of limited financial resources may prefer paper copies rather than electronic documents. One ethics committee recommended that lawyers employ a balancing test and seek the input of their clients in determining the format to use in producing a client file. *Id.*

Regardless of the format selected to store closed client files, paper or electronic documents or a combination of both, law firms must retain control of the records to the extent necessary to ensure their safety, security, confidentiality and overall integrity. A growing number of law firms are storing electronic documents via cloud computing services. Those state and local bar ethics opinions that have addressed the issues of cloud storage have stated that, in general, lawyers may use cloud computing services as long as they are reasonable in selecting a cloud vendor and employ reasonable precautions when utilizing such services.[2] All the opinions referenced ABA Model Rule 1.6, the confidentiality rule, or their respective state's corollary rule. ABA Model Rule 1.6 states, in relevant part:

> "(c) 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." *(emphasis added)*

The Comments to ABA Model Rule 1.6 indicate that reasonableness will be determined by various factors, including the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.[3] Therefore, law firms must weigh these factors in deciding how they will store client files irrespective of whether using their own storage space or that of a third-party vendor and whether the files are in paper or electronic format.

Recent weather-related events such as hurricanes, tornadoes, storms, fires, and floods have damaged law firms and destroyed client files in the process. Criminals are also launching cyber attacks against law firms in an attempt to mine valuable client data. All law firms should have a business continuity plan addressing the exposure to internal and external threats and synthesizes assets to provide for an effective recovery process in the event such a threat manifests. Off-site storage of both paper and duplicate electronic records must be considered as a means to expeditiously recover records and to prevent client service disruptions in the event of a disaster. A frequently updated redundant record server in an off-site location may ensure the safety of electronic records if the law firm office becomes uninhabitable. See CNA's *The Big Picture: Enterprise Risk Management for Law Firms.*

2 See *Caution in the Cumulus: Lawyers Professional & Ethical Risks and Obligations Using the "Cloud" in Their Practice* at **www.cna.com**.
3 See ABA Model Rule 1.6, Comment 18.

What if the file is for a long-term continuing client?

If a completed case or matter was performed for a continuing client, some of the data and documents in the closed file may be needed for future reference in other legal matters being performed by the law firm for this client. In these instances, such information should be moved at the closing of the matter from the case file to a firm-wide active knowledge management system where it can be accessed as necessary. A note should be placed in the client file indicating the new location for the removed materials.

How long should client files be maintained?

While lawyers do not have a general duty to preserve all client files on a permanent basis, they are obligated to prevent the premature or inappropriate destruction of client files.[4] Preserving everything forever, however, is neither practical nor appropriate. When establishing retention schedules, law firms should consider ethical and legal recordkeeping requirements as well as the need for records to defend professional liability claims. Also, some records may have historical value to the firm or be useful in assisting future clients. Law firms should be realistic about the time and costs associated with implementing and maintaining multiple record retention periods. In most cases, the costs of reviewing a closed client matter file several times due to the existence of differing retention periods for various types of records far outweigh the costs associated with retaining some records longer than actually needed.

Generally, records should be maintained sufficiently to preserve evidence in the event it is needed in defense of a professional liability claim. The initial retention period, therefore, should be adequate to cover most professional liability statute of limitations periods, including statutes of repose, in the states in which the law firm practices. While it is impossible to predict with certainty the applicable limitations period for each and every client matter handled by the firm, **a good rule of thumb for an initial retention period for most files is ten years**. Ten years should exceed the statutes of limitations and statutes of repose applicable to most professional liability claims in most states.

Nevertheless, as significant differences exist among law firms with respect to both the nature of their practice and the jurisdictions in which they practice, each firm must analyze this issue and decide for itself an appropriate initial retention period, taking into account such factors as the jurisdictions in which they practice and their clients reside, and the specific practice areas the matters address. Longer initial retention periods may apply to certain matters and clients. For example, estate planning matters, the RMP might call for an initial retention period that considers the expected lifespan of the client. Importantly, limitations periods for such representations will likely probably not begin to run until after the client's death. For criminal law matters, some ethics committees and boards have advised that client files should not be destroyed while the client is alive.[5] For matters involving minor clients, initial retention periods should be set relative to when the minor reaches the age of majority.

4 D.C. Bar Ethics Opinion 283 (July 1998)
5 Advisory Committee on Professional Ethics Appointed by the New Jersey Supreme Court, Opinion 692 (Supplement) (October 28, 2002).

