Vermont Bar Association

Seminar Materials

Road Show 4.0

June 26, 2012
Capitol Plaza
Montpelier, Vermont

Faculty: Kevin F. Ryan, Esq.
James E. Knapp, Esq.
ROAD SHOW 4.0
May 30th – Caledonia Superior Court, St. Johnsbury
June 26th – Capitol Plaza, Montpelier

There has been an explosion in new practices and procedures in the last few years for operating your law office. Many of those practices and procedures come with new risks. Building on prior years’ roadshows, Jim Knapp and Kevin Ryan are coming to a location near you with a new program aimed at the way law practice is changing in today’s world.

The first part of this two-part program will look at a series of topics relating to the ethics of contemporary practice, ranging from competence in an ever-changing world to new forms of advertising, from managing funds to communicating with clients and organizing your practice.

The second part of the program looks at the specific ways in which the new problems associated with these new practices and procedures can be addressed safely, ethically, and with full attention to the welfare of your clients.

Register for both portions of the program or only one. Each portion offers 2 hours of MCLE credit; the morning portion includes 2 hours of ethics credit. Join us when we come to your town!
Vermont Bar Association  
Registration Form

Please complete all of the requested information, print this application, and fax with credit info or mail it with payment to: Vermont Bar Association, PO Box 100, Montpelier, VT 05601-0100. Fax: (802) 223-1573 PLEASE USE ONE REGISTRATION FORM PER PERSON.

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ROAD SHOW 4.0

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Sponsor: Vermont Bar Association

Date: June 26, 2012

Seminar Title: Road Show 4.0

Location: Capitol Plaza, Montpelier, VT

Credits: Morning Session Only - 2.0 Ethics MCLE
Afternoon Session Only – 2.0 General MCLE

All-Day Session – 4.0 MCLE (incl. 2.0 Ethics Credits)

Luncheon addresses, business meetings, receptions are not to be included in the computation of credit. This form denotes full attendance. If you arrive late or leave prior to the program ending time, it is your responsibility to adjust CLE hours accordingly.
James E. Knapp recently became of counsel to the Burlington law firm of Mickenberg, Dunn, Lachs, Hazel & Smith, PLC.; and, also serves as the Coordinator of the Practice Management Program for the Vermont Bar Association. Mr. Knapp’s prior experience includes serving as a Vice President and State Counsel for the Vermont office of Chicago Title Insurance Company and as State Counsel for Stewart Title Guaranty Company. Mr. Knapp is a former shareholder in the Burlington Law Firm of Gravel and Shea. He has lectured for the Vermont Bar Association and other professional education providers on professionalism, ethics, and applied technology in the law practice. Mr. Knapp has also been a presenter at continuing legal education programs on real estate law topics, title insurance, and land use regulation. Mr. Knapp is an instructor on the adjunct faculty at Champlain College. Mr. Knapp is a member of the Vermont Bar Association Title Standards Subcommittee and a current member of the Professional Responsibility Section. He earned his B.A. degree in history, with highest distinction, from the University of Maine at Orono and his J.D. degree, magna cum laude, from Syracuse University College of Law.

Kevin F. Ryan is the Director of Education and Communication at the Vermont Bar Association. He is a graduate, summa cum laude, of the University of Denver College of Law and has his M.A. from Princeton University. He has published on numerous topics, including ethics and professionalism, international law, constitutional law, and political theory.
Vermont Rules of Professional Conduct

Rule 1.1  COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 1

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

Comment 2

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

... 

Comment 4

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation ...

... 

Comment 6
To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA 20/20 Commission proposed revision to Comment 6

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

...Comment 3

An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

Case Notes

Advertisements proclaiming a firm to be “experts” in certain fields of law fall within the prohibition of this rule. So do advertisements using the terms “specialist” or “specialty” where no certification of specialty exists. In re PRB Docket No. 2002.093, 2005 VT 2, 177 Vt. 629, 868 A.2d 709 (mem.).
Advisory Ethics Opinions

07-02 A lawyer may publicize the fact that he or she is listed in a publication such as The Best Lawyers in America, so long as the lawyer makes clear that he or she is not claiming to be one of the best lawyers in American, without violating Rule 7.1.

06-03 The email address "advancingjustice.com" and the media ad phrase "we will fight for your rights—advancing justice one case at a time" are communications governed by Rule 7.1. While there is a "potential" for such communications to mislead the public regarding results a law firm can achieve, without more, the Committee is not prepared to say such communications violate Rule 7.1.

Rule 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may

    (1) pay the reasonable costs of advertisements or communications permitted by this rule;

    (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by any regulatory authority designated by the Supreme Court;

    (3) pay for a law practice in accordance with Rule 1.17; and

    (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if
(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

...  

Comment 3

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising ... Limiting the information that may be advertised ... assumes that the bar can accurately forecast the kind of information that the public would regard as relevant ...

