# File Maintenance And Record Retention Does Not Have To Be A Nightmare

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Unfortunately, way too many trees sacrifice their lives in the name of the paper intense world we call the practice of law. However, file maintenance is one of the most important tasks that any lawyer, no matter what their age and experience, will undertake on a daily basis. Surely, you will agree that the best practice is to contemporaneously organize your client files, so that anyone in your office can access any document at a moment's notice when a client matter or transaction is pending. But what happens to the client file and/or original documents when the matter is concluded? Who maintains the documents? How long must they be maintained? Can they be maintained in an electronic format? This article and the accompanying list of Bar Association Advisory Opinions provide a brief overview to help answer such questions and identify the information to prevent recordkeeping from turning into a nightmare that wakes you from a sound sleep.

As any lawyer is sure to attest, it is the tedious, time-consuming, and space-inefficient nature of file retention and disposal that sometimes makes it a thankless task. As tempting as it may be to simply dispose of an old client file once legal services are "complete," ethics and professionalism rules and guidelines prohibit lawyers from having a one-on-one relationship with the paper shredder. While some lawyers wish to distance themselves from the "antiquated system" of keeping all original documents by disposing of files they are no longer obligated to retain, others are more proprietary and concerned about what happens to client files (and, relatedly, their clients), in the event of counsel's retirement, the sale of the practice, or their sudden incapacitation or death. In any event, every lawyer must bear in mind that while adherence to the New York Code of Professional Responsibility seems tiresome, costly and is an uncompensated administrative task, proper maintenance and disposal of old client files is worthwhile in the long run because it will assist in obtaining future business, settling fee disputes and/or dismissing grievances.

According to the New York Code of Professional Responsibility,[1] certain files are required to be maintained for seven years, including, among others, copies of deposit and/or withdrawals items, account statements, retainer and compen-

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sation agreements with clients, billing sent to the client, checkbooks and checkbook stubs, and any other records pertaining to financial transactions. In fact, some disciplinary agencies have posited that any document in a file relating to something that a client was billed for pertains to "a financial transaction." It may seem that some records are not set forth in DRs and/or their retention period is not specifically dictated by DR 9-102. However, the relationship with the client, other statutory requirements[2] and customary practices may dictate what documents and the time period that the documents need to be kept. Also, upon a prior agreement with the client, the lawyer can maintain the documents for a specified time period. For instance, estates and trusts practitioners may maintain original client wills in a fireproof safe[3]. And a colleague that practices in the area of tax certiorari keeps his closed files with maps and town records for longer than the seven-year period, because his clients often return to him every ten years or so and he prefers not to rely on the local municipalities records (which are often incomplete) to assist the clients with a new application. In addition, where there is no statute or customary practice, a lawyer may look to Bar Association Ethics Opinions for guidance as to whether and how to dispose of client files. *See* the list of Ethics Opinions, *infra*.

Having established where to find information on what client records need to be maintained and the corresponding time period for such maintenance, you now find yourself with enough years in practice (at least seven) to begin to dispose of files, and a bad weather weekend without anything else on your schedule. It is advisable that upon completion of the required retention period, the lawyer should first inspect each client file for any records the client will require in the future, or Documents In Need of Salvaging (DINS). Original documents must be clearly marked and distinguished from copies. Prior to the disposal of the file, the lawyer should notify the client in writing of the intent to dispose of the client's records, and that such records will be returned to the client upon their request. Although we can empathize with the moans and groans associated with regard to the unpaid work that such contact entails, we note that contacting clients may result in new business, because it may remind them that their continuing legal needs can still be served.

Once the client requests the file and has paid the bill[4]; the records must be returned to the client, or, in the case of a deceased or incapacitated client, to the client's legal representative. When the file is returned to the client, we recommend that the lawyer stress to the client the importance of safekeeping the files and certain documents, especially original deeds, wills or other officially certified or sealed documents, for potential future use. The lawyer should also emphasize that the originals be kept in a state of integrity, as clients may be tempted to modify originals and therefore negatively impact their future utility. However, if the client does not request the file or fails to leave instructions about its disposition, the lawyer may dispose of files except DINS, which must be retained. The same procedure should be followed in the case of the dissolution of a firm.[5] Notably, it is advisable that all documents be assessed as to their

legal or evidentiary value and that the aforementioned steps be taken before documents are destroyed.

In addition, a lawyer must also be mindful of client relations with regard to file maintenance. At times, a former client or a legal representative will wish to access their files or indeed request their actual file. Simply stated, a lawyer is required to comply with the client's request, unless there is an exceptional circumstance in which access may be refused.[6] A lawyer may charge the client for any fees incurred in assembling and delivering the files. Even though an obstinate client may demand that the lawyer remove all records that pertain to his or her matter[7], the lawyer may retain copies of the client's file, at the lawyer's own expense, over the client's objection. Although a lawyer may forgo retention of copies, at a minimum, it would be wise to require that each client sign a receipt listing every item that was turned over. Thus, in the event of a malpractice action, fee dispute, or a grievance complaint, the lawyer will have a record of what was in the file at the time it was turned over and will not have to reconstruct it from memory.

