Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*

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The rise of lawyer mobility is a recent and remarkable development within the legal profession. In the past, movement of lawyers between firms was uncommon, but over the last thirty years lateral hiring has become the norm rather than the exception, and lawyers may expect to change their practice locales numerous times over their professional careers. The recent wide acceptance of lawyer mobility caused one court to describe the "revolving door" as a "modern-day law firm fixture."[1]

The era of lawyer mobility began in the 1980s and shows no signs of subsiding. To the contrary, in recent years, lateral moves of entire practice groups have become common. The moves are made possible because client loyalties run to lawyers as well as their firms, and some clients are more interested in the lawyers employ than the firms they retain. As an economic reality, client portability is vital to lawyer mobility.[2]

The lawyer or law firm that controls client files has distinct advantages in any competition for clients. Not surprisingly, disputes over control and possession of client files have long occupied the attention of courts and ethics committees, which over the years have developed a significant body of case law and ethics opinions addressing myriad issues relating to client files. This authority, however, is largely directed to a world of "hard copy" files where pieces of paper neatly assembled within file folders invite a property-based analysis whenever disagreements over possession or access arise. Until recently, the most significant development requiring any rethinking of settled norms was the development of inexpensive duplicating mechanisms (e.g., copy machines, which replaced carbon copies). Although this development was significant on many levels, the greater ease with which hard copy material could be duplicated did not require fundamental changes in the law's approach to client files.

 We would like to thank Calon Russell, Peter Jarvis, Roy Pulvers, Dayna Underhill, and Judith Parker for their valuable contributions to this article.

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1. Graubard, Mollen, Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179, 1180 (N.Y. 1995).

2. *See generally* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY § 1 (1998 & Supp. 2009)

The digitization of client files and law firm intellectual property, however, severely tests the existing framework for defining the relative rights and interests of law firms, lawyers, and clients. Digital files reduce or eliminate some recurring problems with hard copy files. For example, the digital file may be duplicated easily and inexpensively, thereby eliminating disputes over hard copy materials that arise when material is voluminous and can only be duplicated at substantial expense. The ease of digital duplication, however, renders client files and firm intellectual property highly portable, and facilitates the movement of lawyers from firm to firm. The portability of digital files poses significant challenges to firms attempting to mitigate the effects of lawyer mobility.

This article discusses the effects of digitizing client files and firm information in light of lawyer mobility and evaluates the existing framework of law and ethics developed largely in a world of hard copies. The article also offers some practical suggestions for firms seeking to assert greater control over client information and firm intellectual property.

I. A PRIMER ON LAWYER MOBILITY

In sometimes less than artful ways, the law and ethics norms that developed to address lawyer mobility attempt to balance the interests of the client desiring to retain or replace counsel, the firm seeking to preserve its client balance, and the departing lawyer hoping to move clients seamlessly to a new practice environment. Most importantly, ethics norms allowing clients to hire or discharge their lawyers at any time set the stage for lawyer mobility and provide a significant advantage to lawyers who change firms.[3]

A. Questions of Timing: Client Solicitation

For strategic and risk assessment reasons, the lawyer planning a departure may seek the earliest possible contact with a client to receive assurance of the client's loyalty and the necessary authorizations to control the client's files. Applying principles grounded in fiduciary duties, however, courts generally discourage "jumping the gun" and require lawyers to notify their firms of departure plans *before* clients are solicited.[4] The leading case on point, *Meehan v. Shaughnessy*,[5] describes the need to provide firms with "an equal opportunity" to compete for clients, a conclusion seemingly consistent with established fiduciary norms grounded in partnership and agency law.[6] Because

3. *See* Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65, 65-66 (2007).

4. *See, e.g.*, Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 761 (Ill. App. Ct. 2004); Wenzel v. Hopper & Galliher, P.C., 779 N.E.2d 30, 46 (Ind. Ct. App. 2007); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989); Hillman, *supra* note 2, at § 4.8.

5. 535 N.E.2d 1255 (1989).

6. *Id.* at 1267.

solicitation of clients must await the lawyer's notice of departure to the firm, it follows that securing client authorizations on file transfers should not occur until the even later point when clients have been solicited and have had an opportunity to reflect on their decisions.

Allowing clients the opportunity to reflect on their decisions is the premise underlying recurring recommendations that notification of clients be accomplished through a *joint* communication from the firm and the departing lawyer.[7] Such a communication informs the client of the lawyer's departure, advises the client of his or her right to choose counsel, and seeks some direction as to the client's wishes and the management of files. Although joint notice is designed to be a means of achieving *informed* client choice, the difficulties associated with lawyer-firm cooperation at this stage may be substantial, a point recognized in opinions recommending joint notice.[8] The goal of joint notice is effectuating client choice, and the means to this end is leveling the playing field between firms and departing lawyers in the competition for clients.

It should be noted, however, that a limited strand of authority in ethics opinions suggests clients may be solicited before firms are given notice of departure. In particular, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued a 1999 opinion indicating that clients may be solicited before departure plans are announced.[9] The ABA's implication that departing partners may solicit firm clients without giving notice to their firms potentially creates some real mischief. The opinion is more limited than a casual reading would suggest. The potential for misinterpretation arises from the opinion's statement that notifying clients before informing the firm of pending departure is not a violation of the Model Rules. While this may be an accurate statement, the Model Rules are not the primary standards for regulating the relationships of lawyers in a firm as between each other. Virtually every case that addressed the issue emphasized that a lawyer violates fiduciary duties to the firm and its partners by soliciting clients before informing the firm of departure plans. The ABA opinion offers a very specific point on the timing of solicitation under ethics standards and without regard to fiduciary duties owed to firms and colleagues.

B. The Importance of the Client File to the Mobile Lawyer and Her Client

Departing lawyers and the firms they leave and join must consider how to meet clients' needs during and after any transition. Effective client representation generally requires access to the client's file. From the principle

7. *See* Hillman, *supra* note 2, at § 4.8.3.

8. *See* Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1985-86, at *3 (recommending joint notification where practical).

9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999) (explaining potential difficulties of joint communication).

that a client is free to discharge a firm at any time, it follows that the client also has the power to direct the discharged firm to transmit relevant files to the lawyer or firm of the client's choice. A firm faced with the abrupt departure of one or more of its members, in most circumstances, is (or, at least, should be) powerless to frustrate the will of a client by refusing prompt delivery of the requested files.

The client's right to hire and discharge lawyers remains the overriding ethics principle, but, as noted, when the client exercises that right in the context of lawyer mobility, its application may meet some resistance. As a result, the timing of access to client files may be critical in implementing client choice. The departing lawyer may seek, at the earliest possible moment, the client's authorization to remove files from the firm. The firm, however, may prefer the status quo of inaction and delay because as long as it has primary custody of client files it may be in the best position to provide continuing representation.

