

FILE RETENTION AND DESTRUCTION

Most client files (whether paper or electronic) should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years;¹
2. Estate plans for a client who is still alive 10 years after the work is performed;
3. Contracts or other agreements that are still being paid off at the end of 10 years;
4. Cases in which a judgment should be renewed;
5. Files establishing a tax basis in property;
6. Criminal law – keep for two years after the client is released or exonerated ²
7. Support and custody files in which the children are minors or the support obligation continues;
8. Corporate books and records;
9. Adoption files;
10. Intellectual property files; and
11. Files of problem clients.

Whenever possible, do not keep original papers (including estate plans or wills) of clients. If you keep original wills, 40 years must elapse before the will can be disposed of. ORS 112.815 provides: “An attorney who has custody of a will may dispose of the will in accordance with ORS 112.820 if: (1) The attorney is licensed to practice law in the state of Oregon; (2) At least 40 years has elapsed since execution of the will; (3) The attorney does not know and after diligent inquiry cannot ascertain the address of the testator; and (4) The will is not subject to a contract to make a will or devise or not to revoke a will or devise.”

When closing your file, return original documents to clients or transfer them to their new attorneys. Be sure to get a receipt for the property and keep the receipt in your paper or electronic file.

The first step in the file retention process begins ***when you are retained by the client***. Your ***fee agreement*** should notify the client that you will be destroying the file and should specify when that will occur. The client’s signature on the fee agreement will provide consent to destroy the file. In addition, your ***engagement letter*** should remind clients that you will be destroying the file after certain conditions are met.

The second step in the file retention process is ***when the file is closed***. When closing the file, establish a destruction date and calendar that date. If you have not already obtained the client’s permission to destroy the file (in the fee agreement and engagement letter), you can get written permission when you close the file or you can make sure that the client has a complete copy of the file. This includes all pleadings, correspondence, and other papers and documents necessary for the client to construct a file for personal use. If you choose the latter alternative, be sure to document that the client has a complete file. This means that the paper or electronic file you have in your office is *yours* (and can be destroyed without permission) and the file the client has is the *client’s* copy. File

closing is also a good time to advise clients of your firm's policy on retrieving and providing file material once a matter is closed.

The final step in the file retention process involves reviewing the firm's electronic records for client-related material. Electronic data may reside on network servers, Web servers, Extranets, Intranets, the Internet, local hard drives of firm PCs, laptops, home computers, zip drives, disks, portable memory sticks and flash drives, mobile devices, or other media. Examples include e-mail communications, instant messages, electronic faxes, digitized evidence, word processing, or other documents generated during the course of the case. Review these sources to ensure that the client file is complete. If these documents exist only in electronic form, you may choose to store them electronically or print them out and place them in the appropriate location in the client's file.

Paperless practitioners should take note of statutes or rules that require retention of **original paper documents**. Examples include:

- Settlement Agreements on behalf of Minors – “The attorney representing the person entering into the settlement agreement on behalf of the minor, if any, shall maintain the affidavit or verified statement completed under subsection (1)(d) of this section in the attorney's file for two years after the minor attains the age of 21 years.” ORS 126.725(2). See footnote 1 below.
- U.S. Bankruptcy Court documents – “An electronically filed document described in FRBP 1008 [petitions, lists, schedules, statements, or amendments] or a properly completed, signed, and filed LBF #5005 [electronic filing declaration] with respect to the document and a scanned electronic replica of the signed document must be maintained by the filing ECF Participant or the firm representing the party on whose behalf the document was filed in its original paper form until the later of the closing of the case or the fifth anniversary of the filing of the document, except as otherwise provided for trustees by the U.S. Department of Justice. The filing ECF Participant or firm retaining the original document or LBF #5005 and scanned electronic replica of the document must produce it for review upon receipt of a written request.” Oregon LBR 5005-4(e) - Retention of Original Document.
- Oregon eCourt documents – “Retention of Documents by Filers: (1) Unless the court orders otherwise, if a filer electronically files an image of a document that contains the original signature of a person other than the filer, the filer must retain the document in its original paper form for 30 days.” UTCR 21.120 amended September 29, 2014 pursuant to Chief Justice Order 14-049. “Filer means a person registered with the electronic filing system who submits a document for filing with the court.” UTCR 21.010(6).

This is not an exhaustive list. Conduct your own appropriate legal research to identify other instances where original paper documents must (or should) be retained. One example of a document that should be retained is the original signed fee agreement, particularly when your fee is in dispute or the client has an outstanding balance at the time of file closing.

