

MEMORANDUM

Date: October 21, 2019
From: Michael Aaron, Kim Demarchi, Daniel Mazza, Geoff Trachtenberg
To: Attorney Ethics Advisory Committee
Re: Opinion Request EO-19-0009/Attorney File Retention and Access
Discussion Outline for October 24, 2019 Committee Meeting

Our subcommittee has been charged with examining attorneys’ ethical obligations as they relate to retaining client files and providing clients with access to those files. The underlying opinion request, EO-19-0009, was specifically focused on obligations relating to case notes maintained in internal practice management software, but the Committee requested that we consider file-related obligations more generally, as this is not a topic on which the Committee has previously issued an opinion.

This memorandum provides a summary of the topics we intend to cover and our proposed approach to those topics. It is provided for discussion at the October 24, 2019 Committee meeting, with the expectation that we will prepare a draft opinion based on that discussion for review at the November meeting.

Relevant Rule Provisions

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) All 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.

Prior Advisory Opinions

Although none of the opinions of the State Bar's Rules of Professional Conduct Committee (RPC) have the same effect in disciplinary proceedings as do opinions of this Committee, the numerous advisory opinions issued by that committee relating to file issues provide a sense of the types of issues on which attorneys have previously sought and received guidance. Opinions are listed in reverse chronological order; the most relevant opinions are marked with an asterisk and have been included with this memorandum.

- **Opinion 15-02.*** Lawyers may discard documents generated during the course of 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."

Modifies prior opinions 13-02 and 08-02. Clients are only entitled to one free copy of their file; lawyers may charge for additional copies, including for copying documents provided to the client during the course of the representation.

- **Opinion 13-02.** In extreme circumstances where the safety of a client or third party may be jeopardized by providing client with certain documents, lawyer may refuse client's request for copies of documents. Lawyer must take other steps to fully inform the client of the documents' contents and the reason for withholding copies.
- **Opinion 09-04.** Lawyers may use an online file storage and retrieval system, provided that reasonable precautions for security are maintained.
- **Opinion 09-02.** In opinion primarily about withdrawal and termination of representation, notes that client is entitled to client file at withdrawal regardless of the reasons/circumstances for withdrawal.
- **Opinion 08-02.*** Encourages lawyers to establish a file-retention policy and communicate it in writing at the beginning of the lawyer-client relationship. Addresses topics to address including length of retention, which depends on the nature of the documents and the representation. Lawyers who do not communicate about policies in advance should not purge files of documents without notice to and permission from the client.
- **Opinion 07-02.** Lawyers may keep both current and closed files in digital rather than paper form, but may not destroy original paper client documents or paper documents the lawyer has reason to know the client wants them to retain.
- **Opinion 05-04.** Digital storage of files is not unethical, but lawyer must take "competent and reasonable" steps to ensure client's information is not lost or destroyed and that client confidences are maintained.
- **Opinion 04-01.** Lawyer who is owed money by a former client may a retaining lien on client file under generally applicable law regarding retaining liens. However, lawyer may not refuse to turn over specific documents that the client needs for other purposes, because of prejudice to client.
- **Opinion 98-07.*** Absent a governing legal rule, length of time a lawyer must retain a closed file depends on the "lawyer's judgment of the client's reasonable need for the file materials" considering such factors as statutes of limitations and the uses for the documents. Some files should be maintained indefinitely, others may be destroyed with reference to time specified by abandoned property laws. Lawyer may also fulfill obligations by tendering file to client or client's representative, in certain circumstances. Recommends adoption of a file retention policy and requires written notice either at termination of representation or before destruction of file.
- **Opinion 93-03.** Lawyer who has provided a complete copy of the file to the client may charge for requests for additional copies.
- **Opinion 91-01.** Client stopped communicating with lawyer, who possessed various documents provided to lawyer during course of representation. Lawyer should make reasonable efforts to reach the client. If those efforts are unsuccessful, lawyer must retain the documents and treat them as abandoned property, following applicable law. Missing client does not waive confidentiality rights under ER 1.6, so documents cannot be turned over to third parties without consent.

Proposed Topics and Approach

This proposed outline covers all of the generally applicable file-related topics addressed in advisory opinions by the RPC. The Committee's guidance regarding whether all of these topics should be addressed in a single opinion, or at this time, would be appreciated.

Note that this analysis is intended to apply to all records generated in the course of a representation, regardless of whether they are in hard copy or electronic form. The approach we have taken is based on the relevance of a record to the matter being handled, not the format in which it is generated (paper, email, electronic file, etc.).

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 (death, disability, suspension, disbarment, etc.). 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.
 - 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 may be advisable to check with the client or offer to return the document before destroying a 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.
 - Drop a note regarding the importance of succession planning generally in order to ensure that clients can be assisted in the event of a lawyer's sudden, unanticipated death or disability, reference Rule 41.i.

- Lawyers' obligations to continue to retain closed files depend on the nature of the representation and the documents.
- Lawyers can generally satisfy their obligations by returning files to the client. (Do we want to address the missing client situation – e.g. 91-01?)
- Lawyers must give clients sufficient notice before a file is destroyed to permit the client to request a copy while the file remains available.
- Lawyers are well-advised to communicate with their clients about their file retention and access practices early in the representation, before an issue arises.
- 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?

- The client is entitled to a copy of the file documents the lawyer was required to retain (as described above).
- 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 (e.g., 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.
- 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.