Rule 1.18  DUTIES TO PROSPECTIVE CLIENT

(a) A person who, in good faith, discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.6 would require or permit or as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this
paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment 1

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer’s custody, or rely on the lawyer’s advice. A lawyer’s discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

Comment 2

Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, such as through an unsolicited e-mail or other communication, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer
relationship, is not a “prospective client” within the meaning of paragraph (a). A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not acting in good faith and is not “a prospective client” entitled to the protections of paragraph (b) or (c) of this rule. A person’s intent to disqualify may be inferred from the circumstances.

**Rule 1.6  CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c).

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

1. to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or

2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; or

3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.

(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

1. to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act;

2. to secure legal advice about the lawyer’s compliance with these rules; or
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

... 

Comment 5

Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation ...

Comment 16

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision ...

Comment 17

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy ... A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Rule 1.15  SAFEKEEPING PROPERTY

(a)(1) 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 accordance with Rules 1.15A and B. 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 six years after termination of the representation.
(2) For purposes of these rules, property held “in connection with a representation” means funds or property of a client or third party that is in the lawyer’s possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. “Fiduciary relationship” includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(b) A lawyer may deposit the lawyer’s own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer’s possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g):

(1) a lawyer shall not disburse funds held for a client or third person unless the funds are “collected funds.” For purposes of this rule, “collected funds” means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer’s trust account.

(2) a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

(g) In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does
not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer’s trust account within a reasonable period of time:

(1) When the deposit is either a certified check, cashier’s check, money order, official check, treasurer’s check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or

(2) When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V. S. A. Chapter 41; or

(3) When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or

(4) When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction; or

(5) When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

(h) If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer’s other clients or third persons held by the lawyer in accordance with this rule.
A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.¹

Introduction

Lawyers and clients often communicate with each other via e-mail and sometimes communicate via other electronic means such as text messaging. The confidentiality of these communications may be jeopardized in certain circumstances. For example, when the client uses an employer’s computer, smartphone or other telecommunications device, or an employer’s e-mail account to send or receive e-mails with counsel, the employer may obtain access to the e-mails. Employers often have policies reserving a right of access to employees’ e-mail correspondence via the employer’s e-mail account, computers or other devices, such as smartphones and tablet devices, from which their employees correspond. Pursuant to internal policy, the employer may be able to obtain an employee’s communications from the employer’s e-mail server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account. Employers may take advantage of that opportunity in various contexts, such as when the client is engaged in an employment dispute or when the employer is monitoring employee e-mails as part of its compliance responsibilities or conducting an internal investigation relating to the client’s work.² Moreover, other third parties may be able to obtain access to an employee’s electronic communications by issuing a subpoena to the employer. Unlike conversations and written communications, e-mail communications may be permanently available once they are created.

The confidentiality of electronic communications between a lawyer and client may be jeopardized in other settings as well. Third parties may have access to attorney-client e-mails when the client receives or sends e-mails via a public computer, such as a library or hotel computer, or via a borrowed computer. Third parties also may be able to access confidential communications when the client uses a computer or other device available to others, such as when a client in a matrimonial dispute uses a home computer to which other family members have access.

In contexts such as these, clients may be unaware of the possibility that a third party may gain access to their personal correspondence and may fail to take necessary precautions. Therefore, the risk that third parties may obtain access to a lawyer’s e-mail communications with a client raises the question of what, if any, steps a lawyer must take to prevent such access by third parties from occurring. This opinion addresses this question in the following hypothetical situation.

An employee has a computer assigned for her exclusive use in the course of her employment. The company’s written internal policy provides that the company has a right of access to all employees’ computers and e-mail files, including those relating to employees’ personal matters. Notwithstanding this

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
² Companies conducting internal investigations often secure and examine the e-mail communications and computer files of employees who are thought to have relevant information.
policy, employees sometimes make personal use of their computers, including for the purpose of sending personal e-mail messages from their personal or office e-mail accounts. Recently, the employee retained a lawyer to give advice about a potential claim against her employer. When the lawyer knows or reasonably should know that the employee may use a workplace device or system to communicate with the lawyer, does the lawyer have an ethical duty to warn the employee about the risks this practice entails?

Discussion

Absent an applicable exception, Rule 1.6(a) requires a lawyer to refrain from revealing “information relating to the representation of a client unless the client gives informed consent.” Further, a lawyer must act competently to protect the confidentiality of clients’ information. This duty, which is implicit in the obligation of Rule 1.1 to “provide competent representation to a client,” is recognized in two Comments to Rule 1.6. Comment [16] observes that a lawyer must “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” Comment [17] states in part: “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.... Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”

This Committee has recognized that these provisions of the Model Rules require lawyers to take reasonable care to protect the confidentiality of client information, including information contained in e-mail communications made in the course of a representation. In ABA Op. 99-413 (1999) (“Protecting the Confidentiality of Unencrypted E-Mail”), the Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients’ instructions as to the mode of transmitting highly sensitive information relating to the clients’ representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.