The strength of clients' rights to their files derives from the virtually unrestricted power of clients to discharge a lawyer at any time, with or without cause, and usually even if the discharge violates the terms of a retainer agreement.[10] This discharge power would be meaningless without the corresponding ability to direct delivery of the client's file to successor counsel. As the New Hampshire Bar Association Ethics Committee pointedly observed: "A client's file is a client's property. Upon the client's request, a lawyer is obligated to deliver the file to the client . . . . Many lawyers have a hard time accepting the fact that the words mean just what they say."[11]

C. Beyond Client Files: Firm Property and the Departing Lawyer

To complicate matters, firm intellectual property may exist both within and outside client files, thereby creating three competing interests in the same collection of data (i.e., the client, the client's lawyer, and the owner of any intellectual property). That a law firm may have intellectual property rights is without question, but in the absence of clear agreements between the affected parties, the nature of these rights is murky, and success in denying departing lawyers access to and use of information in which the firm may have proprietary rights is spotty at best.

Some firm intellectual property may relate directly to the clients the firm represents. Strong intellectual property rights attach to trade secrets, a status

10. *See* Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2007-174 (2007) (interpreting Rule 3-700(D) of the California Rules of Professional Conduct). The opinion notes that Rule 3-700(D) requires a discharged attorney to surrender to the client all items "reasonably necessary to the client's representation." *Id.* (quoting Cal. Rules of Prof'l Conduct R. 3-700(D)). The opinion also states that the rule is "consistent with the principles that a client may terminate an attorney's employment freely, and that the attorney owes a duty of loyalty to the client, albeit limited, even after termination of employment." *Id.*

11. New Hampshire Bar Ass'n Ethics Comm., Practical Ethics Article (Dec. 1998), http://www.nhbar.org/pdfs/PEA12-98.pdf.

occasionally assigned to client lists, but at least in theory, applicable to a wide range of information developed by firms.[12] The ease with which potential trade secrets may be downloaded poses significant challenges for firms, particularly given the ambiguity of firms' property rights and the lack of development of the law in this area. The potential breadth of a firm's rights in information is illustrated by *Gibbs v. Breed, Abbott & Morgan*,[13] in which the court categorized the departing partners' disclosure of confidential firm information and hiring of firm employees as an "egregious" breach of fiduciary duty.[14] The confidential information at issue included salaries and related information from personnel files. Interestingly, the court found the taking of desk files consisting of correspondence unobjectionable, noting "[t]hese [files] were comprised of duplicates of material maintained in individual client files, the partnership agreement was silent as to these documents, and removal was apparently common practice for departing attorneys[.]"[15]

II. THE SCOPE OF CLIENT FILES: THE TRADITIONAL ETHICS NORMS AND THE DIGITAL DYNAMIC

Even before the digital revolution, defining what belonged in a client file was a difficult task. The advent of electronic storage made this task even more complex. Electronic files can be problematic both in terms of their sheer size and in terms of their content. Notably, the content of a typical electronic document may extend far beyond what appears on the printed page.

A. The Scope of the File in the Pre-Digital Era

Although the primacy of clients' rights in their files is largely accepted, the task of defining what constitutes the "file" in which the client has rights remains problematic. As one court observed, a client file is "an amorphous and vaguely defined entity."[16] Not all information used for clients falls within the contours of what we refer to as the "client file." In the last ten years alone, nearly two thousand reported cases, and more than one thousand law review articles, reference the phrase "client files." But what exactly are the "files" we so readily attribute to clients?

In an idealized version of the past, defining "client files" may have been straightforward, as we would simply walk to an oak file cabinet and pull a folder neatly labeled with the name of the client; the contents of that folder formed the client file. Of course, client files today are more sprawling

12. *See generally* Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets, and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767 (2003); Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 NORTHERN ILL. U. L. REV. 1 (2009).

13. 710 N.Y.S.2d 578 (App. Div. 2000).

14. *Id.* at 583.

15. *Id.* at 582.

16. Nat'l Sales & Serv. Co., Inc. v. Superior Court of Maricopa County, 667 P.2d 738, 740 (Ariz. 1983).

repositories of disparate items relating to the representation of clients.[17] In addition to the usual items of correspondence and document originals, files may include drafts, internal memoranda, forms, summaries of telephone conversations, informal research notes, and the ubiquitous sticky notes reflecting the most cryptic of thoughts or instructions. With the proliferation of electronic input such as electronic mail, the range of matters associated with client representation increases dramatically.

As discussed in more detail below, some intellectual property—including attorney work product and firm know how—may transcend particular client files, and neither law nor ethics norms adequately address proprietary interests in such property. For example, the Model Rules requires the attorney, upon termination of representation, to "surrender papers and property to *which the client is entitled.*"[18] Somewhat more helpful is a 2007 Pennsylvania ethics opinion that addressed at length the nature of rights to a client file and concluded:

> A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client . . . . Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email) . . . (6) all original documents with legal significance . . . (7) all documents and other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client.[19]

The opinion noted that a client would not ordinarily need or want drafts, attorney notes, and memoranda relating to staffing or law firm management. The opinion added that a client is entitled to make a specific request of information not generally included in the file and, in such a case, should be provided with the information unless substantial grounds exist to decline the request.

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17. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2007-100 (2007) (commenting on wide scope of "client file"). The opinion states "[i]n the most simplistic sense, the term encompasses the physical items that are placed into a segregated physical storage place, such as a file folder," but adding that in reality "the file can encompass items that are not physically segregated, or are not themselves 'physical' objects." *Id.*

18. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2006) (emphasis added); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR2-110(A)(2) (1980) (emphasis added).

19. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp., Formal Op. 2007-100 (2007) (listing required materials for client disclosure).

B. The Scope of the Client File: Are Digital Documents and Meta-Data Included?

With the ubiquity of, among other things, email and word processing, come many novel ethical issues related to client files. Although a lawyer might be inclined to avoid such pitfalls by eschewing technology, lawyers must evolve with technology in order to avoid breaching the standard of care owed to clients.[20]

Thus far, states that addressed whether the definition of "client file" includes electronic documents have consistently held in the affirmative.[21] The opinions, however, do little to resolve a number of key questions, including: 1) whether the extraordinary potential size of digital files warrants limiting the definition of "client file"; 2) who may access digital files and in what form; and 3) how to resolve the competing ownership interests that arise more frequently in the digital context.

Questions surrounding digital files are further complicated by the fact that a digital document is more than what is seen on the computer screen because of what is buried in the data itself. Metadata, or data about data, can be found in any document generated by a computer including word processing documents, spreadsheets, and e-mail.[22] Examples of metadata include the dates of file creation and modification, prior revisions, and the identity of the file author and others who have accessed the files. Although metadata may not be apparent upon the initial opening of a file, it is nonetheless accessible without great difficulty.

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20. *See infra* Section IV(B).

21. *See, e.g.*, Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 08-02 (2007) (affirming clients' rights to files regardless of digitization); Cal. State Bar Standing Comm. on Prof'l Resp. and Conduct, Formal Op. 2007-174 (2007) (regarding client papers and property there is no "distinction based on the *form* of any item, whether electronic or non-electronic"); N.C. State Bar, Formal Op. 5 (2008) ("RPC 234 allows lawyers to store client files in an electronic format."); State Bar Ass'n of N.D. Ethics Comm., Op. 01-03 (2001) ("A client's file that is maintained in an electronic format should be provided in that same format if requested."); N.H. Bar Ass'n Ethics Comm., Op. 2005-06/3 (2006) ("the contents of a client's file would necessarily include both paper and electronic forms of communications"); State Bar of Wis. Prof'l Ethics Comm., Op. E-00-03 ("Today, clients may request documents in an electronic form.").

