A Sound Record Retention Policy

A Matter of Self-Preservation

By Michael J. Sullivan and JoAnn L. Hathaway

You've just wrapped up a complicated matter on behalf of a client. It could have been a major transaction or a significant piece of litigation. Either way, your file is extensive, consisting of three to five red ropes and maybe a banker's box or two of documents.

Unless you also have a duplicate digital copy, you are wrestling with the usual document storage issues: what to store, what to return, and what to discard. Suddenly, the client calls and asks for the file. Your client doesn't give a reason, and nothing about the recently concluded legal work gives you cause to suspect you might be sued. Maybe the transaction closed cleanly or the litigation settled on what seemed like favorable terms. Maybe you tried the case and lost it on the merits. Nothing you did caused or contributed to the result, and there is no reason to think the client is more upset than any unsuccessful litigant.

You are tempted to give the file to the client without retaining a copy for yourself because doing so would cost you hundreds of dollars in external copying costs or hours of internal time to duplicate the file in its entirety. Besides, if you copy the documents, where are you going to keep them? Your file room needs more space, not more clutter. The storage facility in the basement of your building is brimming with files that serve as a constant reminder that you, like most lawyers you know, have been a pack rat for too long. The caution that led you to keep those files packed away for years without looking at any of them has left you overconfident about the future.

Stop! You are about to make what could be a serious mistake.

In this instance, the call you received from your client is leading to a lawsuit. Either the transaction that closed cleanly has gone sour or the litigation that ended neatly did not meet the client's expectations. Thus, this previously valued attorney-client relationship is about to turn negative, and the documents in your file may end up being your only defense.

When a lawsuit is filed against you and you meet with the attorney hired to defend you, the last thing your attorney wants to hear is that you did not maintain a copy of your file. You won't want to admit that you returned the file to the client without making a copy or turned it over to successor counsel on a matter in which your client replaced you midstream. If you are left without a copy of the file, your lawyer will have to recreate it to properly defend you. You'll hope it can be recreated in its original form.

Is this too dark a picture? No; recreating a file from scratch is more difficult than it seems. Successor counsel may have melded your file into theirs. It could be hard to determine which documentation was originally yours. Your client might allege that facts discovered during the successor attorney's tenure should have been acted on while you had the file, and it may be very difficult to prove that those facts were undiscoverable by you.

If you turn over the file to your client, you trust that he or she will keep the file intact before giving it to new counsel. It may seem cynical, but it is possible your client could discard documents or correspondence that may be helpful—maybe even essential—in your defense.

Avoid this predicament. While you may not want to pay to duplicate the file and retain a copy for yourself, it is money well spent.

Record retention fundamentals

We're all faced with questions when a matter is closed: what to discard, what to keep, and how long to keep it. We want to ensure we have the necessary paperwork if a former client files a malpractice action

The storage facility in the basement of your building is brimming with files that serve as a constant reminder that you, like most lawyers you know, have been a pack rat for too long.

Law Practice Solutions is a regular feature brought to you by the Practice Management Resource Center (PMRC) of the State Bar of Michigan, featuring articles on practice management for lawyers and their staff. For more resources offered by the PMRC, visit our website at http://www.michbar.org/pmrc/content.cfm or call our Helpline at (800) 341-9715 to speak with JoAnn Hathaway or Diane Ebersole, Practice Management Advisors.

against us and we must comply with rules regarding retention of client records.

Ethics Opinion R-5

When the State Bar of Michigan Professional Ethics Committee issued Ethics Opinion R-5, it did so to provide lawyers with ethical advice and general guidelines for record retention.

Ethics Opinion R-5 does not set forth precise rules regarding how long lawyers are obligated to keep files. It does, however, require law firms to have a record retention policy. The opinion provides, in pertinent part:

> A law firm, including a solo practice, is obligated to have a record retention policy or plan in order to meet ethical obligations. Components of a retention policy should include at a minimum: (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy; (2) information concerning the location of storage facilities; (3) methods for the eventual disposition of records and files; (4) information concerning retention periods and the establishment of retention periods; and (5) a system for monitoring lawyer and nonlawyer employee compliance with the plan.[1]

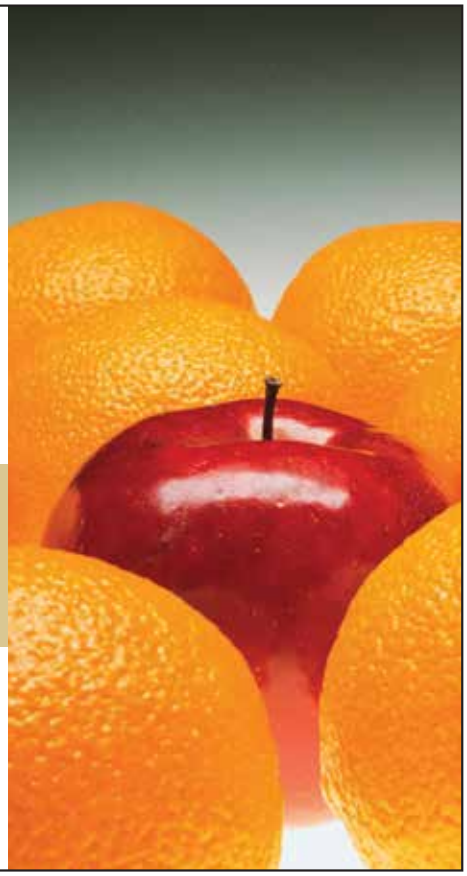
The rule suggests that lawyers should encourage clients to participate in the decision-making process regarding the ultimate disposition of their files. Further, the opinion provides, "A lawyer who fails to obtain client input prior to destruction of a representation file is not absolved of legal liability for negligent or improper destruction of property."[2]

Client file material

Are there any hard-and-fast rules? The answer is yes, but not as many as one might think.