While not exhaustive, the following list contains examples where the law firm may consider maintaining the client file for more than 10 years:

- cases involving a minor;
- cases involving problem clients or where the law firm believes it may face liability;
- contractual matters where the contract is in effect for more than 10 years;
- corporate matters involving articles of incorporation, partnership, or limited liability agreements;
- criminal law matters;
- family law matters involving ongoing custody, child support, or alimony issues; and
- wills, trusts, and estate matters.

In addition, if the law firm has agreed in the engagement letter or by other contract with the client to maintain the client file for a time period longer than its customary RMP, that time period should be clearly noted and adhered to by the law firm.

What if a law firm receives a litigation hold order on a client file?

The most common basis for suspending destruction of a client file is the existence of a litigation hold order. A litigation hold order may be necessary due to a dispute between the client and another party about the underlying matter, or an actual or potential legal malpractice claim against the lawyer or firm. In such circumstances, the firm should follow established procedures to preserve the records according to applicable jurisdictional rules. In most cases, the litigation hold order will require that the *status quo* of the records subject to the hold be maintained and undisturbed.

The failure to initiate, enforce or comply with the terms of a litigation hold can result in the destruction of records that could have continued importance to the firm or to third parties. Therefore, it is critical for lawyers to be able to suspend their retention or destruction schedules, when necessary, to avoid tampering or destroying such records. Designated procedures for suspending or modifying regular record retention or destruction processes pursuant to a litigation hold or some other order or request are critical. Such a protocol will help to avoid allegations of spoliation and their associated consequences, as well as avail themselves of the safe harbor provisions under civil procedure rules. Lawyers also should review their legal malpractice insurance policies to determine if their insurance carrier offers coverage for subpoena assistance.

What steps should a law firm take prior to destroying a client file?

Once a file has been closed and the initial file review has been completed, the law firm should be able to continue to safely and consistently keep the client file without the need for constant review or re-assessment during the time period dictated by the RMP. At the end of the stated time period, however, the client file must be reviewed and its status re-examined before any records can be safely approved for destruction. The purpose of re-examining the client file at the end of the initial retention period is to create an added safeguard against the inadvertent, or even unlawful, destruction of critical or relevant records. These safeguards could mean the difference between compliance and potentially harmful sanctions or penalties. The review of the client file at this stage should be conducted by the lawyer originally responsible for the matter or, if that is not possible, by another attorney. During this review, the designated reviewer should confirm that the client file is accurately marked for destruction and that there is no overriding reason to suspend the destruction process at that time.

The RMP should provide guidance to the file reviewer about proceeding with destruction while permitting discretion on whether to continue maintaining the file. If records must be retained due to a special circumstance, the reason and approval for this exception should be documented in the stored file. The scheduled date for subsequent file review should be noted in the file and recorded in the law firm's calendar system. The RMP should include a definitive schedule to re-evaluate the need for continued retention of files beyond the initial retention period specified in the RMP. In addition, the RMP should designate a time limit for performing the file review prior to the scheduled time for destruction.

Should the law firm keep records of destroyed client files?

Before any client file is destroyed, a written file destruction log should be prepared, and retained as a permanent firm record. The log should include:

- the client name,
- a brief description of the content of files destroyed,
- the individual who authorized destruction,
- the date of destruction, and,
- if an outside vendor was used, the vendor that performed the service.

The description of file materials destroyed should be sufficiently detailed to be easily understandable to any reviewer. While a staff person can prepare the index, attorney approval should be required prior to document destruction, preferably the original responsible attorney. Moreover, if the law firm intends to employ a third-party vendor to destroy client files, the vendor should be thoroughly reviewed. Use of the vendor also should be communicated in writing to the client prior to any file destruction.

Some states, such as Illinois, require that lawyers maintain a permanent record of the name and last known address of all former and current clients. See *Ill. Sup. Ct. Rule 769*. Lawyers also may wish to add the client file information to such mandatory records so that all of the relevant information is easily accessible.

What if the client disappears but the client file contains valuable documents or personal property?

When the file destruction deadline nears, lawyers sometimes face the quandary of how to handle valuable documents within the file when the former client cannot be located. Valuable documents may include such items as stocks, bonds, securities, or an original will or deed. Lawyers must first make a diligent effort to locate the former client. Assuming such a search is unsuccessful; lawyers should examine the relevant jurisdictional law on unclaimed property.[6] Some states allow a lawyer to deposit an original will with the appropriate state agency.[7] If the governing property laws offer no solution as to unclaimed valuable documents or personal property materials, the lawyer may be required to petition an appropriate court for an order on how to resolve the issue. Under no circumstances should lawyers or their staff members destroy such property simply because they do not know what to do with it.

