

2013 FORMAL ETHICS OPINION 15

RETURN OF ELECTRONIC RECORDS TO CLIENT UPON TERMINATION OF REPRESENTATION

Adopted: January 24, 2014

Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

Inquiry #1: In the age of electronic records, what information must be given to a departing client when the client requests the file?

Opinion #1: Rule 1.16(d) of the Rules of Professional Conduct requires a lawyer, upon termination of representation, to “take steps to the extent reasonably practicable to protect a client’s interests, such as...surrendering papers and property to which the client is entitled...”

Comment 10 to Rule 1.16 specifically provides that copies of “all correspondence received and generated by the withdrawing or discharged lawyer should be released; and anything in the file that would be helpful to successor counsel should be turned over.”

Competent representation includes organized record-keeping practices that safeguard the documentation and information necessary to enable the lawyer to (1) readily retrieve information required for the representation; (2) remain abreast of the status of the case; and (3) be adequately prepared to handle the client’s matter. 2002 FEO 5; Rule 1.1, cmt. [6]. The standards for record-keeping, including record retention, for electronic communications, documents, records, and other information (“records”) are the same as the standards for paper records. As stated in 2002 FEO 5 on the retention of email in a client’s file, “[a] lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client’s file.” Whether a lawyer should retain an electronic record that relates to a client’s representation “depends upon the requirements of competent representation under the circumstances of the particular case.” *Id.*

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format (electronic or paper) is the most appropriate for the retention of records generated during the representation of a client. 2002 FEO 5; see also RPC 234 (paper documents in client’s file may be converted and saved in an electronic format if original documents with legal significance, such as wills, are stored in a safe place or returned to the client, and documents stored in electronic format can be reproduced in a paper format).

If an electronic record relative to a client’s matter would be helpful to successor counsel, the electronic record is a part of the client’s file. As explained in CPR 3, a client file does not include

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“the lawyer’s personal notes and incomplete work product,” or “preliminary drafts of legal instruments or other preliminary things which, unexplained, could place a lawyer in a bad light without furthering the interest of his former client.” Therefore, a lawyer may omit from the records that are considered a part of the client’s file the following: (1) email containing the client’s name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations on documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

If the lawyer determines that an electronic record is a part of a client’s file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation. Conversely, if the lawyer, in the exercise of legal judgment, determines that the electronic record is not a part of the client’s file, then the lawyer is not required, but may, provide a copy of the electronic record to the client.

Inquiry #2: Are lawyers required to organize or store electronic records relative to a specific client matter in any particular manner?

Opinion #2: An organized record-keeping system designed to safeguard client information must include electronic records. See Opinion #1. The electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of the representation. A document management system to track records by client and matter is recommended.

Because of the potential for electronic records to accumulate, one important aspect of an organized record-keeping system is a procedure for regularly exercising legal judgment as to whether to retain an electronic record in the client’s virtual file. Such a procedure would, for example, require the regular identification of emails that should be retained and made a part of the client’s virtual file. Waiting until the representation has ended and the client has requested the file to identify electronic records that are a part of the client’s file may increase the likelihood that an important electronic record will not be identified properly.

Inquiry #3: When the representation terminates and the client requests the file, is the lawyer or law firm required to provide the records in the format (electronic or paper) requested by the client?

Opinion #3: Many clients, or successor counsel, will have the technical expertise and financial ability to receive client records in an electronic format without experiencing any problem or undue expense in opening, using, or reproducing the records. These clients will

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probably prefer to receive the records in an electronic format. However, there are clients, such as individuals or small businesses with limited financial means or technical expertise, that cannot afford to purchase expensive software or computer equipment simply to gain access to the records in their own legal files. There must be a weighing of the interests of the lawyer or law firm in producing the client's file in an efficient and cost-effective manner against the client's interest in receiving the records in a format that will be useful to the client or successor counsel.

Therefore, records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. See 2002 FEO 5 ("in light of the widespread availability of computers," emails may be provided to a departing client in an electronic format even if the client requests paper copies).

A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.

Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

Lawyers are encouraged to discuss with a client at the beginning of a representation the records that will be retained as a part of the client's file, and the format in which the records will be produced at the termination of the representation.