

Probate Court Records: Questions and Answers

➤ General Questions and Authority for Disposal

Q1: Is General Schedule #14 effective now? Is it retroactive?

A: General Schedule #14 was effective when it was approved by the State Administrative Board on 8/1/17, with a minor amendment on 11/14/17. It applies to all probate court records.

Q2: Is each probate court formally required to adopt the General Schedule? Can the court use General Schedule #14 without adopting it? Or can the court customize its own schedule?

A: General Schedule #14 is the approved records retention and disposal schedule for all probate courts. MCL 399.811 and MCL 750.491 require that all public records be listed on an approved retention and disposal schedule that identifies the amount of time that records must be kept to satisfy administrative, legal, fiscal, and historical needs.

Courts are not permitted to destroy any court record that has not been identified on a schedule approved by the Archives of Michigan and the State Administrative Board. MCL 399.811. Any record not contained on this list or not having a statutory retention period cannot be disposed of without first securing an amendment to this schedule.

MCL 600.1428 states that “[t]he state court administrative office shall establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with supreme court rules.” The records retention and disposal schedule shall be developed and maintained as prescribed in MCL 399.811.

Q3: Why are there three schedules instead of one?

A: Many courts expressed a desire for a court-specific schedule.

Q4: When do we have to start using the new schedules?

A: If your court is going to dispose of any records, the new schedule relevant to your court must be used.

Q5: Why should a court follow the retention schedule for its post-1940 records?

A: The courts do not have the facilities or the funding to permanently maintain their records, nor do they have the staffing resources to maintain such a large

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body of records. A sample review of court records throughout the state revealed a wide range in the quality of recordkeeping practices and long-term storage methods and facilities; following the retention schedule will provide statewide uniformity of court records management across the State.

Q6: If the probate court handles juvenile matters for the family division of circuit court, what schedule should be used one?

A: The probate court must use the circuit court schedule for circuit court cases.

Q7: What schedule does the probate court use for matters that were under the jurisdiction of the probate before the family division of circuit court was created?

A: The probate court must use the probate court schedule for all case files that were under the jurisdiction of the probate court before the creation of the family division of circuit court.

➤ **Determining Eligibility for Disposal**

Q1: Define “closed date.”

A: Closed means:

- Estates and Trusts: when a closing statement or certificate of completion is filed, when an order for complete estate settlement is entered, or when the case is otherwise closed pursuant to statute or court rule.
- Conservatorship, Guardianship, and Protective Orders: when the guardianship or conservatorship is terminated, the ward dies, the minor reaches 18, or the case is otherwise closed pursuant to statute or court rule, whichever occurs first.

Q2: For civil cases, why is retention based on date of filing and not judgment? What happens if a judgment takes more than a year and the judgment is valid for 10 years?

A: The retention period is based on date of filing for ease of disposal because courts maintain files by filing dates, not judgment dates. Because of the change from judgment to filing date, the retention period was extended four years to accommodate situations where disposition may take more than one year from filing. The previous retention period was six years from judgment date, which would normally be seven to eight years after the filing date. Regardless of the retention period, a case file could be destroyed before the judgment is satisfied. However, the case history data, which contains all the

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information necessary to validate a judgment, is maintained for 100 years. Therefore, the case file does not need to be maintained longer.

Q3: How long does a court retain a file if there is an Order for Administrative Stay for Bankruptcy? Before judgment? After judgment?

A: A case is stayed for bankruptcy no longer than it takes to discharge the bankruptcy. Chapter 7 and 11 bankruptcy cases take less than a year for discharge, and Chapter 13 bankruptcy cases cannot be approved by the bankruptcy court if they are scheduled to take longer than five years.

If a trial court case is pending disposition when the bankruptcy is filed, it is unlikely that the trial court case will still be without disposition five years after the bankruptcy stay is lifted. It is just as unlikely that a circuit court case would be pending for five years before it went into bankruptcy. However, if there were such a situation, the court would not destroy the file of an unadjudicated case, regardless of the retention period. If a trial court case has already been adjudicated (has a judgment), the filing of the bankruptcy case does not affect the retention period for the case because postjudgment filings and activity can take place based on the case history, without the case file.

