WHAT CAN BE DONE WITH ALL THESE OLD FILES?

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"Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools", Lee R. Nemchek 2001. Contact author by email at lnemchek@mofo.com

"File Retention and Document Management Considerations" D. Diane Dillard, UT Mortgage Lending Institute 1994

"File Retention and Document Destruction" D. Diane Dillard, UT Mortgage Lending Institute 2005

"Archiving Legal Files", Jerry R. Selinger and Steve Borgman, Texas Bar Journal, February 1994.

"Dealing With The Death of A Solo Practitioner", James E. Brill, originally appearing as a part of State Bar of Texas Advanced Estate Planning and Probate 2000 Course Material.

Restatement (Third) of the Law Governing Lawyers

"Disposition of a Lawyer's Closed or Dormant Files Relating to Representation of or Services to Clients", ABA Commission on Ethics and Professional Responsibility Informal OP. 1384, American Bar Association, March 14, 1977

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"Spoiliation, Suppression of Evidence, Fraud on the Court: Getting the Case Dismissed for Dishonest Conduct", David L. Pybus, Seminar paper, Houston Bar Association, August 18, 2005.

"File Retention and Disposition Policies", Jeffrey W. Jones, Seminar Paper, American College of Trust and Estate Counsel, October 22, 2005.

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Jimmy Brill is a 1957 University of Texas Law School graduate from Houston whose practice emphasizes probate, estate planning, and real estate.

Until 2012 he served as principal author and project director of the Texas Probate System first published by the State Bar in 1972 and updated six times since then and he previously chaired the State Bar CLE and PEER Committees.

In 1972 he was elected as a Fellow in the American College of Probate Counsel (now American College of Trust and Estate Counsel).

In addition to two awards of merit, The State Bar honored him with its Presidents' Award in 1978 as the outstanding lawyer in Texas, with the Gene Cavin Award For Excellence In Continuing Legal Education in 1994, and with a Presidential Citation in 2005 for chairing the State Bar Task Force On Starting Practice.

In 2006, the Real Estate, Probate and Trust Law Section of the State Bar of Texas presented him with its Lifetime Achievement Award as the Distinguished Texas Probate and Trust Attorney. He also received the Distinguished Service Award for 2000 from the Estate Planning, Probate and Trust Law Section of the Houston Bar Association.

In 2007 he was the recipient of the Dan Rugeley Price Memorial Award from the Texas Bar Foundation and in 2009 was selected as an Outstanding Fifty Year Lawyer.

The College of the State Bar presented him with its 1999 Professionalism Award and in 2000 recognized his article "Dealing With The Death Of A Solo Practitioner" as that year's best article from a State Bar course.

He chaired the Law Practice Management Section of the American Bar Association and in 2004 was honored by that Section with its Lifetime Achievement Award, formally the Samuel S. Smith Award For Excellence In Law Practice Management. He was inducted into the first class and was elected as an initial trustee of the College of Law Practice Management and later served as its treasurer.

For two and one-half years, Brill wrote a monthly column for solo practitioners in the ABA Journal. He received The General Practice, Solo and Small Firm Section of the American Bar Association Donald C. Rikli Lifetime Achievement Award in 2000.

Starting in 1994 he served as mentor to five women lawyers in their first year as solo practitioners and continued the group's monthly meetings for an additional four years. This group became a model for the mentor program of the State Bar.

He was an organizer and for twenty years led monthly meetings of a Houston group of lawyers known as Solos Supporting Solos. This informal group has met each month since September 1994 and provides solos with an opportunity to meet fellow solo practitioners in an informal setting.

Brill is listed in Best Lawyers In America, Trusts and Estates and has been designated as a Texas "Super Lawyer" by Texas Monthly in each of its compilations.

Prior to the 2010 auction of his collection, he was internationally known as an expert in Pitcairn Island Philately. Brill also was named as a Distinguished Alumnus of Lamar High School in Houston, Texas.

SIC TRANSIT GLORIA

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I. BACKGROUND.

The most frequently asked question to the State Bar law practice management consultants is "What do I do with all the files?" Unfortunately, the answer is not what you might think.

The lawyer who wants to develop a policy covering file retention, disposition, and destruction must grasp and deal with the swirling mix of property rights, the client's right to confidentiality, other ethical considerations, and practical practice management.

The reality is that with the advent of word processing, computers, and high speed office copying machines, there has been an unprecedented proliferation of paper with which every lawyer must deal. This has led to problems for storage of all of that paper as well as issues relating to access to stored paper and even to electronic media. Even inexpensive electronic storage has its problems. Changing technology has not helped. Remember 5 inch floppy discs?

Practical issues aside, the current approaches seem to exhibit an overwhelming, if not somewhat unrealistic, desire to "protect" the clients.

Nevertheless, at some point, ethical rules, professionalism, property law concepts, and good old fashioned common sense must come together to recognize that a lawyer cannot keep everything forever.

II. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS.

