



## Center for Professional Responsibility

### FROM PAPER TO KILOBYTES

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*You are a new associate in a medium sized 50 year old law firm that has accumulated thousands of client files, most of which are closed or dormant. The cost of storing these files has become prohibitive.*

*As the new lawyer in the firm whom everyone looks to as being presumptively up to date with current technology, you've been asked to formulate a firm policy about what items in the client files can be transferred to an electronic format, and once the transfer has been made, which items in the files can be discarded. As you begin to think through this process, you realize that even if you do make such a transfer, there will still be some items in individual client files that should not be discarded.*

*What legal ethics issues should you keep in mind as you formulate this new firm policy?*

The issue of how to manage closed or dormant client files has plagued lawyers for many years. Law practices that have been in existence over a long period of time accumulate massive amounts of files that are very expensive to maintain and store. Numerous bar journal articles and state and local bar association ethics opinions have addressed client file retention issues. See, e.g. "File Retention Policies and Requirements" Kenneth L. Jorgensen, 61-DEC Bench & B. Minn. 12 (2004), "Ask ETHICSearch", Peter Geraghty 12 NO. 2 Prof. Law. 24 (2001) (ethical obligations of lawyers to safeguard client files in the event of the merger or dissolution of law firm), "Focus on Professional Responsibility--Ownership of Lawyer's Files About Client Representations; Who Gets the 'Original'? Who Pays for Copies?" John W. Allen, 79 Michigan Bar Journal 1062-65 (2000), "Who Owns the File--The Attorney or the Client?" 7 Law Office Administrator 6-7 (August 1998), "Client Files: Handle with Care," Pamela Phillips and Merri A. Baldwin, 18 California Lawyer 66-68 (May 1998), "How Long Should You Retain Client Files?" 83 Illinois Bar Journal 649-50 (1995), "Ethical Considerations in the Retention of Law Firm Client Files," John C. Montana, 1 The ISG Update 5-7 (June 1999).

An excellent article entitled "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," by Lee R. Nemchek, is available here:

[http://www.aallnet.org/products/pub\\_llj\\_v93n01/2001\\_01.pdf](http://www.aallnet.org/products/pub_llj_v93n01/2001_01.pdf)

One possible solution to the storage aspect of the client file dilemma is to convert the paper in these old files into an electronic format. While this may seem to be a simple solution, some state bar association ethics opinions have identified legal ethics issues that can arise when a lawyer decides to convert from paper to kilobytes.

Even if a lawyer decides to store client files electronically, there may be items in a particular client file - such as original wills, deeds or other client property - that the client may reasonably expect the lawyer will preserve in the original. In view of the varied approach to this issue state by state, it is imperative that you check your local rules of professional conduct.

State bar ethics committees have addressed various aspects of the electronic file retention question.

[Maine Opinion 183 \(2004\)](#) addressed the question of whether a lawyer is obligated to keep paper copies of correspondence generated on the client's behalf if the lawyer maintains electronic copies on his computer system. While the opinion concluded that in general a lawyer did not have to keep paper copies, it stated that the lawyer should consider the client's access to and understanding of technology when returning an electronic file to a client. The opinion also cautioned that a lawyer should maintain the software used to create the files so that the lawyer and the client will be able to open the files long after the software has become obsolete. The opinion stated:

**...it may be necessary for an attorney to retain old versions of software in order to ensure that computerized records may be accessed or printed when requested by the client. Similarly, as part of the obligation to deliver files, an attorney may need to retain the means by which a client may review or print computerized records. While an attorney may satisfy these ethical obligations by providing paper copies of computerized records to the client, electronic file retention is also acceptable provided that the client will have meaningful access to the electronic file in the future.**

State Bar of Virginia Opinion 1818 <http://www.vacle.org/opinions/1818.htm> (2005) stated that a lawyer may maintain paperless client files, but that he must obtain the client's consent before destroying a current client's paper documents. The opinion also stated that before destroying a client's paper file, the lawyer should carefully review the documents in the file to ensure that paper documents that have legal significance only in their paper form - such as testamentary documents, marriage certificates and handwriting samples - are not destroyed. The opinion also indicated that a lawyer can make maintaining client files in an electronic format a condition of representation in a retainer agreement with a prospective client subject to the lawyer's obligation to keep certain documents in their original form.

Missouri Informal Opinion 20010147 (undated) stated that a lawyer may not discard the hard copies of client files after scanning them without the client's consent.

Other opinions state that a lawyer who maintains client files in an electronic format should provide a client with electronic copies should the client request it. [See, e.g. Wisconsin State Bar opinion E-00-03 \(2003\)](#):

**...when the client requests documents be provided on a computer disk which the lawyer has maintained electronically, the lawyer should provide those documents in the requested format, so long as it is reasonably practicable to do so.**

[Accord, North Dakota Opinion 01-03 \(2001\)](#). (A client's file that is maintained in an electronic format should be provided in that same format if requested.)

New Jersey Supreme Court Advisory Comm. On Professional Ethics Opinion 701 [http://lawlibrary.rutgers.edu/ethics/acpe/acp701\\_1.html](http://lawlibrary.rutgers.edu/ethics/acpe/acp701_1.html) (2006) considered whether client files can be stored on a remote server maintained by an outside company. The Opinion stated that the firm could do so so long as the lawyer ensures that the company has safeguards in place that are compatible with the professional obligations of the lawyer to preserve client confidentiality. The Opinion stated:

**...We do think, however, that when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using "reasonable care" against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then "reasonable care" will have been exercised.**

On the general topic of an outside computer maintenance firm's access to a law firm's client files, [See, ABA Formal Opinion 95-398 Access of Nonlawyers to a Lawyer's Database \(1998\)](#).

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