

First Focus



Tech landscape 2011: Top product picks; Rise of Mac viruses; Security for thumbdrives, iPhone; and more

It's once again time to catch up on the latest—greatest and not so great—in legal technology for attorneys, especially those in solo and small firms. And for that, we turn to authors of the 2011 Solo and Small Firm Legal Technology Guide: Critical Decisions Made Simple—Sharon D. Nelson, John W. Simek and Michael C. Maschke. Read more ...

Around the ABA

Dos and don'ts of client trust accounts

"The buck stops with you," says Sheila M. Blackford of the Oregon State Bar Professional Liability Fund in a paraphrase of President Truman's famous quote, explaining that it's ultimately the lawyer who is responsible for his client trust account, even if he designates someone else to help him handle it. With the mishandling of such accounts as the number one reason lawyers get into regulatory trouble, Blackford shares eight tips on proper account management. Read more ...

Technology adoption: Is your firm ahead of the curve?

When Todd Corham, chief information officer at Sedgwick LLP, asked a lawyer how his iPad 2 benefits him, the attorney responded: "It impresses clients." Explaining the importance of client perceptions, Corham said that staying ahead of the technology curve matters. At ABA TECHSHOW 2011, Corham and Josh Poje of the ABA Legal Technology Resource Center provided a current snapshot of how lawyers and law firms are using technology. *Read more ...*

Legal privilege issues in a post-Akzo Nobel world

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Eye on Ethics

Piles of files

Three lawyers have been practicing as the ABC partnership for the past 30 years. Lawyer A intends to retire at the end of the year. The partners have amassed thousands of client files for various matters, most of which are now closed.

Up until now, the firm has been storing these files in the office, but will soon be forced to rent additional storage space. The lawyers would like to have a system to review the files and decide which ones they should keep or destroy. For those files they decide to destroy, which items in each file should be returned to the client?

What are the ethical considerations lawyers should keep in mind when deciding whether to keep or destroy closed client files?

Read more ...

Also! See NEW information on ghostwriting based on last month's column ...

Technology Translators

Working with Styles and Templates in Microsoft Word 2007, part two If you are practicing in jurisdictions around the globe, does it make sense to organize legal work around legal privilege issues, to avoid communications inadvertently becoming seized as part of a discovery process? Until privilege rules are harmonized across borders, business communications that involve in-house lawyers run the risk of not being protected by legal privilege. And that's treacherous for international lawyers. Read more ...

Essential iPhone and iPad apps from legal tech gurus

With more than 300,000 apps available through the Apple App Store, how can a busy lawyer find the best ones? A panel of legal technology experts at ABA TECHSHOW 2011 separated the wheat from the chaff to identify the top apps that can help lawyers be more accessible and productive. *Read more* ...

The musts of establishing outsourced support services

Workers' compensation attorney Channing Migner began using outsourced services more than five years ago, and says that the added support has made his practice more effective at a reduced cost, while also improving client service and satisfaction. Migner and law practice management expert Rodney Dowell share best practices and lessons learned on establishing a good relationship with an outsourcing vendor. Read more ...

General counsel discuss best practices on antitrust compliance

Building a compliance program should be formulated on a risk-based approach, said Jim Walden of Gibson Dunn & Crutcher LLP during a recent Section of Antitrust Lawsponsored roundtable focused on compliance efforts of general counsel in corporate communities worldwide. *Read more ...*

Smart phone security 101

With the growing computing power of smart phones allowing users to work on the go, more than 75 percent of lawyers now carry such mobile devices, necessitating security measures to protect confidential law firm and client data. Stephen Stine of the ABA Legal Technology Research Center offers several basics on keeping smart phone data secure. Read more ...

Disaster planning guide available

ABA President Stephen N. Zack has made disaster preparedness one of the association's key priorities. As a profession, we must prepare for unexpected disasters, and preparedness is key to mitigating and responding to them. To help, the Special Committee on Disaster Response and Preparedness has created the *Guide to Developing and Conducting Business Continuity Exercises*. *Read more* ...

Lawyers, policymakers connect at ABA Day 2011

The ABA, in coordination with 43 state bar associations, brought distinguished lawyers from around the country to Washington, D.C., April 12-14, to discuss with policymakers issues critically important to the legal profession and to our nation. ABA Day 2011 was also an opportunity to celebrate grassroots activists and members of Congress who did much for the legal profession and the communities they represent. Read more ...

"Styles" in Microsoft Word allows you to simultaneously apply multiple formatting options to a document with a click of the mouse.

This month, the Legal Technology Resource Center explains how to use the Quick Style Gallery, templates and other features of Microsoft Word 2007 that can save you time in drafting documents.

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Tech landscape 2011: Top product picks; Rise of Mac viruses; Security for thumbdrives, iPhone; and more

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Windows 7 is the current Microsoft operating system. For business purposes, you mention using either the Professional or Ultimate Edition. Can you talk a bit about the differences between the two and why a lawyer would want to go with one versus the other?

Maschke: As you said, those are the two versions we recommend to solos and small firms. When clients come to us and ask us for our recommendation, we generally recommend that they go with the Professional Edition of Windows 7, which is generally about \$20 cheaper.

There are a few differences between the two versions. The Ultimate version includes a feature called BitLocker, which is a Windows-based hardware encryption scheme that will protect an end-user's data on his or her laptop or desktop machine.

The Ultimate version also includes some additional language support, which many of our clients here in the States don't have a need for.

The \$20 upgrade cost for the BitLocker addition, in our opinion, isn't necessarily worth it. For an encryption solution on computers, we instead recommend that clients go with one of many third-party tools, such as TrueCrypt and PGP. Those are alternatives to Microsoft's BitLocker, which has a number of known vulnerabilities.

Now that Macs are becoming more popular, the "bad guys" are following. What are some of the ways Apple is addressing malware?

Simek: I could go on with this one. I really love the Apple marketing folks. If you go on their website to the OS X page, you'll see, in big letters, "OS X doesn't get PC viruses." Of course it doesn't. Because it's not a PC! Guess what though, it gets Mac viruses.

They've done a couple of things, although it's fundamentally

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not that much different than the Windows world. Internally, the OS X operating system has security set ups so the user isn't running at privileged access normally. They have a concept called "sandboxing," so if you download any content via the Internet, OS X knows that it came from the Internet and prompts you to click before you can actually execute.

Something that Apple did early on that Microsoft just came around to doing recently is the concept of "auto run." So the Mac OS X doesn't automatically launch anything when you put in a flash drive or a CD or other external device into the computer. In the Windows environment, up until recently, Microsoft used to auto run, although a recent patch has stopped that.

Built into the operating system itself, they've taken some steps to make it more secure. Have they gotten it all right? I don't know, it seems that whenever Apple sends out a patch to its operating system, there are hundreds and hundreds of fixes within it. Either they didn't get it right in the first place, or there are that many things that need to be fixed.

Unfortunately, as Macs have become more popular, they are becoming more and more targeted. It's unfortunate. And it's important that attorneys realize that just because they use an Apple product doesn't mean they are immune. All too often, I think, they believe they are.

