

Practice Tips for Developing a File Retention Policy

1. **Ask your malpractice carrier for file retention guidance.**
2. **At a minimum, include the following in your file retention policy.**
 - How the client will be notified of your file retention policy.
 - How the client can obtain their file once the case is closed.
 - Address the cost of postage if the client cannot pick it up.
 - Consider a policy of offering to return the client file at the close of representation and retaining an electronic copy.
 - How the file will be stored.
 - Storage in a fireproof, waterproof location that prevents an unauthorized person from having access to the contents of the file.
 - How long the file will be stored before destruction.
 - What, if anything, the client will be charged for storage beyond the destruction date. See Ethics Opinion 657.
 - How the file will be destroyed in a way that protects confidential information.
3. **Consider maintaining full or partial electronic client files.** They minimize the need for a paper file, reduce storage costs, and can be easily transferred to the client at the close of the case.
4. **Make file retention, storage, return, or destruction easier by creating file maintenance policies and procedures for:**
 - Opening a client file:
 - Assign a unique identifier to each client matter.
 - Include a summary of your file retention policy in your engagement letter or retainer agreement. Sample language for an engagement letter or retainer agreement follows:

You agree that it is your responsibility to obtain your file. We will notify you when it is available but will do so only once. If your file is not picked up within sixty days after we notify you that it is available, we can assume that you do not want it. In that case, we will retain the file for [X] years and then destroy it in accordance with our file retention policy and procedures and the Texas rules of professional responsibility for lawyers. If you want us to retain your file beyond [X] years, you agree to pay the reasonable costs of storage. If you do not seek the return of your file when we notify you that it is available, you may request it at any time before its destruction. Other than the initial notification that your file is available, we will not send any further notices reminding you that it is available to be picked up or regarding when the file will be destroyed or that destruction has taken place.

If [I am/we are] temporarily or permanently unable to practice law due to unforeseen circumstances, you consent to a named custodian attorney licensed in Texas and in good standing with the State Bar of Texas reviewing your client file, including confidential information, to evaluate steps, if any, needed to preserve rights in your case or to notify you and return your file to you or to another attorney at your direction.

□ Handling documents and correspondence during representation:

- Index physical files that involve a lot of physical documents and records.
- Secure physical files at the close of the business day.
- Scan and file any physical files or documents received.
- Preserve email correspondence (incoming and outgoing) related to the case and archive email accounts for departing employees.

□ Closing the client file when the client representation ends:

- Develop a file closing checklist.
- Review the file.
 - ◇ Review file contents after conclusion of the client matter or representation.
 - ◇ Denote the date of review.
 - ◇ Determine when the file can be closed, allowing for all applicable statutes of limitations for claims against the client and the lawyer, including malpractice claims.
 - ◇ Cull any “attorney’s eyes only” or other protected information from the client file.
 - ◇ Return original documents and valuables to the client.
- Send the client a closing letter that provides notice to retrieve the file and a summary of the document retention policy. Sample language to insert in your termination letter follows:

Your file is ready to be picked up. If it is not picked up within sixty days, we will assume you do not want it. We will keep your file for [X] years, after which we will destroy it. If you want us to keep your file longer than [X] years, we are happy to do so, but we will need to charge you the reasonable cost for storage. If you don’t want your file at this time but later decide you want it, you can request it at any time before it is destroyed.

If you choose for us to store your file and [I/we] become temporarily or permanently unable to practice law due to unforeseen circumstances during that time, you consent to a named custodian attorney licensed in Texas and in good standing with the State Bar of Texas reviewing your client file, including confidential information, to evaluate steps, if any,

are needed to preserve rights in your case or to notify you and return your file to you or to another attorney at your direction.

□ Returning the file:

- Return when representation ends or after an agreed time.
- If the file is completely electronic, returning it will be relatively easy. If paper, encourage the client to come get it or mail/ship it at the client's expense. You may want to make a copy at your own expense.
- If you keep the original file, ensure all valuables are returned to the client without delay. Tell the client when the file will be destroyed and what amount, if any, will be billed to them for storage.

□ Storing the file:

- Store in a location that would prevent an unauthorized person from having access to the contents of the file.
- Store in a fireproof, waterproof location.
- Determine how long to store the file if the client does not want it.
- Per Ethics Opinion 627, the cost of storing the file until it can be destroyed is borne by the attorney unless otherwise agreed by client. However, if the client asks for the file to be stored longer than required, the cost of storage may be charged to the client.

□ Destroying the file:

- Remove all valuable property and original documents and return them to the client (including excess IOLTA funds) before destruction.
- Confirm that destruction of the file will not prejudice the client. If destruction will prejudice the client, preserve the file or return it to the client (subject to limitations protecting the interests of other people, or in some situations, the interests of the client).
- Do not ask a client for permission to destroy the file until after:
 - ◇ The expiration of all applicable statutes of limitations for claims against the client and the lawyer, including malpractice claims.
 - ◇ Any retention period required by rules, regulations, court orders, or laws that is longer than the applicable statutes of limitations.
 - ◇ In criminal matters, in addition to statute of limitation issues, a convicted client's sentence and all appeals.
- Destruction must be conducted in a way that protects all confidential information.

5. **Action to take if you cannot find the client.** If you cannot find the client to return client property or their file, or to obtain consent to destroy the file, your options include:

□ Petitioning the court for authority to:

- Destroy a file,
- Dispose of client property, or

- Reconcile or approve a method to return unascertained or insufficient IOLTA funds.
 - See Estates Code chapter 456 for disposition of IOLTA funds.
 - Deposit of property with Texas Comptroller (if accepted).
 - Deposit of original unclaimed wills with the county clerk.
6. **Maintain a separate list of all clients, accessible by staff, with critical information.** Maintaining a list of clients that is easily accessible by staff is important for a variety of reasons, especially if you are temporarily or permanently unable to practice law and someone else will need to determine who your current clients are and how to best help them.
- The file number or identifier with the location of the file (paper and electronic).
 - Whether the file is currently open or closed.
 - The client's name and latest address, phone number, and email address.
 - A brief description of the matter and relevant court information.
 - The attorney(s) and staff, if any, working on the file.
 - A list of any client property or original documents in the file.
 - A record of funds held in IOLTA.
7. **Name a custodian.** A custodian can help if you are temporarily or permanently unable to practice law.
8. **Passwords.** Provide the location of passwords to access your client file records, firm financial records, and other practice-related databases to your custodian.