



ALPS

Practice Management Pointers

The Basics of File Retention & Destruction

Mark Bassingthwaighte, Esq.
mbass@alpsnet.com

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

The first step in file destruction is in determining which files can be destroyed. While we recommend that you keep your files for a minimum of seven years, 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.

This seven year recommendation is based upon an attorney’s risk of facing a malpractice claim and the necessity of having a file that can be used to mount a defense should a claim ever arise. While statutes vary between jurisdictions, many statutes of limitations periods on malpractice under contract law run five to six years. We add a year or so for good measure. The problem with this calculation, however, is that it doesn’t account for the discovery rule which is why others in our profession advocate for a longer retention period of ten years.

Even if the recommended storage time has passed, you cannot simply get rid of all the files that fall into this category because there are going to be exceptions that would call for an additional amount of storage time. The exceptions should include but are not necessarily limited to the following:

- Files on which the malpractice statute of limitation has not yet run (and don’t forget about the doctrine of continuous representation which can toll these statutes);

- Files involving a client who was and still is a minor at the end of recommended file retention period;
- Estate plans for clients who still are alive;
- Files that contain agreements that have yet to be executed or have not been fully paid off when by the time the end of the recommended retention period has been reached;
- Files that establish the tax basis of one or more client assets;
- Adoption files;
- Support or custody files with continuing support obligations;
- Files with renewable judgments;
- Corporate books and records of active client entities;
- Files of clients convicted of a capital crime; and
- Files of certain “problem clients.”

Because there are so many exceptions, every file should be reviewed before being approved for destruction.

When you originally closed any given file, you should have separated out all of the original documents that belonged to the client and saw that they were returned. If this was never done, be certain to do so prior to having the file destroyed. As files are reviewed one final time keep in mind the following list of documents, which are the documents that should never be destroyed or discarded. They are 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 because it can help clarify whether or not a conflict of interest is in play later on. If closure letters are destroyed, you take away your ability to provide documentation that an inactive client is actually a past client. The ramification of this is you now may be prevented from benefiting from Rule 1.9 of the Rules of Professional Conduct, also known as the “Former Client” Rule.

To varying degrees, in most jurisdictions the file is viewed as client property. This means that you should follow any client’s given instructions as to the final disposition of their file. If you did not obtain those instructions when their file was closed, you should try to do so prior to having their file destroyed. You could simply try sending a letter to the client’s last known address

although on older files this may prove problematic. Due to the problem of locating clients on files closed years ago, more and more firms place in their engagement and/or closure letters a short paragraph that discusses the firm's file retention policy so as to avoid this problem on a going forward basis.

Sample file retention language might read as follows.

This matter now is closed. We are returning your original [*records, documents*] related to your case and we are closing our file. As we discussed during our initial interview with you, your file will be kept for a period of [*number of*] years. The file will then be destroyed unless you request that we store it longer or return it to you at that time. If you wish to have us to store the file for a longer period or return it to you when our normal retention period expires, you must give us written notice of that desire within thirty days of receipt of this letter. Please note that if it is your wish to not have your file destroyed, you will need to be responsible for keeping us informed as to how to reach you should your contact information ever change.

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 now preparing to have it destroyed. If your desire is to have us continue to store it or see that it is returned to you, you must send us a letter telling us of your desire and this must be done no later than thirty days after the date 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 tossing all the old files in a dumpster out back and, yes, this does need to be said. Take the necessary steps to have old files incinerated or shredded. You cannot compromise your client's confidences, even during the file destruction process.

Finally, keep an inventory of the final disposition of all files. Make sure that you track the client name, file matter, method of disposition (destroyed, returned), and date of disposition.



Risk Management Questions?

Mark Bassingthwaighe, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or mbass@alpsnet.com.

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