What do you recommend in terms of computerized case management?

Nelson: Probably more than ever before, we really have a clear favorite for solos and small firms, and that's PracticeMaster by STI. We've done a number of installations for our clients and they have been very pleased. The billing component, Tabs3, is also an excellent component and most firms will use both of those applications.

The price is right. The basic version is \$150 for one license, and \$50 for each additional license. If you need the premium version, which most lawyers probably will opt for, the cost is \$395 for the initial license and \$150 for each additional license.

STI support is truly excellent, and you can get a trial license to make sure the software will work for your firm. They've recently released version 16, which has a lot of new features, including something called WorkFlows, which will automate tasks. For instance, if you put a contact in as a new client, it will automatically generate a "welcome client" letter. There are a lot of similar functions. The e-mail integration is greatly improved, and that is something that people have been looking for.

We've also seen a lot of lawyers turning to Software as a Service for case management. Rocket Matter is one good program, but our favorite is Clio, which costs \$49 a month for each attorney and \$25 for each non-attorney. It offers calendaring, time and billing task management, e-mail integration and contact management. We have yet to meet an unhappy Clio user, which is a pretty good

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recommendation in and of itself.

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More lawyers than ever are working on the go, and thumb drives are increasing in popularity. Please talk a bit about new security systems or technologies for use with thumb drives.

Maschke: Within the legal technology field at least, it is widely believed that law firms are four or five years behind in securing their data. In reality, what we see, it's probably a little worse than that.

As USB devices become more popular and have an evergrowing capacity for the amount of storage they can hold, there are two categories of things that law firms should keep in mind. One about the actual USB devices themselves, and the other is what can actually be done on the network itself to secure the environment.

First, with regard to the actual flash drive—you shouldn't use a USB device without hardware-based encryption. Hardware-based encryption is always on, so whatever data is on the drive, is always protected. If you lose your USB no worries—no one is going to be able to crack or break the encryption.

The second thing that hardware-based encryption may offer, depending on the make and model of the USB drive you decide to go with, is a secure password management feature. Rather than saving your user names and passwords in a web browser, which we recommend that no one do—but that most attorneys and end users do anyway—the password feature will securely store your user names and passwords on the USB drive. This eliminates the need for users to store them in a browser, therefore making those names and passwords a little bit more secure.

Second, these devices come with what is called a secureerase feature. If your device is lost and someone tries to guess your password, after a number of incorrect attempts, the device will actually securely wipe itself, rendering all of the data on the device useless.

One of the secure USB devices we recommend is made by IronKey. For a couple of hundred bucks, they come in various storage sizes; it's a USB device that comes with hardware-based AES-256 encryption. The military uses it, so we know it's secure.

In terms of computers and networks the thumb drives are plugged into: More and more, we're seeing as a result of our data breach investigations, employees stealing or taking data with them through the use of USB drives. The end user believes it's a way for him or her to transmit data without being caught.

As the employer, there are a couple of things you can do. One, you can prohibit the use of USB drives through group policy if we're talking about a Windows-based network environment. This would allow the administrator to

specifically prohibit the use of USB drives and even CD-ROM drives.

If, however, you want your users to be able to use removable storage, we would definitely recommend that "logging and auditing" be enabled. This will allow you to be alerted when a device is plugged in.

You also want to be able to archive your logs. So if there's a problem down the line and you need to go back to a certain point in time, you can find out who plugged what into the relevant computer system, and data dating back to the relevant time period will be present. Besides the built-in Windows-based solutions, there are third-party applications that will do this for you.

Servers are a major decision and expense for small businesses. You are recommending that more small firms consider virtualization. Why?

Simek: A major decision and expense, yes, but actually the cost of virtualization when you sit down and look at it, really isn't that major after all, when you consider the cost reduction in hardware from consolidation, maintenance and power to other components.

Virtualization is essentially taking one or more servers, taking an image of their contents and running that content on the memory of a single piece of hardware. So you have multiple "virtual servers" running within that single physical hardware device.

For small firms, I'd suggest they could start with one server—that's all you need for your file and print sharing. It helps you centralize your anti-virus, your patch distributions, and it's also a central place for you to secure your files.

But the key reason to do virtualization is that the server becomes hardware-agnostic. So if, for whatever reason, you have a hardware failure, with your computer, you can quickly run down to Staples or Best Buy or wherever, and buy a replacement, copy the files back on it and launch it Everything is just as it was before. The server doesn't care what kind of hardware you have connected to it--unlike the traditional server model where you had to load the disk drivers, you had to load the network drives, and everything else.

So virtualization helps a great deal in business continuity. That's the primary key here.

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Now I'd like to ask each of you—what's the greatest discovery, tool, heartbreak or "ahh"—in the latest year of so? Or, alternatively, what do you see coming down the pike that you're keeping your eye on?

Nelson: Without any question it is the rise of the iPad as a lawyer's tool, which astonished a whole lot of us. I recommend that anyone who is interested in the iPad listen

to the next issue of "The Digital Edge: Lawyers and Technology," a Law Practice Management Section podcast of the ABA that I record with Oklahoma's practice management adviser, Jim Calloway. This particular podcast features Tom Mighell as a guest. He's the author of *iPad in One Hour for Lawyers*. The podcast will simply list—we don't have time for it here—tons and tons of law practice applications.

I guess I'd say, while the iPad and now the iPad 2 are primarily consumer devices, attorneys are very quickly finding work-arounds to take this very slim and slick device on the road and go to court with them. By using programs such as DropBox and Documents-to-Go, they're solving some of the problems in working on documents.

As we see applications develop, more and more of the solutions are becoming elegant as opposed to simply being work-arounds .

If you search the App Store using terms such as "legal" or "law," you'll be amazed at how many programs are currently available. There are a lot of research tools such as FastCase to keep you up to speed with case law, there are also juror selection programs like iJuror, and presentation programs to actually use in court.

We've seen lawyers swear by their iPads when they use them for case management with apps like Clio or Rocket Matter, which I've already mentioned. During down time in court, which everyone has, they can work on entering time, they can calendar, they can organize their tasks, they can work on documents — it really makes them a lot more efficient.

And of course if they're bored, they can always wait around playing a nice, relaxing game of Angry Birds.

And John?

Simek: I'm going to mention cloud computing. That's a big buzz phrase and certainly covers a lot of different things. We've seen a tremendous amount of interest in it, and tremendous movement in that direction.

We're going to keep our eyes open and our ears to the ground in terms of where cloud computing is going to go. My nickname is Cloud Curmudgeon among those who know me. I'm not saying that you shouldn't be using it, but certainly you should be very cognizant of the issues that revolve around it. There was a whole track at ABA TECHSHOW on cloud computing.

We're seeing a big push in the legal field. Sharon talked about Clio and Rocket Matter, which are Software as a Service, or cloud services. More and more people are leaning that way, thinking it will be cheaper in the long run. It may or may not be. We're watching that and are cautiously optimistic that it'll be a good technology to take us into the future.

How about you, Michael?

