

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion 10-08

Topic:	Obligation to transfer electronic documents with file; cost allocation
Digest:	A lawyer's file includes all electronic and paper documents. The client is entitled to the entire file, except for certain internal documents. The cost of producing the electronic file is generally to be borne by the client.
Rules:	1.16; N.Y. State Bar Ops 780; 760; ABCNY Op. 2008-1; <i>Sage Realty Corporation v. Proskauer Rose Goetz & Mendelsohn</i>

QUESTION

When a lawyer departs from a firm and a client elects to retain the lawyer in the new firm, is the old firm required to transfer all electronic documents as well as paper copies of the file? Who is to bear the cost of production?

OPINION

Rule 1.16(e) provides "[U]pon termination of representation, a lawyer shall take steps, to the extent reasonably practicable....delivering to the client all papers and property to which the client is entitled..." The client is entitled to the file, and if the client has directed the old firm to transfer the file to the new firm, the old firm must do so. NYSBA Opinion 780 (2004)

The file includes all documents, including attorney work product, whether in paper or electronic format, except for documents which might violate a duty of nondisclosure to a third party, or otherwise imposed by law, and firm documents which were intended for internal use only and are unlikely to have real usefulness to the client or successor attorney.¹ This last category might include e-mails between members of the firm concerning administrative matters like instructions to perform a particular task and e-mails between members of the firm and opposing counsel concerning things like confirming the starting time of a deposition or court conference. ABCNY Opinion 2008-1.

¹ *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30 (1997); NYSBA Opinion 766 (2003)

The cost of accessing and transferring the electronic files is not an issue of ethics, but is a legal issue and has been addressed in the two decisions in *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*.² In these cases, the court determined that in delivering the client's file to the client, the attorney may charge the client for the costs of reproducing, assembling and delivering any documents in the file (except for copies made for the attorney's benefit³) in accordance with the attorney's "customary fee schedule," unless the client has already been charged by the law firm for the production of the documents in the law firm's possession. In the event that the electronic files are not readily accessible or missing, it is generally appropriate to charge the client for the cost of any retrieval or search, subject to court review in the event of a dispute.

CONCLUSION

For the reasons set forth above, the client (or the new firm, if the client has so directed) is entitled to the entirety of the file, both electronic and paper, from the old firm. However, reasonable and customary costs of reproduction, assemblage and delivery, are generally allocable to the client.

² 91 N.Y.2d 30 (1997); *on remand*, 294 AD2d 190 (1st Dept. 2002).

³ NYSBA Opinion 780 (2004).