

Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*

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Private law librarians are increasingly being drawn into the parallel universe of records management in their firms and corporate law departments, either as the department's manager or as a researcher in support of the organization's records retention policy development efforts for itself or for its clients. Ms. Nemchek provides a reference foundation for librarians seeking to understand records retention in the private legal environment.

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Introduction

¶1 In a recent special report on the evolving role of law librarians, one large law firm's head librarian advises his colleagues to extend their job knowledge beyond the doors of their libraries: "The more you know about the records department, the MIS department, and the specialized areas of law that your attorneys practice, the more nimbly you will be able to deal with problems that may, at first glance, be outside your field."¹ Although the majority of law library staff members do not have responsibilities outside the library, one-third of all private law librarians who responded to AALL's 1999 biennial salary survey do have such outside responsibilities.² Furthermore, more private law librarians have responsibility for records management and related activities (e.g., conflicts management) than for any other administrative area.³ Every year, many law firm librarians are asked by their administrators to take over the records management department, and the majority of these library professionals know very little about their new area of responsibility.

¶2 Private law librarians become involved in records management activities in ways other than as the department's manager. First, even in law firms that employ records management professionals, librarians often function as the primary researchers when firms decide to develop their own records retention pro-

1. Sid Kaskey, *Are Your Skills Growing?* LEGAL TIMES, July 17, 2000, at 35.

2. AM. ASS'N OF LAW LIBRARIES, AALL 1999 SALARY SURVEY, PART II: SUPPLEMENTARY FINDINGS (online ed.), at http://aallhq.org/members/pub_salary99.asp#Supplementary (information derived from tables 15–17: Other Responsibilities Assumed by Law Librarians).

3. *Id.*

grams. Second, the intense focus on discovery of electronic records in recent years has created the need for a relatively new area of advice provided by law firms to their corporate clients. Librarians who are not researching records retention to benefit their own firms may nevertheless be carrying out the same activities on behalf of the firm's clients. Thus, there are many different reasons why private law librarians may require comprehensive and current reference information in the area of records retention and destruction.

¶13 This article provides a reference foundation for librarians seeking to understand the complex area of records retention in the private legal environment. There are four major sections, each with its own introduction: (1) an annotated bibliography focusing on materials published from the early 1990s to the present; (2) an annotated listing of recent state and local ethics opinions pertaining to records retention; (3) sample records retention policies representing both client and administrative records; and (4) retention program implementation exemplars. The bibliography and ethics opinions listings are current as of October 1, 2000.

Bibliography

¶14 In the literature of professional records management, there are only two treatises that focus entirely on records management in the legal environment.⁴ The first, *Guide to the Management of Legal Records*,⁵ was a groundbreaking publication that covered the breadth of topics inherent in its subject. Unfortunately, however, none of these topics was covered in much depth, and the book was written before the development of automated records management systems for legal records.

¶15 The second title, *A Report on Issues Surrounding Retention of Client Files in Law Firms*,⁶ was also groundbreaking in that it focused specifically on one of the most problematic issues in legal records management. It incorporated the totality of information that was available on the subject at the time of its publication in 1993. The report includes a two-part unannotated bibliography containing sixty-two entries, the most recent of which is dated February 1993.

¶16 Six years after publication of the report, the Columbia, South Carolina, chapter of the Association of Records Managers and Administrators (ARMA)

4. There is, however, excellent coverage of some records management issues in the literature of law office management. See, e.g., MARY ANN ALTMAN & ROBERT I. WEIL, *HOW TO MANAGE YOUR LAW OFFICE* §§ 10.02–10.19 (1973–2000); KAREN D. KADUSHIN, *CALIFORNIA PRACTICE GUIDE: LAW PRACTICE MANAGEMENT* 19–1 to 19–55 (1992–1999).

5. BARBARA E. CORRIGAN ET AL., *GUIDE TO THE MANAGEMENT OF LEGAL RECORDS* (1987). This 103-page book, published by the Association of Records Managers and Administrators, is now out of print. A new work that greatly expands coverage of the earlier book and updates it for the electronic age is currently in preparation. JEAN BARR, BETH CHIAIESE & LEE R. NEMCHEK, *RECORDS MANAGEMENT IN THE LEGAL ENVIRONMENT: A HANDBOOK OF PRACTICE AND PROCEDURE* (forthcoming 2001).

6. HELEN ANDREWS ET AL., *A REPORT ON ISSUES SURROUNDING RETENTION OF CLIENT FILES IN LAW FIRMS* (1993). See *infra* entry no. 6.

published a sixteen-page monograph entitled *Client Records: Guide to Law Firm Record Retention*.⁷ *Client Records* went one step further by exhaustively researching the available literature and developing a records retention policy and schedules that could be adopted with confidence by lawyers practicing in South Carolina. The publication contains an unannotated bibliography with seventeen entries, including the *Report on Issues Surrounding Retention of Client Files in Law Firms* and one source cited by that report. The majority of the other fifteen entries were published after the report was published (late 1993 through 1998).

¶17 In selecting entries to be included in this annotated bibliography, the primary goal was to capture English-language monographs, periodical articles, services, serial publications, and other sources focusing specifically on the subject of legal records retention in the United States and Canada that are *not included* in either of the three publications just described. Forty-one of the fifty-seven entries in the bibliography fall into this category. Furthermore, all but four entries were published in 1990 or later.⁸

¶18 Excluding the *Report on Issues* and *Client Records*, the remaining fourteen entries are cited by at least one of the earlier works. They have been included, nonetheless, because of the significance of their content. For example, they may include sample language for a client engagement letter, a fee agreement, or a retention policy; suggested retention schedules; specific periods for retention; or survey information. In all cases, the selected references make a significant contribution to the literature of legal records management.

¶19 The entries in the bibliography are uniquely enumerated throughout eight topical sections to help with cross-referencing and the author index. In each section, items are listed alphabetically by author and title, unless otherwise indicated. In those cases where an author has written more than one article, the accompanying annotation covers all articles written by that author in the section.

Client File Ownership

¶10 A lawyer's obligation to maintain client records has its foundation in rule 1.15 of the *ABA Model Rules of Professional Conduct*, which states in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . . [P]roperty shall be identified as such and appropriately safeguarded. Complete records of such . . . property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

7. BARBARA EMBICK ET AL., *CLIENT RECORDS: GUIDE TO LAW FIRM RECORD RETENTION* (1999). See *infra* entry no. 35.

8. Although I believe that I have been successful in identifying publications that meet my selection criteria, it is possible that sources have been missed. Because this bibliography will be continued forward past the publication date of this article, I invite readers to call to my attention any overlooked relevant work. Information can be sent to me by e-mail at lnemchek@mofo.com.

(b) [A] lawyer shall promptly deliver to the client any . . . property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property.⁹

¶11 The word “property” is used six times in the quoted language, yet nowhere in the *Model Rules* is it specifically defined. As a consequence, much of the complexity inherent in the area of law firm records retention turns on questions relating to file ownership. For instance, what types of file material fall into the category of client property and, as such, must be maintained and protected as prescribed by ethics rules? Whereas the issue is nonexistent in corporate legal departments, file ownership is the starting point for all records retention research and decision making in law firms. Thus, this bibliography begins by presenting sources that analyze the legal and ethical implications surrounding this controversial concept.

1. Allen, John W., “Focus on Professional Responsibility—Ownership of Lawyer’s Files About Client Representations; Who Gets the ‘Original’? Who Pays for the Copies?” *Michigan Bar Journal* 79 (2000): 1062–65.

Allen is currently chairman of the Standing Committee on Professional and Judicial Ethics of the State Bar of Michigan. His article provides a detailed analysis of newly issued Formal Ethics Opinion R-19 (August 4, 2000), which advises on a client’s right to request copies of file materials and whether the lawyer can charge reasonable costs for such copies. A sample engagement provision regarding client files is included. Although not covered by the formal opinion, Allen takes the position that document retention/destruction policies required under Formal Opinions R-5 and R-12 “pertain only to client property [documents owned by the client], or to documents for which a client would likely demonstrate a need.” If the contents of the lawyer’s file do not fall into either of these two categories, paper copies may be destroyed in favor of microfilm or electronic media without client consent, because such alternatives reasonably protect the client’s interests. Because R-19 is very new and contains advice that in some respects contradicts previous Michigan ethics opinions on the same subject, Michigan practitioners should carefully read both this article and the full text of R-19.¹⁰

2. Clifford, Robert A., “Who Owns Notes and Reports?” *Chicago Lawyer* (August 1998): 8.

This article analyzes Illinois State Bar Association Opinion 94-13.¹¹ The question of whether clients “own” and are entitled to receive copies of attorneys’ notes and other internal writings comes up frequently in states’ ethics opinions. Illinois follows the “work product” or “end product” model of file ownership, i.e., the client does not own lawyers’ notes and internal writings.¹² This article discusses *Sage*

9. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.15 (1983).

10. *See infra* ¶ 41.

11. *See infra* ¶ 30.

12. Other states have adopted the “entire file” model (all file material belongs to the client); still others take the exact opposite position, i.e., the entire file, except for client-owned property, belongs to the lawyer.

Realty Corp. v. Proskauer Rose Goetz & Mendelsohn,¹³ a celebrated case that turns on the issue of the ownership of notes and internal memoranda.

3. Segers, Timothy J., "Control of Client Files When Fees are Unpaid," *Journal of the Legal Profession* 18 (1993): 357–63.
This short article focuses on the ethical considerations involved in asserting retaining liens on client files, including limitations to effective assertion.
4. Skupsky, Donald S., "Who Owns the File—The Attorney or the Client?" *Law Office Administrator* 7 (August 1998): 6–7.
Donald Skupsky is arguably the preeminent authority on records retention in the records management profession today. His company, Information Requirements Clearinghouse, provides consulting services to business enterprises of all kinds, including law firms. Whether or not you agree with his positions, which are sometimes controversial, it is recommended that you stay informed about what he has to say. This brief newsletter article takes the minority position on the issue of file ownership. In responding to a question submitted by a legal administrator in Florida, Skupsky follows Florida's ethics guidance,¹⁴ which advises that the materials in client files belong to attorneys, not to the clients. It is not clear what Skupsky would have advised had the question originated from a lawyer in another state. In general, his approach seems extreme in many respects and not conservative enough for most law firms to follow (see also entry nos. 13, 14, and 41).
5. Slovut, Brian J., "Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File," *Minnesota Law Review* 76 (1992): 1483–1512.
The definitive law review treatment on the issue of file ownership, it covers all the bases and contributes significantly to the literature in this area. Many subsequent writings on file ownership model their recommendations on those of Slovut.

Retention of Client Files—General

6. Andrews, Helen, et al., *A Report on Issues Surrounding Retention of Client Files in Law Firms*. Prairie Village, Kan.: ARMA International, 1993. 94p.
If you had time to read only one publication before producing a plan of attack for your law firm to use in developing a records retention program, this book would be the one. It is the starting point for all legal records retention research. Written by members of the Records Retention Subcommittee of ARMA's Legal Services Industry Action Committee, it incorporates survey information, plus a review of all of the important literature and ethics opinions available at the time of its publication. The cutoff date for inclusion of ethics opinions varies by state, with the earliest sometime during 1991 and the latest during the first quarter of 1993. In addition, the book provides practical guidance on (1) how to develop a retention policy in a law firm, (2) what elements to include in such a policy, and (3) what to expect when attempting to implement the policy. Particularly useful are three charts: (a)

13. 689 N.E.2d 879 (N.Y. 1997). See also Dean Starkman, *New York Dispute Raises Issue of Clients' Right to Lawyers' Files*, WALL ST. J., Feb. 17, 1998, at B18.

14. See *infra* ¶ 29.

state/local citations to American Bar Association documents, (b) common points of agreement across state lines, and (c) states citing other states' ethics opinions. This publication is a must-purchase for records administrators in all states.¹⁵

7. Barr, Jean, "How to Write a Records Policy in Only Four Pages," *Law Office Administrator* 7 (February 1998): 4–5.

This brief newsletter treatment is aimed primarily at administrators of small law firms that do not employ professional records management staff.

8. Dimitriou, Demetrios, "Client Files: To Destroy or Not to Destroy? That Shouldn't Be the Question," *Wisconsin Bar Bulletin* 54 (July 1981): 22–24.

9. Dimitriou, Demetrios, "File Retention Schedules," *Law Practice Management* 16 (January/February 1990): 24–27.

Surprisingly, the author's first, twenty-year old article is still relevant. Among other noteworthy features, it includes a sample retention schedule for practice area file types, including contract actions, bankruptcy claims and filings, marital dissolution files, probate and estate files, plaintiff and defendant tort claim actions, real estate transactions, and lease documents. Almost ten years later, Dimitriou, a San Francisco solo practitioner, was still writing about client file retention. The second article restates much of the content of the first in a slightly expanded form and without the file type retention chart. The general prescriptions contained in these two articles are probably too radical to satisfy the comfort level of most large, general practice law firms. For example, one of the author's premises is that the lawyer's client file—both in its active and inactive states—should be weeded of records that (1) are duplicated in public records (e.g., court documents), (2) have already been provided to the client, and (3) are not needed because the actions they pertain to have passed or otherwise been taken care of (e.g., letters requesting signatures, notifying parties of meeting times and places, etc.). However, this approach to client file retention may work for small firms and solo practitioners, subject to applicable bar rules and ethics opinions of individual states.

10. Freedman, Ellen, "The Records Management Solution of a Mid-Size Law Firm," *Law Office Economics & Management* 34 (1993): 247–60.

This case study-type article was written by the legal administrator of a small firm. The author worked in firms that were not automated and had no records management professional handling basic operations and following best practices. This article is mildly interesting to the extent that it illustrates the various actions that a firm must take in effecting a complete records management overhaul, including implementing records retention/destruction tracking. The information related to automating the firm is now largely out of date.

11. Georgiadis, Paul D., "Client File Retention: Albatross or Shield?" *Law Office Hornbook Report* 2 (Summer 1997), at http://www.hornbook.com/HB_summer97/summer97_files.html.

This article, in an expanded form, is posted on the Web site of the *Law Office Hornbook*, a malpractice avoidance/risk management resource for lawyers and law

15. For an update for the state of South Carolina, see EMBICK ET AL., *supra* note 7.

firm administrators. The site is a collaborative effort of the state bars of Virginia, Hawaii, Arizona, and New Mexico.¹⁶ It includes a table of statute of limitations and suggested retention period dates for Arizona, New Mexico, Tennessee, and Virginia.

12. Montaña, John C., "Ethical Considerations in the Retention of Law Firm Client Files," *The ISG Update* 1 (June 1999): 5–7.

