

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Opinion #2005-06/3  
January 2006

OBLIGATION TO PROVIDE ELECTRONIC MATERIAL

RULE REFERENCES:

NHRPC 1.15  
NHRPC 1.16

I. QUESTION:

Does a law firm have the obligation to relinquish all electronic communications and electronic documents maintained in the firm's computer network concerning its representation of former clients to an attorney who has left the firm and who will continue to represent the clients in a different law firm?

II. FACTUAL BACKGROUND:

An attorney is leaving the present law firm for another firm and will continue to represent certain clients whose paper and electronic files are held by the present law firm. The present law firm is turning over all of the paper files pertaining to its former clients, including paper copies of emails that had been placed in the files. The attorney has requested copies of all e-mail communications and electronic documents on the firm network that pertain to those clients, as well.

III. RESPONSE:

This inquiry concerns whether a law firm has the obligation to relinquish all electronic communications and documents concerning a client in its representation of that client to an attorney who is leaving the law firm and who will continue to represent the client. The firm is already in the process of turning over all hard copy files for those clients and asks whether it can avoid organizing thousands of electronic items in the lawyer's "inbox" and "sent items" folders and whether any prejudice to the client would result if only hard copy items are provided.

The New Hampshire Supreme Court has held 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. *Averill v. Cox*, 145 N.H. 328, 339 (2000). Moreover, Rule 1.16(d) of the New Hampshire Rules of Professional Conduct provides among other things that, upon termination of representation, a lawyer must "take steps to the extent reasonably practicable to protect a client's interests," such as "surrendering papers and property to which the client is entitled." See also Rule 1.15 (Safekeeping Property).

Assuming that the attorney has requested the client's file for and on behalf of the client, there are two issues that should be addressed: (1) does the client's file include electronic communications and documents within the law firm's computer network and (2) is the law firm obligated to provide all of the electronic communications and

documents that exist on the computer network at the time of the request without regard to factors other than the client's request that they be provided.

With regard to the first issue, the contents of a client's file would necessarily include both paper and electronic forms of communications, documents and other records pertaining to the client. The *ABA Model Rules of Professional Conduct* define "writing" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." *ABA Model Rules* (5<sup>th</sup> Ed.), Rule 1.0 *Terminology*. While not adopted by New Hampshire, the ABA rules reflect that, with increased reliance on electronic communications and records in the practice of law, it is reasonable to assume that a client's file can include electronic communications, such as emails, as well as electronic versions of documents filed on behalf of a client. Thus, the mere existence of a paper file does not necessarily allow a firm to automatically exclude from the client's file electronic communications and other computer-based writings.

Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. See *Averill* at 339-40. That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.

Similarly, the firm should take into account whether it has adequately notified this or other former clients of any file destruction policies followed by the firm with regard to both electronic and paper files.