

Three Considerations of Document Proposal

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Reviewing and revising a law practice's document retention and disposal practices is an aspirational goal for many law firms. Indeed, setting such a policy can be quite difficult. One reason is that the rules of professional conduct provide little direct guidance. Another is that there exists no standard, one-size-fits-all approach that has been approved by the courts. As a result, practitioners and their firms are left to consider a system that makes practical sense for the client and attorney, while taking care that whatever rules of professional conduct might be implicated are not violated.

The rules do not require firms to have a well-defined document retention and disposal policy. Indeed, it is not per se error for firms to decide to keep files forever or to destroy files on an ad-hoc, case-by-case basis (as long as other obligations under the rules are considered).

A system that lacks defined parameters, however, can create additional problems down the line. Important files may be accidentally destroyed, for example, or they may be lost among those that are decades old. At worst, the attorney or firm could become the object of a bar complaint or legal malpractice claim and be unable to defend itself based on their document retention and destruction habits.

In defending against a grievance or legal claim, having a document retention policy in place can be helpful. In some cases, the existence of a written policy can be as important as its substance. But in these situations, the client file itself can be quite valuable as well to demonstrate the reasonableness of the attorney's actions. And once a claim has been made against the lawyer, any privilege shared by the lawyer and the former client is typically waived, allowing the lawyer to use the file to defend against claims. See Georgia Rule of Professional Conduct 1.6.b.1.iii.

Modern law practices have successfully managed to reduce the risk that a file could be lost or unintentionally destroyed. Indeed, the use of technology and cloud computing have reduced the number of paper documents and allowed electronic documents to be preserved indefinitely in some instances. Nonetheless, storage of documents electronically still has its limits, and it can be expensive to maintain data storage. While there are no hard-and-fast rules when it comes to document retention or disposal, many law practices consider the following issues.

Establishing a Written Policy

The benefits of establishing a written policy are uncontroversial. Not only does a written policy help to avoid unnecessary misunderstandings with clients, courts and the bar, it also can help ensure consistency among law firm personnel. In short, a written policy can help ensure that everyone is following the same plan by storing and destroying materials in the same manner.

When implementing a new document retention policy or modifying an existing one, the law firm can consider including an effective date. This allows clients and other interested parties an opportunity to express concerns or request

modifications as it applies to an individual case or situation. Many firms will also attach the document retention policy to the engagement letter or fee contract so that clients are aware of the policy early on.

One feature typically included in document retention systems is the option for clients to request their files before any actual document destruction occurs. Written document retention policies are the first line of defense if a request comes for the file and the law firm has already destroyed it pursuant to its retention policy. This is true regardless of whether the request for firm documents comes from the bar, government or discovery. As a result, useful policies are written with production in mind—production to personnel, clients and third parties.

Of course, it is not an error for a firm not to have a written policy, but many firms find that having one reduces headaches.

Maintaining Files for a Certain Period

When evaluating document retention policies, most firms distinguish between two types of documents. Among the first type are original documents with special legal significance, such as wills, leases, purchase contracts, settlement agreements and the like. These documents may be maintained by the law firm indefinitely or returned to the client. If the documents are returned to the client, it is important to confirm their receipt by the client, given their legal importance.

As for all other documents, firms balance the costs of file retention with the risks of destruction, regardless of whether documents are in ink or in the cloud. Indeed, even for those firms that have gone largely paperless, maintaining electronic-only files does not mean there are no costs involved.

Because the Georgia Rules of Professional Conduct do not mandate a period of time to keep files, many firms consider several factors in deciding how long documents will be retained. The most significant is exposure to the law practice itself (through a legal malpractice claim or a breach of fiduciary duty claim) and to the client (as a result of the legal services provided). Other factors include physical storage space, cost and length of time.

The most common period of time identified by law firms to retain documents in civil cases is 7 to 10 years from the date the representation ends. Clients can be reminded about the firm's document retention policy in the file closing letter. Some firms will even send another reminder prior to the destruction of files, advising the client that the documents will be destroyed and noting a specific date by which the client must notify the firm if the client wants the files. Obviously, if a client asks for the return of the file prior to the identified date for destruction, that is a different situation. Georgia Rule of Professional Conduct 1.16(d).

Maintaining Confidentiality

While the rules of professional conduct do not directly address document disposal, this issue may be impacted by attorneys' obligation to maintain client confidences. See Georgia Rule of Professional Conduct 1.6. For example, many law firms maintaining client files with highly sensitive information will maintain them in a secure manner. Other law firms retain trusted vendors to help ensure that confidentiality is maintained even when documents or files are destroyed.

Devising a practical and legally sufficient retention policy can be challenging, especially given the dearth of guidance on this subject. But for many firms, having a written policy in place helps ensure that clients remain satisfied and that the firm manages its risk appropriately.

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