Maschke: The last thing that I wanted to touch on, in moving forward to what we'll see happening in the next year, or least what we hope, is increasing security awareness among law firms. Currently what we encounter with a lot of firms is an "It can't happen here," "It won't happen to me" attitude. As more and more data breaches, especially among large law firms, become more public and more stories appear, we think that security will come to the forefront more than it currently is.

Recently, security awareness has been helped by the FBI report that stated that law firms are becoming increasingly targeted by hackers and cybercrime organizations.

With the move toward cloud computing and end-user mobility with smart phones and iPads, etc., we hope and believe that security will become more of a significant part of the decision–making process when considering moving toward those solutions.

Last year you expressed concern about iPhones and suggested attorneys not use them when confidentiality is concerned. Do you still have those misgivings? And, are there similar ones related to the iPad aside from the many positives about the device you've mentioned?

Simek: Unfortunately, Apple still can't seem to get security right. The iPad runs the same operating system as the iPhone and is subject to the same issues. We thought Apple may have solved the PIN compromise problem with iOS 4. The reality is that researchers have been able to access a fully patched iPhone 4, which was PIN protected, within 6 minutes. Not a good thing.

(For more on smart phone security and the iPhone, see Nelson and Simek's recent *Law Practice Magazine* article.)

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Dos and don'ts of client trust accounts

"The buck stops with you," says Sheila M. Blackford of the Oregon State Bar Professional Liability Fund in a paraphrase of President Truman's famous quote, explaining that it's ultimately the lawyer who is responsible for his client trust account, even if he designates someone else to help him handle it.

In her Law Practice Magazine article, "Managing Your Client Trust Account," Blackford cites Model Rule 1.15 on safekeeping property, and writes that the number one reason for lawyers getting into regulatory hot water is due to mishandling their client trust accounts.

To help lawyers properly manage their accounts, Blackford offers eight tips:

Always remember that money that belongs to your client belongs in your trust account—and until you've actually earned the money, it continues to belong to your client. Caveat: Some lawyers like to use "earned upon receipt" fee agreements so the money can be put into their general account, thereby avoiding the need to use a trust account. Be sure to check your state rules governing this type of fee arrangement before you try to write one.

To help manage your client trust accounts, download the following free forms:

Client Ledger Card Form

Trust Account Receipts and Disbursements
Journal Form

Trust Account Reconciliation Form

Explain in your fee agreement how you apply money held in your trust account toward the legal fees and costs incurred. Also explain that a statement will be provided showing these charges, along with the balance and any amount that's needed to replenish the trust account balance to a required minimum

balance, known as an "evergreen account."

Only use funds in the trust account for client's expenses. Write a trust account check payable to your firm and deposit it into your general account and then write a general account check to pay for your associated overhead expenses (e.g., do not pay your bar dues out of your trust account, please).

Keep a clear, detailed "paper trail" of all trust

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account deposits and withdrawals.

Wait an appropriate amount of time for deposits to clear before writing a trust account check. Be careful to verify that funds have been collected and are in the account first.

Watch out for fraudulent cashier checks, which frequently hit on the day before a bank holiday. Ditto for scams involving wire transfers. And take extra steps to protect your trust account check supply and checkbook from getting into the hands of an embezzler or thief. Lock them in a drawer or in your office safe.

Plan ahead to protect your clients' funds in the event of your death, impairment or disability. Who will sign a trust account check to refund money belonging to each of your clients? Contact your bar for help in making provisions to have a special authorized signer on your trust account if you are a solo practitioner.

And for our final to-do—and it's a big one—maintain your trust account records for the proper time as required in your jurisdiction, likely five years from the date the matter is closed. Be sure to back up your computer to preserve any electronic records, too.

"Managing Your Client Trust Account" is from the January/February 2011 issue of *Law Practice Magazine*, a publication of the Law Practice Management Section.

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Technology adoption: Is your firm ahead of the curve?

When Todd Corham, chief information officer at Sedgwick LLP, asked a lawyer how his iPad 2 benefits him, the attorney responded: "It impresses clients."

Explaining the importance of client perceptions, Corham said that staying ahead of the technology curve matters, also pointing out that technology can help lawyers and law firms gain competitive advantage, lower costs and reduce risk.

Corham, along with Josh Poje of the ABA Legal Technology Resource Center, provided a current snapshot of how lawyers and law firms are using technology in "Technology Adoption: Is Your Firm Ahead of the Curve?" earlier this month at ABA TECHSHOW in Chicago.

Corham and Poje based their insights on the most recent editions of the ABA Legal Technology Survey Report and the International Legal Technology Association Annual Technology Survey. Among their findings:

- Among large firms, 29 percent reported that their technology budgets had increased, while only 5 percent reported a decrease. "In the previous edition of the [ABA] survey, respondents were twice as likely to report a decrease," said Poje.
- More than 21 percent of ABA survey respondents from large firms reported that their firm experienced a security breach of some kind. "Alarmingly, of those who had experienced such a breach, 9 percent admitted that the breach resulted in unauthorized access to sensitive client data, and 7 percent admitted the breach resulted in unauthorized access to other sensitive non-client data. Also cause for concern, just under 20 percent reported that the breach led to downtime/loss of billable hours," said Poje.
- While 63 percent of ABA survey respondents from large firms reported the existence of encryption software in the workplace, only 36 percent reported using it.
- Windows XP is still the operating system used by a majority of American law firms, yet Windows 7 is gaining ground quickly. Corham expects use of Windows 7 to grow by 25 percent over last year in the next ILTA survey.
- Computer monitors are getting bigger and cheaper.
 Corham noted that consumers are abandoning 15-inch monitors for bigger choices, as the price difference between options have shrunk. Also, more lawyers are using dual monitors to enhance productivity, especially for document review work. "One to have the database

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- up, and the other for the document," he said.
- Smart phones are ubiquitous at large firms, with 93
 percent reporting personal usage, shared Poje. The top
 two types last year were BlackBerry (66 percent) and
 iPhone (20 percent).
- Microsoft Word is the dominant word processing program, and most law firms are now installing Microsoft Office 2010 over the 2007 version. "The 2010 version is a little more stable," Corham said.
- Progressive firms are implementing e-mail management measures—some are imposing storage caps and others have automatic deletion policies. Corham advocates "matter-centric e-mail filing" to identify and organize stored messages.
- Case/practice management software is available at 70
 percent of large firms, yet only 23 percent of ABA
 survey respondents from large firms reported using such
 software, said Poje.
- Many large firms have invested in federated or enterprise search platforms. "They're expensive, but they are dropping in price," said Corham.
- Virtual desktops are increasing in popularity. Corham recommends Citrix's Zen Source as the leading product.
- While only 3 percent of overall respondents to the ABA survey reported using expert systems, 7 percent of large firm respondents reported that their firm offered such systems. "Large firms were also significantly more likely to offer self-help legal guides/information, at 26 percent versus 18 percent overall," said Poje.
- Cisco and Avaya are the leading companies providing Voice over Internet Protocol to large firms. Corham prefers Cisco. His preference may be due in part to the commitment Cisco has to R&D. "Cisco spent more money on research and development last year than Avaya made—\$6 billion."
- Seventy-one percent of large firm respondents to the ABA survey reported sending confidential or privileged e-mail every day, according to Poje. When asked about security measures for those messages, respondents were most likely to point to a confidentiality statement in the body of an e-mail (89 percent), followed by a confidentiality statement in the subject line (37 percent) and encryption (34 percent).

