

# DOCUMENT RETENTION AND DESTRUCTION FOR LAWYERS

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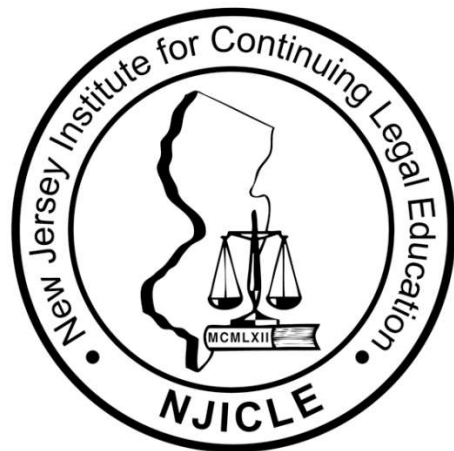
**2023 Seminar Material**

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# **DOCUMENT RETENTION AND DESTRUCTION FOR LAWYERS**

**Moderator/Speaker**

**Marc D. Garfinkle, Esq.**  
*The Law Office of Marc Garfinkle  
(Morristown)*

**Speakers**

**Hillary K. Horton, Esq.**  
*Office of Attorney Ethics  
(Trenton)*

**Thomas G. Rantas, Esq.**  
*Lewis Brisbois Bisgaard & Smith LLP  
(Newark)*

M1134.23



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## **CONTACT LIST FOR EAGER BEAVER, ESQ.**

1. ATTORNEY, possibly including SSI, Fed Employer ID number, State Tax ID, DOB, Office and Home address and phone numbers, list of other states admitted to practice with dates and bar ID numbers
2. SPOUSE/ADULT CHILDREN, names and phone numbers
3. OFFICE MANAGER, name, home address and phone numbers
4. INFORMATION TECHNOLOGY MANAGER, name, home address or business address if independent contractor, phone numbers including after-hours number if available, possibly include list of computer and telephone passwords
5. SECRETARY, name, home address and phone numbers
6. BOOKKEEPER, name, home address and phone numbers
7. LANDLORD, name, address and phone numbers
8. PERSONAL REPRESENTATIVE, name, address and phone numbers
9. YOUR ATTORNEY, name, address and phone numbers
10. ACCOUNTANT, name, address and phone numbers
11. CHOSEN CLOSING ATTORNEY, name, address and phone numbers
12. LOCATION OF YOUR WILL and/or TRUST, name of contact person, address and phone numbers
13. POST OFFICE BOX, location, box number, address, phone number and information on other signatory
14. NAME OF PROFESSIONAL CORPORATION, Corporate name, location of corporate minute book, seal stock certificate and tax returns, name of corporate counsel, address and phone numbers
15. PROCESS SERVICE COMPANY, name, address and phone numbers
16. NAME OF ANYONE SHARING OFFICE SPACE, name, address and phone numbers, also nature of practice
17. INFORMATION ON ALL INSURANCE POLICIES, insurer's name (name of agent), address and phone numbers, policy numbers

- A. Office Property Liability
  - B. Malpractice
  - C. General Liability
  - D. Medical/Dental
  - E. Disability
  - F. Worker's Compensation
  - G. Long Term Care
  - H. Life Insurance
- 
- 18. REMOTE STORAGE UNIT, location, storage company's name, address and phone numbers, list of items stored
  - 19. SAFE DEPOSIT BOX, location, institution's name, address and phone numbers, box number or other identifier
  - 20. LEASES, item's leased, lessor's names, addresses and phone numbers
  - 21. LAWYER TRUST ACCOUNT(s), institution's name, addresses and phone numbers, name of contact person at institution
  - 22. LAWYER BUSINESS ACCOUNT, institution's name, addresses and phone numbers, name of contact person at institution
  - 23. CREDIT CARD INFORMATION, institution's name, address and phone number
  - 24. MAINTENANCE CONTRACTS, items covered, vendor's names, addresses and phone numbers
  - 25. CLEANING SERVICE, name, address and phone numbers
  - 26. LAWN SERVICE, name, address and phone numbers





