ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday January 30, 2020

No. 5 Update and possible action regarding Ethics Opinion draft

o EO-19-0009

Committee member Kim Demarchi will present information at the meeting.

SUPREME COURT OF ARIZONA ATTORNEY ETHICS ADVISORY COMMITTEE

Ethics Opinion File No. EO-19-0009

(for consideration at January 2020 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 concerning 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) Al 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 preserving 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. Files must be continuously maintained, rather than organized only after 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 a 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.[1]

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?[2]

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.

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[1] If a lawyer makes a reasonable effort to return the file to the client and give notice that the file will be destroyed if the client cannot be reached to receive the returned file, then the lawyer may treat the file as abandoned property subject to applicable law. *See* State Bar of Arizona, Rules of Professional Conduct Committee, Opinion No. 98-07.

[2] 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.

RED LINE OF EO-19-0009

SUPREME COURT OF ARIZONA ATTORNEY ETHICS ADVISORY COMMITTEE

Ethics Opinion File No. EO-19-0009

(~~Draft~~ for consideration at ~~December 2019~~January 2020 meeting)

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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~~ Files must be continuously maintained, rather than organized only ~~at the conclusion of~~ after 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).

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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.[1]

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[1] If a lawyer makes a reasonable effort to return the file to the client and give notice that the file will be destroyed if the client cannot be reached to receive the returned file, then the lawyer may treat the file as abandoned property subject to applicable law. *See* State Bar of Arizona, Rules of Professional Conduct Committee, Opinion No. 98-07.

[2] 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.

ADVISORY OPINION 98-07

STATE BAR OF ARIZONA

State Bar of Arizona Ethics Opinions

98-07: Client Files

6/1998

This opinion discusses an attorneys responsibilities for a client's file after termination of representation. [ERs 1.4, 1.15, 1.16]

FACTS:[1]

An attorney with a sole practice recently moved from private practice to employment with a government agency, a County Public Defender's Office, and an attorney with a domestic relations practice have each inquired about retention and destruction of client files after representation of a client has ended.

The sole practitioner is concerned with how long client files in the practice areas of criminal (felony and misdemeanor), divorce, corporate representation, securities representation and commercial litigation should be retained. The expense of retention, as well as the needs of the past clients are of concern.

The Public Defender's Office is concerned about whether or not its current document retention/destruction policy should be updated. The Public Defender's Office also asks who owns the files, the Public Defender's Office or the client and whether or not the Public Defender's Office is ethically obligated to give its clients the original files, either upon request or in lieu of destroying the files. Several factors causing files to be held longer include the increasing length of sentences, growing imposition of lifetime probation, and new laws as to the use of predicate prior convictions (both misdemeanor and felony) to enhance or affect punishment. Also relevant are the expense of file maintenance and the larger initial expense of microfilm or electronic storage.

The domestic relations attorney raises similar issues. That attorney includes a paragraph in written retainer agreements which provides, in part:

> At the end of the case, and upon final payment of all sums outstanding, Attorney shall return original file materials provided by Client. Clients are provided with copies of relevant documents on an on-going basis, and it is Client's responsibility to keep such documents. Attorney shall have no duty to provide copies of those documents to Client or successor counsel, and if such copies are later requested, they will be made at Client's expense. The file remains the sole property of [Attorney] and will not be transferred to Client or successor counsel . . . upon payment of copying costs, Attorney shall provide copies of file materials at Client's request; however, the personal notes of the attorneys, paralegals, and secretaries, shall not be copied. Attorney shall not be responsible for maintaining any file materials longer than five years following the end of the case or

termination of representation, whichever occurs sooner.

The sole practitioner does not state what, if any, file retention policy was in place upon undertaking the client matters. The domestic relations lawyer keeps all files indefinitely, even though the client retention agreement allows destruction after five years.

As to the Public Defender's Office, pursuant to A.R.S. § 41-1351 the State of Arizona Department of Library, Archives & Public Records maintains a Records Retention and Disposition Schedule for all State and County offices. These schedules contain the comment: "Records may be kept beyond their designated retention periods only where required by law or regulation, or if they are involved in current or pending litigation."[2] The inquiring Public Defender's Office follows this schedule and has a records retention/destruction schedule that is based on the type of offense involved. Homicide and lifetime probation files are kept indefinitely; other felony files for ten years; misdemeanor files for five years; juvenile files for five years; appeal files and post conviction relief (PCR) files for ten years; and, mental health files for five years.

