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To Purge or Not to Purge: Retaining Client Files in the Digital Age

By Nicole Nuzzo

While slow to start, technology has caught up to the business of practicing law resulting in a change in many law firms' practices. By maintaining virtual files and allowing attorneys to work remotely, many law firms have implemented flexible policies for lawyers, while reducing the cost of doing business.[1] This progressive approach to solving the attorney's notoriously miserable work-life balance has been implemented by firms large and small.[2] The days of fax machines and book shelves have been replaced with digital scanners, paper shredders, and document management software. However, as attorneys transition to a "paperless" practice, they cannot afford to shred their professional and ethical obligations.

Generally, the contents of a client file, other than attorney work product in certain circumstances, belongs to the client and on request, must be promptly provided to the client.[3] An attorney also has an obligation to deliver on request attorney work product to a client if reasonably necessary to the client's representation.[4] Client papers and property includes those items in electronic and paper format.[5]

In California, there is no statute or rule of professional conduct establishing an express time period for attorney client file retention. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (LACBA) opined that in criminal matters, the file should be retained for the life of the former client.[6] Regarding civil matters, because the client's right to the file continues after termination of the relationship, LACBA opined that such files should be retained for at least five years with the caveat that files with intrinsic value to the client should not be destroyed absent client consent.[7]

Addressing the same issue, the Bar Association of San Francisco Legal Ethics Committee (BASF) declined to suggest a bright-line rule relating to the retention of client files, and explained an attorney is a bailee of the client's property and thus, has an obligation to retain those papers which are necessary to preclude reasonably foreseeable prejudice to the client.[8] If so, a lawyer's ethical

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obligation cannot be discharged by relying solely on a firm's retention policy for a fixed timeframe. Rather, the file must be retained, in whole or in part, unless it can be disposed of without reasonably foreseeable prejudice to the client.

In 2001, the State Bar of California Standing Committee on Professional Responsibility and Conduct (COPRAC) issued a formal opinion addressing this issue, advising that client files in criminal matters should not be destroyed during the client's lifetime absent authorization from the client to destroy or otherwise release the file.[9] With respect to civil files, the committee declined to accept the recommendation of LACBA and instead agreed with BASF that there should be no fixed timeframe for the necessary retention of client files.[10]

The American Bar Association Committee on Ethics and Professional Responsibility also declined to provide a fixed timeframe on retention of client files. The committee recognized the economic burden associated with storing closed files and made it clear that an attorney does not have an obligation to retain client files permanently. The committee, however, cautioned against several specific acts: (1) destruction of original client documents (especially when not recorded or filed in the public record); (2) destruction of information that may be useful in the assertion of a client's defense or position; (3) destruction of information an attorney knows or should know may still be necessary or useful to the client's position in a matter for which the applicable statute of limitations has not expired; and (4) destruction of information that a client may need, that has not previously been given, that is not otherwise readily available to the client, and that the client may reasonably expect the attorney maintain. The committee noted that an attorney should use "good common sense" in deciding what is appropriate to discard and when.[11]

In utilizing "good common sense," an attorney should query whether it is appropriate to solely maintain files in electronic form. In our new digital age, the question is not only the length of time but the format in which to retain client files. Maintaining files in electronic form is often easier for those who choose to work remotely and is arguably more cost-effective than the offsite storage facilities lawyers historically employed to retain client files. Hard-copy documents, however, may need to be retained irrespective of cost or a law firm's desire to "go green."

COPRAC likewise has opined that the destruction of *closed* files requires an exercise of judgment. If the attorney has reason to believe that a file contains items required by law to be retained or that the client will reasonably need to establish a right or a defense to a claim, the attorney should inspect the file and retain such items for the period required by law, or according to the reasonably foreseeable needs of the client. The balance of the file may be destroyed after certain procedures are followed.[12]

Electronic client file storage is not specifically addressed by any California Rules of Professional Conduct. COPRAC issued a formal opinion addressing an attorney's duties, such as the duty of confidentiality, if she chooses to transmit or store confidential client information electronically.[13] The scope of this article does not extend to such duties, although practitioners should ensure compliance if a "paperless" policy is implemented.

As to original papers and property received from a client, in the absence of an agreement to the contrary, the attorney's obligations are determined by the law of bailments.[14] For example, if an attorney is in possession of an original testamentary document, scanning the document, and purging the original is prohibited.

Likewise, the California Rules of Court mandate the retention of certain original papers, such as subpoenas and interrogatories, among other things.[15] An original of the specified documents must be retained for at least six months after final disposition of the case. The format of retention shall be in the paper or electronic form in which it was created or received.[16] Thus, if an original response to a voluminous Request for Production of Documents is received in paper format, an attorney is obligated to maintain the original in the form received (*i.e.*, paper format) for the requisite period.