John Montaña is one of the most prominent authorities on records retention in the United States, second only to his former employer, Donald Skupsky (see entry nos. 4, 13, 14, and 41). This detailed newsletter article analyzes selected ethics rules, ethics opinions, and ABA professional responsibility guidance, and is particularly useful for the beginner seeking general guidance because it is written in clear, easily understandable language (no legalese).

13. Skupsky, Donald S., "Records Retention Programs for Law Firms," *Trial* 32 (January 1996): 52–55.

14. Skupsky, Donald S., "Records Retention Requirements for Law Firms and Legal Departments," *Records Management Quarterly* 25 (April 1991): 34.

Both of these articles present one of Skupsky's most controversial pronouncements: "Do not permit attorneys to review files before destruction." This approach may work in the corporate environment, but it is rarely implemented in law firms. Entry no. 14 effectively contrasts law firm records practices with similar practices in corporate legal departments.

15. Smith, Caryl Masyr, "How to Create a Records Retention Policy," *Law Technology News* 6 (August 1999): 34, 38.

This brief trade newspaper treatment focuses on the document management and automated records management system aspects of implementing a records retention program.

16. Smith, Gary J., and David D. Cooke, "Forgotten Documents Can Be Treasure or Time Bomb: Client Documents in Law Firm Files," *U.S. Business Litigation* 1 (December 1996): 8.

This article addresses the critical but almost entirely neglected issue of returning originals and copies of clients' corporate records to clients. Most law firms have no mechanism for coordinating the implementation of their retention policies with those of their corporate clients. As a result, in a worse case scenario, a firm may be compelled to produce copies of damaging documents contained in its files that its client has legally destroyed years before, pursuant to its records retention policy. This article discusses the categories of law firm documents that are protected by the attorney-client privilege and the work-product doctrine. Those document types not so protected cannot be shielded from discovery. The authors advise legal records managers to manage their clients' corporate documents in accordance with the clients' retention policies as well as those of the law firm.

16. *Law Office Hornbook*, at <http://www.hornbook.com/> (last visited Nov. 17, 2000)

Retention of Client Files—State Specific

¶12 Sources in this section are arranged alphabetically, first by state and then by author and title. In some cases, annotations are provided for each state's sources as a group, as opposed to each individual listing. Only sixteen states are represented, but many of these sources include citations to other states' cases, ethics opinions, and rules of professional conduct. Therefore, those conducting research in the area of legal records retention are advised to review all of the sources listed.

17. Dodge, David D., "Retention of Client Files Involves Ethical Considerations," *Arizona Attorney* 36 (July 2000): 17. **[Arizona]**
18. Dodge, David D., "Termination of Lawyer/Client Relationship," *Arizona Attorney* 35 (June 1999): 18. **[Arizona]**
19. Fishkin, Jerome, "File Retention Considerations," *San Francisco Attorney* 24 (June/July 1999): 11–12. **[California]**
20. Karpman, Diane, "The Files Belong to the Client," *California Bar Journal* (December 1997), at <http://www.calbar.org/2cbj/97dec/97dec-04.htm>. **[California]**
21. Phillips, Pamela, and Merri A. Baldwin, "Client Files: Handle with Care," *California Lawyer* 18 (May 1998): 66–68. **[California]**

California is well represented in the literature of legal records retention; the three articles listed include discussions of all of the important issues. Karpman's article contains no significant information. Fishman's article follows the format and content of the San Francisco Bar's Ethics Committee Opinion 1996-1,¹⁷ including eight hypotheticals. In addition, Fishman provides a section entitled "What Can't Be Given to the Client," which includes conflict of interest information, certain police reports, and documents subject to confidentiality stipulations and protective orders in this category. The final article, by Phillips and Baldwin, is the most substantial. It includes a sample fee agreement provision on file retention and recommends adopting a document retention policy. Of great interest in this article is a discussion of a failed 1996 proposal by the Bar Association of San Francisco to the California State Bar Conference of Delegates in which the bar association proposed a resolution to adopt a new state rule of professional conduct addressing client file retention.¹⁸ The article describes the content of the proposal and the opposition launched against it. Although the proposal was not adopted, the dele-

17. See *infra* ¶ 25.

18. The authors of entry no. 36 *infra* called for similar action in Texas two years earlier.

gates passed a substitute resolution requesting a formal state bar opinion on client file retention.¹⁹

22. Montaña, John C., "Retention and Destruction of Client Files in a Law Firm," *Colorado Lawyer* 25 (April 1996): 47–50. **[Colorado]**

This is an important article by one of records management's leading authorities. Although written for Colorado practitioners, the article also analyzes opinions from several other states.

23. Truhlar, Doris B., and Joseph N. de Raismes, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files," *Colorado Lawyer* 16 (1987): 1787–94. **[Colorado]**

Though older than most of the others included in this bibliography, this article is noteworthy because it reports on the results of a survey conducted by the Colorado Bar Association Ethics Committee. The responses received represented the records retention practices of approximately 1,000 individual lawyers. The survey was not scientific or even systematic; it was designed to uncover current practices. The article reproduces the questionnaire in an appendix, discusses the responses to each question, presents some of the findings in graph form, and includes both a sample fee agreement provision and a sample "Authorization and Release" document, which deals with storage and alternate disposition of client files.

24. Wirth, Richard J., "The Archives Retention Quandary," *Connecticut Lawyer* 3 (February 1993): 6–8, 22. **[Connecticut]**

This heavily footnoted bar journal treatment reiterates the provisions of ABA Model Rule 1.15(a) and ABA Informal Ethics Opinion 1384 (1977).²⁰ The Connecticut Bar Association's Law Office Management Committee adopted a file destruction policy on December 21, 1983, and its Board of Governors adopted the policy for voluntary use by bar members on February 21, 1984. The policy is reprinted in the article, along with a note stating that the policy guidelines "are substantially the same as those proposed by Demetrious Dimitriou" (see entry nos. 8 and 9). Wirth provides recommendations for handling attorney work product, drafts, and executed documents prior to storage or destruction. In addition, he raises (but does not discuss) some interesting issues that are not treated elsewhere, notably: (1) how should inactive file transfers to outside attorneys be handled? and (2) should attorneys require clients to sign and deliver release/receipt authorizations when files are returned to them?

19. Proposed California State Bar Formal Opinion Interim No. 97-0003 is currently being redrafted for public comment. See *infra* ¶ 21.

20. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1384 (1977) (discussing disposition of a lawyer's closed or dormant files relating to representation of or services to clients) [hereinafter ABA Informal Op. 1384]. The provisions of this frequently cited opinion are summarized in ANDREWS ET AL., *supra* note 6, at 62. Characteristically, this opinion does not provide specific retention periods; rather, it adopts a general approach that is geared primarily toward protecting the interests of the client.

25. Phelps, J. R., and Terri Olson, "When May I Destroy My Old Files?" *Florida Bar Journal* 68 (January 1994): 58–63. **[Florida]**
This is an excellent bar journal treatment which, in addition to all of the standard elements characterizing such articles, provides a model file retention policy that includes guidelines for (a) culling files, (b) carrying out file destruction, and (c) policy implementation. In addition, the article includes a unique element: a list of actions that constitute "completion of the matter" in eight different types of matters. For example, in a probate/estate administration matter, the matter can be considered closed upon acceptance of the final accounting.
26. Thar, Anne E, "How Long Should You Retain Client Files?" *Illinois Bar Journal* 83 (1995): 649–50. **[Illinois]**
This article typifies the short pieces that frequently appear in state bar journals as ethics or malpractice-related features, although this one has a bit more meat to it than most in that it recommends specific retention periods for certain types of files, discusses notice requirements, and includes a discussion of file closing procedures. This author recommends that, in general, "attorneys should retain closed files for at least 10 years," with exceptions for estate planning files, matters involving minors and disabled individuals, certain types of contract matters, and others.
27. Kerr, David J., "Creating a Record Retention Policy," *Michigan Bar Journal* 69 (1990): 684–87. **[Michigan]**
Michigan is the first state on record to mandate the development and implementation of records retention policies for all solo practitioners and law firms in the state.²¹ According to this article, "[f]ailure to have such a policy is a violation of ethics, . . . and subjects the attorney to discipline." This article examines the requirements of Formal Opinion R-5 and provides guidance to Michigan practitioners who must comply with them, as well as a "suggested" law firm records retention policy that satisfies all of these requirements.
28. Frans, Myron L., and Christopher J. Kopka, "Records Management and Retention Policies for Law Firms," *Bench & Bar of Minnesota* 54 (April 1998): 28–34. **[Minnesota]**
This well-written article examines the issue of file ownership and offers practical advice on designing and implementing a law firm records management and retention policy. It thoroughly analyzes applicable ethics rules and opinions, court decisions, ABA pronouncements, and the *Restatement of Law Governing Lawyers*; it also includes sample retainer agreement language and extensive footnotes.
29. Martin, Robert W., "How Long Do I Have to Keep Those Client Files Anyway?" *Montana Lawyer* 21 (September 1995): 5–7. **[Montana]**
Martin, assistant risk manager for the Attorneys Liability Protection Society, suggests that seven to ten years is a reasonable response to the question posed by the article's title, although with many caveats. He reviews a handful of state ethics opinions and pays particular attention to ABA Informal Ethics Opinion 1384.²²

21. Mich. Bar Ass'n Ethics Comm., Formal Op. R-5 (1989). This opinion is annotated in ANDREWS ET AL., *supra* note 6, at 72.

22. ABA Informal Op. 1384, *supra* note 20.

Interestingly, Martin holds the minority position regarding file destruction. He advises lawyers to keep inactive client files indefinitely, as long as space or other practical limitations (such as cost) are not problems. His position is that implementing a retention/destruction policy need only come into play if there is no longer any room to store old files.²³

30. Lovell, Sandy, "Court Panel Mulls Revisions of Lawyer Record-Retention Rules," *New Jersey Law Journal* 158 (December 6, 1999): 4. **[New Jersey]**
On September 7, 1999, New Jersey's Advisory Committee on Professional Ethics received its first written request for an advisory opinion on the subject of how long files need to be retained before destruction. On November 29, 1999, the committee issued a public call for comments on the issue, with responses due by December 28, 1999.²⁴ This article reports on the background leading to the committee's action, including a discussion of existing New Jersey authority. It discusses the use of offsite storage facilities and electronic media by both solo practitioners and larger law firms to help ease the space problems caused by growing inactive file inventories. As of this writing, the Advisory Committee has not yet issued its opinion.
31. Baxter, Kathleen R., "Ethical Considerations: How Long Do You Need to Keep Your Files," *State Bar News* 39 (July/August 1997), at <http://www.nysba.org/media/sbn/files.html>. **[New York]**
In this brief state bar publication treatment, Baxter offers one interesting piece of advice that does not appear in other articles: it is a lawyer's responsibility to advise a client of records retention requirements that apply to records that the lawyer turns over to the client. Stated another way, she suggests that a lawyer who fulfills his ethical obligations to a client whose matter has closed by delivering to the client all documents and file materials that belong to the client has an additional responsibility to advise the client regarding the need to retain materials pursuant to tax or other federal or local regulations.
32. Hunker, Frederick, "Navigating Closed Client File Concerns and the Rule 41(A) Trap," *Ohio Lawyer* 14 (January/February 2000): 26-27. **[Ohio]**
The first section of this brief "Malpractice Alert" restates the position of the Ohio Supreme Court and Ohio's Board of Commissioners on Grievances and Disciplines that client files are the property of the client and must be returned to the client upon request. In addition, Hunker, vice president of claims with the Ohio Bar Liability Insurance Company, advises on best practices for the handling of closed files.
33. "Ethics Forum: Questions and Answers on Professional Responsibility," *Pennsylvania Law Weekly* (October 26, 1996): 7. **[Pennsylvania]**

23. Martin reiterates this position in a later short piece that is not included in this bibliography because it is not widely available. Robert W. Martin, Jr., *Succession Planning for Solo and Small Firm Practitioners*, ALPS RISK MGMT. REP., Jan. 1999, at 1. The *ALPS Risk Management Report* is distributed to firms that purchase malpractice insurance from Attorneys Liability Protection Society.

24. *Request for Comments on Client Record-Retention Rules*, 158 N.J. L.J. 742 (1999).

34. "Ethics Forum: Questions and Answers on Professional Responsibility," *Pennsylvania Law Weekly* (January 19, 1998): 4. **[Pennsylvania]**
These short pieces are examples of legal newspaper ethics columns. The format of such columns is standard and appears frequently in legal newspapers: a hypothetical question is posed on an ethics-related question, and the question is answered in the column. The question in the 1996 article is: "I am moving my office to a much smaller location and I want to destroy old files. How long must I maintain files and is there any preferred method of disposal?" Two years later, the question focused on file copying costs: "The client contends since he paid me that I have to give him the file and, if I want a copy, then the expense is on me." Typically, answers include advice from ABA model rules, other states' ethics opinions, and court cases.
35. Embick, Barbara, et al., *Client Records: Guide to Law Firm Record Retention*. Columbia, S.C.: Columbia, South Carolina, Chapter of ARMA International, 1999. 16p. **[South Carolina]**
This publication is the second most important title currently in print on the subject of law firm records retention after *A Report on Issues Surrounding Retention of Client Files in Law Firms*.²⁵ Authored by a committee of records managers from Columbia, South Carolina, law firms, the *Guide* is the product of extensive research into the written commentary, bar rules, and ethics opinions of North and South Carolina on this subject. It includes summaries of relevant ethics opinions for South Carolina through Opinion 98-33 (1998) and for North Carolina through Opinion 245 (1997), as well as a sample retention policy, a retention schedule broken down by areas of law, and a bibliography.²⁶ Reviewed together, *A Report on Issues* and this publication provide an excellent research foundation for creating a law firm records retention policy in any state.
36. Selinger, Jerry R., and Steve Borgman, "Archiving Legal Files. Document Retention of Closed Legal Files: Ethical Dilemmas and Hidden Traps," *Texas Bar Journal* 57 (1994): 128-31. **[Texas]**
In discussing the issue of file ownership, this article focuses on a very old ethics opinion²⁷ that does not appear in *A Report on Issues Surrounding Retention of Client Files in Law Firms*. In addition, it analyzes court cases to a greater extent than many other articles and ethics opinions. Regarding the issue of compliance with ethical retention obligations, the article compares and contrasts ABA Informal Ethics Opinion 1384²⁸ and the *Restatement of Law Governing Lawyers* (still in draft form at the time of the article's publication). This article is unique in that the authors call for the state legislature, the state bar, or both to eliminate the uncertainty associated with these issues by amending ethics rules and enacting statutes to define retention periods and formalize policy implementation proce-

25. ANDREWS ET AL., *supra* note 6.

26. To the extent that the research in *Client Records: Guide to Law Firm Record Retention* includes all relevant publications pertaining to South Carolina (through the date of its publication), these sources are not included in the state-specific section of this bibliography.

