To the Forum:

Following five years of private practice in New York I am relocating to Oregon where at least initially I will be working from my new and very small apartment. My practice in New York was primarily litigation (personal injury and commercial), and some criminal defense work. I must have all of my files out of the office by the time I go in four weeks. What are my responsibilities for retention of these files? Obviously the expense of moving the files cross-country is prohibitive and, in any event, I do not have room to store the files in my new apartment. I have a limited budget for my law office expenses and hope to not have to pay for storage.

Sincerely,
Moving on Out

Dear Moving on Out:

You are required to maintain certain documents for a specified period under the New York Rules of Professional Conduct (the "Rules"), but closing your New York practice and beginning a new practice in another state implicates a number of additional ethical obligations. You should exercise care in order to ensure that you meet each of your responsibilities while also (hopefully) not incurring great expense.

Notifying Your Clients and Terminating Representation Where Appropriate

If you have not already done so, you should notify all current and former clients that you are closing your New York practice. A lawyer, as a fiduciary, owes his or her clients the duty of keeping them informed about their business, which includes the clients' relationships with the lawyer. Failure to notify clients that your law office has moved or closed breaches your duty to preserve and protect your clients' legal rights and interests.[1] Timely notice that you are closing your New York practice and moving to a new address will fulfill your duty to notify.

If you do not intend to continue representing your current clients, you should formally terminate your representation of them. Under Rule 1.16(c), you may voluntarily withdraw from representation of a client if your withdrawal will not have a material adverse impact on the client's interest.

Assuming that termination is desirable and appropriate, and will not prejudice your clients, you must take certain steps in order to fulfill your ethical obligations during withdrawal, including (1) seeking permission from the court to withdraw from representation, if any courts in which you currently represent clients so require; (2) giving your clients reasonable notice and allowing them time to find alternate counsel; (3) refunding fees advanced that have not been earned; and (4) returning to the clients any property or papers they entrusted to you.

Records You Must Maintain

Under Rule 1.15(d)(1), there are eight categories of documents you must maintain for seven years after the events they record, which are:

(i) records of all deposits in, and withdrawals from, accounts maintained under Rule 1.15(b) and any other bank account that concerned or affected your legal practice showing the date, source, and description of each deposit and the date, payee and purpose of each withdrawal or disbursement;

(ii) records for special accounts showing the source and amount of funds, for whom the funds were held, and the description, amounts, and names of persons to whom the funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing disbursements to them or on their behalf;

(v) copies of all bills to clients;

(vi) copies of all records of payments to persons for services rendered, such as investigators, not in your regular employ;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks, check stubs, bank statements, pre-numbered cancelled checks, and duplicate deposit slips.

Take care to ensure you are maintaining all the records required by this Rule. Note, however, that electronic copies will satisfy your obligations for all those subcategories requiring that you maintain "copies." This will reduce storage space and costs.

Records You Should Maintain

Under New York law, your clients have broad rights to the contents of their respective files.[2] It is not too broad a statement to say that your client files are not actually yours, but property entrusted to you by your client. Your clients, therefore, can exercise their option to request their respective files from you, and, if they do, you are obligated to provide their files to them. Therefore, you should take care to

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maintain client files carefully, in the event your clients or former clients request them.

This is not to say that you have a duty to preserve every document, down to the last handwritten calendar entry, in each of your client's files. Instead, you should take certain reasonable steps to ensure you are preserving all necessary hard-copy and electronic material, while at the same time not burdening yourself with unnecessary moving and storage expenses.

- First, consult your engagement letters and related correspondence with your clients: did you provide them with a document retention policy or otherwise make any promises or agreements regarding storage and preservation of client files? If so, you must either satisfy those obligations or, if they now appear overly burdensome, contact your clients to make alternate arrangements.
- Second, you should maintain all documents your clients would reasonably expect you to maintain, such as original documents, documents the client provided you, and documents the client may need in order to continue the transaction or litigation.
- Third, you should maintain any documents reasonably useful to your client's assertion of any claim or defense in the matter for which you were retained, especially if the relevant limitations periods have not expired. Additionally, you should take care to maintain relevant and useful documents on criminal matters and on matters for minor clients, even if the matters are closed.