A. Section 44. Safeguarding and Segregating Property. A lawyer who converts the property of another is liable as is one who negligently fails to safeguard against the conversion or loss of entrusted property. The lawyer is to use "reasonable measures for safekeeping" objects belonging to clients such as a safe deposit box or office safe. The lawyer clearly is a bailee and probably could be regarded as a constructive trustee.

A lawyer's duty to safeguard client documents does not end with the representation. It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, or declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.

B. Section 46. Documents Relating To Representation. The lawyer must deliver to the client or former client, at an appropriate time and in any event, promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs. Agency law mandates that the lawyer supply the documents requested by the lawyer's principal.

A lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation unless substantial grounds exist to refuse.

Ordinarily, what will be useful to the client is for the client to decide. A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another or if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime. Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Under the conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report.

III. FILE OWNERSHIP.

A. The Starting Point. File ownership is the starting point for records retention and making a decision but there is no uniform rule throughout the states.

B. Entire File Rule. Some states have adopted the entire file rule where all file material belongs to the client.

C. End Product Rule. Other states take the exact opposite position that except for client owned property, the entire file belongs to the lawyer. This is referred to as the "end product" and "work product" model of file ownership.

D. Typical Contents Of A Lawyer's File. What might be found in "the client's file".

1. Documents entrusted to lawyer by client.
2. Original documents obtained from others.
3. Original documents prepared by the lawyer.
4. Photocopies of signed documents.
5. Unsigned copies of documents.
6. Prior drafts of documents.
7. Correspondence.

8. Receipts for expenditures made for clients.
9. Research materials

    a. Briefs
    b. Legal memoranda
    c. Copies of cases, statutes, articles

10. Lawyer's notes and other legal pad items.
11. Billing, time keeping, and service records.

    a. Prebills that summarize the services and/or reflect time spent
    b. Paper on which initial entries were recorded

12. Multiple copies of any of the foregoing.
13. Electronic versions of any or all of the foregoing.

E. Entire File Rule Carried to the Extreme. "When a former client asks for its file, a law firm must include any electronic documents or components or components of the file as well as whatever may be on paper. The cost of locating and compiling the electronic records has no bearing on the law firm's duty in this regard." See New Hampshire Bar Association Ethics Opinion 2005-06/-03.

F. The Fuzzy Middle Ground. The file, or at least most of it, belongs to the client and the client has the reasonable expectation that the lawyer will maintain the file so that it is available when the client needs it. The client's interest in the file has often been described as a property right and thus the file belongs to the client.

IV. ATTORNEY'S LIEN.

A. Black Letter Ethics. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may acquire a lien granted by law to secure the lawyer's fee or expenses. DR 1.08 (h).

1. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation. DR 1.15 (d).
2. There is no statutory attorney's lien in Texas. To the extent that the lien exists, it is a passive, common law, possessory lien. Burnett v. State, Tex. Cr. App., 642 S.W. 2d 765. A demand for payment is a pre requisite to the lien. Smith v. The State of Texas, Tex Civ. App., Corpus Christi, 490 S.W. 2d 902 (1972) rehearing denied.
3. Ethics Opinion 118, September 1955. An attorney should not be required to deliver his entire set of files to his client upon termination of the professional relationship. An attorney should retain within his files all matters purely personal to him and should turn over to the client only those papers which would affect either the rights or the exercise of the rights of the client. An attorney is privileged to delay delivering items to the client until he has had an opportunity to make an inventory of his files and determine what should be turned over to the client.

Note: The Professional Ethics Committee of the Supreme Court is a statutorily created committee charged with the task of issuing written opinions on ethical questions raised by Texas attorneys. The full text of all of the opinions is available at www.txethics.org.

4. Ethics Opinion 395, May 1979. The existence and enforceability of an attorney's lien with respect to a client's property, papers and files is a question of law. In Texas, an attorney's lien is recognized by the common law under certain circumstances. The Code of Professional Responsibility (the "Code"), however, does place restrictions upon the lawyer's right to assert a possessory lien with respect to the client's property, papers and files.

The Code [former DR 2-110 (A) (2)] provides that a lawyer must take reasonable steps to avoid foreseeable prejudice to the rights of his client, including delivering to the client all the papers and property which the client is "entitled". Thus, a lawyer ethically may assert his

attorney's lien with respect to a client's papers and property only where the attorney's lien is enforceable under the law and, in any event, may not refuse to deliver the client's papers and property to the client if retention of the file would prejudice the rights of the client.

Common law possessory attorney's lien has been held to be unenforceable if the lawyer voluntarily withdraws, is justifiably discharged because of misconduct, relinquishes possession of the client's property, or has not demanded payment of the debt.

EC 2-32 requires a lawyer "to minimize the possibility of harm". While the Code does not expressly prohibit the assertion of an attorney's lien where recognized under applicable law, it places severe ethical restrictions on an attorney's right to assert his lien where the client's legal rights would be jeopardized.

The assertion of an attorney's lien will present both ethical and legal questions which must be decided under the facts and circumstances of each case.

