New York State Bar Association
Committee on Professional Ethics

Opinion 940 (10/16/12)

Topic: Use of off-site backup tapes to store a client's confidential information; retention of files in original paper form

Digest: Lawyer may store confidential information on off-site backup tapes if lawyer takes reasonable care to ensure adequacy of systems to protect confidentiality. When records must be retained, nature of the records determines whether lawyer (i) must maintain originals, (ii) may discard originals and maintain electronic copies in particular formats, or (iii) may maintain electronic copies in any format.

Rules: 1.6(a) & (c), 1.15(d)

FACTS

1. The inquiring attorney's firm scans all documents and makes them part of an electronic case management system. The electronic data is backed up daily on tapes, and the tapes are stored outside of the firm's office. Thus, in the event of a catastrophic loss to the office building or server, no more than a single day's data would be lost. The inquiry does not describe the entity that will handle the off-premise storage of the backup tapes, but it is presumably a commercial service provider rather than the firm itself.

QUESTIONS

2. May an attorney use a tape backup system to store a client's confidential information away from the firm's premises?

3. When the New York Rules of Professional Conduct (the "Rules") obligate an attorney to maintain certain records, may the attorney satisfy that obligation by keeping electronic copies such as backup tapes, or is the attorney required to keep the paper originals?

OPINION

A. Tape Backup Systems

4. The Rules address not only intentional disclosures of confidential information by a lawyer but also the exercise of reasonable care to avoid such disclosures by others. Rule 1.6(a) provides that, subject to certain exceptions, a lawyer "shall not knowingly reveal confidential information." Rule 1.6(c) provides that a lawyer "shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client," except for certain disclosures authorized

by the rule. [1]

5. We previously addressed a related inquiry. The question in N.Y. State 842 (2010) was whether a lawyer could use internet server ("cloud") storage to store and back up confidential information. In that opinion, the Committee opined that such use is permissible "provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained." The opinion gave several examples of steps that a lawyer might take to exercise such care.

6. We believe the principles governing use of a "cloud" storage system would also govern use of backup tapes maintained away from the firm's premises. A lawyer may use such backup tapes to store client information if the lawyer exercises reasonable care to protect the confidentiality of that information.[2]

7. Opinion 842's examples of conduct bearing on reasonable care are also relevant to use of backup tapes. Thus, for example, it may be appropriate for the lawyer to:

A. Ensure that the provider maintaining the backup tapes "has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information"; and
B. Investigate the provider's "data storage security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances."

N.Y. State 842.

B. <u>May a Lawyer Satisfy Retention Requirements With Electronic Copies?</u>

8. In asking the second question, the inquirer references the ethical requirement that certain kinds of records be maintained "for seven years after the events that they record." This includes, for example, records of certain bank accounts, copies of retainer agreements, copies of bills to clients, copies of closing statements, and all checkbooks and bank statements. Rule 1.15(d)(1).

9. For most kinds of records listed in Rule 1.15(d)(1), it suffices under the terms of that

[1] Some opinions also address whether a duty of reasonable care to protect confidential information applies to a lawyer's conduct in general. *See, e.g.*, N.Y. State 842 (2010) ¶4 (citing opinions); N.Y. State 709 (1998). We need not address that topic here, because the inquiring lawyer will be entrusting the tapes to others rather than maintaining them personally.

[2] Indeed, given proper safeguards, use of an off-site backup system may be not just permissible but advisable for those lawyers who choose to maintain their records in electronic form. The primary, on-site storage system may have vulnerabilities that a backup system could help mitigate. *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.) ("Disciplinary authorities are not likely to be sympathetic if records disappear because of a computer malfunction.").

Rule to keep "copies" of those records. However, for the records listed in Rule 1.15(d)(1)(viii) – namely, "checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips" – it is necessary to maintain the records in their original form for the required seven years. This does not mean, however, that a lawyer must use a bank that routinely returns paper copies of cancelled checks, or must pay an extra charge to obtain paper copies. In N.Y. State 758 (2002), we said:

> "If these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form."

10. Thus, lawyers need not obtain original cancelled checks just to satisfy the retention rule. Rather, lawyers must preserve cancelled checks and the other items listed in Rule 1.15(d)(1) in whatever form the law firm receives or initially maintains these items in the ordinary course of business. *See generally* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 617-18 (2012 ed.).

11. For the documents that may be kept as copies, the Rule provides further guidance. Requirements of maintaining copies are satisfied by maintaining "original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection." Rule 1.15(d)(3). Whether a particular storage format meets this standard may not be obvious, in which case consultation with an information technology specialist may be appropriate. *See Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.).

12. The answer to the inquirer's question thus depends on the kinds of record involved. It will not suffice to keep electronic copies of certain paper records like checkbooks, bank statements, and deposit slips when they are originally received or maintained by the law firm in paper form. Those must be kept in their original paper form. As to other kinds of records, for which Rule 1.15(d)(1) requires only the keeping of copies, those copies may be kept electronically, but only in a format that preserves an image that cannot be altered without detection, per Rule 1.15(d)(3).

13. A lawyer may also be ethically obligated to preserve various records other than those records subject to the seven-year retention requirement imposed by Rule 1.15. *See, e.g.*, N.Y. State 623 (1991) (opining that documents in closed files may be destroyed unless there are legal preservation requirements or "extraordinary circumstances manifesting a client's clear and present need"); N.Y. State 460 (1977) (opining that absent legal requirement to preserve records or specific instructions from client, retention period may be determined on basis of client's foreseeable need); N.Y. City 2010-1. Other obligations may be imposed by law or court rule. *See, e.g.*, N.Y. State 460 (1977); N.Y. City 2010-1; 22 NYCRR § 603.7 (1st Dep't rule requiring lawyers to preserve specified records in personal injury cases). Whether retention of electronic copies would satisfy these various obligations outside Rule 1.15 will again depend on the kind of record involved.

14. For example, it may be necessary to preserve the originals of documents such as wills,

deeds, contracts, and promissory notes. *See* N.Y. City 2010-1. For other kinds of documents subject to preservation obligations, it may suffice to keep copies if "the legal effect or evidentiary value of such records is not thereby impaired," because, for example, the copies "may be introduced into evidence or otherwise used in place of the originals" if the need should arise. *See* N.Y. State 460 (1977); N.Y. County 624 (1974). In still other cases, there may an obligation to keep records based on foreseeable client need, yet that need would be only for the information in those records, and not for the records themselves. In such a case there would be no ethical constraints on the form in which electronic copies are kept.

CONCLUSION

15. A lawyer may use off-site backup tapes to store confidential client information if the lawyer takes reasonable care to ensure that the storage system, and the arrangements for its use, adequately protect the confidentiality of such information.

16. For certain kinds of records, the Rules require that original paper documents be kept if the lawyer receives or initially maintains paper originals in the ordinary course of business. For certain other kinds of records, the Rules require retention but permit a lawyer to keep electronic copies in lieu of paper originals if the electronic copies are in a format that preserves an image not subject to alteration without detection. For yet other kinds of records that must be retained, the Rules permit electronic copies to be kept in lieu of paper originals without restriction.

(4-12)