

The Basics of File Retention & Destruction

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The question most frequently asked of ALPS risk managers is, “What do I do with all these old files?” This article shares a little advice to help those with questions or concerns regarding the destruction of client files.

The first step in file destruction is in determining which files can be destroyed. We recommend keeping files for a minimum of seven to ten years. However, you should check to see if your jurisdiction has specific file retention rules or guidelines as jurisdictions do differ on this point. If the recommended storage time has not passed, keep the file.

Even if the recommended storage time has passed, you cannot simply toss all the files of that time period. Some situations require additional file retention. For example, you should not destroy a file in any of the following situations:

- cases for which the malpractice statute of limitation has not yet run (and don't forget about the doctrine of continuous representation);
- cases involving a minor client who still is a minor when the recommended file retention period ends;
- estate plans for clients who still are alive;
- agreements to be executed or fully paid off after the retention period expires;
- files establishing a tax basis;
- adoption files;
- support or custody files with continuing support obligations;
- cases with renewable judgments; corporate books and records;
- files of clients convicted of a capital crime; and

- the files of certain “problem clients.”

Because there are so many exceptions, you must thoroughly review each file before destroying it.

When you originally closed the file, you should have separated all the original documents that belong to the client, and returned them to the client. If you did not, then you should do it now. The following are documents that a lawyer should not ever destroy or discard: documents that clearly or probably belong to the client; original documents; any other documents that the client may need or reasonably might expect his lawyer to preserve, and every file’s letter of closure. The letter of closure is an important document to retain to assist in the resolution of conflict of interest concerns that might arise down the road. In the absence of such a letter, you will be unable to document that an inactive client is actually a past client thus preventing you from benefiting from Rule 1.9 of the Rules of Professional Conduct, the “Former Client” Rule.

Remember that in most jurisdictions the file belongs to the client. This means that you must follow the client’s instructions on the disposition of the file. If you did not obtain the client’s instructions when you closed the file, seek those instructions before you destroy the file. You can simply send a letter to the client’s last known address. However, some files are old enough that locating the client could be difficult. For this reason, many firms place in their engagement and/or closure letters a short paragraph discussing the firm’s file retention policy.

Sample file retention language might read as follows.

This matter now is closed. We suggest that you keep all your information relating to this matter in a safe place where you can easily locate it. We are returning your original [*records, documents*] related to this case and we are closing our file. As we discussed during our initial interview with you, we will retain our copy of your file for [*number of*] years. After that time, we will destroy the file unless you ask us to either continue storing it, or return it to you. If you want us to continue storing your file or return it to you when our normal retention period expires you must give us written notice of that desire within five days after you receive this letter.”

If you need to send the client such a letter years after closing the file, you might consider designing a letter based upon this sample language:

Our law firm destroys files [*number of*] years after they are closed. We have retained your file for that period of time, and are ready to destroy it unless you want us to either continue storing it or return it to you. If you want us to do one of those two things, you must send us a letter telling us of your desire, and you must do so no later than five days after you receive this letter.

Once you learn your client's wishes, carry them out. If you are going to destroy a file, make sure you follow through with the notion of destruction. "Destruction" does not mean leaving a file in a dumpster behind the office. You should incinerate or shred the file. You cannot compromise your client's confidences, even in file destruction.

Your last step is to keep an inventory of all file dispositions. Make sure that you track the client name, file matter, method of disposition (destroyed, returned) and date of disposition.

One final comment – a lawyer should take special care to indefinitely preserve an accurate and complete record of his receipt and disbursement of trust funds.