27. State Bar of Tex., Comm. on Interpretation of the Canons of Ethics, Op. 118 (1955), *reprinted in* 18 TEX. B.J. 524 (1955).

28. ABA Informal Op. 1384, *supra* note 20.

dures. Furthermore, they suggest that a “catchall statute” specifying a three-year retention period for those records that are not otherwise required by law or regulation to be maintained for a specific period²⁹ could be applied to legal client files by analogy, though subject to qualifications.

37. Inge, Wendy, “Handling and Retention of Clients’ Documents,” *Virginia Lawyer* 44 (December 1995): 10. [Virginia]

This brief bar journal treatment advises lawyers to retain all files permanently, if possible. If not possible, Inge’s position is that the primary purpose of a document retention policy is to protect confidential client information.

Retention of Client Files—Specific Practice Areas

38. Boone, Jeffrey S., “A Document Retention Policy for Patent Attorneys,” *IDEA* 26 (Summer 1985): 49–56.

This comment article is a rare example of the application of best practice retention and disposition principles to a specific practice area. It is both easy to understand and focused. The inclusion of a retention schedule listing common record types used in patent matters—both litigation and prosecution—adds greatly to its value. Specific retention periods are suggested for the following record types, among others: patent assignment agreements, correspondence (agreement and general), invention disclosures, interference files, patent infringement litigation files, patentability opinions, validity and infringement opinions, patent application files, original patents, patent search results, and unsolicited ideas. Furthermore, the author considers the different retention requirements of corporate counsel versus private patent attorneys and provides different retention periods for each environment.

Retention of Law Firm Administrative Records—General

39. Gomola, Gary R., “Should That Be Kept? A Record-Retention Guide for Your Law Firm,” *Accounting for Law Firms* 11 (July 1998): 6.

This article is a laundry list of common record types created in law firms and their recommended minimum retention periods, grouped by administrative area. The list includes, among others, records in the areas of general accounting, tax, partnership and corporate governance, payroll, human resources, and general contract. The authorities from which the retention periods derive are not included.

40. “Records and Files: The ‘Status Quo’ Can Be Expensive,” *Law Office Management & Administration Report* (January 1996): 3.

Another laundry list, this one is organized by minimum recommended retention period, ranging from thirty days to permanent. No statutory or regulatory authorities are included.

41. Skupsky, Donald S., “Business Records: What to Keep and For How Long,” *Law Office Administrator* 5 (August 1996): 6–8.

29. See, e.g., Tex. Bus. & Com. Code Ann. § 35.48(b) (West 2000).

In this article, Skupsky focuses on the nonclient records that a law firm creates. He characterizes old records as “junk” and very emphatically advises firms to destroy business records when retention reaches the end of the minimum periods required by law. He provides the suggested minimums for various accounting, tax, employment, corporate, and contract records.

42. “When Can We Safely Destroy Old Records?” *Law Office Management & Administration Report* (May 1999): 2–4

This brief newsletter article is a hybrid, touching on both client and administrative records retention issues. It includes the standard laundry list that is common in these types of articles. In addition, it provides a short list of ARMA publications and Web resources on records retention. For firms that are ready to invest in imaging technology, there is an equipment review and a brief directory of imaging service providers.

Retention of Law Firm Administrative Records—Specific Departments

43. Goodman, Susan K., “Policy Development for Information Systems Department Records,” *Records Management Quarterly* 31 (April 1997): 27–37.

All modern business organizations have information systems (IS) departments. As Goodman notes, regardless of the structure, size, and function of the department and of the nature of the business enterprise, “there are usually commonalities related to the types of records maintained and the issues encountered related to them.” Typically, administrative records retention in law firms is a neglected area. If considered at all, the departments generally included and scheduled are human resources and accounting (see entry no. 44), because retention of these records is subject to federal, state, and local regulation. This article focuses specifically on the development of retention schedules for records created by IS departments. Although Goodman was not writing for the legal environment, the information contained in the article is applicable to law firms. She describes in depth the major records series typically found in information systems departments and their typical use; information about various categories of electronic records that IS maintains for other administrative departments of the organization; and the issue of centralization or decentralization of technology use and control. She does not provide suggested retention periods for the records series that are discussed, but she does supply the necessary foundation from which to develop an effective schedule for IS records that can be further annotated with retention periods set by the law firm.

44. Rosenberg, Richard S., and Stephen M. MacPhail, “Keeping Paper,” *California Law Business* (December 6, 1999): S24–S25.

This very short article provides exactly what an administrative records retention schedule needs. Each record series discussed includes a retention period and its governing authority. The authors discuss federal and California statutes that prescribe specific retention periods for records generated by various human resources activities. An excellent example of a departmental retention schedule that law firms can adopt with some measure of confidence.

Retention of Corporate Law Department Records

¶13 The following publications discuss records retention issues from the viewpoint of corporate counsel. Because the primary purpose of records management in the corporate environment is to prevent or reduce exposure to liability in the event of litigation, many of the items deal with evidentiary issues, including discovery, spoliation, and improper document destruction.

45. Blostein, Stewart, "Record and Document Retention," *Legal Administrator Update* 3 (November 1998): 15, 19–20.

This laundry list-type newsletter article is similar in content to the articles listed earlier under general administrative records retention (entry nos. 39–42). Although appearing in a publication for legal administrators, its focus is on business records created and maintained by individuals and small business owners, not lawyers and law firms.

46. Campbell, D. Jeffrey, and Patricia S. Gagliardi, "Defining the Limits of What Can Be Destroyed," *New Jersey Law Journal* (April 12, 1993): 10.

47. Campbell, D. Jeffrey, and Jonathan R. Kuhlman, "Stanching the Paper Flow," *New Jersey Law Journal* (November 15, 1993): 13.

Both articles provide excellent advice to outside corporate counsel. The first focuses on the doctrine of spoliation of evidence, adverse inference arising from improper evidence destruction, and spoliation as a tort. The second deals exclusively with developing and implementing a legally defensible records retention program in the corporate environment.

48. Cohen, Joel, "Is There 'Sanctuary' for a Client's Records at a Lawyer's Office?" *New York Law Journal* (May 10, 1994): 1.

This interesting article examines the two categories of client documents that may be housed and maintained by a client's lawyer—privileged and nonprivileged—and attempts to dispel any misconceptions that corporate clients may have regarding the relative protection from discovery such documents enjoy. The article ends by describing an incident involving a subpoena, which contained a "no notification to customer" statement, issued to an off-site records storage company for the purpose of examining law firm documents stored there.

49. *Corporate Counsel's Guide to Records Retention*. Chesterland, Ohio: Business Laws, Inc., 1986–2000.

This loose-leaf publication is a recommended purchase for anyone working in the corporate legal records environment. A monthly newsletter included as part of the subscription, entitled *Corporate Counsel's Records Retention Report*, focuses on one specific subject area each month (e.g., retention of environmental, human resources, or tax records; the legal implications of document destruction, etc.). The June 2000 issue, entitled "Bibliography of Records Retention Resources," is a seven-page annotated list of books, articles, and Web sites organized along the same lines as the subjects covered in the three-volume *Guide*. The newsletter is available for separate purchase.

50. *Corporate Counsel's Quarterly*. Chesterland, Ohio: Business Laws, Inc.
Several issues each year focus on records retention and reporting requirements in specific areas. Recent articles have covered retention of intellectual property³⁰ and environmental records.³¹ Although this journal is valuable on its own, the complete Business Laws package—consisting of the loose-leaf *Guide*, the monthly *Report*, and the *Quarterly*—constitute a must-buy for all corporate legal department records managers.
51. “Document-Retention Policies: Evolving Beasts; Technology Is Forcing Many Companies to Re-Evaluate Policies,” *Corporate Legal Times* (April 1998): 1, 46–56.
Lengthy roundtable discussion focuses on “how effective document-retention policies can enable a company to shield itself from the powerful weapon of discovery.” A panel of four corporate counsel from large corporations discusses electronic evidence discovery, spoliation, e-mail, and other technology issues, as well as how these issues influence corporate document retention policies. Excellent coverage of the subject.
52. Fedders, John M., and Lauryn H. Guttenplan, “Document Retention and Destruction: Practical, Legal and Ethical Considerations,” *Notre Dame Lawyer* 56 (October 1980): 5–64.
Still frequently cited after twenty years, this excellent law review treatment of the subject is exhaustively researched and heavily footnoted. Section three on document retention-destruction programs in the corporate setting is particularly valuable.
53. “Records Retention,” *Corporate Counsel's Quarterly* 13 (January 1997): 1–28.
This article isolates and discusses four separate topics: (a) handling records in a disaster situation, (b) privacy aspects of personnel records retention, (c) legal aspects of document destruction, and (d) ethical aspects of records retention. It provides many references to relevant case law and statutory authorities.
54. Turian, Samantha R., “When to Store It, When to Shred It: Suggestions for Document Retention and Elimination,” *Practical Lawyer* 41 (October 1995): 21–31.
This practical article advises outside counsel on why and how to develop and implement document retention policies for their corporate clients. It includes a sample destruction authorization memorandum and a sample retention schedule memorandum.

Electronic Records Retention

55. Cotton, Christopher V., “Document Retention Programs for Electronic

30. *Corporate Counsel's Guide to Intellectual Property Records Retention Requirements*, CORP. COUNS. Q. Jan. 2000, at 63.

31. *Guidelines for an Environmental Document Retention Policy*, CORP. COUNS. Q., Apr. 1998, at 74.

Records:Applying a Reasonableness Standard to the Electronic Era,” *Journal of Corporation Law* 24 (1999): 417–31.

This extensively researched and footnoted law review note focuses on electronic records retention in the corporate environment. The author posits that document retention programs for electronic data should be held to the same “reasonableness” standards as programs covering traditional, paper-based records. “However, in applying this standard, it is apparent that retention periods for electronically stored data should be longer than ‘reasonable’ periods for paper records,” because the administrative expense to the corporation to store and manage the data is greatly decreased. This theory contradicts best practices records management, which contends that retention periods must be based on record content, not format or cost.

56. Feldman, Joan E., “Electronic Risk Control: Effectively Managing Computer Files,” *Practical Lawyer* 42 (December 1996): 41–50.

Feldman is a leading authority in the area of electronic risk and records management. This article is a mini-tutorial on how computers create and store files, including data deletion and restoration/reconstruction techniques. Her advice on what to expect upon receipt of a request to produce electronic evidence and how to manage electronic files to minimize discovery risk is both practical and understandable, even to nontechnical legal personnel.

57. Jessen, John H., “Managing Electronic Data Holds Far-Reaching Issues, Including Client Risks,” *Law Office Administrator* 7 (April 1998): 7–8.

Jessen is recognized within the records management profession as an authority on electronic records management. This short newsletter article touches on some practical areas of concern, including maintaining client confidentiality, old records hidden on hard drives, encryption password management, record contamination, and use of electronic records management as an aggressive litigation tactic.

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State and Local Ethics Opinions

¶14 The ethics opinions cited and annotated in this section are those that are not included in either of the leading sources mentioned earlier, *A Report on Issues Surrounding Retention of Client Files in Law Firms*³² or *Client Records: Guide to Law Firm Record Retention*.³³ Full summaries, including precedential authority, of all of the ethics opinions, including those provided in the earlier works, are available in the *ABA/BNA Lawyers' Manual on Professional Conduct*.³⁴ The biweekly current reports newsletter issued as part of this service monitors cases, rules, regulations, and ethics opinions on the subject of records retention under the index heading "Files of Client." Anyone doing research on legal records retention or charged with keeping up-to-date on new cases, bar rules, and ethics opinions in this area must regularly review this title. However, when possible, it is preferable to read the full text of ethics opinions in addition to reviewing the summaries provided by the *Manual*.

¶15 Twenty-three states, plus the District of Columbia, are represented here. *A Report on Issues* and *Client Records* provide ethics opinions issued by an additional nineteen states, bringing the total number of United States jurisdictions whose bar associations provide some guidance in the area of records retention and destruction to forty-three (not including opinions issued by county and city bars). Note, however, that the issues treated by each state's bar differ considerably from state to state. Whereas one opinion may recommend a specific retention period before which clients' files should not be destroyed, another might use vague language such as "client documents must be retained as long as may be necessary to protect the interests of the client." In addition, some states address unique issues that other states have not yet confronted. For this reason, a researcher reviewing

32. ANDREWS ET AL., *supra* note 6.

33. EMBICK ET AL., *supra* note 7.

34. ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT (1984-) [hereinafter ABA/BNA LAWYERS' MANUAL]. All direct quotations in the ethics opinions section annotations are from the summaries in the *Manual* unless otherwise indicated.

ethics opinions as a precursor to developing a legal records retention policy should examine *all* available opinions, not just those for states in which the firm has offices.

¶16 Bar association ethics opinions are advisory only. They are interpretations of ethics rules offered as guidelines to lawyers for following the rules.³⁵ Most ethics opinions include a proviso stating that the opinion is not binding upon the courts, upon the bar associations that issue them, or upon individual members of the bar. In actual practice, however, these opinions are frequently cited by the courts, and bar associations place heavy reliance on them in disciplinary actions and in formulating new opinions.³⁶

¶17 The opinions are listed alphabetically by state and in date order (earliest to latest) within state. Each opinion has been assigned one or more of twenty-eight index terms that categorize the subject matter(s) of the opinion, and a subject index is included to provide increased accessibility.

Alabama State Bar Opinions of the General Counsel

¶18 Opinion 93-10 (June 10, 1993) — *File Disposition; File Formats*. This is a generally vague opinion that relies heavily upon ABA Informal Ethics Opinion 1384.³⁷ The *ABA/BNA Lawyers' Manual* uses the word “reasonable” five times in its summary of this opinion. The opinion suggests that “the definition of reasonable time depends on the nature of the documents and the attendant circumstances,” and that the length of time a file is stored is “more a matter of the lawyer or firm’s policy” than any regulatory requirement.³⁸ However, in developing a policy, six years is considered reasonable, based on Alabama statutes of limitations for filing malpractice and bar discipline matters. Six years of retention is also reasonable in cases where the client cannot be located. The general counsel further advises (1) to use legal notices in local newspapers to try to locate former clients, and (2) that microfilm and other nonprint media that will preserve the integrity of client file materials are appropriate alternatives to paper for long-term storage purposes.

Arizona State Bar Committee on the Rules of Professional Conduct

¶19 Opinion 93-03 (March 17, 1993) — *Provision of File Copies to Client; Charging for File Copies*. A lawyer may charge a client for the actual costs of providing *additional* copies of file materials to the requesting client, when all documents to which the client is entitled have already been supplied. However, the lawyer may not charge the client for an initial copy of the original file.