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Legal privilege issues in a post-**Akzo Nobel** world

If you are practicing in jurisdictions around the globe, does it make sense to organize legal work around legal privilege issues, to avoid communications inadvertently becoming seized as part of a discovery process? Until privilege rules are harmonized across borders, business communications that involve in-house lawyers run the risk of not being protected by legal privilege. And that's treacherous for international lawyers.

In-house lawyers outside the United States often are required to "check their license at the door," says Susan Hackett of the Association of Corporate Counsel. Speaking on a panel at the Section of International Law Spring Meeting in Washington, D.C., Hackett noted that in-house counsel abroad often don't enjoy the same status as those in the United States—as independent lawyers and members of the bar.

South Korea hasn't recognized legal privilege for in-house lawyers, according to panelist Youngjin Jung of Kim and Chang in Seoul, and the same applies to other Asian countries such as Japan. What happens if a Japanese inhouse lawyer becomes a member of a U.S. bar, as many have? Can he then claim legal privilege and have it recognized by the court in Japan? Which privilege rules apply to the lawyer?

The complexities of practice in a multinational world got more complicated last October, with the European Court of Justice decision in *Akzo Nobel Chemicals and Akros Chemicals v. EC.* The ECJ ruled that in-house counsel are not independent practitioners and, therefore their communications are not subject to legal privilege.

But not all jurisdictions have that rule. "It will come down to which entity does the discovery in a given case," said Kenneth O'Rourke of O'Melveny & Myers LLP in Los Angeles. "If this [Akzo] case had been investigated by the Dutch Competition Authority instead of the European Commission, there would have been no case," he said, because the Dutch Competition Authority recognizes the independence of in-house counsel and grants legal privilege to their communications.

"Legal privilege is a bedrock issue," said Kenneth O'Rourke of O'Melveny & Myers The panel, "Ethics and Confidential Communications: *Akzo Nobel* and its Global Ramifications," also featured Christof Swaak of Stibbe in

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LLP. "We see cracks in the bedrock from time to time, and this case has brought us back to the bedrock."

Amsterdam who defended the *Akzo* case. Swaak cautioned that the decision has already led to more careful communications between inhouse counsel and company personnel. "In-house lawyers

are less willing to commit complaints or advice to writing," he said, "instead relying on conference calls or verbal communications and hoping they are remembered." If inhouse lawyers want to commit a matter to writing, he said, they seek ways to avoid doing so in EC jurisdictions.

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"If you want to put things in writing, store them in Canada," said Mahmud Jamal of Osler in Toronto. "We have constitutionalized legal privilege." Jamal added that Canadian lawyers were surprised by the *Akzo* ruling. "Lawyers exercise independent judgment regardless of whether the paycheck is from a client or employer," he said. "For Canadian lawyers, the notion of anything else is anathema."

Hackett says the decision has another, possibly unintended consequence. "This is the 'Full Employment Act for Outside Counsel," she said. "The *Akzo* decision encourages companies to send their legal work outside. One effect of that is to dismantle the internal reporting structures within companies that could address problems in their early stages," she said.

"And I encourage lawyers in the audience to release yourselves from the auto-signature," Hackett continued, referring to the disclaimer included at the bottom of lawyer e-mails since Sarbanes-Oxley. "If you order a deli sandwich and the e-mail has the legal disclaimer, it becomes more difficult to distinguish between those e-mails that are and aren't privileged communications," she said. Hackett suggests the disclaimer language only be added when necessary, so that legal privilege claims have merit.

Panelists universally agreed that the *Akzo* decision has changed the international practice of business. "Legal privilege is a bedrock issue," said O'Rourke. "We see cracks in the bedrock from time to time, and this case has brought us back to the bedrock."

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Essential iPhone and iPad apps from legal tech gurus

With more than 300,000 apps available through the Apple App Store, how can a busy lawyer find the best ones? A panel of legal technology experts separated the wheat from the chaff in April to identify the top apps that can help lawyers be more accessible and productive.

Speaking to a full house at ABA TECHSHOW 2011 in Chicago, the experts—Josh Barrett of Black Helterline LLP, Jeff Richardson of Adams and Reese LLP, and Reid Trautz of the American Immigration Lawyers Association Practice and Professionalism Center—shared the top 60 apps on their list.

Here are some favorites:

Atomic Browser – This web browser is far superior to the mediocre Safari app, said Barrett. Atomic boasts excellent speed, multi-tab navigation and lots of options that are easy to find and customize. Barrett said it's his default browser on his iPhone, and it's only 99 cents.

Calvetica Calendar – The built-in calendar app on the iPad is not great—this one is better, said Richardson, explaining that users can create events with Calvetica using far fewer taps than the native app. Moreover, it can quickly jump to specific dates, and it uses the built-in Calendar database so users can go back and forth between Calvetica and the native app. The cost is \$3.

Noted – Trautz said that buying Noted was the best \$1.99 he spent this year. The app is a quick notepad that automatically sends a user's typed note to her designated email account. Noted is "faster than many 'memory' apps, and more reliable because I constantly check my e-mail box, but I don't always see the reminders in my memory app."

GoodReader – Richardson called GoodReader one of the best apps available, and essential for lawyers using the iPad. The universal app allows users to store and manage documents on their iOS device, and does a great job with PDFs, giving users the ability to annotate, markup and highlight them. The app costs \$3.

Chase Mobile – Users can view their account balances on most bank apps, but Chase Mobile also allows users to deposit checks. "Use you iPhone to scan the check, and a few taps later your check is deposited—without you having to go to the bank," said Barrett.

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Fastcase – This free app allows users to access case law and statutes on the iPad and iPhone. You can run searches and retrieve items by citation. According to Richardson, "every lawyer should download this app now."

iType2go – Avoid accidents while walking and texting at the same time with this app, which includes a see-through screen that uses the iPhone camera to show users where they are while typing. The free version is fun to test, and for \$1.99 users can send messages without leaving the app.

Photogene – This photo-editing app has dozens of the tools users would expect—crop, straighten, filters, rotation, white balance, etc.—with a dead simple interface. Users can define editing presets to apply to multiple photos. Trautz, Richardson and Barrett said the app is best used on the iPad. The iPad version costs \$3.99.

LogMeIn Ignition – This universal app allows users to remotely control any PC or Mac, as long as that computer is kept on. LogMeIn brings programs that can only run on a computer—such as billing and document management software—to users' iPhone or iPad.

Penultimate – This app turns your iPad into a handwriting note pad—without OCR or the conversion of handwriting to text. With a variety of ink colors and note taking styles, Penultimate exports users' notes to PDF. It's an iPad-only app, and costs \$2.99.

Word Lens – As an immigration lawyer, Trautz finds this app useful. "It instantly translates printed words from Spanish to English or English to Spanish using the iPhone camera. Just point the app at a sign or document and watch the words change immediately." The app is free, but each language-to-language dictionary is \$9.99.

