Thursday, September 6, 2012

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

# 'Fall' cleaning for attorneys – document, file retention

Even the "greenest" attorneys are often left with mountains of paper following the conclusion of a matter. Electronic communications compound the problem, as attorneys struggle with what to print or store.

With new matters looming on the horizon, preparing and managing closed files is a task that can be all too easily put off. This article explores records that attorneys and firms are required to retain, and offers practical suggestions for closed-file management.

Generally, law firm records can be divided into two categories, administrative and matter-specific. The New York Rules of Professional Conduct mandate the preservation of certain administrative records, while matter-specific items require an approach that considers both the needs of the client, as well as the attorney.

By SARAH MERKEL
Daily Record Columnist

## Administrative records

The Rules of Professional Conduct require that attorneys or firms retain for a period of seven years certain "Bookkeeping Records":

1) Records of deposits and withdrawals from client trust accounts and other accounts related to the lawyer's practice. The records must "specifically identify the date, source and description of each item deposited," and "the date, payee and purpose of each withdrawal or disbursement," Rule 1.15(d)(1)(i);

2) Records of funds collected and distributed from special accounts. These records must show the amount and the source of the funds deposited, the names of persons for whom the funds are held, "the description and amounts, and the names of all persons to whom such funds were disbursed," Rule 1.15(d)(1)(ii);

3) Checkbooks, check stubs, bank statements, prenumbered canceled checks, and duplicate deposit slips, Rule 1.15(d)(1)(viii);

4) Copies of retainer and compensation agreements, Rule 1.15(d)(1)(iii);

5) Copies of statements to clients or others showing the disbursement of funds on their behalf, Rule 1.15(d)(1)(iv);

6) Copies of all client bills, Rule 1.15(d)(1)(v);

7) Copies of records of payments to persons or entities not employed by the lawyer or firm for services rendered, Rule 1.15(d)(1)(vi); and

8) Copies of retainer agreements and closing statements filed with the Office of Court Administration, Rule 1.15(d)(1)(vii). [See, e.g. 22 NYCRR 603.7; 691.20]

The last five items on this list require the lawyer to retain only "copies," see Rule 1.15(d)(1)(iii)-(vii). Copies can be maintained in virtually any form "that preserves an image of the document that cannot be altered without detection," Rule 1.15(d)(3). Both electronic "copies" and hard copies can be intentionally altered. As a result, no one form is inherently more protective, see NYSBA Opinion 680 (1996).

In contrast, the rules contemplate that financial records, items one through three above, should be retained in their original form, Id., see Rule 1.15(d)(1)(i), (ii) and (viii). However, if these records originated in electronic form, then retention in that same form is sufficient, Id.

Regardless of the method used to preserve copies or records, financial records must be "located, or made available" at a lawyer's "principal New York state office," and must be produced if requested as part of a disciplinary investigation or at the direction of the Appellate Division, Rule 1.15(i). The failure to maintain or produce such records is a disciplinary violation in and of itself, Rule 1.15(f).

## Matter-specific files

Other than the rules discussed above, the Rules of Professional Conduct do not set forth specifics on what attorneys should retain in their files following the conclusion of a matter, or how long these records should be kept. It is important, for both the protection of the client and the attorney, that practitioners develop a set of internal guidelines governing document retention and destruction.

*Continued ...*

Thursday, September 6, 2012

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

*Continued ...*

Generally, all materials that belong to the lawyer may be destroyed, NYSBA Opinion 623 (1991). The seminal *Sage Realty Corp.* case provides helpful guidance as to what items in a file belong to the client versus the lawyer. Clients are not entitled to "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law" or to "firm documents intended for internal law office review and use" which are "unlikely to be of any significant usefulness to the client or to a successor attorney," *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 NY 2d 30, 37-38 (1997).

Where materials belong to the client, the lawyer should offer to make these materials available, NYSBA Opinion 623. If a file contains documents that are "required by law" to be maintained or "that the client would foreseeably need to establish substantial personal or property rights," the client should be advised that the file contains these items and that they should be preserved, Id.

Even if a client fails to take possession of the file, such documents should be maintained for the duration of time required by law, Id.

As such, attorneys should be careful not to destroy documents that will be necessary for a client to establish a claim or defense in a matter for which the applicable statute of limitations period has not yet expired, or that the client "may need and may reasonably expect" that the lawyer will maintain, NYCBA Opinion 2008-1.

Generally, "pleadings, transactional documents, and substantive correspondence" fall into these categories, while drafts or non-substantive internal emails most likely do not. Email communications and other electronic documents, where they are substantive in nature, should be preserved, Id.

Whether evaluating electronic records or reams of paper, "common sense" should prevail, see ABA Informal Opinion 1384 (1977). Considerations advanced by the ABA 35 years ago still ring true:

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 or 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. A lawyer should take special care to preserve, indefinitely, accurate and complete records of the lawyer's receipt and disbursement of trust funds.

6. In disposing of a file, a lawyer should protect the confidentiality of the contents.

7. 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.

8. A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of, ABA Informal Opinion 1384.

**Practical Advice**

Administrative documents should be segregated and preserved in accordance with the Rules of Professional Conduct. Mingling such documents with matter-specific files can create headaches if an attorney is ever required to produce these records.

At the close of a matter, attorneys can and should purge extra copies, and should take steps to preserve substantive email communications and electronic files. Making your own internal "closed file" check sheet can help simplify this process. However, the document retention period will vary depending on the nature of the action or representation.

As with all ethical issues, client communication is first and foremost. Before destroying any substantive file materials, the attorney should communicate with the client. While firms can pass on record retention or copying costs to the client, the failure of a client to respond will not necessarily relieve an attorney of his or her obligation to maintain critical documents.

Finally, client files and records are crucial in any potential malpractice action involving the attorney and his or her client. In general, copies of client files should be maintained for at least six years following the close of the representation. Your malpractice carrier may suggest longer retention periods depending on the nature of the matter. In the end, proper file retention protects both attorneys and clients alike.

*Sarah Snyder Merkel is a partner with The Wolford Law Firm LLP, a firm focused exclusively in the area of litigation. The firm handles both civil and criminal matters.*