22. Various definitions exist for metadata. *See The Sedona Guidelines: Best Practice & Guidelines Commentary for Managing Information & Records in the Electronic Age*, THE SEDONA CONFERENCE WORKING GROUP SERIES, Sept. 2005, 94, Appendix F, *available at*: http://www.arma.org/pdf/articles/Sedona RetGuide200409.pdf (defining metadata). The Sedona Guidelines define metadata as "[i]nformation about a particular data set which describes how, when and by whom it was collected, created, accessed or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information)." *Id.*; *see also* Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (applying similar metadata definition); Sylvia E. Stevens, *Guarding Against the Disclosure of Embedded Information*, OREGON STATE BAR BULLETIN, April 2007, *available at*: http://www.osbar.org/publications/bull etin/07apr/barcounsel.html (citing Merriam-Webster Online Dictionary) (defining metadata as "[d]ata that provides information about other data").

Thus, the task of defining "client file" has evolved beyond differentiating between substantive documents and sticky notes. Now we must differentiate between paper documents, digital files, and metadata. While there is little substantive difference between a hard copy and a digital image, there can be significant differences between hard copies and files that contain metadata. Unfortunately, most legal authorities that have tried to integrate digital-era issues into the definition of "client files" merely differentiate between tangible and digital documents and fail to consider the implications of metadata.

III. LIMITATIONS ON CLIENT'S RIGHTS TO FILES

In order to understand what is in a client file, we must first consider what is not. Although the considerable weight of authority suggests that clients have virtually unqualified rights to files maintained on their behalf, several theories—met with varying degrees of acceptance—may operate to limit clients' rights in their files. These theories include an extension on the lawyer work-product doctrine, the closely related idea that client access to file content does not extend to materials tangential to the lawyer's final work output, and the somewhat controversial retaining lien, permitting the discharged firm to retain a file until its fees are paid in full.

A. Lawyer Work-Product

An increasingly disputed component of client files (and firm property) is lawyer work product. As a preliminary matter, it is important to note that although the concept of lawyer work product is rooted in the evidentiary work-product privilege, its meaning evolved to encompass the substantive intellectual work of the lawyer without regard to the other traditional elements of the evidentiary privilege (e.g., anticipation of litigation).[23] Generally, upon termination of the attorney-client relationship, a client has presumptive access to the entirety of a file's contents insofar as those contents relate to the representation of the client.[24] A growing body of authority, however, suggests that a distinction should be drawn between general material contained in client files and attorney work product that may be included in the files. Some authority has gone so far as to state expressly that work product is the property

23. *See* Anthony E. Davis & David J. Elkanich, *Document Retention and Destruction Policies: Establishing Reasonable Guidelines for Law Firms*, ASSOCIATION OF LEGAL ADMINISTRATORS (2006) (discussing "principal minority rule" that clients have ownership rights only in the end product documents and the "alternative minority view" that the file belongs to the law firm); *see also* Richmond, *supra* note 12, at 30-36 (criticizing approach that denies clients' access to material when costs of preparation charged to client).

24. *See* Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P., 689 N.E.2d 879, 882 (N.Y. 1997) (advancing broad client rights in files relating to their representation). Dicta in the opinion suggests access may be denied for private expression of thoughts as well as firm documents intended for internal use only. *Id*. at 882-83; *see also* Richmond, *supra* note 12, at 31-33 (discussing *Sage Realty*).

of the attorney rather than the client.[25] As one ethics committee stated:

> There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods. The client pays for the professional's skill and expertise, not a physical product. The rules are not designed to change what is essentially the lawyer's work product into something belonging to the client.[26]

One of the more explicit discussions of types of work product that attorneys may withhold from files requested by clients is offered in a 1995 Montana ethics opinion interpreting the state's variation on the Model Rules. The opinion explicitly permits an attorney to withhold "materials personal to the lawyer or created or intended for internal use by the lawyer."[27] The opinion provides the following nonexclusive list of such papers or materials: notes made by the attorney as preparation for drafting of documents, notes taken by the attorney during client or witness interviews (assuming separate witness statements exist), notes taken by the attorney pertaining to investigation of facts, notes made by the attorney in preparation for a deposition or trial, internal notes to other members of the firm, notes and memos to the file prepared by the attorney, and intra-office communications except research memoranda.[28] On the extreme opposite, Oregon Formal Ethics Op. 2005-125 seems to dictate that virtually all documents, including lawyer work-product, must be turned over on client request.[29]

The idea that an attorney or firm may have a proprietary interest in some portion of a client's file is a minority view in the United States.[30] There is

25. *See* Ethics Comm. of the Colo. Bar Ass'n, Formal Op. 104 (1999) (noting lawyers may retain "documents that would be considered personal attorney work product, and not papers and property to which the client is entitled"); Conn. Bar Ass'n, Informal Op. 00-3 (2000) (noting "[o]ther than a narrow range of work-product documents, and materials of which copies have already been provided to a client, the files belong to the client"); Comm. on Prof. and Judicial Ethics of the State Bar of Mich., Op. R-5 (1989) (noting "[s]ome documents in files assembled for the representation of clients 'belong' to the law firm or lawyer, e.g., attorney work product. The law firm and lawyer may properly maintain and destroy the documents which 'belong' to the lawyer or law firm without consultation with the client").

26. Comm. on Prof'l and Judicial Ethics of the State Bar of Mich., Formal Op. R-019 (2000); *see also* Peter H. Geraghty, *Whose File Is It Anyway?*, Sept. 2006, http://www.abanet.org/media/youraba/200609/article 01.html (discussing work product when transmitting file to newly-retained firm).

27. Ethics Comm. of the State Bar of Mont., Op. 950221 (1995) (identifying example materials considered personal to lawyer and example materials not considered personal to lawyer).

28. *Id.*

29. Or. State Bar Bd. of Governors, Formal Op. 2005-125 (2005) (suggesting strong reason required for not producing all documents of assistance to client).

30. *Compare* Sup. Ct. of Ala., Formal Op. 1986-02 (1984) (lawyer may retain certain documents absent a prior agreement to give material to client), *and* Iowa Sup. Ct. Bd. Prof'l Ethics and Conduct, Formal Op. 85-02 (1985) (lawyer not obligated to turn over work product), *and* Ethics Comm. of the Bar Ass'n of S.F., Op. 1990-

broader acceptance of the proposition that the client has ownership rights in file contents both related to and necessary to the representation of the client. Disagreement may be expected, however, on the application of the standard and the existence and extent of rights in the residual content that falls beyond the standard.[31] If the work-product doctrine raises troublesome questions in the discovery context in which it developed, it should be unsurprising that work-product concepts become even more difficult when applied to the increasingly complex questions of the rights of attorneys, law firms and clients in client files.