Keynote – Apple's Keynote for designing and delivering slide presentations is available for the iPad at \$9.99. Barrett, who created and presented slides for his TECHSHOW session using Keynote for iPad, said he prefers using this version over the desktop one. While the iPad app has fewer features than the desktop application, it has more than enough horsepower. "I actually find the limited features a plus as it makes me focus on my content," he explained.

Siri Assistant – This free app serves as a text/voice-activated personal assistant. Just tell the app what you want —Where is the nearest gas station? Call United Airlines.— and it will figure it out for you. Google Mobile is good too; but Siri Assistant is usually faster.

Text'nDrive – Avoid the temptation to text or e-mail while driving with this productivity app. Users first register their e-mail account, then—when they start the app—it reads their texts and e-mails as the messages arrive. The basic version is free, but to send response messages, pop for the pro version at \$9.99 or wait for frequent half-price sales.

Learn more about legal technology from Barrett on Tablet Legal, Jeff Richardson on iPhone J.D. and Trautz on Reid my Blog!

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ABA TECHSHOW is the world's premier legal technology
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The musts of establishing outsourced support services

Workers' compensation attorney Channing Migner began using outsourced services more than five years ago, and says that the added support has made his practice more effective at a reduced cost, while also improving client service and satisfaction. In his *Law Practice Today* article, "Outsourcing Support Services Domestically and Globally," Migner, and his co-author Rodney Dowell, share best practices and lessons learned on establishing a good relationship with an outsourcing vendor.

With an increase in the number of offshore support centers set up by U.S. companies, there is a growing pool of Englisheducated talent available through outsourcing providers in locations like India. Moreover, Migner and Dowell report that many providers keep their teams trained on U.S. law and legal systems. "You get to start with a motivated team that has the basic paralegal and processing skills and can be rapidly trained on the specifics on your law firm," they say.

"You can reap the benefits of outsourcing as long as you do your diligence well, maintain healthy supervision throughout and are ready to work closely with the outsourcing provider as your partner in success," say Channing and Migner.

Finding the right outsourcing partner can be a challenge. Migner and Dowell advocate a deliberate approach, and suggest that lawyers seek providers with at least five years experience. Lawyers should also require at least three references from firms similar to their own that have had an outsourcing engagement for more than a year. In addition, lawyers must review details of providers' data security and confidentiality measures, including IT security delivery facilities, screening of personnel and disaster recovery plan.

More than just reviewing these measures, lawyers should ensure that an agreement with a provider take into account the need to maintain client confidentiality and secure confidential information. From the contractual side, Migner and Dowell recommend:

- A strong non-disclosure agreement with a strong data security clause in the main contract;
- A separate, additional non-disclosure agreement for remote workers accessing data; and

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• Contractual confirmation of data security measures.

Whether the outsourced work involves paralegal, secretarial or marketing support services, lawyers are required to maintain appropriate supervision. "What is important is that the lawyer who uses outsourcing providers does not abdicate the professional liability and legal responsibility in the use of such work products," explain Migner and Dowell.

They advise lawyers to create a strong organization around their case management system, creating a structured work flow and distinct case processing tasks that make it easier to make assignments to remote workers. In addition, lawyers should work with their provider to create procedures and manuals that define how tasks should be performed. For each task, Migner and Dowell suggest that lawyers set a service level agreement to serve as a benchmark on quality, quantity and expected turnaround time.

"You can reap the benefits of outsourcing as long as you do your diligence well, maintain healthy supervision throughout and are ready to work closely with the outsourcing provider as your partner in success," conclude Migner and Dowell.

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April/May 2011 e-news for members



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General counsel discuss best practices on antitrust compliance

Building a compliance program should be formulated on a risk-based approach, said Jim Walden, Gibson Dunn & Crutcher LLP, during a recent CLE program sponsored by the Section of Antitrust Law during its recent Spring Meeting.

That risk-based approach means two different things, though, for the U.S. Department of Justice and for business people. For the DOJ, they're thinking about themselves and the power they have to do something if a corporation is caught, continued Walden, who heads his firm's White Collar Defense & Investigations Group. Business people tend to think about it in terms of "I don't think we have bad people" here. And they tend to doubt whether they are going to be given any credit by the government for having a compliance program in place. "If I do, and am 'caught,' it means the program has failed" is often times the mentality.

Walden was joined by a panel of other antitrust experts to discuss the compliance efforts of general counsel in corporate communities worldwide in "General Counsel Compliance and Ethics Roundtable."

In the event of a multinational merger and acquisition, having an integration plan is critical, since areas of local law are not necessarily built into an outside company's compliance programs.

Internationally, employees' obligations as well as rights vis-à-vis compliance vary from jurisdiction to jurisdiction, according to panelists. In the event of a multinational merger and acquisition, having an integration plan is critical, since areas of local law are not necessarily built into an outside company's compliance programs. That integration plan should be drafted as early in the acquisition process as is possible, even prior to due

diligence, panelists said.

The compliance culture of the company being acquired is important to consider. What best practices might an acquiring company want to adopt or keep? What practices of the acquisition company are not in sync with those of the acquiring company? The acquiring company should not assume that ethics and compliance with the law in the jurisdiction of the company being acquired, is a given.

In moving forward with an integration plan, include new

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employees. This will help build a sense of ownership of the compliance program, said panelist Martha Rees, vice president and chief antitrust counsel, DuPont Legal. New employees need to understand personal accountability and the standard of compliance.

In longer-range planning, the issue of training also needs to be considered. What should it look like? In what language and what format will the training be conducted, and who will be instructed first? Often an outside counsel--who may have already assisted in regulatory matters of the acquisition--will be able to assist with training.

Anne Marie Cushmac of McGuireWoods LLP, who regularly counsels clients on antitrust compliance, offered tips on structuring a compliance program. Fostering a culture of compliance is a must--there has to be a strong and appropriate tone at the top, but adhering to the standard also needs to come from middle managers. The compliance culture needs to be global in nature; there can't be varying expectations depending on the locale in which the employee works. Individual responsibility is necessary, but the company needs to provide resources and the code of conduct.

Reinforcing compliance periodically is also important, and auditing periodically will help detect early warning signs. Finally, guidance should be tailored, including the realities that the industry players may actually face.

Penny Register-Shaw, FedEx Trade Networks Inc., also served as a panelist of "General Counsel Compliance and Ethics Roundtable." Kathleen Beasley, Haynes and Boone LLP, acted as moderator.

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Smart phone security 101

With the growing computing power of smart phones allowing users to work on the go, more than 75 percent of lawyers now carry such mobile devices, necessitating security measures to protect confidential law firm and client data.

In his recent article, "Smart Phone Security 101," ABA Legal Technology Research Center staffer Stephen Stine shares several basics on keeping smart phone data secure.

Use a password – Using a log-in password is the first and most important step in securing smart phone data. However, Stine urges lawyers not to use "swipe" log-in methods, which have been shown to leave smudge patterns when users unlock their phones with the swipe gesture of their choosing. Stine cites a *New York Times* article that reports that such gestures can be guessed 68 percent of the time under certain kinds of lighting.

