
APPENDIX N

FAQS RE DOCUMENT DESTRUCTION AND PRESERVATION

Question: How long does a lawyer or law firm have to keep closed files?

Answer: Lawyers and law firms have to keep different files and documents for different periods of time. For example, the Code of Professional Responsibility requires lawyers to keep escrow and trust account records for seven years. See DR 9-102(D); 22 NYCRR § 1200.46(d).

DR 9-102(D) requires lawyers to keep for seven years copies of all retainer and compensation agreements with clients, client bills and all “records showing payments to lawyers, investigators or other persons, not in the lawyer’s regular employ, for services rendered or performed.” The Rule requires lawyers to keep copies of all retainer and closing statements filed with the Office of Court Administration for seven years. Although the Rule does not specify this, it would be prudent to maintain such OCA filings for seven years after the matter is closed.

DR 9-102(D) also requires lawyers to keep their operating account bank records for seven years.

Question: What bank records are covered by DR 9-102(D)?

Answer: A lawyer or law firm should keep all monthly statements, cancelled checks, deposit slips, checkbooks, check stubs, ledgers and reconciliation statements for all special, trust, IOLA and escrow accounts, as well as for all operating accounts. As a precaution, a lawyer or law firm should maintain such records for any other fiduciary account the lawyer or firm maintains.

Question: What records do I have to keep for conflicts checking purposes?

Answer: The Code of Professional Responsibility requires lawyers and law firms to maintain conflicts check systems and “keep records of prior engagements.” See DR 5-105(E); 22 NYCRR § 1200.24(e). Lawyers and law firms should keep enough information about client matters (open and closed) to determine, for example, whether they can represent a new client against a former client or concurrent clients with “differing interests.” Lawyers considering a new representation need to be able to determine whether it is “substantially related” to a prior representation. It is advisable to keep the firm’s client database (whether that is maintained on index cards or on a sophisticated computer) up to date, with complete information about client identity (included related entities) and the nature of the matter for which the lawyer or law firm was retained. These records must be maintained for as long as the lawyer is in practice or the law firm (or its successors) in business. After all, conflicts may follow lawyers from firm to firm and there is no fixed period for maintaining the information. Thus, a prudent lawyer should maintain it for as long as necessary, namely, as long as the lawyer is in practice. For guidance on former client conflicts, see DR 5-108; 22 NYCRR § 1200.27.

Question: Can a lawyer simply have a document destruction policy and get rid of all closed files after six months?

Answer: The answer is yes and no. Six months sounds like much too short a time frame. The statute of limitations for legal malpractice actions is three years and it can be tolled by continuing representation of a client, even on unrelated matters. There is no statute of limitations for disciplinary complaints, which can be filed many years after a case is over. It is wise to keep client files for at least six years. There is another consideration. Before any files are destroyed by the firm, the clients should be consulted. In *Sage Realty Corp., et al. v. Proskauer Rose Goetz & Mendelsohn, LLP*, 91 N.Y.2d 30, 666 N.Y.S.2d 985 (1997), the Court of Appeals held that the client was entitled to the entire file, except for internal law firm documents. The firm should give the clients an opportunity to pick up their files before destroying them. Helpful guidance also can be found in NYSBA Opinion 623 (1991) and NYSBA Opinion 460 (1977).

Question: What about old original wills? Can those just be thrown out on the reasonable assumption that they are no longer needed because the clients have died or found new counsel?

Answer: If a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire (or in the event of disability). In some cases, lawyers may be able to file them with appropriate courts. Original wills, like contracts, property deeds, trust instruments and other documents that a client might need to establish "substantial personal or property rights," or other original documents like birth and marriage certificates and passports, must be returned to the client or safeguarded by the lawyer. Failure to do so can result in professional discipline for failure to safeguard a client's property or damages for breach of fiduciary duty.

Question: Is there anything else that a lawyer or law firm should consider in designing a document retention program or policy?

Answer: Yes. First, no documents or files should be discarded if they might be necessary to the firm's defense of its own conduct or its handling of a matter. A firm should be particularly careful not to destroy documents that show that the firm committed malpractice or violated the ethics rules. Second, it is very important that client confidentiality be preserved during any document or file destruction. Shredding is advisable, since anything else may lead to disclosure of client confidences or secrets and liability for the firm. Similar caution should be used when computer equipment is replaced. No computer should be disposed of before the hard drive has been carefully erased, scrubbed or shredded, which can be accomplished simply by using available software programs. Just deleting files and documents won't do, since a person with sufficient computer expertise can retrieve most of those files and documents with a "restore" function. Expert advice is strongly recommended.