Metadata in the form of drafts, deletions and comments, revisions, and prior iterations is arguably almost entirely lawyer work-product. Therefore, the majority view—that clients have access to both end products and lawyer work-product—implicitly gives the client access to some metadata. At least one jurisdiction has explicitly given clients such access.[32]

Ethics norms affirm the primacy of the client's interest in the file but largely

1 (1990) (attorney under no obligation to reveal uncommunicated work product if sole issue is attorney malpractice), *and* Suffolk County Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 88-3 (indicating lawyer's work product is not property of client), *with* D.C. Bar Legal Ethics Comm., Formal Op. 333 (2005) (material to which client is entitled includes work product), *and* Sup. Ct. of Ga, Formal Op. 87-5 (1988) (duty to release client files extends to work product but not billable time records). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 cmt. *c* (2000) ("When lawyer and client have conflicting wishes or interests with respect to work product materials, the lawyer must follow the instruction of the client.").

31. *See In re* Grand Jury Proceedings, 727 F.2d 941, 945 (10th Cir. 1984) (noting client ownership of files as general principle of law); Resolution Trust Corp. v. H----, P.C., 128 F.R.D. 647, 649-50 (N.D. Tex. 1989) (relying on fiduciary nature of attorney-client relationship to conclude files created in course of representation belong to client); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Gottschalk, 729 N.W. 2d 812, 819-20 (Iowa Sup. Ct. 2007) (adopting majority position entitling client to entire file); Averill v. Cox, 761 A.2d 1083 (N.H. 2000) (declining to distinguish between ownership interests based on end product and work product); Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P., 689 N.E.2d 879, 882 (N.Y. 1997) (concluding client access to files includes paid for work-product materials); Maleski v. Corporate Life Ins. Co., 641 A.2d 1, 6 (Pa. Commw. Ct. 1994) (holding once client has paid for creation of document, client holds proprietary interest in it); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(2) (2000); *see also* Alaska Bar Ass'n Ethics Comm., Formal Op. 2003-3 (2003) (concluding attorney must presumptively give client access to entire file unless there exist substantial grounds to refuse); Ariz. Comm. on the Rules of Prof'l Conduct, Op. 08-02 (2008) (recognizing files belong to clients); D.C. Bar Legal Ethics Comm., Formal Op. 333 (2005) (recognizing once client has paid for work product it belongs to client); Louisiana RPC 1.16(d) (lawyer must promptly release entire file upon written request from client); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n., Op. 183 (2004) (opining that file is property of the client but declining to answer whether attorney has ownership of work product); Minn. Lawyers Prof'l Responsibility Bd., Op. 13 (1989); Neb. Ethics Advisory Opinion for Lawyers, Formal Op. 01-3 (2001) (identifying, as general rule, client is entitled to work product); Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Informal Op. 92-8 (1992) (opining all materials acquired or prepared to represent client and materials beneficial to client belong to client); Or. State Bar Bd. of Governors, Formal Op. 2005-125 (2005) (defining client file to include work product); S.C. Bar Ass'n Ethics Advisory Comm., Op. 92-37 (1992) (concluding all material prepared in course of representation constitutes client file); Utah State Bar Ethics Advisory Opinion Comm., Formal Op., 06-04 (2006) (concluding client file includes all material not restricted by statute, discovery rule, or court order); Wash. State Bar Ass'n, Formal Op. 181 (1987) (concluding file generated in course of representation belongs to client).

32. N.H. Bar Ass'n Ethics Comm., Formal Op. 2005-06/3 (2006) (recognizing contents of client file necessarily include paper and electronic materials relating to client).

neglect the question of how firms and departing lawyers should address competing interests in work product.[33] Both the Model Code and the Model Rules, for example, require a lawyer discharged by a client to surrender to the client all "papers and property *to which the client is entitled*."[34] If such a vague standard was inadequate in a simpler world of hard copy files, it can hardly be expected to provide any useful guidance in the much more complicated environment of electronic data.

B. Sticky Notes and Related Detritus

Independent of file content over which the firm and the client may assert an interest are assorted materials and items that lack obvious substantive significance. Sticky notes, internal correspondence, and even preliminary drafts are examples of file detritus that, in contexts other than malpractice claims, has little value to either the client or the lawyer. Although most ethics opinions and cases focus on broader and more consequential issues of file ownership and work product, authority exists supporting the view that the apparently inconsequential odds and ends within a file are neither client property nor attorney work-product.[35] To the extent allowed, culling valuable prior versions of documents may be an important step preliminary to converting a file to electronic format.[36]

C. Impact of E-Discovery Rules on Work-Product and Sticky Note Limitations

Our increasing acceptance (and expectation) of a storm of information in the e-discovery context begs the question of whether the work product and sticky note limitations will survive. Responding to discovery requests can require examination of many layers of data and extraction of metadata.[37] To the extent

33. A recent Arizona ethics opinion has offered some guidance on this issue, noting "even if the departing lawyer did only a few hours of research for the client, he or she must ensure that the work product generated during that research is left with the firm in a form that will be usable for the continued representation of the client." Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 10-02 (2010).

34. MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2006) (emphasis added); MODEL CODE OF PROF'L RESPONSIBILITY DR2-110(A)(2) (1980) (emphasis added).

35. *See* Alaska Bar Ass'n Ethics Comm., Op. 2003-3 (2003) (rejecting the right of a firm to withhold work product). The opinion added that "access may be denied to documents intended for internal law office review and use. This might include, for example, preliminary impressions of the legal or factual issues presented in the representation, that are recorded primarily for the purpose of giving internal direction to staff. Access might also be denied to notes relating to the lawyer's impression of the client." *Id.*; *see also* Or. State Bar Bd. of Governors, Formal Op. 2005-125 (2005) (noting entire file, including work product, must be surrendered upon request of client, but not extending this mandate to "personal notes" bearing on the lawyer-client relationship rather than the client's position).

36. *See* Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Formal Op. 185 (2004) (discussing culling of files for electronic preservation and storage); *see also* Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Formal Op. 183 (2004) (recognizing importance of retaining old versions of documents for clients' future access).

37. *See* FED. R. CIV. P. 34 (2006) (governing production of documents and electronically stored information). This new rule allows parties to request discovery of files in a specific format. *Id.* If a format is

such requirements are applied to the transfer of client files, the work-product and sticky notes limitations could disappear.

Existing authority does not clearly address whether the term "client file," as used in the professional responsibility context, means what those same words might mean if written in a request for production governed by state or federal e-discovery rules. We believe that the answer must be no. E-discovery is expensive, and it makes little sense to spread such expenses to the professional responsibility context unless the expenses are tied to the transfer of useful information. For example, an appropriate place for the expansive (and expensive) reach of e-discovery rules, as applied to client files, is in the context of claims against the lawyer, such as legal malpractice claims. Given that production is tied to a cause of action in such situations, much of the metadata and volumes of communications may have probative value. Therefore, in the discovery context, as opposed to the withdrawal of representation or lawyer mobility contexts, it will be more important for the receiving party to have access to metadata. Clients switching lawyers or lawyers switching firms, however, are unlikely to gain anything from having access to every version of every document produced by the first lawyer. Neither would the new lawyer, in this situation, benefit from having such access, except in rare circumstances.