Enable encryption features – "On certain smart phones, log-in passwords can be used in conjunction with on-device encryption," says Stine, indicating that the combination is powerful data protection that "renders data on the phone inaccessible to anyone without proper authorization." Certain Windows mobile phones, BlackBerrys and Nokia Symbian phones as well as the iPhone 3GS and 4 include on-device encryption. While Android phones do not currently include the feature, Stine recommends third-party software such as Nitrodesk Touchdown and Good for Enterprise to add some limited on-device encryption protection.

Backup your data – Backups ensure that important smart phone data isn't lost if the mobile device or the information kept on it is somehow destroyed. For iPhone users, Stine reports that certain data can be backed up using iTunes, either manually or automatically when syncing the device with a computer. Remember to encrypt the backups, advises Stine.

Seek third-party security measures – There are various third-party software packages that provide added security. For instance, Lookout—available in free and premium versions for Android, Windows Mobile and BlackBerry phones—offers remote backup, remote tracking, remote data wiping, and protections against viruses and malware.

Do not "jail break" your phone – "Jailbreaking a phone to access unsupported features could not only void the phone's warranty, but could also make the device more

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susceptible to malware such as viruses and Trojans."

"Smart Phone Security 101" appeared in the January 2011 issue of the Family Law e-newsletter, a publication of the Section of Family Law.

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Disaster planning guide available

ABA President Stephen N. Zack has made disaster preparedness one of the association's key priorities. As a profession, we must prepare for unexpected disasters, and preparedness is key to mitigating and responding to them.

The Special Committee on Disaster Response and Preparedness has worked since its inception in 2006 to promote and enhance business continuity both internally at the association and externally with members and others in the legal profession. Most recently, the committee created the *Guide to Developing and Conducting Business*Continuity Exercises that was first presented to bar leaders at the Midyear Meeting in Atlanta. For readers who have not yet seen the guide, here are some suggestions for planning and eventually conducting continuity tests and exercises.

Remember that your business continuity management plan is a living document that should be reviewed and updated at least once a year.

Business continuity exercises can range from the simple to the complex. The guide discusses five exercise types, listed here in order of increasing complexity: orientation; test or functional drill; tabletop exercise; functional exercise; and full-scale exercise.

If you have not yet planned or executed a business continuity exercise, an incremental approach is recommended, starting with an orientation and working up — through regularly scheduled training sessions — to the level of a functional exercise or full-scale exercise.

The key characteristics of an orientation type of exercise include:

Format

 Low-stress, informal setting with little or no disaster simulation; panel discussion, slide/video presentation, briefing or guest lecturer

Uses

 To introduce newly assigned principals or staff to emergency plans, contents of a business continuity management (BCM) plan, and roles and responsibilities. An annual refresher of the BCM plan

Leadership

 Led by a facilitator who presents information and guides discussion. Facilitator should have **EYE ON ETHICS**

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knowledge of the subject and objectives of the orientation.

On the other end of the spectrum is the full-scale exercise, which will require considerably more resources and time, plus actual mobilization of personnel if there is a designated alternate emergency facility.

For comparison, here are the key characteristics of a fullscale exercise:

Format

- Complex and comprehensive; the ultimate exercise type
- Places participants in circumstances resembling an actual emergency
- Players respond in real time; with on-the-spot decisions and actions that generate real responses from other players and consequences
- Difficult to design; messages must be carefully scripted and sequenced

Uses

 To evaluate the operational capabilities of an organization's entire emergency management program and all elements of the BCM plan

Leadership

- Controllers manage and direct the flow of the exercise
- Simulators assume external roles and deliver planned messages to players
- Evaluators act as observers who assess performance and effectiveness
- Facilitator/exercise director has overall responsibility for keeping the exercise on track
- Data collectors record the exercise events and observations for later analysis.

At whichever level you start, remember that your BCM plan is a living document that should be reviewed and updated at least once a year. Urgent needed changes that arise from an exercise should be incorporated as soon as possible.

More disaster preparedness resources are available on the Special Committee on Disaster Response and Preparedness webpage.

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Lawyers, policymakers connect at ABA Day 2011

The American Bar Association, in coordination with 43 state bar associations, brought distinguished lawyers from around the country to Washington, D.C., April 12-14, to discuss with policymakers issues critically important to the legal profession and to our nation.

ABA Day 2011 was also an opportunity to celebrate grassroots activists and members of Congress who did much for the legal profession and the communities they represent.

On day one, Reps. Judy Biggert (R-IL), Lloyd Doggett (D-TX) and Sen. Jeff Merkley (D-OR) accepted awards for supporting ABA legislation that protected Interest on Lawyers' Trust Accounts, or IOLTA, funds. All three awardees made clear their commitment to the justice system and spoke to the importance of legal services for the poor.

Sen. Mike Enzi (R-WY) later received the same award for his IOLTA efforts. Sens. Mark Begich (D-AK) and John Thune (R-SD) also received awards for supporting ABA legislation that protected lawyers from the Red Flags Rule designed for creditors.

After a short training session to orient attendees to the political climate on day two, lawyers met with members of Congress and their staffs to discuss three key topics: the importance of funding the Legal Services Corporation to ensure access to justice; the need to fill persistent judicial vacancies; and the need to provide adequate funding for our legal system, including the collection of fees due to courts.

That night, ABA members James Felman (Kynes, Markman & Felman), Martin Lybecker (Perkins Coie LLP) and Col. John Odom (Jones, Odom & Politz, LLP), received the ABA Grassroots Advocacy Award, along with the New York State Bar Association, in a ceremony at the U.S. Supreme Court.

The final day of the ABA's annual grassroots lobbying event featured morning discussions with White House Counsel Robert Bauer and Rep. Pete Sessions (R-TX). Afterwards, lawyers returned to congressional offices to remind policymakers that the legal community speaks with a unified voice on topics as fundamental as access to justice and the independence of the judicial branch.

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Do you have a question about legal ethics that affects your practice? ETHICSearch can help. For quick and confidential research assistance, click here to send your questions.

Piles of files

By Peter H. Geraghty Director, ETHICSearch

Three lawyers have been practicing as the ABC partnership concentrating in real estate and probate matters for the past 30 years. During this time, they have represented hundreds of clients and have amassed thousands of client files for various matters, most of which are now closed.

Lawyer A intends to retire at the end of the year.

Up until now, the firm has been storing these files in the firm office, but will soon run out of space and will be forced to rent additional storage space.

The lawyers would like to have a system in place whereby they can review the files and make decisions as to which files they should keep and which files they can destroy. For those files they decide to destroy, which items in each file should be returned to the client?

What are the ethical considerations lawyers should keep in mind when deciding whether to keep or destroy closed client files?

Discussion

This is one of the most common inquiries posed to ETHICSearch: How long do I keep my closed client files?

ABA Informal Opinion 1384 (1977) put forth seven basic considerations to keep in mind when considering whether to keep or discard a client file:

- 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 in 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 necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not

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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 except will be preserved by the lawyer.
- 4. In determining the length of time for retention of disposition of a file, a lawyer should exercise discretion. The nature and contents of some 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 that the lawyer has destroyed or disposed of.

