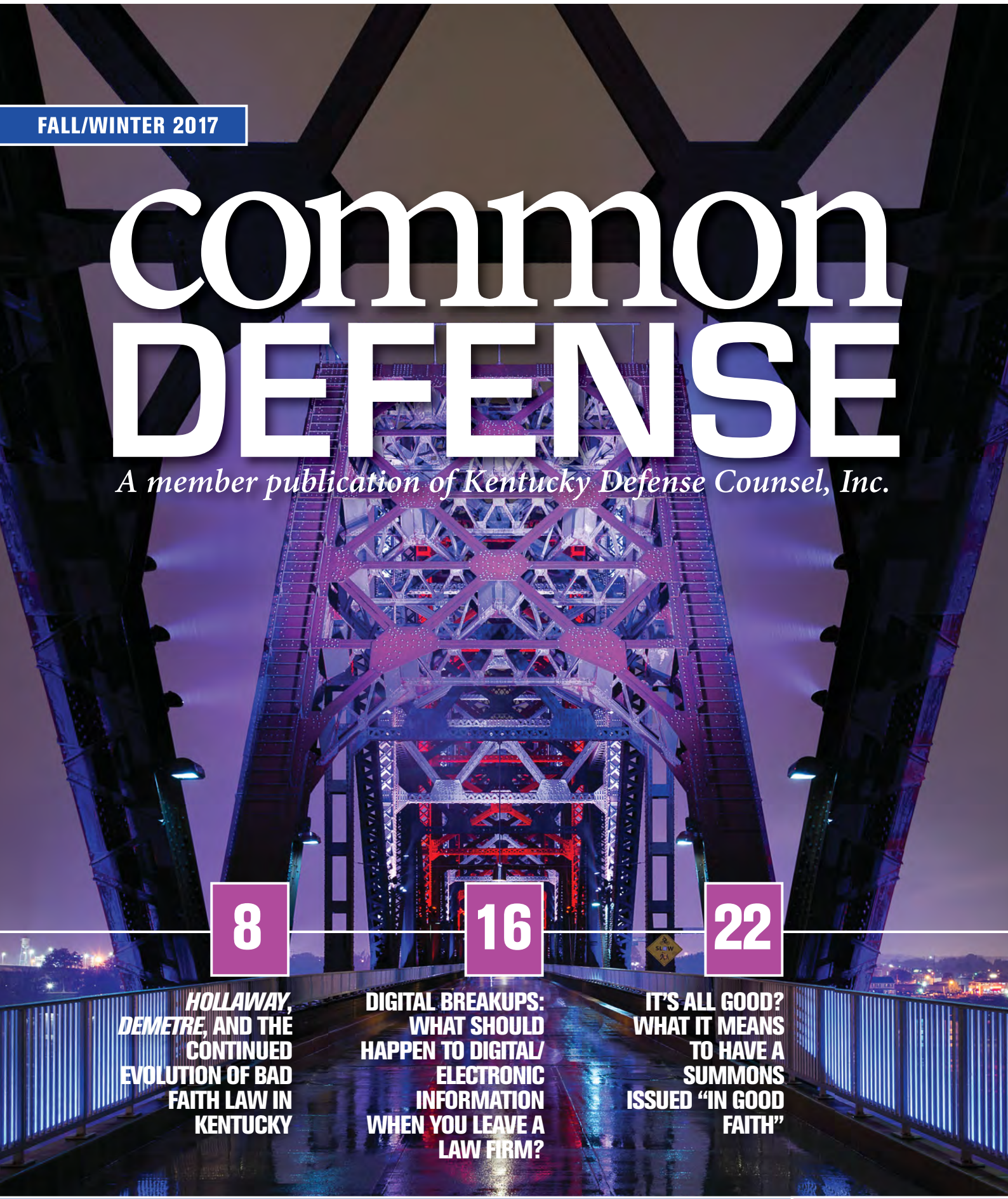
FALL/WINTER 2017

common DEFENSE

A member publication of Kentucky Defense Counsel, Inc.



