The Amazing Client Electronic File

The 2009 Kentucky Rules of Professional Conduct Bring Electronic Documents in from the Cold

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For years the bane of many a lawyer's existence was how to manage client paper files. Issues concerned the duty of a lawyer to maintain, return, and destroy client files consistent with the requirements of confidentiality, the property interest of clients in their files, and good malpractice risk management. With the replacement of the typewriter by the computer client documents are now routinely created in electronic format (e-documents) and often transmitted by e-mail. For this reason, one might think the ethical duties of file management got easier to manage because, of course, there would be so much less paper to control.

As we all know that did not turn out to be the case. There seems to be nearly as much paper to file as ever. Adding to the burden is that in addition to e-documents, copious amounts of e-mail relevant to a representation are sent over the Internet to clients, courts, and third persons, as well as e-mail sent within the firm about a matter. In today's practice of law most clients of necessity now require two files – one paper and the other electronic. As the old saying goes every solution breeds new problems.

The purpose of this article is to review a lawyer's duty to include e-documents in a client's file. The Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2008-1 nicely framed the issues with these questions:

- What ethical obligations does a lawyer have to retain e-documents and e-mail relating to a representation?
- Are there ethical considerations in how a lawyer organizes and stores e-documents and e-mail?
- What obligation does a lawyer have to provide a client with retained e-documents and e-mail related to a representation that were not required to be retained?

This article begins with a review of the guidance in KBA ethics opinions on client file management and the coverage of e-documents and e-mail in the 2009 Kentucky Rules of Professional Conduct. This is followed with an analysis of the questions raised and answered in Formal Opinion 2008-1. The article concludes with suggested risk management practices for client e-files.

Kentucky Guidance on Client File Management

Is a client entitled to a copy of the file?

The general rule in Kentucky is that clients are entitled to the return of their complete file upon termination of a representation with the exception of uncompensated work product unless withholding it would substantially prejudice the client's interests. The KBA Ethics Committee observed in KBA E-235 that:

> The client is entitled to receive what he has paid for and the return of what he has delivered to the lawyer. Beyond that, the conscientious lawyer should not withhold from the client any item which could reasonably be anticipated to be useful to the client.

For more information on this general rule, read 2009 Rule 1.16(d) and its Comments (9) and (10); and KBA Ethics Opinions E-235, E-280 and E-395.

What goes in a client file?

There is no single Kentucky Professional Conduct Rule (hereinafter Rules or Rule) that specifies everything that should be in a client's file, but KBA Ethics Opinions E-235 and E-395 adopted an ABA opinion listing what records must be given to a client. The list includes:

- Notes and memos to the file prepared by the attorney containing recitals of facts, conclusions, recommendations.
- Correspondence between attorney and client.
- Correspondence between the attorney and third parties.
- Material furnished by the client.
- Searches made at the expense of the client.
- Copy of pleadings and the like.
- Legal research embodied in memos or briefs.

In addition Rule 1.15, Safekeeping Property, requires that complete records of client funds and other property be kept by the lawyer and preserved for a period of five years after termination of the representation.

How should lawyers dispose of client files on closed matters that no longer need to be retained?

KBA Ethics Opinion E-300 provides guidance for the disposition of closed or nonessential client files. The basic policy is:

- Storing retired and inactive files is a law practice economic burden.
- A lawyer does not have a general duty to preserve all files permanently.
- Clients reasonably expect that valuable and useful information will not be prematurely or carelessly destroyed.

Based on this policy the opinion lists these considerations in managing file closing and destruction:

- Unless the client consents, do not destroy items that belong to the client (*e.g.*, original documents and items furnished by the client).
- Do not destroy items useful in the defense of a client on a matter in which the statute of limitations has not run.
- Do not destroy or discard information the client reasonably may expect to be preserved (*e.g.*, information the client may need, was not previously given, is not otherwise readily available).
- Do not dispose of files required to be preserved by rule or law.
- A lawyer should ordinarily attempt to contact the client by mail for file disposition instructions before destroying files.

The opinion contains the advice that the lawyer should follow in disposing of files:

- Protect the confidentiality of the contents.
- Screen the file to assure destruction complies with good practice.
- Maintain a closed file register or index of files that have been destroyed or otherwise retired.

How do the Rules treat e-documents and e-mail for client file purposes?