Finally, if the expansive definition of "client file" used in the e-discovery context were applied in the client withdrawal or lawyer mobility contexts, the costs associated with moving a client file could stifle client and lawyer mobility. Due to the frequency and acceptance of lawyer mobility, a more reasoned approach is required.

D. Retaining Liens

A retaining lien is a common-law possessory lien that attaches to a client's file to secure payment of fees earned and sums advanced by a firm.[38] The retaining lien attaches to all papers, books, documents, securities, monies, and property of the client possessed by the firm.[39] The lien allows a firm to retain a client's file pending payment of fees, and it is generally lost upon the voluntary surrender of the file. The lien has long been recognized at common law and is a frequent subject of litigation. Today, a split in authority exists as to whether such liens may be used to secure payment.[40] Not surprisingly, retaining liens seemingly fare less well in ethics opinions than in the case law.

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not requested, the producing party must turn over the files as they are kept in the ordinary course of business or in a reasonably usable form. *Id.* But both the Federal Rules and case law have given the producing party safeguards against overreaching requests.

38. *See* Marsh, Day & Calhoun v. Solomon, 529 A.2d 702, 707-08 (Conn. 1987) (rejecting public policy challenge to retaining lien).

39. *See* Brauer v. Hotel Assocs., Inc., 40 N.J. 415, 192 A.2d 831, 833 (1963) (setting forth extent of retaining lien).

40. *See* Hillman, *supra* note 12, at §2.3.2.

Retaining liens are particularly important in the lawyer mobility setting because they may enable a firm to delay and perhaps block the ability of a departing lawyer to take a client file from the firm unless the client pays outstanding legal fees or provides adequate security. Although the client is ostensibly free to change attorneys at any time, the client cannot compel the initial attorney to return the files unless that client first pays the balance owed, makes a mutually acceptable arrangement, or furnishes adequate security for the services rendered by the former attorney. Although courts often attempt to reconcile the client's right to discharge a lawyer with the lawyer's right to assert a retaining lien, when a firm has the right to retain client files pending full payment of fees and expenses, the client's right to discharge the firm may seem more illusory than real.[41]

The difficulty of reconciling the client's paramount right to choose a lawyer with the lawyer's ability to frustrate that choice by withholding files casts doubt on the status of the retaining lien in a number of jurisdictions. The lien is not recognized by the Restatement (Third) of the Law Governing Lawyers, and a growing number of ethics opinions caution that files may not be withheld if the result would be prejudicial to clients.[42] In jurisdictions where exercising lien rights to withhold client files is allowed, however, the mere threat may be a potent disincentive to changing counsel.

There exists, of course, an uneasy tension between the retaining lien and the right of the client to change firms.[43] Increasingly, courts and ethics committees have attempted to restrict retaining liens by precluding their imposition when the result would be substantially prejudicial to clients. This limitation, however, is not self-executing, and the burden is on the client or the departing lawyer to establish that the potential for prejudice exists.[44] Because establishing the existence of prejudice may entail both expense and delay, the relief offered by the prejudice limitation in some situations will be more theoretical than real.

Finally, a curious development in retaining liens arises in the digital file universe. With the ease of e-mail and crosscopy lines, PDFs and data storage, it is common for clients to possess copies of many, if not most, key documents pertaining to a matter. It is entirely possible that real-time duplication will

41. *See generally* Nat'l Sales & Service Co., Inc. v. Super. Ct. of Maricopa County, 136 Ariz. 544 (1983) (providing illuminating exchange on retaining fees in majority, concurring, and dissenting opinion).

42. *See* D.C. Bar Legal Ethics Comm., Formal Op. 273 (1997) (considering interests of clients when lawyers move from one firm to another); Iowa State Bar Ass'n Comm. on Prof'l Ethics and Conduct, Informal Op. 07-08 (2007) (providing lien may be asserted only under circumstances that do not prejudice clients); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43(1) (disfavoring retaining liens but leaving room for exceptions by statute or rule).

43. *See Marsh, Day & Calhoun*, 529 A.2d at 707-08 (discussing tension between clients' right to change and attorneys' right to compensation).

44. *See* Johnson v. Cherry, 422 F.3d 540, 556 (7th Cir. 2005) (requiring showing to justify disregarding retaining lien).

erode the usefulness of the retaining lien as a collection device.

IV. CLIENTS' INTERESTS IN THEIR FILES

A client's right to her file, whether limited or not, is critical to the lawyer's smooth transition away from one firm and into another. The client's rights in the file, however, extend beyond merely obtaining and transferring the file. Put simply, a law firm cannot provide the client with a file that is of any use to the client if the file does not exist, has not been properly maintained, or is not organized in such a way that its contents are accessible to the client.

A. File Retention

Apart from defining the contours of the client file, what is the scope of the lawyer's duty to retain and maintain the full file during the course of the representation? If the client has a reasonable expectation, however derived, that the client file will include materials available for transfer at the client's direction, the law firm is well advised to retain those materials in a manner conducive to transfer. Moreover, the lawyer's obligation to protect the property of a client extends to a client file, with the consequence that a closed file not returned to the client or disposed of pursuant to court order should be preserved *in its entirety* for some period of time.[45]

File retention requirements raise interesting issues in the lawyer mobility context. For example, if a departing lawyer takes a long-term client, which files, if any, must the old firm retain for the benefit of the client?[46] Complicating matters, especially when lawyers move across state lines, is the fact that retention periods differ across jurisdictions. The Model Rules require maintenance of account records "and other property" for five years following termination of representation.[47] The New Jersey rules, however, require retention of records and other property for "seven years after the event they record."[48] Although this may amount to a shorter or a longer period than the five-years-from-termination standard of the Model Rules, a 2001 New Jersey ethics opinion determined that the seven-year retention requirement should be measured, at the latest, from the conclusion of representation.[49]

Even with regard to file contents beyond client "property," ethical duties of competent representation and effective communication with clients may require

45. *See* Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 08-02 (2008) (addressing common questions about Arizona file retention rules). "Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct . . . a purge without first consulting the client." *Id.*

46. *See id.* (suggesting either old or new firm can assume responsibility for file retention).

47. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2006).

48. N.J. RULES OF PROF'L CONDUCT R. 1.15(a) (2009).

49. *See* N.J. Adv. Comm. on Prof'l Ethics, Formal Op. 692 (2002) (clarifying New Jersey file retention requirement).

the retention of material relating to client matters for some period of time following termination of representation.[50] Moreover, maintenance of files beyond the jurisdiction's normal retention period may be necessary when the possibility of litigation extends for an indefinite period.[51]

The obligation to retain client files should be subject to superseding agreements allowing destruction of files. Consider along this line the comments of the New Jersey ethics opinion noted above:

> Additionally, we see no reason why a client may not expressly agree to the destruction of a closed file at any earlier time. A general retention policy adopted by the firm or a specific understanding with regard to retention in the given case may be expressly agreed upon in any one of a number of ways, such as within a retainer agreement or by written acknowledgment at a point in time before or after the file has been closed. If such written agreement is intended to be made applicable to "client property" as defined above, RPC 1.15, the agreement should be executed only after the property is in the attorney's possession and should specifically describe the property intended to be destroyed or otherwise disposed of.[52]

Note in particular the qualification applied to "client property," that any such agreement should be executed *after* the firm is in possession of the property. This would limit the usefulness of many retainer agreements as applied to file destruction practices, and caution would suggest that notice should be provided to the affected clients in all cases before materials pertaining to past representation are destroyed. The extent to which destruction of work product requires similar protective measures depends on whether such materials are part of the file "owned" by the client, as discussed above.

