

Breaking the cycle:  
The Ethics of Becoming A More Sustainable Lawyer

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Remote – Zoom Presentation  
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**Buchalter**

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- Privilege & confidentiality
- The client file
- Going paperless
- The cloud
- Remote concerns
- Mobile practice tips
- Questions



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**Be cool. Consider the environment.**  
Please don't print this email unless you really need to.

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Eco-Tip: Printing emails is usually a waste.  
Make this tip go viral, add it to your email signature.

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**Please consider the environment**

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The reality of modern law practice requires disposal of a great deal of paper, some of which will contain information protected by Oregon RPC 1.6

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### Benefits to Going Paperless!

- Reduced costs for storing/printing
- Improved document management – from anywhere
- Save time searching for documents/information
- Control permission for access
- Improved security
- Higher level of client service
- Easier compliance with courts, others' electronic filing requirements
- Reduction in firm's environmental impact

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1. What constitutes a client file?
2. How long do you have to keep the client file?
3. Can you recycle client files?
4. Can you keep an electronic only file instead?
5. Can you put the file up in the cloud?

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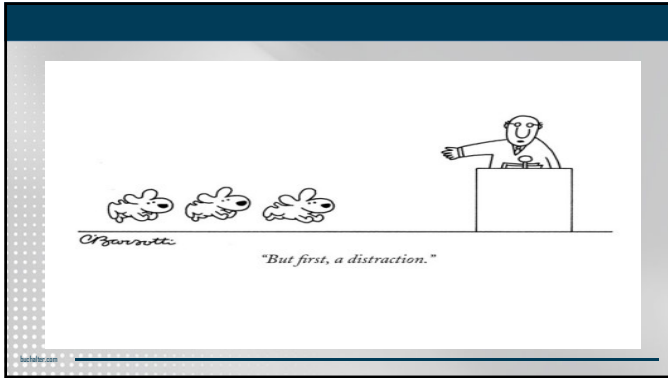
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### Yes, Competency Matters

- RPC 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Cmt [8]: Lawyer must "maintain" competence by keeping abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education.

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- What technology do you need?
- Understand and mitigate risks of technology?
- How do you obtain and maintain competence?



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## The Duty of Confidentiality

- RPC 1.6(a):
  - (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 permitted by paragraph
- RPC 1.0(f)
  - (f) **"Information relating to the representation of a client"** denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

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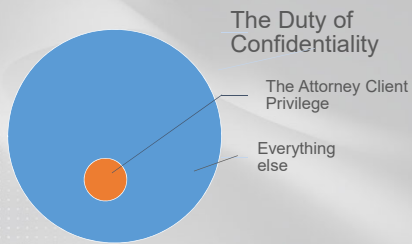
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## Confidentiality v. Privilege: An Example



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So...  
What is the client file?



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### Formal Opinion No. 2017-192

- **Question presented:** What makes up the client file?
- **Answer:** Almost everything.
- RPC 1.16(d): upon termination, take steps to protect client interests (including surrendering papers and property to which client is entitled)
- RPC 1.15-1(d): lawyer shall promptly deliver to the client any property the client is entitled to receive

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### Formal Opinion 2017-192

- The secret: No RPC talks about what is or is not, or should or should not be in the client file.
  - Every email?
  - Every draft?
  - Every note?
- Absent viable attorney lien, obligated to produce entire file to client.
- Client file = the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client.

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- This includes:
  - Litigation materials, including pleadings, memos, discovery
  - Correspondence
  - Expert opinions, medical and business records, witness statements
  - Electronic documents and records
  - Emails, word documents
  - Audio files, photographs
  - Text messages
  - Work product, lawyers' notes and internal memoranda
- You may retain a copy of the client file.

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### Formal Opinion 2017-192: The Exceptions

1. Documents to which the client is not entitled
2. Notes that may bear on the lawyer-client relationship rather than the merit's of the client's position
3. Internal firm communications
4. Electronic documents/metadata, or info which would otherwise be too burdensome and expensive to identify, locate, and produce in a readable or accessible format
5. Substantive reasons – court order, law, etc.

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So...

Can we recycle the client file?



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### Formal Opinion 2005-141

- **Question presented:** May Law Firm recycle client documents using a recycling service?
- **Conclusion:** Yes.
- 1. Oregon RPC 1.6(c): take reasonable efforts to ensure recycling company's conduct is compatible with the Law Firm's obligation to protect client information.
- 2. Reasonable efforts include, **at least**, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately.

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### RPC 5.3: Supervising Nonlawyer Assistance

- Nonlawyers in the firm:
  - Give appropriate instruction and supervision
  - Be responsible for work product
- Nonlawyers outside the firm:
  - Make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations
  - Varies depending on circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information

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### Formal Opinion No. 2016-191

- **Question Presented:** May Lawyer maintain electronic-only files and convert existing paper files to electronic form?
- **Conclusion:** Yes, qualified.
- With limited exceptions, there is no ethical prohibition against maintaining the "client file" solely in electronic or paperless form.
- **Exceptions:** documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds, and wills

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### Formal Opinion 2016-191

- Lawyers who maintain electronic-only client files should take **reasonable steps** to ensure the security and availability of electronic file documents during appropriate time periods, including following the completion of the matter or termination of the representation.
- Remember:
  - You may enter into agreements with a client re file retention.
  - Make sure the conversion to an electronic file does not violate retention agreement.
  - Does the conversion to client file present potential client hardship?
  - Convert original client documents with consent.