Except as outlined above, the inquiring attorneys do not provide information as to what notification is provided clients concerning document retention policies at the time of retention for the matter, at the conclusion of the representation or prior to destruction of the files.

Questions Presented

1. What are the ethical guidelines as to client file retention and destruction of a client's file after representation of the client on a matter has terminated?

2. May an attorney ethically refuse to copy or turn over to a client internal documents such as personal notes of attorneys, or other parts of a file?

3. Must a County Public Defender's Office, or any lawyer, give a prior client the client's file upon request or in lieu of destruction.

Relevant Ethical Rules

ER 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account . . . . Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be reserved for a period of five years after termination of the representation.

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 papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

* * * * *

Comment

The provisions of paragraph (d) are substantially identical to DR 2-110(A)(2) and (3).

ER 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Relevant Arizona Ethics Opinions

Opinion No. 81-32, November 2, 1981

This opinion addresses issues of an attorney's retaining lien under Ethical Considerations and Disciplinary Rules relevant at the time. When fees have been paid and no lien exists, a client's papers must be returned, not including the internal memos of the attorney. In particular, the opinion states:

> . . . the attorney must return to his client those papers and documents which belong to the client. That direction certainly extends to correspondence matters that are of public record such as pleadings; and documents and evidence that have come into the attorney's hands as a result of his representation. It does not, however, extend to such things as the attorney's own notes, and memos to himself; nor to his myriad scratchings on note sheets; not to records of passing thoughts dictated to a machine or a secretary and placed in the file; nor to ideas, plans or outlines as to the course the attorney's representations is to take. Those recorded thoughts remain the property of the attorney and, in our opinion, he need not release those even though his bill has been paid in full.

Opinion No. 91-01, January 15, 1991

This opinion focuses on an attorney's obligation as to documents furnished to a lawyer in a divorce action by a client who had disappeared. Some of the documents were community property. An attorney should "take all reasonable measures to contact the client to determine his wishes with respect to the final disposition of his records." After

taking such efforts the lawyer "must maintain the documents with the standard of care of a professional fiduciary until the documents are presumed, under Arizona law, to be abandoned, or until there has been a judicial determination regarding disposition of the client's property."

Opinion No. 92-01, March 12, 1992

This opinion states the ethical requirements when there is a dispute between a current attorney and a former attorney as to certain original client documents in the context of an attorney's lien.

Opinion No. 93-03, March 17, 1993

This opinion notes the ethical propriety of charging for copying a file. An attorney may ethically charge a client for the cost of making a duplicate copy of a file already furnished (over time) to the client, but may not charge for a copy of the original file.

Opinion

File retention and destruction policy often is a subject of court rule or statute. Some examples are: Court Records, Ariz. R.S.Ct. 29; Trust Account Verification, Ariz. R.S.Ct. 43; Records Kept By Clerk, Records Management, Ariz. R. Civ. Pro. 79(g); Retention and Destruction Of Records and Evidence, Ariz. R. Crim. Pro. 28 and A.R.S. § 12-282, Custody of records filed; purging; destruction. Statutes and written administrative rules or policies often establish document retention schedules for government agencies. For instance, pursuant to A.R.S. § 41-1351 the Records Management Division of the Arizona Department of Library and Archives published case specific document retention schedules for the State Attorney General's Office, the Maricopa County Attorney's Office and the Maricopa County Public Defender's Office.

No rule of court or statute directly addresses the issue presented in this opinion. Further, this Committee may not offer an opinion on purely legal issues and does not do so here. In particular, no opinion is offered as to any legal requirements[3]for document retention or destruction or as to the legal issue of a client's entitlement to some or all of the documents in any file, whether in an attorney's lien situation or otherwise. No opinion is offered as to the legal ownership of all or any portions of the office files of past clients. The legal ownership of portions of office files can become the subject of litigation in various contexts.

The facts of this opinion assume representation on a matter has ended, either by withdrawal of the attorney or by termination of the matter. Promptly, at that time, a lawyer has a duty to deliver to a client any funds or other property the client is entitled to receive. ER 1.15(b). A lawyer is required to surrender papers and property to which the client is entitled at the conclusion of representation. ER 1.16(d). The lawyer has a continuing obligation to minimize harm to his prior client after withdrawal or termination of the matter. See, "Duties after Withdrawal," ABA/BNA Lawyers' Manual on Professional Conduct at 31:1201 (1996). Thus, any document retention and destruction policy must provide a reasonable method of identifying that property to which a client is entitled and returning that property to the client. Depending on the circumstances, that may or may not include the entire file.