There are statutory rules for the retention of records by courts and state agencies.[3] In addition, lawyers whose practices involve dealing with federal governmental agencies should be familiar with those agencies' guidelines.

There are also rules with respect to retaining certain types of records that should be kept in mind when establishing firm policy. MRPC 1.15 requires lawyers to keep records of client funds (i.e., trust account records and "property") for five years after termination of the representation. A safe harbor for lawyers is to avoid becoming the custodian of original client records. Typically, there is little reason to have original records during the pendency of a case, and there is no reason to have them once a matter has been closed. Moreover, there are numerous reasons why you might not want to have your client's original records in your possession at any time. No office filing system is foolproof, and there always exists the possibility that a record could be lost or otherwise inadvertently destroyed. If it is the original, it may not be replaceable. If



> Typically, there is little reason to have original records during the pendency of a case, and there is no reason to have them once a matter has been closed.

it is merely a copy and your client still has the original record, replacing it is simple. For record retention purposes, possessing original client records when a file is closed creates obligations that would not otherwise exist.

Attorney's file

In general, how long to keep a file after closure depends on the nature of the matter. A law firm could certainly draft a record retention policy that theoretically disposes of certain types of files soon after representation is concluded. However, there are significant reasons why files should not be disposed of, not the least of which is self-preservation.

The statute of limitations applicable in a legal malpractice action expires two years from the date of last services rendered concerning the matter from which the claim arises, or six months from the client's discovery of the claim. Apart from the implications of the discovery rule, a lawyer could theoretically be timely served with suit papers as much as three years after concluding representation of the client. MCR 2.102(D) provides that a summons expires 91 days after the complaint is filed. However, the court may issue a second summons for a definite period not exceeding one year from the date the complaint is filed. Your file may be your best, and perhaps only, defense to that lawsuit.

Thus, it seems minimally prudent to keep a file for at least three years following its closure. Even a three-year destruction policy does not take into consideration the fact that a lawsuit could occur at a later time if the client had not yet discovered the claim.

A uniform period for record retention will not work for all files. Using the three-year minimum as a baseline, lawyers must exercise good judgment concerning how long to keep a particular matter in storage. Here are some general guidelines worth mentioning:

- Records of client property and funds must be kept for five years, pursuant to MRPC 1.15(a).
- Tax information regarding a client should be kept for six years, pursuant to IRS guidelines.
- Probate and estate planning records should be maintained at least until the client dies and the estate is settled, and then for three years afterward for access in the event of a malpractice action.
- Litigation files might typically fall within the general three-year rule, i.e., three years after all appeal periods have expired. Be careful of nonfinal orders. An order becomes appealable as of right only when the matter is fully disposed of at the trial court level concerning all defendants. Thus, if your client is extracted early from the litigation through a motion, the order may not be appealable for several years if the case remains pending against codefendants. Special situations involving claims of minors or claims settled by way of a structured settlement may call for a much longer storage period.
- Divorce files should typically be kept for at least three years after all orders are fulfilled, i.e., three years after alimony ends, child support ends, or the property settlement is completed.

Conclusion

There is no guarantee that even your best efforts will prevent a client from bringing a malpractice claim against you. However, you can take steps to protect yourself by protecting your client's records and complying with the rules that apply to record retention. By doing so, you will have the file that may well form the building block for your defense against any claim that might arise. ■

A version of this article was originally published by ProAssurance. It is reproduced with permission.

Michael J. Sullivan has more than 30 years of litigation experience in the professional liability arena, much of it spent in the defense of attorneys. Active in state and local bar organizations, he served as a director, officer, and president of the Oakland County Bar Association, ending in 2008. Mike is also on the Oakland County Bar Foundation's Board of Directors and was foundation president in 2009–2010.

JoAnn L. Hathaway is a practice management advisor for the State Bar of Michigan. She is active in the ABA Law Practice Management Division and a frequent speaker on law firm technology and risk and practice management topics. She is an Adobe Acrobat certified expert and is certified in Time Matters and Billing Matters software. Previously, Ms. Hathaway worked as a legal liability claims director and risk manager.

ENDNOTES

1. SBM Professional Ethics Committee, Ethics Opinion R-5, Syllabus (December 15, 1989), available at <http://www.michbar.org/opinions/ethics/numbered_opinions/r-005.cfm> (accessed January 19, 2014).
2. *Id.*
3. See MCL 600.2137 and MCL 18.1285 *et seq.*