Now, more than ever, technology plays a huge role in the practice of law and as a result, lawyers are finding that electronic documents are just as prevalent as paper records. Indeed, many lawyers and law firms prefer electronic record keeping because it is an efficient and economic way to save space and office resources. As a result, there may be some confusion as to the form in which documents are permitted to be maintained. According to the Code of Professional Responsibility, as well as the New York State Bar Association Committee on Professional Ethics, certain records may be converted and retained as computer images, as long as they are retained in their original form and cannot be altered without detection, for the mandatory seven-year period.[8]

If one is fortunate enough to have reached a point of achieving substantial success and the financial security to retire, he or she should consider the implications of what happens to clients and clients' files upon retirement. For sole practitioners, it is recommended that one prepare a contingency plan early for retirement and/or sale of the practice, sudden incapacitation, or death. Unfortunately, when a lawyer is mentally and/or physically incapable of serving a client, they are compelled to withdraw from practice. Thus, it is advisable for the lawyer to have a contingency plan to make arrangements with another lawyer to notify clients accordingly and to review files to ensure that all legal requirements are met. If the lawyer fails to provide for such events, the Court has the authority to suspend the lawyer from practice and to appoint a Receiver to act on the clients and the lawyer's behalf. In essence, the Court will allow the Receiver to step into the lawyer's shoes to make discretionary decisions, even if such decisions are contrary to what the lawyer believes needs to be done.[9]

Recently, the New York State Bar Association's Committee on Law Practice Continuity published a wonderful resource for its members entitled "Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement, or Death." The publication and accompanying compact disc contain detailed instructions, forms and references to the relevant DRs as

well many of the relevant ethics opinions, including those cited in this article.

Hopefully, this article provides some insight as to what to do with the overflowing file cabinets in your law office. Although, it may seem like a wearisome process, properly maintaining and disposing of client files will assuredly pay off in the end. Once the guidelines are followed, the fortunate lawyer can avoid recordkeeping nightmares and feel free to have any relationship whatsoever with their favorite paper shredder.

## LIST OF ETHICS OPINIONS ON FILE RETENTION / DISPOSAL

**NewYork State Bar Association Committee on Professional Ethics Digest**

Opinion # 724- 11/30/90 Obligations of law firm in regard to wills in its custody

Opinion # 460- 02/28/77 Circumstances under which lawyers may dispose of closed files

Opinion # 623- 11/07/91 Procedures for disposing of closed files; partners' ethical obligations are joint and several notwithstanding dissolution.

Opinion # 766- 09/10/03 Former client and /or successor counsel is presumptively entitled to access all attorney files.

Opinion # 680- 01/10/96 Some records may be retained as computer images; certain records must be retained in original form.

Opinion # 758- 12/10/02 Retention of original trust account documents; retention of original files electronic from and original files in paper form.

Opinion # 755- 05/04/04 Procedure for when a possibly incapacitated client asks for return of the original will.

Opinion # 750- 12/08/04 Retaining copies of client's file over client's objection; on returning the file, limitation of attorney liability.

Opinion # 707- 09/15/98 Sale of a portion of law practice.

Opinion # 709- 10/07/98 Retention of closed files

Opinion # 521- 04/29/80 Lawyer may contact executor or beneficiaries to advise them that he holds original will of deceased client.

**New York City Bar Committee on Professional & Judicial Ethics**

Opinion # 1999-05 Lawyer's obligation regarding disposition of original wills where the testator cannot be located and the lawyer is retiring or the firm is dissolving

**Bar Association of Nassau County Committee on Professional Ethics**

Opinion # 06-2 Attorney may charge clients for continued storage of closed files

## ENDNOTES

[1] 22 N.Y.C.R.R. § 1200.46 (d) [Disciplinary Rule ("DR") 9-102 (d)].

[2] This article does not specify statutes for each individual practice area.

[3] Forty years must pass before a will can be disposed legally. If, for any reason, the lawyer wishes to dispose of an original will, he must contact the client and return the document or receive consent to dispose of it. If the client is unreachable, the lawyer may pursue one of three options: retain the will in storage indefinitely, assign a succeeding attorney to retain the will, or file the will with a court to assure safekeeping. Fortunately, the lawyer is not required to sift through pages of obituaries each day to learn of a client's death; that is, unless he has agreed to do so. However, upon hearing of the death of a client, the lawyer may contact the executor or beneficiary under the original will and inform them of his possession of the document.

[4] New York recognizes retaining liens, which is too broad a topic to go into in this article.

[5] *See* 22 N.Y.C.R.R. § 1200.46 (h).

[6] *See* DR 9-102(c) and *Sage Realty Corp v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997).

[7] NYSBA Eth. Op. 780.

[8] *See* 22 N.Y.C.R.R. § 1200.46 (d) (8) [DR 9-102(d)(8)] and NYSBA Eth. Op. 680.

[9] *See* 22 N.Y.C.R.R. §§603.16; 691.13; 806.10; 806.11; 1022.23 and 1022.24.