DIGITAL BREAKUPS:

WHAT SHOULD HAPPEN TO DIGITAL/ ELECTRONIC INFORMATION WHEN YOU LEAVE A LAW FIRM?

By Tonya S. Rager and David A. Trevey • Kinkead & Stilz, PLLC

Lawyers have been leaving or changing firms for decades. Such departures or changes used to involve little more than getting new letterhead and making sure the yellow page ads and the "shingle" out front matched the new firm name. The digital world (i.e. the Internet) has changed that irrevocably.

There are several reasons the issues in this article are important and relate to your law practice. One study found that between the second and seventh year in practice, 53% of lawyers change their practice setting – meaning that you will more than likely either leave where you are or experience someone leaving you. *New Results from After the JD, Wave II: Seven Years Into a Lawyer's Career*, Researching Law (Am. Bar Found., Chicago, Ill.), Spring 2009, at 3. Regardless of whether you stay in one firm your entire career, have your own firm, or make multiple transitions, everyone in today's society (not just lawyers) uses electronic communications, uses electronic storage, and has a digital presence online. Learning to properly manage the different mediums when a change occurs is vital and deserves our attention, as it is highly unlikely that any one of us will make it through an entire career without confronting these circumstances.

Today, the considerations have multiplied as the modes and complexity of legal communications have increased. The ramifications for failing to consider the implications of attorney departures or changes in work status range from ethical improprieties to flat-out loss of business. Search for yourself online and you will see that despite never having paid for any "listing" with any particular service, your name and other information about your practice are listed on various sites. If you are lucky, your current firm website will appear first in the search results, followed by the unintended services that picked you up: AVVO, lawyers.com, Martindale.com, legaldirectories.com, lawyercentral.com, FindLaw, LinkedIn, Facebook, whitepages.com, lawyerratingz.com, manta.com, and so on. While you may be savvy enough to realize you should change your firm affiliation on LinkedIn and Facebook, what can and what should you do about other sites? What about your old firm's site? What about your e-mail, both those e-mails sent or received pre-departure and those e-mails that might come to that address after you leave? What steps and considerations should a lawyer and law firm undertake when digitally disassociating? This article will explore the considerations, both ethically and from a business standpoint, that lawyers and firms should consider when a disassociation occurs.

To Start

The main concern for any lawyer, whether leaving a firm or remaining in a firm after another lawyer's departure, is the clients' interests. This must be the starting point for any discussion about leaving a firm. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414 (1999). The concept of protecting clients' interests goes beyond what you might think or feel about the departure. Rather, it is an ethical duty that exists regardless of personal feelings (bad or good) toward the now-former colleagues. Those ethical considerations have been explored in depth on other topics such as contact with clients (before or after leaving a firm), solicitation of other persons in the firm (before or after leaving a firm), and possession and transfer of hard copies of client files, for instance. This article will steer clear of those issues to focus on the digital side of the breakup.

When it comes to electronic information, such as electronic mail, web presence, and electronic files kept on a server, lawyers have some difficulty applying that guiding principle of protecting client interests to these (relatively) new modes of information and communication. Electronic information is a hybrid of traditional types of information. Pleadings drafted and filed in a case clearly belong to the case and that client, but many of us now keep that information stored electronically, and, particularly for those who have form pleadings, we use that pleading as a template for future documents. Does that mean the pleading is up for grabs by the departing lawyer? Or, take e-mail – virtually no lawyer can now do his/her day-to-day work without it. But to whom does the e-mail belong? The server upon which the e-mail is stored and generated may or may not belong to the firm, but the e-mail account likely does. The departing lawyer is the author (or recipient) of the e-mail, and most of us have a sense that if it is something we wrote or something sent to us, it belongs to us.

If we, as lawyers, stop and consider the ethical rules surrounding departure from a law firm and the guiding principle that the actions taken by the departing lawyer and the remaining lawyer(s) must keep the clients' interests front-and-center, then how we provide for the treatment of electronic data – our digital disassociation, if you will – becomes less about the lawyers and more about best practices for fulfilling our fiduciary duties to our clients and to one another.

