THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2008 - 1

A LAWYER'S ETHICAL OBLIGATIONS TO RETAIN AND TO PROVIDE A CLIENT WITH ELECTRONIC DOCUMENTS RELATING TO A REPRESENTATION

QUESTIONS

What ethical obligations does a lawyer have to retain e-mails and other electronic documents relating to a representation? Does a lawyer need client permission before deleting e-mails or other electronic documents relating to the representation? When a client requests that a lawyer provide documents relating to the representation, may the lawyer charge the client for the costs associated with retrieving e-mails and other electronic documents from accessible and inaccessible storage media?

OPINION

I. Background

We live in the digital era. Lawyers routinely use e-mail to formally convey important information and documents to clients, colleagues, and other counsel. Just as routinely, lawyers use e-mail to conduct informal conversations. In many law practices, lawyers are as likely to send an e-mail as to pick up the telephone or walk down the hall to a colleague's office.

The growing reliance by lawyers on digital technology, of course, is not limited to e-mails. Virtually all correspondence, transactional documents, and court filings originate as electronic documents. Many of these electronic documents are never converted into paper format, and lawyers have become increasingly comfortable in drafting, editing, and commenting on these documents. Emblematic of the growing reliance on electronic documents, courts and administrative agencies now increasingly insist that lawyers make filings electronically. In addition, many lawyers and law firms, taking advantage of widely available document imaging technology, convert their paper records into electronic documents for organizational and storage purposes.

Given this reality, we believe that it would be useful to address some of the ethical issues implicated by a lawyer's reliance on e-mails and other electronic documents. Specifically, this Opinion addresses (i) a lawyer's ethical obligation to retain e-mails and other electronic documents relating to a representation; (ii) the ethical limitations on a lawyer's ability to delete e-mails and other electronic documents; (iii) the extent to which a client has a presumptive right to e-mails and other electronic documents in a lawyer's possession; and (iv) the extent to which a

lawyer may charge a client for producing e-mails and other electronic documents at the client's request.[1]

II. A Lawyer's Obligation to Retain E-mails and Other Electronic Documents

A lawyer's file relating to a representation includes both paper and electronic documents.[2] The ABA Model Rules of Professional Conduct (the "Model Rules") define a "writing" as "a tangible or electronic record of a communication or representation ...." Rule 1.0(n), Terminology.

The Code of Professional Responsibility (the "Code") does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation. The only Code provision that specifically requires a lawyer to retain client records is DR 9-102. That disciplinary rule imposes mandatory record-retention requirements with respect to a small number of discrete documents, such as retainer agreements, bills to clients, bank statements, and records of transactions in escrow accounts. *See* DR 9-102(D)(1)-(10).

The Code, however, contains several provisions that implicitly impose on lawyers an obligation to retain documents. For instance, under DR 6-101, a lawyer has an obligation to represent a client competently. *See also* EC 6-1 ("Because of the lawyer's vital role in the legal process, the lawyer should act with competence and proper care in representing clients."). Similarly, DR 7-101(A)(3) states that "[a] lawyer shall not intentionally . . . [p]rejudice or damage the client during the course of the professional relationship," subject to certain defined exceptions in DR 2-110 and DR 7-102.

In 1986, before the explosive growth in electronic documents, this Committee addressed a lawyer's obligations regarding the retention and disposition of documents in the lawyer's file at the end of a representation. Endorsing several guidelines adopted by the American Bar Association,[3] we recognized as a starting point that certain documents in a lawyer's file might

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1 This Opinion does not purport to address issues relating to the duty of a lawyer and client to preserve evidence, including electronic documents, that arise when a party has notice that the evidence is relevant to litigation or reasonably should know that the evidence may be relevant to anticipated litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908 (Sup. Ct. Nassau County 2006).

2 The term "lawyer's file" is fast becoming a throwback to an earlier era, connoting as it does a collection of sorted physical documents. In this Opinion, "lawyer's file" means the collection of documents relating to a representation, regardless of the (electronic or paper) form or character (sorted or unsorted) of the documents.

3 Formal Opinion 1986-4 of the Committee on Professional and Judicial Ethics stated in pertinent part:

> 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.

belong to the client and should be returned at the client's request.[4] ABCNY Formal Op. 1986-4. This Committee further opined, without significant elaboration, that before destroying any

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See ABA Inf. Op. 1384 (1977); N.Y. State 460 (1977). The ABA guidelines, which follow, are particularly helpful:

1. Unless the client consents, a lawyer should not destroy or discard items that . . . probably belong to the client. . . .

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 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 expect will be preserved by the lawyer.

4. In determining the length of time for retention or 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 [consider preserving], perhaps for an extended time, an index or identification of the files that the lawyer has destroyed or disposed of.

