

Retention of Electronic Records after the File is Closed – What is a Lawyer’s Professional Responsibility?

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In this paper we explore a lawyer’s responsibility with respect to the disposition of electronic records relating to representations of or services to clients after the matters have terminated and the files have been closed or retired.

This paper does not delve into questions of a lawyer’s retaining lien or a lawyer’s right to withhold contents of a file from a client or another lawyer representing a former client. Nor does this paper purport to enter into questions regarding the ownership or proprietary interests in the contents of a lawyer’s file except where it may be relevant to the storage issue. These questions may be questions of law and it is not the intent of this paper to explore or give opinions on matters that concern questions of law.

Most states ethics committees of state bar associations have written ethics opinions on the topic of the disposition of closed and retired or dormant client files. The ABA has rendered Formal Opinion 92-369 (1992) and Informal Opinion 1384 (1977) which discuss this issue. The ABA opinions and the ABA Model Rules of Professional Conduct are advisory only. A reader is advised to check on the ethics rules, laws and court opinions of their individual jurisdiction. This paper addresses current issues raised by the technological nature of the data as it relates to retention, preservation and storage. It is intended to raise issues and provide suggestions for consideration by attorneys in light of the jurisprudence of their respective jurisdictions.

Types of Records:

There are several types of electronic records that can be developed by a law firm in the process of handling a client’s file or in providing legal services to a client. A typical listing may include:

1. Accounting records – including personal client / contact information entered into an accounting system, records of funds received into and disbursed from trust, records of accounts rendered and payments made, file names associated with the client, disbursement records on a client’s file and other office-specific records generated for the purposes of managing the accounting function of the law practice.
2. Word Processing records – including letters, faxes, memos, documents, pleadings, submissions, opinions, filings and drafts of same and backups of same.
3. Communication records – including email (between lawyer and client, lawyer and lawyer, lawyer and third party and inter-office), or delivery of same such as courier records or email that may have originally existed in paper form but which were subsequently digitalized, records of telephone calls placed or received or long distance charges associated with same, faxes themselves or listing of faxes sent and received and charges associated with same, recordings of communications or meetings (such as taping or video recording of conversations or meetings that have become digitalized)
4. Evidence – this could include evidence that exists in electronic form in its native format (for example email, word processing and accounting records, database and spreadsheet data or any other evidence that was created electronically) and evidence which was digitalized such as photographs, voice or video recordings, documents which were scanned and subsequently kept in image format or converted to an OCR format or both, and evidence that was created within the firm (such as affidavits, replies to interrogatories and the like). This can also include evidence which was produced by your own client and by adverse parties or others.
5. Lawyer’s brief – including notes, entries into case management, evidence management and trial management software, electronic listings of documents, photographs, email exchanges, and time and matter chronologies. This category could include items which may exist in the law firm in several places – for example, evidence which was produced by discovery and which was subsequently entered either in its native

format directly or in a summary fashion, into trial preparation or other analysis software (such as databases, spreadsheets, trial presentation software).

6. Documents created for the client – including corporate records, wills, land and mortgage documents, agreements – in other words, electronic versions of documents that were finalized in written or paper form. This could include documents which were subsequently entered into the public arena as well as those which were strictly confidential or private within a small group.
7. Ancillary records – electronic diary and meeting entries, electronic summaries of telephone calls received and returned, notes made in calendaring and contact software.

Where do the records Reside?

In this aspect of the question we examine where the electronic records could reside in a law firm setting. A listing of the locations could typically include the following:

1. On hard drives, either on specific workstations or on servers, laptops and home computers, and in some cases, third party machines (such as computers in business centers in hotels and airports).
2. On backups, in tape and other data storage and retention devices.
3. On floppy disks, ZIP and other high-storage media.
4. On web servers when using group ware software (such as lotus notes or other software used to facilitate multi-party work situations) or web-based applications (such as time and billing, database, document depository applications, ASP's (application service providers) or web-enabled mediation applications or web-based backup depositories, for example.
5. On the Internet, Extranets and Intranets.
6. In email folders and database servers.
7. On audio, video and other storage media.

Other ways of Looking at the Electronic Information:

There are at least four broad ways of viewing

electronic files in the hands of a lawyer:

1. Those that were in existence before the lawyer's retainer, outside of the lawyer's office,
2. Those that were in existence before the lawyer's retainer, inside the lawyer's office,
3. Those that came into existence during the retainer for the benefit of the lawyer,
4. Those that came into existence during the retainer for the benefit of the client.

As for category #1 - it is fairly clear that these documents came into the lawyers' hands solely as agents for the client or third parties responsible for their delivery to the lawyer. Following termination of the retainer, these documents, whether in electronic or other form, should be returned to their rightful owner. Copies of these documents may be required to be retained as part of a lawyers' duty to maintain his/her file for malpractice claims, to defend against a client complaint and as required by professional conduct requirements.