Ethical Considerations

Much has been written about lawyers leaving/changing firms and what conversations should occur and what information should be exchanged to allow the clients to choose their continued representation. It is obvious that attempts by either side to thwart those communications will not be viewed favorably by disciplinary overseers.

In general, lawyers who are departing a firm, as well as the lawyers remaining in the firm, have a duty to (1) keep clients informed – that is, to let the clients know that the lawyer is leaving if that lawyer has substantial responsibility for an active matter(s); (2) assure clients that their matter(s) will be competently handled; (3) honor the client's wishes regarding selection of counsel, including not taking actions that frustrate the representation and conveying accurate information so the client can make an informed choice of counsel; (4) preserve client confidentiality; and, (5) avoid conflicts of interest. In the context of digital information, those duties would include such things as making sure a departing lawyer who will continue representing a client post-departure is promptly provided with the paper copy of that client's file as well as the digital/electronic copy. And, when providing the electronic copy of the file, it should be obvious that you should not delete, rearrange, or edit the contents, which could justi-

fiably be viewed as a form of sabotage that impedes the representation of the client and negatively affects the client's case/matter. By the same token, if the client is remaining with the firm being left, the departing lawyer should not erase or alter items before departure.

Electronic Mail

What happens when the departing attorney's primary method of communication with clients is an e-mail address that is hosted by the former firm? Even though the firm may own the rights to the e-mail address, can it suspend, close, or forward the account without the leaving attorney's permission? Can persons who were not the intended recipients of e-mails sent by or to the lawyer read and act on them? Substantive e-mails are just digital letters. They are intended for receipt by the addressee. If they come from a client, e-mails are likely to contain attorney-client privileged materials. What duty does a lawyer have to protect his client's confidential information? What duty does a firm have to ensure that it protects confidential information and does not intentionally infringe on those communications that are no longer meant for the firm?

While this article is geared toward lawyers moving immediately from one private firm to another and the firms they leave, it should be noted that this is not always the case. Particular circumstances may dictate a wholly different analysis. For instance, if a lawyer is either leaving a firm with no concrete plans to continue the practice of law, leaving private practice to go in-house or take a government job, or retiring, a law firm may well be *obligated*, in order to discharge its duties, to keep the departing lawyer's e-mail active for a period of time. In such circumstances, the firm should keep that lawyer's e-mail address open for a reasonable time, create an appropriate auto-reply message indicating that the lawyer is no longer with the firm, provide personal contact information for the lawyer (if appropriate), and include a message to current and potential clients with an alternate firm contact for their continued needs.

How much time constitutes a reasonable time can be debated, and the answer may differ depending on the type of practice. While 30-60 days may be sufficient in a criminal law practice, that amount of time may be wholly unreasonable for a real estate or tax practice. Professional or commercial liability defense practices may deserve a different period of time. What is reasonable should be geared to each specific instance.

Fired lawyers? Suddenly disbarred lawyers? Deceased or incapacitated lawyers? No one can plan for each and every possible circumstance that may arise, but as long as decisions are guided foremost by protecting the clients' interests, then a law firm should be on solid ground. Such an approach not only fulfills the firm's fiduciary obligations, it just makes common sense.

But what about other breakups? An amicable departure from a firm? A not-so-amicable departure? Dissolution of the firm? Clients both staying and leaving? These present more difficult situations – situations in which personal feelings, business survival, and livelihoods can become intertwined, and lawyers and law firms may find themselves at odds over how digital information is to be treated, altered, maintained, transferred, deleted, etc. Any inquiry or analysis of how this information is handled should start from the standpoint of the clients' interest.

No one can plan for each and every possible circumstance that may arise, but as long as decisions are guided foremost by protecting the clients' interests, then a law firm should be on solid ground.

