State Bar of Arizona Ethics Opinions

08-02: Client Files; Confidentiality of Information; Safekeeping Property; Duty as to Client Property

12/2008

OPINION PARTIALLY WITHDRAWN; SEE OPINION 15-02

Lawyers have certain ethical obligations in maintaining closed client files. Clients are entitled to most of the contents of a closed file. Lawyers should establish a file-retention policy and communicate that policy to the client, in writing, at the commencement of the lawyer/client relationship. If a lawyer does not have a file-retention policy, the lawyer will have additional ethical obligations to fulfill prior to the destruction of any closed client file.

FACTS

Lawyers have raised many questions about file retention, the answers to which are not addressed specifically in either the Rules of Professional Conduct or in previous Arizona ethics opinions. In light of these frequent requests for informal ethics advice, the Committee on the Rules of Professional Conduct has chosen to issue this formal opinion *sua sponte*.

QUESTIONS PRESENTED

1. Is it ethical for a lawyer to establish a file-retention policy with client consent to keep files for a period of time other than the five-year standard set forth in Ariz. Ethics Op. 98-07?

2. Is it ethical for a lawyer to destroy a file identified as requiring indefinite retention by Ariz. Ethics Op. 98-07?

3. Is it ethical to save only certain portions of the client file that the lawyer deems relevant?

4. May a lawyer destroy documents that are available to the client as public records?

5. May a lawyer fulfill the lawyer's ethical obligations by giving the entire file to the client at the termination of the representation?

6. Is it ethical for a lawyer to transfer file-retention responsibilities to another lawyer or law firm? Who should assume responsibility for closed files upon the dissolution of a law firm?

7. In the absence of a file-retention policy, is it ethical for a lawyer to destroy files without notice to the client?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.4 Communication

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> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
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ER 1.6 Confidentiality of Information

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).
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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 maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. 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 preserved for a period of five years after termination of the representation.
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ER 1.16 Declining or Terminating Representation

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> (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.
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RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 91-01, 98-07, 07-02

OPINION

Jurisdictions around the country recognize variable time frames for file-retention policies. While some jurisdictions establish specific minimum time periods for retaining closed client files, others reject application of a bright-line standard, instead leaving the lawyer to exercise his or her discretion after taking certain factors into consideration.[1] Yet another available option is to surrender the file in its entirety to the client upon termination of representation. In spite of the differences across the country, most jurisdictions rely upon common guiding principles in their directives, namely that lawyers fulfill their duties of communication, confidentiality, and protection of their clients' interests.

While not addressing these exact issues, previous Arizona ethics opinions assist in reaching the conclusions contained in this opinion, which serves as an extension to the conclusions and recommendations in Ariz. Ethics Ops. 98-07 and 07-02. Op. 98-07 provides an extensive analysis of a lawyer's responsibilities for a client's file after termination of representation. Notably, the opinion includes summary information from ABA Informal Ethics Op. 1384 (March 14, 1977), which provides guidance in developing and managing client file-retention policies. Op. 07-02 provides information about maintaining client files in electronic format. The opinion specifically addresses the necessity of obtaining client consent prior to the destruction of any original paper documents transferred to or saved in digital format. Op. 07-02 remains a valid opinion and should be consulted if a file-retention policy will include transferring documents to a digitized or electronic format. By expanding the principles in these opinions, lawyers are provided broader discretion and greater confidence in managing their law practices.

A. Defining the client file

Defining the client file is important in determining parameters for a file-retention policy. ER 1.16 was changed in 2003 to state explicitly that the lawyer has a duty to "provide the client with all of the client's documents, and all documents reflecting work performed for the client." Comment 9 was also added to the rule:

> 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.

