ETHICS OPINION 2010-02

Retention, Storage, Ownership, Production and Destruction of Client Files

Introduction

Formal Opinions 1986-02, 1993-10, 1994-01 are the most recent pronouncements of a lawyer's ethical obligations regarding client files. Since those opinions were issued, advances in technology, electronic filing, and internet-based electronic file storage and retrieval services have created issues that were not contemplated by those opinions. Realizing the need to provide guidance to lawyers that is relevant to the practice of law in today's technological world, the Disciplinary Commission offers the following opinion concerning a lawyer's ethical responsibilities relating to the retention, storage, ownership, production and destruction of client files.

Applicable Rules

The following rules must be considered when determining a lawyer's professional responsibilities relating to client file retention policies. Although most often considered a rule relating solely to lawyer trust accounting, Rule 1.15, Alabama Rules of Professional Conduct, sets out a lawyer's responsibilities relating to types of property of clients or third persons, other than money, and provides, in pertinent part:

> "(a) A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. […] 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 six (6) years after termination of the representation….

"(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

"(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

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"A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts…."

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"Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party."

The issue relating to whom the file belongs was decided in Formal Opinion 1986-02, wherein we held that the materials in the file furnished by or for the client are the property of the client. Therefore, Rule 1.15, Ala. R. Prof. C., imposes an ethical and fiduciary duty on the lawyer to properly identify a client's file as such, segregate the file from the lawyer's business and personal property, as well as from the property of other clients and third persons, safeguard and account for its contents, and promptly produce it upon request by the client.

Although specifically addressing the issues relating to declining or terminating representation, Rule 1.16(d), Ala. R. Prof. C., also refers to client property and provides, in pertinent part:

> "(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."

As we explained in Formal Opinion 1986-02, the file belongs to the client. However, the client's possessory rights to the file are subject to an attorney's lien created by Ala. Code §34-3-61 (1975, as amended), for unpaid fees and expenses. We take this opportunity to reiterate that where a lawyer is asserting a valid attorney's lien pursuant to the Attorney's Lien Statute to secure payment for reasonable fees and expenses that the client has not paid, the lawyer has a statutory right to withhold a client's papers and

property in his possession until such time as the client satisfies the lien by tendering payment or makes reasonable and satisfactory arrangements to protect or otherwise secure the lawyer's interest in the unpaid fees and expenses.

Rule 1.6, Ala. R. Prof. C., embodies one of the most fundamental principles of our profession and requires that, with few exceptions, a "lawyer shall not reveal information relating to representation of a client." The duty to maintain confidentiality includes the duty to segregate, protect and safeguard a client's file and the information it contains. The obligation to maintain a client's file contemporaneously organized and orderly filing and indexing system is inherent in the duty of confidentiality and explicit in Rule 1.15. The failure to do so is a breach of Rule 1.15 and may also rise to the level of a breach of Rule 1.6. The principles of confidentiality, loyalty and fidelity are so fundamental to the practice of law that these rules must be enforced to eliminate even the risk of a breach of these principles.

However, a lawyer's obligation to identify and segregate a client's file, safeguard its contents, maintain its confidentiality, and promptly account for and produce it upon request from the client, does not create an obligation to preserve permanently all files of the lawyer's clients or former clients. See, D.C. Bar Opinion 206; ABA Informal Op. 1384 (1989). Lawyers do not have unlimited space to store files and what limited space is available is often expensive. Lawyers do have an ethical obligation to prevent the premature or inappropriate destruction of client files. See, D.C. Bar Opinion 205 (1989).

Clients may reasonably expect lawyers to maintain valuable and useful information, not otherwise readily available to the client, in their files for a reasonable period of time. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 13384 (March 14, 1977).

Adopt File Retention Policies

The best practice is for a lawyer to adopt and follow a file retention policy that best fits the needs of the lawyer's practice and the lawyer's clients. File retention policies may vary from lawyer to lawyer and even from client to client, but they must be consistent with the guidelines expressed in this opinion. Additionally, the policy must be communicated to the client in writing at the outset of the representation. Upon conclusion of the representation, the lawyer should reiterate the policy and engage in appropriate follow up with the client regarding retention and destruction of the client's file. The lawyer's file retention policy may be included in the retainer or engagement agreement. In certain situations, it may be necessary and appropriate for a lawyer to create a separate file retention and destruction policy, tailored to meet the specific needs of a client or a client matter, or the lawyer's practice. In developing a file retention and destruction policy, the lawyer must abide by the guidelines expressed in this opinion and should also consider the individual client's level of education, sophistication, resources and other relevant circumstances.

