

## FORMAL OPINION NO 2016-191

### Client Property: Electronic-Only or “Paperless” Client Documents and Files

#### Facts:

Lawyer prefers to maintain client file documents in electronic form only, to the greatest extent possible. For open matters, Lawyer plans to convert documents to electronic form and contemporaneously destroy the paper copies as they are received.

Lawyer’s closed matters contain a mix of paper and electronic documents. Lawyer plans to similarly convert the paper documents in her closed files to electronic form and destroy the paper copies of the documents.

#### Question:

May Lawyer maintain electronic-only files and convert existing paper files to electronic form?

#### Conclusion:

Yes, qualified.

#### Discussion:

With limited exceptions for documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds, and wills, there is no ethical prohibition against maintaining the “client file” solely in electronic or paperless form.<sup>1</sup>

Lawyers must take appropriate steps to safeguard client property (Oregon RPC 1.15(a)), maintain confidentiality of client information (Oregon RPC 1.6(c), Oregon RPC 1.9(c)(2)), and communicate with the client regarding the terms of the representation and relevant develop-

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<sup>1</sup> For a discussion of what constitutes the “client file,” see OSB Formal Ethics Op No 2005-125 (Client Property: Photocopy Charges for Client Files, Production or Withholding of Client Files).

ments affecting the representation (Oregon RPC 1.4). Accordingly, lawyers who maintain electronic-only client files should take reasonable steps to ensure the security<sup>2</sup> and availability<sup>3</sup> of electronic file documents during appropriate time periods, including following the completion of the matter or termination of the representation.

Lawyers and clients may enter into reasonable agreements regarding how the lawyer will maintain the client's file during and after the conclusion of a matter. A lawyer who chooses to convert paper file documents in closed files to electronic-only documents should confirm that doing so will not violate the terms of the retention agreement with the client. The lawyer should also consider the former client's circumstances—that is, whether an electronic-only file might present a hardship for the former client if the former client needs to access and work with the documents in paper form. *See* Oregon RPC 1.16(d).<sup>4</sup> Even

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<sup>2</sup> See, for example, OSB Formal Ethics Op No 2011-188 (rev 2015) (Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials), explaining that a “Lawyer may store client materials on a third-party server as long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client’s information secure within a given situation.”

<sup>3</sup> Whether and how long to maintain a client file is a matter of substantive law and beyond the scope of this opinion. The Professional Liability Fund (PLF) generally recommends that files be kept for a minimum of 10 years to ensure the file will be available to defend the lawyer against malpractice claims. See, for example, “File Retention and Destruction,” part of the PLF practice aid and form collection in the “File Management” category on the PLF’s website, <[www.osbplf.org](http://www.osbplf.org)>.

<sup>4</sup> Examples may include indigent or incarcerated former clients, or other clients who may have difficulty using electronic-only documents. Oregon RPC 1.16(d) provides:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

after a lawyer has taken reasonable steps to electronically preserve original documents created by a client, the lawyer should not destroy original client documents without the client's express consent.

**Approved by Board of Governors, September 2016.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-3 (duty of confidentiality), § 6.2-4 (duration of duty of confidentiality), § 7.4 (client communication) § 12.4-1 to § 12.4-2 (client property), § 16.4-5 (issues in the electronic age), § 16.4-5(b) (disclosure of metadata), § 16.4-5(c) (third-party electronic storage) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 44–46, 59–60 (2000) (supplemented periodically).