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# Creating a Document Retention and Destruction Policy

# Risk Management Considerations for Lawyers and Law Firms

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# Why should a law firm develop a document retention and destruction policy?

## Create and maintain order

A document retention and destruction policy can provide order for a law practice and greatly assist with efficiencies. The retention of all mail, emails, and other documents in perpetuity can lead to disorganization and escalating storage costs. The greater the number of documents retained, the less likely it is that an attorney will be able to locate a specific document in a timely manner. If an attorney is unable to locate relevant documents, it could lead to the appearance that he or she is unresponsive or unorganized; it may further decrease the productivity level of the attorney and his or her staff. On the other hand, the ad hoc destruction of documents can lead to wasted time, confusion, spoliation allegations, and the inability to defend against an ethics complaint or legal malpractice claim. A document retention and destruction policy can provide the law firm with a solution to avoid such concerns.

## Lessen the chance for client confusion

Following the termination of an engagement, there may be confusion concerning whether the attorney maintains the various documents comprising the client's file, and if so, for how long. Consequently, creating and then clearly communicating a retention and destruction policy to the client straight away should avoid this confusion. Reiterating the policy in the closing letter then serves the additional purpose of delineating the end to all legal services. A final warning letter to the client prior to the actual destruction of the file may also be appropriate.

## Assist with risk management

Creating a policy can also assist with risk management concerns. Most lawyers have heard the risk management advice that a well-documented file is the best defense against malpractice allegations or a disciplinary complaint. To the extent that a file may have been supportive, its untimely destruction can greatly harm a lawyer's defense. If a law firm is required to respond to a subpoena and/or discovery request, or to defend itself against a grievance or malpractice lawsuit, the inability to produce relevant documents can be devastating.

On the other hand, if a law firm has a thoughtful document retention and destruction policy, relevant documents should not be prematurely destroyed. Moreover, once a document is destroyed, there will be a consistent explanation regarding why it and all other documents in its class were destroyed pursuant to policy. On the contrary, the ad hoc approach to document management may create confusion or lead to accusations of willful or selective destruction. Consistently adhering to a written policy is key in defending any decision to purge or retain documents.

## Assist with confidentiality concerns

The greater the number of documents retained, the greater the number of documents subject to a breach of confidentiality because of a cyber hack or other cyber incident. For example, a recent cyber hack resulted in the release of confidential documents that had been stored since the 1970s. By routinely and systematically purging documents, a law firm decreases what client information is available for release due to unintended disclosure.

The ABA Model Rules speak to this issue as follows:

> **ABA Model Rule 1.6, Confidentiality**
> "(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." See also, Comment [18] and [19].

Routine, prudent, and reasonable destruction of documents may serve to mitigate any harm caused by the release of confidential information in the event of a cyber hack, thereby, assisting lawyers in meeting their ethical duties.

# Developing a document destruction and retention policy

## Define a document

Once a law firm determines the need for a document retention and destruction policy, the first step in developing the policy is to identify what is meant by a document. Not every scrap of paper or incoming email needs to be labelled a document.
To the extent that an item is not considered a document, a lawyer should consider destroying it immediately after review.

Documents, however, should always be retained and destroyed pursuant to a policy. Moreover, law firms should develop a consistent system for both electronic and hard documents. Depending upon an attorney's practice, the items listed in the yellow box are suggestions for demarcating "documents" and "non-documents".

Some examples of documents and non-documents may be as follows:

**Documents:**

- Retainer agreements
- Conflict waivers
- Client's original file
- Original contracts
- Settlement agreements
- Trust / estate documents
- Real estate / closing paperwork
- Corporate / financial records
- Tax returns
- Attorney time and expense records
- Substantive (non-scheduling) correspondence

**Non-documents:**

- Drafts of papers and memos
- Duplicate copies
- Photocopies of research material
- Administrative notes
- Transient attorney notes
- Scheduling and rescheduling emails

## Intrinsically valuable documents

Further, intrinsically valuable documents should be returned to the client, filed with the court, (depending upon the jurisdiction) or kept permanently. They should never be destroyed.

The following items, for example, depending upon the engagement, may be considered intrinsically valuable documents:

**Intrinsically valuable documents**

- Photos
- Birth certificates
- Stocks
- Bonds
- Wills
- Deeds
- Promissory notes
- Releases
- Conflict waivers

Once the firm defines a document, the next step is to contemplate considerations for developing the actual policy. Some considerations are as follows:

**Develop a policy that can be consistently followed**
A good policy should be user friendly and uncomplicated enough to allow for consistent application. For example, one approach to creating a policy is to maintain various sub-categories of documents with corresponding, respective retention periods. This approach, however, may be too cumbersome for staff and attorneys to consistently follow. The second approach is to decide that all documents, with limited exceptions are governed by the same retention period. The obvious benefit to the latter approach is its simplicity. One "save or destroy" rule may be the easiest way to ensure consistent and accurate compliance.