No Arizona Ethics Opinion directly addresses the retention and destruction of a client file after termination of representation and after all property otherwise belonging to the client has been returned. The American Bar Association and several states have addressed various aspects of the issue.

Case law resolution of disputes between a client and her prior lawyers often turn on the characterization of ownership of the documents in question. The recent case of Sage Realty Corporation v. Proskauer Rose Goetz & Mendelshohn, 91 N.Y.2d 30, 689 N.E.2d 879 (N.Y., December 2, 1997), cited in Sage Realty v. Proskauer Rose L.L.P., 1998 N.Y. App. Div. Lexis 6437 (June 4, 1998) however, discusses both legal ownership issues and ethical considerations. In Sage, the court held that a prior law firm must turn over the prior firm's files, including drafts, internal memoranda, mark-ups, research and other internal documents containing the opinions, reflections and thought processes of the lawyers in relation to a complex mortgage refinancing and ownership restructure. The New York court stated:

> A majority of courts and state legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions. Id. at 91 N.Y.2d at 34-35. [citations omitted]

The New York court went on to state:

> By contrast, a minority (although a substantial number) of courts and state bar legal ethics authorities, . . . distinguish between the "end product" of an attorney's services, the documents representing [sic] which belong to the client, and the attorney's "work product" leading to the creation of those end product documents, which remains the property of the attorney. Id. at 91 N.Y.2d at 35 [citations omitted][4]

The New York court cites the current Proposed Final Draft No. 1 (March 29, 1996) of the Restatement of the Law Governing Lawyers, Section 58, Documents Relating to Representation, as setting forth the majority view. This draft section specifically deals with the issue of a former client's inspection and copying of her prior lawyer's files. The text of Proposed Final Draft No. 1, Section 58, provides:

(1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.

(2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

(3) Unless a client or former client consents to nondelivery or substantial grounds exist for refusing delivery, a lawyer must deliver to the client or former client, at an appropriate time an din any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

(4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by Section 55(1) [valid attorney's lien].

The logic of the Restatement Proposed Final Draft is that a client has a reasonable expectation, and the lawyer has a reasonable duty, to preserve and make available to the client not only documents and things clearly the property of the client, but also all documents in a lawyer's file that the client reasonably needs, subject only to any "valid attorney's lien" or "other justifiable grounds" including all documents created by the lawyer. The burden is placed on the lawyer, not the client, to present such "justifiable grounds."
Comment b. to the Proposed Final Draft states a lawyer's duty to safeguard client documents is "similar to the duty to safeguard [client] property" and "does not end with the representation." The duty continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer or consents to disposal of the documents. The Comment makes clear "a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence."

Comment c. to the Proposed Final Draft states ". . . a client is entitled to retrieve documents in possession of a lawyer *relating to representation of the client."* [emphasis added] Such documents include most, but not necessarily all, of a lawyer's file. Documents placed in the lawyer's possession as well as to documents produced by the lawyer are covered. Exceptions include only things such as a valid attorney's lien, production that would violate the lawyer's duty to another, a lawyer's reasonable belief that the client would use a document to commit a crime, production of a psychiatric report to a mentally ill client which is likely to cause serious harm to the client, similar items and "certain law-firm documents reasonably intended only for internal review, such as memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client." Even as to such excluded items "a tribunal may properly order discovery of the document when discovery rules so provide."

The New York Court in Sage blends property concepts with ethical principles in its holding that "Barring a substantial showing by the Proskauer [law] firm of good cause to refuse client access, petitioner [former client] should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation" subject to the exceptions set out in the Proposed Restatement Final Draft. Sage , 91 N.Y.2d at 37. The Sage court, however, " . . . caution[s] that our holding in this matter is not to be construed as altering any existing standard of professional responsibility or generally accepted practice concerning a lawyer's duty to retain and safeguard all or portions of a client's file once a matter is concluded." Id.

A review of the major existing ethics opinions is helpful in demonstrating several general ethical themes.

