# Ethics Of Destruction And Inadvertent Disclosure Of Documents And ESI

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The retention and destruction of documents raises ethical considerations in two overlapping spheres: an attorney's obligation to competently protect his or her client's interests in the contents of the client file (see Model Rules 1.15 and 1.1); and the attorney's obligation to comply with – and ensure the client's compliance with – discovery obligations. (See Model Rules 3.4 and 8.4; see also Fed. R. Civ. P. 26, 34, 37.)

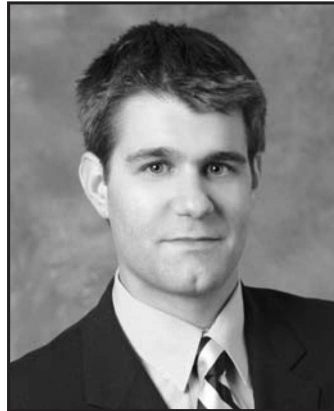
**Attorney's Files**

Attorneys are obligated to maintain their client files on behalf of their clients. Although attorneys do not need to maintain their files indefinitely, they must maintain documents and information that, for example, might be relevant to reasonably anticipated litigation.

Clients have an ownership interest in portions of the lawyer's file and a right to access the client file. (See Model Rule 1.15(a) of Professional Conduct.) Which items in a client's file are the client's property will depend on the scope of the engagement, the jurisdiction and any agreement that exists between the parties. This determination takes on heightened significance, in terms of potential cost and obligation, in connection with electronically stored information (ESI) because e-mail and other electronic information exists in multiple "places" and in multiple forms.

As thoroughly described by Pennsylvania Bar Association Formal Opinion 2007 in a multijurisdiction survey, there are two approaches to determining the portions of the client's file to which the client is entitled: the "entire file" approach and the "limited file" determination. The majority view is the entire file approach. Under this determination, the client has a right to "everything in the lawyer's possession necessary to the continued representation of the client." (PBA Formal Opinion 2007.)

In some jurisdictions that follow an "entire file" approach, internal attorney documents are nevertheless not considered part of the entire file. In these jurisdictions, authorities generally observe that documents such as time sheets, billing records, internal case assignment and conflict check forms that would not be important to clients need not be delivered, but most other documents, including drafts that contain substantive information not found in later drafts, ordinarily would be important to the client. (Maine Ethics Op. No. 187 [Nov. 5, 2004].) In addition, documents relating to a lawyer's personal impressions of the client and to other representations that were placed into the file for potential reference need not be made available to the client. (South Carolina Ethics Advisory Op. No. 92-37.)



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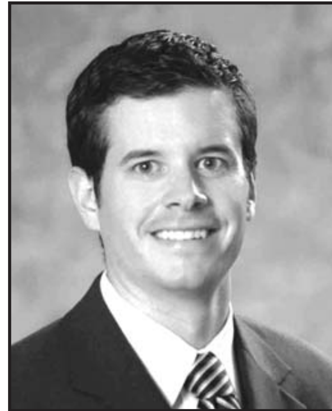

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In a minority of jurisdictions, the client is entitled only to a limited selection of core materials from the file, such as filed pleadings, correspondence and final – but not draft – memoranda. Absent a demonstrated need, the client would not be entitled to those items. For example, in *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App. 1992), the court determined that the client was entitled to a lawyer's work product only to the extent that it is reasonably necessary to the client's understanding of the lawyer's "end product."

In many jurisdictions, the precise contents of the file to which the client is entitled is a subject that is appropriate for agreement between the client and the lawyer. For example, some documents could be excluded from the "file" if so defined in the fee agreement, but exclusion of all attorney "personal notes" from the file cuts "too broad a swath;" documents needed for protection of a client's interests could not be excluded from the file; lawyers must "tread carefully" and explain effect and rationale for requested agreement. (New Hampshire Bar Assoc. Ethics Comm., "Clients Are Entitled to Their Files," Practical Ethics Article [Dec. 1998].)

**Retention And Destruction Of Client Files In Possession Of Counsel**

An attorney's duty of competence under Model Rule of Professional Responsibility 1.1 also demands that the lawyer "provide competent representation to a client." Thus, any destruction of documents or ESI must not impair the attorney's ability to represent the interests of the client, regardless of any ownership interest on the part of the client in the file.