Any lawyer who contemplates retaining possession of his client's property and papers should be aware of the possibility that his action may be determined to be unethical because the attorney's lien is legally unenforceable or enforcement of the lien results in damage or prejudice to his client's rights. A jury could find that the attorney was not trying to establish a possessory lien but was willfully and wrongfully refusing to relinquish a client's documents. Thus, an attorney refuses to relinquish his client's files at his risk.

5. Ethics Opinion 411, January 1984. Having first made demand for payment and in the absence of limiting circumstances, an attorney may withhold the papers, money or property of a client until the outstanding fees and disbursements have been paid.

Actual, foreseeable prejudice of a client's rights, as distinguished from mere inconvenience or annoyance, creates an ethical violation in contravention of the Disciplinary Rules. An attorney who has once been retained to represent a client's rights may not later precipitate actual harm to those rights merely to collect a fee. The retaining lien does not constitute an absolute shield against the charge of unethical conduct.

6. Query. Is the possessory nature of the lien extinguished when a solo practitioner dies?
7. Query. Does the non-lawyer executor or heir have the right to the lien?

V. HOW LONG, OH LORD, HOW LONG?

A. Protecting The Interests of the Client. How helpful is vague language such as "client documents must be retained as long as may be necessary to protect the interests of the client"? Is the retention period until you run out of space? What about your garage? Outside storage?

Do you hold client files for the period of time equal to law regarding abandonment of property? Do the client files escheat to the state (as though unclaimed client funds)?

B. Retention Policy. In search of a bright line rule.

1. Trust accounts

a. Rule 1.14(a) of Texas Disciplinary Rules of Professional Conduct requires lawyers to retain for five years after termination of representation records of client's funds and other property that came into the hands of the lawyer.
b. Rule 15.10 of Texas Rules of Disciplinary Procedure enumerates the records that must be retained.

"Every attorney licensed to practice law in Texas who maintains, or is required to maintain, a separate client trust account or accounts, designated as such, into which funds of clients or other fiduciary funds must be deposited, shall further maintain and preserve for a period of five years after final disposition of the underlying matter, the records of such accounts, including checkbooks, canceled checks, check stubs, check registers, bank statements, vouchers, deposit slips, ledgers, journals, closing statements, accountings, and other statements of receipts and disbursements rendered to clients or other parties with regard to client trust funds or other similar records clearly reflecting the date, amount, source and disbursements of the funds or other property of a client".

C. Discovery. Texas Rules of Civil Procedure, Rule 196.4 Electronic or Magnetic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party

wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot--through reasonable efforts--retrieve the data or information requested or produce it in the form requested, the responding party must state an objection to complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

D. A Texas Standard? According to Section 35.48 of the Texas Business & Commerce Code, a business record required to be kept by state law may be destroyed at any time after the third anniversary of the date the record was created unless a law or regulation applicable to the business record prescribes a different retention period or procedure for disposal.

E. Federal Mandates.

1. Employee Retirement Income Security Act (ERISA) requires retention of many records relating to employees, especially as to those that participate in a retirement plan subject to its provisions.
2. Occupational Health And Safety Act (OSHA) requires preservation of medical records regarding exposure to toxic or hazardous substances through current employment and for 30 years thereafter.

F. Attempts At Specific Guidance. Note: This is not one size fits all. Different states have different rules. Different matters have different life cycles. Multi-state firms must retain for longest interval prescribed by any state in which it practices.

1. Criminal matters - Retain as long as client is incarcerated or case is on appeal. California and New Jersey - as long as client is alive.
2. Minors - Retain until 4 years following attainment of majority.
3. Adverse possession - At least 25 years after the possession commences.
4. Estate planning files - Until client's death plus 4 years.
5. Probate files - Until estate is settled and all audit periods have expired (Eg. 3 years and 9 months for taxable estates without closing letters).
6. Trusts - Until final distribution and final account plus applicable statute of limitations.
7. Estate and gift tax returns - Indefinitely.
8. Income Tax Returns - 6 years from later of due date or date actually filed and longer if there are carry over losses or certain other items.
9. Signed original documents. Until they are out of date and no longer of consequence.

G. Help Under The Estates Code?

1. Depositing the Will With the Clerk.

a. Section 252.001. Will Deposit; Certificate. A testator, or another person for the testator, may deposit the testator's will with the county clerk of the county of the testator's residence. Before accepting the will for deposit, the clerk may require proof satisfactory to the clerk concerning the testator's identity and residence.

The county clerk shall receive and keep the will on the payment of a $5 fee.

On the deposit of the will, the county clerk shall issue a certificate of deposit for the will.

b. Section 252.002. Sealed Wrapper Required. A will intended to be deposited with a county clerk shall be enclosed in a sealed wrapper.

The wrapper must be endorsed with: (1) "Will of," followed by the name, address, and signature of the testator; and (2) the name and current address of each person who is to be notified of the deposit of the will after the testator's death.