**Document Retention &  
Destruction for Lawyers –  
Security & Confidentiality of Files**

Presented by Thomas G. Rantas



# General Rules in New Jersey

## General Rules in New Jersey

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- The entire file belongs to the client. See Advisory Committee on Professional Ethics (“ACPE”) Opinion 692, 163 N.J.L.J. 220 (January 15, 2021) (“It is well settled that the entire file belongs to the client . . .” (citations omitted)).
- If a client requests the file, the attorney must provide it. See *Ibid.* (2001) (“It is well settled that the entire file belongs to the client and must be provided upon request.” (citations omitted)).
- When receiving the file, the client is entitled to all essential documents. See ACPE Opinion 554, 115 N.J.L.J. 565 (May 16, 1985) (“[T]he client or his new attorney is entitled to receive the file with everything which is or was essential for the completion of the litigation.”)

## General Rules in New Jersey (Continued)

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- There is no justification for withholding the file. See *Frenkel v. Frenkel*, 252 N.J. Super. 214, 220 (App. Div. 1991) (where a client demanded his file to pursue a claim with a new attorney, the former attorney must turn over the file even if the former attorney was not fully paid).
  - An attorney may keep the file and provide a copy of the file to the client so as to have access to the file to protect the attorney against potential malpractice suits, ethics inquiries, or tax investigations. See *Opinion 554*. Providing a copy of the file to a client will satisfy an attorney's obligation under RPC 1.16(d). See *Frenkel*, supra, 252 N.J. Super. at 221.
  - However, originals of any significant legal documents (e.g., contracts, deeds, or wills) should be returned to the client and the attorney should keep a copy. See *In re Borden* 121 N.J. 250, 524 (1990).
  - The attorney may charge the client for reasonable copying costs. See *Opinion 554*.

## General Rules in New Jersey (Continued)

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- Absent an express agreement to the contrary, an attorney must maintain files for seven years after the conclusion of the representation. See Opinion 692 (“[I]n providing a safe harbor to the attorney who has conformed to the ethical requirements discussed above, we conclude that absent an express agreement to the contrary, the client should not reasonably expect the attorney to retain the file for the client’s benefit more than seven years after the conclusion of the representation.”)
  - This does not mean that you cannot make a business decision to keep it longer.
  - If a criminal matter, the attorney should not discard the file while the client is alive because a criminal conviction can have effects long past the seven-year period. See ACPE Opinion 692 (Supplement), 170 N.J.L.J. 343 (October 28, 2002). However, the attorney can discard the file if the client expressly authorizes its destruction.
  - Longer time periods may also apply in other situations (e.g., representation of a minor). See *Ibid.*

## General Rules in New Jersey (Continued)

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- Regardless, an attorney may not automatically destroy documents considered “client property” after the seven-year period has expired.
  - RPC 1.15(a) directs attorneys to safeguard the property of clients and third parties. See Opinion 692.
  - Specifically, “client property” must be either [(1)] returned to the client, [(2)] disposed of pursuant to court order or agreement with the client, or [(3)] preserved and maintained for a reasonable period of time following the conclusion of the matter. See *Ibid*.
    - Concerning the representation of insureds through an insurance company, any agreement to discard documents must be with the insured, who is the client of the attorney. See Opinion 692 (Supplement).
    - Furthermore, an attorney may not rely on an insured’s consent regarding file disposition included in a contract or policy between the insured and insurer executed before the beginning of the representation. The attorney is obligated to make sure that the insured knows what is in the file when it agrees to its destruction. See *Ibid*.

## General Rules in New Jersey (Continued)

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- What constitutes “client property” is “fact sensitive and depends on the nature of the matter and of the representation itself.” Opinion 692 (Supplement).
  - “Client Property” includes original wills, trusts, deeds, executed contracts, corporate bylaws, and minutes. See Ibid.
  - In “most cases” “client property” would not include medical records, x-rays, expert reports, deposition transcripts, and answers to interrogatories. See Ibid.
    - However, that does not mean such documents could be considered “client property.” See Ibid.
    - Depending on the nature of the representation, such documents would be considered “client property” if necessary to “protect an interest or defend a claim.” Ibid.
  - An attorney must use her discretion to determine what should be kept. Ibid. (“Before destruction, whether based on the client’s consent or at the end of the seven-year retention period, the attorney should carefully review the file’s contents to make certain that documents that the lawyer is required by law to maintain or that the client may foreseeably need are not destroyed. Once again, the Committee notes that counsel must exercise reasonable discretion in these matters, based upon the particular facts, and as may be required by applicable law.”).

