MANAGING THE MOUNTAIN OF PAPER: RECORDS MANAGEMENT IN THE LAW FIRM

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It has been said that science and technology information increases 13% each year and doubles every 5.5 years. My experience with law firms and their records has been that this may well be a conservative figure. Regardless, our information explosion leaves us to deal with practical issues of determining what records to keep, how to organize and store them once we've decided to keep them, and how to avoid the trouble we can get into if we make the wrong decisions.

Perhaps the thorniest issue faced by attorneys is what to do with client's files for matters that have been concluded and closed. Attorneys are looking for ways to minimize storage requirements, while at the same time protecting their client's confidential documents, and also preserving information which would assist them in the defense of a malpractice claim.

A records management policy enables the firm to properly dispose of client files, to determine what records must be retained to operate the firm, and how to organize them so that they can be easily retrieved when needed. Perhaps just as important, a records management policy will take into account statutory requirements, and also potential litigation.

Statutory requirements are established by government entities, and provide explicit guidelines for storing records. For example, since the IRS can audit tax records seven years back, all tax-related documents should be retained at least that long. As another example, The Fair Labor Standards Act (FLSA) requires that basic records relating to employee compensation be kept for three years.

All businesses, including law firms, hope to avoid litigation. But law firms know that wishing cannot replace proper preparation. Litigation-related considerations *must* be part of any records management policy. Consider that

Microsoft documents, including emails, suggested that the company violated anti-trust regulations. Consider that Wal-Mart suffered sanctions as large as $18 million for withholding and destroying documents in connection with various lawsuits.

Documents are destroyed during the normal course of business. Voicemails and files are erased. Emails are deleted. But if a court finds that documentary evidence was improperly destroyed, heavy sanctions can be imposed, and all of a party's claims or defenses can be denied. Evidence of having followed normal business practices within an overall records management policy can show good intent. And ensuring that certain records are deleted in the normal course of business according to a records management policy can provide peace of mind that certain types of company records will not ultimately be used against it.

The first step to establishing a records management policy is to carefully identify all types of records in the firm, such as client records, accounting records, employment records, benefit policy records, insurance records and so forth. Don't forget to include all electronic records including email, vmail, word processing documents, stored images, back-up tapes and so forth.

Carefully look at any statutory requirements first, to determine what *must* be preserved, and for how long. One might think that incorporating guidelines in your records management policy is easy where statutory compliance is concerned. In some cases it is. The Association of Records Managers (http://www.arma.org/index.cfm) provides a fair amount of information on retention requirements. An additional resource can be found in "*Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*" by Lee R. Nemchek (www.aallnet.org/products/2001_01.pdf).

But beware, because not all sources are reliable. A search on the internet for records retention guidelines set forth by accounting firms, for example, produced a wide variety of results. Therefore, your firm must be careful of the source(s) used to determine statutory requirements. In the case of a disparity, use the more conservative term of retention.

The cost of retaining files is significantly increasing not only in the metropolitan area but throughout the Commonwealth. The firm does not want to become a permanent repository for client files, nor face possible legal repercussions for haphazard destruction of files. For guidelines in this area see the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion 89-213 and 99-120. The American Bar Association has issued

guidelines for disposition of files in Informal Opinion 1384. Although it does not answer the question of specifically when an attorney may dispose of a file, it does provide guidelines to include in any file retention program. The Pennsylvania Bar Association's Committee set out some very general guidelines. They also suggest that attorneys apply common sense in determining retention periods, because it is not possible to simply establish a flat period of time after which all contents of all files should be destroyed. This is not reasonable, and above all else, a file retention policy must be reasonable.

A base period of seven years of file retention from the conclusion of a particular matter is adequate, with longer periods established for specific and narrowly-defined areas of practice. Individual exceptions should not be incorporated directly into a file retention policy except to include a statement that exceptions will occur only when the facts concerning the file are documented and reasonably warrant the exception, in which case the file will be retained longer than the specified period. Exceptions should never shorten the life cycle of the file.

They basically defined three broad categories of property to be considered.

Documents and other property which belong to, or would be of some intrinsic value to, the client and subject to Rule 1.15 (Safekeeping Property). This category would include such documents as original wills, original deeds, photographs, original birth certificates, business records, estate papers, title insurance policies and so forth. These documents need to be returned to the client. If a file is going to be placed into storage, the attorney should return category one items before storing the file, as it may not be possible to locate the client later to do so.

Of course, the better approach would be to find a way to avoid having any original documents in the file at all. To accomplish this, photocopy all original documents upon receipt and return the originals to the client as soon as possible thereafter. In this way, the attorney will have the necessary document for future reference without having to worry about the location, i.e., possible loss or permanent storage, of the original document.

With increasing use of technology and disk space becoming less expensive, the attorney may alternatively want to consider scanning an image of the document onto electronic media prior to returning the original to the client. The advantages of storing documents on electronic media include the ability to maintain a back-up off-site, the ability to access the documents remotely, and the need to occupy less physical space to keep the documents.