35. ANDREWS ET AL., *supra* note 6, at 9.

36. *Id.*

37. ABA Informal Op. 1384, *supra* note 20.

38. Ala. State Bar Op. of the Gen. Couns., Op. 93-10 (1993), *reprinted in* 58 ALA. LAW. 368, 368-69 (1997).

¶20 Opinion 98-07 (June 3, 1998) — *File Ownership; Notice Requirements; File Disposition; File Destruction; Retention Policies*. This is an important opinion for all jurisdictions, because it includes a comprehensive review of cases and other states' prior ethics opinions on point. The opinion provides some advisory counsel on all of the most important issues relating to client file retention, including file ownership, notice requirements, charging clients for file copies, and criminal matter retention requirements. Regarding closed file retention periods for Arizona, the opinion advises that client file materials "must be safeguarded for a period of time equal to that under Arizona law for the abandonment of personal property,"³⁹ after all reasonable efforts have been made to contact the client to return the materials or obtain authorization to destroy. Furthermore, this opinion follows earlier Michigan Opinion RI-109⁴⁰ in that it directs lawyers/law firms to "establish and maintain a written client file retention and destruction policy"⁴¹ so as to best protect the interests of both the clients and the law firms.

California State Bar

¶21 Proposed Formal Opinion Interim No. 97-0003 — *File Ownership; File Disposition; Criminal Matters*. Upon final issuance, this opinion could be California's definitive statement on whether an attorney is ethically required to retain closed files for any specific length of time following the completion of a representation. The state bar's Standing Committee on Professional Responsibility and Conduct tentatively approved the proposed formal opinion at its January 22, 1999, meeting and put it out for member/public comment. Comments were collected until the deadline of February 25, 2000. As of August 1, 2000, the proposal was in the process of being redrafted before another release for public comment. Unfortunately, the opinion as proposed doesn't offer much new or unique advice. It benefits from earlier opinions issued by the bars of Los Angeles County and the city of San Francisco (see annotations below), but follows the latter as opposed to the former. The opinion takes the position that a set retention period for closed client files—such as the five years deemed reasonable by Los Angeles Formal Opinion 475⁴²—should not be adopted. Instead, this opinion states that "no specific time period for retention of a particular item [in a client file] can be specified." It is important to note that California is one of the few states that does not follow the ABA Model Rules of Professional Conduct; instead, it has its own ethics rules. Consequently, its approach to retention issues is not based on ABA Model Rule 1.15(a) or ABA Informal Ethics Opinion 1384.⁴³ However, California has analo-

39. Ariz. State Bar Comm. on Rules of Prof'l Conduct, Op. 98-07 (1998), available in LEXIS, Ariz Library, Azetop File.

40. See *infra* ¶ 37.

41. *Id.*

42. See *infra* ¶ 22.

43. ABA Informal Op. 1384, *supra* note 20.

gous rules, and this proposed opinion interprets California Rules of Professional Conduct 2-300, 3-700, and 4-100. In addition, this proposed opinion cites governing statutes to a much greater extent than do other states' opinions.

Los Angeles County Bar Association Ethics Committee

¶22 Formal Opinion 475 (September 20, 1993) — *Locating Clients; Notice Requirements; File Destruction; Criminal Matters*. This significant opinion discusses in detail the obligations of law firms desiring to liquidate inactive client file inventories. Among other provisions, the opinion suggests that when former clients cannot be located and no written agreement with the client regarding file disposition exists, five years after the case closes is an appropriate period to retain file materials that are not intrinsically valuable. File materials that must be retained indefinitely, even when the client cannot be located, include stocks, bonds, original wills, notes and deeds, and other similar original documents. In addition, criminal matter files must be retained throughout the life of the former client, unless otherwise authorized by the client. The opinion further suggests that ninety days is a sufficient amount of time to wait for a response from a client to whom a notice of pending file destruction has been sent.

¶23 Formal Opinion 491 (October 20, 1997) — *File Destruction; Deceased Clients*. "A law firm may not destroy the files of a deceased client unless there is no foreseeable possibility that the files would be necessary to protect legal interests of the client and there is a reasonable belief that the files contain no documents of monetary or intrinsic value." The firm has a continuing duty of confidentiality toward deceased clients. This opinion cites as earlier authority Los Angeles Formal Opinion 475⁴⁴ and San Francisco Opinion 1996-1.⁴⁵

San Diego County Bar Association Legal Ethics Committee

¶24 Opinion 1997-1 — *File Ownership; Provision of File Materials to Client*. Upon withdrawal from representation, a lawyer must, upon request, turn over uncommunicated work product to the client if such work product is reasonably necessary to the client's continuing representation.

San Francisco Bar Association Legal Ethics Committee

¶25 Opinion 1996-1 (1996) — *File Disposition; Provision of File Materials to Client*. This opinion follows three earlier San Francisco Bar Association ethics opinions and does not deviate from their advice. The position taken is that an attorney's obligation regarding clients' files cannot be measured by a fixed time period. "The key to retention . . . is the attorney's obligation as a bailee of the client's property and the need to retain those papers which are necessary to pre-

44. See *supra* ¶ 22.

45. See *infra* ¶ 25.

clude reasonably foreseeable prejudice to the client.” The opinion is noteworthy in three respects: (1) The text includes a hypothetical chronology of how a “client file” is created and built. (2) Six hypothetical fact situations, along with the appropriate file retention guidelines answering the questions posed by the situations, are provided. (3) The opinion brings up (without addressing) an issue that very few other opinions raise: may an attorney weed materials out of a client’s file once the client has requested that the file be turned over to him?

Colorado Bar Association Ethics Committee

¶126 Opinion 104 (April 17, 1999) — *File Ownership; Provision of File Materials to Client*. At the termination of representation, a lawyer must surrender to the client papers and property that belong to the client, regardless of whether copies of documents have previously been provided. The client is entitled to all file materials that can be categorized as “end product,” which includes final versions of drafted documents, all other drafts of documents remaining in the file at the end of the representation, documents provided to the lawyer by the client, correspondence, legal research, and research memoranda. A lawyer may withhold personal attorney “work product,” which includes internal firm memoranda, conflicts and new business information, and “lawyer’s notes containing personal impressions and comments that relate to the business of representing the client.” Lawyer’s notes containing both factual information and personal impressions should be turned over to the client in redacted or summarized form. In cases where it is unclear whether a document is end product or work product, “the lawyer’s duty to protect the interests of the client favors production.” Furthermore, in the absence of a valid agreement to the contrary, a lawyer may not withhold file materials from a client pending payment for duplication costs.

Connecticut Bar Association Committee on Professional Ethics

¶127 Informal Opinion 98-23 (October 27, 1998) — *Locating Clients; Retention of Original File Materials*. Lawyers must make a “serious effort to locate hard-to-find clients, including using the Internet and other electronic searching mechanisms,” in cases where the lawyer’s file retention policy includes returning original documents to the client. If the client cannot be found, lawyers must retain original vital records such as executed wills, trust agreements, “and other similar documents for so long as is practicable.” However, noncritical records may be weeded out of the files.

District of Columbia Bar Legal Ethics Committee

¶128 Opinion 283 (July 15, 1998) — *File Ownership; Locating Clients; File Disposition; Cost Allocation*. This opinion distinguishes between two approaches to defining client file ownership. As many of the annotated ethics opinions included here indicate, jurisdictions generally adopt either an “end product” or “entire file” approach

to returning client material. This opinion chooses a “more workable means of segregating property” by defining three categories of materials typically found in client files: (1) valuable client property, (2) other client property (not valuable), and (3) non-client materials. This significant opinion discusses these categories and their recommended dispositions in depth. It touches on all of the areas associated with inactive file retention, reviews other states’ relevant ethics opinions, and cites many articles. It adopts the following positions: (a) In the absence of an agreement to the contrary, valuable client property cannot be destroyed; it must either be returned to the client or an appropriate representative, turned over to the state pursuant to applicable unclaimed property laws, or maintained indefinitely by the lawyer. (b) Nonvaluable client property that is not reasonably necessary to protect a client’s interests may be destroyed five years after the end of representation in cases where the former client cannot be located. (c) Nonvaluable materials in a client’s file that do not belong to the client or to any client-related third party may be destroyed at any time. On the question of who bears responsibility for costs associated with file maintenance, review, and delivery to clients, lawyers are responsible for all costs associated with a client’s valuable property; however, clients may be charged reasonable costs associated with fulfilling their instructions relating to nonvaluable file materials.

Florida Bar Professional Ethics Committee

¶29 Opinion 88-11 (Reconsideration) (May 15, 1993) — *File Ownership; Attorneys’ Liens*. The primary subject of this opinion is an attorney’s right to assert a retaining lien on file materials for amounts owed by a client for work done on the client’s behalf. The opinion is noteworthy in that it presents Florida’s position that case files belong to lawyers, not to clients. This is the minority position on the issue of file ownership.⁴⁶

Illinois State Bar Association

¶30 Advisory Opinion on Professional Conduct 94-13 (January 1995) — *File Ownership; Provision of File Materials to Client*. The advice in this opinion provides the foundation for subsequent Illinois opinions on the subject of file ownership.⁴⁷ In the context of a factual situation involving a military court martial, the question posed is whether a lawyer may refuse a client’s request to turn over investigative materials that are part of the lawyer’s file on the client’s case. The opinion discusses seven categories of documents “normally created or maintained by a lawyer with respect to a client matter” and considers the lawyer’s obligation to turn over or disclose items in each category. The opinion clearly elucidates Illinois’ position that certain categories of file materials are lawyer property and may ethically be withheld from clients.

46. “Florida is the only exception where the entire file belongs to the attorney.” Martin, *supra* note 23, at 1.

47. See *infra* ¶¶ 31–32.

¶131 Advisory Opinion on Professional Conduct 94-14 (January 1995) — *File Ownership; Provision of File Materials to Client*. Specifies that all papers and property belonging to a client must be surrendered to the client when the lawyer retires or withdraws from representation. Also specifies that copies of file materials not expressly belonging to the client should be provided, but at the client's expense. "The lawyer's obligation extends to both active and inactive files." The opinion does not go into detail concerning which parts of a client's file "belong" to the client and which parts belong to the lawyer.

¶132 Advisory Opinion on Professional Conduct 94-19 (March 1995) — *File Destruction; Legal Aid Agencies*. Approves destruction of client files five years after cases are closed. However, agencies are instructed to retain deeds, wills, and "other critical documents" indefinitely and to offer to return any original material furnished by the client. The opinion states that the five-year rule may be followed "so long as the program has kept the client informed about the status of the client's matter." In addition, client contact and conflict information for cases handled by legal aid agencies must be retained indefinitely. Compare and contrast Iowa's Opinion 91-20,⁴⁸ which advises on substantially the same issue.

Iowa Bar Association Committee on Professional Ethics and Conduct

¶133 Opinion 91-20 (November 14, 1991) — *File Destruction; Legal Aid Agencies*. Approves destruction of client files, including conflicts information, by a legal aid agency five years after closing a case. "Representations adverse to former clients whose files and conflicts cards have been destroyed will not be deemed improper if the lawyer believes that the representation will not be affected by any previous representation and the client consents in writing to the representation."

Kansas Bar Association

¶134 Ethics Opinion 98-05 (June 4, 1998) — *Disposition of Abandoned Client Property*. Allows lawyers to turn over unprivileged portions of unclaimed client files to the state treasurer, pursuant to the Kansas Unclaimed Property Act, after "all efforts" to return such abandoned files and other property to the client have been made.

Maryland State Bar Association Committee on Ethics

¶135 Opinion 92-2 (October 1991) — *Disposition of Abandoned Client Property*. This opinion provides nothing new regarding disposition of closed client files.

¶136 Unnumbered, Undated Opinion⁴⁹ — *File Destruction; Provision of File Materials to Client*. This opinion answers an interesting question not addressed

48. See *infra* ¶ 33.

49. *Ethics Docket; Keeping Client Files*, Md. B.J., Nov./Dec. 1994, at 52.

elsewhere: Is an attorney required to retain indefinitely the file of an individual who has been an inactive client for more than five years and who, when contacted regarding the disposition of his inactive files, will not consent to file destruction and also will not consent to accept the files back from the attorney? In the specific fact situation considered, where the attorney's file contains only copies of documents that have previously been supplied to the client, the answer to the question is no. "[T]he decision to destroy the file is within the discretion of the attorney once he has offered to return the records and said offer has been refused."

Michigan Bar Association Ethics Committee

¶137 Informal Opinion RI-109 (December 17, 1991) — *File Destruction; Notice Requirements; Damaged Client Files; Retention Policies*. Although many opinions advise lawyers to notify clients in writing—either at the beginning of the engagement, at its conclusion, or at the point when a lawyer desires to liquidate his closed file inventory—of the lawyer's or firm's file disposition practices, very few opinions address the need for firms to adopt and implement records retention programs. This opinion responds to a fact situation involving the disposition of damaged, closed client files. Within this context, it advises that "the firm has no further duty to notify the clients or to restore damaged files" if (1) the firm has established and implemented a records retention program that adheres to all applicable ethics rules and other requirements, (2) the firm has advised clients of the program and its policies, and (3) the time for the client to exercise his right to retrieve his files or authorize their destruction has expired under the program. As noted earlier,⁵⁰ Michigan is the first state on record to have mandated the development of records retention policies.

¶138 Informal Opinion RI-178 (November 4, 1993) — *File Destruction; Legal Referral Services*. Intake files created by a legal referral service lawyer may be disposed of without first notifying clients, so long as the means and method of disposition maintain confidentiality. The advice in this opinion is specific to the fact situation presented and may not be applicable to other situations involving files of legal referral services. In this case, the intake files "contain only identifying information, a brief recitation of the legal issues, the referral to a participating lawyer, and the ultimate disposition of the matter."

¶139 Informal Opinion RI-240 (June 26, 1995) — *File Destruction; Notice Requirements; Files vs. Property; Retention Policies*. This opinion distinguishes between client files that contain "client property" and those that do not. The latter may be destroyed without notifying the client, but client property must be retained permanently or delivered to the client. If a client cannot be located, reasonable attempts must be made to provide notice before file destruction. Although

50. See *supra* Bibliography (entry no. 27). Informal Opinion RI-109 follows earlier Formal Opinion R-5 (1989), discussed extensively in entry no. 27.

the opinion does not clearly define “client property,” it advises firms to develop retention policies under which all files are reviewed upon closure to determine whether they contain client property. Interestingly, the opinion advises that non-lawyers—for example, legal assistants or records managers—may conduct such file reviews as long as the policy has been developed or approved by lawyers.

¶140 Informal Opinion RI-320 (April 20, 2000) — *File Ownership; Provision of File Materials to Client; Charging for File Copies*. This important opinion concludes that (1) files belong to lawyers, (2) clients are entitled to access to file information, as opposed to physical custody of file materials, and (3) the reasonable expense of providing access, including searching for and reproducing information to which the client is legally entitled, may properly be charged to the client. The committee states that several earlier informal opinions on these issues reached “improper and/or erroneous conclusions” and should be disregarded in whole or in part.