Clients may not be afforded a “reasonable expectation of privacy” when they use an employer’s computer to send e-mails to their lawyers or receive e-mails from their lawyers. Judicial decisions illustrate the risk that the employer will read these e-mail communications and seek to use them to the employee’s disadvantage. Under varying facts, courts have reached different conclusions about whether an employee’s client-lawyer communications located on a workplace computer or system are privileged, and the law appears to be evolving. This Committee’s mission does not extend to interpreting the substantive law, and

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3 See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) (Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services) (“the obligation to ‘act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision’” requires a lawyer outsourcing legal work “to recognize and minimize the risk that any outside service provider may inadvertently -- or perhaps even advertently -- reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters.”).

therefore we express no view on whether, and in what circumstances, an employee’s communications with counsel from the employee’s workplace device or system are protected by the attorney-client privilege. Nevertheless, we consider the ethical implications posed by the risks that these communications will be reviewed by others and held admissible in legal proceedings. Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

The time at which a lawyer has an ethical obligation under Rules 1.1 and 1.6 to provide advice of this nature will depend on the circumstances. At the very least, in the context of representing an employee, this ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party. Considerations.tending to establish an ethical duty to protect client-lawyer confidentiality by warning the client against using a business device or system for substantive e-mail communications with counsel include, but are not limited to, the following: (1) that the client has engaged in, or has indicated an intent to engage in, e-mail communications with counsel; (2) that the client is employed in a position that would provide access to a workplace device or system; (3) that, given the circumstances, the employer or a third party has the ability to access the e-mail communications; and (4) that, as far as the lawyer knows, the employer’s internal policy and the jurisdiction’s laws do not clearly protect the privacy of the employee’s personal e-mail communications via a business device or system. Unless a lawyer has reason to believe otherwise, a lawyer ordinarily should assume that an employer’s internal policy allows for access to the employee’s e-mails sent to or from a workplace device or system.

The situation in the above hypothetical is a clear example of where failing to warn the client about the risks of e-mailing communications on the employer’s device can harm the client, because the employment dispute would give the employer a significant incentive to access the employee’s workplace e-mail and the employer’s internal policy would provide a justification for doing so. The obligation arises once the lawyer has reason to believe that there is a significant risk that the client will conduct e-mail communications with the lawyer using a workplace computer or other business device or via the employer’s e-mail account. This possibility ordinarily would be known, or reasonably should be known, at the outset of the representation. Given the nature of the representation—employment dispute—the lawyer is on notice that the employer may search the client’s electronic correspondence. Therefore, the lawyer must ascertain, unless the answer is already obvious, whether there is a significant risk that the client will use a business e-mail address for personal communications or whether the employee’s position entails using an employer’s device. Protective measures would include the lawyer refraining from sending e-mails

inapplicable to communications with counsel using workplace computer); Scott v. Beth Israel Medical Center, Inc., 847 N.Y.S.2d 436, 440-43 (N.Y. Sup. Ct. 2007) (privilege inapplicable to employer’s communications with counsel via employer’s e-mail system); Long v. Marubeni Am. Corp., No. 05CIV.639(GEL)(KNF), 2006 WL 2998671, at *3-4 (S.D.N.Y. Oct. 19, 2006) (e-mails created or stored in company computers were not privileged, notwithstanding use of private password-protected e-mail accounts); Kaufman v. SunGard Inv. Sys., No. 05-CV-1236 (JLL), 2006 WL 1307882, at *4 (D.N.J. May 10, 2006) (privilege inapplicable to communications with counsel using employer’s network).

For a discussion of a lawyer’s duty when receiving a third party’s e-mail communications with counsel, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 11-460 (2011) (Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel).

This opinion principally addresses e-mail communications, which are the most common way in which lawyers communicate electronically with clients, but it is equally applicable to other means of electronic communications.
to the client’s workplace, as distinct from personal, e-mail address, and cautioning the client against using a business e-mail account or using a personal e-mail account on a workplace computer or device at least for substantive e-mails with counsel.

As noted at the outset, the employment scenario is not the only one in which attorney-client electronic communications may be accessed by third parties. A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client’s situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

7 Of course, if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.
VBA ADVISORY ETHICS OPINION 2010-6

DIGEST:

Vermont attorneys can utilize Software as a Service in connection with confidential client information, property, and communications, including for storage, processing, transmission, and calendaring of such materials, as long as they take reasonable precautions to protect the confidentiality of and to ensure access to these materials.

The full opinion is available at https://www.vtbar.org/FOR%20ATTORNEYS/2011%20Advisory%20Ethics%20Opinions.aspx
Road Show 4.0

St. Johnsbury May 30, 2012
Newfane June 19, 2012
Montpelier June 20, 2012
Auditing Your Practice

• Asking Questions
  • Where are you going?
  • What do you need to know today?
  • Do you advertise?
Changing Interactions with Clients

- A long time ago, in a place far away . . .