The dilemma of how closed files should be maintained and/or destroyed is not a new one. In Ariz. Ethics Op. 91-01, the client left certain original documents with the lawyer. After the termination of representation, the lawyer could not locate the client to return the original documents, despite reasonable efforts to do so. The lawyer inquired whether destroying the documents was ethical. The opinion analyzed the duties of confidentiality and safeguarding client property, ER 1.6 and ER 1.15 respectively, in reaching the conclusion that "the client is the one with the ultimate power to dispose of his property, or to authorize the lawyer to do so. Only after the lawyer has determined under Arizona law that the property is deemed to have been legally abandoned [should] the lawyer dispose of the client file." Indeed, these basic principles from Op. 91-01 -- reasonable notice, adequate safeguards, and application of Arizona law on property abandonment -- shaped the conclusions of Op. 98-07.[2]

The inquiry in Op. 91-01 was specifically limited to original documents received from the client. Op. 98-07 states that after returning materials received from the client, the balance of the file belongs to the lawyer. However, the 2003 change to ER 1.16 vests the client with authority over the vast bulk of the file. Therefore, the same

standards of care set forth in Op. 91-01 apply to the entire client file, not merely to documents received from the client.

Op. 07-02 addresses the lawyer's obligation to preserve the file, either in hard copy or digital format, after returning documents received from the client. The format of the file content, paper or electronic images, does not change the lawyer's responsibility to consider the client's interests in shaping the file-retention policy. The client is entitled to the file regardless whether the contents of the file have been digitized.

All of these opinions suggest that lawyers prepare files for the benefit of their clients and should likewise preserve files for the benefit of the clients. The files belong to the clients, not to the lawyers. Because the files belong to the clients, file-retention policies should take into account the clients' possible future needs as more important than the lawyers' possible future needs.[3]

B. Considerations for developing a file-retention policy

Lawyers can and should adopt file-retention policies tailored to the specific needs of the clients and the lawyers' practice. Protecting client interests is paramount in planning and implementing a policy. Any retention policy should be communicated to the client in writing at the inception of the lawyer/client relationship.[4] The policy should ensure that client files are stored and destroyed in a manner that protects client confidentiality. Finally, the lawyer must conduct a final review of the file prior to destruction to make certain that all ethical obligations are met.

> **1. Retention periods**

One recurrent issue is whether under certain circumstances a lawyer should retain a file for a length of time other than the five-year period referenced in Op. 98-07, which states in pertinent part:

> 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 material.

This statement was not intended to create a per se five-year rule, but instead was meant to provide a conservative recommendation upon which lawyers could generally rely. Five years remains a safe default option for the lawyer and client in the absence of an agreement otherwise. The five-year rule is also supported by ER 1.15(a), which sets a five-year requirement for keeping trust-account records. However, a practitioner and client may agree upon other equally appropriate time periods. For example, two years may be an appropriate time frame to retain some types of client files, while seven years may be more appropriate in other circumstances. The five-year period does not satisfy the purposes of file retention in all cases.

Client files are retained to safeguard client confidences, client property, and client's interests. ER 1.6, ER 1.15, and ER 1.16(d). This purpose and the specific implications of the lawyer's file-retention policy should be explained to the client in writing at the beginning of the representation. ER 1.16, cmt. 11, ER 1.4. Communicating the file-retention policy to the client affords the client a better understanding of the risks and assurances of the policy and allows the lawyer the opportunity to more closely tailor the policy to the client's specific needs and desires.

The ethical application of file-retention policies still requires the lawyer, under ER 1.16(d), to surrender original documents to the client at the termination of the representation. As to what should be done with the remainder of the file, the lawyer should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client.

Further, certain areas of law may be governed by statute requiring that files be maintained for a certain period.[5] Likewise, lawyers should take care to comply with any and all applicable procedural rules in structuring and applying a policy.[6] Retention policies should also include the manner by which client confidences will be protected during the destruction process. Lawyers must take care to screen files prior to destruction as a final assurance that no original documents or property to be tendered to the client remain in the file, and that there is no possibility of future litigation. The lawyer must be sure that no further purpose is served by retaining the file prior to its destruction.

2. Indefinite file retention

Op. 98-07 recommends indefinite file retention for "probate or estate matters, homicide cases, life sentence cases and lifetime probation cases." These cases are exceptional because it will likely be a very long time before the lawyer will be able to establish that there is no possibility of future litigation or need for the file. In an estate matter, it may be many years before the client dies. In a death-penalty matter, it may be decades before appeals, post-conviction-relief proceedings, habeas petitions, and other remedies are fully exhausted.[7] It may take decades, but a time may come when there will be no further litigation and there is no longer any substantial purpose served by retaining the file. Even complex cases with high stakes and resounding implications may have an end. At that end, the lawyer may determine that no client interests remain to protect and the lawyer may ethically destroy the file. The principles for screening a file for destruction remain the same whether screening a civil-traffic file or a capital file. However, the standard for retaining these exceptional cases is not necessarily indefinite. The length of time for retaining a file depends upon the client's possible future need for the file.