Precisely which documents should be maintained will vary from client file to client file, and you may exercise discretion – tempered with a healthy dose of caution – in evaluating each file and determining what documents should be maintained and which may be destroyed. Administrative documents, such as routine correspondence, memoranda or notes about staffing the matter, or conflict-checking memoranda, can usually be safely destroyed. Finished work product for which the client paid and documents relevant to the strategy of a transaction or litigation, such as research memoranda and communications with the client about plans and tactics, should be preserved. Whether or not to preserve other documents will involve a judgment call: for example, a draft document may be important to one file and thus should be preserved, but a draft document in another file may not be important and could be destroyed. Therefore you must evaluate the importance of the documents in a file to the litigation and/or transaction in order to determine whether the documents should be maintained. If you harbor any doubts as to whether a document should be preserved, you should keep it.

You also do not have a duty to preserve client files indefinitely, and in determining how long you must maintain files, you, again, may exercise discretion tempered with caution. Some files, particularly criminal matters or civil matters with potential criminal implications, such as tax-related matters, should be maintained for longer periods. Before destroying any files as "stale," you should consult your malpractice insurance carrier to ensure you are in compliance with the carrier's document retention policies.

Proper Storage and Destruction of Files and Records

Rule 1.6 requires lawyers to refrain from knowingly revealing their clients' confidential information, which includes all information protected by the attorney-client privilege, anything that is likely to embarrass or harm the client if revealed, and anything that the client requested be kept confidential. Your duty to maintain your clients' confidences continues even after the lawyer-client relationship has ended. Therefore, you must take care when storing – and, when appropriate, destroying – files to ensure that your clients' confidential information remains confidential.

Between the documents you *must* maintain and the documents you *should* maintain, you may be looking at a substantial amount of paper. However, anything you maintain as a paper copy, as opposed to an original document, can just as easily be maintained electronically, which will drastically reduce the required storage space and fees. For example, five categories of documents you must maintain under Rule 1.15(d)(1) – subsections (iii), (iv), (v), (vi), and (vii) – specify your need to maintain copies. Electronic copies will satisfy your obligation to preserve these documents under this rule. Similarly, electronic documents of non-original documents in your client files, such as copies of correspondence, will satisfy your obligation to preserve client materials. This reduces the amount of paper you must maintain to original documents and documents in three of the eight categories under Rule 1.15(d)(1), subsections (i), (ii), and (viii).

After determining what documents must be maintained in paper form and what may be maintained electronically, you can establish what documents can be destroyed. Because the client's right to the file supersedes yours, you should not destroy any documents in a client's file – even paper copies of documents you intend to maintain electronically – without consulting with the client. After receiving client approval, review the records again before destruction to make sure no original documents or other documents you must or should retain are in the set to be destroyed.

Your final step in your document preservation and destruction obligations is to preserve or destroy the documents in a manner consistent with your obligations to maintain your clients' confidences and, for those documents being maintained, to preserve them in a manner from which they can be maintained. This involves steps such as:

- Consulting with your malpractice carrier and clients before destroying any documents from client files;

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Ashley Michelle Quigless
Arun Jethalal Rambhia
Haran Craig Rashes
Joel J. Reinfeld
Wa Ren
Shivani Retnam
Jabeen Zehra Reza
Margaret Suzanne Riley
Ronald Gerald Robey
Carlos Ivan Rojas-Calderon
Marian Dorothy Rosen
Neha Sachdev
Ricardo Anthony Salmon
Jie Sang
Epifanio Dionisio Santos
John Adam Sarto
Marco Scalera
Jeremy Oliver S Seeff
Maki Sentoku
Sheryl Shah
Gili Shapira
Dharmendra Sharma
Ramiz Ryan Shlah
Juana Del Pilar Silverio
Gina D. Silvestri
Gursimarjit Singh
Nishant Kumar Singh
Robert Edward Michael Smith
Stephanie Jane Smith
Timothy James Spiegel
Oleksiy Stolyarenko
Shuyuan Sun
Shruti Suresh
Rebecca Sims Talbott
Randal Scott Thiel
Bin Tian
Han-mei Tso
Polina Tulupova
Antonio Fidelis Valiente
Maria Patricia Pumaren Vallejo
Michelle Van Mook
Samia Ahmed Van Peperstraete
William Clayton Vandivort
Albrecht Von Wilucki
Leopold Joseph Wachocki
Jun Wei Wang
Tsuehhua Jessie Wang
Curtis Richard Weber
Ned Courtney Weinberger
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Sean S. Williams
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Gillian Allyce Woolf
Timothy Andrew Work
Brian D. Wynn
Muchun Xu
Seiji Yamashita
Rumiko Yoneyama
Kyungmin Yoo
Akihiko Yoshimura
Tingting Zhang
Liang Zheng
Hanshuo Zhou
Hong Zhou
Zheng Zhou
Haitao Zhu