Informal Opinion 1384 is still very widely cited in state bar ethics opinions. See, e.g. New Jersey 692 (2002), West Virginia Bar Opinion 2002-01(2002), California State Bar Opinion 2001-157 (2001), The Association of the Bar of the City of New York Opinion 1999-05 (1999), Pennsylvania Bar Opinion 99-120 (1999), Arizona Bar Association Opinion 98-07(1998), Wisconsin Opinion E-98-01 (1998), Utah State Bar 96-02 (1996) and South Dakota Opinion 94-6 (1994).

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Rule 1.15 Safekeeping Property of the ABA Model Rules of Professional Conduct also provides some guidance in this area. State bar association ethics opinions have recognized that this Rule applies not only to client trust fund accounts and records but also to other client property. See, e.g. Connecticut Bar Opinion 98-23 (1998) that states as follows:

The Rules of Professional Conduct, as adopted in Connecticut, relate to this issue through Rule 1.15 *Safekeeping Property*, subsection (a). While the section generally refers to the maintenance of financial and clients' funds accounts, it also provides, in a pertinent portion, "other properties shall be identified as such and appropriately safeguarded." This language has been universally understood to require an attorney to take appropriate, reasonable steps to

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safeguard file documents which are property of the client, and any important original documentation from the client.

New York Opinion 1999-05 (1999), applied DR 9-102 (the New York Code of Professional Responsibility corollary to Model Rule 1.15) when it discussed a lawyer's obligations to safeguard missing client's wills when the lawyer retires or the lawyer's firm is undergoing dissolution and concluded:

...that a retiring lawyer—or one whose firm is dissolving—may communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills. However, as to those clients who cannot be located, the lawyer's obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law. The original Wills remaining in the lawyer's possession could be placed in storage or in the custody of a successor attorney (indexed and stored in a manner that will protect client secrets and confidences), unless it is appropriate to use available procedures for filing original Wills with a court for safekeeping.

An excellent article entitled "Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools," by Lee R. Nemchek, is available on the American Association of Law Libraries website.

When a lawyer retires: Joint responsibilities toward client files

There are several state and local bar association ethics opinions that have discussed a lawyer's and the firm's obligations with regard to client files when he either retires from a firm or the firm he was associated with dissolves. In general these opinions state that a lawyer has joint and several responsibilities with the firm to ensure that the files are disposed of properly.

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See, for example New York State Bar opinion 623. The opinion states:

...A lawyer who leaves a law practice, due either to retirement or dissolution of a law firm, has joint and several responsibilities with other firm members for the proper disposition of client files. In the case of closed client files, the lawyer may destroy all documents that belong to him without notice to the client unless extraordinary circumstances exist. As for documents belonging to the client, the lawyer must offer to make them available to the client and may follow the client's instruction as to their disposal. If the client fails to respond in a reasonable period of time, the lawyer should review the files to determine

which files he must salvage because of legal requirements or because the documents establish client rights. The lawyer may then destroy the remainder of the files in a manner that preserves client confidentiality. He must notify the client of any documents that must be salvaged and forward any documents the client is required by law to maintain. If the client is deceased or incapacitated, the lawyer may deliver the files to the client's representative. If delivery to the client or his representative is not possible, the lawyer must retain these files until the expiration of the legal retention period or the period of reasonably foreseeable need by the client but may charge the client the cost for maintaining the files. NY State Opinion 460; DRs 1-102(A)(5), 4101(B)(1)(D), 9-102(B)(D)(G); ECs 1-5, 4-4, 4-6, 7-1, 7-8, 7-11, 7-12.

Nassau county opinion 93-23 takes a similar view to that expressed in the New York State opinion, but addresses it in the context of lawyers who leave a law firm after it dissolves, but leave their client files with a group of lawyers who stay to form a successor firm. The lawyers who leave the firm send a letter to the new group of lawyers and ask them to send them approximately 30% of the files and to destroy the rest. The Nassau county bar opinion states again that the lawyers have joint and several responsibility for the files and that they cannot be simply discarded. The opinion states:

...If there are any members of inquiring counsel's current firm who are not members of the predecessor law firm in dissolution, they are nonetheless equally ethically bound since the present firm, of which they are members has custody of the files. As this Committee opined in Nassau County Opinion 89-43 and restated in Nassau County Opinion 92-27, an attorney voluntarily assuming custody of the files of another lawyer's client has the same ethical obligations for the files as if they were his or her own files.

See Also Masachusetts Bar Opinion 76-7 (1976).

Destruction of client files and the protection of client confidentiality

If a lawyer decides to destroy a client file, he should take steps to protect against the disclosure of client confidences. See, the following excerpt from the treatise section of the ABA/BNA Lawyers' Manual on Professional Conduct that provides a summary of recent ethics opinions on this topic:

New Jersey Ethics Op. 692 (Supplement) (2002) (when destroying client files, lawyer must take appropriate measures to ensure confidential information is protected from improper disclosure; "simply placing the files in the trash would not suffice"), New York

State Ethics Op. 641(1993) (lawyers complying with recycling ordinance must learn how paper is to be recycled in order to determine whether protective measures, such as shredding, are necessary to protect client confidences); and Oregon Ethics Op. 2005-141 (2005) (law firm contracting with recycling service to dispose of office files must take reasonable care to prevent company from disclosing or using confidential client information; firm must instruct company about lawyers' duty of confidentiality and company must agree to safeguard all such materials).

West Virginia Ethics Op. 2002-01(2002) (method of destroying closed files of former clients must protect confidentiality of contents); Wisconsin Ethics Op. 98-1, 14 Law. Man. Prof. Conduct 291 (1998) (in disposing of closed filesof former clients, lawyers must exercise due care to insure that confidential information is not disclosed). 55 Law. Man. Prof. Conduct 111.

Conversion of paper to electronic files

Storing closed client files can be very costly. Can the conversion of paper to electronic files be a solution for the lawyer who is trying to reduce storage costs?

There have been several state bar opinions on the storage of client files in an electronic format. See, for example State Bar of Arizona Opinion 07-02 (2007), New Jersey Opinion 701 (2006), State Bar of Virginia Opinion 1818 (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.

Some of these opinions also caution that if a lawyer does decide to store files in this manner, care should be taken to maintain a copy of the software used to create the file so that the lawyer will be able to open it should the client ever request a copy.

For further information on this topic, See the Eye on Ethics column entitled *From Paper to Kylobytes - updated* (2007). This article has links to many state and local bar opinions that have discussed ethical issues as they relate to the conversion of paper to electronic files.

Conclusion

When putting together a client file retention policy, check your local rules and ethics opinions. If there are no opinions on point in your jurisdiction, contact your state or local bar. Chances are they have fielded this question many times!

"Piles of Files" was originally printed in the June 2008 issue of $\it YourABA$.

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Do you have a question about legal ethics that affects your practice? ETHICSearch can help. For quick and confidential research assistance, click here to send your questions.

