ATTORNEY PROFESSIONALISM FORUM

Dear Forum:

I am the managing partner in a 50-plus attorney firm. We are in the process of re-evaluating our document retention policies for closed litigation and transactional files. While some attorneys at my firm retain their files indefinitely, others destroy their client files 30 days after the representation has concluded. We would like to develop a firm policy not only for consistency sake, but primarily to reduce the costs associated with the mounting volume of documents being stored in our records department, off-site and on our servers.

What are our ethical obligations to retain and preserve client files after the matter has concluded? After a litigation has been resolved, either through a settlement or judgment, must we continue to maintain the client's files, and if so, for how long? Are the rules the same for transactional matters? How long after a transaction has closed or been completed before we can destroy the client files for that representation?

I am also concerned about electronic files and emails, since I recently learned from one of my partners that he routinely deletes all emails after reading them and does not keep copies of "sent" emails. Do lawyers have an obligation to keep emails?

Does the firm have an obligation to notify our clients before destroying the files? One of our partners destroyed his copies of a client's transactional documents 30 days after the deal closed. The client called a year after that deal closed asking for the files and has threatened to sue the firm because those files were destroyed. The partner never contacted the client to tell them that he was disposing of the files. However, our engagement letter with that client expressly provides that we can dispose of the client's files upon the conclusion of the engagement. We understood that to be permissible but would appreciate your guidance.

Sincerely,

John Q. Manager

Dear John Q. Manager:

The sheer volume of documents, correspondence, drafts, and final work product generated by law firms in paper and electronic form can be staggering. While recent technology advances, such as cloud storage, can make it seem that file retention is easier and less expensive than traditional methods – such as warehouse storage – this is not always the case. The transfer of paper documents to electronic formats for digital storage can be time consuming and costly. It is vital that firms regularly update their document retention policies as technologies change, consult with their IT staff on the firm's ethical obligations to store data, and monitor their attorneys and staff to make sure that everyone complies with the firm's policies. Indeed, we recommend that every firm should have a formal document retention policy and that the policy is reevaluated yearly and disclosed to the firm's attorneys and staff. Otherwise, attorneys may believe that their computers, firm's network, and/or email systems are automatically backing up all their work in perpetuity when, in fact, automatic deletion policies are regularly deleting documents without the attorney's knowledge. Without a formal policy, different attorneys will employ different practices, which can result in the problems mentioned in your letter. Therefore, your firm's plan to develop a firm-wide retention policy is a prudent one and is something that your firm should develop and implement as soon as possible.

Despite the fact that all attorneys encounter the same question of what, if any, documents they must retain and for how long after their representation of a client has concluded, the New York Rules of Professional Conduct (RPC) offer little guidance to attorneys on these issues. Indeed, the New York City Bar Association Committee (NYCBA) on Professional and Judicial Ethics noted in Formal Opinion 2010-1 that there are very few provisions in the RPC that address document retention.

One rule that generally touches upon an attorney's document retention obligation is RPC 1.16(e), which provides that:

> [u]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid forseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, *delivering to the client all papers and property to which the client is entitled* . . . .

Id. (emphasis added). RPC 1.16(e), however, does not define how broadly "papers" or "property" should be construed. For example, do "papers" and "property" include the attorney's emails or work product or drafts that are relevant to the representation or do they simply include any "papers" and "property" provided by the client, deal documents or pleadings?

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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RPC 1.15(d) also gives us a list of bookkeeping records that a lawyer *must* retain for seven years including retainer agreements, bills rendered to clients, records of deposits and withdrawals, and bank statements. It is worth noting that RPC 1.15(d) distinguishes what items may be retained as copies (such as retainer agreements and bills) and what items must be retained in their original form (such as check stubs and bank statements). *See* RPC 1.15(d)(iii), (v), (viii); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 917 (2016 ed.); NYSBA Comm. on Prof'l Ethics, Op. 1077 (2015). Even upon dissolution of a firm, appropriate arrangements must be made for the maintenance of such original documents by either a successor firm or the attorneys personally. *See* RPC 1.15(h).

Moreover, under RPC 1.1, a lawyer has an obligation to represent a client competently, which implies a general duty to retain files as clients may reasonably expect to ask their attorney for copies of the work product for which they paid. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008) (noting that former New York Lawyer's Code of Professional Responsibility 6-101, which also included an obligation to represent a client competently, "implicitly impose[s] on lawyers an obligation to retain documents."). In addition, some local court rules require attorneys to keep copies of all files for seven years in personal injury, property damage, and wrongful death cases, such as pleadings, medical reports, repair bills, and correspondence concerning a claim or cause of action. *See*, *e.g.*, 22 N.Y.C.R.R. 603.25(f) (First Judicial Department) and 691.20(f) (Second Judicial Department).

These rules do not address the overwhelming majority of documents and electronic data that law firms create on a regular basis during the course of a representation such as drafts of legal documents and yes, emails. Several ethics opinions and legal decisions addressing lawyers' obligations on document retention offer some help.