¶141 Formal Opinion R-19 (August 4, 2000) — *File Ownership; Provision of File Materials to Client; Charging for File Copies*. This opinion formalizes the advice provided in Informal Opinion RI-320.⁵¹

Missouri Chief Disciplinary Counsel

¶142 Opinion 980141 (undated) — *File Ownership; Attorney’s Notes*. Attorney notes belong to the client, when such notes “consist of the lawyer’s impressions about the case, comments written down during telephone calls about the case and during meetings with the lawyer’s staff and clients.”

¶143 Opinion 990020 (January-February 1999) — *Locating Clients; Destruction of Deceased Attorney’s Files*. Attorneys in possession of the inactive client files of a deceased attorney may destroy them after five years of maintenance, provided that other conditions are met (original documents returned to clients, written notice of pending destruction sent to clients at their last known address, reasonable time allowed for clients to respond, etc.).

¶144 Opinion 990122 (May-June 1999) — *File Destruction; Notice Requirements*. This opinion focuses on notice requirements prior to destruction of original file materials. It is somewhat general in nature; however, it specifies that if a file contains only copies of documents that have already been provided to the client, the lawyer may destroy it.

¶145 Opinion 990241 (November-December 1999) — *File Ownership; Originals vs. Photocopies*. Whereas original file materials belong to the client and cannot be destroyed absent client consent, photocopies of file materials belong to the lawyer and may be destroyed in a confidential manner by the lawyer at any time.

¶146 Opinion 000082 (March-April 2000) — *File Destruction; Notice Requirements*. Thirty days is not sufficient notice to clients that they must arrange

51. See *supra* ¶ 40.

to pick up their inactive files before destruction takes place. Lawyers are advised to “wait a substantially longer time before assuming that silence amounts to consent.” The opinion also advises that a lawyer may destroy a client’s files whenever a client consents, either orally or in writing. This advice is contrary to best practices records management, which requires destruction authorizations to always be in writing (to protect the lawyer’s interests as well as the client’s).

Montana State Bar Ethics Committee

¶147 Opinion 910510 (May 10, 1991) — *File Disposition*. This opinion is another example of one that draws heavily from ABA Informal Ethics Opinion 1384.⁵² It does not provide any new or otherwise significant information.

New York State Bar Association Committee on Professional Ethics

¶148 Opinion 680 (January 10, 1996) — *File Retention; File Formats*. This opinion discusses the permissibility of and requirements for storing closed client files and records on electronic media. Lawyers must ensure that all records subject to mandatory record-retention provisions are properly transferred to the chosen media format before disposing of the paper records. Records originally created in electronic form may be retained in that form; however, certain records must be retained in their original paper forms, including, but not limited to, financial records (e.g., checkbooks, check stubs, bank statements, prenumbered canceled checks, duplicate deposit slips, etc.).

North Dakota State Bar Association Ethics Committee

¶149 Opinion 92-11 (September 16, 1992) — *Locating Clients; File Disposition*. This opinion directs retiring lawyers seeking to turn over closed files to successor lawyers to obtain permission from clients before doing so. It suggests that publishing a legal notice in local newspapers may assist in ascertaining the whereabouts of old clients.⁵³ It specifies that documents belonging to clients may not be destroyed absent client consent. This opinion is somewhat vague, but it is the only guidance provided by this state’s bar ethics committee.

***Ohio State Bar Association Committee on Legal Ethics
and Professional Conduct***

¶150 Opinion 98-2 (December 14, 1998) — *Retention of Original Estate Planning Documents*. This opinion provides detailed guidance to lawyers who are retiring from practice and who are in possession of clients’ wills. The same guidance applies to any practicing lawyer who desires to liquidate his inventory of

52. ABA Informal Op. 1384, *supra* note 20.

53. See *infra* Appendix B: Retention/Destruction Program Exemplar Package for sample “public notice language.”

original client estate planning documents. Under no circumstances may wills be destroyed, even if the client, the client's representative, or any surviving member of the client's family cannot be located. In such cases, wills must be preserved and retained indefinitely. The lawyer must leave instructions regarding further disposition of such wills upon the lawyer's death. In the event that a responsible party still cannot be found, wills should be "delivered to the chair of the local certified grievance committee or the disciplinary counsel" upon the lawyer's death. Lawyers are advised to avoid this situation by obtaining explicit instructions from clients ahead of time, including "the manner in which the will is to be disposed of if neither the client nor the client's designee" can be located at the time of the lawyer's retirement or death.

***Pennsylvania Bar Association Committee on Legal Ethics
and Professional Responsibility***

¶51 Opinion 99-120 (October 6, 1999) — *File Disposition; File Ownership; Retention Policies*. As discussed earlier,⁵⁴ ABA Model Rule 1.15(a) is the foundation for all practice and procedure in the area of legal records retention. This significant opinion interprets Pennsylvania's counterpart to this rule, Pennsylvania Rule of Professional Conduct 1.15(a), which states that lawyers must preserve client property for five years after the representation ends. It advises that the most "reasonable reading of the rule is that it does not establish a flat, five-year period for the retention of files" that must be applied in every case.⁵⁵ In addition, the opinion interprets the term "property" in light of court opinions and earlier ethics opinions. The opinion presents recurring themes from the literature of legal records retention and destruction, notably (1) that lawyers and firms "should develop a detailed file storage, management and retention policy and should follow the policy uniformly";⁵⁶ (2) that only lawyers may make decisions regarding file destruction; and (3) that the provisions of the firm's file retention policy should be outlined for clients in the initial engagement letter.

Rhode Island Supreme Court Ethics Advisory Panel

¶52 Opinion 94-9 (February 23, 1994) — *File Destruction*. Rhode Island's only ethics opinion on the subject of records retention advises that closed client files may be disposed of after seven years.

54. See *supra* ¶ 10.

55. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Op. 99-120 (1999) [Digest], available at LEXIS, Pa. Library, Paetop File. It is interesting to note that other states have altered the language in ABA Model Rule 1.15(a) upon adoption. See, e.g., N.J. RULES OF PROF'L CONDUCT R. 1.15(a) (substituting "seven years" for "five years").

56. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Op. 99-120 (1999), *supra* note 55.

South Dakota State Bar Association Ethics Committee

¶153 Opinion 94-6 (March 24, 1994) — *File Disposition*. The state's first ethics opinion addressing file disposition issues adopts ABA Informal Ethics Opinion 1384.⁵⁷

¶154 Opinion 96-7 (October 2, 1996) — *File Ownership; Charging for File Copies*. Distinguishes between file material that “could reasonably be deemed useful to the client” and a lawyer’s notes and memoranda “produced primarily for his or her own use in working for the client.” This opinion specifies that such internal work product need not be turned over to the client. It addresses the issue of whether the firm may charge the client for photocopies of file materials, the time spent searching for requested items in files, or both, but does not provide a definitive answer.

Utah State Bar Ethics Committee

¶155 Opinion 96-02 (April 26, 1996) — *File Disposition*. This opinion talks in generalities about retention and destruction of client files without offering any particularly useful guidance. Nevertheless, it is the only ethics opinion on the subject issued by the Utah State Bar Ethics Committee to date. The opinion advises that protection of client interests is the primary consideration in making file disposition decisions, and that lawyers should discuss available options—including returning files to the client or retaining files for a certain period—with their clients in advance.

Vermont Bar Association Committee on Professional Responsibility

¶156 Opinion 97-8 (undated) — *File Disposition*. This opinion provides no substantive guidance; it advises that client file retention periods are “a matter for the lawyer’s discretion.”

¶157 Opinion 99-7 (undated) — *File Ownership; Medical Records; Attorneys’ Liens*. This opinion takes the position that attorney notes and internal memoranda do not belong to the client and need not be turned over to the client. A lawyer “may assert an attorneys’ lien for fees and costs only to the extent that doing so would not prejudice the client in pursuing his or her case.” In addition, it includes a cautionary note regarding turning over a client’s medical records to the client in personal injury cases, advising lawyers to consider whether it is in the client’s best interest to read his or her own medical records without the assistance of counsel to interpret them. If legitimately concerned, the lawyer “may so advise the client and suggest that the client’s new counsel aid in the interpretation” of the records.

57. ABA Informal Op. 1384, *supra* note 20.

Virginia State Bar Standing Committee on Legal Ethics

¶158 Opinion 1664 (February 9, 1996) — *Archival Disposition of Closed Client Files*. This interesting opinion places restrictions on the archival disposition of closed case files that may be of historical value to scholars. The opinion specifies that such files may not be turned over to a university (or, presumably, to any other archival institution such as an historical society) “without client consent if the files contain client confidences or secrets.” Thus, the duty of client confidentiality takes precedence over any other use or value that may attach to the files, even years after the legal matters have closed.

Wisconsin State Bar Committee on Professional Ethics

¶159 Opinion E-98-1 (June 4, 1998) — *Locating Clients; File Destruction; Maintenance of Inactive Files in Possession of Lateral Attorneys*. This opinion provides that client files “should not be destroyed until at least six years have passed after the last act which could result in a claim being asserted against the lawyer.” It also provides that lawyers should wait “a reasonable period of time, perhaps six months,” before destroying files, after making an effort to locate the client in order to provide notice of the lawyer’s file disposition intentions. Other important provisions include: (1) lawyers must review closed files prior to destruction; (2) original client documents should not be destroyed without making an effort to return them to the client; (3) destruction records must be retained “for a reasonable period of time”; and (4) confidentiality must be maintained in destroying client files. In addition, this opinion discusses a very important issue that most other opinions do not address: the responsibility of a law firm to a client who was not represented by the law firm, but whose files are nevertheless in its possession. This situation frequently occurs when firms dissolve or when lateral partners bring inactive client files with them to a new firm. This opinion expressly provides: “The fact that a law firm has dissolved or that the lawyers in possession of the file were not involved in the representation does not change the duties or the obligations of either the lawyers or firm involved in the representation or the lawyers or firm currently maintaining the file: each retains responsibilities to the client to handle client files in the manner prescribed by the ethics rules.” In effect, it advises that firms must incur whatever costs are necessary to safeguard the files of clients who will never be clients of the firm, if such files are on their premises or under their control.

¶160 Opinion E-00-3 (July 10, 2000) — *Provision of File Copies to Client; Charging for File Copies; File Formats*. Upon request, the client is entitled to a computer disk copy of client documents and files stored by the lawyer in electronic format. The lawyer may bill the client for reasonable costs incurred in retrieving the information and copying it to electronic format for delivery to client, and may also bill for providing documents in electronic format that have already been provided to the client in hard copy. Furthermore, lawyers should

“consider ease of access and retrieval of client files when configuring their electronic filing system,” and should consider including language in their retainer agreements explaining how clients can gain access to files maintained electronically. This opinion also addresses the issue of client property versus work product.

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Sample Records Retention Policies and Schedules

¶161 After the firm's retention policy development committee has conducted its research and decided on an approach, the next step is to draft a policy or policies.

The complexities of writing records retention policies in the legal environment are beyond the scope of this article; however, the project generally must be tackled on multiple levels. Different policies must be written for client files and administrative files; furthermore, the proliferation of electronic records in law firms significantly affects policy elements. In addition, firms must decide whether to adopt the practice area approach to client file retention scheduling⁵⁸ or the blanket retention schedule approach, which assigns retention periods to *types*⁵⁹ of file materials regardless of practice area. Finally, firms must decide whether to adopt an active or passive authorization approach⁶⁰ when drafting their policies.

¶162 Detailed, useful examples of retention policies used by law firms are extremely difficult to come by. The enormous amount of work that goes into developing such policies contributes to the less-than-forthcoming response given by most legal records managers when asked to share. Moreover, there is no fill-in-the-blank retention policy format that can be used by all firms; even an excellent sample must be revised and customized for each firm that uses it.

¶163 Two sample policies are provided in appendix A, one for client files and one for the administrative files of a law firm human resources department. The retention periods provided in the policy schedules are examples only. If parts or all of the sample policy language is adopted by a firm, the retention periods must be revised to reflect unique requirements dictated by applicable state ethics opinions, rules, statutes, regulations, and court opinions. Furthermore, it is a best practice to annotate the final version of each retention schedule that a firm develops

58. The practice area approach to retention scheduling requires, first, the identification of each broad area of law practiced by the firm (e.g., bankruptcy, family law, labor), and, next, further subdivision of each broad area into practice specializations. For example, bankruptcy can be subdivided into (a) claim and delivery, (b) debtors commercial credit, (c) foreclosure, (d) restructuring, (e) workouts, and (f) wrongful repossession. See EMBICK ET AL., *supra* note 7, at 12–13 (contains other examples of practice area divisions and subdivisions). These divisions and subdivisions become the basis of the practice area retention schedule. Retention periods are then specified for each practice subdivision, completing the schedule.

59. Common file types found in most client files include correspondence, memoranda, drafts, notes, court documents, research, extra copies, working files, billing files, and new business documentation. Typically, even when firms choose blanket retention scheduling, special retention periods must be designated for files in certain practice areas, such as intellectual property prosecution and estate planning and administration.

60. The active approach requires an approver (attorney, client, department head, etc.) to actively indicate his or her instructions regarding file disposition. If a retention policy takes the active authorization approach, document destruction or other disposition of file materials may take place only if there is a signed authorization from the approver. Absent such authorization, no action may be taken, even if the retention period has passed. The passive authorization approach allows records disposition to take place if a specified period of time has elapsed with no objection raised by the approver. Typically, the passive approach uses language such as the following: "If you do not respond to this destruction authorization memo within sixty days of receipt, the materials eligible for destruction and highlighted on the attached index sheets will be destroyed pursuant to policy by the firm's confidential document destruction vendor."

with citations to the opinions, rules, statutes, regulations, etc. authorizing each retention period specified in the policy.

Retention/Destruction Program Exemplar Package

¶164 Every records retention program is comprised of two separate and distinct phases. The first is the policy creation phase. This phase requires extensive research using the bibliographic sources and ethics opinions provided in the first part of this article, combined with a thorough examination of the unique culture and risk management practices of the law firm or corporate law department. The process of researching and drafting a records retention policy is typically difficult and lengthy. However, once the policy is written, approved, and disseminated within the firm, a second, equally difficult, phase of the retention program begins. This is the policy implementation phase.

