

## **Model Policy: Client file retention and destruction**

### **Why you need this policy:**

One of the thorniest challenges of managing a law office is the handling of client files. It's not just an administrative issue. Retention and destruction of client files are subject to legal and ethical requirements, including the ABA Rules of Professional Conduct.

### **How this policy helps you:**

It's crucial to establish a written policy that explains how long client files will be closed, retained, culled, i.e., rid of extraneous information, and, ultimately, destroyed.

### **How to use this policy:**

This Model Policy combines the provisions of a couple of leading examples and must be carefully adapted to meet your own policies and procedures by one or more partners who are familiar with the ABA Rules and other legal and ethical requirements that apply.

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# **Model Policy: Client file retention and destruction**

## **ABC Law Firm**

### **1. Purpose of policy**

The attorneys of the ABC Law Firm have adopted this Policy to ensure that files containing the records of client matters are handled appropriately and in accordance with all of the firm's obligations under applicable laws and ethical codes.

### **2. Definitions**

For purposes of this Policy, the following terms will be defined accordingly:

**Client file** means paper or electronic records pertinent to the case of a particular client represented by ABC Law Firm, including but not limited to, documents brought to the attorney by the client or the client's agents; pleadings pertinent to the case; depositions or other discovery documents pertinent to the case that the client was billed and has paid for, and "work product" (i.e., notes in the file consisting of attorney's impressions about the case and notes containing comments and thoughts made during phone conversations with the client).

**Disposition** means the final action taken during the life cycle of the record within this office including its: destruction; transfer to vital record status; transfer to the client; transfer to third-party, e.g., another lawyer or law firm; or permanent retention.

**Retention period** means the period of time following the closing of the matter (active to inactive status) until its final disposition.

**Vital record** means any record that must receive the highest level of protection because of its necessity to protect the interests of the lawyer or the firm and essential to the resumption of business. These records must be secured in a destruction proof environment such as a fireproof safe or vault.

### **3. Retention of client files**

**a. File closing:** A client file must be reviewed by the lawyer before being closed and prepared for storage. Closing of a file must be in accordance with a specific written policy takes into account the following factors:

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- No file may be closed and scheduled for destruction under a retention schedule until all matters relating to the resolution of all matters relating to the representation as follows:
  - i. **All matters:** Discharge by client or withdrawal from representation by firm;
  - ii. **Litigation:** Satisfaction of judgment. Final dismissal of action because of settlement or exhaustion or abandonment, with client consent, of all appeals options;
  - iii. **Bankruptcy claims and filings:** Discharge or debtor payment of claim or discharge of trustee or receiver;
  - iv. **Dissolution of marriage:** Final judgment or dismissal of action, or date upon which marital settlement agreement is no longer effective, except when minor child custody is involved in which event the date of the last minor child's reaching majority;
  - v. **Probate claims and estate administration:** Acceptance of final accounting;
  - vi. **Tort claims:** Final judgment or dismissal of action except when minor involved, in which event the date of such minor reaching majority;
  - vii. **Real estate transactions:** Settlement date, judgment or foreclosure, or other completion of matter; and
  - viii. **Leases:** Termination of lease.
- No file may be closed until all outstanding fees are paid or discharged.
- No file may be closed until there is a final distribution and accounting of all trust account balances relating to the file.
- No file may be closed until the responsible attorney examines the file to identify all client property and that client property has been returned to the client or is stored as a vital record, if necessary, including such personal documents as tax records, expense records, bank records, deeds, corporate documents, etc.

**b. Culling of files:** At the discretion of the lawyer, the file can be culled of unnecessary materials, including:

- Legal memoranda, briefs, pleadings, and other documents that can be reproduced from other sources.
- Drafts of documents otherwise preserved in final form unless the process of creating the final document might later be an issue. Marked-up copies are often useful in the event questions later arise.
- Notes and memoranda recording nonpublic information regarding a client or its adversary can be destroyed.
- Copies of published opinions and other available published material.
- Duplicate documents.
- Depositions may be culled particularly if electronic transcriptions are available.
- vii) Extraneous material such as scratch pads, legal pads, and paper clips.

