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Practice Tips

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CAN I DIGITIZE MY CLIENT FILES?

The Office of Bar Counsel frequently receives calls from attorneys who are running out of storage space. The question asked is whether or not they can digitize their clients' files and destroy the physical files.

The answer is generally yes. The Rules of Professional Conduct do not prohibit an attorney from creating electronic versions of a client's file. Further, in 2006, the Standing Committee on Ethics and Professional Responsibility found that storing client information on a third-party server was permissible if the storage provider maintained reasonable security measures to protect attorney-client privileged information.¹

The applicable disciplinary rule is RPC 1.15 (Safekeeping Property), which requires that client funds and other property be preserved for seven years after the conclusion of representation. Although client files are not specifically mentioned in the rule, a client file is considered the client's property in Nevada.²

As noted above, we often do not receive a phone call unless storage space is at a premium. For example, one attorney stopped by our office a couple of years ago asking about the file retention period because he was simply running out of room to keep all his files. Upon learning it was seven years, he was visibly relieved because he could finally dispose of his files from the 1960s, 1970s, 1980s and 1990s. Conversely, we also get calls from firms just starting up and asking about electronically stored files in order to determine how much office and/or storage space their firm will require.

However, we advise that just because the rules do not prohibit maintaining electronic files in

lieu of physical copies, the attorney should still exercise common sense in determining whether or not the hard copy should be destroyed. Documents in which the original has independent legal significance should, obviously, not be destroyed. For example, if a lawyer maintains a client's wills and trust documents, the originals should be maintained even if electronic copies are created and other contents of the file are destroyed.

Further, court rules may also prohibit the immediate destruction of hard copies. As electronic filing becomes the norm, court rules are addressing how the paper copy of a pleading is to be maintained. For example, Eighth Judicial District Court Rule 8.08 (Maintenance of original documents) states that:

Unless otherwise ordered by the court, an original paper form of all documents filed electronically, including original signatures, shall be maintained by the filing party for a period of two years after the final resolution of the action, including the final resolution of all appeals. The document shall be made available, upon reasonable notice, for inspection by other counsel or the court.

Accordingly, if the client file at issue is a litigation matter subject to electronic filing, you ought to check with the applicable court rules to determine how long a physical copy must be maintained.

Lastly, if the seven years expire or you've otherwise converted the physical files into electronic versions, remember to properly dispose

of the physical copies. In other words, just because you no longer have to keep the physical file, you still have to take steps to ensure that attorney-client privileged information is safeguarded (e.g., shred the files). An attorney's duty to maintain confidentiality extends past the seven-year period and generally continues to exist even after a client's passing.³

One attorney who called regarding this issue asked if he could simply dump his old files into a dumpster after the file retention period had expired. When informed that such an approach would likely fall short of his ethical obligations, he asked if he could bill the client for shredding the documents. Besides the practical considerations of trying to collect from a client whose representation ended at least seven years earlier, an attorney cannot circumvent his or her ethical obligation just because it would cost money to pay for a shredding service or to otherwise dispose of the files properly.

One final note: if you do choose to scan documents, make sure they're scanned properly and are legible before getting rid of the originals. Receiving a PDF document in which every page was copied at a 45-degree angle does not make for pleasant reading. Further, if the scanning was too light, the resulting documents may be illegible and might not be text searchable. Scanning documents solves many problems, especially those involving space-limitations and clients who repeatedly request copies of their files. However, as with any technology, scanning also brings its own headaches. ■

1 See Standing Committee on Ethics and Professional Responsibility. Formal Opinion No. 33 (2006).

2 See, e.g., NRS 7.055 (Duty of discharged attorney to deliver certain materials to client; enforcement; adjudication of claims to materials).

3 See, e.g., Ronald D. Rotunda, John S. Dzienkowski, *Legal Ethics*, 2009-2010 Edition, at 243-246.