## General Rules in New Jersey (Continued)

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- When the seven-year period expires, the attorney must take appropriate steps to destroy the file in accordance with the Confidentiality of Information Requirements set forth in RPC 1.6. See Opinion 692 (“Simply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties.”).
- If a client file contains “client property” and the attorney wishes to destroy the file, the attorney must take reasonable steps to notify the client, including but not limited to mailing a notice to the client’s last known address and waiting a reasonable time to respond, which could be six months or more. See Opinion 692 (Supplement).



# Paper v. Electronic Documents

## Paper Documents

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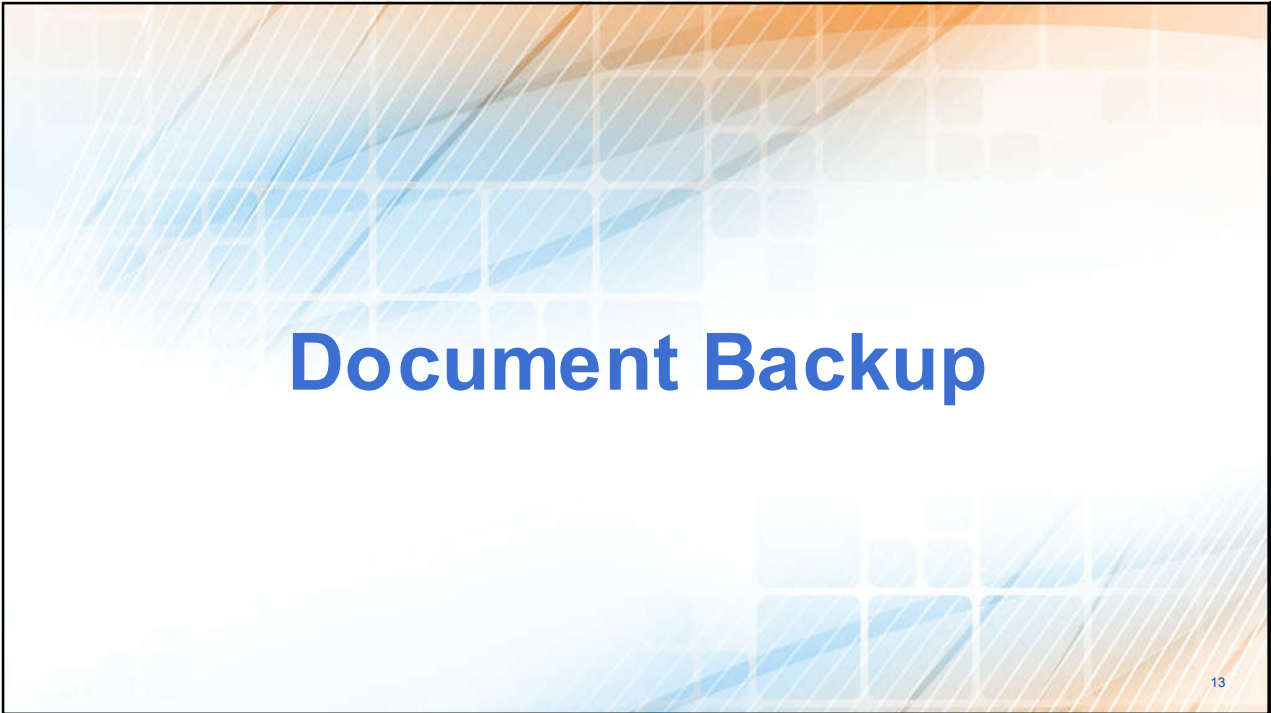
- An attorney may continue to maintain a client file in paper format.
  - Depending on the type of documents, an attorney may have to continue to keep paper originals or copies.
    - For instance, certain types of “client property” have to remain in paper format. See ACPE Opinion 701, 184 N.J.L.J. 171 (April 10, 2006) (“Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property.’ [(citations omitted)]. Such documents cannot be preserved within the meaning of RPC 1.15 merely by digitizing them in electronic form.”).