**Reduce to writing and distribute**
Once the system is developed, it should be reduced to writing and distributed to all attorneys and staff. Everyone working at the law firm should know and understand the system, from the receptionist to the most senior partner. A firm never wants to risk an uninformed staff member or attorney deciding to purge various items without realizing that he or she is violating policy.

## Deciding upon a reasonable retention period

### Document retention

There are many factors to consider when deciding upon how many years to maintain documents. Further, once a retention period is established, there should always be discretion afforded the handling attorney to allow for exceptions. What follows are some suggested resources and considerations to assist in determining the appropriate number of years to maintain documents.

**State ethics rules**
Lawyers should consult respective state bar rules of professional conduct for guidance when formulating a policy. ABA, Model Rule 1.15 Safekeeping Property, reads as follows:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

The various state specific rules may or may not follow the model rules on this subject. Rule 1.15 of the South Carolina Rules of Professional Conduct, for example, sets forth that, absent some other obligation, "a lawyer shall securely store a client's file for a minimum of six years unless the lawyer delivers the file to the client, or the client, in writing, authorizes its destruction". Consequently, lawyers should check with their respective ethical rules for state specific guidance.

**Area of Practice**
A law firm's substantive area of practice is an important consideration when establishing a document retention and destruction policy. In some areas of practice, issues with legal services may not surface until years after the engagement has terminated. Estate, probate and trust files, for example, should be kept well beyond the termination of legal services. Moreover, many states have also relaxed privity so that a lawyer's duty of care may eventually and possibly extend to a client's heirs, providing further incentive to retain such files. Criminal law, files involving minors, and certain family law files, such as those involving prenuptial agreements, are also examples of files that should be retained well beyond when legal services have ended.

**Consult the legal malpractice statute of limitations**
Respective state statute of limitation periods should be consulted when formulating a policy. While many attorneys believe that state statute of limitations for legal malpractice are governed by a fixed number of years, many states allow for various exceptions depending upon the circumstances. Some states provide for continuous representation exceptions, toll the statute until the client sustains an "actual injury", use the "discovery" rule, or allow for counterclaims to revive a barred malpractice claim. Consequently, a cognizable claim may arise many years past the date when legal services were last provided.

**Provide for exceptions to any general rule**
There should always be attorney sign-off required before any file is destroyed pursuant to policy. There are certain files that a law firm may wish to retain for a longer period of time than the standard policy.

- files with contracts in effect for more than 10 years
- files concerning estate, probate and trust matters
- files with ongoing family law matters (custody, prenuptial agreements)
- files with criminal law matters
- files with problem clients / E&O considerations

Finally, while determining the outside length of time to keep client files is perhaps more an art than a science, many lawyers and risk managers have determined that 10 years may be a good rule of thumb for retaining most closed files.

## Deciding upon a manner of storage and destruction

### Address confidentiality concerns

Any document retention and destruction policy should contemplate storing and destroying documents in a thoughtful manner that considers client confidentiality. Storing paper files may sometimes lead to storage concerns.

Some firms scan documents and then house them either internally or in the Cloud. If a law firm decides to store its documents internally, the firm should make every effort to protect the information from internal or external threats and a reputable cyber specialist should be consulted. Further, if the firm decides to store documents in the Cloud, state ethics rules and opinions should be reviewed to ensure that the selected vendor is appropriate. Most ethics opinions focus on control and confidentiality  of documents and the method of Cloud storage should concentrate on both. Only reputable vendors who understand the level of confidentiality required for client files should be used. Regardless of how files are stored, the client should be informed. Once it is time for the file's destruction, an IT specialist should again be consulted to effectively destroy electronic data from computers and copiers.

To the extent that vendors are consulted, the law firm should conduct due diligence into the vendor's reputation. The vendor should enter into confidentiality agreements and carry insurance coverage. The law firm should inform the clients of the vendor's use and of the electronic conversion of their files.

### Create a destruction log

A log should be created prior to a documents destruction. The log will prevent the assertion that the contents of the file never existed and will eliminate confusion in regard to the whereabouts of documents.

The handling attorney must always be notified prior to the destruction of any document as he or she may know of a reason to hold the document for a longer than standard period of time.

The following information may be considered for the destruction log:

**Destruction log**

- client's name
- brief description of contents
- individual attorney who authorized destruction
- whether any material was returned to client
- date of and manner of destruction
- receipts and releases
- name of outside vendor if used for destruction or scanning

## Litigation Hold

One other exception to the law firm's policy will be relevant in the event of the receipt of a litigation hold letter. Under those circumstances, nothing should be destroyed or moved. In this case, the file must be clearly marked that a litigation hold is in place. No new storage policies should be implemented.

## Conclusion

A thoughtful document retention and destruction policy can assist a law firm with organization and efficiencies. Further, the policy can avoid spoliation claims, client confusion, and assist if ever there is a disciplinary or legal malpractice lawsuit filed against the law firm.

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