Kentucky lawyers are bound to protect confidences of their clients. SCR 3.130(1.6). When communicating about clients, their interests, or their matters, a lawyer must – according to the Supreme Court – "take reasonable precautions to prevent the information from coming into the hands of unintended recipients." SCR 3.130(1.6) cmt. 15. The Comment specifically states, however, that lawyers are not *required* to use "special security measures" if the method of communication has a "reasonable expectation of privacy." *Id*. Does the lawyer have a "reasonable expectation of privacy" in his or her electronic mail?

Most lawyers (and really, most people) tend to view their e-mail as "their" e-mail. Rightly or wrongly, many people use their "work" e-mail as their general e-mail – it is many times the fastest and most reliable way to communicate in a multitude of situations, not just with clients. We use e-mail to communicate internally, with other counsel, with courts, with potential clients, and even with our children's school and our spouses.

Taking the view that the e-mail "belongs" solely to the firm and may be discontinued at the snap of a finger or upon notification that a lawyer is leaving is outdated (if it was ever appropriate). Certainly, the firm may "own" the e-mail account, but if those communications are attorney-client in nature and the client has expressed the desire to remain with the departing lawyer, then logic would dictate that the firm does not "own" those communications and has a duty to ensure that communications between clients and the departing lawyer are not interrupted or impeded. Discontinuing the departing lawyer's e-mail account without, at a minimum, providing clients with contact information for the departing lawyer – the person to whom they have addressed their message, after all – is no different than receiving a letter in the mail or a fax and failing to forward it to its intended recipient. We all are probably familiar with our duties under the "errant fax or e-mail" rule, SCR 3.130(4.4(b)), which requires us to refrain from reading the content of the communication and to notify the sender. Similarly, failing to notify/forward a client communication that comes to the e-mail account of a departed lawyer and is clearly intended for that lawyer should be considered on par with failing to forward letters, pleadings, court notices, or other information critical to the representation of the client. Moreover, failing to perform this duty may expose the firm to liability. If a message is sent to the departed lawyer and contains information critical to the representation of the client, if that information is not communicated to the lawyer, and if the former law firm's failure to communicate leads to an adverse outcome for the client, then the former client and/or departed lawyer may ultimately look to the former firm to recoup their loss.

Websites

Demanding digital dissociation can be difficult enough when the firm controls the medium such as the departing lawyer's e-mail. It can be more difficult when a third party is involved, such as many of the websites that contain information on the lawyer and the law firm. A departing attorney's first job is to distinguish between the two.

Does the firm have its own website? As part of a discussion about leaving a firm, there should be a conversation about when the website administrator will remove the lawyer's profile from the firm's website. Even if the firm pays a third party to design, build, and administer its website, the firm controls the rights to content. Law firms usually do a pretty good job of removing pages from their website that are dedicated to the departing lawyer. However, there are occasions where that is not true and a reasonable

time passes without the information's removal. In these circumstances, it may become necessary for a lawyer to make a written request to be removed from the firm's site, or, in the case of a firm that totally dissolves, to have the website shut down entirely. The reason to care about the accuracy of information on these sites is the same as above – protecting clients and their interests. It is an incorrect representation to state publicly (on the Internet) that a lawyer works for a firm when he/she does not. Correcting this error is even more important when the departed lawyer's web page contains contact information that is no longer correct.

But what about other websites that are not controlled by the law firm or the lawyer? The question for the departing lawyer and the law firm is who has responsibility for ensuring that those third-party sites reflect accurate information?

These other websites generally fall into three groups. First are websites maintained by professional associations, organizations, and courts. These sites are generally easy to update, and the responsibility for updating outdated information falls on the departing lawyer. Indeed, most of these organizations (think bar association or court websites) explicitly put that responsibility on the individual lawyer already. (The Kentucky Bar Association, for example, requires updated contact information be provided within 10 days.)

A second group of websites are quasi-professional and/or quasi-social media sites, such as LinkedIn and Facebook, that are also relatively simple to update. Again, the information on these websites should be under the control of the individual lawyer, who has the responsibility for the personal and professional information displayed on these websites.