Q4: Are reports or queries available in the case-management system to indicate which files are eligible for destruction?

A: Courts should contact their system providers about the availability of reports or queries that will assist in identifying cases eligible for destruction.

➤ Case History Data (Register of Actions, Calendars, Docket Books, Indices)

Q1: What is the official record, the electronic ROA or the paper ROA in the file?

A: The electronic case history data (ROA) is the official record if the case history data exists in the case-management system. The paper ROA is the official record if the case history exists only in paper. If identical case history for a particular case exists in both the case-management system and on a paper ROA, the electronic case history is the official record and the paper ROA should be destroyed. If case history for a particular case exists in both the case-management system and on a paper ROA, but the data is not identical, the court must maintain the most complete record.

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Q2: If the case history/register of actions (ROA) is in the electronic case-management system, can the paper ROAs be destroyed?

A: The electronic case history is the official record. All paper (ROAs) can be destroyed, provided they are a copy of the data in the case-management system. All paper ROAs that are not copies of the case history data in the case-management system (e.g., ROAs created before the court had an automated case-management system) must be kept for the full retention period.

Q3: How do we handle an inquiry for case history or a document from a party whose case file has been disposed?

A: Case history and case files will not be disposed of before they should be. Each retention period for a given type of record reflects the legal, administrative, fiscal, and historical need for the records. Records that are no longer of any use or are no longer needed for any of these purposes are eligible for disposal. The retention periods were reviewed and approved by the State Court Administrator; Records Management Services of the Department of Technology, Management & Budget; Archives of Michigan; the Attorney General; and the State Administrative Board in accordance with MCL 399.811 to ensure all these interests were adequately considered.

Q4: What if someone needs information to record transfer of property but the case file is gone?

A: If someone requests a case file document that is necessary to record transfer of property that was not filed with the register of deeds when it was entered by the court, and that file has been disposed pursuant to the records retention and disposal schedule, an action for quiet title can be filed with the court.

Q5: Is a system provider required to maintain case history for the retention period? Will a system provider ever purge the case history from a case-management system?

A: All system providers are required to maintain case history for the full retention periods prescribed by the records retention and disposal schedule. Courts are responsible for ensuring that their system provider adheres to these requirements.

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Q6: If a court has case files, docket cards, and journals that were created before the automated case-management system, what does the court need to maintain?

A: If a case does not contain a case history (ROA), the entire file must be maintained or the court must enter the required case history data into the court's case-management system before disposing of the file. Maintaining only the judgment is not sufficient. Docket cards and journals may be sufficient, but it depends on what these records are. These terms have different meanings to different courts. If a journal or docket card contains the history of a case (what would normally be in a ROA) and that history contains all the data required for case history, the file can be disposed.

Q7: Are indices considered case files?

A: Case records consist of indices, case history (ROA), and case files. See MCR 8.119(D)(1). Before automated case-management systems were implemented, the indices were the numerical and alphabetical means for locating case files. They include the case name and case number. With automation, the indices are no longer separate from the case history (ROA) and are simply a query on the case name or case number. Case files contain the documents.

➤ Case Files

Q1: What is the official case file – paper or electronic?

A: Documents or files can be maintained in any medium authorized by the Records Reproduction Act. Examples are paper, digital image, or microfilm. After a paper document is reproduced into a digital format, the official record is the digital format and the paper records are nonrecords. The paper files should be destroyed.

Q2: If a court runs a new ROA at the time of closing a case, is this necessary if the court is keeping an electronic ROA in the case-management system?

A: MCR 8.119(D) requires all courts to maintain case history in an automated case-management system. Case history printed from a case-management system to paper (ROAs) is not a record; it is a reproduction only and is considered a nonrecord.

