The ELECTRONIC Client File: Distinction Without a Difference?

Advances in technology during the past 40 years certainly have altered the way lawyers provide legal services to their clients. That provides the ethical underpinnings of Legal Ethics Opinion 357 (Former Client Records Maintained in Electronic Form), the committee’s most recent opinion involving technology.

Many lawyers maintain some or all of their clients’ files electronically. As the committee notes, such a practice often “reduces costs and increases efficiency” inuring benefits to lawyers and clients alike. Indeed, the opinion also recognizes that, in some cases, it is the clients who require that their lawyers provide them with documents in electronic form.

Yet, all clients and all lawyers do not, in fact, possess the same technological sophistication and/or resources, and there may be circumstances where a former client (or the former client’s successor counsel) is unable to access the electronic records as maintained by the lawyer. Although the committee strongly recommends that lawyers and clients reach agreements at the onset of the representation regarding how client files are to be maintained, how requested copies will be provided to the client, and who will bear the costs associated with providing the files in a particular form, the committee’s approach in the absence of such agreements follows a familiar path.

Rule 1.16 provides that “in connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client’s interests . . . surrendering papers and property to which the client is entitled.” In interpreting this provision, the D.C. Court of Appeals has made clear, “a client should not have to ask twice for his file.”

As early as 1986, the Legal Ethics Committee stated unequivocally that the entire file belonged to the client, and it has consistently upheld and strengthened this position in subsequent legal ethics opinions. A client’s file includes all material “that the client or another attorney would reasonably need to take over the representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client’s interests.”

Opinion 357 confirms that the lawyer’s duty to promptly surrender electronically maintained client files upon the termination of the attorney–client relationship does not differ from the lawyer’s duty to turn over paper client files. On the narrower questions of when a lawyer is required to convert electronic files to paper files (before turning them over) and who bears the cost of such conversion, the committee carefully balances the interests of both the reasonable lawyer and the reasonable client, concluding that:

(a) in response to a reasonable client request, the lawyer must convert properly maintained electronic files to paper;
(b) in most instances, the client will bear the costs of such conversion;
(c) however, the lawyer should bear the costs of conversion if “(1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client’s need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies.”

While the committee eschews a “bright-line” test, the balancing of interests analysis falls squarely within the parameters of Rule 1.16(d), embodying the withdrawing lawyer’s underlying obligation to take “all reasonable steps to mitigate the consequences to the client,” but allowing, in some instances, that the lawyer’s actions need not entirely comply with the former client’s specific demands.

The ABA 20/20 Commission’s charge is a formidable one. Ultimately, the realities of the modern practice of law, advances in technology, and global practice developments may well lead to...
monumental changes in legal ethics and lawyer regulation. Unless and until those changes occur, however, a lawyer’s use of technology, like all other lawyer conduct, is subject to the existing rules.

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Notes
1 The Legal Ethics Committee, a standing committee of the D.C. Bar, is comprised of 15 volunteers: 11 lawyers and four nonlawyers, elected by the Board of Governors.
3 See Rule 1.16(d). See also Rule 1.15(b), which provides that absent an agreement with the client (or other law), “... 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...”
4 See In re Than Q. Thai, 997 A.2d 428 (D.C. 2009), quoting In re Landsberg 518 A.2d 96 (D.C. 1986). In In re Thai, the court suspended the lawyer for 60 days (with a stay of a portion of that suspension and a payment of restitution to the client) for failure to turn over his client’s file five days after the client requested it. The court found that the five-day delay represented a significant portion of the 30 days, within which the respondent had to appeal his deportation order. In addition, the lawyer intentionally obstructed the client’s efforts to retrieve his file. See also In re Bernstein 707 A.2d 371 (D.C. 1998) and In re Russell 424 A.2d 1087 (D.C. 1980).
5 See D.C. Ethics Op. 168 (1986). See also D.C. Ethics Op. 206, 230, 250, 283, 333, and 350. While on its face Rule 1.16(d) permits a lawyer to withhold from the client “attorney work product that has not been paid for,” this exception is inapplicable when “the client has become unable to pay” or “when withholding the lawyer’s work product would present a significant risk to the client of irreparable harm.” See also D.C. Ethics Op. 250 (1994) (“It seems clear to us that retaining liens on client files are now strongly disfavored in the District of Columbia, [and] that the work product exception permitting such liens should be construed narrowly...”)
6 See D.C. Ethics Op. 333 (2005). The committee specifically held that handwritten notes and memoranda reflecting the lawyer’s internal thoughts and strategies are part of the file to which the former client is entitled to receive.
7 Opinion 357 also provides extensive guidance on how and when a lawyer may convert paper files to electronic files, and in what circumstances he or she may subsequently destroy the paper documents.
8 See Rule 1.16, Comment [9].

Disciplinary Actions Taken by the District of Columbia Court of Appeals

IN RE HOWARD D. DEINER. Bar No. 377347. December 8, 2010. Deiner was suspended on an interim basis based upon his October 26, 2010, convictions for serious crimes in the Circuit Court of Arlington County, Virginia.

IN RE SAMUEL N. OMWENGA. Bar No. 461761. December 2, 2011. Omwenga was suspended on an interim basis based on a substantial threat of serious harm to the public.

IN RE JAMES M. SCHOENECKER. Bar No. 490488. December 8, 2010. Schoenecker was suspended on an interim basis based upon his conviction of a serious crime in the Circuit Court, Branch IV, of Walworth County, Wisconsin.