

ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday January 30, 2020

No. 3 Former State Bar Ethics Opinions Assignments

- o Op. 15-02

Staff will present information at the meeting.



State Bar of Arizona Ethics Opinions

15-02: Client Files; Safekeeping of Property; Maintaining Client Files; Termination of Representation

6/2015

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 the 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. Understanding the lawyer's duty to preserve client documents in this manner advances client interests. It enables a lawyer to restrict "the file" to documents that actually assist the lawyer in competently and diligently representing the client, in the context of the particular client matter and the lawyer's practice, as well as effectively communicating with the client and exercising professional judgment on the client's behalf, rather than preserving anything and everything ever generated or received during the course of the representation. To the extent prior opinions of this Committee may be construed as asserting otherwise, they are withdrawn.

FACTS

This opinion addresses issues raised by numerous lawyers seeking informal advice regarding their obligation to retain duplicative and incidental documents, including electronic documents, generated in the ordinary course of representation.

This opinion also reexamines the conclusion of Op. 08-02 that a lawyer must, at the conclusion of representation, furnish a client with an additional copy of documents from the client's file that the lawyer already provided to the client during the course of representation.

The committee issues this formal opinion sua sponte to clarify practitioners' ethical obligations under ER 1.16(d) and Comment 9 thereto.

QUESTIONS PRESENTED

1. Is it ethical for a lawyer to purge, in the ordinary course of representation, electronic or other documents 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?
2. Is it ethical for a lawyer to charge a client for the cost of copying a document, contained in the client's file, that the lawyer already has furnished to the client free of charge?

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

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 1.16 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.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 81-32, 93-03, 98-07, 07-02, 08-02, 13-02.

OPINION

Upon termination of the representation and upon the client's request, the Arizona Rules of Professional Conduct ("ERs") impose on a lawyer an ethical obligation to provide the client with "all of the client's documents, and all documents reflecting work performed for the client."^[1]

However, "client file" is a term that is not defined by the Rules of Professional Conduct, that appears nowhere in ER 1.16, and that appears only in Comment 11 to ER 1.16: "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." Comment 9 to ER 1.16(d) also provides guidance on the extent of a lawyer's ethical obligations to preserve and provide documents to a client. While this comment does not have the force of a rule,^[2] it proffers that the documents to which a client is entitled, upon request and 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."

I. Duty to Preserve Documents Relating to the Representation

Previous Arizona ethics opinions have attempted to define what documents a lawyer must preserve and provide to the client to meet the lawyer's ethical obligations.^[3] The two most recent opinions, issued in 2008 and 2013, appear to suggest that every document potentially relating to the representation must be retained during the representation and offered to the client at its conclusion.

Op. 08-02 begins by explaining 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. . . ."^[4] From there, Op. 08-02 recommends that "[b]ecause 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 a purge without first consulting the client."^[5] With this recommendation, though, Op. 08-02 lends itself to the inference that a lawyer must preserve every document, no matter how inconsequential, for fear that discarding a document may subject the lawyer to accusations of unethical conduct.

Op. 13-02 confirms this reading. Although the focus of that opinion is on the particular effect that incarceration may have on the lawyer's obligation to surrender client documents, rather than on the duty to preserve particular items, the analysis begins by citing Op. 08-02 for the proposition that a "client file" "includes virtually all documents received or generated in connection with the representation, excepting only 'internal practice memoranda' from the items that must be surrendered on a client's request."^[6] Based on this definition of "client file" and ER 1.16(d)'s requirement that a lawyer provide to a client all documents, Op. 13-02 can also be read to impose on a lawyer an ethical obligation to preserve every document, no matter how duplicative, incidental, or ministerial.

The broad language of Ops. 08-02 and 13-02 relating to the bounds of the "client file" create significant practical problems for both clients and lawyers. These opinions arguably bespeak an ethical preservation obligation, under which a lawyer arguably must preserve everything received or created in the course of the representation. However, neither opinion considers the practical effects of this pronouncement on the everyday realities of law practice nor takes into account a lawyer's professional judgment or discretion.