ABCNY Formal Op. 1986-4.

4 Although the 1986 Opinion recognized the distinction between documents that are the client's property and documents that are the lawyer's, it did not articulate any rules for drawing that distinction. This is understandable because the distinction is a question of law, and is therefore beyond the Committee's jurisdiction. *See, e.g.,* N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."); ABCNY Formal Op. 1986-4 ("Initially, it must be determined whether the papers in

documents that belong to the client, the lawyer should contact the client and ask whether the client wants delivery of those documents.[5]

As to documents "that belong to the lawyer" or "as to which no clear ownership decision can be made," this Committee opined that the questions whether and how long to retain these documents were "primarily a matter of good judgment." *Id.* We noted that with respect to these documents, the 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. *Id.*

In any given representation, 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.

To be sure, our 1986 Opinion does not require a lawyer to retain every paper document that bears any relationship, no matter how attenuated, to a representation. For instance, consistently with the guidelines described above, 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 in the representation of a client, we believe that the retention guidelines articulated in our 1986 Opinion should also apply to e-mails and other electronic documents.

As is the case with paper documents, which 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

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question, including work product, belong to the client or to the attorney. This is a legal question beyond our jurisdiction.").

5 *But cf.* ABA Informal Op. 1384 (1977) ("A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.").

representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in our 1986 Opinion. No ethical rule prevents a lawyer from deleting those e-mails.[6]

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under our 1986 Opinion. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.

III. A Lawyer's Obligations to Organize and Store E-mails and Other Electronic Documents

We next consider whether a lawyer has any ethical obligation to organize in any particular manner those e-mails and other electronic documents that the lawyer retains, or to store those documents in any particular storage medium.

We do not believe, as a general matter, that a lawyer has any 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.

This is more of an issue for e-mails than for other electronic documents. Law firms frequently store electronic documents other than e-mails, such as transactional documents and court filings, in a document management system. In such a system, electronic documents are typically coded with several identifying characteristics, including by client and matter. Many document management systems permit documents to be located by using those identifying characteristics, making it much easier to assemble them.

E-mails raise 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

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6 On a related subject, the Committee on Professional Ethics for the New York State Bar Association has set forth procedures for the disposal of an attorney's file at the conclusion of the representation. *See* N.Y. State 623. With respect to documents belonging to a client, the New York State opinion calls for the lawyer, in the first instance, to make the documents available to the client and, depending on the nature of the client's response, to take steps designed to give the client a full opportunity to take possession of those documents. With respect to documents belonging to the lawyer, the New York State opinion provides that a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances showing a client's "clear and present need for such documents." N.Y. State 623 (citing N.Y. State 398 (1975) and ABCNY Formal Op. 1986-4).

take affirmative steps to preserve those e-mails that the lawyer decides to save. Furthermore, unless a lawyer organizes the saved e-mails to facilitate their later retrieval, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as explained in Part V below, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by moving those e-mails to an electronic file devoted to a specific representation, or by coding those e-mails with specific identifying characteristics, such as a client and matter number, when the e-mails are first sent or received.

IV. A Lawyer's Obligation to Provide the Client with E-mails and Other Electronic Documents in the Lawyer's Possession

A related, but distinct, issue is the scope of a lawyer's obligation to provide the client with e-mails and other electronic documents retained by the lawyer. Put differently, once a lawyer decides to retain an e-mail or other electronic document — even when that electronic document does not have to be retained under our 1986 Opinion — does the lawyer have an obligation to provide the client with that electronic document upon request?

The Code does not explicitly address this issue. The Code recognizes that a client has a right to certain "papers and property" in the possession of the lawyer, but does not spell out what those "papers and property" consist of. *See, e.g.*, DR 2-110(2) (providing that, upon withdrawing from a representation, a lawyer shall "deliver[] to the client all papers and property to which the client is entitled"); DR 9-102(C)(4) (providing that lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive").[7]

The leading New York case discussing this issue is the Court of Appeals' 1997 decision in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 37 (1997). Abandoning the distinction adopted by some courts "between documents representing the 'end product' of an attorney's services, which belong to the client, and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney," *id.* at 35, the Court of Appeals adopted what it termed the "majority view." It held that "upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding," the client is "presumptively accord[ed]... full access" to the lawyer's file on a represented matter. *Id.* at 34.[8]

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7 *See* Cal. State Bar Formal Op. 2007-174 (construing e-mail and certain other electronic documents to fall within the scope of California Rule of Professional Conduct 3-700(D)(a), which provides that when a client requests the return of the "[c]lient papers and property," they include any items that are "reasonably necessary to the client's representation").