2. After death, Sections 252.101-105 describe the procedure for obtaining delivery from the county clerk.

a. Section 252.101. Notification By County Clerk. A county clerk shall notify, by registered mail, return receipt requested, each person named on the endorsement of the will wrapper that the will is on deposit in the clerk's office if: (1) an affidavit is submitted to the clerk stating that the testator has died; or (2) the clerk receives other notice or proof of the

testator's death sufficient to convince the clerk that the testator has died.

b. Section 252.102. Will Delivery On Testator's Death. On the request of one or more persons notified under Section 252.101, the county clerk shall deliver the will that is the subject of the notice to the person or persons. The clerk shall obtain a receipt for delivery of the will.

c. Section 252.103. Inspection Of Will By County Clerk. A county clerk shall open a will wrapper and inspect the will if: (1) the notice required by Section 252.101 is returned as undelivered; or (2) the clerk has accepted for deposit a will that does not specify on the will wrapper the person to whom the will is to be delivered on the testator's death.

d. Section 252.104. Notice And Delivery Of Will To Executor. If a county clerk inspects a will under Section 252.103 and the will names an executor, the clerk shall: (1) notify the person named as executor, by registered mail, return receipt requested, that the will is on deposit with the clerk; and (2) deliver, on request, the will to the person named as executor.

e. Section 252.105. Notice And Delivery Of Will To Devisees. If a county clerk inspects a will under Section 252.103, the clerk shall notify, by registered mail, return receipt requested, the devisees named in the will that the will is on deposit with the clerk if: (1) the will does not name an executor; (2) the person named as executor in the will: (A) has died; or (B) fails to take the will before the 31st day after the date the notice required by Section 252.104 is mailed to the person; or (3) the notice mailed to the person named as executor is returned as undelivered.

On request, the county clerk shall deliver the will to any or all of the devisees notified under this Section.

VI. WHO HAS RIGHT OF ACCESS TO "CLIENT FILES"?

A. <u>The Main Considerations.</u>

1. Confidentiality
2. Safekeeping

B. <u>Files of Individual Clients.</u>

1. Personal right
2. Agent under statutory durable power of attorney?
3. Guardian?
4. Ward who retains certain rights?
5. Family member?
6. Business associates?
7. Trustee in bankruptcy?
8. Executor or administrator?

C. <u>Files of Entity Clients.</u>

1. General partner
2. Limited partner?
3. Corporate officer?
4. Corporate director?
5. Shareholder of corporation?
6. Manager of limited liability company?
7. Member of limited liability company?
8. Trustee?
9. Beneficiary of trust?

D. <u>Real Help From Estates Code.</u> Sections 252.201-204 provide meaningful remedies against someone who refuses to delivery the will and other papers including arrest, confinement, and damages.

1. Section 252.201. Will Delivery. On receiving notice of a testator's death, the person who has custody of the testator's will shall deliver the will to the clerk of the court that has jurisdiction of the testator's estate.
2. Section 252.202. Personal Service on Custodian of Estate Papers. On a sworn written complaint that a person has custody of the last will of a testator or any papers belonging to the estate of a testator or intestate, the judge of the court that has jurisdiction of the estate shall have the person cited by personal service to appear and show cause why the person should not deliver: (1) the will to the court for probate; or (2) the papers to the executor or administrator.
3. Section 252.203. Arrest; Confinement. On the return of a citation served under Section 252.202, if the judge is satisfied that the person served with the citation had custody of the will or papers at the time the complaint under that section was filed and the person does not deliver the

will or papers or show good cause why the will or papers have not been delivered, the judge may have the person arrested and confined until the person delivers the will or papers.

4. Section 252.204. Damages. A person who refuses to deliver a will or papers described by Section 252.202 is liable to any person aggrieved by the refusal for all damages sustained as a result of the refusal.

Damages may be recovered under this section in any court of competent jurisdiction.

E. A Real Case. Resolution Trust corp. v H --- , P.C., 128 FRD 647 (N.D. Tex. 1989) is usually cited for the proposition that the client owns every scrap of paper in the file and states that the attorney has "no right or ability to unilaterally cull or strip from the files created or amassed during his representation of that client..."

F. Another Real Case. Estate of Robert Daniel Eichenour, Deceased, Probate Court Number 4, Harris County, Texas, Docket Number 264,493-402.

Client died. Administrators demanded lawyer to deliver legal files that were "owned" by the Decedent. Lawyer files for declaratory judgment and claims attorney-client privilege and confidentiality of client information and turns over original papers or documents owned by the client but denied that Decedent "owned" files maintained by his attorney. Administrators were Decedent's children who had been involved in litigation with Decedent. Lawyer stated that Decedent gave confidential information to his attorney with the reasonable expectation that the information and communications would remain confidential.

Lawyer asked Court to determine (a) what portion of legal files other than original client papers were "owned" by Decedent and therefore property which Administrators have a right to possess, and whether Administrators have legal right to compel Decedent's attorney to reveal confidential information and privileged communications with Decedent.

On February 2, 1995, Judge William C. McCullough found that all files and the entire contents thereof maintained by the lawyer, which are in his possession or under his control, were the property of Decedent during his lifetime and that the Independent Administrators are entitled to possession of them and ordered the lawyer to deliver the files to the Administrators.

