

ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday December 19, 2019

No. 3 Update and possible action regarding Ethics Opinion draft

- o EO-19-0009

Committee member Kimberly Demarchi will present information at the meeting.

SUPREME COURT OF ARIZONA ATTORNEY ETHICS ADVISORY COMMITTEE

Ethics Opinion File No. EO-19-0009

(Draft for consideration at December 2019 meeting)

Lawyers must retain sufficient information regarding the work they have done on a matter to permit the client to understand what was done for them and to permit a subsequent lawyer to take up the matter if the lawyer is discharged, withdraws, or is unable to continue the representation for other reasons such as death, disability, or discipline. This obligation informs the lawyers' obligations with regard to what materials they keep, how they store and organize those materials, and what they do with records at the end of a representation.

ISSUE PRESENTED:

What are the ethical duties of lawyers regarding retaining client files and providing clients with access to those files?

FACTUAL BACKGROUND:

The Committee received a request for an opinion regarding whether case notes maintained in internal practice management software constitutes a portion of the client file to which the client is entitled upon request. The topic of file-related obligations is not one the Committee has previously had the opportunity to address, though it has been the subject of numerous advisory opinions from the State Bar's ethics committee. Given the relevance of this topic and the frequency of requests for guidance through opinion requests and the ethics hotline, the Committee has expanded the scope of this opinion to address file-related obligations more generally.

RELEVANT ETHICS OPINIONS:

State Bar of Arizona, Rules of Professional Conduct Committee, Opinion Nos. 15-02, 09-04, 09-02, 08-02, 07-02, 05-04, 04-01, 98-07, 93-03, 91-01.

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT:

ER 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] [A] lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

ER 1.4 Communication

(a) A lawyer shall:

. . . .

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information;

....

ER 1.15 Safekeeping Property

....

(d) . . . Except as stated in this Rule or otherwise permitted by law or by agreement between the client and the third person, a lawyer shall promptly deliver to the client . . . any funds or property that the client . . . is entitled to receive and, upon request by the client . . ., shall promptly render a full accounting regarding such property.

ER 1.16 Declining or Terminating Representation

....

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

....

COMMENT

[9] Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client already has received one copy of them.

[10] Even if the lawyer has been discharged by the client, the lawyer must take all reasonable steps to avoid prejudice to the rights of the client.

[11] Lawyers may fulfill their ethical obligations with respect to client files by returning the file to the client. File retention policies should be disclosed to the client, preferably in writing and at the inception of the relationship.

Arizona Supreme Court Rule 41. Duties and Obligations of Members

The duties and obligations of members shall be:

....

(i) To protect the interests of current and former clients by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently.

OPINION

Lawyers do not maintain files for the sake of maintaining files, but rather because keeping records of what they have done or plan to do in the course of representation is part of diligent, competent representation. The Rules of Professional Conduct do not expressly describe what the contents of a lawyer's file should be, but they do impose obligations that assume the existence of an adequate record of the lawyer's work. Those obligations include:

- Providing competent representation that demonstrates the "thoroughness and preparation reasonably necessary." ER 1.1.
- Keeping the client "reasonably informed" about the status of the matter the lawyer is handling. ER 1.4(a)(3).

- Promptly complying with reasonable requests for information. ER 1.4(a)(4).
- Planning for the lawyer’s inability to continue their law practice, either temporarily or permanently, including through unanticipated circumstances beyond the lawyer’s control. Ariz. S. Ct. R. 41(i).
- Taking steps to avoid prejudice to a client who terminates the lawyer’s representation, including by providing the client with both “the client’s documents” and all documents “reflecting work performed for the client.” ER 1.16.

These obligations serve as the touchstone for determining the answers to practical questions about what files lawyers should retain and how they should retain them. Moreover, because the focus of record-keeping analysis is based on the purpose of making or retaining a document, the guidance that follows applies to all records generated in the course of a representation, regardless of whether they are in hard copy or electronic form or where they are stored in a system that intermingles them with documents to which the client is not entitled.

What Materials Must Lawyers Retain in Their Files?

Lawyers must retain sufficient information regarding the work they have done for the client to permit the client to understand what was done for them and to permit a subsequent lawyer to take up the matter if the lawyer is discharged, withdraws, or is unable to continue the representation for other reasons such as death, disability, or discipline.

The specific materials to be kept will depend on the nature of the work being done. Lawyers do not need to keep every document generated in the scope of the representation, so long as the materials kept in their file are sufficient to meet the standard above. For example, a lawyer may discard handwritten notes that are later turned into a memo or may mark up a draft brief by hand and discard that copy once the edits have been made.

How Should Lawyers Store Their Files?

Lawyers should consider the security of their files when determining how to store them. Security considerations include both preservation (such as maintaining backup copies) and access (ensuring that unauthorized persons may not have access).

