

Do I Have To Keep These Old Files?

BY ROY SIMON

Are old files stacked all over your office, or is your file room running out of space, or are you paying huge bills to store your closed files off site? If so, read on. This article tells you (1) what papers you must keep, (2) how long you should keep them.

The File Belongs to the Client

Files belong to clients, not to lawyers. A client who has paid a lawyer's bill is entitled to the lawyer's "entire file" except for certain internal law firm documents. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 97 N.Y. Int. 0208 (Dec. 2, 1997). Before you destroy any file, therefore, you must offer it to your client.

If the client wants your file, your problem is solved. But what about clients who do not want their files, or never respond to your calls or letters asking if they want their files? What should you keep? For how long?

What Should You Keep?

Every file contains four categories of items: (1) items you must keep to comply with the Code of Professional Responsibility; (2) items you must keep to fulfill your fiduciary duties to your clients; (3) items you need to enable you to check for conflicts of interest that may arise in the future; and (4) items you may wish to keep to protect yourself and your firm in case you are later charged with wrongdoing. Let's look at each category.

Code duty

Disciplinary Rule 9-102(D) of the Code of Professional Responsibility requires lawyers to keep certain documents for "seven years after the events which they record..." These records include such things as trust account records, copies of all retainer and compensation agreements, bills to clients, and records of payments to investigators outside the firm.

Fiduciary duty

You have a fiduciary duty to protect your clients and former clients by preserving vital papers that may substantially affect their rights. These papers include such things as the originals of wills, contracts, deeds, trust instruments, and settlement agreements. In N.Y. State Bar Ethics Op. 623 (1990), the Ethics Committee described these papers as "documents in need of salvaging," or "DINS" – that is, "documents...that the lawyer or the client is required by law to maintain or...that the client would foreseeably need to establish substantial personal or property rights..." If you throw out the DINS papers, your clients may suffer serious harm – and they may look to you to pay the damages for their lost rights.

Checking for conflicts

You may need parts of your old files to check for conflicts of interest with former clients. Under DR 5-105(E), which was added to the Code of Professional Responsibility in 1996, a law firm must have a system in place to check for conflicts with current or prior engagements. Under DR 5-108(A), a lawyer must not oppose a former client in a “substantially related” matter without the former client’s informed consent. If you throw out a closed file and a new client later asks you to oppose your former client, you may need the old file to determine whether the old matter is substantially related to the new matter.

Selfprotection

You may want to keep certain items to defend yourself against any later disciplinary charges, legal malpractice suits, etc. To do that, you’ll need evidence of what you did and why, probably including your notes, memos to the file, and drafts of papers. On the other hand, if you destroy evidence showing that you have committed legal malpractice or other wrongs, you could be liable for “spoliation of evidence,” a tort recently discussed in *Kirkland v. New York City Housing Authority*, 1997 N.Y. App. Div. LEXIS 13334 (1st Dep’t, Dec. 23, 1997). There the court dismissed a third party complaint to punish the third party plaintiff for destroying key evidence. The court stated (with citations omitted):

Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. We have found dismissal to be a viable remedy for loss of a “key piece of evidence” that thereby precludes inspection.

How Long Should You Keep Closed Files?

In deciding how long to keep closed files, there are three main considerations. First, as mentioned above, DR 9-102(D) requires you to keep certain bookkeeping records for seven years. Second, in 1996 the statute of limitations for legal malpractice actions in New York was shortened to three years. Third, there is no statute of limitations at all for disciplinary charges in New York (though proposals for a statute of limitations are now circulating).

With this in mind, I suggest that you keep the entire file in every case for at least three years; keep required DR 9-102(D) documents for at least seven years; keep files from unusual cases or angry clients for ten years; keep “DINS papers” until they no longer have any value (which may be many years); and keep basic information about prior engagements forever. Under this system, you will neither destroy papers you ought to preserve nor overwhelm your storage space with papers you may ethically destroy.

What to destroy

When you do destroy old files, remember that DR 5-108(A)(2) requires you to preserve client confidentiality absent that client’s informed consent to waive it. You should not simply throw your old files in an ordinary garbage can. Opinion letters, factual summaries, witness statements, and other sensitive papers should be shredded before they are discarded.

On the other hand, public documents such as pleadings, legal research, and documents filed with the court may not need to be shredded. Court papers in a drunk driving case or a nasty divorce are obviously more sensitive than court papers in a routine contract case, for example. Use your best judgment, but assume that anything you don't shred will be found by snoopers and used to embarrass or blackmail your former clients.

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