¶165 In the familiar realm of librarianship, the situation is analogous to copyright compliance policy development. Some administrators and managing partners still believe that protection from infringement lawsuits is afforded simply by writing and publicizing a copyright compliance policy. Nevertheless, we know this isn't true. Within the past ten years, most private law librarians have evolved from being completely ignorant of copyright compliance issues to leading the compliance crusade in their firms and corporations. One of the most important elements in this crusade is the understanding that there is no compliance without implementation; the existence of a policy implies the necessity to develop an administrative mechanism to implement the policy. With respect to copyright compliance, this mechanism usually includes rules, procedures, forms, training, and auditing (policing). In a law firm setting, the process of developing a records retention program is the same.

¶166 Depending on the age and size of a firm, implementing a records retention policy can be extremely costly on many levels.⁶¹ Although examining the implementation process in detail is, again, beyond the scope of this article,⁶² records retention is an area that lends itself to the use of exemplar letters, memos, and forms. Appendix B provides ten such exemplars, running the gamut from an initial client contact letter to a final public notice regarding file disposition by a

61. Implementation costs typically include *staff* resources (both regular and temporary); *supplies* needed to reorganize, relabel, and rebox files as they are reviewed prior to disposition; *space* to stage and review boxes retrieved from storage while awaiting further disposition; confidential document *destruction services* provided by bonded commercial vendors; and fees for significantly increased off-site *storage activity* (retrieving, delivering, refiling, and/or permanently removing boxes from storage).

62. At the time of this writing, there are no books or articles that discuss in detail how to implement a records retention policy in a law firm environment. *But see* ANDREWS ET AL., *supra* note 6, at 27–28. The topic will be covered more extensively in a forthcoming publication. BARR, CHIAIESE & NEMCHEK, *supra* note 5.

dissolving law firm. The exemplars can be used as a starting point for firms that have not yet developed the tools of implementation, although they must be adapted to reflect the unique retention requirements of individual firms. In each sample, language that will vary from firm to firm appears in bracketed italics.

Appendix A

Sample Records Retention Policies and Schedules

Sample Client File Retention Policy⁶³

1. Purpose

1.1. Background

This Firm, like many others, has experienced a proliferation in the number and amount of files that it retains both on its premises and in storage. This proliferation has resulted not only from the increase in the volume of work performed by lawyers within the firm, but also from the uncontrolled collection of duplicative and unnecessary materials within files and the lack of a reasonable policy concerning the destruction of outdated files.

1.2. Statement

The purpose of this document retention policy is to control the volume of files and to make files more useful and accessible by providing guidelines as to what the firm should and should not retain in official files and by establishing procedures for the destruction or the return to clients of files which are no longer needed.

2. Contents of the Official File

2.1. Standard Subfiles

A standardization of subfiles will segregate materials into classifications which will permit the Firm to apply differing retention periods and will help those who have a future need to find materials in the files to access those materials more quickly and accurately. With this in mind, every file should have at least the following subfiles:

- Correspondence
- Documents or Court Documents
- Drafts
- Notes, Memoranda and Legal Research
- Client Relations

63. This sample policy uses both the blanket retention schedule and active authorization response approaches to the drafting of retention policies for client files.

These major subfiles, which are described in paragraphs 2.2 through 2.6 below, may be divided for purposes of classification (e.g., as to types of documents or memoranda of facts versus memoranda of law) and given titles that fit the needs of the individual attorney, but the records centers will organize the subfiles numerically to fit within one of these five general categories or one of the other major subfiles described in paragraphs 2.7 through 2.12 below. Attorneys and secretaries may request the addition of subsidiary files to any of the standard subfiles described above, but new main headings should not be created. Attorneys may request an Extra Copies file for temporary use in active files; however, Extra Copies files will be destroyed before files are sent to storage off-site.

2.2. Correspondence

Correspondence files should contain clean copies of all correspondence to and from the Firm. If the correspondence includes enclosures, copies of the enclosures should appear along with transmittal letters in the file. Correspondence should not be defaced by handwritten or other notations. If for any reason it is appropriate to mark up a piece of correspondence and to retain the marked copy, the secretary who maintains the files should place the marked copy in the Notes, Memoranda and Legal Research file. Correspondence should be organized chronologically and separate personal correspondence files for individual attorneys should be avoided or should be consolidated with the single correspondence file when the file is stored.

2.3. Documents or Court Documents

The Documents subfile should contain only the final documentation produced. For example, if the matter involves a loan transaction, this file would contain a copy of the closing documents. In many cases, it may be appropriate to include a formal closing binder instead of a Final Document file folder. If the matter does not close, this subfile would be removed or would be empty. In litigated matters, there will be a Court Documents subfile, which should contain only the copies of documents actually filed with the court or administrative agency, bearing the appropriate docket stamp, together with relevant orders and opinions of the court or agency.

2.4. Drafts

The Drafts subfile should contain only one clean, unmarked copy of each draft of a document received by or prepared by and circulated outside the Firm. All other drafts should normally be destroyed when the file is sent to offsite storage. As a general rule the file should not include internal draft documents, which we have not circulated to anyone outside of the Firm, or documents marked with handwritten comments, except when we have circulated the marked copy to a client, opposing counsel or other persons outside the Firm. An individual partner may conclude that on a particular project it is important to retain marked copies or internal drafts that have not circulated outside the Firm. When a partner believes

that marked copies or internal drafts should be retained in the official file and the practice group head concurs, the secretary who maintains the files should segregate the marked copies in a separate drafts or memoranda file which properly identifies the drafts as marked or working copies. When the project is complete, the partner should reevaluate the decision to retain these copies. In most cases, the Firm believes that marked copies do not add a meaningful history to the file. Usually these copies reflect the correction of drafting or other errors, without casting any meaningful impression of the parties' intentions.

2.5. Notes, Memoranda and Legal Research

The Notes, Memoranda and Legal Research subfile is a working subfile designed to contain research information, handwritten and other notes and marked copies of correspondence used during the preparation and negotiation of documents. At the earlier of the sending of the files for storage or the closing of the transaction, this file should be organized. As a rule, the partner or associate in charge of the matter should discard handwritten notes, whether the notes are separately included in the subfile or appear on drafts of documents. All duplicated materials should also be discarded. Copies of standardized or printed materials should also be discarded, except where retention is desirable to understand the nature of any research performed. As with other files, a partner may elect to retain handwritten materials where in his or her judgment the retention is desirable. In most cases, the Firm believes that the usefulness of handwritten notes is transitory, since these notes tend to lose meaning over time as the creator has a diminished ability to place the notes in proper context. The notes often are not a balanced record of the issues considered and often do not contain items raised at a meeting by the note-taker. A better practice is to either discard the notes or to have them properly transcribed into a clearly written memorandum.

2.6. Client Relations

The Client Relations subfile should contain all paperwork relating to client relations, including the engagement letter, if applicable, and any conflict reports, letters, or waivers. Correspondence relating to client relations matters should appear only in this file and not in the Correspondence file. Materials relating to client billings should also be placed in this subfile, unless a separate Billing subfile has been requested.

2.7. Permanent File

The permanent file, which normally will be prepared by the records center when the file is sent to offsite storage, should contain any documents which are likely to have a useful life extending beyond ten years. For example, this file should retain any final documents that reflect an ongoing legal relationship, such as leases, licenses, stock transfer records, by-laws and shareholder agreements. The attorney responsible for the file will be asked to confirm to the records center whether any documents should be placed in the permanent file. Estate planning

documents, such as wills and trusts, are to be handled under a separate document retention policy.

2.8. Client Papers

If this file is created, it should contain copies of documents supplied by the client to assist in the preparation or negotiation of documents. As soon as the matter is completed, or at an earlier date, if appropriate, the supervising attorney should return client documents to the client or, if the client so directs, he or she should cause the documents to be destroyed. The Firm should not retain in its possession, except for the period needed to make copies or to respond to court orders or proceedings, a client's original documents, and only under extraordinary circumstances should a client's original documents be sent to offsite storage. As a consequence of the foregoing, the Client Documents subfile should be empty and may be removed from the official file when the file is sent to offsite permanent storage, absent special instructions. There are a few obvious exceptions to this rule. For example, in a real estate matter the client may supply copies of title documents, leases and similar documents. Copies of these documents would usually be placed in the separate Title Matters subfile. In an estate planning file there may be similar considerations. If the client is a regulated financial institution, the Firm very likely will be called to list all documents that it retains.

2.9. Corporate Review

In some transactions the Firm conducts a corporate review or "due diligence" investigation. Generally, the entire file reflects this review or investigations and it is neither necessary nor desirable to gather all elements of the review into a single subfile. However, often materials are collected in conducting the reviews that are later used during the transaction. The Corporate Review subfile is the appropriate place to collect these materials, if they do not otherwise fit readily into a prescribed subfile category. The firm has not established a standard policy concerning the retention of these materials following the completion of the transaction and leaves the matter to the discretion of the partners in charge of the matter.

2.10. Firm Opinion File

In many corporate transactions, the Firm is called upon to render one or more formal opinions. The Firm Opinions subfile should contain the final form of the opinions. Drafts should not be placed in the subfile (although circulated drafts would generally appear as enclosures in the correspondence subfile). Backup materials, including any internally prepared memoranda, certificates of public officials or others and similar documents, should also reside in this subfile. The file should indicate the names of the two partners involved in the preparation and review of the opinion. Care should be used to eliminate materials in the Drafts, Client Papers and Notes, Memoranda and Legal Research subfiles that duplicate materials in the opinion subfile.

2.11. Title Matters

A Title Matters subfile will be present in most complex real estate matters. This file should contain title history documents, title policy information and the like. If appropriate, this file may be further subdivided; however, each subdivision of the subfile should indicate that it is a Title Matters subfile.

2.12. Government Applications and Approvals

In cases where the Firm represents regulated entities, there may be a need to maintain a file which reflects the correspondence and applications between the client and the firm, on the one hand, and the regulator, on the other, and action taken by the regulator in response. Generally, this file should contain only those papers that relate to positions taken with or by the regulator on a formal or informal basis.

2.13. Other Subfiles

The Firm's records managers wish to maintain a filing system that is "user friendly." The subfiles described above are believed to cover the Firm's current classification of subfiles by practice group. Attorneys and staff may request additional subfiles, but are encouraged to create subfiles that are subsidiary to the main subfiles listed above. These subfiles may be temporary or permanent. Temporary files should be properly identified (by color coding or other means) and should be discarded before the files are sent to offsite storage. Permanent files should be reviewed periodically and before the files are stored to make sure that the materials within the files otherwise meet the retention criteria outlined above and do not duplicate the contents of any other subfile. Every subfile should be clearly identified as such. For example, a file designated as "Documents—Leases" would be a subfile of Documents. Original documents should be placed only in Documents subfiles and not in working files.

3. Special Considerations

3.1. Long Standing Relationships

The Firm has established a number of long standing relationships with clients. Often attorneys handling these relationships have established "General" or other similar matters which, as a practical matter, are never closed. When the records center discovers files of this sort that are accumulating large quantities of paper, the records center will notify the attorneys in charge and will encourage them to divide the file into a current and stored part. The stored part, once designated, will then become subject to the file retention procedures described in this policy statement.

3.2. Individual Standards

Departments or practice groups may provide for procedures for more extensive destruction of working drafts or notes rather than leaving such matters to the discretion of individual attorneys. In addition, more stringent policies on other matters may be adopted with the approval of firm management, it being understood, though,

that all such procedures must be formulated in a manner to permit the organization of the files at the time they are stored so that the retention policies to be implemented subsequently can be implemented without a review of the stored files.

3.3. Identifying Longer Periods for Retention

Section 5 below sets forth the standard Firm procedures for retention and destruction of files. The attorney responsible for opening a file should determine and advise the records center, at the time a file is opened, whether special circumstances require deviation from standard Firm procedures—for example, a government requirement for a longer document retention period, or the existence of circumstances (such as minority or disability) that would toll normal statutes of limitations. In addition, practice groups may identify particular types of projects that require longer retention periods.

3.4. Destruction Procedures

When destroying files in accordance with the procedures set forth in Section 5, precautions should be taken to make certain that confidential client information is not inadvertently disclosed. In considering whether to take extra precautions (e.g., shredding), the responsible attorney should advise the records center at the time a file is closed which portions, if any, of the file require special destruction procedures to safeguard confidentiality.

4. Storage Procedures

4.1. General

Before sending a file or any portion of a file to permanent storage either in a local records center or offsite, the records center having possession of the file should review and organize it to determine whether the foregoing procedures have been followed, and with the following in mind:

- except for duplications caused by the retention of copies in the correspondence file and in the draft documents file, no document should appear in the same form more than once in the file;
- handwritten materials should be deleted in the absence of an instruction to the contrary;
- documents with a useful life beyond ten years should be placed in a permanent file.

Before any materials are discarded, the matter should be reviewed with a secretary, legal assistant, or attorney who is designated by the attorney responsible for the file as the person responsible for review of the file. Records personnel are not authorized to remove materials from files, except in the most obvious cases of duplication. Nonconforming files should result in an inquiry to the person who sent the file, and in appropriate cases, the file should be returned to that person. When in doubt as to the desirability of retaining any specific materials, the secretary, legal assistant or attorney should seek instructions from a supervising attorney.

4.2. Files Containing Unusual Materials

If a secretary sends a file with handwritten notes, client documents, uncirculated documents with handwritten notations (i.e., any such document in a folder other than the correspondence file) or other materials not generally included in stored files, a note to the records center indicating that these materials are to be retained and are to be indexed should accompany the file. Generally, secretaries should send files with these unusual materials to the records center only if they have received instruction from the partner in charge of the matter to do so.

4.3. Responsibility

The lawyers working on the matters are ultimately responsible for the contents of the file and compliance with the foregoing procedures. When in doubt refer the matter to the most senior available attorney listed for that matter.

5. Retention of Files

5.1. Notification

At the outset of each matter which results in the sending of the Firm's Billing Policies and Procedures Statement, the Statement will advise the client of the Firm's file retention policy as follows: "Under our document retention policy, we normally destroy files [*seven years*] after a matter is closed, unless other arrangements are made with the client."

5.2. Special Instructions at Time of Offsite Storage

When a file is sent to offsite storage, the records center will notify the responsible or billing partner and ask if any special file retention instructions should be affixed to the file. In the absence of special instructions, the provisions of Sections 5.3, 5.4 and 5.5 shall apply.