6 See, e.g., Advisory Committee on Professional Ethics Appointed by the New Jersey Supreme Court, Opinion 692 (Supplement) (October 28, 2002).
7 See, e.g., 15 ILCS 305/5.15.

How should old client files be destroyed?

The methods used to destroy records should be specified in the RMP. Methods for all record types (e.g., paper, electronic files, microfiche, CDs and other data storage devices) should be described. The firm is obligated to maintain client confidentiality, and destruction methods should reflect that obligation.

Paper files should be shredded or incinerated. Data storage devices specific to a file such as tapes, CDs, floppy disks, and USB flash drives should be physically destroyed rather than overwritten with other data to ensure that the data is irretrievable. Destruction of electronic files requires careful attention. They will probably require the use of special software to ensure that files are permanently erased. In destroying electronic files, it is important to identify and eliminate all duplicate files, which may exist on network servers, personal computers and data storage devices such as tapes, hard drives, flash drives, tablets, and smart phones. If law firms utilize third-party vendors to assist in destroying client files, they should enter into confidentiality agreements with such vendors to ensure that client confidences are protected. Clients also should be informed in writing of the use of such third-party vendors.

Commercial software is available that is designed to overwrite selected computer data files and e-mails to render them unrecoverable even through the use of forensic methods. Investigate the background, experience and reputation of the software developer and obtain information on how the software works before obtaining it. Test the software on different types of files before using it to comply with the RMP.

Do sole practitioners have any special duties with respect to RMPs?

Since, by its very nature, a sole practice does not lend itself to another lawyer having automatic access to the sole practitioner's client files, such lawyers must take proactive measures in order to diligently represent and protect their clients. Comment 3 to ABA Model Rule 1.3 states, in relevant part:

> To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

Sole practitioners should enter into an agreement with another local attorney who will agree to follow the guidelines set forth in comment 3, above, should the sole practitioner die or become disabled. Once the sole practitioner has such an agreement with a local attorney, the sole practitioner should include a preemptive client consent clause in all engagement letters, so client consent to such an arrangement is obtained. Sample language for a preemptive client consent clause can be found in the CNA *Lawyers' Toolkit 3.0*. Instituting a preemptive client consent clause will not only protect the interests of the sole practitioner's client but will also spare family members of the lawyer who dies, disappears, or becomes disabled from the burden of determining what to do with the client files left in the office or storage facility.

Firm Records

Firm records are the internal documents and data a lawyer or firm generates or uses to manage the law practice that are unrelated to any specific client or matter. They include items such as the firm's charter and by-laws, organizational or administrative directives and communications, general accounting and tax records, employee compensation and payroll records, and internal time-keeping records. They are essential to the firm's management and on-going existence. While not typically shared externally, firm records can be important to the defense of a malpractice or disciplinary action.

In devising a **Records Management Plan ("RMP"),** law firms should establish separate retention schedules for firm records and client files, as these documents are separated early in the retention process and the information they contain is of varying importance to the law firm. Firm records are often retained longer than client files, usually because they have relevance to more than one matter or concern (examples include conflicts checking guidelines, which may be significant for matters relating to more than one client, or docketing system procedure manuals). Some firm records should be kept indefinitely, as in the case of a firm's corporate charter or partnership agreement. Also, some states impose mandatory retention periods for certain firm records. For example, virtually all jurisdictions have a corollary rule to ABA Model Rule 1.15: Safekeeping Property, which dictates that lawyers maintain financial records of bank accounts in which client funds are maintained. Lawyers must review their own jurisdiction's rules on precisely what records must be preserved and the minimum retention period.

Conclusion

Developing a **Records Management Plan** to manage client files and firm records is a significant and important aspect of firm practice management. While implementing and managing a RMP can be a daunting task for law firms that have handled records on an ad hoc basis, it will provide long-term benefits in the form of reduced storage costs, improvement in the ease of researching existing records and retrieving research previously performed within the firm, responding to and resolving client questions and disputes, and producing records when required in litigation or civil, criminal, regulatory or licensing investigations. As the state of the law with respect to lawyer obligations in this area varies by state and federal jurisdiction and is evolving, lawyers should regularly consult local rules, regulations and resources for current guidance.

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