Documents or property which the client might expect to be returned. This category would include items such as the client's only copy of tax returns, pleadings, bank statements or other business records. These are documents which can usually be retrieved again from an agency or business, but at some effort and expense. Once again, it makes sense for the attorney to make a duplicate file copy or electronic copy of this category of documents upon receipt, and to return the original documents to the client as soon as possible thereafter.

Non-client documents or property which belong to the attorney or a third party. This category would include the attorney's draft of pleadings, attorney's notes, research memorandum, file copies of correspondence and generally documents which would be for the attorney's use in representing the client. The documents in this category are the documents which are most necessary when defending a malpractice claim. This property is recognized to be part of what the client has purchased when they retain legal counsel. Accordingly, this property does not need to be turned over to the client prior to destruction of the file, but must be turned over to the client upon request, under Rule 1.15(b).

More recently, we have some detailed guidance from the Advisory Committee on Professional Ethics of the New Jersey Supreme Court in its Opinion 692 of October 28, 2002. While the Pennsylvania Bar Association's Committee set out some very general guidelines, I think the New Jersey Advisory Committee's Opinion took the next step. While the New Jersey Opinion is certainly not binding, it nonetheless is a very well considered Opinion that most certainly delineates the specific additional categories and details, in effect supplementing the guidelines as set forth in the Pennsylvania Opinion, and certainly is authoritative for guidance.

Most notably, it goes on in detail to first define "property of the client." Most particularly helpful is the reference to what is not normally and generally to be considered "property of the client." I am referring specifically to that portion of the New Jersey Opinion that concluded "...in most cases, including those involving personal injury or malpractice claims, medical records, x-rays, expert reports, deposition transcripts, and Answers to Interrogatories do not constitute property of the client." The Opinion goes on to point out, though, that such materials could, under certain circumstances, fall within the definition of property depending on the nature of the matter and the representation itself, where it is foreseeable that the former client will need such documents in the future to protect an interest or defend a claim. They also go on to point out that anything of an inherent value "...such as bonds, stocks, jewelry..." is property of the client and cannot be disposed of even at the end of the retention period. It points out that even after reasonable effort to

reach the former client with regard to such property its disposition can only be accomplished through the appropriate unclaimed property act within the jurisdiction.

Next, there is a very good discussion in the Opinion regarding "agreements to destroy client property" specifically referring to the necessity or desirability to have a separate agreement concerning destruction if it is to occur in a period of less than that which was the standard of seven years, or set forth in the retainer agreement, or firm policy.

The delineation and discussion in the Opinion regarding criminal files, minor's personal injury files, and requirements of retention, by operation of state and federal laws and regulations, are very helpful.

Who has the responsibility for retention and maintenance? Is it the firm or the individual attorney who has been retained? In the case of a solo practitioner, who has responsibility for retention and maintenance, for how long, and subsequent to the death or retirement of the solo practitioner, what are the guidelines?

Again, the Opinion is a must read for anyone either contemplating the establishment of or a review of any existing policy, and emphasizes again the absolute need and desirability of including, either in the retainer agreement or as a supplement to the retainer agreement, the necessity to notify the client of the policy in detail, at the beginning of the professional association.

Keep in mind that no matter how the property is defined or what method is used to return/dispose of it, attorneys are still subject to Rule 1.6 (Confidentiality of Information) requiring the attorney to protect the client's confidentiality. That means that contents of client files must be handled in a manner which will preserve confidentiality; by fire or shredding.

Once all of the firm's information is categorized and retention guidelines are established, attention must be turned to several final items. First and foremost, is the organization and retrieval of retained information.

It does you no good to retain information if you cannot quickly and easily retrieve it when needed. What system do you have in place for your stored information? If you depend on electronic storage for the bulk of past information, has your software platform changed to the extent that retrieving that information will be difficult or impossible? Should you consider a document management package such as Worldox (www.worldox.com) or I-Manage (www.netright.com)? Should you establish file organization conventions to be consistently followed throughout

the firm, rather than have everyone do "their own thing?" Should you consider a records management package which barcodes files, and can track storage locations of the files and easily facilitate retrieval?

Next is accountability and communication. Who is in charge of implementing the policy, and seeing that it is carried out consistently? Who maintains the index of client files destroyed, including how and when? Who makes sure that records which were to have been deleted are not lingering on the hard drives of workers in remote locations? Who makes sure that everyone in your firm "gets the message" and follows the policy?

A well thought out records management policy is crucial to assist the firm to efficiently organize and locate its information, keep the cost of information storage to a minimum, meet its ethical obligations to its clients, and avoid legal problems and sanctions. So it may sound strange, but the right time to think about the destruction of a client's file is before you create the file or begin work for the client. And the right time to notify the client as to your policy of disposition of client files is upon engagement, and within the engagement agreement.

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