## Electronic Documents

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- If an attorney exercises “reasonable care,” she may maintain a client file in an electronic format. See Opinion 701.
  - In Opinion 701, the inquiring attorney asked “whether the Rules of Professional Conduct permit him to make use of an electronic filing system whereby all documents received in his office are scanned into a digitized format such as Portable Data Format (‘PDF’). These documents can then be sent by email, and as the inquirer notes, ‘can be retrieved by me at any time from any location in the world.’ The inquirer notes that certain documents that by their nature require retention of original hardcopy, such as wills, and deeds, would be physically maintained in a separate file.”

- The Committee stated that “there is nothing in the RPCs that mandates a particular medium of archiving such documents. The paramount consideration is the ability to represent the client competently, and given the advances of technology, a lawyer’s ability to discharge those duties may very well be enhanced by having client documents available in an electronic form that can be transmitted to him instantaneously through the Internet.” Ibid.
- The Committee further stated that, subject to maintaining confidentiality, “nothing in the RPCs prevents a lawyer from archiving a client’s file through use of an electronic medium such as PDF files or similar formats. The polestar is the obligation of the lawyer to engage in the representation competently, and to communicate adequately with the client and others. To the extent that new technology now enhances the ability to fulfill those obligations, it is a welcome development.”



# Document Backup

## Document Backup

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- Paper
- Electronic (local storage)
- Cloud (web-based software service or solution where data is processed and stored on remote servers rather than on local computers and hard drives)

## Document Backup – Cloud

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- Archiving a client file in an electronic format so that it is accessible through the internet creates its own unique ethical obligations regarding confidentiality under RPC 1.6. See Opinion 701.
- While it was not examining cloud storage in Opinion 701, the Committee created guidelines regarding electronic storage that apply to more than local electronic storage. Specifically, the Committee noted that “the benefit of digitizing documents in electronic form is that they ‘can be retrieved [by an attorney] at any time from any location in the world,’ but that such access created the potential for hackers to obtain confidential client information. See Ibid.

## Document Backup – Cloud (Continued)

- The Committee advised that: “It is very possible that a firm might seek to store client sensitive data on a larger file server or a web server provided by an outside Internet Service Provider (and shared with other clients of the ISP) in order to make such information available to clients, where access to that server may not be exclusively controlled by the firm’s own personnel. And in the context originally raised by the inquirer, it is almost always the case that a law firm will not have its own exclusive email network that reaches beyond its offices, and thus a document sent by email will very likely pass through an email provider that is not under the control of the attorney.” Ibid.
- The Committee then stated: “We are reluctant to render a specific interpretation of RPC 1.6 or impose a requirement that is tied to a specific understanding of technology that may very well be obsolete tomorrow. Thus, for instance, we do not read RPC 1.6 or Opinion 515 as imposing a per se requirement that, where data is available on a secure web server, the server must be subject to the exclusive command and control of the firm through its own employees, a rule that would categorically forbid use of an outside ISP. The very nature of the Internet makes the location of the physical equipment somewhat irrelevant, since it can be accessed remotely from any other Internet address. Such a requirement would work to the disadvantage of smaller firms for which such a dedicated IT staff is not practical, and deprive them and their clients of the potential advantages in enhanced communication as a result.” Ibid.



## Document Backup – Cloud (Continued)

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- The Committee warned that an attorney must “exercise reasonable care’ against the possibility of unauthorized access to client information” and stated that “A lawyer is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access.” Ibid.
- “Reasonable care” “does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access.” Ibid.
  - The Committee specifically stated that, “Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.” Ibid.

## Document Backup – Cloud (Continued)

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- The Committee gave specific guidance how an attorney can use electronic storage and fulfill her ethical obligations for confidentiality: “The touchstone in using “reasonable care” against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then ‘reasonable care’ will have been exercised.” Ibid.
  - Specifically, the Committee stated that “where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.” Ibid.
  - However, there is no specific opinion in New Jersey that discusses what specific practices an attorney should follow to ensure they are employing “reasonable care.”

## Document Backup – Cloud (Continued)

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- Other bodies have addressed similar issues, like the ABA.
  - ABA Formal Opinion 477 discusses the necessity of using a fact-based analysis based on nonexclusive factors to guide lawyers in making a “reasonable efforts” determination. These factors are:
    - the sensitivity of the information;
    - the likelihood of disclosure if additional safeguards are not employed;
    - the cost of employing additional safeguards;
    - the difficulty of implementing the safeguards;
    - the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
    - See ABA Formal Opinion 477 (2017).