The final group of third-party websites presents a more difficult prospect. Many Internet sites that show lawyer listings simply pull data from other sites, reproduce it without your explicit permission or even knowledge, and bill themselves as an alternative search location for legal services. Some are known quantities that are affiliated with and/or owned by large legal services companies. Others replicate data found on the Internet by "crawlers" and do not generate their own content, but rely on others – ostensibly clients and former clients – to provide content. Some of these sites have a place to which requested changes can be submitted; some do not. The good news is that if the lawyer corrects his or her information in key places, it tends to filter down to these other sites over time. In the current environment and structure of the Internet, the best practice for the departing lawyer is to Google him or herself and correct what can be corrected.

Vigilance is key for both the lawyer and the law firm. Some firms have an employee devoted to marketing or public relations, and part of that person's job duties is to undertake these tasks. But for those lawyers departing a firm who do not have such a resource, the responsibility for updating third-party websites largely falls on the individual lawyer.

Other Digital/Electronic Files

In addition to e-mail and websites, departing attorneys and their former firms must decide what to do with internal electronic files and data. Who "owns" an attorney's Outlook calendar, old e-mail, and electronic contacts? What about bookmarks, Internet cookies, auto-generated and filled-in usernames and passwords, and browser histories? All of these types of information in digital format will likely be dealt with during a lawyer's dissociation with a firm, whether they are talked about or not.

Calendars associated with firm e-mail may contain a mix of case-asso-

ciated appointments, personal appointments, birthdays and both professional and personal reminders ("change home air filters!!!!"). Synced contacts from an attorney's cell phone, including family members and friends, are similarly unlikely to be interesting to the law firm; yet, as the information resides, at least in part, on the firm's systems, servers, and off-site back-up, should those items also be considered property of the firm? What about the same information that is synced to the lawyer's cellphone? Is it the firm's property on the lawyer's firm-issued laptop, but the lawyer's property on his or her personal (non-firm-issued) cellphone? Bookmarks, cookies, and auto-fill fields are all examples of information that may be contained on the lawyer's work computer, but that carries for the lawyer some expectation of privacy (think Social Security numbers or credit card information).

Presently, there are no definitive standards for any of these issues. While there are a multitude of potential solutions, no "rules" have yet been established. Moreover, different types of data may warrant different treatment. For instance, passwords entered into particular websites may be more appropriately and economically addressed by wiping the attorney's computer back to factory settings, while an Outlook calendar may be appropriately downloaded to a thumb drive and provided to the attorney. We are not making any hard and fast recommendations here because each situation and each form of electronic data is different. Instead, we are suggesting that the treatment and handling of the digital information and its platform should be tailored to the specific circumstances.

Some Thoughts

The above forms of digital information now pervade every attorney and law firm's day-to-day practice. When lawyers leave a law firm or when a law firm dissolves, the handling of digital information is critical and will only become more so as society moves toward ever more technologically advanced (and integrated) systems and operations.

This increasing digital integration requires lawyers and law firms to carefully consider their approach to such information. Although we have offered some opinions above regarding how different digital formats should be appraised and handled, the bald truth is that there is a dearth of case law – or even ethics opinions – to provide substantial guidance to either side of a breakup or dissolution.

Perhaps the best advice would be for law firms and lawyers to preemptively spell out how digital information will be treated upon attorney disassociation to avoid these uncertainties and provide a roadmap for actions to be taken, or not taken, when such a disassociation occurs. One of the many challenges in addressing these issues upfront is that digital media and technology are currently in a state of rapid and constant change. For example, relatively recently, the state of the art for digitally storing information used to be an on-site server; now, however, cloud-based storage is the norm. Different storage media may forcibly change how firms and lawyers analyze appropriate steps to take upon disassociation. Nonetheless, a well-defined electronic data policy could both provide much-needed guidance to the parties and prevent the issue from devolving the parties' relationship into outright animosity.