5.3. [*Seven*] Years

*On or shortly prior to the [*seventh*] anniversary of the original offsite storage date for the file, the records center will prepare a notice for the attorney responsible for the file (or another attorney designated by the Firm) to send to the last known address of the client, or to its successor in interest who is listed in the Client Relations subfile, indicating that in the absence of instructions requesting delivery of files to the client, it is the Firm's intention to destroy the portion of the files belonging to the client. The notice will indicate that the Firm will pay for appropriate handling and transportation charges, unless the responsible attorney makes other arrangements. If the client requests delivery of the files, an attorney will be asked to review the file index (and in some cases the files themselves) to determine which files properly are deliverable to the client. After this review, the Firm will deliver all of the files to the client, except the Client Relations subfile, a copy of the Documents or Court Documents subfile (but not the original which shall be sent to the client) a copy of the Permanent Retention file (but not the original which shall be sent to the client), any Firm Opinion subfile and any other*

materials designated by the reviewing attorney to be retained by the Firm. If the client objects to the destruction of the file, the matter shall be referred to a partner for further review. If the client does not object to the destruction of the files and does not request delivery of the files, all of the files other than the Documents or Court Documents subfile, the Permanent Retention subfile, the Client Relations subfile, any Firm Opinion subfile and any Government Applications and Approvals subfile shall be destroyed.

5.4. [Twelve] Years

If a client has requested, and the Firm has agreed, to retain files in a matter beyond the [seven] year normal retention period, then on or shortly prior to the [twelfth] anniversary of the original offsite storage date for the file, the records center will prepare a notice for the attorney responsible for the file (or another attorney designated by the Firm) to send to the last known address of the client, or its successor in interest who is listed in the Client Relations subfile, indicating that in the absence of instructions requesting delivery of files to the client, it is the Firm's intention to destroy the portion of the files belonging to the client. The notice will indicate that the Firm will pay for appropriate handling and transportation charges, unless the responsible attorney makes other arrangements. If the client requests delivery of the files, an attorney will be asked to review the file index (and in some cases the files themselves) to determine which files properly are deliverable to the client. After this review, the Firm will deliver all of the files to the client, except the Client Relations subfile and any Firm Opinion subfile and any other materials designated by the reviewing attorney to be retained by the Firm. If the client objects to the destruction of the file, but does not request delivery, the matter shall be referred to a partner for further review. If the Firm continues to retain the files, the client will be advised, absent special instructions from the reviewing attorney, that unless other arrangements are made by the client, the files will be destroyed after another [three] years. If the client does not object to the destruction of the files and does not request delivery of the files, all of the files shall be destroyed except the Permanent Retention subfile.

5.5. [Fifteen] Years

Absent special instructions relating to a particular file, any file remaining in the possession of the Firm other than the Permanent Retention subfile on or after the [fifteenth] anniversary of the original offsite storage date for the file shall be destroyed in its entirety without notice.

5.6. Records Center Records

The records center will maintain, as part of its file index, a permanent record of all files, indicating those files that have been delivered to clients, destroyed, or otherwise disposed of in accordance with this Policy.

6. Adoption and Amendment

6.1. Adoption

This statement of policy has been adopted on (*month, day, year*), to be effective from and after that date and has been based upon standards in effect on the date of adoption.

6.2. Amendment

The Firm has reserved the right to amend, modify, waive or revoke all or any portion of this policy statement and to adopt one or more new statements in lieu thereof. Should any bar association or any other authority having the right to regulate the activities of the Firm or of any attorneys who are members or employees of the Firm adopt standards for document retention which are legally binding on the Firm or any of its attorneys and which conflict with any provision of this policy statement, the adopted standards shall be controlling to the extent of their applicability without further action by the Firm.

Signed: _____
Chair, Risk Management Committee

Sample Administrative Department File Retention Policy (Human Resources/Payroll)⁶⁴

File Type: Primary Personnel File—Attorneys & Staff

Retention period: Active + 7 years (2 years onsite, 5 years archived)

The primary personnel file includes all documentation pertaining to an employee's or partner's employment or partnership and includes, if applicable:

- Application for Employment
- Application for Internal Position
- Approved Hire Authorization Form
- Bar Exam & Bar Review Course Reimbursement Requests
- Bar Stipend Form
- Candidate LEXIS/Westlaw printouts; media articles
- Commendations/Recognition Announcements
- Confidentiality Agreement
- Confirmation of Hire, Offer Letter, Notice of Hire
- Conflicts Questionnaires
- Contract Letters/Agreements
- & Officer Background Checks
- Action Documentation/Warnings
- Educational Reimbursement Applications
- Emergency Preparedness Receipt
- Employee Profile
- Employee Separation Record
- Forwarding Address
- Job Description
- Job Posting
- Leaves of Absence Requests & Confirmation Letters
- Local Office Checklists
- Longtimer Memos
- Miscellaneous Non-Confidential Correspondence
- Moving/Relocation Expense & Exploratory Trip Form
- New Employee Arrival Notice
- Orientation Checklist
- Performance Evaluations (Staff & Legal Assistants)
- Performance Rebuttals

64. This policy and its related schedules address the types of files typically created and maintained by the human resources department (HRD) of a large, multi-office law firm, and the short and long-term retention of such files. Access to these files is limited to HRD personnel and government or legal agencies conducting relevant investigations, unless addressed specifically below. Government inspectors or the representatives of other legal agencies must comply with the same rules as others regarding what the law permits the employer to reveal from the employee or partner's files.

- Personnel Action Notices
- Personnel Guidelines Acknowledgment Memo
- Resume
- Salary Increase Letters/Memos
- Separation Agreement
- Separation/Exit Forms Documentation
- Summer Associate Documentation
- Tests/Writing Samples
- Training/Seminars Documentation
- Transcript (Staff & Legal Assistant)
- Unemployment Claims & Decisions

Additional access to a specific personnel file is limited to the active or former employee or partner, and the supervisor with a need to know.

Personnel File Inspections

Current and former employees and partners have the right to inspect their personnel files, i.e., any records that are used or have previously been used to determine the person's qualifications for partnership, employment, promotion, additional compensation, termination or other disciplinary action according to the policy below. Records of investigations regarding possible criminal offenses will not be available for review. Employees may grant written authorization for other individuals to have such access.

Inspection of the individual's personnel file by him/her will take place only in the HRD located at the appropriate office location where the primary personnel files are maintained, during regular business hours, within 30 days following the receipt of the written request for an appointment from the individual to review the file. For nonexempt staff and legal assistants, inspections may only be performed during the employee's free time. Personnel may inspect their records and make notes about the contents of the file, but may not alter, add or remove anything from their file. Documents signed by the employee or partner that are located within the personnel file may be copied by an HRD representative at the request of the individual. An HRD representative must be present to monitor all personnel file inspections and will return the file to its proper place when the inspection is completed.

Personnel Files Retained In Office Locations Other Than Headquarters: One year after the individual's termination, forward the personnel field files to the HRD. The documentation in the personnel field file may or may not be integrated into the primary personnel file and/or the confidential file, depending upon duplication of materials.

File Type: Confidential File—Attorneys & Staff**Retention Period:** Active + 7 Years (2 years onsite, 5 years archived)

The confidential file is maintained separately from the primary personnel file and may include all information pertaining to an employee's or partner's health and medical condition, leaves of absence including disability leave documentation, benefit plan choices, dependent and beneficiary information, and COBRA documentation. The confidential file pocket envelope retained in the confidential file includes:

- Biography Form (Martindale-Hubbell)
- Emergency Contact Audit form
- Employee Information Change Form & Other Change Documentation
- Employment Verification Copies
- Interview Evaluation Form and Schedule
- Investigations/Legal Actions
- Letters of Recommendation
- Miscellaneous Confidential Documentation
- New Hire Information Form
- Performance Evaluations by Previous Employers
- Performance Rebuttals
- Reference Checks
- Subpoena Copies

Confidential Files Retained In Office Locations Other Than Headquarters:

One year after the individual's termination, forward the confidential field files to the HRD. Documentation in the confidential field file may or may not be integrated into the primary confidential file, depending upon duplication of materials.

File Type: Non-Partner Attorney Evaluation File**Retention Period:** Active + 3 Years (2 years onsite, 1 year archived)

Copies of written summaries of evaluations for non-partner attorneys (associates, of counsel and contract attorneys) comprise this file. The following individuals have access to these files: the chair of the firm; managing partner for operations; employment attorney for the firm; office managing partners; department chairs; department evaluation partners; chief administrative officer; manager of attorney training and development; the firmwide recruiting manager; and the written designee of any of those individuals.

File Type: Attorney Recruiting File**Retention Period:** Active + 7 Years (2 years onsite, 5 years archived)

This file is generally used by recruiting coordinators as a pre-hire attorney applicant file. Retain forms and documents for newly hired attorneys in this file until post-hire; thereafter, transfer them to the attorney personnel file or the attorney confidential file, as appropriate. If the attorney applicant is not hired, keep forms

and documents in the recruiting file for a minimum of two years and a maximum of seven years. Documentation in this file includes:

- APC File Cover Sheet; Authorization for Hire Form
- Applicant Change Status Form
- Firm Newsletter Notice
- Forwarding Address
- General Evaluations
- Interview Evaluation Form
- Interview Schedule
- Interviewee Expense Reimbursement Form
- Moving/Relocation Expense & Exploratory Trip Form
- New Hire Orientation Schedule
- Recruiting Expenses & Invoices
- References; Letters of Recommendation
- Resume
- Summer Associate Documentation*
- Testing/Writing Samples
- Transcripts
- Work Assignment Request Form*
- Work Project Evaluation*

*Note: Filed in the primary personnel file if an attorney or a summer associate is hired as a regular employee.

File Type: Staff Recruiting Applicant File

Retention Period: Active + 7 Years (2 years onsite, 5 years archived)

This file is generally used by recruiting coordinators as a pre-hire staff applicant file. Retain forms and documents for newly hired staff in this file until post-hire; thereafter, transfer them to the staff personnel file or the staff confidential file. If the staff applicant is not hired, retain forms and documents in the recruiting file for a maximum of two years. Documentation in this file includes:

- Job Posting
- Local Office Checklist
- Previous Employer Performance Evaluations
- Recruiting Expenses/Invoices
- References; Letters of Recommendation
- Resumes
- Transcripts
- Testing/Writing Samples

File Type: Confidential Expatriate Files

Retention Period: Active + 7 Years (2 years onsite, 5 years archived)

This file is maintained separately from the primary personnel file, and it includes all documentation pertaining to an employee or partner's expatriate assignment. Keep all benefits-related information in the confidential file with other benefits information.

File Type: Payroll File

Retention Period: Active + 7 Years (2 years onsite, 5 years archived)

Access to payroll files is limited to the firm's corporate financial officer and to payroll personnel. Access may be granted to HRD personnel, government agencies or other legal agencies that are conducting investigations or audits, such as retirement plans or workers' compensation payroll audits.

- Automatic Payroll Deposit Form
- Bar Stipend Payment Request
- Bonus Documentation
- Contract Agreement Letters
- Correspondence (Miscellaneous)
- Disability Authorizations
- Employee's Tax Withholding Questionnaire
- Federal and State Tax Forms
- Garnishments
- Leave of Absence Letters, Memos, Documentation
- Leave of Absence Payroll Notification Form
- Longtimer Memo
- Manual Paycheck Documentation
- New Hire Information Form
- Paid Time Off/Vacation Request Forms
- Personnel Action Notices
- Reconciliations
- Separation Agreement Documentation
- State Disability Insurance Claims & Check Stubs
- Unemployment Claims
- Verification of Employment

File Type: Retirement Plan Files—Partners

Retention Period: Life of Partner + 5 years

Access to these files is limited to HRD Retirement Plan personnel. Access may be granted to other HRD personnel, government agencies or other legal agencies that are conducting investigations or audits.

File Type: Supervisor's Field File

Retention Period: Active + 1 Year

The field file retained by the controlling supervisor may be maintained either at the supervisor's desk or in the personnel department at each office location. The information contained in the field file is confidential, and supervisors must be mindful of security issues regarding these files. The files maintained by a supervisor should relate to current job performance activities of the employee, and should only contain information the supervisor is currently using. Such files may include information relating to the following employee issues:

- Attendance records
- Current, active disciplinary track items
- Information that will be used to prepare the next scheduled performance appraisal
- Last performance review
- Paid time off or other leave
- Positive and negative comments regarding the employee's performance
- Work schedule

Keep other types of information in the primary personnel file maintained in the HRD at each location. Do not retain field files in lieu of regular personnel files.

Subject Files

Each HRD section and payroll is responsible for maintaining its own subject files. Access to these files is limited to HRD or payroll personnel and government or legal agencies conducting relevant investigations, unless addressed specifically below. Some of the retention periods listed below provide specific lengths of time for both onsite and offsite (archived) storage of records prior to destruction. If the length of time given is not broken down in this manner, then the appropriate HRD section may use its discretion as to when to send records offsite. However, it is recommended that records be sent offsite after the current year.

Type of File**Retention Period**

Accounts Payable Reports

Current Year (CY) onsite
+ 2 Years archived

Affirmative Action and Supporting Data

Current Year + 6 Years

Attorney Applications

- | | |
|---|---|
| <ul style="list-style-type: none"> • Solicited • Non-Solicited • On Campus Interviews • In-Office Interviews • Not Interviewed (Reject letters) | 2 Years
2 Years
7 Years
7 Years
2 Years |
|---|---|

(cont. on next page)

Type of File (cont.)

Budget Reports

Compensation Analysis

Contract Files (Vendor, Consultant, Etc.):

- Change Orders
- Contract Work Papers
- Contracts
- Correspondence
- Definitive Contract
- Documents, Approval Record
- Invitation to Bid; Request for Proposal
- Invoices
- Letter of Intent
- Notice of Award
- Original Quotation Letter, Proposal
- Project analysis & Plan Record
- Specifications
- Supplemental Agreement

Contract Negotiation Files

Educational Reimbursement Policy

EEO Quarterly/Annual Reports

Employee Applications

Employee Relations Issues:

- Employee Dispute Files
 - Discrimination Files
- Open
- Closed
 - Benefits, Historical & Problem Wage, Payroll & Salary Current
- Job Analysis/Description File

ERISA

- 5500's
- Summary Plan Descriptions
- Summary Annual Reports
 - Benefits, Retirement Plans

Expatriate Policy, Dependent Education,

Tax Cycles, Tax Equalization

Retention Period (cont.)

