Bar Counsel raised a concern recently regarding the storage and use of electronic records. Upon reading ABA Formal Opinion 11-459 (8/4/11), Bar Counsel asks: "Whether Maine Advisory Opinion #195 dealing with confidentiality of email information is still 'good and worthy'?

Opinion #195 interprets "confidentiality of information" under now former Bar Rule 3.6(h). The Commission's opinion in #195 "employing the . . . general standard requiring lawyers to 'employ reasonable care and skill and applying the lawyer's best judgment in the performance of professional services' (Maine Bar Rule 3.6(a)) [instructs] [w]hen exercising professional judgment in choosing a particular form of communication, lawyers should consider both the content of the communication as well as the security of the email address to which it is being sent."

While ABA Formal Opinion 11-459 takes a softer, gentler, more cautious approach, Maine Bar Opinion #195 prevails and is still "good and worthy."

Since at least 1986, the Commission has issued a series of opinions relating to confidentiality of records, both paper and electronic. See Opinion #74 (10/1/86); Opinion #183 (1/28/04); Opinion #185 (4/1/04) and Opinion #194 (6/30/08).

Opinion #195 (6/30/08) is the most recent in that series and is guaranteed to be followed as computer technology moves into its cloud phase. The world is changing rapidly. We store records in clouds, do our work on Smart phones, tablets and other devices by Wi-Fi and daily suffer security breaches. These devices are frequently employer provided, but then are also often used for personal communications as well. They are lost, stolen and discarded daily with the information they contain ripe for the picking. Attorneys should remain familiar with these prior Commission Opinions, the current Maine Rules of Professional Conduct, particularly Rule 1.6, and the principles developed on the foundation of former Rule 3.6.