3. Preservation of the file

File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents.

Similarly, lawyers have sought to ease their file-retention responsibilities by advising clients to obtain from government agencies those portions of the client file that are maintained as public records. ER 1.16 does not contain a public-records exception. Significant portions of the client file, such as pleadings, minute entries, or transcripts, may be available to the client through public records requests. However, by application of the rule, the client is entitled to receive these documents from the lawyer without limitation.

4. Tender of file upon termination of representation

A lawyer *may* fulfill the lawyer's ethical obligations by tendering the entire file to the client at the termination of the representation.[8] This practice may be adopted as a file-management policy. As with a more traditional file-retention policy, a lawyer should communicate this policy to the client in writing at the inception of the lawyer/client relationship. However, prior to implementing this policy, the lawyer must make certain that no statute of limitations or substantive law requires the lawyer to keep the file and that surrendering the entire file to the client adequately protects the client's interests. Additional factors to consider in determining whether such a policy is ethical include, but are not limited to, the client's sophistication and available resources and the very nature of the representation. Such a policy is not appropriate for all practice areas or for all clients.[9]

Tendering the entire file to the client means assembling the entire file -- both paper and electronic documents and any other materials -- and delivering it to the client. The method of delivery is inconsequential. Some clients may elect to receive their files in person, while other clients may be satisfied with delivery by mail or courier. Documenting the tender of the file to the client with either a receipt or other delivery confirmation is advisable.

Tendering the file, however, is not merely offering the file to the client or making it available to the client for review. Tendering the entire file to the client presumes that the lawyer will not maintain a copy and, therefore, the completeness of the file is of the utmost importance.[10] Likewise, the lawyer should advise the client to take adequate measures to protect the file, because a copy will no longer be available to the client through the lawyer's office.

Many practitioners furnish courtesy copies of documents to their clients during the representation. Providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the *entire* file at the termination of the representation. Although some of the documents being provided to the client may be duplicates, tendering the entire file protects the interests of the client and the lawyer with the assurance that nothing has been overlooked. Finally, lawyers should not charge the client for any costs incurred in tendering the file.

5. Issues for lawyers in transition

Situations may arise in the course of a lawyer's career that require the lawyer to either assume responsibility for the closed files of another lawyer, or to leave closed files in the care of another lawyer. Lawyers may leave the practice due to unexpected illness. Partnerships may dissolve prematurely. Associates may leave a firm without notice.

Assuming responsibility for another lawyer's closed files is not prohibited by the rules. However, when doing so, lawyers should take care to avoid conflicts of interest and to protect confidences. The best practice when assuming responsibility for the closed files of another lawyer is to use reasonable efforts to contact the clients to advise them of the situation.[11] The lawyer assuming responsibility for the closed client files should respect the file-retention policy that was originally communicated to the client and take measures to ensure that all ethical obligations have been met prior to the destruction of any file. If the lawyer assuming responsibility for the closed client files intends to make changes to the file-retention policy, notice of that change should be communicated to and agreed upon by the client.

Similarly, law firms should consider and agree how closed files will be managed upon dissolution of the firm. Principles of joint and several responsibility may apply, or individual firm members may each be responsible for their own closed files. Regardless of the agreement reached, voluntary assumption of responsibility for the files of another may create ethical obligations.

C. Obligations in the absence of a file-retention policy

In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property.[12] After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for file retention and destruction may actually decrease the amount of time a file must otherwise be preserved.

CONCLUSION

Lawyers should develop and implement policies to manage closed client files. The policy should be communicated to the client in writing at the beginning of the lawyer/client relationship. The policy should be closely tailored to meet the client's needs, taking into account, applicable statutes of limitations, substantive law, and particular circumstances likely to arise from the nature of the representation. Devoting resources to policy development and implementation will best protect the interests of the clients and should have the additional benefit of easing lawyers' managerial responsibilities.