- Opinion 477 also provides guidance regarding the methods necessary to protect electronically stored confidential client information.
- Understand the nature of the threat (e.g., proprietary client information may present a greater risk for data theft and, therefore, may require greater protections);
  - Understand how client confidential information is transmitted and where it is stored (e.g., evaluate each access point, and each device, for security compliance);
  - Under and use reasonable electronic security measures (e.g., encryption, complex passwords changed regularly, firewalls and antivirus software, apply security patches, ability to remotely disable lost or stolen devices, multi-factor authentication to access firm systems);
  - Understand how electronic communications about client matters should be protected (e.g., having an initial discussion with a client about what levels of security will be necessary for each electronic communication);
  - Label client confidential information (e.g., marking privileged and confidential communications as privileged and confidential to stop inadvertent disclosure or including proper disclaimers);
  - Train lawyers and nonlawyers in technology and information security (e.g., training and testing);

## Document Backup – Cloud (Continued)

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- Conduct due diligence on vendors providing communication technology. As per ABA Formal Opinion 08-451, these include:
  - reference checks and vendor credentials;
  - vendor’s security policies and protocols;
  - vendor’s hiring practices;
  - the use of confidentiality agreements;
  - vendor’s conflicts check system to screen for adversity; and
  - the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

## Document Backup

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- Failure to Backup Data
  - There is no specific obligation to create backups.
  - Also, no specific requirement to have technological competence as a lawyer in New Jersey. In 2015, the New Jersey Supreme Court's Special Committee on Attorney Ethics and Admissions declined to recommend any amendment to RPC 1.1., or to add an official comment to that rule as the ABA had done with regard to technological competence.
  - Nevertheless, other jurisdictions consider the security and backup of client data as one and the same.



# Security & Confidentiality

## Security & Confidentiality

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- The threat is real – attorneys and law firms face greater security threats than before.
- From small to large law firms, many have adopted online cloud storage.
- Whether the firm is big or small, hackers are using phishing attacks, social engineering, complex technical exploits and other methods to gain access to law firm networks.
- Just because the saying regarding cybersecurity intrusions is “when, not if” does not mean that attorneys can ignore their ethical and legal obligations.



## Security & Confidentiality (Continued)

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- Security for retained documents:
  - Best practices for safeguarding retained documents
- Security for transmitted documents:
  - Best practices for safeguarding transmitted documents
- Create a policy and follow it

# Proper Destruction of Files

## Proper Destruction of Files

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- Paper Files

- Screen the materials for “client property” or information that will be useful to the client for other reasons
- To protect confidentiality, materials cannot be placed in the trash without additional protections.
- Best practice is to use a professional shredding vendor that will maintain confidentiality during the process.

## Proper Destruction of Files

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- Electronic Files
  - Follow the spirit of the Opinion 692.
  - Cannot simply delete electronic documents.
  - Best practice is to ensure that the client information is no longer retrievable from any hardware, software, or device that is no longer in the attorney's control.

# Consequences of Poor Document Security

## Consequences of Poor Document Security

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- What can happen?
  - Regardless of how the file is maintained, there are ethical and legal problems that can arise from failing to maintain the client file.

## Ethical Violations

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- Opinion 692 states that “Failure to retain a client's closed file will not necessarily result in discipline. Simple negligence does not equate with unethical conduct. Therefore, unless the destruction of the file material constitutes an act of gross negligence or, along with the destruction of other files, a pattern of negligence, RPC 1.1, or misconduct, RPC 8.4(c) and (d), it alone should not be considered an unethical act.”
- Opinion 692 further states that “Accordingly, assuming that an attorney's destruction of a client file does not constitute fraud, dishonesty or misrepresentation, and that it is not done purposefully to prejudice the administration of justice, RPC 8.4(c) and (d); does not constitute gross negligence or a pattern of negligence, RPC 1.1; and does not violate the provisions of RPC 1.15 or R. 1:21-6, the destruction of a client file is ethically permissible subject to [requirements set forth in ACPE 692].”