Although as a general rule the file belongs to the client and must be produced promptly upon request, circumstances may exist that would make production of a copy of the entire client's file inappropriate. Absent a court order, a lawyer should not tender the entire file to a client, who has diminished capacity or serious mental health disorders, or to juvenile clients or to clients who have a propensity for violence. A lawyer may also refuse to tender the entire client file to clients who are violent criminal defendants, sex-offenders, or other clients where the information contained in the file would endanger the safety and welfare of the client or others. In these circumstances, it is reasonable and appropriate for the lawyer to redact or remove documents containing sensitive mental health or medical records, descriptions of crimes, photographs of crime scenes or victims, sensitive or salacious information, and personal or other identifying information relating to jurors, victims, witnesses or others. A lawyer's retention and destruction policy should allow for these exceptional situations.

How long must a file be retained?

Generally, a lawyer should maintain a copy of the client's file for a minimum of six (6) years from termination of the representation or conclusion of the matter. A lawyer's failure to maintain a file for this minimum period of time is presumptively unreasonable based upon consideration of the statute of limitations under the Alabama Legal Services Liability Act (Ala. Code §6-6-574) and the six-year period of limitations for the filing of formal charges in lawyer disciplinary matters (Rule 31, Alabama Rules

of Disciplinary Procedure). Six (6) years is the absolute minimum period, but special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer, or the administration of justice.

What is considered part of the client's file?

In general, there are two approaches to determine what constitutes the client's file. The "entire file" approach provides that the client owns and is, therefore, entitled to all of the documents within the client's file, unless the lawyer establishes that withholding items would not result in foreseeable prejudice to the client or would, as previously discussed, endanger the health, safety or welfare of the client or others. *In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP.*, 91 N.Y. 2d 30, 666 N.Y.S. 2d 985, 689 N.E. 2d 879, 883 (1997); *Clark v. Milam*, 847 F. Supp. 424, 426 (D. W.Va. 1994); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992); *Martin v. Valley Nat. Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991); *Resolution Trust Corp. v. H--, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989). The "end product" approach divides ownership of documents in the file between the client and the lawyer and permits a lawyer to retain certain documents, such as notes by the lawyer to himself made in preparation for deposition, trials, or interviews or blemished drafts of other documents, which may contain the lawyer's

mental impressions, opinions, and legal theories, some of which may not be flattering or palatable to the client or the lawyer. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, et al.*, 824 S.W.2d 92 (Mo. App. E.D. 1992); Minnesota Lawyers Professional Responsibility Board Opinion 13 (June 15, 1989); ABA Informal Ethics Op. 1376 (Feb. 18, 1977). Either approach requires weighing the protections of both a lawyer's right to think and practice freely during the representation and the client's right to demand an accounting of the actions of his lawyer. The rationale supporting the "end product" approach is that unless the lawyer's recorded thoughts are protected, he will not provide effective representation. The "entire file" approach, which is the majority view, fosters open and forthright lawyer-client relations. The rationale supporting this approach is that a lawyer's fiduciary relationship with a client requires full, candid disclosure. The relationship would be impaired if lawyers withheld any and all documents from their clients without good cause. *Henry v. Swift, Currie, McGhee & Hiers, LLP, et al.*, 581 S.E.2d 37 (Ga. 2003) (Adopting the majority view.) The Disciplinary Commission agrees with the majority of jurisdictions that the "entire file" approach is the best approach. The lawyer is in possession of the file, knows its contents, and is best able to determine the appropriateness of redaction or removal of some of its contents. In those situations where the lawyer determines that production of the entire file is unreasonable or inappropriate, the lawyer must provide reasonable notice to the client that portions of the file have been redacted or items removed for good cause.

What contents of a client's file may be destroyed?

We have consistently opined that six (6) years is the minimum period of time a lawyer must retain a client's file after the file is closed or after final disposition of the matter. See, Formal Opinions 1994-91 and 1993-10. Although we have opined that six (6) years was generally a reasonable minimum period of time, we are aware that most have assumed that the six (6) year minimum period of time applied to all client files. Today, we emphasize that six (6) years is the minimum period of time that a client's file must be retained, but circumstances may extend that minimum period of time indefinitely. Even when the passage of time and other circumstances render destruction of a client's file appropriate, there are some contents that should never be destroyed.

In Formal Opinion 1993-10, we described the nature of documents that might be contained in a client's file and opined that it was the nature of those documents that determined whether they could be destroyed. We stated that those documents fall into four (4) basic categories. Today, we modify that categorization to simplify the analysis; the results are unchanged.

Category 1 property is "intrinsically valuable property." Its "value" is inherent in its nature. Value is not dependent upon certainty of ownership or its source. The fact that the property may be a copy or duplicate, rather than an original, may minimize its value, but this factor, without more, does not change its character as a Category 1 documents. Copies of Category 1 documents must be retained indefinitely, unless the

lawyer determines that the copy can be lawfully destroyed because it has been rendered useless and of no value by the client's possession of the original, or by the proper recording of the original, or at the specific written instruction of the client, under circumstances where destruction of the property would not otherwise be illegal or improper. However, the best practice is that the lawyer should never destroy originals of Category 1 property. Where destruction is necessary and appropriate, the lawyer should deliver the original to the client or deposit it with the court. Examples of such property include, but are not limited to: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, stock certificates, bonds, cash, negotiable instruments, certificates of title, abstracts of title, deeds, official corporate or other business and financial records, and settlement agreements.