While there is currently no well-defined body of law to guide lawyers leaving law firms or to set the parties' relative rights and responsibilities vis-à-vis the various forms of digital information that permeate the practice of law (and many other industries/professions), there are a few guideposts out there. See, for instance, Robert W. Hillman & Allison D. Rhodes, *Client Files and Digital Law Practices: Rethinking Old Concepts in an Era of Lawyer Mobility*, 43 Suffolk L. Rev. 897 (2010). One large bar association has issued an opinion on how to handle post-dissolution e-mails, stating that the departing lawyer has no right to an auto-reply message, but the law firm has an obligation to review e-mails to the departed lawyer and forward those e-mails involving the departed lawyers' clients. *See* Philadelphia Bar Association Professional Guidance Committee, Op. 2013-4 (2013). Respectfully, we disagree with the position of the Philadelphia Bar Association because it fails to recognize the character of digital information. While the law firm from which the lawyer departed does have an obligation to protect client interests, the departing lawyer also has that responsibility. Surely, no one would argue that the law firm should open a court notification or letter addressed to a specific departed attorney and then make a judgment about whether the notice or letter should be forwarded to the lawyer or not. That, however, is just what the Philadelphia Bar Association did in the digital context.

The sources that do exist, paltry though they are, show that these issues are being analyzed in relation to property law, contracts/agreements between the law firm and attorney, and equitable considerations. *See, e.g.*, Edina Harbinja, *Legal Nature of Emails: A Comparative Perspective*, 14 Duke L. & Tech. Rev. 227; *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (although not a lawyer-leaving-a-law-firm case, holding that a departing employee's e-mails with her lawyer sent and received on her web-based personal e-mail account, but accessed through her work computer, were privileged); *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436 (2007) (again, although not a lawyer-leaving-a-law-firm case, holding that e-mails between a physician and his lawyer were not privileged where hospital's policy forbade personal use of hospital e-mail and reserved hospital's right to monitor, access and disclose communications transmitted on hospital e-mail server).

Traditional property law seems to indicate that whoever owns the tangible property where the information is housed, owns the information. This body of law is ill-equipped to deal with today's technological world of syncing phones and data that is stored both everywhere and nowhere. Did you sign a contract or partnership agreement with the firm that indicated what would happen with such files? Where do the equities lie? Who did the drafting? Lawyers can argue for years over subjects like this, but it turns out that there is relatively little authority that provides reasoned, structured guidance to law firms and lawyers. ABA Formal Opinion 99-414 (1999) addresses many of the ethical considerations for lawyers and law firms parting company, but it simply does not sufficiently address the issues raised in this article – mostly because such issues did not exist in 1999. As noted by one panelist at the 38th ABA National Conference on Professional Responsibility, many of these issues are "not expressly covered by ethics rules or case law. No cases say that a firm must give out a departed lawyer's contact information or take certain steps with the lawyer's email or voicemail such as forwarding messages. . . . This is an area bounded by very few rules and very little authority." Joan C. Rogers, *Panelists Describe What to Do, or Not, When Lawyers Move from Firm to Firm*, ABA/BNA Lawyers' Manual on Prof'l Conduct (June 6, 2012) (quoting Ronald C. Minkoff).

Breakups are never easy for the lawyer leaving or for the law firm being left. We return to the overarching theme of this article – that the interest of the client must be paramount over any other competing interests. With that guidepost and some common sense on the part of everyone involved, law firms and departing lawyers can fashion reasonable and appropriate ways to protect clients and meet the challenges of the constantly changing digital world in which we now live.

Tonya S. Rager and David A. Trevey are partners in firm Kinkead & Stilz, PLLC in Lexington. They practice in the Professional Liability Defense Department and have dedicated their careers to the defense of all types of professionals, physicians, hospitals, clinics, dentists, podiatrists, chiropractors, lawyers, accountants, architects, engineers, etc. They regularly practice from Pikeville to Paducah. trager@ksattorneys.com dtrevey@ksattorneys.com