

Tip of the Month

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Y2Keep Your Files

As a member of the Class of 2000, Y2K loomed large over New Year's Eve while we were trying to party like it was 1999. My friend's parents actually shut off their power at the stroke of midnight, which in hindsight, is pretty hilarious. As a naïve high school senior, my biggest concern was probably whether we would go to school the following week. Looking back, I can't imagine the stress law firms must have felt about their electronic files and records. Or now, 25 years later, how terrified firm administrators would be of the millennium bug given that it is much more commonplace to electronically store old files, scan incoming mail, and conduct business via e-mail.

"How long do I have to keep my files?" is a frequent question we field on the AttPro Risk Management hotline. This inquiry arises in a few situations – when a lawyer is planning to retire, a law firm is preparing to move to a new office, or when a firm is developing a file destruction policy. We always suggest that the lawyer check their jurisdiction's rules related to file retention and generally recommend that closed files should be kept for at least seven years. While a seven-year time frame will satisfy (and sometimes exceed) most jurisdictional rules for file retention, you could consider this the minimum length of time to retain your files.

When it comes to your file retention policy, perhaps instead of asking "How long?" consider asking "Why?" As you scroll through your electronic file list or comb through old filing cabinets wondering when you can make room for new files, asking "Why should I keep this file?" may be a better guide to developing a policy that complies with your state guidelines, satisfies your professional responsibilities to your clients, and protects you from potential malpractice claims. So, let's examine some "whys" ... without the pressure of a computer blackout:

- **The file contains original documents** – While some states dictate the minimum number of years to retain your client files, you should also consider the lifespan of the documents in the file. For example, if a contract term has not expired, it would be premature to dispose of the file. Original documents, such as wills, deeds, and certain contracts, may have to be retained indefinitely and any destruction will likely need to be evaluated on a case-by-case basis (if you destroy them at all). Depending on the circumstances, it may be best to coordinate the return of the client's original documents.
- **There is pending or anticipated litigation** – Before destroying a file, check the docket to see if the client or the matter you previously handled for them has resurfaced in litigation. Likewise, if you receive a litigation hold letter, you should check the status of the case or any government investigation before valuating the file for destruction.

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- If you are under a litigation hold, be sure to maintain the file in its entirety because violation of the hold could have serious evidentiary consequences for your client.
- **The statute of limitations has not yet expired** – Your entire file, including all of your notes and draft documents, might be your best defense in a legal malpractice action. Maintain your file until your state's statute of limitations for legal malpractice claims has run. Again, consider this a minimum length of time to keep the file. The client relationship or nature of the case may warrant holding on to the file for an extended length of time.

Unfortunately, there is no simple answer to how long you must keep your old files. However, by following these best practices, you can ensure you appropriately retain your clients' files and maintain your peace of mind. And, hang on to (retain?) those Doc Martens and flannels. While we may not face another potential worldwide computer glitch, those trends will surely come around again.

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