## Potential Ethical Violations

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- RPC 1.1 Competence: “A lawyer shall not: (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer’s conduct constitutes gross negligence. (b) Exhibit a pattern of negligence or neglect in the lawyer’s handling of legal matters generally.”



## Potential Ethical Violations

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- RPC 1.15 Safekeeping Property: “(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record. (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. (d) A lawyer shall comply with the provisions of R. 1:21-6 (“Recordkeeping”) of the Court Rules.”

## Potential Ethical Violations

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- RPC 8.4 Misconduct: “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law; (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.”

## Malpractice

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- Claims can arise out of many related areas:
  - Failure to maintain client files;
  - Failure to maintain “client property”;
  - Failure to maintain client confidentiality;
  - Data breaches (e.g., see ABA Formal Opinion 483)

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## DOCUMENT RETENTION AND DESTRUCTION

Marc Garfinkle

There are not many rules pertaining to the retention and destruction of documents by attorneys. Principally, the rules pertain to attorney bookkeeping, confidentiality of information, and other basic concepts attorneys are expected to be familiar with. In practice, the issues are diverse.

Who keeps a file when a firm dissolves?

Who, if anyone is entitled to have your work product?

When and how may documents be destroyed?

How do we handle electronic document files?

What security must we maintain for our documents?

It is important to note that the Rules of Court and the RPCs do not spell out the answers to most questions that arise under this rubric, but they emphasize the importance of these issues. Attorneys are responsible for understanding and applying the rules. This seminar should give you the information and the tools to do so.

**Rule 1:21-6(c) Required Bookkeeping Records.**

- (1) Attorneys, partnerships of attorneys and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:
- (A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and
  - (B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and
  - (C) copies of all retainer and compensation agreements with clients; and
  - (D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and
  - (E) copies of all bills rendered to clients; and
  - (F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and
  - (G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and
  - (H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and
  - (I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

**RPC [1.15](#) Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. [1:21-6](#) ("Recordkeeping") of the Court Rules.

**ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**  
**Appointed by the New Jersey Supreme Court**

**OPINION 692**

10 N.J.L. 154

January 22, 2001

**Retention of Closed Clients' Files**

*The Advisory Committee on Professional Ethics has been asked for advice concerning the length of time an attorney must maintain a client file following the final disposition of a matter. For the reasons discussed below, we hold that such portions of the file which constitute property of the client must be either returned to the client, disposed of pursuant to court order or agreement with the client, or preserved and maintained for a reasonable period of time following the conclusion of the matter. Absent an express agreement that the file be subject to destruction at an earlier point in time, the client may assume availability of the file up to a date seven years after it has been closed, at which time it may be destroyed. In making this determination, the Committee considered, among other authorities, RPC 1.1 (Competence); RPC 1.4 (Communication); RPC 1.6 (Confidentiality of Information); RPC 1.15 (Safekeeping Property); RPC 8.4 (Misconduct), and R. 1:21-6.*

*RPC 1.15(a) directs a lawyer to safeguard the property of clients or third persons, and although complete records of ... account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record, See footnote 1 1 neither the Rules of Professional Conduct nor the law of bailment prescribes or delimits the period of time the property itself need be maintained. Rather, RPC 1.15(b) compels the attorney to promptly notify clients or third persons of the receipt of property to which they are entitled and, except as otherwise permitted by law or by agreement with the client, promptly deliver the property to them. This requirement implies that property of the client may never be destroyed without the client's permission or some legal authority, such as a court order.*

*Clearly, that which the client has entrusted to the attorney, such as original documents, photographs or things, remains the property of the client. Additionally, depending upon the nature of the representation, that which has been created or obtained by the attorney as part of the undertaking and for which the client retained the services of the attorney constitutes 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. See footnote 2 2*

*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.*

*We recognize that an attorney may wish to preserve the material for purely business reasons. The potential of further business from the client, the usefulness of the material for similar matters undertaken for others and the protection that may be afforded the attorney should there be a claim of professional malpractice, unethical conduct or a fee dispute are examples of why an attorney may, for such reasons, choose to retain file material. Publications are replete with suggestions on the best*



*practices in that regard. The question posed to this Committee, however, is confined to the ethical constraints, and we therefore present no specific advice with regard to the practical business aspect of the matter. Attorneys are well advised to familiarize themselves with the practical issues and the many suggested means of dealing with them.*