Ethical rules permit attorneys to destroy documents and files. "A lawyer does not have a general duty to preserve all of his files permanently." (ABA Informal Opinion 1384 [1977].) "The fewest ethical implications are raised by documents which belong to the lawyer. Unless the lawyer has an independent legal duty to retain such documents, he is free to discard them absent 'extraordinary circumstances manifesting a client's clear and present need for such documents.'" (NYCLA Eth. Op. 725 [1998] [quoting N.Y. State Op. 623 (1991)].)

That said, "[a]t the other end of the spectrum are documents which are subject to a specific legal duty of retention. An attorney's legal duty to retain documents can thus arise because those documents have independent legal significance such as deeds and wills, or because those documents may be subject to a litigation hold (discussed in detail below). (See, e.g., Fed. R. Civ. P. 26.)

**Ethical Obligations To Comply With Discovery Rules**

Rule 3.4 of the Model Rules of Professional Conduct regulates fairness to the opposing party and counsel and prohibits a lawyer from, inter alia, "unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." (Model Rule 3.4 (a).) The rule further prohibits counsel from "fail[ing] to make reasonably diligent effort[s] to comply with a legally proper discovery request by an opposing party." (Model Rule 3.4 (d).)

At the extreme, document destruction could violate Model Rule 8.4, which prohibits unlawful and dishonest conduct. For example, in *Attorney Grievance Commission of Maryland v. Potter*, 844 A.2d 367, 382 (Md. 2004), an attorney violated Rule 8.4 (c) and (d) by deleting computer records of a client's file at a law firm before departing. Even though he ended up representing those clients and assumed that they would not want their files at the previous law firm, he did so without authority to do so and therefore violated the rules.

Determining when the obligation to preserve evidence arises is important in avoiding the evidentiary consequences of spoliation and the potential ethical implications if that spoliation runs afoul of the obligation not to unlawfully obstruct discovery and make reasonably diligent efforts to comply with discovery requests by the other party. Unfortunately for counsel, particularly given the potentially cumbersome (and expensive) nature of securing electronic information within the reach of the sprawling tentacles of ESI from future litigation threats both real and imagined, there is no bright-line rule.

**Retention And Destruction Of Client Files In Possession Of Counsel**

Amendments to the Federal Rules of Civil Procedure clarify and codify the application of the duty to preserve potentially discoverable information to ESI. Federal Rule of Civil Procedure 34 defines ESI broadly to include "writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained."

For discovery purposes, ESI is divided into two categories: (1) reasonably accessible; and (2) not reasonably accessible. Information that is not reasonably accessible includes legacy data remaining from obsolete systems that is now unintelligible and data that was deleted but that remains in fragmented form, requiring forensics to restore and retrieve. Such information might not be required to be produced under Rule 26(b), which provides that a party need not produce ESI discovery that is not reasonably accessible because of "undue burden or cost."

In connection with ESI, an attorney should affirmatively ensure that the litigation hold is effective by working with technology professionals to understand the retention and destruction process. Counsel should also determine if a forensic expert is needed to create legally defensible images or recovery of deleted and/or legacy data. The attorney should affirmatively ensure that more than just e-mail has been looked at. The litigation hold might include preserving and securing back-up tapes and e-mail, suspending the recycling/overwriting of back-up tapes, suspending any auto-delete or system-overwrite processes, taking a mirror image copy of hard drives and creating forensically sound copies of shared or departmental server drives. In order to preserve metadata and embedded data, the information should be retained in its native format, not merely printed out on paper.

The revisions to the Federal Rules of Civil Procedure grant a safe harbor for destruction of ESI. Rule 37(f) states that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system." According to the Committee Report, "good faith" may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information as part of the "litigation hold."

Thus, counsel should ensure compliance with ethical obligations of fairness and competence by securing the availability of potentially discoverable information when the duty to preserve attaches and by avoiding the following pitfalls: failing to adequately understand the universe of ESI; failing to understand how ESI is preserved, deleted, recycled or backed up; concluding that information would be an undue burden to preserve because it is not reasonably accessible; failing to implement a litigation hold as the plaintiff; assuming the litigation hold does not apply to post-litigation-created documents and information; labeling documents as work-product in anticipation of litigation but failing to implement a litigation hold; notifying an insurance carrier of a potential claim but failing to implement a litigation hold; waiting until the complaint is filed to implement a litigation hold; failing to follow-up with those who have a duty to preserve; and overreliance on the new safe-harbor provision for ESI.

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