G. Stop The Presses. In a more current development, the Supreme Court of Texas holds that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners. Kristin Terk Belt et al v. Oppenheimer, Blend, Harrison & Tate, Inc., et al., 192 SW 3rd 780 (TX 2006) It would not be much of a stretch to believe that the personal representatives could require lawyers to produce client files and their contents.

H. Ethics Opinion 570. In 2006, this Opinion decided that the work product doctrine does not protect the lawyer from the lawyer's own client with respect to notes created by the lawyer. The opinion "does not address the issue with respect to other types of documents or information contained in a lawyer's file" and that "withholding such notes from a client denies the client the full benefit of the services the lawyer agreed to provide to the client".

I. The Texas Rule. All of the foregoing are used at one time or another to justify the Entire File Rule in Texas.

J. Suggested Language Regarding Client Files.

Client understands that in order to protect client's interests in the event of disability or death of Lawyer, it may be necessary or appropriate for a staff member, a personal representative (including someone acting under a power of attorney), or another lawyer who is retained by any such person or by Lawyer to have access to Client's files and records in order to contact Client, to determine appropriate handling of Client's matters and of Client's files, and to make referrals with Client's subsequent approval to counsel for future handling. Client grants permission and waives all privileges to the extent necessary or appropriate for such purposes.

Furthermore, in the event of Lawyer's death or disability, if further services are required in connection with Client's representation and another lawyer is subsequently engaged by Client, Client expressly authorizes a division of fees based on the proportion of work done or the responsibilities assumed by each. Such division specifically authorizes the payment of fees and expenses to Lawyer's estate, personal representatives, and heirs.

Lawyer shall return all documents provided by Client as well as all original documents

generated in connection with the representation. Lawyer may retain copies of all such documents as well as all other materials.

Lawyer may destroy any of Client's files at any time with Client's written consent and in any event, after five years from the conclusion of the representation. During that five year period, Lawyer shall make such files available to Client for copying. No further notice to client will be required prior to such destruction.

VII. ADOPT STANDARD INTERNAL PROCEDURES.

A. File Opening Checklist.

1. Client intake form
2. Engagement letter

B. Standard Organization for Files.

C. File Closing Procedures.

1. Checklist to ensure all tasks have been completed.
2. Future actions are calendared with clear responsibility.
3. Final billing completed.
4. Disengagement letter restating file retention policy and advising client to take any necessary actions.
5. Redundant and unnecessary documents destroyed.

D. Storage.

1. Paper files must be protected from water, wind, fire, sunlight, insects, rodents, mold, and curious parties.
2. Paperless media must be maintained in retrievable format in a secure location away from the paper documents they are intended to duplicate. Many of us are painfully aware that we cannot be certain as to the life expectancy of media.
3. Maintain master index of files showing location and tentative destruction dates.

E. Delivering the File to the Client. Obtain a descriptive receipt dated and signed by the client. Consider superimposing a copy of the client's driver's license on that receipt.

F. Firm Copies. Consider making copies for the firm, especially if there is reason to believe that the client is dissatisfied. If in doubt, make a complete copy of the file before delivering to client. If client did not pick up file, consider retaining that file until statute of limitations has run on malpractice claim against the firm.

G. Notice Prior to Destruction. Notify clients prior to destroying their files, particularly if client had not signed off on your firm's destruction policy.

H. Parting Is Such Sweet Sorrow. A lawyer who leaves a firm may leave with that firm the documents of those clients that the lawyer represented while with the firm, but that lawyer must ensure that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of client's documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

1. Duties of attorneys in possession of the inactive client files of deceased attorneys.

   a. Is notice to last known address adequate?
   b. How long should clients have to retrieve their records?

2. A law firm has responsibilities to a client who was not represented by the firm but whose files are in possession of the law firm.
3. Responsibility to the client and for the files is a joint and several obligation of the lawyer who represented the client and the lawyer in possession of the files.
4. Frequency is exascerbated when lawyers leave the firm (and leave the files with the firm), a lateral hire joins the firm, or when a firm dissolves.

VIII. DESTROYING THE FILE.

A. Destroying Paper Is the Easy Part.

B. Electronic Data Is Nearly Indestructible. Hitting the delete key merely deletes the link to the document but the document remains unless it is overwritten. Even that may not be enough to deter a determined computer forensic specialist.

1. U.S. Department of Defense standard 5220.22-M specifies how to overwrite computer discs.
2. Fair and Accurate Credit Transaction Act (FACTA) Disposal Rule effective June 1, 2005 requires any person who maintains or possesses "consumer information" for a business purpose to properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information in connection with its disposal. The Rule defines "consumer information" as any information about an individual that is in or derived from a consumer report.

"Reasonable measures" for disposal under the Rules are 1) burning, pulverizing, or shredding; 2) erasing or physically destroying electronic media; and 3) entering into a contract with document disposal service. https://www.ftc.gov/news-events/press-releases/2005/06/facta-disposal-rule-goes-effect-june-1

According to the FTC, the Rule applies to debt collectors, attorneys, and those who obtain a credit report on prospective nannies, contractors, or tenants.

3. Graham - Leach - Bliley Safeguards Rule requires most financial institutions to have their security programs incorporate practices dealing with proper disposal of consumer information.