The rapidity with which e-documents and e-mail came to dominate client information in the 1990s overwhelmed the then existing ethics rules on client files. After going through an awkward adjustment period in dealing with the ethics of modern electronic modes of communication and document creation, it was realized that existing ethics principles could be applied to e-documents and e-mail just as they applied to paper documents with only minor adjustments to professional responsibility rules. It is now generally recognized that lawyers are authorized to file client information electronically.[1]

An earlier version of Kentucky's Rules did not anticipate the impact of e-documents and e-mail on the delivery of legal services, but the recently issued 2009 Rules treat e-documents, e-mail, and paper documents related to a representation alike. For example, in Rule 1.0, Terminology, a new definition was added for "writing" or "written":

> (n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment (20) to Rule 1.7, Conflicts of Interest: Current Clients, reinforces the point that correspondence with a client by e-mail is a writing that just like paper correspondence should be placed in a client's file:

> Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission).

Comment (2) to Rule 4.4, Respect for Rights of Third Persons, includes another example of the intent of the Rules to treat e-documents and e-mail the same as paper documents:

> Paragraph (b) recognizes that lawyers sometimes receive documents or other communications that were mistakenly sent or produced by opposing parties or their lawyers. … For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

May required client trust account records be maintained exclusively in electronic format?

I covered this question in "Client Trust Account Principles & Management for Kentucky Lawyers" (2d ed., 2010) as follows:

> The question arises whether client trust account records may be maintained exclusively in electronic format eliminating the storage of voluminous paper files. Rule 1.15, Comment (1) provides in part:
>
> > "A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule."

The cited ABA Model Financial Recordkeeping Rule provides the following guidance on electronic files:

> "Records required by this rule may be maintained by electronic, photographic, computer or other media provided that they otherwise comply with this rule and provided further that printed copies can be produced. These records shall be located at the lawyer's principal office in the jurisdiction or in a readily accessible location."

It appears from these provisions that Kentucky lawyers have a basis for maintaining trust account records in electronic format and do not have to create paper records except on an as needed basis. Note that original client documents entrusted to a lawyer must be maintained in their original form. It is recommended that the KBA Ethics Hotline be called to confirm this conclusion before maintaining client trust account records exclusively in electronic format.

From the foregoing it is concluded that under Kentucky's Rules lawyers are authorized to file client information electronically in a filing system that consist of e-documents, e-mail, and business records. Retention and disposition of e-documents and e-mail should be managed by the same standards applicable to paper documents as provided in KBA ethics opinions.

What Ethical Obligations Does a Lawyer Have to Retain E-Documents and E-Mail Relating to a Representation?

Given the clear intent of the Rules to treat e-documents and e-mail the same as paper documents, Kentucky lawyers should follow the guidance of KBA E-235 in deciding what e-documents and e-mail goes in a client's e-file. The duties of competence and diligence along with the requirement to protect a client's interest upon termination of a representation "such as surrendering papers and property to which a client is entitled" all reinforce this conclusion. [2]

Section II of Formal Opinion 2008-1 includes this reasonable advice on evaluating what to retain in an electronic file:

- [A] lawyer should use care not to destroy or discard documents (i) 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 expired; or (ii) that the client has not previously been given but which the client may need and may reasonably expect that the lawyer will preserve.

- [A] number of documents will likely fall into one of these two categories. Among those documents are legal pleadings, transactional documents, and substantive correspondence. Other documents regularly generated during a representation, such as draft memoranda or internal e-mails that do not address substantive issues, are unlikely to fall into these categories. Often a lawyer will need to exercise good judgment, document by document, to determine whether specific documents should be retained.

- [A] lawyer [is not required] to retain every paper document that bears any relationship, no matter how attenuated, to a representation. For instance … a lawyer does not have an ethical obligation to keep every handwritten note of every conversation relating to a representation. The same conclusion will often be reached with respect to drafts of correspondence, of pleadings, and of legal memoranda, among other types of paper documents. Because many e-mails and other electronic documents now serve the same function that paper documents have served … [these] retention guidelines … also apply to e-mails and other electronic documents.

- [W]hich e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside … [retention] guidelines…. No ethical rule prevents a lawyer from deleting those e-mails.

- As to documents to which no clear ownership decision can be made, … whether and how long to retain these documents [is] primarily a matter of good judgment.

Are There Ethical Considerations in How a Lawyer Organizes and Stores E-Documents and E-Mail Relating to a Representation?

Section III of Formal Opinion 2008-1 provides this guidance on maintaining electronic client files that should work for Kentucky lawyers:

- [A]s a general matter … a lawyer has [no] … ethical obligation to organize electronic documents in any particular manner, or to store those documents in any particular storage medium.