In 1986, the NYCBA Committee on Professional and Judicial Ethics issued an opinion on document retention and recommended that before destroying any documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 1986-4 (1986). The committee further recommended that, "with respect to papers that belong to the lawyer, or papers as to which no clear ownership decision can be made, the answer to the questions whether and how long to retain such files is primarily *a matter of good judgment*, in the exercise of which the lawyer should bear in mind the possible need for the files in the future." *Id.* (emphasis added). This opinion cites to a number of ABA guidelines which are helpful in making such a determination including whether the lawyer knows or should know that the information "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 is information that the client may need "which the client may reasonably expect will be preserved by the lawyer." *Id.*

In 2008, after 20 years of exponential growth in the creation of electronic files and email use, and new court decisions that addressed attorney file retention, the same committee revisited its 1986 opinion. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). The 2008 opinion, with a focus on the need to retain email and other electronic documents, essentially made the same recommendations as the earlier opinion because "many emails and other electronic documents now serve the same function that paper documents have served in the representation of a client." *Id.* Consistent with its earlier opinion, the committee opined that lawyers should use care not to destroy or discard documents such as "legal pleadings, transactional documents and substantive correspondence" while documents such as "draft memoranda or internal e-mails that do not address substantive issues" may be deleted. *Id.* We recommend reviewing both of these opinions when evaluating your document retention policies.

The decision of the N.Y. Court of Appeals in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30 (1997) also has provided guidance in addressing the issue of what categories of documents a firm must turn over to the client once its representation of that client has concluded. In that dispute, after a client obtained new counsel for a large and complex transactional matter, the client sought the entire file from its prior firm, including "internal legal memoranda, drafts of instruments, markups, notes on contracts . . . [and] firm correspondence with third parties." *Id.* at 33. The former counsel objected, arguing that those documents were unnecessary for the new counsel to advise the client on their continuing obligations from the transaction. *Id.* The Court held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively afford[ed] . . . full access" to the attorney's file on the matter. *Id.* at 34. The Court, however, specifically excluded two categories of documents from this requirement, including "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law" and "documents intended for internal law office review and use." *Id.* at 37. The Court noted that, for example, "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" would not need to be disclosed to the client by the former law firm. *Id.* at 37–38.

Consistent with this decision, the 2008 NYCBA formal opinion suggested that a client would not have a presumptive right to internal email communications between lawyers of the same 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." *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). While *Sage Realty* addressed what retained documents must be turned over to a client, the Court specifically stated that its decision was "not to be construed as altering any existing standard of professional responsibility or generally accepted practice concerning a lawyer's duty to retain and safeguard all or portions of a client's file once a matter is concluded." *Id.* at 38. Rather, the decision just addressed a client's access to documents that had already been retained. *Id.*

Other than the time requirements for retaining certain files identified above, the RPC does not set forth a time-period requirement for file retention. Local bar associations such as the Nassau County Bar Association have recommended that lawyers preserve files for a seven-year period regardless of whether the attorney is required to do so. *See* Bar Ass'n of Nassau County Comm. on Prof Ethics Op. 2006-02 (2006).

Due to the limited number of bright-line rules indicating what documents should be retained, the form in which they should be stored, and the duration of such retention after a representation has concluded, these types of issues are a matter of business judgment that the law firms must make based on the type of legal representation and the client's possible need for the files in the future. Put another way, while your firm may not have an ethical or legal *obligation* to retain documents, such as casual correspondence, internal emails or draft memoranda, your firm may decide as a matter of smart business practice to retain documents (both paper and electronic) concerning a client's representation for a certain extended period after the representation concluded as protection, for example, in the event of a future a malpractice claim (i.e., for three years after the representation ended). *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2008-1 (2008). In fact, prior to making decisions about the time period for your firm's document retention policy, we recommend that you review the retention requirements imposed by your malpractice insurance carrier as its policy requirements may be broader than what is required under the law or the RPC. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1, n. 2 (2010). Alternatively, if a law firm determines in its judgment that files should be destroyed in a shorter time frame than the applicable statute of limitations for any malpractice claim, we recommend that you communicate your document retention policy to the client both at the time of the engagement and at the conclusion of the representation.

We believe that a law firm's document retention policy is a subject that should be addressed in your firm's engagement letter, particularly if your firm chooses to implement a shorter period of retention. According to the NYCBA Committee on Professional and Judicial Ethics, an engagement letter can provide for the destruction of documents at the conclusion of the engagement if they "would furnish no useful purpose in serving the client's present needs for legal advice" or they are "intended for internal law office review and use" as defined in *Sage Realty*. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2010-1 (2010). "[D]ocuments with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments" must be preserved unless the client specifically directs otherwise. *Id.* With respect to the remaining documents, which may be deemed useful to the client, if the lawyer obtains the *informed consent* of the client pursuant to RPC 1.0(j), an engagement letter may authorize the attorney to review a closed file and make a determination – at her sole discretion – as to whether the documents should be retained or returned to the client. *Id.* You are advised, however, to consider the client's level of sophistication when obtaining the informed consent. *Id.*

Lawyers are individuals so we should not expect all attorneys in a practice to have the identical methods for handling their email volume. Just like a "clean" desk, some attorneys prefer to keep a "clean" inbox whereby they delete all email once it is read so important email that still requires attention is not buried. Other attorneys prefer to retain all of their email so they can easily search their inbox for a particular subject. There are also attorneys who prefer to create specific matter folders which are essentially desk top file cabinets for each case. Finally, there are those stalwarts who prefer to print important emails for the firm's physical file.