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### Document Retention & Destruction Policy

- Elements: retention period, retention and destruction guidelines
- Fee agreement: notify client that firm has right to maintain file, convert it, and store for **reasonable time period**
- At file closing: establish destruction date and calendar date
  - Return original documents
  - Notify client of conversion to electronic format
- Review the firm's electronic records for client related material
- Final review of file before destruction

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### How Long to Keep the File?

- In general: PLF recommends **10 years**
- Some more than 10 years:
  - Case with minor, at least until age of majority, maybe longer
  - Criminal law, at least until 2 years after client released or exonerated
  - Family law –children minors, or support obligations continue
  - Corporate books/records
  - Adoption files
  - IP files
  - Estate plans
  - Contracts/agreements still being paid off at end of 10 years
  - Problem clients

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### Scanning Mechanics – See PLF checklist

- 1. Scanned docs – but don't forget electronic documents
- 2. Use OCR Software and capability so searchable
- 3. Privileged documents need to be clearly marked
- 4. How are the electronic files backed-up
- 5. Consider password protection, as necessary
- 6. Consider storage/size/labor issues

Just a sampling of concerns with scanning

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• But ...

• What about the cloud?



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### Foraml Opinion 2011-188

• **Question presented:** May Law Firm contract with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

• **Answer:** Yes, qualified.

- 1. The lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.
- 2. Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry standards relating to confidentiality and security.

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- Reasonable steps may require:
  - Ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials.
  - Requiring vendor to notify lawyer of any unauthorized third-party access to the materials.
  - Investigating how the vendor backs-up and stores its data and metadata to ensure compliance with the lawyer's duties.
- Technology changes = reasonableness may change as well, causing technology to become obsolete or less secure
- Lawyers may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials

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### Cloud Computing Summary Considerations

- Financial security
- Limits on staff access
- Protection from 3d parties
- Reasonable amount of assurance
- Comparable technology
- Server locations

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### Home Office: Reality



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### Privilege & Confidentiality

#### Traditional office

- Designated work spaces
- In-person meetings
- Limited access
- Proprietary software
- Commercial-grade security
- Regular staffing
- On-site support

#### Remote/trial/pandemic setup

- Semi-designated work space
- No (or limited) in-person contact
- 24/7 open access
- Less secure tech
- Not staffed by employees
- Staff is remote

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### The "Client File"

- **RPC 1.16(d):** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as . . . surrendering papers and property to which the client is entitled, . . .

—Remember the client file...

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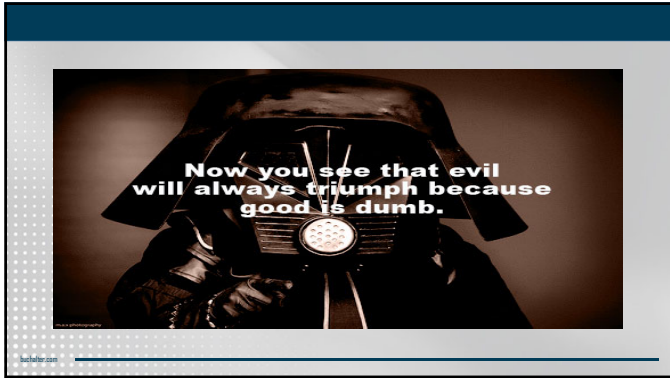
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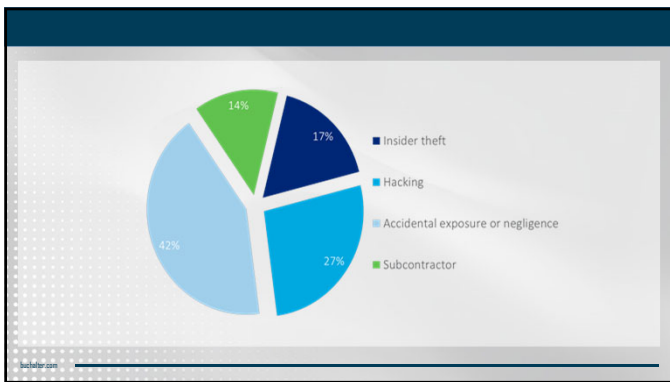
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- ### 10 Ways to Minimize Risk
- Use secure networks, where possible
  - Use encrypting technology
  - Inactivity timer
  - Location services
  - Remote wipe (and wipe on attempts)
  - URLs and QRs
  - Update your device
  - Don't jailbreak or root
  - Terms of Service – malicious apps
  - Virtual assistants

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David J. Elkanich is a Shareholder in Buchalter's Portland and Seattle offices, and Chair of the Firm's new Professional Responsibility Group.

Mr. Elkanich focuses his practice primarily on legal ethics, risk management, and discipline defense. He advises lawyers, law firms, in-house legal departments, as well as students and other professionals, on a variety of ethics issues, including conflicts of interest, confidentiality, fee disputes, internal investigations, law firm dissolutions and partnership disputes, malpractice and professional liability cases, and litigation issues, such as withdrawal and disqualification motions.

David is an avid speaker and tweets (occasionally) at @DavidElkanich.

David is an adjunct professor at Lewis & Clark Law School, where he has taught ethics since 2012. He received his J.D. from the University of Oregon School of Law and his B.A., magna cum laude, from the University of Arizona.

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