



## Digital Workflow

File retention obligations

### **How long should I keep paper?**

Once people realize the benefits of scanning and decide to do it they usually have one last question: how long should I keep the paper after I scan it? My advice is always to get rid of the paper as soon as possible. A friend of mine who long ago found Nirvana in being completely paperless says he thinks it should be illegal to sell scanners without a paper-shredder attached.

Still, people wonder about getting rid of paper and believe there are special rules that require them to keep certain papers. Which ones? They're not sure so they tend to keep most of them—just to be sure they comply with that mysterious bureaucratic edict.

### **Myth #1 the law makes me keep paper records**

The other day I came across a web post entitled [How To Store Your Tax Returns](#), which offered the following advice:

Since you should actually KEEP your tax returns and associated financial documentation, you want to have a systematized method for organizing these papers. Why keep them? First of all, if you ever get audited, you'll really want them. Secondly, in case of your death, these documents may be needed in the settling of your estate. Whatever the situation, you'll need these in paper form and not digital scans.

There was no reference to any IRS rules or regulations; just the author's opinion that the government requires citizens to keep tax documents in paper form.

### **What the IRS actually requires**

In 1997 the IRS issued a bulletin (Rev. Proc. 97-22) to address the issue of electronic records. A review of this decade old document shows that electronic records are, in fact, allowed by the IRS, as long as certain basic requirements are met. Here are the requirements for electronically stored documents ("ESD"):

- ESD must be 'accurate and complete' versions of hard copies
- ESD must have reasonable controls to assure integrity and accuracy
- ESD must be periodically checked to insure integrity
- ESD must produce 'legible and readable' hardcopies

- ESD must be 'legible and readable' when displayed on computer screen
- ESD must not be outside control of taxpayer (i.e. IRS must be able to get access if they direct you to grant them access).
- Tax payer is allowed to use more than one ESD system, as long as each complies with the above requirements.

Obviously, these requirements are reasonable. More importantly, they are quite easy to comply with. You aren't going to use an electronic storage system that is unreliable and produces unreadable information. And you are certainly going to make sure that your electronic information is properly backed up. Therefore, your system is going to comply with IRS regulation 97-22.

### **Natively electronic information**

Emails are a good example of information that is in electronic format, so obviously the law doesn't require you to convert all your emails to paper so you can store them. And the same is true of things like spreadsheets and computer databases, which aren't even easily converted to paper form.

The recent amendments to the Federal Rules of Civil Procedure were designed to deal with electronically stored information, which is known by the acronym 'ESI.' These rules contemplate that such information will often be best handled in 'native format.' In short, the trend is actually in favor of storing information in digital form. The law has been changed to adapt to this practical reality, and people who persist in saying that paper records are required are speaking more out of fear than knowledge.

### **Louisiana Law**

Louisiana Revised Statute §9:2612 deals with electronic records and provides in part "If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information..." The statute goes on to list requirements that are basically similar to the IRS Rev 97-22 list. Revised statute §9:2607 states that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form." And it goes on to say that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." In short, "if a law requires a record to be in writing, an electronic record satisfies the law." *Id.*

### **Exceptions to digital storage**

Some documents require the paper original, but there are not many such examples. Original promissory notes are probably still required to be kept because, in order to cancel a mortgage, you need the original note. At least, that's true in most states. Original wills & testaments may need to be kept in paper form, and perhaps some stock certificates.

Use your common sense and you'll find that there aren't a lot of documents where you need to keep the original paper copy. Maybe you'll err a little on the side of caution, but for God's sake don't keep your tax returns in paper form. Think about it for a second, even if you lost your copies of the tax returns, do you think the IRS would lose their copy of

your returns? And what format do you think that they keep their copies of your return in? Not in paper, that's for sure.

### **Informing your client**

The best time to let your client know about your record-keeping policies is right up front. Most attorneys (prudently) use engagement letters to make sure that their client is properly informed of how their representation will be handled. Below is some sample language regarding file-handling and retention that can be included in your representation agreement:

“Our policy is to scan and otherwise digitize all file materials and to use and retain as little paper as possible. We therefore ask that if you, for some reason, require that paper files be kept that you notify us of that requirement so that we can arrange a mutually satisfactory manner in which to maintain paper files. Upon termination of our representation it is our policy to purge all papers from our files, other than those papers which require that an original be maintained. If you want we will gladly provide you with a CD-ROM or other digital storage device that contains all of your case and file information in digital form. No guarantees are made that client files will be retained for more than 3 years after the representation is terminated.”

This language alerts the client that your policy is to be paperless, but allows them to let you know that they would like you to retain paper (at least up until the conclusion of the case).