Certain documents seem obviously to fall within the scope of the documents that should be preserved: end-product documents created by the lawyer such as pleadings, motions, wills, contracts, and the like; material communications with and from the client and opposing lawyers; and copies of court filings and orders in a litigation matter.^[7]

But lawyers receive and create many other documents in the ordinary course of their practice, the retention of which is neither practical nor necessary. For example, a lawyer may scratch out a new theory on a whiteboard, or even the back of a napkin, or may email herself an idea to consider in more detail, or otherwise further pursue, when the circumstances permit. Once the theory has been incorporated into advice to the client, more formal memos to the file, or other end products, the napkin is discarded or the whiteboard wiped clean for use in the next brainstorming session. In the electronic world, even more chaff is created and discarded. Lawyers and their staff routinely generate electronic calendar invitations (or paper calendar entries), routinely blind copy emails to themselves or carbon copy emails to others within the firms. Multiple lawyers on a client team may receive the same email from a client or opposing counsel, resulting in multiple “copies” of the identical message on the firm’s email server. A lawyer may work on a draft of a pleading over several sessions, opening and closing the draft on her computer without saving multiple versions corresponding to the edits made each day (or each hour). Read at their most sweeping, Ops. 08-02 and 13-02 arguably stand for the proposition that a client is entitled, at the close of representation, to copies of all of these hard-copy and electronic materials, no matter how trivial or difficult to capture.

The focus of both Ops. 08-02 and 13-02 is rightly on protecting the rights and interests of the client. Yet overstating the lawyer’s ethical obligation to preserve documents created in the course of the representation works against client interests. Increasing the cost and difficulty of file retention and storage increases the cost of legal services, and at worst discourages lawyers from creating documents that would aid their representation of the client out of concern that creating the document will require its preservation and storage. Moreover, a “client file” cluttered with unnecessary chaff makes it more difficult for the working lawyer to find relevant materials, and makes the file less useful to the client or to subsequent counsel when it is turned over to them. Clients and lawyers both benefit from a rule of reasonableness with regard to file retention, such that unnecessary and duplicative materials can be discarded while materials necessary to the representation are retained.

For these reasons, we conclude that a lawyer’s obligation to preserve documents reflecting work performed for a client does not limit the lawyer’s ability to undertake ordinary course purging of electronic or other documents 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.^[8] Notwithstanding any language in Ops. 08-02 and 13-02 to the contrary, neither opinion should be read to suggest an ethical obligation to preserve such documents.

II. Additional Copies of Documents Provided Free of Charge During the Representation

Comment 9 to ER 1.16 explicitly states that “[a] lawyer shall not charge a client for the cost of copying any documents unless the client has already received one copy of them.” In addition to the preservation problem, Op. 08-02 arguably renders inconsequential the fact that a lawyer may have provided documents to the client free of charge during the representation. While Op. 08-02 acknowledges this practice,^[9] it ignores the guidance of Comment 9 by holding that “[p]roviding contemporaneous courtesy copies does not change the lawyer’s obligation to tender the entire file at the termination of the representation.”^[10] To the extent the lawyer has

already provided documents to the client in the ordinary course of the representation (as ER 1.4 encourages the lawyer to do), Op. 08-02's mandate that "lawyers should not charge the client for any costs incurred in tendering the file" runs directly contrary to Comment 9.

The language of Comment 9 contemplates that a lawyer may charge a client upon termination of the representation for additional copies of documents previously provided during the representation. The Committee also addressed this issue in Op. 93-03, stating that

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.^[11]

In keeping with the letter and spirit of Comment 9, and our guidance offered in Op. 93-03, we hold that a lawyer may charge a client for subsequent copies of documents which the client has already received free of charge during the representation.^[12] The contrary statement of Op. 08-02 is withdrawn.

CONCLUSION

In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents 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. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn.

Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.

[1] ER 1.16(d).

[2] Rule 42, Ariz. R. Sup. Ct., Preamble [21] ("The Comments accompanying each Rule explain[] and illustrate[] the meaning and purpose of the rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

[3] Ariz. Ethics Ops. 81-32, 98-07, 07-02, 08-02, 13-02.

[4] Ariz. Ethics Op. 08-02 at 3.

[5] *Id.* at 4-5.

[6] Ariz. Ethics Op. 13-02 at 5 (emphasis added).

[7] Consistent with the language of the Rules of Professional Conduct, which as noted above do not define the “client file,” we do not intend to suggest that any particular content of “the file” or manner of file organization is ethically required. The exact content of, and manner in which a lawyer retains and organizes, documents relating to a client representation will necessarily be shaped by the lawyer’s own working style, practices, and professional judgment,, as well as the nature of the representation and reasonably available information technology.

[8] Lawyers should consider carefully whether a particular document would be needed by the client in the future, based on the information available to the lawyer at the time of the decision to retain or discard the document.

[9] Ariz. Ethics Op. 08-02 at 5 (“Many practitioners furnish copies of documents to their clients during the representation.”)

[10] Id. (emphasis added).

[11] Ariz. Ethics Op. 93-03 at 2.

[12] Lawyers who follow a policy of providing copies free of charge during the course of the representation and charging for subsequent copies would be wise to inform their clients of their practices regarding the provision of copies, so that a client receiving copies during the representation understands that they should retain those copies and will not be provided a second copy free of charge.

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 proceeding. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rules change, a different conclusion may be appropriate.

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