Files may be stored in electronic, rather than hard-copy form, provided that security considerations are addressed and the client is not otherwise prejudiced. For example, certain hard copy documents may have particular legal or evidentiary status, such as ink-signed wills or contracts. It is advisable to check with the client or offer to return the document before destroying hard copy documents provided by the client to the lawyer.

Lawyers should maintain organized files so that they may be promptly provided to clients in the event of termination, withdrawal, or inability to continue representation. It is important that files be continuously maintained, rather than organized only at the conclusion of a representation, transaction, or proceeding, so that clients can be assisted in the event of lawyer’s sudden, unanticipated death or disability. *See* Ariz. S. Ct. R. 41(i).

Once a matter has concluded, the lawyer’s obligation to continue to retain closed files depends on the nature of the representation and the documents. Again, prejudice to the client is the standard on which the lawyer’s obligation is judged. At a minimum, lawyers must give client sufficient notice before a file is destroyed to permit the client to request a copy while the file remains available. In addition, lawyers can generally satisfy their obligations by returning files to the client.

Rather than waiting until an issue arises, or until the conclusion of the representation, lawyers are well-advised to communicate with their clients about their file retention and access practices early in the representation. Lawyers can obtain informed consent to a file retention policy in advance by incorporating it into an engagement letter or similar paperwork, provided disclosure to the client is adequately clear.

What File Materials Must Be Provided to Clients?¹

The client is entitled to a copy of the file documents the lawyer was required to retain, as described above. Per ER 1.16, comment 9, the client is not entitled to internal memoranda that relate solely to practice management issues such as billing, scheduling, and staffing. The client's right to a copy of file documents is based on the nature of the documents, rather than the location where the documents were stored. Lawyers will find it easier to comply with their duty to provide a copy of the file to the client, and to do so promptly, if they store their files in a manner that separates or flags the documents that must be produced from those that need not.

The client is entitled to a single copy for free, and the lawyer may charge for additional copies or special copying requests that have associated costs, such as, scanning a file maintained in paper form. Lawyers may satisfy their obligations by providing copies throughout the representation, and do not need to provide additional free copies of those documents previously provided at the end of the representation. Of course, the lawyer may choose to provide more documents or copies than are required.

¹ Note that this opinion addresses only what the client is entitled to under the Rules of Professional Conduct. The client may be entitled to more or different documents in other contexts, for example in the context of legal malpractice litigation.

ETHICS OPINION REQUEST



RECEIVED

MAY 01 2019

Request for Ethics Opinion

CLERK SUPREME COURT

April 30, 2019

FILED
MAY 01 2019
JANET JOHNSON
CLERK SUPREME COURT
BY: *das*

Supreme Court of Arizona
Court Clerk's Office
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231

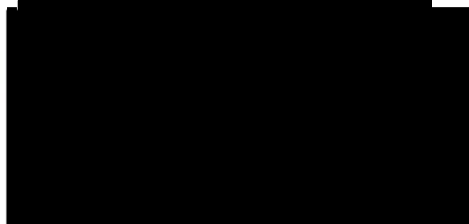
EO-19-0009

Re: Request for Ethics opinion

Dear Clerk:

Pursuant to Arizona Supreme Court Rules, Rule 42.1 please find enclosed a brief statement outlining the question presented, the facts and a brief discussion of the issues.

Should you require anything further in order to process this request, please contact me via email



Enc:

Question Presented:

Does a lawyer have an ethical obligation to provide to the client, at the client's request upon termination of the representation, electronically stored file "notes" which are entered by the lawyer and/or non-lawyer, office staff?

Facts:

Our law firm uses an electronic case management system (CMS) that *inter alia* allows for lawyers and office staff to electronically enter "notes" in the system. These notes are electronically stored along with other case information. The purpose of the notes varies from lawyer to lawyer. Some lawyers enter comprehensive notes, which may include everything from case planning and strategy to communication between the lawyer, a client, and non-lawyer office staff. Our firm has a document retention and destruction policy, which is referenced in our retainer agreement. Our firm expects lawyers to maintain electronic case notes so that if the case is reassigned to a different lawyer, the new lawyer can quickly come up to speed in prosecuting the case. Although the retention/destruction of these electronically entered notes are not specifically mentioned in the policy, our firm currently retains these electronically entered notes indefinitely. The lawyers at this firm have differing interpretations of Ethic Opinion 15-2 with some arguing that the opinion mandates the release of electronic notes.

Discussion:

Although the term "client file" is not defined by the Rules of Professional Conduct, Ethics Opinion 15-2 provides some guidance as to what is a client file in its conclusion that lawyers are ethically obligated, upon a client's request at the conclusion of representation, to provide the client with the client's documents and all documents reflecting work performed for the client. This obligation does not require lawyer to retain paper or electronic documents generated or received in the course of the representation, that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client at the conclusion of the representation.

However, the opinion goes on to reference Comment 9 to E.R. 1.16(d) that holds that:

Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client already has received one copy of them.

This request is an attempt to reconcile the conclusions reached in [Ethics Opinion 15-2](#) and Comment 9 to E.R. 1.16.