- New realities
  - DIY solutions
  - Legal Zoom
    - WWW.LEGALZOOM.COM
  - Vt. Secretary of State

- Other sources of information
  - Shared experiences
Responses to Changes

- UPL

- If you can’t beat them, join them
  - Law firm portals with customizable forms

- None -- dangers/risks vs. advantages

- Your experiences?
Competence in a Changing World

- What is competence
  - Recognizing legal issues – issue spotting
  - Parsing legal precedent
  - Writing

- What about life?

- What do I need to know now?
Technology Skills and Competence

• How much tech do you have to know?
  • None → I am a techno-geek!

• Where do you practice?

• What do you practice?

• Some examples
  • Texting; IMs
  • Facebook, Flickr, and the social scene
Specific Practice Areas

- Family law
- Criminal defense
- Civil litigation
- HR/employment law
  - Creating the policies
  - Monitoring the usage
  - Subpoenas and search warrants
- Representing the corporation
  - Promotions and advertising
Practicing Law

- What are you doing to serve your clients?
- Adding a new area of practice
- Changing an area of practice
How Do I Become Competent

- How many seminars?
- What kinds of books?
- Consult with whom?
  - I did my clerkship!
- What about the listservs?
  - What can I ask? How much detail?
  - Opposing counsel may be lurking
• Organization
  • What does it take?
  • Can technology help?
Wonderful World of Advertising

- What can you say?
  - Factual statement
  - Puffing vs. unsubstantiated claims

- Are there limits?

- What creates a problem?
A rose by any other name

• URL’s
  • www.attackattorney.com
  • www.bestlawyerinVermont.biz
• Domain names
  • info@fastsettlement.law
• Advertising tags
  • “Advancing justice one case at a time”
  • “Life is short – get a divorce”
  • “We collect big, so you can take it easy”
  • “I am the hammer; they are the nails”
I Have a Facebook Page

- OK, but should you have two
  - Personal vs. Professional

- What do you say?
  - Care required
  - E.g., lawyer asks for continuance – posts vacation pics - Court not happy!

- Phototagging
  - Should you research yourself periodically?
Emailing a Client - Updated

- Update on emailing clients
  - The ABA speaks
  - Company accounts
  - Webmail accounts
  - Who has the password?

- Email for you
  - No Autocomplete
  - No “Reply All”
  - Watch for email chains!
Backup – Ethical Obligation

- Makes good sense too
- Rule 1.1
- Rule 1.15 – Protect Client Property
- How to do it
  - Rule 1.6 – Confidentiality
  - VBA Advisory Ethics Opinion
The Afternoon Session

- Practical solutions
Backups

• Three-Tier Solution

1. Synchronize two drives
2. Near-line – separate computer
3. Offline
   • Tape/disk
   • Cloud
Advertising

• What works?
  • New media vs. old media

• How and where to say “it”

• Some examples of good and bad advertising in the new media
How to advertise – or NOT!

- Advertising in the rest of the world
What Can You Say?

Life’s short. Get a divorce.
312.341.0900

Take control.
GET A DIVORCE.
312.341.0900
More bad advertising

• What doesn’t work?

• What might work but is in poor taste?
  • And does it really “work” if its poor taste is perceived?
A new trend in advertising

• Helping the client along
  • Inform – the “hub of information”
  • Entertain
  • Encourage connections
Managing Money

• What are you doing differently?

• Online banking
  • Passwords
  • Heightened security
    • The Trojan Problem

• ACH/EFT transactions
  • Never for trust accounts
  • How about your operations account?
Watching the Money

• Small, repeated transactions
• Linked accounts
• New scam – iPhone and bank deposits
• Old scams – still out there
Left-over Money

• Abandoned property rules

• Annual reporting to state
  • May 1 deadline
  • Who cares? Penalties, interest, fines

• Websites
  • http://www.vermonttreasurer.gov/unclaimed-property/information-for-holders
  • http://www.vermonttreasurer.gov/unclaimed-property/information-for-holders
Preparing for the Future

• “Succession” planning – a time of transition for your clients
  • Disaster
  • Absence
  • Disability
  • Death
The Duty to Plan

Rule 1.3 (Competence), Comment 6
ABA 20/20 Commission revision

Duty to the client

Duty to the profession
Succession Basics

• Identify a potential “Trustee”

• Complete the “Law Firm Information Sheet”

• What about the files?
Preparing for Recovery

• Disaster
  • How do I restart my practice?

• What did I have?