In NYCBA Committee on Professional and Judicial Ethics Opinion 2008-1 (2008), it was noted that while no particular method of electronic organization is required, the organization of emails by files devoted to specific representation was commendable. Even if you are unable to convince all of the attorneys in your firm to commit to such a system, it is advisable to ensure that their email habits do not result in the loss of documents that a client may need later on and reasonably expects the lawyer to preserve. *Id.* It is especially advisable to consult with your IT department to determine if your email system includes an automatic delete function, make sure that your entire firm is aware of that function, and have a protocol for how attorneys should preserve email that should be saved. *See id.* Hopefully, the partner in your firm who routinely deletes *all* emails at least prints out or copies the client on the correspondence that could be deemed useful to the client. If the partner is not making copies, you may suggest that the email retention policy be reconsidered firm-wide or if that attorney is simply not adher-

ing to a policy already in place speak to the offending attorney about how his actions are opening himself and the firm to potential claims of malpractice.

With respect to your question about the wisdom of the destruction of an entire transactional file 30 days after that deal closed, a similar issue was addressed in Bar Association of Erie County Committee on Professional Ethics Opinion 10-06 (2010). In that opinion, the committee addressed an inquiry where, after the settlement of a personal injury claim, an attorney was interested in sending a notice to clients regarding the firm's file. The notice would indicate that if the client did not pick up the materials in connection with the case, or provide instructions regarding the disposition of those materials – within 30 days – the materials would be destroyed. *Id.* The committee opined that this notice would not conform to established ethical responsibilities because:

> (1) it does not take into account the requirements in the Rules of Professional Conduct or other rules governing the particular types of records described therein, (2) it does not require the client's informed consent before the destruction of other types of records, and (3) it contemplates the unilateral destruction of the entire file by the lawyer after a waiting period far shorter than the periods recommended in the ethics opinions that have addressed this subject.

Id. Your partner's situation is distinguishable from the Erie inquiry in that there was an engagement letter that provided for the destruction upon the conclusion of the engagement and there was no notice of the destruction after the matter concluded. To the extent that the destroyed file contained any of the documents that your firm was *required* to retain or return to the client under the RPC or local rules, such as the client's property, we are of the opinion that the destruction of the file was improper and you may have some exposure to a malpractice claim. With respect to the remaining documents in the file, destruction without further notice to the client would only have been permissible if you had obtained the *informed consent* of your client – preferably in writing – through the engagement letter. *Id.* As informed consent will depend on the sophistication of the party giving it, we would need more information on the details about the client and the specific directions in the engagement letter. In the future, however, we would recommend implementing a policy whereby you obtain informed consent of your destruction policy at the commencement of your representation and, subsequently before destroying any deal files, you send an email or letter to the client notifying him or her that the firm has a 30-day retention policy as indicated in the engagement letter and unless you hear from the client before a certain date, the firm will proceed to destroy those files in accordance with the firm's policy.

A dearth of clear rules for attorney file retention means that attorneys have an obligation to review files at the conclusion of a matter and use their good judgment to determine what files may be discarded in each case. In addition to potentially violating ethical rules and performing a disservice to your client, hasty file destruction also can lead to an inability to protect your own firm's interests down the road in the event you need to defend yourself against a malpractice claim. We know that keeping files can be expensive but there are many lawyers who believe that they will get repeat business if the clients have to come back for their files. Everything should be kept in balance. We recommend including your retention policies in the engagement letter at the start of your representation with a client, obtaining informed consent from the client as to your firm's file storage policies at the outset, creating policies that require attorneys in your firm to retain emails that may be deemed important to your clients, reviewing the contents of each file before it is destroyed, giving the client notice of the firm's intention to destroy certain files, and providing the client with a reasonable opportunity to obtain those files.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a mid-size firm but have decided to set out on my own. Although I am going solo, I expect to continue working on some cases with my current firm. I intend to handle all aspects of my new practice – at least at the outset – including bookkeeping and accounting. In addition to working with my soon-to-be former firm, I also plan to work with some other firms, including some out-of-state firms, where they plan to refer work to me in return for a fee-splitting arrangement. We both will be providing services to the client on those matters. I want to avoid any ethical improprieties and I am concerned that the fee-splitting issues could be complicated.

Are there any issues with engaging in a fee-splitting arrangement with these firms? What rules should I be aware of? Can I put the split fees into a general practice bank account? Are there any types of law practices or attorneys that I am prohibited from entering into a fee-splitting arrangement with?

Any advice on how to handle split fees would be appreciated.

Sincerely,
Gon Solo