- In determining how to organize and store electronic documents, a lawyer should take into consideration the

nature, scope, and length of the representation, and the client's likely need for ready access to particular documents. From an ethical standpoint, a lawyer should ensure that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve.

• E-mail raises more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time. With such a system, a lawyer will have to take affirmative steps to preserve those e-mails that the lawyer decides to save.

What Obligation Does a Lawyer Have to Provide a Client with Retained E-Documents and E-Mail Related to a Representation That Were Not Required to be Retained?

The practical consideration of this question is that it is often prudent during a representation to retain virtually all client-related e-documents and e-mail. Later, when a client requests the file, the ethics issue arises whether retained e-documents and e-mail not required to be filed must be provided to the client. In the absence of Kentucky authority on point Section IV of Formal Opinion 2008-1 and New Hampshire Bar Association Ethics Committee Opinion #2005- 06/3 offer this guidance that is helpful for Kentucky lawyers:

Section IV of Formal Opinion 2008-1:

• The general rule is that a client is presumptively accorded full access to the lawyer's file on a represented matter.

• Exceptions to the general rule are that "a client does not have a presumptive right of access to e-mail communications between lawyers of the same law firm that are 'intended for internal law office review and use' and are 'unlikely to be of any significant usefulness to the client or to a successor attorney.' … [T]hose e-mails might include an instruction to another lawyer or employee of the firm to perform a particular task; a preliminary analysis by a lawyer of a factual or legal issue in the representation; or a communication by a lawyer addressing an administrative issue."

• Other exceptions could include "documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation."

• Does a lawyer "need to provide client access to otherwise inconsequential documents similar to those intended for 'internal law office review and use,' but sent instead to or from a third party not employed by the lawyer's firm [?]" Common examples of these documents are an e-mail sent to opposing counsel confirming the starting time of a deposition, or an e-mail sent to a testifying expert asking for transcripts of recent testimony. A lawyer is not under an ethical obligation to provide a client with electronic documents of this sort."

New Hampshire Bar Association Ethics Committee Opinion #2005-06/3:

• "[I]f a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. … That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party."

Risk Managing Client Electronic Files

Risk managing a lawyer's duty to maintain client files in a manner to competently represent a client involves:

- Implementing a file retention and disposition plan,
- Including in all letters of engagement how a client's file is managed, and
- Establishing office procedures for protecting client file confidentiality.

E-documents and e-mail must be specifically covered by each of these risk management tools. It is beyond the scope of this article to go into a detailed examination of each. What follows is an overview of some of the more important considerations in developing a client e-file risk management program.

E-documents and e-mail in file retention and disposition plans

Law firms must have a filing procedure that systematically collates retained records in a readily retrievable paper and electronic filing system format. The first step is to integrate e-document file identification procedures with those used to code paper files for a client by using the same identifying characteristics for both. It is key not to allow a gap in how a client's paper file and e-file are compiled and retrieved. Lawyers sometimes overlook that a client's file is not completely protected by privilege and that some parts are subject to discovery. Organize the office filing system in a way to avoid costly e-document retrieval searches because of a discovery demand or for any other reason.

E-documents are not difficult to manage since they are primarily the electronic version of the kind of documents lawyers are used to filing. The real problem is controlling the filing, retention, and destruction of e-mail. Unlike mail that is received in a central office location, e-mail is sent and received on an individual basis and often on portable e-mail devices, laptops, and computers used outside the office. Furthermore, many firms automatically delete e-mail on a periodic schedule. It is critical that e-mail concerning a representation be at least temporarily part of the client's e-file for retention review and that automatic deletion of e-mail that should be permanently filed be avoided.

One recommended approach in accomplishing this is:

- Ensure that all substantive e-mail communications with clients is maintained in the client's correspondence file, either by printing hard copies or creating a permanent e-mail folder for client correspondence;
- Establish a protocol for ensuring that e-mails are maintained for the client file. For example, if multiple attorneys are working on a matter, assign one person on the matter to be in charge of ensuring that all appropriate e-mails are maintained in the file or create a public folder in which all client e-mail can be stored; and
- Consider deleting internal e-mails with drafts of documents that are not forwarded to the client [3]

Include in e-mail retention procedures the requirement that e-mail recipients record insofar as possible:

- Date and time of transmission and receipt of the e-mail;
- Author, writer, sender; and
- Identification of the recipient, other addressees, and person for whom intended.

Use a letter of engagement to obtain agreement on how a client's e-file will be managed.