If you possess electronic data containing “consumer personal information” within the meaning of the Oregon Consumer Identity Theft Protection Act (ORS 646A.600 to 646A.628) you are required to develop, implement, and maintain safeguards to protect the security and disposal of the data. Failure to do so can result in civil penalties. For more information, See “2007 Legislation Alerts - Business Law/Consumer Protection (Identity Theft),” *In Brief* (November 2007) and Kimi Nam, “Protect Client Information from Identity Theft,” *In Brief* (August 2008), available on PLF website, www.osbplf.org.

If you possess personal health information of clients or others within the meaning of the Health Insurance Portability and Accountability Act (HIPAA), you are obligated to conduct a risk analysis and take proper steps to secure your records. Failure to do so can result in civil penalties. For more information, See Kelly T. Hagan, “Business Associate, Esq.: HIPAA’s New Normal,” In *Brief* (September 2013), available on the PLF website, www.osbplf.org.

The retention policy for electronic data should be consistent with the retention policy for paper files. Regardless of how files are retained, the PLF recommends that all client files be kept a minimum of 10 years. If you intend to scan client files and dispose of the original documents, review the PLF practice aid, “A Checklist for Imaging Files and Disposing of Original Documents,” available on the PLF website, www.osbplf.org.

Organization and Destruction of Closed Files

Closed paper files should be organized by years or organized into two groups: files that are 10 years and older and files that are less than 10 years old. If possible, however, separate closed client files into groups according to the year the work was completed so that each year you know which files to review for destruction. Electronically retained files should be organized in a similar fashion, or identified in a manner that allows you to determine easily when the file was closed. If you possess files that must be retained on a permanent or long-term basis, clearly mark the file and the file box to prevent inadvertent destruction.

Keep a permanent inventory of files you destroy and the destruction dates. Before destroying any client file, review it carefully. Some files need to be kept longer than 10 years, as noted above. Others may contain conflict information that needs to be added to your conflict database or original documents of the client, which should never be destroyed. Always retain proof of the client’s consent to destroy the file. This is easily done by including the client’s consent in your fee agreement or engagement letter and retaining the letters with your inventory of destroyed files. Follow the same guidelines when evaluating whether to destroy electronic records. For additional guidance on closing client files, See the PLF practice aid “File Closing Checklist,” available on the PLF Web site, www.osbplf.org, and at the end of this chapter.

Since June 1, 2005, the Fair and Accurate Credit Transaction Act (FACTA) Disposal Rule (the Rule or FACTA) requires any person who maintains or possesses “consumer information” for a business purpose to properly dispose of such information by taking “reasonable measures” to protect against unauthorized access to or use of the information in connection with its disposal. The Rule defines “consumer information” as any information about an individual that is in or derived from a consumer report. Although the Rule doesn’t specifically refer to lawyers, it may be interpreted to apply to lawyers, and the practices specified in the Rule would safeguard clients’ confidential information.

“Reasonable measures” for disposal under the Rule are (1) burning, pulverizing, or shredding physical documents; (2) erasing or physically destroying electronic media; and (3) entering into a contract with a document disposal service. See OSB Formal Ethics Opinion No. 2005-141. Permanent destruction of electronic data requires special expertise.³

When choosing a document disposal service, select a company certified by the National Association for Information Destruction (NAID). NAID members securely destroy materials in compliance with FACTA, HIPAA, and the Gramm-Leach-Bliley Acts. Casually discarded information is a risk and a liability.

¹ ORS 126.725(2) requires that the attorney representing a minor’s legal guardian in a tort claim keep the Affidavit of Custodian for two years after the minor reaches the age of 21. Retaining the Affidavit of Custodian is mandatory. You may wish to keep your entire file. See Brooks F. Cooper, “Settlements for Minors – 2009 Legislative Changes,” *In Brief* (November 2010). There may be other instances where it is advisable to keep files involving a minor who is still a minor at the end of 10 years. Examples include ongoing conservatorships or guardianships and family law matters involving custody of a minor who is still a minor at the end of 10 years.

² In criminal law cases, an action for legal malpractice may not accrue, for statute of limitation purposes, until the date on which the client is exonerated through reversal on direct appeal, through post-conviction relief proceedings, or otherwise. See *Stevens v. Bispham*, 316 Or 221 (1993), *Abbott v. DeKalb*, 346 Or 306 (2009), and *Drollinger v. Mallon et al.*, SC S0588839 (2011).

³ With proper technique, deleted documents can be retrieved and restored. Consult with an information technology expert to determine what steps must be taken to ensure that client documents have been *completely* purged from your system, including backups, if applicable. For recommendations on how to store data for long-term archival needs, contact the Association for Records Management Professionals at <http://www.arma.org>.

IMPORTANT NOTICES

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