*Another purpose for which an attorney may choose to preserve closed file material is based upon the duty of professional care arising out of the specific attorney-client relationship. Under such circumstances, the material is maintained not because it is the property of the client, but rather because it would be consistent with the professional responsibility of the attorney to anticipate the potential future need for such material by the client. Examples of such material would be medical records which might otherwise become unavailable, financial data obtained which may be useful to establish the basis of an investment for future tax purposes, etc.*

*Failure to retain a client's closed file will not necessarily result in discipline. Simple negligence does not equate with unethical conduct. Therefore, unless the destruction of the file material constitutes an act of gross negligence or, along with the destruction of other files, a pattern of negligence, RPC 1.1, or misconduct, RPC 8.4(c) and (d), it alone should not be considered an unethical act.*

*Accordingly, assuming that an attorney's destruction of a client file does not constitute fraud, dishonesty or misrepresentation, and that it is not done purposefully to prejudice the administration of justice, RPC 8.4(c) and (d); does not constitute gross negligence or a pattern of negligence, RPC 1.1; and does not violate the provisions of RPC 1.15 or R. 1:21-6, the destruction of a client file is ethically permissible subject to the admonitions below.*

*It is well settled that the entire file belongs to the client and must be provided upon request. See footnote 3 3 Cf. Opinion 554, 115 N.J.L.J. 565 (1985) (a client or the client's new attorney is entitled to receive the file with everything which is or was essential for the completion of the litigation); Opinion 203, 94 N.J.L.J. 298 (1971) (a client has the right to be represented at all times by counsel of the client's choosing and the file should be delivered to the attorney selected by the client). The question presented here, however, deals with the situation where no specific request has been made. Inherent in the attorney-client relationship is an expectation on the part of the client that the attorney may be called upon to and will provide requested information which is necessary to the client's needs. RPC 1.4 (Communication). Therefore, at the close of the file, it is presumed that for some reasonable period of time a client may assume that the entire file would be available if it were requested.*

*In establishing a fair and reasonable period of time, reference may be made to the New Jersey Administrative Code which reflects state policy. See footnote 4 4 The retention period required by the vast majority of licensed professions is seven years. That being the case, in providing a safe harbor to the attorney who has conformed to the ethical requirements discussed above, we conclude that absent an express agreement to the contrary, the client should not reasonably expect the attorney to retain the file for the client's benefit more than seven years after the conclusion of the representation. See footnote 5 5 After a period of seven years has passed, such file material may ethically be destroyed.*

*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.*

*Lastly, the manner in which client files are destroyed must conform to the confidentiality requirements of RPC 1.6. Simply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential and privileged information remains protected and not available to third parties.*

*\* \* \* Footnote: 1 1*

*See also R. 1:21-6(b)(9) which provides that copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining [to the event which they record] must be retained for a period of seven years. Footnote: 2 2*

*Depending on the nature of the representation and the matter, the list of such documents may include appraisals, banking records, real estate and transactional closing documents, employee benefit plans, due diligence documents and reports, governmental authorizations or permits, governmental notices of violations or compliance, policy and procedures manuals, environmental site investigation reports, fiduciary accounting, financial records or statements, insurance policies, lease records, loan documents, securities filings, tax determinations, tax filings or returns, original trademarks, copyrights and patents, etc. This listing is illustrative only and does not serve to limit the types of documents that may be the property of the client. Footnote: 3 3*

*An exception is data relating solely to the attorney-client relationship and data taken from another unrelated file. Footnote: 4 4*

*NJAC 13:30-6.5(b) (Medical Examiners - Seven Years) ; NJAC 13:30-8.7(c) (Dentistry - Seven Years); NJAC 13:34-7.1(d) (Marriage and Family Counselors - Seven Years); NJAC 13:34-18.1(g) (Professional Counselors - Seven Years); NJAC 13:33-1.29(a) and 39-7.14(f) (Ophthalmic Dispensers/Ophthalmic Technicians - Six Years); NJAC 13:35-9.11(b) (Acupuncturists - Seven Years); NJAC 13:36-1.8(b) (Mortuary Science - Six Years); NJAC 13:38-2.3(a) (Optometrists - Seven Years); NJAC 13:39A-3.1(c) (Physical Therapy - Seven Years); NJAC 13:42-8.1(g) (Psychologists - Seven Years); NJAC 13:44-4.9(b) (Veterinarians - Five Years; Three Years if patient has died); NJAC 13:44E-2.2(b) (Chiropractic Examiners - Seven Years); NJAC 13:44F-8.2(a) (Respiratory Care - Seven Years); and NJAC 13:44G- 12.1(e) (Social Worker Examiners - Seven Years). Footnote: 5 5*