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Q4: Does a court need to maintain case files that were created before implementation of an automated case-management system?

A: Case history data and case files have different retention periods. Regardless whether records are paper, microfilm, digital image, or electronic data, each type of record must be maintained for its full retention period. Most circuit court case history must be maintained for 100 years, while the case files only need to be maintained for 6-10 years. Refer to the records retention and disposal schedule for details.

Q5: How are courts supposed to process records by closed dates when they are stored by filing date?

A: Certain assumptions about records will permit courts to dispose of records with minimal processing and instructions are available to assist with this process.

➤ Transcripts

Q1: Do transcripts have to be saved?

A: Transcripts are filed with the court and are docketed in the case history data (ROA) as filed. As such, they are part of the file contents even if they are maintained separately. They are to be retained for the full retention period of the case file in which they were filed.

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Q2: Can transcripts be destroyed with the files?

A: Transcripts are filed with the court and are docketed in the case history data (ROA) as filed. As such, they are part of the file contents even if they are maintained separately. They are to be disposed of at the same time as the file.

Q3: If a court has court recorder tapes going back to 1970, can those be destroyed? Can you recommend a company that will destroy those types of records?

A: There is not a simple answer to this question. Because courts do not associate entry of judgments with the recordings of cases, it is difficult to determine when to destroy court reporter notes, tapes, and recordings. A good rule of thumb would be to maintain them for the longest retention period for case files. In addition, when conducting a records disposal project, courts must determine which case records are ineligible for destruction (stayed before adjudication or in warrant status) and continue to maintain them. The recordings of these cases should be identified at that time and maintained.

➤ **Microfilm**

Q1: Is there a plan in place for older records already microfilmed? Are we supposed to destroy microfilm at some point?

A: You would keep to the longest retention period because some courts do interchange their microfilm, like civil case and criminal case, you would keep it for the longest retention period, then destroy, unless it says offer to archive.

Q2: Do cases have to be microfilmed anymore (only acceptable means of retention)? Is scanned image acceptable?

A: Courts may reproduce records in accordance with the Records Reproduction Act (MCL 24.401 *et seq.*). If original paper versions of records specified in the retention schedule are reproduced into an archival quality medium/format as provided by the Records Reproduction Act for the purpose of replacing the paper records before the required retention period, the paper records shall be destroyed, but no earlier than 30 days after being reproduced to allow for verification of the images. The reproduced records replace the paper records as the official record. MCR 1.109(D)(3). Also, an amendment to MCR 8.302, effective January 1, 2017, removed the specific requirement to microfilm or copy testamentary documents filed with the probate courts.

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➤ Methods of Storage (Paper versus Digital)

Q1: What is the authority for a court converting all of their paper records to digital images and then destroying the paper?

A: MCR 1.109(D)(3) and the Records Reproduction Act (MCL 24.401, *et seq.*) are the authority for converting paper records to digital images and then destroying the paper.

Q2: Best practices for transferring microfilm to digital images.

A: Records Management Services (RMS) of the Department of Technology, Management, and Budget is responsible for establishing standards and best practices for reproduction of records pursuant to the Records Reproduction Act.

See the RMS website for these materials at

http://www.michigan.gov/dtmb/0,5552,7-150-9141_21738---,00.html.

Specifically, *Best Practices for the Capture of Digital Images from Paper or Microfilm* is at

http://www.michigan.gov/documents/hal_mhc_rms_bp_for_digitizing_125527_7.pdf.

Q3: When can we destroy the paper document or file that has been scanned into an EDMS?

A: When the document or file has been scanned, the digital image is the official record pursuant to court rule. The paper document or file should be destroyed after the court has ensured that the digital image is accurate and legible, in accordance with the SCAO's digital imaging standards.

Q4: After documents have been scanned in, how long should we keep them before we destroy them?

A: If you have digitized your records, they are the official record and paper is the duplicate and should be destroyed. After you are done scanning documents, you should keep them at least 30 days to provide adequate time to verify that the digital records are accurate and legible in accordance with digital imaging standards.