Formal Opinion 2008-1 suggests that a lawyer and client reach agreement at the beginning of a representation on retention, storage, and retrieval of electronic documents in a letter of engagement by considering:

- The types of e-documents and e-mail that the lawyer intends to retain, given the nature of the engagement;
- How the lawyer will organize those documents;
- The types of storage media the lawyer intends to employ;
- The steps the lawyer will take to make e-mail and other electronic documents available to the client, upon request, during or at the conclusion of the representation; and
- Any additional fees and expenses in connection with the foregoing.

In addition consider including in the letter of engagement:

- A specific time and procedure for the client to claim his paper and e-file after the representation is concluded.
- That the file is subject to destruction if not claimed as stipulated.
- All means of communication the firm uses – fax, cell phone, e-mail, etc. disclosing the risk of interception and providing that the client consents to these means.
- (*optional*) A condition that the firm has the choice of returning some or all of the client's file in electronic format, except for original documents.[4]

Protecting confidentiality of client information in e-documents.

The following is a list of some of the more important risk management measures that should be considered in formulating office policy to protect e-document confidentiality:

Basic Rules: Every firm should have in place measures to protect client e-document confidentiality. This begins with basic rules on office access security, locking doors and filing cabinets, turning off computers and copy machines, memorizing passwords, and making sure that computer screens are not visible to other than firm members.[5]

Hacker Protection: Use "firewalls" – electronic devices and programs that prevent unauthorized entry into a computer system from outside that system.

Off-site Access: Use a password for access to the firm's computer system by firm members working from home or out of the office. Establish encryption requirements for sensitive matters. Limit or prohibit permanent storage of e-documents on home computers, laptops, and other portable e-mail devices. Prohibit communicating confidential information over public connections. If absolutely necessary to do so, use an encryption program.

Portable and E-Mail Devices: Register all portable and e-mail devices used by firm members for firm matters. Establish procedures for prompt notification of the loss of any registered device. Confirm that the firm has the ability to wipe these devices remotely.

E-Mail: Implement written procedures for managing e-mail that protect confidentiality by covering:

- Who has access to confidential e-mail;
- How confidential multiple address messages and group distributions are to be controlled;
- How confidential e-mail is to be backed up, stored, and destroyed; and
- How people who work at home get access to the firm's computer system and send and receive confidential e-mail.

Metadata: Metadata is data hidden in e-documents generated in the course of their writing and editing. Metadata often con-

tains confidential information that is transmitted in e-documents – most frequently by e-mail. Avoid inadvertently disclosing confidential or privileged metadata by carefully using a format that removes metadata from e-documents. Many firms use automatic metadata scrubbers.

One of the most important risk management considerations in protecting client confidentiality is the necessity for a firm to keep up with technological developments in creating and transmitting e-documents and the new ways invented of hacking computer security programs. This is an ongoing requirement that someone high in the management of every firm must have as a top priority in their job description.

A Final Risk Management Consideration

Always consider the possibility of a malpractice claim or a bar complaint when stripping a client's file at the end of a representation. If that happens, you will need a complete file showing how the matter was practiced. This is an important reason to retain at least some routine e-mail and other e-documents that might well be deleted because they show a pattern of client communication and effort on a case. A frequent allegation in bar complaints is lack of communication. A client e-file containing numerous, if routine, e-mails to a client is an excellent defense to that allegation. In contingency fee cases plaintiff's lawyers' client files are often quite thin because detailed records for billing purposes are not required. When a client complains of a lack of diligence by the lawyer, a client e-file showing e-mail with the client and third persons about the case can be strong evidence that the lawyer was working hard on the case. Better to keep too much than deleting useful exonerating evidence. Unlike paper documents that are expensive to retain, e-documents can be saved in great quantity on very small disks and very large in capacity hard drives.

ENDNOTES

1. ABA/BNA Lawyers' Manual on Professional Conduct, Electronic Communications, 55:404 (4/30/2008).
2. See Rules 1.1, 1.3, and 1.16(d).
3. MacAvoy, Espinoza-Madrigal, and Starr, *Think Twice Before You Hit The Send Button! Practical Considerations In The Use Of Email*, The Practical Lawyer, Vol. 54, No. 6, 12/2008.
4. The Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010, Use of Client Engagement Letters to Authorize the Return or Destruction of Client Files at the Conclusion of a Matter, is an excellent review of the use of LOEs to cover disposition of client files. It includes a sample LOE provision for disposition of a client's file upon termination of the representation. This opinion is readily available on the Internet via Google.
5. Martin, *Why You Need An Employee Policy For Electronic Information*, The Practical Lawyer, Vol. 56, No.1, 2/2010.