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- When converting paper files to electronic form, using a reliable vendor for the conversion;
- Preserving emails in a file separate and apart from your email program, which may automatically delete emails after a set period;
- Storing all records to be maintained, whether in paper or electronic form, in a secure location in which the records are unlikely to be lost or damaged;
- When destroying files, using a reliable vendor for shredding and disposal;
- Maintaining a log or index of complete client files destroyed as stale;
- When storing electronic files, maintaining a means by which they can be accessed. For example, if your electronic files are stored on CD or DVD, make sure you have a computer with a CD or DVD drive. If your files are saved on a particular kind of software, make sure you maintain that software on your computer. You will not fulfill your duty to preserve documents if they are stored in an electronic form you cannot access!

Conclusion

While moving an office is rarely a trouble-free process, by taking reasonable and proper steps to fulfill your ethical obligations, you can reduce potential future headaches. Re-familiarize yourself with your duties to keep your clients informed, to preserve the documents required by the Rules and all documents that may be necessary or useful to your clients, and to keep your clients' information confidential, and, when determining which documents to preserve and which may be destroyed, temper your discretion with care and caution.

The Forum, by
Vincent J. Syracuse and Amy S. Beard
Tannenbaum Helpern Syracuse & Hirschtritt LLP
New York, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an associate at a 50-person general practice firm in New York City with a practice in real estate law and litigation. Every day I receive numerous letters, faxes and emails from clients and adversaries which I always try to answer. My practice is to also use letters or email when it is necessary for me to communicate with an adversary on an important subject. But although I try to be diligent, for reasons that no one has been able to explain, it seems that my adversaries ignore my correspondence, especially emails. Do adversaries have an obligation to respond to my letters and email? How much time do they have to respond to us? Is there anything we can do if our adversaries don't respond? On a related topic, I learned in law school that lawyers have an obligation to communicate with clients and answer their questions. But, my problem is that I get so many telephone calls and emails and that I can't seem to keep up with them. What are my obligations to my clients? How much time do I have to respond? A friend told me that there is a 24-hour rule but I can't seem to find it. Finally, while I am on the topic, I find that many lawyers in our firm use text messaging and email to communicate with us. These communications should be protected by attorney-client privilege but I am concerned that they emails may get to the wrong person and that I could be criticized for not protecting my client's confidences. Is it proper to communicate with clients electronically?

Sincerely,
Communication Challenged

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1. *In re Cardoso*, 200 A.D.2d 42, 47 (2d Dep't 1994) (lawyer who abandoned his law office and, a few months later, his practice, without notifying his clients, breached duties owed to his clients); *Vollgraff v. Block*, 117 Misc. 2d 489, 493 (Sup. Ct., Suffolk Co. 1982) (law firm was obligated to inform clients of the firm's dissolution).

2. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 36 (1997) (approving "an expansive general right of the client to the contents of the attorney's file, upon termination of the attorney-client relationship, more closely conforms to the position taken by the courts of this State on the client's broad rights to the contents of the file when representation ceases on a matter still pending" and finding "no principled basis upon which exclusive property rights to an attorney's work product in a client's file spring into being in favor of the attorney at the conclusion of a represented matter.") (citations omitted).