As to other former client papers and property, before disposing, the attorney first must use reasonable means to notify the former client of the existence of the file, of the client's right to examine and retrieve the file, and of the intended destruction.[17] Where an item has no intrinsic value, but the attorney fears that loss of the item will injure the former client, the item should be retained or preserved by microfilming or similar means.[18] If the attorney has no reason to believe that the items are required by law to be maintained or would be reasonably necessary to the former client to establish a right or a defense to a claim, then if the former client cannot be located by any reasonable means, or fails to respond to the notice after a reasonable time, the attorney may destroy the items.[19]

For firms implementing a "scan-and-purge" policy for current client files, no authority specifically addresses whether the firm must notify current clients of the existence of a paper file, the right to examine and retrieve the contents, and the intended scanning and shredding. However, as such is required as to former clients,[20] a prudent practitioner would take these steps as to current client papers and property, as well. Attorneys also have

a duty to keep clients reasonably informed about significant developments relating to the representation.[21] Clients may find shredding their existing paper file significant, such that the intent to do so must be communicated to the client in advance, and the opportunity to retrieve the file should be provided. Furthermore, unless it is stated in an attorney's retainer agreement, an attorney will likely find she must bear the expense of copying the imaged file, if requested.[22]

Due to the cumbersome procedures set forth by the various opinions noted herein and the lack of specific legal authority, file retention should be addressed in retainer agreements. In many instances relating to the retention of files, the consensus appears to be that an attorney's duty is clearer if client consent is obtained. In addition to the duration of retention, client acknowledgment of a firm's "paperless" policy in retainer agreements is the best practice.

If an attorney decides to go "paperless," it would be prudent to follow a plan. The plan should include, at the very least, scanning all incoming documents and returning originals to the client immediately, unless the original is otherwise needed as evidence for the case; creating and electronically serving all documents (including providing the client with an electronic copy) where permitted and practicable; seeking stipulations from counsel regarding electronic service; and for documents required by law to be so retained, maintaining originals in paper format. As to all client files, an attorney should exercise common sense in determining when a client's file can truly be destroyed and should follow the recommended procedures as outlined above.

It is important to note that if an attorney chooses to maintain electronic copies of client files, or portions thereof, the lawyer should ensure confidentiality through use of appropriate security.[23] Likewise, a lawyer should ensure that digital backup exists and remember that, before any paper is purged, it needs to be properly shredded or otherwise rendered undecipherable.[24]

In some industries, going paperless is a cost-effective and easy endeavor through a business's creation of bright-line retention and destruction policies. In the legal industry, the digital age cannot always transcend rules of ethics. As attorneys and law firms transition to the digital age, it is important for each handling lawyer within the firm to query not only how long, but also in what format, it is best to maintain client files. At least for now, there is no clear rule on what to purge or not purge in all cases and circumstances.

Notes

1. Joan C. Williams, et. al., *Disruptive Innovation: New Models of Legal Practice*, 67 Hastings L.J. 1 (2015).
2. *Id.*
3. *See, e.g.,* Cal. Rules of Prof. Conduct, Rule 1.16 (e) (1); Cal. State Bar Formal Opn. 1992-197.
4. Cal. State Bar Formal Opn. 1992-197.
5. Cal. State Bar Formal Opn. 2007-174.
6. LACBA Opn. No. 475 (1994) (citing LACBA Opn. No. 420).
7. LACBA Opn. No. 475 (1994).
8. BASF Opn. 1996-1.
9. Cal. State Bar Formal Opn. 2001-157.
10. *Id.*
11. ABA Comm. on Ethics and Professional Responsibility, Informal Opn. No. 1384 (1977).
12. Cal. State Bar Formal Opn. 2001-157.
13. Cal. State Bar Formal Opn. 2010-179.
14. Cal. State Bar Formal Opn. 2001-157; Cal. Civ. Proc. Code §§ 1813-1847; Cal. Prob. Code §§ 700-735.
15. Cal. Rules of Court, Rule 3.250 (a).
16. Cal. Rules of Court, Rule 3.250 (b).
17. Cal. State Bar Formal Opn. 2001-157.
18. Cal. State Bar Formal Opn. 2001-157.
19. Cal. State Bar Formal Opn. 2001-157.
20. Cal. State Bar Formal Opn. 2001-157.
21. Cal. Rules of Prof. Conduct, 1.4.
22. Cal. State Bar Formal Opn. 1994-134; BASF Opn. 1984-1; San Diego Bar Ass'n Legal Ethics Comm. Opn. 1977-3.
23. Cal. State Bar Formal Opn. 2010-179.
24. *See, e.g.,* Cal. Rules of Prof. Conduct, Rule 1.6; Cal. Bus. & Prof. Code § 6068; Cal. Civ. Code §§ 1798.80-1798.84.