Current Year + 2 Years

Current Year + 4 Years

Life of Contract onsite +
3 Years archivedActive onsite + 15 Years
archived

Life of Policy + 10 Years

Current Year + 1 Year

Current Year + 1 Year

Current Year + 20 Years

Current Year + 20 Years

Onsite until closed

Current Year + 20 Years

Year + 7 Years

Current Year + 3 Years

Current Year + 6 Years

Life of Plan + 3 Years

Life of Plan + 3 Years

Current Year + 15 Years

Current Year + 15 Years

(cont. on next page)

<u>Type of File (cont.)</u>	<u>Retention Period (cont.)</u>
Firm Publications	
• Benefits News & Announcements	Current Year + 1 Year
• Flexible Benefits Enrollment Guide	Current Year + 6 Years
• Flexible Benefits Enrollment Handbook	Current Year + 6 Years
• General Announcement Updates	Current Year + 1 Year
• Health & Safety Tips	Current Year + 5 Years
• HR Bulletins	Current Year + 6 Years
• Local Office Newsletter	Current Year + 1 Year
Flex Day Reports	Current Year + 6 Years
Flexible Benefits Credit & Debit Reports	Current Year + 6 Years
Flexible Spending Account Records	Current Year + 7 Years
Illness & Injury Prevention Program	Current Year + 3 Years
• Inspection Reports	
• Meeting Minutes	
• Recommendations	
• Training Program Info & Attendance Records	Current Year + 3 Years
Immigration Reform & Control Act I-9 Forms	Active onsite + 3 Years archived
Independent Contractor Records	Active onsite + 7 Years archived
Insurance Carrier Files	
• Correspondence Files	Current Year + 2 Years
• Premium Files	Current Year + 3 Years
• Contract File	Life of Contract + 3 Years
• Claims Experience Files	Life of Contract + 3 Years
• Original Quotation Letter, Proposal Documents & Approval Record	Life of Contract + 3 Years
Layoff Policy	Life of Policy + 10 Years
Leave of Absence Listing	Current Year + 3 Years
• Family & Medical Leave Reporting Data, Letters, Disputes, etc.	Current Year + 3 Years
Longtimer Records (Payroll Log)	Current Year + 1 Year onsite, 5 Years archived
Mandatory Continuing Legal Education (MCLE) Records	Current MCLE cycle: 3 Years onsite + 4 Years archived
Monthly Management Briefings	Current Year + 3 Years
Moving/Relocation Expense	7 Years from last amend- ment

(cont. on next page)

Type of File (cont.)

Paid Time Off/Vacation Request Forms

Paid Time Off/Vacation Balances and Reports

Payroll Records

- Quarterly/Annual Filings
- Labor Statistics
- New Hire Reporting
- W-2's
- W-4's
- Authorized Payroll Deductions
- Time Cards (Pre-Automation)
- Garnishments/Liens

Policy Manuals

Policy/Program Development Records

Referral Fees Log

Relocation Expense Reports

Retiree Files (Benefits)

Retirement Beneficiary Designation Forms

Retirement Plan Audits

Staffing Analysis

Staffing Comparisons

Surveys: Compensation, Salary, Benefits

Retention Period (cont.)

Current Year + 1 Year onsite, 5 Years archived

Current Year + 1 Year onsite, 5 Years archived

7 Years from last amendment

7 Years from last amendment

7 Years from last amendment

7 Years from last amendment

Current Year + 1 Year onsite, 5 Years archived

7 Years from last authorization

Current Year + 2 Years onsite, 4 Years archived

Current Year + 1 Year onsite, 5 Years archived

Current Year + 10 Years

Life of Policy + 10 Years

7 Years from last amendment

Year + 2 Years onsite, 5 Years archived or until taxclearance, whichever is longer

Life of person + 5 Years

Life of person or Duration of Plan Participation + 5 Years

Current Year + 5 Years archived

Current Year + 3 Years

Current Year + 10 Years archived

Current Year + 3 Years

(cont. on next page)

Type of File (cont.)

Temporary Agency Invoices
 Transfer Subsidy Payment Log

Workers' Compensation

- CAL OSHA Supplemental 101 Records
- OSHA 200 logs
- Claims Kits
- Claims Reviews
- MICA Reports
- Occupational Injury Reports—First Aid
- Occupational Injury Reports—Lost Time
- Occupational Illness Reports—Lost Time
- OSHA Inspection Files
- Workers' Comp Files
- Material Safety Data Sheets

Voluntary Early Retirement Program

Retention Period (cont.)

Current Year + 1 Year
 7 Years from last amendment

Current Year + 5 Years
 Current Year + 5 Years
 Current Year + 5 Years
 Current Year + 5 Years
 Current Year + 5 Years
 Current Year + 10 Years
 Current Year + 10 Years
 Active + 50 Years
 Current Year + 10 Years
 Active + 50 Years
 Active + 30 Years
 Life of Program + 10
 Years

Appendix B

Retention/Destruction Program Exemplar Package

Sample Engagement Letter Language Re: Firm's Document Retention Policy

1. You are entitled upon written request to any files in our possession relating to the legal services performed by us for you, excluding our internal accounting records and other documents not reasonably necessary to your representation, subject to our right to make copies of any files withdrawn by you. Once your matter is concluded, we will close your file, and you will receive notice thereof. Your physical files may be sent to storage offsite, and thereafter there may be an administrative cost for retrieving them from storage. Thus, we recommend that you request the return of your file at the conclusion of your matter. Under our document retention policy, we normally destroy files *[ten years]* after a matter is closed, unless other arrangements are made with the client.

2. The firm and the client agree that all client-supplied materials and all attorney end product (referred to generally as "client material") are the property of the client. Attorney end product includes, for example, finalized contracts, pleadings, and trust documents. The firm and the client agree that attorney work product is the property of the firm. Attorney work product includes, for example, drafts, notes, internal memoranda and electronic files, and attorney representation and administration materials, including attorney-client correspondence and conflicts materials.

After the close of a matter, the firm will notify the client of any client materials that remain in firm's possession. The client will be invited to retrieve these client materials within *[45 days]* of notice, or the client may direct the firm to forward the client materials to the client, at the client's expense. If within *[45 days]* of this notice the client fails to retrieve the client materials or request the firm to forward them, the client authorizes the firm to destroy the client materials.

After the *[45-day]* period, the firm will, consistent with all applicable rules of professional conduct, use its discretion as to the retention or destruction of all attorney work product and any client materials that remain with the firm.⁶⁵

65. Adapted from Myron L. Frans & Christopher J. Kopka, *Records Management and Retention Policies for Law Firms*, 54 BENCH & BAR MINN., Apr. 1998, at 29, 33 (entry no. 28).

**Initial Client Contact Letter Re:
Authorization to Return/Destroy Files**

Dear *[Client]*:

Under our firm's document retention policy, we normally destroy client files *[ten years]* after a matter is closed, unless other arrangements are made with the client. Our records show that our files on the following matters previously handled for you are now subject to destruction unless you wish to make other arrangements:

Matter Name	Number of Storage Boxes	Boxes to be Transferred to Client	Boxes to be Destroyed

You are entitled to any of your files in our possession relating to legal services performed by us for you, excluding our internal accounting records and other documents not reasonably necessary to your representation. Please contact me at the telephone number given above if you wish to inspect any of the above-listed files before making a decision as to whether to have them transferred to you or destroyed. If you do wish to inspect files, we will need to arrange a mutually convenient time and place for the inspection. Our offsite storage facility will charge for removing files from storage for inspection at the rate of *[\$1.25]* per box, which you would be expected to pay.

If you choose to have some or all of the above-described files transferred to you either after or without inspection, the cost of such a transfer will be approximately *[\$1.50]* per box, or a total of *[\$_____]* if all boxes eligible for destruction are transferred. We will handle any files that you wish to have destroyed without inspection at our expense. At this time, no action will be taken on boxes in our possession which are less than *[ten years]* old.

Please indicate in the spaces provided above whether you wish the listed files destroyed or transferred to you. If you elect to inspect boxes and/or to have boxes transferred to you, you are acknowledging your obligation to pay the costs of removal from storage and transportation by signing a copy of this letter.

Letter to Client Confirming Retention/Destruction Arrangements

Dear *[Client]*:

This letter confirms our mutual understanding that our files generated in connection with services previously rendered to you on the matters described below are to be transferred to you or destroyed by us under our document retention policy:

1. Files to be transferred to *[Client]*:

Matter/File Description	Box Designation(s)

The above-listed files will be delivered to you at *[address]*, and we will bill you for the cost of transportation, which is estimated at *[\$1.50]* per box, or *[\$_____]* for the whole group.

2. Files to be destroyed:

Matter/File Description	Box Designation(s)

Destruction of the above-described files will be handled by us at our expense. No action will be taken at this time on the boxes in our possession which are less than *[ten years]* old.

Please confirm that you concur in the above-described arrangements for handling the designated files by signing this letter in the appropriate space below and returning a signed copy to me in the enclosed, self-addressed enveloped.

**Authorization for Records Destruction Memo—
From RM Department to Lawyer**

Memorandum

TO: *[Attorney Name]* COPIES:
FROM: *[Records Department Staff Member]*
DATE: FILE:
RE: Authorization for Records Destruction

The following file(s)/volume(s) have been marked for destruction by you, your secretary or a legal assistant. Please confirm by signing below that the listed materials should be destroyed in their entirety, specify preferred method of destruction and return this memo to me in the records center. Thanks for your cooperation in this matter.

Client/Matter No.:

File(s)/Volume(s):

These materials should be:

___ sent for confidential shredding; or

___ discarded via the firm's standard trash disposal receptacles.

Approved for destruction by:

[Attorney Name]

Date

Attachment: Matter index marked to show file(s)/volume(s) to be destroyed.

Authorization for Records Destruction Memo—Pre-Storage Weeding*Memorandum*

TO: *[Attorney name]* COPIES:
 FROM: *[Records Department Staff Member]*
 DATE: FILE:
 RE: Authorization for Records Destruction

As part of the regularly scheduled, ongoing process of sending inactive files to offsite storage, the file(s)/volume(s) highlighted on the attached index sheet(s) are now eligible for destruction. Eligibility is based on the firm's document retention policy, which states that certain types of file materials are not to be sent offsite, but are to be destroyed. These items include drafts, notes, publicly available research materials, extra copies, and working files. Also highlighted are empty subfiles that were created upon request but never used. Typically, such files are removed, recycled, and deleted from the client/matter index when the file is prepared for offsite storage.

Please confirm by signing below that the listed file(s)/volumes(s) may be destroyed in their entirety, specify preferred method of destruction, and return this memo to me in the records center. Thanks for your cooperation in this matter.

Approved for destruction by:

[Attorney Name]

 Date

The volumes highlighted on the attached index sheets should be:

___ sent for confidential shredding; or

___ discarded via the firm's standard trash disposal receptacles.

Attachment: Matter index marked to show file(s)/volume(s) to be destroyed. File(s)/volumes(s) not highlighted will be retained and sent to offsite storage.

**Letter to Former Attorney Re: Authorization to
Return/Destroy Personal Files**

[Former Attorney's Name]

[Former Attorney's Current Address]

Re: Liquidation of Personal Files

Dear *[Former Attorney]*:

A recent inventory of records in our offsite storage facility indicates that files and/or boxes of personal material are being stored under the personal records number assigned to you while you were employed by *[law firm name]*. Attached are index sheets detailing these materials; highlighted items have been designated for destruction. To enable us to properly return or dispose of these materials, we ask that you please follow these steps:

1. Review the attached index sheet(s).
2. Check one of the disposition options listed on the next page.
3. Sign the bottom of this letter authorizing us to carry out your disposition instructions.
4. Fax a signed copy to me at the telefacsimile number listed above.

If we do not hear from you within *[45 days]* of the date of this letter, the materials highlighted on the attached index sheet(s) will be destroyed according to *[law firm's]* document retention schedule applicable to such materials. If you have any questions, please don't hesitate to contact me. Thanks very much for your cooperation in this matter.

___ I authorize destruction of all materials listed on the attached index sheet(s).

___ I authorize partial destruction and partial retrieval. I have made notations on the attached index sheet(s) regarding the files I authorize for destruction, and I will contact you as instructed above to arrange for retrieval of the remainder within *[30]* days of the signature date below.

___ I will retrieve all files circled on the attached index sheet(s). I will contact you as instructed above to make the necessary arrangements within *[30]* days of the signature date below.

Signature

Date

Attachment: Letter to Client From Law Firm-in-Dissolution

Hufstedler & Kaus (A Partnership in Wind-up)

[Contact Address]

[Former Client Name]

[Last Known Address]

Re: Disposition of Client Files

Dear *[Former Client]*:

The law firm of Hufstedler & Kaus (H&K) dissolved on *[date]* and no longer conducts any business other than the closing of its affairs. To complete the wind-up process, H&K must dispose of all client files in its possession. You may be more familiar with one of the firm's predecessor names: Agnew, Miller & Carlson; Beardsley, Hufstedler & Kemble; Hufstedler, Miller, Carlson & Beardsley; Hufstedler, Miller, Kaus & Beardsley; Hufstedler, Kaus & Beardsley; or Hufstedler, Kaus & Ettinger.

Our records indicate that we maintain the following client records on your behalf:

Matter Name: Client/Matter Number:	File/Box Descriptions:
Matter Name: Client/Matter Number:	File/Box Descriptions:

Please indicate your disposition instructions regarding the above-listed file(s) by completing and returning the attached form. If we have not heard from you within *[60]* days of the date of this letter, we will assume that you do not want your file. Matters closed over *[seven]* years ago will be destroyed as soon as possible. While matters closed less than *[seven]* years ago will be held until they have been closed for *[seven]* years before they are destroyed, we strongly urge you to arrange for the transfer of any such files at this time.

H&K is maintaining thousands of boxes of client files in offsite storage. Unless your response indicates a need to expedite the return of your file, our intention is to process all responses simultaneously and coordinate the return of files via UPS ground service, commencing in *[month, year]*.

If you have any questions, please feel free to contact *[name]* at *[telephone number]*.

The following are my instructions for disposing of my file(s):

- Send the file(s) to me at this address:
_____. If the cost exceeds [\$5.00], I agree to pay the cost of transfer in advance or, alternatively, I will arrange another method of file transfer at my own expense.
- Send the file(s) to the following named law firm at this address:
_____. If the cost exceeds [\$5.00], I agree to pay the cost of transfer in advance, or, alternatively, I will arrange another method of file transfer at my own expense.
- Destroy the file(s).
- I have no knowledge about this matter.

Dated: _____
Signature

Client Name:

Last Known Address:

Matter Name(s)/Number(s):

File/Box Descriptions:

Bar Code Number(s):

Public Notice Language Re: Records Destruction by Law Firm-in-Dissolution

Please be advised that the law firm of [*Mudge Rose Guthrie Alexander & Ferdon LLP*] is in dissolution. As a result of the dissolution, Mudge Rose is preparing to destroy its closed client files on [*November 3, 1996*]. If you were ever a client of Mudge Rose or its predecessors—including Mudge Rose Guthrie & Alexander; Mudge Rose Guthrie Alexander & Mitchell; Nixon Mudge Rose Guthrie & Alexander; Mudge Stern, Baldwin & Todd; Daniels Houlihan & Palmeter; or Edwards Villoresi Perucci & Paulsen—you may have a file or files, including original documents, that are in danger of being destroyed. Mudge Rose will provide these files to you upon written request. If you wish to obtain your file(s), please contact the Firm within [*60*] days of the publication date of this notice, at the following address:

Mudge Rose Guthrie Alexander & Ferdon LLP
Attention: Records Department
180 Maiden Lane
New York, NY 10038