ABA Informal Ethics Opinion 1384 (March 14, 1997) (adopted by South Dakota, Opinion 94-6, March 24, 1994) does directly address the issues. That opinion states:

> All lawyers are aware of the continuing economic burden of storing retired and inactive files. How to deal with the burden is primarily a question of business management, and not primarily a question of ethics or professional responsibility.
>
> A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.

> But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyer's files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the client's detriment.

ABA Informal Opinion 1384 concludes "common sense should provide answers to most questions" and suggests various important considerations. These considerations include not destroying: (1) items that clearly or probably belong to the client (especially when not filed or recorded in the public records); (2) information the lawyer knows or should know may still be necessary or useful in the assertion or defense of a client's position in a matter for which the applicable statutory limitations period has not expired; and (3) information not previously given to the client, not otherwise reasonably available to the client, which the client may need and may reasonably expect will be preserved by the lawyer. ABA Informal Opinion 1384 further advises lawyers to take special care to preserve, indefinitely, accurate and complete records of receipt and disbursement of trust funds; to protect confidentiality of contest in disposing of a file; and not to destroy a file without screening its contents. A lawyer is advised to preserve, perhaps for an extended time, an index or identification of files destroyed.

Utah Opinion 96-02 (April 26, 1996) addresses retention of files and establishes a variable retention period. A lawyer in disposing of or retaining a client's file must protect the client's foreseeable interests. In some circumstances, the lawyer may meet this obligation by tendering the entire file to the client or the client's legal representative. In other circumstances, the period of retention will vary depending upon applicable statues of limitations, the uses to which the materials may be put, other applicable rules or laws, and the client's expectations.

California Opinion 1992-127 (1992) addresses the issue of cooperation by criminal defense counsel with successor counsel handling the appeal. This opinion states "the attorney must turn over all papers and property in the client's file to the client or to successor counsel. This would include the entire contents of the file, not just the pleadings, depositions and exhibits in the file, and includes work product reasonably necessary to the client's defense. . . . ." The attorney's impressions, conclusion, opinions, legal research, and legal theories prepared in the client's underlying case ordinarily are 'reasonably necessary to the client's representation." This opinion stresses the considerations arising from the constitutional right of a defendant to effective assistance of counsel and the prior attorney's duty to cooperate with new counsel in a criminal case continuing on appeal, including claims of ineffective assistance of counsel.

South Carolina Opinion 92-19 (August, 1992) also establishes a variable period, but concludes a lawyer may dispose of closed client files only when it becomes reasonable to believe their disposal will not prejudice the client's rights.

Virginia Opinion 1418 (May 14, 1991) points out one of the reasons why a file may be necessary to protect a client's post representation interests, stating that in a criminal matter a lawyer must turn over his file to the client or his current lawyer in a claim of ineffective assistance of counsel during prior proceedings and may not charge to copy such a file.

Michigan Opinion RI-109 (December 17, 1991) validates the practice of creating a file retention policy, stating that when a law firm establishes a record retention plan which protects the client's rights and advises the client of the plan, and the client has retrieved their files or the time to exercise that option has expired under the plan, the firm has no further duty to notify clients of damaged or lost files.

New Mexico Opinion 1988-1 (undated) calls for a lawyer to determine the value to the client of the content of client files before their destruction.

Illinois Opinion 94-19 (March 1995) takes the approach of a blanket time limit for file retention and approves destruction of legal aid files after five years, not including wills and conflicts information. Iowa Opinion 91-20 (November 14, 1991) approves legal aid destruction of client files, including conflict information, all after five years.

Michigan Opinion RI-240 (June 26, 1995) approves lawyer destruction of files without notification to the client, provided they contain no client property or reasonable notification concerning client property has been given. New York Opinion 623 (November 17, 1991) reaches a similar conclusion.

As to the cost of copying files, Arizona Opinion No. 93-03 (March 17, 1993) states, in part:

> . . . an attorney is not obligated under either ER 1.15(b) or 1.16(d) to provide extra copies of a client's file free of charge. Once an attorney has given the client all documents to which the client is entitled, he or she has fulfilled the duty created by these rules and may properly charge the former client for the actual cost of making additional copies of documents which had been previously provided.
>
> Thus, it is important to distinguish our opinion from those in which the attorney proposes to charge the client for copying the original file. This practice violates ER 1.15(b) and ER 1.16(d).

