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New York State Bar Association
Committee on Professional Ethics

Opinion 1077 (12/9/15)

Topic: Record retention and electronic storage

Digest: A law firm may scan original signed retainer agreements into the firm computer system and then destroy the original agreements, provided that the firm maintains the scanned copies for seven years after the events they record.

Rule: 1.15(d)

QUESTION

1. The inquiring lawyers are in a firm that "has a high volume practice" and receives "thousands of signed retainer agreements" every year. They ask whether they may ethically scan each retainer agreement into the firm's computer system and then destroy the original signed agreement.

OPINION

2. Rule 1.15(d)(1) of the New York Rules of Professional Conduct (the "Rules") requires lawyers to maintain certain records for seven years after the events that they record. As to some categories of records, the Rule states that lawyers shall maintain "copies" of those records. *See* Rule 1.15(d)(1)(iii)-(vii). As to other categories, including certain bank records, the Rule requires that the records be maintained but makes no reference to copies. *See* Rule 1.15(d)(1)(i), (ii) & (viii).

3. We addressed issues of record retention and electronic storage in N.Y. State 680 (1996). There we interpreted provisions in the Code of Professional Responsibility that were identical to those now applicable under the Rules. We concluded that, as to records for which a lawyer is required to maintain "copies," the lawyer may maintain the records in certain alternative forms, but that, under the provisions not making reference to copies, the lawyer must retain the records in their original form. *See also* N.Y. State 950 (2012) (storing mail in electronic rather than paper form), N.Y. State 940 (obligation to retain certain documents in original form).

4. The current inquiry relates specifically to retainer agreements. Lawyers are obligated only to maintain "copies" of such agreements. *See* Rule 1.15(d)(1)(iii) (lawyers must maintain "copies of all retainer and compensation agreements with clients"). Rule 1.15(d)(3) effectively defines the word "copies" for purposes of Rule 1.15(d). Subparagraph (d)(3) states:

> For purposes of Rule 1.15(d), a lawyer may satisfy the requirement of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

5. The inquirer proposes to maintain copies of the agreements by scanning them into the firm computer. May the law firm use such a scanning system without being assured that a scanned image of a retainer agreement "cannot be altered without detection"? For the reasons below, we think that complete assurance of that kind is neither available using many standard technologies, nor required by subparagraph (d)(3).

6. In N.Y. 680, we stated that before determining to change the form in which records are maintained, "the lawyer must make certain that the new storage means to be used safeguards the records from inadvertent destruction or alteration at least as effectively as the traditional paper record, and that the new technique will permit the prompt production of accurate, unaltered copies" upon request in connection with disciplinary proceedings. But we acknowledged that "stored electronic data is susceptible of being transferred from an unalterable format to a readily manipulable one," and that even paper copies "are also susceptible of being intentionally altered." Despite that acknowledgement, we concluded that "those documents for which the Rule explicitly permits 'copies' to be retained may be stored in the form of computer images."

7. In any event, we read Rule 1.15(d)(3) to mean that if a lawyer maintains records in some medium *other* than the specific ones listed – that is, other than original records, photocopies, microfilm, or optical imaging – then that other medium must preserve an image of the document that cannot be altered without detection. But a lawyer using one of the specifically listed forms – "original records, photocopies, microfilm, [or] optical imaging," which would include scanning as proposed in the inquiry here – satisfies the Rule even in the absence of special measures to ensure visibility of alteration.

8. We note two cautions. First, even if scanning or some other optical imaging technology does not preclude all possibility of undetectable alteration, the very requirement that the saved record be a "copy" imposes some standard of fidelity to the original. *See* N.Y. State 680 (recognizing permissibility of storage by "reliable" electronic means). Second, the obligation imposed by Rule 1.15(d)(3) does not end with the creation of the copy; the storage system must be reliable enough so that the copy is maintained for the required seven years.

CONCLUSION

9. Lawyers are required to maintain "copies" of all retainer and compensation agreements with clients. A law firm does not violate that requirement if it destroys original retainer agreements after scanning the original signed agreements into its computer system and then maintains the scanned images for the requisite period.

(27-15)