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50. *See* MODEL RULES OF PROF. CONDUCT R. 1.1, 1.4 (2006) (requiring lawyers to provide competent representation and effective communication to clients); *see also* N.J. Adv. Comm. on Prof'l Ethics, Formal Op. 701 (2006) ("[A] client file will likely contain other documents, such as correspondence, pleadings, memoranda, and briefs, that are not 'property of the client' within the meaning of RPC 1.15, but that a lawyer is nevertheless required to maintain at least for some period of time in order to discharge the duties contained in RPC 1.1 (Competence) and RPC 1.4 (Communication), among others.").

51. *See* Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 98-07 (1998) (recommending indefinite retention in "probate or estate matters, homicide cases, life sentence cases and lifetime probation cases").

52. N.J. Adv. Comm. on Prof'l Ethics, Op. 692 (2001); *see also* City of New York Comm. on Prof'l and Judicial Ethics, Op. 2010-1 (2010) (discussing use of engagement letters to determine disposition of client files). The foregoing City of New York opinion breaks client files down into three categories: (1) documents with intrinsic value such as wills, deeds, and negotiable instruments which must be preserved or returned to the client, (2) documents that a lawyer knows or should know may still be useful to the client which may be only be disposed of pursuant to the client's informed consent, and (3) documents that would serve no useful purpose in serving the client's present needs which may be discarded without consulting the client. *Id.*

B. Digital File Retention

Somewhere between "best practice" and liability lives the typical standard of care. The more pervasive a practice becomes, the more likely it will become part of the standard of care.[53] Thus, lawyers must stay abreast of technological trends in the profession.[54] Doing so, however, may require lawyers to rethink the way they practice law.

Competent record retention in the digital age requires that lawyers and firms possess appropriate technology and expertise in order to reliably transmit and store client documents. Some law practices will require sophisticated technical infrastructure, while others only need forethought and the tools of a basic business operating system. Because the standard of care has evolved to the point where digital files are the norm rather than the exception, there no longer are acceptable excuses for losing electronic documents, leaving deletion features on, or employing staff who are unable to operate the technical tools of a modern law practice.

In addition to having appropriate hardware, software, and expertise, lawyers must have adequate systems in place for file storage and retrieval. Without proper planning and software, electronically stored documents may be impossible to retrieve. Location and medium of storage, as well as the consistency in practices among employees, should all be considered when developing an efficient electronic storage system. If one lawyer stores email in a folder, another lawyer saves email in a document management system, another lawyer pays little or no attention to email retention, while a fourth lawyer prints and files email hard copies, the resulting file is of little use to the firm, the client, or successor counsel.[55]

There is sparse authority concerning issues relating to digital file retention. The most prevalent issue is whether a firm can dispose of hard copies once they are scanned and stored digitally. The lawyer, at the very least, should obtain

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53. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000) (describing standard of care as "competence and diligence normally exercised by lawyers in similar circumstances").

54. *See* Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 05-04 (2005) (obligating attorneys to ensure protection of clients' electronic information); Fla. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 06-2 (Sept. 15, 2006) (recommending lawyers continue training in areas of technology); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 782 (2004) ("Reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission [of metadata] in order to make an appropriate decision with respect to the mode of transmission."); *see also* TREPPEL V. BIOVAIL Corp., 249 F.R.D. 111 (S.D.N.Y. 2008) (sanctioning company for in-house lawyer's failure to preserve electronically stored information); Vt. Bar Ass'n Prof'l Responsibility Section, Formal Op. 2009-01 (2009) (concluding lawyers obligated to disclose unprivileged metadata in discovery). Prior to a later withdrawal, the ABA generally categorized disclosure of metadata as "inadvertent" and prevented recipients of such data from viewing it. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005) (effectively imposing duty to prevent disclosure of metadata whenever possible by withdrawing ABA Formal Op. 92-368 (1992)).

55. Though many resist the tide and persist in efforts to print every electronic document for the paper file, this practice is neither environmentally responsible nor practical in light of volume.

the client's permission before disposing of hard copies.[56] Nevertheless, the lawyer may be required to maintain hard copies of documents with independent legal significance (e.g. testamentary documents, marriage certificates).[57] In some jurisdictions it is permissible for a lawyer to operate an electronic file storage business for other law firms.[58] The ABA similarly allows files to be stored with third-party vendors so long as the attorney "make[s] reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information."[59] The other common issue that arises with digital retention, and which is implicated with third-party storage, is file security.

C. File Security

File security should be an integral part of a firm's file retention policy. The obligations to safeguard client property and preserve client confidence will affect access to files,[60] the manner in which files are delivered to clients,[61] and the means used to destroy files.[62] When outside service providers are used to assist in file maintenance or delivery, a firm should take reasonable steps to ensure the provider has measures in place to protect the confidentiality of client information.[63]

File security is perhaps the area where state ethical rules have been slowest to evolve. Many, if not most states, still allow attorneys to communicate using unencrypted email.[64] State bars, however, may have good reason for refraining from adopting specific security guidelines because, given the pace of technological advances, specific guidelines could quickly become obsolete. Lawyers may be well advised to heed the words of the New Jersey Advisory

56. *See* Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 07-02 (2007); Mo. State Bar, Informal Op. 20010147 (2001).

57. *See* Fla Bar Prof'l Ethics Comm., Formal Op. 06-1 (2006); Va. State Bar Comm. on Legal Ethics, Op. 1818 (2005).

58. *See, e.g.*, Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Formal Op. 185 (2004); State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 33 (2006); N.J. Adv. Comm. on Prof'l Ethics, Op. 701 (2006); Vt. Bar Ass'n Prof'l Responsibility Section, Op. 2003-03.

59. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995).

60. *See* Ethics Comm. of the Colo. Bar Ass'n, Formal Op. 89 (1991) (discussing restricting access to files when office space is shared).

61. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999) (endorsing conventional mail and noting that because letters are sealed they may be more secure than e-mail).

62. *See* Comm. on Prof. and Judicial Ethics of the St. Bar of Mich., Formal Op. R-5 (1989) (file must be shredded or incinerated rather than simply discarded).

63. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398 (1995).