*Although concerned primarily with confidential communications, to the extent that Opinion 542, 114 N.J.L.J. 387 (1984) deems it appropriate to destroy a file based upon a contract between the insured and the insurance company, it is now here rejected.*

### About the Panelists...

**Marc David Garfinkle** maintains a solo practice in Morristown, New Jersey, where since 2012 he has limited his practice to matters relating to legal ethics, bar admission, judicial misconduct and attorney discipline. He has also been the municipal public defender in Livingston, New Jersey.

Admitted to practice in New Jersey and California, and before the United States District Court for the District of New Jersey and the Northern District of California, Mr. Garfinkle is a former New Jersey ethics investigator and has been a member of the American, New Jersey State, Morris County and Essex County Bar Associations, as well as the Association for CLE Administrators (ACLEA). He is Past Chair of the District VB Ethics Committee, writes a monthly "Practice Paper" on legal ethics for the *New Jersey Law Journal*, and is a frequent guest of the media in professional responsibility matters. In addition to lecturing for ICLE, Mr. Garfinkle produces live ethics and "new lawyer" CLE for attorneys coast to coast, and his clients have included state bar associations in Ohio, Missouri, South Carolina, Alaska and Oregon, as well as the ICE trial attorneys for the United States Department of Homeland Security. His online programs have been produced by Lawline.com, West LegalEduCenter, Solo University.com and RocketMatterCLE, among other providers. Having taught Persuasion and Advocacy at Seton Hall Law School since 2007, he is also the self-published author of several books including *\$olo Contendere: How to Go Directly from Law School into the Practice of Law Without Getting a Job* (3d. Ed.), *The Hip-Pocket Guide to Testifying in Court*, *The New Lawyer's Hip-Pocket Guide to Appearing in Court* and *The Hip-Pocket Guide to Speaking in Public*.

Mr. Garfinkle received his B.A. from Marietta College and his J.D. from UC Hastings (formerly Hastings College of the Law, University of California).

**Hillary K. Horton** is Deputy Ethics Counsel, Office of Attorney Ethics (OAE), in Trenton, New Jersey, where she investigates and prosecutes matters in which an attorney is accused of violating the *New Jersey Rules of Professional Conduct*, including financial crimes. Prior to her work with the OAE, she was a Deputy Attorney General in the Division of Criminal Justice, where she focused in appellate advocacy.

Ms. Horton is admitted to practice in New Jersey and Pennsylvania (inactive), and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court. A member of the National Organization of Bar Counsel (NOBC), she has lectured regularly for the Attorney General's Advocacy Institute on eyewitness identification and other topics.

Ms. Horton is an honors graduate of Alfred University and Rutgers Law School.

**Thomas G. Rantas** is a Partner in the Newark, New Jersey, office of Lewis Brisbois Bisgaard & Smith LLP and a member of the firm's Professional Liability Practice, where he represents clients in a wide variety of complex civil, commercial, insurance and professional liability matters. He focuses his professional malpractice defense practice in the representation of attorneys and insurance brokers and agents, and also regularly represents insurers in complex coverage and bad faith disputes. In addition to his litigation practice, he has experience in

providing counseling to insurers and corporations on several legal, business and regulatory issues; and focuses in providing opinions to insurers on coverage issues involving all types of insurance policies.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York, Mr. Rantas was appointed to the District XA Ethics Committee in 2016. He is a former Pupil of the William J. Brennan, Jr. American Inn of Court and co-author of "Managing Expectations in the Tripartite Relationship," (International Association of Defense Counsel Professional Liability Roundtable, 2013).

Mr. Rantas received his B.A. from Rutgers College, Rutgers University, and his J.D. from Albany Law School.