Materials in a client's file obtained from the client are generally owned by the client. The lawyer is ethically required to use reasonable efforts to return all client property, including such materials, upon termination of the representation. Such materials owned by the client may not be destroyed until, and if, a reasonable effort to return such property has been made and a reasonable notice of destruction has been given. After reasonable notice, such materials must be safeguarded for a period of time equal to that under Arizona law for the abandonment of personal property. Arizona Opinion No. 91-01 (January 15, 1991).[5]

The balance of the file generally belongs to the lawyer, however the former client has an interest in and right to access the file. That interest is based upon the client's reasonable expectation arising from the lawyer/client relationship and the client's post-representation need for access. The lawyer has a resultant ethical duty to allow access. The duty to allow access extends to internal memoranda and work product relating to representation of the client, unless there is substantial justification to deny access to such materials. The burden is on the lawyer to demonstrate such a justification. Such access may be exercised upon request and ordinarily will be exercised upon change of counsel, subsequent litigation, or other reasonable need for the file materials.

A lawyer or his employer should establish and maintain a written client file retention and destruction policy. The policy must comply with all case law, rule and statutory requirements for document and file retention. Retention times must take into consideration the client's foreseeable interests. The policy should include an individual file review at the conclusion of the matter.

In some circumstances the lawyer may fulfill her ethical obligations by tendering the entire file to the client (or to the client's legal representative) at the termination of representation. Indefinite file retention for probate or estate matters, homicide cases, life sentence cases and lifetime probation cases is appropriate. File retention of five years for most other matters is appropriate. An appropriate period of retention will vary depending upon the lawyer's judgment of the client's reasonable need for the file materials. This judgment should include consideration of applicable statutes of limitations, the length of the client's sentence or probation, and the uses by the former client of the materials. Specified portions of the lawyer's file may be withheld only upon a showing by the lawyer of valid attorney's lien or other substantial justification such as a duty to a third person.

The lawyer should not charge her prior client for delivery of the original (or copy) of the file. If the lawyer wishes to retain a copy, the client should not be charged. After the original or one full copy has been given, the lawyer may ethically charge for additional copies.

Written notice of the document retention and destruction policies of the lawyer should be given to the client at or before the termination of representation, or if not given then, given prior to the destruction of the file.

---

[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.** **© State Bar of Arizona 1998.**

[2] There is a separate document retention schedule maintained for "All Arizona Counties - Public Defender" (part two, chapter 5, page 46, revised 5/97); "All Arizona Counties - County Attorney" (part two, chapter 6, page 17, revised 5/97); and the State Attorney General by office. Information obtained from the Records Management Division of the Department of Library, Archives and Public Records, State of Arizona.

[3]Whether based on case law, state statues as to particular agencies, or federal statutes as to grant funding or similar matters.

[4] The New York Court places Arizona among these minority jurisdictions.

[5] See, A.R.S. . § 44-301, et. seq., Uniform Unclaimed Property Act (1981 Act) (five year holding period).

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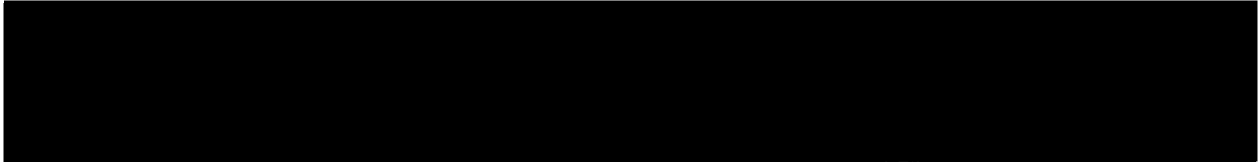
ETHICS OPINION REQUEST



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MAY 01 2019

CLERK SUPREME COURT

Request for Ethics Opinion

April 30, 2019

FILED

MAY 01 2019

JANET JOHNSON
CLERK SUPREME COURT
BY: adc

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

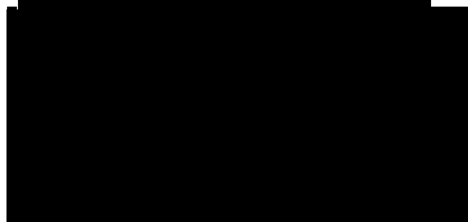
EO-19-0009

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.