64. *See, e.g.,* Mass. State Bar Ass'n Comm. on Prof'l Ethics, Op. 00-01 (2000) (noting attorney's use of unencrypted e-mail usually does not violate duty of confidentiality); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 195 (2008); City of N.Y. Comm. on Prof'l and Judicial Ethics, Op. 1998-2 (1998) ("[E]lectronic transmission is in most instances an acceptable form of conveying client confidences even where the lawyer does not obtain specific client consent."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

Committee on Professional Ethics which, in the context of protecting client confidences, noted: "What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure."[65]

D. In Which Format Should a File Be Produced? Special Problems Concerning Concurrent Hard Copy and Electronic Filing Systems

After determining the scope of the file and assuring proper storage and retention, how then does the firm produce the file for the departing lawyer and her client? Some of the problems surrounding digital files are gradually being addressed in the contexts of client withdrawal and lawyer mobility. Issues include determining the format in which lawyers must transfer files, who has to pay for both the cost of transfer, and the cost of changing formats. In the paperless file, firms will generally maintain digital data in any number of formats, such as through commercially available software (*e.g.*, Microsoft Office, Adobe Reader), or proprietary software owned by the law firm (*e.g.*, docketing software). But can the client or the mobile attorney request a specific format? And can the firm seek to alter the format? The answers to these questions are mixed and in many cases unresolved.[66]

The Arizona Bar adopted a fact-specific test calling for firms and lawyers to produce documents in a format that is usable by the client.[67] For example, the lawyer may be required to convert a digital file into a tangible medium if the client lacks the means to do so herself.[68] The Arizona opinion does not address whether a lawyer would be prohibited from scrubbing the metadata from a client's file. Given the general professional obligation to minimize prejudice to clients upon withdrawal, however, logic would dictate that the lawyer should transmit the file to a client in its *most* useable format—its native format with metadata intact. Converting documents to PDF, for example, may impair, among other functions, searchability and prevent further editing, copying, and pasting. On the other hand, the client's interest in a useable format should be weighed against the burden and cost of production. This inquiry naturally leads to another issue—whether the law firm must bear such costs.

Who must pay for copies of a file or conversion to a different format is another largely unresolved issue. Generally, the law firm cannot charge a client

65. N.J. Sup. Ct. Adv. Comm. on Prof'l Ethics, Op. 701 (2006); *see also* State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 33 (2006).

66. *See* Helen Hierschbiel, GOING PAPERLESS: ETHICAL CONSIDERATIONS, OREGON STATE BAR BULLETIN, Apr. 2009, http://www.osbar.org/publications/bulletin/09apr/barcounsel.html (noting lack of Oregon authority regarding which format a file must be stored or produced in).

67. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 07-02 (2007) (requiring lawyers to provide clients "meaningful access"); *see also* Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 183 (taking approach similar to Arizona State Bar).

68. *See* Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 183.

for returning documents originally provided by the client or documents created for the client.[69] But the firm likely could use an engagement agreement to reallocate copying costs to the client.[70] If the firm wants to retain copies of such documents, it should do so at its own expense and may be able to do so even if the client objects.[71]

In the District of Columbia, the lawyer "does not have an affirmative duty to pay for the delivery of files relating to the representation of a former client when the materials in the files are not reasonably necessary to protect the former client's interest."[72] Further, in some jurisdictions, the lawyer may charge the client for assembly and retrieval of documents.[73]

V. COMPETING INTERESTS

It is not the client alone who may assert an interest at the moment of lawyer mobility. The law firm, former colleagues whose intellectual property might be included, and other clients whose confidential information may be embedded in documents all have interests that must be considered before transition.

Because lawyers are accustomed to assigning ownership attributes as a way of defining property rights, the question of who "owns" the client file gives rise to additional layers of controversy when lawyers and their clients change firms.[74] Though the issues are numerous, in the world of "hard copies" and easy access to duplicating machines, ethics norms evolved to address basic questions of ownership and the right to possess client files. Generally, the client either owns the file or has a right, superior to those of interested law firms and attorneys, to possess and control disposition of the file. However

69. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46 cmt. c, e (2000); *see also* Or. State Bar Bd. of Governors, Formal Op. 2005-125.

70. *See* Adams v. Putnam Co., 658 S.E.2d 805, 806-07 (Ga. Ct. App. 2008); *In re* X.Y., 529 N.W.2d 688, 690 (Minn. 1995); Averill v. Cox, 761 A.2d 1083 (N.H. 2000); Neb. State Bar Ass'n Advisory Comm., Op. 2001-03.

71. *See* Quantitative Fin. Strategies, Inc. v. Morgan, Lewis & Bockius, LLP, 2002 WL 434380, at *4 (Penn. Com. Pl. 2002); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 780 (2004).

72. D.C. Bar Legal Ethics Comm., Op. 283 (1998).

73. *See* Or. State Bar Bd. of Governors, Formal Op. 2005-125 (2005); City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2008-1 (2008).

74. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility., Formal Op. 2007-100 (2007) ("[N]ot only does the client have a right of access to the file, but also the client has an ownership interest in the contents of the file."). *But see* N.J. Adv. Committee on Prof'l Ethics, Op. 692 (2001) ("Clearly, that which the client has entrusted to the attorney, such as original documents, photographs or things, remains the 'property of the client.'. . . Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property . . . . As to the remainder of the file (correspondence, pleadings, memoranda, briefs, etc.), while some authorities consider most if not all such documents to be 'property of the client' and therefore subject to the provisions of RPC 1.15, we see no ethical or practical reason to adopt that broad a definition of 'client property' and decline to do so."); Brian J. Slovut, *Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File*, 76 MINN. L. REV. 1483, 1484 (1992) ("Two problems impede the determination of who owns the documents in a client's file. First, in many states, no clear standard defines who owns which documents within the client's file. Second, the standards that do exist are inconsistent.") (citations omitted).

described, the key concept is that the file "belongs" to the client.

When applied to client files, terms like "ownership," "control," and "belongs" lack precise meaning and must be used with some caution because their meanings are not only vague but also vary in differing circumstances. Sometimes, possession or access are necessary and sufficient criteria to determine whether a client's rights are satisfied. In other cases, the client or the attorney may assert an interest in the file that is vindicated only if the relevant material is not used or possessed by others. The ability to duplicate file content, for example, facilitates file portability, but also increases the circumstances in which the extent of concurrent rights in file content becomes the critical inquiry. For example, whether a law firm may include research memos or drafts of agreements prepared for specific clients in its intellectual property database, is simply one context in which the simple statement "the file is the property of the client" belies the difficult questions underlying the concept of file ownership.

If the competing interests are simply the client's right to obtain her file upon termination of representation, and a lawyer's right to take a client file to a new firm, the client generally owns the entire file subject to minor restrictions. In some instances, a more nuanced approach is necessary. Research memoranda, demand letters, and patent analyses are products a client may deem "purchased." Conversely, the lawyer may assert an intellectual property interest in her own work product and, in the context of lawyer mobility, the firm upon whose payroll the drafting lawyer was working may also assert an ownership interest in the product. These questions may apply differently to a final product as opposed to drafts and working copies. Finally, with the increasing use of word processing databases, many documents are actually the work product of many lawyers over time who built on the work of others and on behalf of different clients. Who then "owns" the document, and who "owns" the work product when these considerations are allowed?

A. As Between Lawyers and Their Firms

In the lawyer mobility setting, the interests of the firm and the departing lawyer diverge, and each may claim some rights in the content of a file. No mechanism exists to resolve the competing claims, which means the departing lawyer may exercise "self help" and simply take the supposed work product, or, at the other extreme, the firm may simply withhold portions of the file in which it claims a proprietary interest. Neither approach is broadly accepted. Nor is a liberal copying policy necessarily the solution since the "ownership" rights asserted by one party will have full meaning only if the other party is denied use of the product.