As for category #2 - these documents could encompass proprietary information in the hands of the lawyer - encompassing such things as precedents or materials in knowledge management or document databases, electronic resources, research databases, CD-ROM and internet research resources, materials on intranets etc. It is clear that these documents are not intended to form part of the client's file nor is there any intention to transfer any interest in these materials to the client. It is clear that these are and remain the property of the lawyer and law firm. No specific policy need be addressed regarding their disposition after the conclusion of the lawyer's retainer.

Category #3 encompasses such matters as time and billing records for the lawyer, draft documents, inter-office email and timed or regular computer system backups - in other words, the electronic records that record the business processes active in the law firm that assist the production and provision of legal services. The lawyer must consider if any of these must be retained for malpractice defense, to defend against a client complaint or for professional conduct requirements.

If not, then the attorney need consider how to retain these documents. If they have to be retained, then issues arise as to how best to retain these:

electronically or in hard-copy form. If they are retained in hard-copy form (by way of printing and storage on the client file that will be sent to storage) then the paper copies can be subject to the usual office policy on the retention and destruction of closed files. If they are to be kept electronically, then a number of issues arise.

Are they to be kept on the firm's network? If so, then periodic backups will contain copies of the documents – and I assume at this point that these backups will be retained indefinitely. The attorney must consider this and decide if an alternate retention strategy is warranted. For example, these records could be burned onto a CD-ROM or other storage media and deleted from the office network system. The CD-ROM or storage media could then be deleted or discarded following the passage of the appropriate time for retention of this type of records according to bar and regulatory requirements.

As for the fourth category, we can further subdivide this into at least five categories:

- a. Documents prepared by the lawyer for the benefit of the client.
- b. Documents prepared by the lawyer for his or her own benefit or protection.
- c. Documents sent by the client to the lawyer during the course of the retainer, the property of which is intended to pass to the lawyer at the date of dispatch,
- d. Documents sent by the client to the lawyer during the course of the retainer, the property of which is to remain with the client, and
- e. Documents prepared by a third party during the course of the retainer and sent to the lawyer.

Dealing with each of these categories in turn:

- a. Documents prepared by the lawyer for the benefit of the client.

This category includes traditional documents, were they in hard copy form, would belong to the client (such as wills, final contracts, leases and the like). However, in an electronic society, documents in this category can encompass documents which may not reflect their full utility in hard-copy form. They could also include notes and annotations made to transcripts in evidence managers such as Summation™ (although the transcripts themselves

fall into Category 1, arguably the lawyer's notes and annotations to those transcripts may fall into category 1 or 2), entries made in trial presentation software such as Trial Director™ or PowerPoint™, entries made in strategy tools such as CaseMap™ or all entries made in case management systems such as Amicus Attorney™ or Time Matters™. Moreover, the "document" in most cases would be created with software that has been licenced by the law firm and cannot be transferred to the client. The issue then becomes, given that you have electronic copies of these documents, what do you do with them?

First, to the fullest extent possible, all electronic copies of documents in this category should be removed from any computers or storage devices not in the possession or control of the lawyer. This would extend to data that was placed in an ASP (application service provider), extranet or internet multi-party workgroup setting.

Second, since a lawyer should preserve his/her file for a minimum time to protect against a malpractice claim or defend against a client complaint, electronic copies of all these records should be preserved. See the discussion in category #3 above concerning separating documents from the office network and their storage on media that can be later discarded or destroyed. I further suggest that these documents be placed on separate media from those in category #3 as their retention period may be different from those in category #3.

Third, this category may include work product that may be transformed into the firm's knowledge management system or precedent system. In this case, identifying characteristics (names, addresses etc) should be removed from the intended precedent. Following the purging of client information from the intended precedent, it should be stored as part of the firm's system in a manner that reflects its use as a precedent (trust will for husband and wife, first time marriage for both, two children both their own) and not identified with any identifying characteristics (as George Jones Will, for example).

- b. Documents prepared by the lawyer for his or her own benefit or protection.

Here the client has no claim of property over these records. This could include notes for trial, summaries of instructions or conversations, notes for submissions to court, inter-office memos (not

memos of law), computerized BF (bring forward or tickler) diary entries and notes made in electronic contact managers and case managers. .

The difficulty here is that in some cases any client's data can be clearly separated from other client's information (such as in Summation™ or CaseMap™) while in other cases it is part of the database built for the management of the firm (such as in Amicus Attorney™ or Time Matters™). Where the data can be clearly separated, then an appropriate manner for handling this would be to adopt the suggested method in Category #3 above, separate the data, burn it onto a CD-ROM or other storage media and store it away with a copy of the relevant software required to access the data. Again, consider if the data should be stored on a separate disk to allow for different storage periods. Where the information may not be separated, as in Amicus Attorney or Time Matters database, then the firm must adopt a policy of whether or not to preserve periodic backups of the database that would allow the database to be rebuilt as of a certain date. This is especially important where the database is purged of older files/information on a periodic basis. Then the decision must be made of the policy to be followed for the retention of these databases and the appropriate period that such data must be retained prior to destruction.