Category 2 property is "valuable property." Its value is dependent upon the present circumstances or upon the reasonably foreseeable probability of a change in future circumstances. Factors that the lawyer may consider are certainty and identity of ownership, source of the property, its intended purpose, its planned or possible use, its character as an original or copy, its form and size, the practicality of preserving or storing it, and the reasonable expectations of the client or owner regarding its ultimate disposition. Category 2 property may be destroyed with the actual consent of the client or upon the client's implied consent, which may be obtained by the client's failure to take possession of the property on or within 60 days of a date established by the

lawyer's written file retention policy or as provided in a separate written notice, sent to the client's last known address, advising of the date of the lawyer's planned destruction or disposal of the property. Notice provided as part of the lawyer's written file retention policy, which is affirmatively acknowledged in writing at the outset of the representation or upon termination of the representation, is presumed sufficient and no further notice or attempted notice is required prior to destruction or final disposition of the property. Examples of Category 2 property include, but are not limited to: tangible personal property, photographs, audio and video recordings, pleadings, correspondence, discovery, demonstrative aids, written statements, notes, memoranda, voluminous financial, accounting, or business records, and any other property, the premature or unauthorized destruction of which would be detrimental to the client's present or reasonably foreseeable future interests.

Category 3 property is property that has no value or reasonably foreseeable future value. It does not fall into either Category 1 or Category 2. It may be destroyed after the minimum required period of time without notice to or authorization by the client. However, the best practice is for the lawyer to use the same notice procedure for Category 3 property as prescribed for Category 2 property.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of

which reasonable attempts should be made to contact the client and deliver the documents to him. After the minimum retention period of six (6) years, those documents may be appropriately destroyed. There is no longer a category 4 for purposes of the analysis.

Before destroying or disposing of any client file, it is the lawyer's responsibility to review and screen the file to ensure that Category 1 property is not being destroyed. The lawyer must maintain an index of all destroyed files, which index must contain information sufficient to identify the client, the nature or subject matter of the representation, the date the file was opened and closed, the court case number associated with the file, a general description of the type of property destroyed, e.g., "Pleadings, Correspondence, Notes, Legal Research, Videotapes, Photographs," a notation that the file was reviewed for Category 1 property, by whom, whether or not such property was contained in the file, and if so, its location or disposition, and the date and method of destruction of the file.

What are the ethical considerations relating to electronic files?

The practice of law today often requires legal documents and many other components of a client's file to be converted to, created, transmitted, stored, and reproduced electronically. Moving from "the paper chase" to "the paperless office" presents practical concerns. Converting existing paper files to electronic format is

usually accomplished by "scanning" the paper file, which converts it to a format that can be stored, transmitted, and reproduced electronically.

When paper files are converted to electronic format, destruction of the paper file is not without limits or conditions. Even after Category 1 documents are scanned and converted to electronic format, the lawyer cannot destroy the paper Category 1 document. After scanning and conversion, Category 2 and 3 documents may be destroyed, but the best practice is to follow the procedure used for ordinary paper documents.

Like documents that are converted, documents that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file. This requires the lawyer to ensure that only authorized individuals have access to the electronic files. The lawyer should also take reasonable steps to ensure that the files are secure from outside intrusion. Such steps may include the installation of firewalls and intrusion detection software. Although not required for traditional paper files, a lawyer must "back up" all electronically stored files onto another computer or media that can be accessed to restore data in case the lawyer's computer crashes, the file is corrupted, or his office is damaged or destroyed.

A lawyer may also choose to store or "back-up" client files via a third-party provider or internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or internet-based servers may include what is commonly referred to as "cloud computing." According to a recent ABA Journal article on the subject, "cloud computing" is a "sophisticated form of remote electronic data storage on the internet. Unlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor." Richard Acello, *Get Your Head in the Cloud*, ABA Journal, April 2010, at 28-29.

The obvious advantage to "cloud computing" is the lawyer's increased access to client data. As long as there is an internet connection available, the lawyer would have the capability of accessing client data whether he was out of the office, out of the state, or even out of the country. In addition, "cloud computing" may also allow clients greater access to their own files over the internet. However, there are also confidentiality issues that arise with the use of "cloud computing." Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third-party that is free to access the data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the internet.

However, such confidentiality concerns have not deterred other states from approving the use of third-party vendors for the storage of client information. In Formal Opinion No. 33, the Nevada State Bar stated that:

> "[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney's direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent."

