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When the Firm Moves: Keeping or Destroying Old Documents

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Special to the Daily Report

LAW FIRMS USED TO OPEN in a location near the courthouse, and stay there from generation to generation. As clients moved, however, law firms started to move away from city centers and toward other locations that met their needs. In some instances, law firms allowed newly renovated buildings with more perks and upgrades to lure them into better space.

Moving a firm once involved little more than packing up boxes of files and moving them to a new location. Old documents were left in the boxes and sent to "storage." Ongoing matters were unpacked and filed largely in accordance with the practice's traditional system. The likelihood of another move was seen as remote, so firms had little reason to consider, much less plan, for further moves.

Then the world changed again. As the real estate market transformed and technology made a firm's physical location less significant, law firms and attorneys began moving with greater frequency. Now, prior to the expiration of their leases, many law firms carefully consider their options, and in many situations, choose to relocate.

For firms with short histories, these moves resemble the old system of packing up paper files and loading computers for transport to a new location. But for law firms and practices that have lasted for decades, if not centuries, a move from one location to another can produce a host of legal, ethical and professional issues.

When an attorney relocates, he or she faces many more challenges than in the past. These include determining where old paper files will be stored and how to safely and confidentially transport e-documents to new computer networks and servers, which may create unique cybersecurity risks.

Attorney Obligations

Attorneys are obligated to maintain information necessary to fulfill professional duties and protect client confidences and secrets. For example, ABA Model Rule 1.16(d) states: "Upon termination of representation a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled"

If documents needed to protect client interests have been destroyed, the law firm risks not only the ability to defend against a legal malpractice claim, but also may receive a bar grievance for failing to take the steps necessary to surrender papers and

property to which the client is entitled.

Of course, law firms can consider the costs associated with storing old files. After all, law firms are businesses attempting to operate at a profit. The challenge for firms is to adopt document retention practices, protocols and procedures sufficient to fulfill the law firm's legal, ethical and professional duties.

For every law firm, the level of risk the firm is willing to take when disposing of old files versus the price it is willing to spend to keep them in storage will vary.

Have It in Writing

The first and most important step for every law firm is to adopt a written document retention policy specifying the practices, procedures and protocols for every employee in the law firm. Ad hoc or informal "understandings" are insufficient and create unacceptable risks.

One risk of an ad hoc procedure is that the document retention practices of the attorneys, practice groups and other employees may vary significantly throughout the firm. When that happens, a more conservative standard followed by some can be used as evidence of negligence by others. Furthermore, it is difficult for law firms with no written document retention policy to ensure that reasonable steps have been taken to preserve necessary client files and information.

One of the most important features of any document retention policy is timing. Rule 1.15 of the Model Rules requires attorneys to preserve client records and other property "for a period of five years after termination of the representation." Although some states have adopted the ABA Model Rules in their entirety, many others, like Georgia, have not.

Generally, documents from closed files should be divided into three categories. The first category is documents, such as originals, that have special legal significance (wills, leases, contracts, etc.). These documents should be kept, at a minimum, for the number of years required by state bar rules, but not less than the time needed for full operational effect of the document.

The second category encompasses nearly all other documents. These documents should be retained for the number of years required by state bar rules or until the statute of limitations for any legal malpractice claims has lapsed, whichever is greater.

The third category includes documents subject to a "litigation hold." A litigation hold often exists when a pending litigation or government investigation may implicate the documents. The law firm must retain the documents until the litigation hold is no longer in effect.

If a law firm plans to move but does not have a written document retention policy, it should adopt one. Upon adoption, the law firm should train all staff and inform all clients of the policy to ensure compliance. It is best to inform clients of the law firm's document retention policy in the engagement letter or fee contract. Every document retention policy should afford clients the opportunity to retrieve their documents before destruction.

ABA's Guidance

The ABA, in Informal Opinion 1384, offers some additional guidance for document retention policies:

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 on 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 useful to 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 of dispositions of a file, a lawyer should exercise discretion. The nature and contents of 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 the lawyer has destroyed or disposed of. ☞

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