• What do I need?
LAW OFFICE INFORMATION SHEET

Date: 

LAW PRACTICE LEGAL NAME:

Physical Location(s):

Mailing Address (if different):

Location of Post Office Boxes:

Box #:

Location of Key(s)

Telephone Numbers:

Web Site Address:

Date of Formation: State of Formation:

Location of Business Records:

Employer Identification Number:

Vermont Business Number:

IRS CAF Number (for IRS Powers of Attorney):

IRS PTIN Number (IRS Tax Preparer Identification Number):

(Note: Annual IRS Registration of PTIN now required)

Officers/LLP LLC Managers (Corp/Bypass Entity):

Name & Address:

Social Security #:  
Individual PTIN:  
Individual CAF:  

Name & Address:

Social Security #:  
Individual PTIN:  
Individual CAF:
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**ATTORNEYS IN LAW PRACTICE:**

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Address: _______________________________________

Contact Numbers:  Home: _______________  Cell: __________
Social Security #: _________________________________
License #: _____________________________________  Jurisdiction________
Date of Expiration: _______________________________
License #: _____________________________________  Jurisdiction________
Date of Expiration: _______________________________
License #: _____________________________________  Jurisdiction________
Date of Expiration: _______________________________

COMPUTER SYSTEMS & OPERATIONS:

Type of computer system utilized for the office. _________________________________

Location of password or access codes: _______________________________________
Type of backup system utilized: _____________________________________________
Location of disk or tape storage: ___________________________________________
Location of any office procedures manuals related to use of computer system:

CALENDAR/DOCKETING SYSTEM:

Type and locations: _________________________________

Who has access to Calendars: _____________________________________________
Password(s) to Calendar/Docketing System: _________________________________
PROFESSIONAL LIABILITY INSURANCE:
  Liability Insurance Company: ____________________________
  Address: ____________________________________________
  ____________________________________________________
  Agent: ____________________________
  Policy #: ____________________________
  Coverage Amount: ____________________________
  Deductible Amount: ____________________________
  Location of Original Policy: ____________________________
  Attach a copy of the Declarations Page: __________ Date Attached:

BUSINESS OWNERS INSURANCE
  Business Insurance Company: ____________________________
  Address: ____________________________________________
  ____________________________________________________
  Agent: ____________________________
  Policy #: ____________________________
  Coverage Amount: ____________________________
  Deductible Amount: ____________________________
  Location of Original Policy: ____________________________
  Attach a copy of the Declarations Page: _______ Date Attached

WORKERS COMPENSATION INSURANCE
  Workers Compensation Insurance Company: ________________
  Address: ____________________________________________
  ____________________________________________________
  Agent: ____________________________
  Policy #: ____________________________
  Location of Original Policy: ____________________________
  Attach a copy of the Declarations Page: _______ Date Attached

HEALTH INSURANCE
  Health Insurance Company: ____________________________
  Address: ____________________________________________
  ____________________________________________________
  Agent: ____________________________
  Policy #: ____________________________
  Location of Original Policy: ____________________________
  Attach a copy of the Declarations Page: _______ Date Attached
  Employees who are covered: __________________________________
  ____________________________________________________

4 of 12
LAW PRACTICE DISABILITY INSURANCE
Insurance Company: ___________________________
Owner of Policy: ___________________________
Policy #: ___________________________
Insured: ___________________________________
Value: ___________________________________

LIFE INSURANCE POLICIES WHICH DESIGNATE LAW PRACTICE AS BENEFICIARY:
Life Insurance Company: ___________________________
Owner of Policy: ___________________________
Policy #: ___________________________
Value: ___________________________________

Life Insurance Company: ___________________________
Owner of Policy: ___________________________
Policy #: ___________________________
Value: ___________________________________

LAW PRACTICE PENSIONS, RETIREMENT PLANS:
Company Name: ___________________________
Address: ___________________________
Account #: ___________________________

Company Name: ___________________________
Address: ___________________________
Account #: ___________________________

REAL ESTATE (Own)
Property Description: ___________________________
Current tax assessed value ___________________________ (Please provide copy of current tax bill.)
Is the property currently mortgaged? ______
Balance of Mortgage: __________
Bank/Lending Institutions:
Name: ___________________________
Address: ___________________________
Contact Person: ___________________________

5 of 12
Property Insurance:
  Insurance Company: ________________________________
  Address: _______________________________________
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  _______________________________________________

Agent: ___________________________________________
Policy #: ________________________________________
Location of Original Policy: ________________________

REAL ESTATE (Rent)
Property Description: ______________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________
____________________________________________________________________________________

Landlord Name: _________________________________
Address: _______________________________________
Telephone: ______________________________________
Location of Lease Agreement: ______________________
Current Monthly Rent: ____________________________

OFFICE EQUIPMENT:
Location of list of all office equipment - telephones, voicemail, fax machines, copiers,
postage meter (include model/serial numbers for identification): ______________
____________________________________________________________________________________
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BANK ACCOUNTS (Operating accts, IOLTA, Payroll accts, Savings accts, etc):
Name of Bank: __________________________________
Account Type: __________________________________
Account Number: ________________________________
Authorized Signers: ______________________________

Name of Bank: __________________________________
Account Type: __________________________________
Account Number: ________________________________
Authorized Signers: ________________________________

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Account Type: ________________________________
Account Number: ________________________________
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Name of Bank: ________________________________
Account Type: ________________________________
Account Number: ________________________________
Authorized Signers: ________________________________

LOCATION OF CHECKBOOKS, STATEMENTS & DEPOSIT RECORDS:
____________________________________________________
____________________________________________________

INVESTMENT ASSETS:

Name of Investment Account: ________________________________
Account Number: ________________________________
Broker Name & contact Info: ________________________________

Name of Investment Account: ________________________________
Account Number: ________________________________
Broker Name & contact Info: ________________________________

Name of Investment Account: ________________________________
Account Number: ________________________________
Broker Name & contact Info: ________________________________

SAFE DEPOSIT BOX(S):
Location: ________________________________
Box #(#s): ________________________________
Key Location: ________________________________
Names of Persons with Access: ________________________________
Location: ____________________________________________

Box # (s): ___________________________________________

Key Location: _______________________________________

Names of Persons with Access: __________________________

FINANCIAL RECORD KEEPING SYSTEMS:

Type or nature of **Payroll System** (in-house computer system, manual system, payroll company): ____________________________________________

Who is responsible for handling payroll and making all payroll tax deposits: ____________________________________________.

Who has access to payroll account: ________________________________________

Type and Location of **Bookkeeping System**: ____________________________________________

Who maintains and/or has access to office books and records: _______________________

Accountant for the practice: ____________________________________________

Address: ____________________________________________

Telephone Number: ____________________________________________

Type and Location of **Timekeeping System**: ____________________________________________

Who maintains and/or has access to timekeeping system and records: ______________________

Location timekeeping records: ____________________________________________

Location of Client Billing records: ____________________________________________

Who handles client billing: ____________________________________________

**DATABASES:**

Name of Database: ____________________________________________

Information in Database: ____________________________________________

Name of Database: ____________________________________________

Information in Database: ____________________________________________
**ACCOUNTS PAYABLE**

Location of Vendor List: ____________________________

**Monthly Vendors:**

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| Amount: ____________________________ |
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Law Practice lines of credit and/or business loans:
Bank/Lending Institutions:
| Name: ____________________________ |
| Address: __________________________ |

  | Contact Person: ____________________ |
  | Account or Reference Number: ____________________ |
  | Amount Currently Outstanding: ____________________ |

Equipment Lease Obligations or Maintenance Contracts:
| Company name: ____________________ |
| Address: __________________________ |
  | Telephone #: ____________________ |
  | Account or Reference Numbers: ____________________ |

| Company name: ____________________ |
| Address: __________________________ |
  | Telephone #: ____________________ |
  | Account or Reference Numbers: ____________________ |

| Company name: ____________________ |
| Address: __________________________ |
  | Telephone #: ____________________ |
  | Account or Reference Numbers: ____________________ |

| Company name: ____________________ |
| Address: __________________________ |
  | Telephone #: ____________________ |
  | Account or Reference Numbers: ____________________ |
MEMBERSHIP DUES
Name & contact information: ______________________________________
_____________________________________________________________
Account Number: _____________________________________________
Name & contact information: ______________________________________
_____________________________________________________________
Account Number: _____________________________________________
Name & contact information: ______________________________________
_____________________________________________________________
Account Number: _____________________________________________

SUBSCRIPTION DUES:
Name & contact information: ______________________________________
_____________________________________________________________
Account Number: _____________________________________________
Name & contact information: ______________________________________
_____________________________________________________________
Account Number: _____________________________________________

CLIENTS:
Type and location of CLIENT LIST: ________________________________
Who has access to list: __________________________________________
Location of ACTIVE CLIENT FILES: ________________________________
Who has access to client files: ___________________________________
Location of CLOSED CLIENT FILES: ________________________________

Who has access to client files: ________________________________

FILE ORGANIZATION AND STORAGE:

Type of Files: ________________________________________________
Location of files: _____________________________________________
Who has access to files: _______________________________________

Type of Files: ________________________________________________
Location of files: _____________________________________________
Who has access to files: _______________________________________

Type of Files: ________________________________________________
Location of files: _____________________________________________
Who has access to files: _______________________________________

STORAGE OF ORIGINAL CLIENT DOCUMENTS:

Location of ORIGINAL CLIENT DOCUMENTS:______________________

Who has access to files: _______________________________________

Location of ORIGINAL CLIENT DOCUMENTS:______________________

Who has access to files: _______________________________________

Location of ORIGINAL CLIENT DOCUMENTS:______________________

Who has access to files: _______________________________________
Running Out of Space?
Obligations and Suggestions Regarding Closed Client Files

As lawyers retire, consolidate offices, downsize, or just run out of room, I am often asked, “How much longer do I have to keep these files?” It would seem as though this would be a simple question to answer, but, as is often the case in ethics, it is not.

There is only one Vermont Rule of Professional Conduct that specifies how long a record of anything must be kept. Rule 1.15(b) states, in pertinent part: “Complete records of such [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.” This six-year rule applies only to accounting records, not client files.

It appears that there is no other legal guidance on this subject in Vermont save Vermont Advisory Opinion 97-08, issued by the Vermont Bar Association Professional Responsibility Committee in 1997. It is very helpful and recommended reading. In researching the law of other states, I found that similar bar association advisory opinions are based largely upon ABA Informal Opinion 1384 issued in March 1977. Despite its age, this ABA opinion remains the seminal authority on file destruction, and is worth revisiting.