- c. Documents sent by the client to the lawyer during the course of the retainer, the property of which is intended to pass to the lawyer at the date of dispatch.

Where these documents existed only in hardcopy, preserving the same was not difficult as they could be stored in a sub-file and placed in storage. Presumably the client kept copies of these but in any event copies could be provided with relative ease. In an electronic world, these documents could include electronic instructions (as in email or attachments to email). Some email programs store all email in one large file and as such separating out particular email messages can be difficult. Consider creating a separate electronic client folder for each matter in your email client and adopting a policy for the transfer of all relevant client-oriented email to the appropriate client email folder. Until the software evolves to allow separation and storage of such electronic documents in the manner suggested in Category #3, the least costly and invasive method

may be to make hard copy printouts of such documents and store the hardcopy records with the paper file and purge the email from the system.

- d. Documents prepared by a third party during the course of the retainer and sent to the lawyer.

Documents in this category are the property of the client either because the client is expected to pay for them as a disbursement or they are paid for by a third party on behalf of the client. The client is entitled to receive these documents. Where the documents exist in electronic form, the client may elect to receive paper copies as they may not have the relevant software to access the data in its native form. However, this does not relieve the law firm from the need to preserve this data in the event of a claim against the firm either due to settler's remorse or a negligence claim. As such, a prudent method of handling may be to burn this data onto a CD-ROM as noted in category #3 above and preserve it along with a copy of the relevant software to allow such data to be recreated, should the need arise.

Conclusion:

Every firm has a cost to storage. The need to preserve data and files against the possibility that it may be needed in the future (such as in a wills or estates matter where the need to document instructions, testator capacity or to negate undue influence allegations) or in the defense of negligence allegations has to be determined against the rules in each jurisdiction on the preservation of client files and in light of relevant limitation dates. The growth in electronic communication, databases and electronic analysis tools places a new need on law firms to consider their data storage, retention and preservation policies. Lastly the continual change in electronic media, operating systems, hardware and software raise issues on the ability to recreate data at some indefinite time in the future even if such data has been stored in a vault and on media that limit the ravages of time. It is suggested that the policies and procedures put into place by a firm for the preservation of data be determined against such variables as the expected need for the data in the future, the difficulty in recreating the data from hardcopy (such as rebuilding a relational database), the compatibility of older software on newer hardware and current operating systems. A firm needs to consider their ability to defend themselves against claims and their ability to recreate the

necessary data and evidence that would be required in such a situation.

Storage Considerations:

Storage of electronic media raises questions as to the electronic document backup, storage and retrieval systems in place in the lawyer's office. This is very important where the rate of change in technology is so rapid that the storage media becomes obsolete prior to the passage of applicable limitation periods.

I have suggested that electronic documents be gathered together and burned onto a CD-ROM or CD-ROM's, distinguishing the documents by the appropriate disposal period. In addition, I suggest that you should also store a copy of all software and operating systems required to read the information. I have chosen CD-ROM's as they are very inexpensive and stable yet compact. These CD-ROM's should be stored off-site, in a secure and safe environment. Moreover, preserving a copy of the software required to access the information at least gives the lawyer the opportunity to be able to access the data at some time in the future. I do not advocate storage on networked office systems, as there is continual pressure to delete older files which may result in the unwitting deletion of data.

Consider your office network backups. Some networks maintain a method of generation of backups that extend only three generations back (grandfather, father and son). This implies that older files could be deleted and all backup copies quickly lost as the newer generation of backups rewrite older ones. Moreover, tape backups are not as robust as CD-ROM's. Since current computer

DVD drives are preserving the ability to read CD-ROM's – I suggest CD-ROM technology as the preferred storage media at the moment. However, this may change as technology changes. Firms are well advised to consider their storage choices and whether or not data and software needs to be periodically migrated to newer storage devices as technology evolves.

There are also computer hardware considerations. For example, the firm may consider preserving a working copy of current computer hardware (such as a Pentium II machine and its Windows 98™ operating system) in order to reduce the chances that a newer computer would not be able to run the relevant application software and/or operating system in order to retrieve the data.

Lastly, the firm should have a policy to periodically review all electronic records once all retention and limitation periods have expired and to destroy the storage media as the periods expire.

Bibliography:

1. *ABA Formal Opinion 92-369 (1992) and Informal Opinion 1384 (1977)*
2. *ABA Model Rules of Professional Conduct*
3. *Whose File is it Anyway? Who Owns Client File Documents when the Retainer Ends.*, J. Morris, F. Folk and J. Vamplew, Vol 52, Part 1, January 1994 *The Advocate* p. 97.