

Are the Electronic Files on Your Computer Yours, or Your Client's?

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For centuries, lawyer files have consisted and have been stored primarily if not exclusively as paper. We are now well into an electronic era in which substantial portions of a lawyer's file may exist primarily if not exclusively in electronic form. What difference does this make? Who owns and who can ask for what?

In January 2006, the New Hampshire Bar Association Ethics Committee published Op 2005-06. The opinion addresses a law firm's obligation to turn over the electronic materials concerning a former client that was leaving the firm to follow a departing attorney. The opinion holds that in addition to the paper file, the electronic file must be made available to the client.

The opinion relies partially on a New Hampshire Supreme Court case holding that the contents of a client's file belongs to the client and that, upon request, an attorney must provide the client with the file. New Hampshire Bar Ass'n Ethics Comm., Op 2005-06/3, 1/06, citing to *Averill v Cox*, 145 NH 328, 339 (2000). The opinion further relies upon New Hampshire RPC 1.16(d). *Averill v Cox* is very similar to OSB Legal Ethics Op No 2005-125. In addition, §11.15 of The Ethical Oregon Lawyer (2003) provides that: "[a]s a general proposition, and absent a valid and enforceable attorney lien, a client is entitled to his or her files or to have the files forwarded to subsequent counsel." Finally, Oregon RPC 1.16(d), like the parallel New Hampshire rule, provides in pertinent part:

Upon termination of representation, a lawyer shall takes steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . .

Under these circumstances, the conclusion seems inescapable that the Oregon Supreme Court would conclude that the electronic part of a lawyer's file must be made available to the client.¹ See also Oregon RPC 1.0(q), which provides that a "writing" includes a "tangible or **electronic record** of a communication or representation, including . . . e-mail." (Emphasis supplied.) Of course, the mere fact that the lawyer is required to produce a file to the client does not prohibit the lawyer from retaining a copy of the file. OSB Legal Ethics Op No 2005-125.

A recent Nevada ethics opinion supports and arguably extends this view. Nevada State Bar Standing Comm. on Ethics and Professional Responsibility, Formal Op. 33 (February 9, 2006) provides that a law firm is permitted to store the electronic materials relating to the client on a remote server under third-party control as long as the law firm carefully selects the third-party company to ensure that the information is kept confidential. This is consistent with OSB Legal

¹ There are some limited portions of a paper file that a lawyer may not be required to turn over. See OSB Legal Ethics Op No 2005-125. Those same limitations should apply to the electronic file, as well.

Ethics Op No 2005-141, which holds that a law firm need not shred documents before turning them over to a recycler as long as the recycler is obligated to treat them confidentially.

The New Hampshire opinion also asserts that the potential expense to the firm of compiling these electronic materials does not justify a failure to provide them. On the other hand, it would seem that consistent with the holding in OSB Legal Ethics Op No 2005-125, a law firm may be able to shift this cost—at least to clients with the ability to pay—if the firm’s fee agreement so provides.