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#### 4. Storing files

All files must be kept in storage for at least 10 years beyond the closing date of the file.

**a. Storage of closed files:** Closed files must be stored:

- On-site for the first two years after closing.
- Off-site after the first two years after closing.

**b) Storage facilities:** Facilities in which files are stored must be:

- Physically secure to protect client confidentiality.
- Reasonably safe from environmental factors such as moisture.

#### 5. Destruction of files

**a. 10 Years minimum retention:** ABC Law Firm will maintain legal files for at least 10 years after the representation ends. But while files may not be destroyed before 10 years, it may be necessary to retain client files and refrain from destroying them for a longer period in accordance with the following guidelines.

**b. Attorney must review, approve destruction:** No ABC Law Firm client file may be destroyed unless and until the attorney who represented the client or, if that attorney is not available, another attorney designated by ABC Law Firm management, reviews the file and determines that it is appropriate to destroy it.

**c. Criteria for review:** In determining whether it is appropriate to destroy the file, the reviewing attorney shall consider at least the following factors:

- Whether the **statute of limitations** for legal malpractice has run or been tolled.
- If the representation was of a **minor client**, whether the client has reached majority age at the time of review.
- Whether client expressed **dissatisfaction** with the representation or outcome.
- Whether there remains an **unsatisfied judgment** that cannot be renewed—in which case the file should be maintained until a malpractice action could no longer be brought after the date for renewal expires.
- Where **minor children** were tangentially involved, a file should not be destroyed until all such children reach majority age, plus the extinguishment of their rights to a malpractice action.
- In a **dissolution representation**, a file should be maintained for as long as there are any acts left to be executed by any party, and during the pendency of an award of spousal maintenance or child support.

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- When there is a **structured settlement**, the file should be maintained until all payments are made.
- In **collections cases**, the file should be maintained until the judgment is paid or until renewal of the judgment is no longer viable, plus the time for bringing a malpractice action.
- In **criminal representations**, the file should be maintained for the longer of either:
  - i. The length of incarceration and/or parole, or the satisfaction by the client of any alternative sentence, such as Community Service, fines, disgorgement, restitution, SES or SIS; or
  - ii. The period of time for bringing a malpractice action.
- In **corporate representations**, the file should be maintained for the life of the corporation plus the period of time for bringing a malpractice action.
- In **estate planning, estate administration and probate matters**, the file should be maintained until the resolution of the final accounting plus the time period for bringing a malpractice action.
- In **Trust administration matters**, the file should be maintained until all operative trust clauses are exhausted, plus the time period for bringing a malpractice action.
- Explicit confirmation that none of the conditions requiring continued maintenance of the file, as set out in the Rules of Professional Conduct Rule 4-1.15(h)(1-4), are present, even in circumstances where destruction is pursuant to an agreement between the lawyer and the client.

## **6. Client notification**

Notifying the client of destruction of the client file is not provided where ABC Law Firm has previously notified the client of the Firm's retention period at the inception of the representation. If ABC Law Firm has not previously obtained the client's consent to the destruction of the file at the time of destruction, the file may not be destroyed until the requirements of the Rules of Professional Conduct Rule 4-1.15(h) have been met, and the file has been reviewed by the responsible attorney in the representation according to the provisions of this Policy.

## **7. Post-destruction records**

After the destruction of the client file, the ABC Law Firm will maintain records of:

- The file's opening and closing.
- The date of the conclusion or termination of the representation.
- Whether the file was destroyed under an agreement with the client or the Rules of Professional Conduct Rule 4-1.15.
- If destruction was carried out under an agreement with the client, a copy of the communication (Engagement Letter/Fee Agreement or other written

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document) notifying the client of the retention/destruction policy, and the client's consent thereto, if required.

- The date of destruction.
- The name of the attorney that reviewed the file and authorized its destruction.

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