Answers to the specific questions presented are as follows.

1. Is it ethical for a lawyer to establish a file-retention policy with client consent to keep files for a period of time other than the five-year period set forth in Ariz. Ethics Op. 98-07?

Yes, it is ethical. The standard recommendation for file retention in most cases has been five years. However, with the consent of the client and under appropriate circumstances, lawyers may establish more flexible, individualized file-retention periods.

2. Is it ethical for a lawyer to destroy a file identified as requiring indefinite retention by Ariz. Ethics Op. 98-07?

It may be ethical. Certain files, such as estate matters and homicide cases, have been identified as requiring indefinite retention. Those files may be appropriate for destruction only after careful review by the lawyer confirming that all ethical obligations regarding return of property have been fulfilled, that all legal retention requirements have been met, that no future possibility of litigation exists, and that no other substantial purpose is met by any further retention of the file.

3. Is it ethical to save only the portions of the client file that the lawyer deems relevant?

No, lawyers should not purge files of documents prior to storage without notice to the client and permission from the client.

4. May a lawyer destroy documents that are available to the client as public records?

No, lawyers should not refer clients to public records access for information contained in closed files.

5. May a lawyer fulfill the lawyer's ethical obligations by giving the entire file to the client at the termination of the representation?

In some circumstances, lawyers may be able to fulfill their ethical obligations by tendering the entire file to the client upon termination of representation.

6. Is it ethical for a lawyer to transfer file-retention responsibilities to another lawyer or law firm? Who should assume responsibility for closed files upon the dissolution of a law firm?

Lawyers should develop policies that take into consideration changes in law firm personnel and unexpected changes in firm management. A lawyer who assumes responsibility for another lawyer's files must consider ethical obligations such as avoiding conflicts of interest and maintaining client confidentiality.

7. In the absence of a file-retention policy, is it ethical for a lawyer to destroy files without notice to the client?

No, it is not ethical to destroy files without notice to the clients. Lawyers with closed files that have not been retained in compliance with a file-retention policy communicated to the clients will have additional ethical obligations to fulfill prior to destruction of the files.

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[1] *See* West Virginia L.E.I. 2002-01 (allowing destruction of most files after five years, but providing that certain cases, such as claims of minor children and certain tax matters, should be maintained for longer periods of time); Iowa Ethics Op. 08-02 (recommending a retention period of no shorter than six years if the lawyer has a written file-destruction policy and ten years in the absence of such a policy); Maine Ethics Op. 187 & M. Bar R. 3.4(a)(4) (discussing Maine's eight-year retention rule).

[2] *See* Ariz. Ethics Op. 98-07, n. 5, referencing A.R.S. §44-301, *et.seq.*, Uniform Unclaimed Property Act (1981 Act) (five-year holding period).

[3] As this committee lacks the authority to render opinions on purely legal matters, this opinion does not address issues regarding lawyers' retaining liens, legal disputes or causes of action relating to file ownership and possible civil or malpractice claims relating to file retention. Lawyers are advised to consult their malpractice insurance carriers regarding whether the carriers suggest or require that any specific issues regarding file retention be taken into consideration in the adoption of new policies and procedures.

[4] *See* ER 1.16, cmt. 11.

[5] For example, pursuant to A.R.S. § 8-120(E), lawyer files in adoption matters shall not be destroyed until after seven years.

[6] Public lawyers are subject to records retention and disposition schedules filed with the Records Management Division of the Department of Library, Archives and Public Records, State of Arizona.

[7] *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 10.7 and 10.13 (issues of competent and ethical representation include but are not limited to examining the files of prior counsel and providing files to successor counsel).

[8] *See* ER 1.16, cmt. 11.

[9] For example, direct tender of an entire criminal file to an incarcerated, mentally ill sex-offender would be inappropriate.

[10] As noted in n. 3, *supra*, lawyers should consult with their malpractice insurance carriers regarding whether they have specific requirements regarding file retention.

[11] *See* ABA Formal Op. 92-369 (Dec. 7, 1992), addressing the disposition of a deceased sole practitioner's client files and property.

[12] *See* Op. 98-07, citing Op. 91-01.