As discussed above, the view that files may contain work product that is the property of the firm rather than client is accepted in some jurisdictions.

Largely intended as a privilege permitting the withholding of documents in litigation, the work-product doctrine is used in some jurisdictions as a basis for a firm to assert proprietary rights that justify withholding some portions of a client's file when transfer is directed. Applied in this context, the work-product doctrine is a nascent doctrine normally associated with rights of a firm rather than individual lawyers. Nevertheless, lawyers produce the services and, at least in theory, have some competing claims to work product. Further complications arise when, as often is the case, numerous lawyers contribute at varying levels to the product.

For these reasons, work-product and related proprietary interest theories should be addressed on two levels. The first level involves identifying the contours of the client file and addressing whether any party other than the client has a claim to a portion of that file. This is the issue addressed by most cases and ethics opinions discussing work product outside the privilege context. Assuming a claim to work product exists, a second inquiry seeks to identify whether the rights vest with the firm or individual lawyers, and, if the latter, how competing claims are resolved when more than one lawyer contributes to the work-product content. To some extent, claims of firms and lawyers *inter se* may be resolved through partnership agreements and consistently implemented firm policies.

In terms of proprietary software, the situation is complex for other reasons. Data provided to a client in a particular format is useless if the client lacks the software required to read it. Under those circumstances, if the information is properly within the definition of "client file," conversion to a readable format should be required when turning over the file. If the data exists in a format that will be of use to the client, and the software produces a "portable" version of the data without violating the licensing agreement between the software vendor and the law firm, the data should be turned over with the client file in the most useful format. Proprietary software often manipulates data or populates useful information such as docketing rules. The cost of the software is overhead and part of what the client purchases when hiring the law firm, and any portable benefits derived from the software belong to the client as well.

B. Competing Interests as Between Clients

Fortunately, a brighter line exists when it comes to the competing interests of two clients. Quite simply, the attorney is ethically obligated to remove metadata that might reveal the confidences of other clients before turning over a file.[75] Consider a lawyer who drafts a demand letter for client A and subsequently alters the electronic version of the letter to suit the needs of client

75. *See* California State Bar Comm. on Prof'l Resp. and Conduct, Formal Op. 2007-174 (2007); Fla. Bar Prof'l Ethics Comm., Op. 06-2 (2006); N.Y State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004); City of N.Y Comm. on Prof'l and Judicial Ethics, Formal Op. 2008-1 (2008).

B. To the extent that someone in possession of the electronic document could discover the contents of client A's letter, both clients have a confidentiality interest in the document. Such discovery is often possible due to the existence of metadata.

The obvious solution to this dilemma is to scrub only metadata that poses a risk of revealing confidential information. Depending on the complexity of the file, however, this solution could be extremely difficult and costly to implement. While scrubbing all of the metadata from a file is relatively easy, more sophisticated software is usually required to scrub a particular data field. Scrubbing particular entries within a particular field is even more difficult. For most lawyers, it is impractical to attempt to perfectly parse and scrub only those traces of confidential information.

VI. PRACTICAL SOLUTIONS

Clearly, the law is undeveloped, inconsistent, and inadequate to provide useful guidance to lawyers and law firms hoping to avoid controversy and maximize client satisfaction in the face of lawyer mobility. Traditional ethics norms do not address digital file realities, and fiduciary duty and partnership law are imprecise and at times entirely contradicted by professional obligations to clients. To each of the problems identified above, we believe the most practical solutions are in contract–partnership agreements, policy manuals, and client engagement agreements.

To the extent possessory and ownership rights might lead to conflicts among partners or colleagues, nothing prevents lawyers and their firms from resolving ownership issues in the partnership or other agreement in ways that do not implicate clients' interests. Law firms should look to well-crafted partnership or shareholder agreements as well as employment agreements governing associates to provide contractual guidelines whenever possible.[76] These agreements should define the respective intellectual property rights of firms and their members. Specifically, the agreements should address whether departing attorneys may retain and use work product they developed while at their firms, particularly under circumstances in which the relevant work product is the result of collaborative efforts that reflect the contributions of many lawyers within the firm. Equally, if not more important, the agreements should address the process to be employed when a lawyer leaves the firm and takes client files or firm information. These agreements should cover issues including notice of intent to download files, the types of files that may be downloaded, and the procedures to be employed when downloading files.[77]

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76. *Cf.* Gibbs v. Breed, Abbott & Morgan, 710 N.Y.S.2d 578, 582 (N.Y. App. Div. 2000) (finding taking desk files permissible in part because "partnership agreement was silent as to these documents").

77. *See* Richmond, *supra* note 12, at 14-15 (2009) (discussing policies firms should adopt to protect their intellectual property).

In the end, the specific contours of these agreements matter less than the mere existence of contractual guidance so that when a lawyer prepares for and executes a law firm transition there is no ambiguity as to the possessory and ownership rights of documents, forms, and attorney work product.

In terms of aiding the smooth transition vis-à-vis the client's interests and the scope of the client's file, much of the ambiguity in defining the scope and retention/transfer expectations of digital files can be mitigated by carefully thought out written agreements between lawyers and their clients at the outset of the representation. As the City of New York Committee on Professional and Judicial Ethics noted, engagement letters can and should address:

> (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.[78]

Further, engagement letters are an appropriate place to resolve ownership issues pertaining to lawyer work-product rights and to what extent those rights might intersect with the client's concurrent right to ownership and possession.

It remains unclear to what extent a law firm engagement letter can contract away the scope of what a client is entitled to take upon termination of the representation. State law, where it exists, might clearly set out parameters giving clients broad (and enforceable) rights despite the language of an engagement letter. More control may exist in defining document retention in the engagement—essentially an agreement with a client regarding what the law firm will keep in the file. If the lawyer keeps a document, state law is more likely to control the extent to which it must be produced upon termination. File transition may be smoother, however, if the client agrees that the lawyer need not keep particular documents or digital files and the lawyer does in fact purge those materials.

Finally, even the most artfully defined file and best conceived protocol is utterly meaningless if the firm lacks technical infrastructure and technical tools to consistently store, search, create, and transfer the file.[79] There is no excuse in the present software marketplace for sloppy and inaccessible digital storage. Both client and firm information should be organized and accessible through files that are coherent and rationally structured. Records displaying

78. City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2008-1 (2008).

79. For detailed guidelines on creating an effective records management policy, *see* Anthony E. Davis & David J. Elkanich, *Document Retention and Destruction Policies: Establishing Reasonable Guidelines for Law Firms* (Association of Legal Administrators, 2006).

downloaded files should be maintained. The discipline of file maintenance should extend to metadata. Information needs to be managed efficiently, and this is a goal that the digitization of files makes achievable. With an information management system in place, firms may have some hope of controlling the duplication and/or removal of information in ways consistent with the protection of client interests.

The only remaining barrier, perhaps no different than existed with the oak filing cabinet procedures of another era, is pilot error. Lawyers and law firm staff must diligently use the systems or the systems will fail. In light of the foreseeable transfer of so many client files in this age of lawyer mobility, such a failure may be seen as a failure of competent representation.