More information on ghostwriting

By Peter Geraghty Director, ETHICSearch

Last month's article on ghostwriting has attracted some comments and additional information from interested readers.

The ghostwriting article cited to Utah State Bar opinion 74 (1981) for the proposition that there is a duty to disclose when the lawyer's assistance is extensive, substantial or significant. Since the date of that opinion, Utah has issued Formal Opinion 08-01, Utah State Bar Ethics Advisory Op. Comm. Op. 08-01 (2008), a digest of which as it appears in the ABA/BNA Lawyers' Manual on Professional Conduct states as follows:

A lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Undertaking to provide limited legal help does not generally alter any other aspect of the attorney's professional responsibilities to the client.

The article also cited Florida State Bar Ass'n Comm. Professional Ethics Op. 79-7 (2000), New Hampshire Bar Ass'n Ethics Comm. article, *Unbundled Services -- Assisting the Pro se Litigant* (1999), and Massachusetts Bar Ass'n Comm. Professional Ethics Op. 98-1 (1998) for the same proposition put forth in the Utah bar opinion.

Since the issuance of the Florida opinion, Florida has added comments to its rule of professional conduct 4-1.2(c) Florida Rule of Professional Conduct 4-1.2(c), an excerpt from which states as follows:

...If the lawyer assists a *pro se* litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding *pro se*, has received no assistance

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from a lawyer.

Since the issuance of New Hampshire Opinion, in 2007 the New Hampshire Supreme Court has adopted New Hampshire Rule of Civil Procedure 17 subpart (g) of which states as follows:

(g) Pleading prepared for Unrepresented Party. When an attorney provides limited representation to an otherwise unrepresented party, by drafting a document to be filed by such party with the court in a proceeding in which (1) the attorney is not entering any appearance, or (2) the attorney has entered a Limited Appearance which does not include representation regarding such document, the attorney is not required to disclose the attorney's name on such 21 pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement "This pleading was prepared with the assistance of a New Hampshire attorney." The unrepresented party must comply with this required disclosure. Notwithstanding that the identity of the drafting attorney need not be required to be disclosed under this rule, by drafting a pleading to be used in court by an otherwise unrepresented party, the limited representation attorney shall be deemed to have made those same certifications as set forth in Rule 18(a) despite the fact the pleading need not be signed by the attorney.

And, since the issuance of the Massachusetts bar opinion, in 2009 the Massachusetts Supreme Court has adopted Supreme Judicial Court Order In Re: Limited Assistance Representation, an excerpt from which follows:

4. Assistance in the preparation of documents.

An attorney may assist a client in preparing a pleading, motion or other document to be signed and filed in court by the client, a practice sometimes referred to as "ghostwriting." In such cases, the attorney shall insert the notation "prepared with assistance of counsel" on any pleading, motion or other document prepared by the attorney. The attorney is not required to sign the pleading, motion or document, and the filing of such pleading, motion or document shall not constitute an appearance by the attorney.

Finally, readers may also be interested in *Kansas Ethics Opinion No. 09-01* (2009), a digest of which from the *Lawyers' Manual* states:

An attorney may offer limited scope representation. Any lawyer who prepares a pleading for an otherwise pro se litigant must disclose such assistance, including the phrase "Prepared with Assistance of Counsel" on the pleading. The attorney need not provide

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identifying information such as name, bar number or address.

For further information on unbundling, See the ABA Standing Committee on the Delivery of Legal Services Pro Se/Unbundling Resource Center. A list of state bar ethics opinions and current rules that address various unbundling issues is also available.



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Working with Styles and Templates in Microsoft Word 2007, part two

A video tutorial accompanying this article is available for ABA members. Also, see part one of this article and its related video.

Learning to use styles and new features introduced in Microsoft Word 2007 such as Quick Style Sets and the Quick Styles Gallery can save you time in drafting documents.

Styles for one-click formatting

"Styles" in Microsoft Word allows you to simultaneously apply multiple formatting options to a document with a click of the mouse. For example, imagine that you have to format certain text in Garamond font, 12 point, blue, bold and small caps, as well as apply single-spacing and left-side paragraph indentions of 1-inch. Instead of applying those options one by one, you can save all your formatting choices as a style and apply them with a single mouse click.

Using the Quick Styles Gallery

Word 2007 introduced the Quick Styles Gallery, a grid of available styles located in the Styles group of the Home tab of the Ribbon. Click on the second downward arrow icon on the right side of the Styles grid to view all of the Quick Styles accessible in the gallery. Click on a Quick Style to apply its set of styles to your document.

To add a style that you create to the Quick Styles Gallery, either save it as a new Quick Style or check the "Add to Quick Style List" box.

There are other available Quick Styles besides the ones in the gallery. To add more styles, open the Styles pane and click on "Options." Select "All Styles" from the pulldown menu to see all of the other available Quick Styles. Then, right-click on a desired style and select "Add to Quick Style Gallery."

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To remove a Quick Style from the gallery, right-click on it and select "Remove from Quick Style Gallery."

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Reuse documents and styles with templates and style sets

You can use Word templates when you are creating many similar documents that are based on the same set of styles. Download these templates and forms from Microsoft or from other sources such as the ABA Web Store.

To create your own template, first apply the appropriate styles to your document. Next, save those styles as described in part one of this article, then click on the Office Button "Save As." In the "Save as type" dropdown menu that will appear, select "Word Template" (.dotx) or "Word Macro-Enabled Template" (.dotm).

Generally, templates are saved in C:\Documents and Settings\UserName\Application Data\Microsoft\Templates. You may need to adjust your Advanced Settings to view the templates folder, which is usually hidden from view when using Windows Explorer.

To create documents based on templates you have created or downloaded, first go to the Office Button and click "New." Next, in the left column of the new document window that will appear, click on "My Templates" in the Templates section, and select your template.

If you leave the default radio button for "Create New Document" selected, the template will open as a regular document that can be edited and saved as usual, leaving your template intact for future use.

If you didn't save your template in the Templates folder you must manually locate the template by going to the Office Button and clicking "Open." This will open the template as a template, and you will have to select the Office Button "Save As" and switch the document type under the "Save as Type" pulldown menu to save your file as a document instead of a template.

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Quick Style sets

Quick Style sets allow you to quickly preview and apply different sets of styles and templates to a Word document in real time. Access Style sets via the "Change Styles" button on the Home tab of the Ribbon. Move your cursor over the list of Style sets to preview the different styles and formatting available to your document in real time. Add your own Style sets to the list by opening a template you've created or by modifying the styles in a document, and then selecting "Change Styles," "Style Set," "Save as Quick Style Set."

Style Inspector

Another helpful tool is the Style Inspector. From the Styles

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pane, click on the "Style Inspector" button (an image of double A's with a magnifying glass). Click on text to find out information on the style name and formatting. Click on the "Reveal Formatting" button (an image of a single letter A with a magnifying glass) on the Style Inspector window to view more detailed formatting information.

Conclusion

With a little practice using styles and templates in Microsoft Word, you can go a long way toward saving yourself time in drafting documents.

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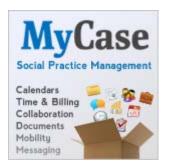


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