8 The *Sage Realty* Court agreed with those lower courts that "refused to recognize a property right of the attorney in the file superior to that of the client." 91 N.Y.2d at 36. For this

Sage Realty recognized two principal exceptions to the general rule of presumptive right of full access. The Court of Appeals held that a client is not entitled to the disclosure of (i) "documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law", or (ii) certain "firm documents intended for internal law office review and use" that are "unlikely to be of any significant usefulness to the client or to a successor attorney." *Id.* at 37-38. The Court of Appeals elaborated that this second category might 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." *Id.*[9]

Consistently with the exceptions recognized by *Sage Realty*, 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." Although it would be impossible to construct a list of the types of e-mails that would fall within the *Sage Realty* exceptions, those 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.

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proposition, *Sage Realty* relied upon the New York Supreme Court's decision in *Bronx Jewish Boys v. Uniglobe, Inc.*, which held that:

> Under New York Law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S.2d 711, 713 (Sup. Ct. 1995)(internal citation omitted).

9 The exceptions identified by *Sage Realty* to the presumption of client access to the documents in the lawyer's file are consistent with Comment (c) to Section 46 of the *Restatement (Third) of the Law Governing Lawyers*, which also recognizes circumstances under which a lawyer may refuse to provide certain documents in the lawyer's file to the client:

> A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved . . . .

The *Sage Realty* Court did not address whether a lawyer would 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.

V. A Lawyer's Entitlement to Reimbursement for Providing the Client with Electronic Documents in the Lawyer's File

The burden associated with retrieving and producing e-mails and other electronic documents is mitigated by the lawyer's ability, under *Sage Realty*, to charge the client based on the lawyer's "customary fee schedules" for gathering and producing documents to a client. *Sage Realty*, 91 N.Y.2d at 38. Although the Court of Appeals' *Sage Realty* decision principally related to paper documents, we do not see any principled reason why a lawyer's fees may not reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. *See* DR 2-106.[10] The reasonableness of that fee will often depend on the circumstances. On the one hand, it may be reasonable for a lawyer to charge a client for hiring an outside vendor to assist in the retrieval of electronic documents that a lawyer has stored on a less accessible storage medium that was widely in use at the time of retention. On the other hand, it may not be reasonable for a lawyer, who chooses not to use widely available and cost-effective technology to organize or code electronic documents, to then charge the client the additional costs resulting from the lawyer's choice.

In some situations, a client might request a copy of the electronic documents in the lawyer's file, but decline to pay the lawyer's reasonable fee associated with the retrieval and review of those documents. As a general matter, a lawyer is not obligated to shoulder the costs of retrieving electronic documents in order to return those documents to the client. As the Court of Appeals held in *Sage Realty*: "[A]s a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement." 91 N.Y.2d at 38. We are reluctant, however, to articulate a bright-line rule. There may be some circumstances under which a client reasonably expects its lawyer to manage the client's e-mails and other electronic documents to allow for those materials to be sent to the client without either the lawyer or the client incurring substantial additional expense.[11] A lawyer should also consider whether to insist on the advance payment of fees

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10 In those instances when a lawyer's electronic documents have not been coded, or saved to a specific file, a lawyer will need to take steps to ensure that in returning electronic documents to a client, the lawyer does not inadvertently reveal the confidences and secrets of another client. See DR 4-101(B)(1).

11 *See* Model Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not

associated with the retrieval and review of electronic documents when it is reasonably foreseeable that the client would suffer immediate harm as a result of any delay in the delivery of the requested documents.

VI. At the Outset of the Engagement Lawyer and Client Should Consider Discussing the Retention, Storage, and Retrieval of E-mails and Other Electronic Documents

In light of the exponential growth in e-mails and other electronic documents, and the pace of technological change involving the organization and storage of electronic documents, it may be prudent for a lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of an engagement. Lawyer and client may find it worthwhile to discuss and reach agreement at the outset on issues such as (i) the types of e-mail and other electronic documents that the lawyer intends to retain, given the nature of the engagement; (ii) how the lawyer will organize those documents; (iii) the types of storage media the lawyer intends to employ; (iv) 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 (v) any additional fees and expenses in connection with the foregoing. Consistently with the holding of *Sage Realty* and DR 2-106, those costs should accord with the lawyer's customary fee schedule and must not be excessive. By raising these issues at the outset of the representation, perhaps as part of the engagement letter, a lawyer and a client will be able to make informed decisions about the appropriate manner of retention, storage, and retrieval of electronic documents to which a client has a presumptive right of access.

CONCLUSION

In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures 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. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and

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been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law."). The lawyer may retain copies of the client file at the lawyer's expense. *See* N.Y. State 780 (2004).

expensive for the lawyer to retrieve those e-mails, and, as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided.

In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.

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