In approving on-line file storage, the Arizona State Bar noted in Formal Opinion 09-04 that:

> "[T]echnology advances may make certain protective measures obsolete over time. Therefore, the Committee does not suggest that the protective measures at issue in Ethics Op. 05-04 or in this opinion necessarily satisfy ER 1.6's requirements indefinitely. Instead, whether a particular system provides reasonable protective measures must be "informed by the technology reasonably available at the time to secure data against unintentional disclosure." N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."

In their opinions, the Bars of Arizona and Nevada recognize that just as with traditional storage and retention of client files, a lawyer cannot guarantee that client confidentiality will never be breached, whether by an employee or some other third-party. Rather, both Arizona and Nevada adopt the approach that a lawyer only has a duty of

reasonable care in selecting and entrusting the storage of confidential client data to a third-party vendor. The Disciplinary Commission agrees and has determined that a lawyer may use "cloud computing" or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.

The duty of reasonable care requires the lawyer to become knowledgeable about how the provider will handle the storage and security of the data being stored and to reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider.

In whatever format the lawyer chooses to store client documents, the format must allow the lawyer to reproduce the documents in their original paper format. If a lawyer electronically stores a client's file and the client later requests a copy of the file, the lawyer must abide by the client's decision in whether to produce the file in its electronic format, such as on a compact disc or in its original paper format.

When a lawyer discards laptops, computers, or other electronic devices, he must take adequate reasonable measures to ensure that client files and/or confidential information have been erased from those items. Failure to do so could result in the

disclosure of confidential information to a subsequent user. If such disclosure occurs, the lawyer could be subject to disciplinary action for a violation of Rule 1.6 of the Alabama Rules of Professional Conduct.

In what format must the client's file be delivered?

There are various possible combinations of client file formats, including original paper files scanned and converted to electronic document format, original e-documents, and e-mails. Often client files are maintained in part in paper format and electronic format. Rarely is it possible to originate and maintain a client file in electronic format. Therefore, the best practice is to develop a procedure that integrates the various file formats into an organized, indexed and searchable, unified system, so that prompt access to and production of the complete file, regardless of its various formats, can be reasonably assured.

Where a client has requested a copy of his file, the file may be produced in the format in which it is maintained by the lawyer, unless otherwise agreed upon or requested by the client. If the client requests that the electronic documents be produced in paper format, then the lawyer must accommodate the client, unless the lawyer's written file retention policy agreed to by the client provides otherwise. Even in cases where the lawyer's file retention policy provides that the file will be produced in only electronic format, where the client's level of education, sophistication, or technological ability, or lack of financial resources, or the unavailability of computer hardware or

software necessary to access the documents would create an burden on the client to access the file in electronic format, the lawyer must produce a copy of the file in traditional paper format. Likewise, if the client requests the lawyer to produce the file in electronic format, but the lawyer maintains portions of the file in traditional paper format, the lawyer is not required to produce the file in electronic format, but may simply produce the file in the format in which it is maintained.

Can the lawyer charge the client for the cost of copying the file?

A lawyer may not charge the client for the cost of providing an initial copy of the file to the client. We note that many lawyers furnish courtesy copies of documents to their clients during the representation. Again, unless the lawyer includes a provision providing otherwise in his written file retention policy, acknowledged by the client at the outset of the representation, providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the *entire* file to the client at the termination of the representation. And, the lawyer may not charge the client for copying the *entire* file, even though courtesy copies of some documents have been previously provided to the client. 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. If the lawyer includes a contrary provision in the client contract or engagement letter which provides that contemporaneous courtesy copies of documents during the representation satisfies his obligation to

produce the client's file, such provision must describe with specificity what documents will be contemporaneously produced, what documents will not be contemporaneously produced, and what procedure and safeguards will be in place to ensure that the contemporaneous courtesy copy policy will be consistently followed. In any case, the client has a right to inspect the lawyer's file to ensure that the client's contemporaneous courtesy copy corresponds to the lawyer's copy of the file. Lawyers may not charge the client for any costs incurred in producing and tendering the file to the client. However, the lawyer may charge reasonable copying costs if a client requests additional copies of his file.

As a general rule, the client is responsible to make arrangements to pick up a copy of his file at the lawyer's place of business. The lawyer may insist on a written acknowledgement of receipt from the client as a condition of surrender of the file. In the event the client refuses to acknowledge receipt of the file, the lawyer may refuse to tender the file. If the client requests that the file be produced to his authorized agent, then the lawyer should insist on written authorization to do so and should expressly warn the client that production of the file to a third party may defeat confidentiality and attorney-client privilege. Finally, if the client requests that the file be produced by mail, common carrier, or at a location other than the lawyer's office, the client is responsible for the costs associated with such production and the lawyer may withhold production

until the client pre-pays the estimated costs or makes arrangements agreeable to the lawyer.