ABA Informal Opinion 1384 sets forth eight factors that a lawyer should consider before making any decision to destroy a client file. Briefly summarized, they are:

1. return client property, particularly originals;
2. retain anything necessary for your own defense;
3. retain what the client expects you to preserve;
4. make decisions based on content, not just age;
5. preserve accounting records;
6. protect confidentiality when destroying documents;
7. screen all files before destroying their contents; and
8. keep an index of the files destroyed.

Vermont Advisory Ethics Opinion 97-08 adds two more factors:
9. heed government imposed rules; and
10. keep administration of estate records indefinitely.

The opinion warns that there may also be applicable state statutes to consider or rules of the malpractice carrier that should be ascertained. Federal rules and laws should not be overlooked in such categories as bankruptcy, federal taxation, and environmental protection laws. Any lawyer familiar with government practice knows this is a daunting task.

These are broad guidelines and do not give the lawyer a specific time period. Many lawyers simply apply the six-year limit of Rule 1.15(b) by analogy to all records—including case files—and are done with it.

Blindly applying a six-year rule to all client files, however, without consideration of the content of the files, can be dangerous. Six years might not be enough to protect the interests of both the lawyer and the client. Instead, let file content dictate when it is time to destroy a closed file. What material is retained is as important as how long it is retained.

Before turning to guidelines that may assist in valuing various documents, the lawyer should be aware of two other relevant rules: VRPC rules 1.16(d) and 1.6(a). Rule 1.16 advises that at the end of the representation, the lawyer must surrender all papers and property to which the client is entitled. The original file belongs to the client, not the attorney. Turning the client file over to the client without more, however, is generally not advisable. Many lawyers routinely make a copy of the file before releasing it because at some foreseeable time it might be needed. A malpractice suit, a third-party action, or perhaps a disciplinary inquiry could make these documents essential. Client files contain considerable work product in the form of memos, pleadings, research material, and notes that still holds value for the lawyer. Whatever issue might arise later is rarely predictable, especially when the lawyer is trying to make that prediction just as the representation has ended.

Rule 1.6(a) advises the lawyer to protect the confidentiality of information relating to the representation. This is a broader requirement than that in the former Code of Professional Responsibility, which required that the confidentiality of secrets and confidences of the client be maintained. The obligation to protect confidential information extends beyond the time during which the lawyer is actively representing the lawyer. The duties of loyalty and confidentiality may extend far into the future. Consequently, the lawyer has to use care in deciding where to put a closed client file. A locked file drawer, vault, warehouse, or rented storage space might be secure enough for the storage of physical files. The lawyer's basement, garage, or barn are usually accessible to other people and, therefore, not the best place to put client files.

Many lawyers are now scanning files into electronic format and discarding original files. If hard copies of confidential files are to be discarded, they should be shredded, burned, or otherwise destroyed in a way that will preclude access by unauthorized people. The person who does the data input or scanning should be a person who is also bound by confidentiality restrictions.

What Is to Be Retained?

With these ethical considerations in mind, it is possible to take a few prophylactic steps at the beginning of the representation that may minimize the eventual burden of retaining closed files.

At the beginning of the representation, the lawyer should advise the client as to how the client file will be treated when it is within the lawyer's possession, what the client's obligations are to retrieve it, and how and when retained client files will be destroyed. This informed consent might be obtained as part of the fee agreement.

The lawyer should consider creating and implementing a written policy on record retention. These policies often include information such as use of model initial fee agreements regarding inactive files, guidelines for culling files, schedules for destruction of inactive files, and assignment of specific tasks to specific lawyers and staff members in order to avoid confusion and ensure accountability.

When the representation has
concluded, a notice of destruction policy and a statement of the client’s right to take the file should be sent to the client, perhaps along with the last bill or a letter of termination. Regardless of whether these recommended steps are taken, copying files eventually becomes a priority. The end of the representation is a time when the lawyer has a significant opportunity to control the size of an inactive file. The lawyer should make an initial examination of the file, page by page, and designate what material will not be copied and saved. Making this preliminary purge of documents will probably be annoyingly burdensome, but it will save the lawyer far more money, time, and trouble in the long run. It is the ideal time for this task because, fresh from ending a representation in a particular case, the attorney is best able to recognize what materials are irrelevant and unimportant.

There are a few basic steps in culling the client files for the purpose of making a copy to be retained and stored until a more particular examination and decision can be made. First, all original documents should be identified, copied for the lawyer’s file where lawful and practicable, and returned to the client. When the client takes delivery of these originals, a signed receipt or other documentation of when and how delivery occurred should be placed in the retained client file. Second, all extraneous material should be removed. Material that may not be necessary to retain include: duplicates; research notes; message slips; first drafts; boilerplate pleadings based on a retained form; copies of public records; filed pleadings that are, therefore, available elsewhere; and published material downloaded or copied from places where another copy is available. Third, remove all the research material and file it in a more readily accessible place, such as a legal reference file maintained according to subject.