Note that Federal Trade Commission did not appeal trial court's decision that lawyers were not included in the definition of financial institutions.

4. Sarbannes-Oxley Act imposes significant criminal penalties on anyone who destroys documents "with the intent to impede, obstruct, or influence an investigation or proper administration of any matter with in the jurisdiction of any department or agency of the United States . . . " 18U.S.C.§1519.
5. Health Insurance Portability and Accountability Act of 1996 (HIPAA) imposes penalties for disclosure of medical information.

C. Spoliation. Spoliation is the destruction of evidence or the significant and meaningful alteration of a document or instrument. Andrade Garcia v. Columbia Medical Center of Sherman, 996 F. Supp. 605 (E.D. Tex. 1998). It is not an independent tort but is analyzed like one: There must be a duty to preserve evidence, the duty must be breached, and there must be prejudice to the other party.

1. There is no duty to preserve evidence unless a reasonable person would conclude from the severity of the accident or other circumstances surrounding it that there was a substantial chance of litigation. Wal-Mart Stores, Inc. v. Johnson, 106 SW 3rd 718 (Tex. 2003).
2. While the case is pending, parties and their counsel have an affirmative duty to preserve evidence, even if they have not received a request for production.
3. Counsel has an affirmative duty to effectively communicate the requirements to the client, and help manage the process of ensuring the preservation of electronic documents.

D. Progeny of Enron. Although Arthur Andersen had an extensive document retention policy in place prior to the problems at Enron, an email instructing employees to comply with a valid document retention policy was the smoking gun leading to that firm's criminal conviction. The conviction was overturned and that firm's document retention policies were at least impliedly approved. Arthur Andersen L.L.P. v. United States, 125 S. Ct. 2129 (2005).

IX. GOOD PROCEDURES THAT INCREASE PROTECTION FOR YOURSELF AND YOUR FAMILY.

A. Written Employment Agreements. A proper employment agreement or engagement agreement can go a long way in avoiding many problems.

1. A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation. DR 1.02 (b).
2. When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after

commencing the representation. DR 1.04 (c). A contingent fee agreement shall be in writing. DR 1.04 (d).

B. Conclude Representation. Upon conclusion of the lawyer's responsibility with respect to a particular matter, it is a good idea to send a "termination letter".

1. This may have the effect of identifying the commencement of an applicable limitations period. The general rule is that malpractice claims must be brought not later than two years after the day the cause of action accrues. Texas Civil Practice and Remedies Code §16.003. But note that Texas has adopted the rule that the limitations period commences upon discovery of the attorney's actions or omissions. Willis v Maverick, 760 S.W.2d 642 (Tex. 1988).
2. This is a good time to review the file to determine if there are any items that should be disposed of.
3. The letter should state that the lawyer's services have been completed and should specify any actions to be taken by the client. Original documents and other materials furnished by the client should be returned.

C. Suggested Language For File Destruction.

During our representation of you, we have created one or more files containing notes and documents relating to this matter. All original documents and other materials furnished by you have been returned to you previously, sent to other appropriate parties, or are enclosed with this letter.

It is our firm policy to destroy files when we no longer need them. We invite you to examine your files during our normal office hours to determine if you would like copies of any of their contents. Please consider doing so as soon as possible while this is fresh in our minds. We remind you that it is our policy to destroy most files after five years following the conclusion of our services and that our initial agreement confirmed this procedure. No further notice will be given to you prior to such destruction.

X. GOOD FILE RETENTION POLICIES INCLUDE PROPER FILE DESTRUCTION POLICIES.

A. Basic Considerations.

1. Have a written plan and follow it routinely.
2. No one size fits all. Files for different clients and different areas of practice call for different destruction schedules.
3. Consider statutes of limitations.
   a. Malpractice claims are to be brought within two years from the date the client discovers or should have discovered an error.
   b. Statutes of limitation are tolled for minors.
   c. Absent fraud, income tax claims can be brought within six years.
4. Do not use files as research banks. Have separate research and form files.
5. Give clients original documents.
6. Coordinate law firm's retention policies with those of its corporate clients.
7. When delivering file, advise client regarding client's need to retain materials pursuant to tax or other federal, state, or local regulations.
8. Enclose a copy of file retention policy with all final bills.

B. Reference. The most comprehensive source for further study is "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools" (See attached acknowledgments).

XI. SPECIAL CIRCUMSTANCES.

A. Lawyer, Insured, Insurer. Consider the relationship of lawyer who represents an insured and is retained and paid by an insurance company. Does the insured own the file? Or does the insurer? Are the insured's medical records "property of the client?" Can the attorney deliver the entire file to the insurer without the consent of the insured?

B. Solo Practitioner. What about the situation where a sole practitioner dies? Must the widow(er) or the estate store those files

indefinitely? Is there a different duty with regard to active files and inactive files? What duties befall the lawyer who settles the estate?

