

New York State Bar Association

Committee on Professional Ethics

Opinion 680 - 1/10/96 (57-95)

Topic: Record Retention By Electronic Means

Digest: Lawyers may retain some records in the form of computer images, but certain records must be retained in original form.

Code: DR 9-102(D), 9-102(H)

QUESTION

May lawyers comply with the mandatory record-retention provisions of the Code by storing records in the form of computer-generated images or by other electronic means?

OPINION

Canon 9 of the New York Lawyer's Code of Professional Responsibility contains, in DR 9-102(D), mandatory record-retention requirements applicable to all members of the New York bar. Retainer agreements, bills to clients, bank statements, and records of transactions in escrow accounts are among the categories of records that the Code requires be maintained "for seven years after the events which they record." In addition, DR 9-102(H) provides that all such records must be "located, or made available at the principal New York State office of the lawyers subject hereto" for production in connection with disciplinary proceedings.

With the increasing computerization of the law office, and the recent development of electronic imaging and storage technology, the question naturally arises as to whether New York lawyers are required, as an ethical matter, to retain records in original, hard-copy form for the seven-year period provided in the Code, or whether the Code permits record retention by more technologically advanced means. We take it that the possibly higher cost of creating records in the form of (or transferring existing records to) computer images may be more than offset by the

savings in storage costs attributable to dramatically reducing the volume of the retained records.

Our review of the pertinent Disciplinary Rule persuades us that the Code permits some records to be maintained in the form of computer images, while other records must, as the Code is now written, be retained in their original, hard-copy form. We note that DR 9-102(D)(3)-(7) refer explicitly to “copies” of the documents referred to in those subsections (*e.g.*, retainer and compensation agreements, statements to clients or others showing disbursements of funds, bills to clients), while DR 9-102(D)(8) refers not to “copies” but explicitly to: “all checkbooks and checkstubs, bank statements, prenumbered canceled checks and duplicate deposit slips...” We conclude that the items referred to in DR 9-102(D)(8) must be retained in just the form described by the Code; that is, the actual checkbooks, checkstubs, bank statements and the other documents referred to in that subsection must be retained as is, in paper form, for the seven-year period prescribed by that Rule.

We also conclude, however, that those documents for which the Rule explicitly permits “copies” to be retained may be stored in the form of computer images. In reaching this conclusion, we have relied upon our understanding that the computer images are stored electronically as images on storage media (such as CD-ROMs) that are “read-only” and therefore are not any more likely to be altered or destroyed inadvertently than the paper copies they replace, and that when such images are ultimately printed onto paper they produce an accurate reproduction of the original document. We also understand that techniques are now commercially available under which electronic data can be recorded and stored on optical disks in a manner that the information cannot be modified or removed from the disk without detection. R. Raysman and P. Brown, “The New Technology for Storing Business Records,” *N.Y.L.J.* at 3 (Aug. 9, 1994). We note that the staff of the Securities and Exchange Commission (“SEC”) has recently relied upon such a system to conclude that storage on optical disks was acceptable to satisfy the records-retention requirements imposed upon investment advisers under SEC rules. See 1995 SEC No-Act. LEXIS 684, *Oppenheimer Management Corporation*, August 28, 1995.

We recognize, of course, that any electronic storage technique is subject to abuse, and that the stored electronic data is susceptible of being transferred from an unalterable format to a readily manipulable one so that without inspection of the original disk itself there can be no assurance that a paper purportedly printed out from such a disk does not reflect an alteration. Paper copies retained as such are also susceptible of being intentionally altered, however, by the use of a photocopier - or in a more technologically sophisticated manner by transferring the paper document (even one that has been retained for years in that form) to a computer file by means of an electronic scanner, altering it, and then printing it back out onto paper before producing it in connection with a disciplinary proceeding. In short, the various different means of record storage do not by themselves appear to affect the potential for fraud in a material way.

The importance of the Code's record retention requirements, and associated provisions assuring that such records will be readily available to authorities, cannot be over-emphasized. Before any lawyer determines to change the form in which such 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 pursuant to DR 9-102(H). Moreover, any lawyer who chooses to transfer existing paper records to computer images must insure that all required copies are in fact transferred before any paper records are disposed of; the lawyer who fails to do so acts at the peril of engaging in spoliation, and will be at risk to suffer the severe consequences of such conduct. DR 9-102(I) (failure to maintain and produce records as specified by disciplinary rules subjects lawyer to discipline).

Finally, DR 9-102(D)(1), (2) and the text following (8) require the maintenance of records in any bank accounts involved in the lawyer's practice, of all financial transactions in "books of account" kept in the regular course of business, and of other similar records. We do not believe that anything in those Code provisions requires that such records be made in the first instance on paper as distinguished from in the form of electronic data entry. Consequently, we conclude that any such records that are created in electronic form may be retained in that form. Records described by these provisions that are created by entries on paper books of account, ledgers, or other such tangible items, however, should be retained in their original form.

CONCLUSION

Records required to be maintained by the Code in the form of "copies" may be stored by reliable electronic means, as noted above, and records that are initially created by electronic means may be retained in that form, but other records that are specifically described by the Code must be retained in their original format.
