



New York State Bar Association
Committee on Professional Ethics

Opinion 950 (12/17/12)

Topic: Saving law firm mail in paper or electronic form

Digest: Law firm that retains electronic copies of mail may destroy the original paper mail, except when it finds that particular items must be retained in paper form, if it follows reliable procedures to identify and retain those particular items.

Rules: 1.6, 1.15(d)

FACTS

1. The inquirer is a legal services agency that provides services to members of a union. The Agency is located within the headquarters of the Union.

2. Mail received by either the Agency or the Union is received and processed by a third party vendor. The Agency has confidentiality agreements with the personnel of the Vendor who receive and process mail.

3. The Agency proposes to have the Vendor scan all mail and email it to the appropriate attorneys or other legal service personnel. Also, in some cases, the original “hard copy” of the mail would “automatically” be sent to the addressee. According to the inquiry, this would include documents “for which an original is required,” such as “motions, deeds, all client original signature documents, checks, transcripts, title documents [and] all escrow account statements and related documents.”

4. In other cases, the Vendor would retain the hard copy of the mail for one month. During that time, lawyers or other legal staff who receive the emailed scan of the mail may click on the item and thereby cause the Vendor to deliver the hard copy of that mail item to the addressee. After one month, if no legal staff has requested retention, the Vendor would destroy the hard copy of the mail in a secure manner, but the scanned copy would be maintained on a secure server indefinitely.

QUESTIONS

5. May the Agency ethically implement a plan to destroy the hard copy originals of certain items of mail, and retain only electronic copies, when legal staff has not requested that the hard copies of those particular items be delivered so as to allow retention?

OPINION

6. Before considering the question asked, we note briefly the issue of confidentiality. “A fundamental principle in the client-lawyer relationship” is that, in the absence of the client’s informed consent or except as permitted or required by the Rules of Professional Conduct (the “Rules”), “the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source.” Rule 1.6, Cmt. [2]. The attorney not only has an obligation to refrain from revealing such information, but also must exercise reasonable care to prevent its disclosure or use by “the lawyer’s employees, associates, and others whose services are utilized by the lawyer.” Rule 1.6(c); *see also* Rule 5.3(b) (specifying when a lawyer is responsible for conduct of an associated nonlawyer that would be a violation of the Rules if engaged in by a lawyer).

7. The employees of the Vendor will have access to confidential client information. We have not been given the details of the Agency’s confidentiality agreements with personnel of the Vendor. We may point out, however, that those agreements, and the Agency’s oversight over the Vendor’s adherence to them, must be sufficient to constitute reasonable care in protecting confidential information.

8. The inquiry also does not provide details about the servers on which electronic copies of mail will be kept, and in particular does not indicate whether those servers would be maintained by the Vendor or the Agency. In any event, the Agency must exercise “reasonable care to ensure that the system is secure and that client confidentiality will be maintained,” N.Y. State 842 (2010), and some of our opinions provide guidance as to how such care might be exercised.¹

9. We now turn to the question about destroying hard copies of mail items. In a recent opinion, we discussed ethical requirements to retain documents in their original form. N.Y. State 940 (2012). That opinion was not focused on items of mail; it related to records in general, and we think its principles apply in the more specific context presented here.

Items that must be retained in their original form

10. The inquirer has recognized that certain mail items need to be retained in their original hard copy form. This includes certain items specifically listed in the Rules, such as bank statements, when those items were received as paper copies in the first place. Rule 1.15(d)(1)(viii). It includes other kinds of documents as well, such as promissory notes and

¹ For example, the opinion cited above states in the context of internet server (“cloud”) storage that reasonable care to protect a client’s confidential information against unauthorized disclosure may include consideration of the following steps: “Ensuring that the online data storage provider 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”; “Investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances”; and “Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.” N.Y. State 842 ¶9 (2010); *see also* N.Y. State 709 (1998).

deeds. See N.Y. State 940 ¶¶ 9 – 10 & 13 – 14 (2012) (noting that whether records must be maintained in their original form will depend on the kind of record involved, and giving examples of documents in this category).

11. The proposed system includes two mechanisms for ensuring that mail is retained in hard copy when necessary. First, the Vendor would “automatically” send relevant legal staff hard copies of mail “for which an original is required.” Second, if the Vendor fails to identify such a document, there would be another opportunity to do so when the relevant legal staff reviews the email with the scanned document.

12. The adequacy of these two mechanisms would depend on the details of their design and implementation. It is unclear from the inquiry how the Vendor will identify mail for which an original is required. To the extent possible, the Agency should have a clear and reliable protocol that the Vendor can readily apply, but the inquiry does not describe any such protocol.

13. The inquiry also does not provide full details about the thirty-day opportunity for review by legal staff. It does not indicate, for example, whether there would be any mechanism for extension of the period, or review by another lawyer, when an assigned lawyer is on vacation or fully occupied with some other matter. In the absence of more information about the two mechanisms and their reliability, we cannot opine on the proposed system’s adequacy.

Items for which at least copies must be retained

14. As to some other mail items, there will be no ethical requirement to maintain the items in their original paper form, but the inquirer will be ethically required to retain at least copies. N.Y. State 940 ¶¶ 11 – 14 (2012). The proposed system, which includes a plan to keep electronic copies of all mail on a secure server indefinitely, should satisfy this requirement. In some cases, however, there may be constraints on the kind of electronic storage used.²

CONCLUSION

15. A system for retaining hard copies of mail when necessary, and keeping only electronic copies in other cases, may be permissible if the firm implements a reliable method for identifying those items that it is ethically required to be maintained in hard copy.

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² For example, in particular cases, the electronic copies might have to meet standards for future admissibility in evidence, *see* N.Y. State 940 ¶14. And when the item is one listed in Rule 1.15(d), copies must be maintained in a “medium that preserves an image of the document that cannot be altered without detection.” Rule 1.15(d)(3).