XII. THE ABA SPEAKS.

A. Common Sense. All lawyers are aware of the continuing economic burden of storing retired and inactive files. A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

B. General Considerations.

1. Unless the client consents, a lawyer should not destroy or discard items that clearly or probably belong to the client. Such items include those furnished to the lawyer by or in behalf of the client, the return of which could reasonably be expected by the client, and original documents (especially when not filed or recorded in the public records).
2. A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.
3. A lawyer should use care not to destroy or discard information that the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer.
4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.
5. In disposing of a file, a lawyer should protect the confidentiality of the contents.
6. A lawyer should not destroy or dispose of a file without screening it in order to determine that consideration has been given to the matters discussed above.
7. A lawyer should preserve perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

XIII. ALTERNATIVE PROVISIONS FOR EMPLOYMENT AGREEMENT.

A. Possible Alternative Language.

Client is entitled upon written request to any files in the Firm's possession that relate to legal services performed by the Firm for the Client, subject to the Firm's right to make copies of any files withdrawn by Client.

All client supplied materials and all attorney end product (collectively "client material") are the property of Client. Examples of attorney end product include finalized contracts or estate planning documents, deeds, and corporate records.

Attorney work product is the property of the Firm. Examples include photocopies of client materials, drafts, notes, internal memoranda, administration materials, attorney-client correspondence, and electronic versions of both client material and attorney work product.

After completion of the matter, the Firm will notify client of the existence of client materials that remain in the Firm's possession. Client has an affirmative duty to retrieve those client materials or to direct the Firm to forward the client materials at Client's expense. If Client fails to retrieve the materials or request the Firm to forward them, this failure shall be regarded as Client's authorization for the Firm to destroy the client materials without further notice to Client.

B. When Must Consent Be Given? Must client be aware of specific items in the file at the time the client give consent?

C. The Lord Gives and the Lord Takes Away. October 28, 2002 New Jersey Advisory Committee on Professional Ethics Opinion 692 (Supplement) states that unless the attorney is in possession of the client property before a retainer agreement is signed, the provisions of that agreement

permitting destruction of a file are insufficient to permit destruction of client property.

XIV. WHY CAN'T LAWYERS HAVE BRIGHT LINE RULES LIKE THE DOCTORS?

The rules for the custodianship, transfer, and disposal of medical records are cited in Title 22, Part 9, Chapter 165 of the Texas Administrative Code.

Rule Section 165.1(a) defines in great detail the content of "adequate medical record".

Pursuant to Rule Section 165.1(b), Texas physicians are required to maintain a patient's records for at least 7 years from the last date of treatment, or in the case of a patient younger than 18 years old, until the patient is 21 years old or 7 years from the last treatment, whichever is longer.

XV. EFFORTS TO CHANGE THE RULE IN TEXAS.

A. A Slow Process. Since the first presentation of "Dealing With The Death Of A Solo Practitioner" in 2000, efforts have been ongoing but real progress has been non-existent.

B. The Formal Process.

1. Ultimately, any changes in the Disciplinary Rules or in the Rules of Disciplinary Procedure require adoption and promulgation by the Supreme Court of Texas. There are two ways to reach the Supreme Court:

   a. Referendum. This is expensive both in resources and in political capital. Most active bar members are still licking their wounds from the complete and overwhelming rejection of every proposed amendment to the Rules by the membership in 2011.

   b. Inherent Powers. The Supreme Court has the responsibility and the authority to regulate lawyers and law practice in Texas. In doing so, the Court has the inherent power to change the Rules and the Court used these powers in 2006 to provide guidance for notifying clients and others of the death of a lawyer.

C. The Committee Process. It all starts with the State Bar committees. In 2014, a proposal was submitted to the Texas Disciplinary Rules of Professional Conduct Committee. At its February 2015 meeting a presentation was made to urge the Committee to adopt a rule to the effect that a client's file is presumed to be abandoned if there has been neither a request for the file nor some contact with the lawyer or law firm during the preceding five years. As of May 1, 2017, the Committee has not issued a recommendation nor has it requested additional information. If it is ever forthcoming, the report will be considered by the Board of Directors of the State Bar.

D. The Assembly. There is a little known and even less used procedure for reaching the Board. It involves a formal resolution that must be in the hands of the State Bar by April first for publication in the May issue of the Texas Bar Journal to announce that it will be considered at the Assembly that is held at the State Bar Convention in June. The Resolution selected for this process was adopted by the Council at the General Practice, Solo and Small Firm Section of the State Bar. All of that was done and the proposed amendment passed unanimously without any opposition. The Resolution is attached as **Attachment A**. Next step, the Board of Directors.

E. The Board of Directors. In past years the Board of Directors considered, voted on, and recommended a proposal for the Supreme Court to adopt, after which, the Court took action. Unfortunately, this Board was not so inclined and apparently without any discussion at its meeting in September 2016, referred the issue to yet another committee.

An oral report made at the meeting of the Board in January 2017 indicated that the committee's approach is not to amend the Rules, but to draft official comments to the Rules for consideration by the Board.

Section 10 of the Preamble to the Texas Disciplinary Rules of Professional Conduct states, "The Comments also frequently illustrate or explain applications of the rules, in order to provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules."