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➤ Disposal Process

Q1: What if our court wants to start disposing of records?

A: SCAO is producing step-by-step instructions to help courts with the disposal process. If it is critical for a court to dispose of records soon, contact Trial Court Services staff at trialcourtservices@courts.mi.gov to start developing a disposal plan.

Q2: Is records disposal mandatory?

A: It is highly recommended for a number of reasons.

- Foremost, courts are running out of space for their paper records and converting all records to electronic format is costly. It is becoming increasingly difficult for courts to justify with their funding units the costs for long-term maintenance of a growing body of records, and while the cost of storage and hosting digital images may be cheap, there is usually an annual access fee for every user, and digital images with a long-term retention period (over 10 years) should be migrated during the retention period, a cost that can be prohibitive over time.
- Also, courts do not have adequate facilities, resources, and funding to preserve historical records, which is the responsibility of the Archives of Michigan under law.
- Finally, if all courts dispose of records when they become eligible, it provides a comparable body of records from one court to another, reduces inefficiencies in search and retrieval, reduces unnecessary storage costs, and creates equality. Court users can be both hurt and helped by record availability when seeking things such as visas, licenses, housing, jobs, and driving privilege.

Q3: How does Archives become involved in the disposal process and when do we contact them?

A: Archives will be providing guidance on this process that will be included in the Michigan Trial Court Records Management Standards, a resource that will be distributed in 2018.

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Q4: Is there an SCAO form for the Order to Dispose of Records?

A: The form has not yet been approved by the Archives of Michigan, but a draft for use by circuit courts can be provided.

Q5: Are courts required to oversee the actual destruction of their records?

A: The clerk must certify, on the Order to Dispose Court Records, that records have been destroyed. If a court is not overseeing the actual destruction of records, it must use a reputable company for disposal to ensure that the records are destroyed in the manner ordered.

Q6: What if a judge does not want to destroy the files?

A: Although the records retention and disposal schedule is law and the court should comply with it, the clerk of the court cannot destroy records until the chief judge signs the Order to Dispose Court Records.

➤ Approved Methods of Disposal

Q1: What are the approved methods of disposal?

A: Transfer to Archives when required, or destroy. Destruction must be done as specified in the standards.

➤ Transferring Records to Archives of Michigan

Q2: What is Mark Harvey's contact information?

A: State Archivist Mark Harvey can be contacted at harveym@michigan.gov or 517-449-5885.

Q3: Do we have to transfer records to the Archives of Michigan when the retention period has been met?

A: Yes. According to law, records identified in the records retention and disposal schedule for transfer to Archives must be transferred when the retention periods have been met. Duplicate records shall not be maintained by the court in any format (e.g., paper, electronic or digital format, or microfilm or microfiche), except as otherwise authorized by the State Court Administrative Office. MCL 399.811.

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Q4: Isn't it the responsibility of the probate register to preserve historic court records?

A: It is the responsibility of the Archives of Michigan to designate court records of historical value to the citizenry of Michigan and that must be preserved in archival format. Court Records pre-1941 have been designated as such a record.

Q5: Delayed registrations of foreign birth are confidential under MCR 3.617. If they are they sent to archives, will they be subject to FOIA?

A: Archives does not take confidential records and the schedule will be amended to remove the requirement to offer these records to Archives.

Q6: How does FOIA work when files are transferred to the Archives of Michigan?

A: If a court record is public, it remains public when transferred to Archives. If a court record is nonpublic, confidential, or sealed, Archives will not take the record.

Q7: By what method do you anticipate we will transfer to the archive? Is there an electronic means for this?

A: There are a variety of methods by which to transfer records to Archives. Documents can be transferred in paper, microfilm, or digital format. Data can be uploaded. Archives of Michigan uses Preservica, a cloud-hosted and on-premise active digital preservation software to preserve electronic court records. This standards-based software ensures that content is safely stored, can be found and trusted, is secure, and is updated to future formats.