The lawyer is then in a position to give the full client file to the client while retaining the copy that has been purged. Eventually there will come a time, sometimes specified in a file retention policy, when there will be a second review. At this point the attorney will exercise experience and judgment to decide how long the file should be kept based upon its contents.

**General Time Lines**

Below are suggested voluntary guidelines, developed in other states,

which may be worth the Vermont lawyer’s consideration. These are only guidelines, suggested by other writers who often contradict each other. The guidelines are offered here only because they are, hopefully, better than nothing.

**Criminal Defense**

Client files should be retained for at least six years after the end of the client’s sentence. Some commentators recommend retaining these files as long as the client is alive.

**Personal Injury**

Client files should be maintained for five years after final judgment or dismissal, or six years after a minor comes of age.

**Guardianship and Trusts**

Financial records should be maintained indefinitely. Other documents should be retained for six years after the guardianship or trust terminates.

**Other Probate Matters and Estates**

Client files should be retained for ten years after final judgment. Tax records should be maintained indefinitely.

**Family Law**

Client files should be maintained for six years after final resolution. Files should be retained for five years after a marital settlement expires. Permanent electronic records are recommended before file is destroyed.

**Real Estate**

Except as to tax requirements, files should be retained for six years after closing, foreclosure, or other completed events.

**Leases**

Client files should be maintained for five years after termination of the lease.

**Tax matters**

Client files should be retained for at least six years and indefinitely if there is a hint of possible fraud.

**Contracts, Notes, Any Other Matters with Long Statutes of Limitation**

Files should be retained for fifteen years. Another suggestion for contract actions is five years after satisfaction of judgment, one year after dismissal, or five years after filing if not brought to trial.

**Bankruptcy**

Files should be retained for five years after discharge, payment, or any other event in which there is no reasonable expectation of payment.

**Old Original Files**

While much of this may be helpful to a new attorney dealing with new files, it is not of much value in the situation where many older lawyers now find themselves: the client never took the original file, or perhaps it was never proffered, and the lawyer has been keeping it for many years. Some of these files can be very old indeed and the location of the client long since lost. Nevertheless, all lawyers (or their heirs) eventually get to the point where enough is enough and it is time to destroy documents.

If the lawyer never received the client’s consent to destroy what is essentially client property, a good faith effort must be made to obtain it. Typically, letters are sent out to the last known address of the client. The letter states that it is time to come retrieve the file, that the
file will be held for a certain number of days, and that it can be retrieved from the lawyer at a specified location.

These letters often come back undeliverable. The client has relocated without forwarding address or is deceased, heirs unknown. In a final effort to provide notice, the lawyer could publish this information in the newspaper. In all probability, these actions will satisfy the lawyer's due diligence obligation.

Eventually the lawyer may have to destroy original files containing original documents. If left with that alternative, hopefully the lawyer will do so in a way that will preserve the confidential contents. Ultimately, as the VBA ethics opinion advised a decade ago, whether or not boundaries are crossed will depend upon "sound exercise of good professional and business judgment."[13]

Wendy S. Collins, Esq., is Bar Counsel with the Vermont Professional Responsibility Program. She is available to consult with you confidentially regarding your ethics questions and can be reached at 802-859-3000 or 802-828-3204.

1 Advisory Ethics Opinion 97-08, available at http://69.39.146.6/Upload%20Files/Web Pages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Conflict%20of%20Interest/97-08.pdf
3 The subsequently enacted ABA Model Rule 1.15(b) took care of that issue.
5 VBA Ethics Opinion 97-08, supra note 1.
6 VRPC Rule 1.16(d) states:
   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 another counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.
7 The rule does not apply to lien papers. Exactly what the client is entitled to and the applicability of the attorney retaining lien will not be discussed here. For purposes of this article, it is assumed that there is no dispute between lawyer and client about these issues.
9 VRPC Rule 1.16(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ...." See also Arizona Ethics Op. 07-02, June 2007, available at http://www.azbar.org/Ethics/opinionview.cfm?d=694 (if client requests rights to access to documents which attorney has digitalized, attorney is obliged to provide them in a readable form, even if it means making hard copies).
10 The lawyer should also consider what medium is used for storage as technology continues to evolve rapidly. Today's technological cutting edge may be obsolete by next year. Lawyers who formerly transferred files to microfiche and floppy disks find they must now keep obsolete software and hardware in order to access the electronic files.
12 These guidelines are based on other resources cited here and especially Mittman, Spring Cleaning: A Dozen Pointers for Purging Files, THE YOUNG LAWYER, April 1997, reprinted in J. Kan. B. Ass’n, May 1997, at 18; and Demetrios Dimitriou, Client Files: To Destroy or Not to Destroy? That Shouldn’t Be the Question, Ws. B. Bull., July 1981, at 54.
13 Advisory Ethics Opinion 97-08, supra note 1.

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