In the author's opinion, the Comments are not sufficient, and in order to provide real comfort to the lawyer who desires to get rid of old files, the Rules themselves must be amended.

No other report from that committee has appeared.

XVI. THE REAL ISSUE.

A. Practical Reality. In the "rush" to perpetuate the status quo, the members of the Board and of the Committees fail to consider the practical reality that confidentiality of client affairs is the loser. Well-meaning lawyers, members of their staff, and non-lawyer family members will continue to go through the files of the disabled, retired, or deceased lawyer to see what's there and to make referrals. Perhaps someone selected in this manner will be retained by the client but what about the other files, especially the closed files? They have no value, no one wants them, and they occupy valuable space. The practical reality is that one day, files will be destroyed. The issue is whether a lawyer can ethically destroy that lawyer's own client files or whether the destruction of those files will be performed by non-lawyers who are not aware of and are not regulated by the ethical restraints of our profession.

In a profession claiming the inviolate nature of confidentiality, the choice seems clear and beyond debate.

XVII. CONCLUSION.

The current system is based largely on an impractical idealism that might have worked in another era. Lawyers simply cannot be expected to maintain clients files into perpetuity. They and their families need guidance as to how long and what portion of the client files must be kept.

Texas should adopt the end product rule. The lawyer should return original documents and other documents needed by the client and should provide information of special interest to the client that may not be readily available through another source. Everything else should belong to the lawyer.

The client should have access to the file to determine if the client desires other items. Once the client has had this opportunity, the lawyer should be free to dispose of the remainder of the file at any time and without any further notice.

ATTACHMENT A

PROPOSED ANNUAL MEETING RESOLUTIONS

The following resolutions have been submitted to be considered by the Annual Meeting Resolutions Committee at the State Bar of Texas Annual Meeting on June 16-17 in Fort Worth. Any resolutions adopted by the committee will be considered by attendees of the General Session. If adopted by that body, the resolution expresses the majority opinion of those attending the General Session, not an action of the State Bar.

RESOLUTIONS ADOPTED BY THE GENERAL PRACTICE, SOLO AND SMALL FIRM SECTION OF THE STATE BAR OF TEXAS

WHEREAS, the Supreme Court of Texas has the constitutional and statutory responsibility within the state for the lawyer discipline and disability system and has inherent power to maintain appropriate standards of professional conduct.

WHEREAS, in order to carry out this responsibility, the Supreme Court of Texas promulgated rules ("the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure") for lawyer discipline and disability proceedings and these rules regulate the conduct of lawyers.

WHEREAS, Item 10 of the Preamble to the Texas Disciplinary Rules of Professional Conduct states that they are "rules of reason."

WHEREAS, the Supreme Court of Texas and the State Bar of Texas share the responsibility for regulating the conduct of lawyers who are licensed to practice in Texas. Subject to the inherent power of the Supreme Court of Texas, the responsibility for administering and supervising lawyer discipline and disability as specifically delegated to the board of directors of the State Bar of Texas.

WHEREAS, the Supreme Court of Texas has approved, adopted, or promulgated the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure in order to provide guidelines for the regulation of the practice of law in the state of Texas.

WHEREAS, the board of directors is vested with the authority to adopt rules of procedure and administration not inconsistent with the Texas Rules of Disciplinary Procedure, the responsibility for the enforcement of those rules, and as the duty to seek clarification and modifications when appropriate.

WHEREAS, Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and Rule 15.10 of the Texas Rules of Disciplinary Procedure require a five-year retention of certain records relating to funds and other property belonging to clients.

WHEREAS, without a comparable rule relating to the maintenance and preservation of the files, documents, and other items belonging to a client, a lawyer has a never-ending obligation for their maintenance and preservation.

WHEREAS, the current, never-ending obligations of lawyers to store indefinitely all files of all clients is of no real benefit to clients, but at the same time, it is an unreasonable burden on the lawyer and ultimately on the family of the lawyer.

WHEREAS, a five-year period for retaining client files would provide reasonable protection for clients and welcome relief for lawyers.

WHEREAS, the General Practice, Solo and Small Firm Section of the State Bar of Texas has approved the following resolutions and hereby requests the board of directors of the State Bar of Texas to adopt the following modifications of Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and Rule 15.10 of the Texas Rules of Disciplinary Procedure.

BE IT RESOLVED, that the board of directors of the State Bar of Texas petition the Supreme Court of Texas to exercise its inherent power to amend Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct by adding the following provision:

> (d) In the absence of a contractual provision, a client request, or an ongoing dispute, the files, funds, and other property belonging to a client are presumed to be abandoned five (5) years after termination of the representation and maintenance and preservation will no longer be required under these Rules.

BE IT RESOLVED, that the board of directors of the State Bar of Texas petition the Supreme Court of Texas to exercise its inherent power to amend Rule 15.10 of the Texas Rules of Disciplinary Procedure by adding the following provision:

> In the absence of a contractual provision, a client request, or an ongoing dispute, the files, documents, and other items belonging to a client are presumed to be abandoned five (5) years after final disposition of the underlying matter and maintenance and preservation will no longer be required under these Rules. TBJ