

The Ethics of Electronic Client Files

Floating in the Cloud

By Amber Hollister



Paper is so 1999. In an era when lawyers file complaints electronically, dicker over computer search terms and exchange discovery on Dropbox, many of us are seeking ways to eliminate paper from the practice of law. This trend is transforming the very nature of a client file. Gone are the quaint Redwelds and yellow legal paper of days past, as we text, scan and email our way to a brave new world.

A matched set of newly issued ethics opinions, OSB Formal Opinion Nos. 2016-191 and 2017-192¹, outline lawyers' ethical responsibilities when shifting to a paperless office environment and responding to client requests for copies of their files.

Are texts and emails part of a client file? What if a client wants paper copies of an electronic file? May a lawyer simply scan existing paper files and destroy the originals? How long do electronic files need to be maintained? May a lawyer store electronic files with a third-party

cloud-based vendor? The following hypothetical scenarios explore the contours of the new opinions.

Text Messages

1. *You represent a client seeking a divorce. Midway through the representation, the client terminates your representation and asks you to send her new attorney the file. You have exchanged hundreds of texts with the client, which are stored on your iPhone Messenger app. Are text messages part of the file?*

Text messages are part of the file, with limited exceptions. In today's world, many clients prefer to communicate with their attorneys in the same way they do with friends. As a result, it is increasingly common for clients to send text messages that provide direction and share key information relating to their representation.

When a client terminates a representation, an attorney may wonder what to do with those texts. As a starting point, upon termination, an attorney has a duty to provide the client with a copy of the file. RPC 1.16(d); 1.15-1(d). The file is broadly construed to include "the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client." OSB Formal Ethics Op. No. 2017-192.

As the Legal Ethics Committee notes in the opinion, "Information technology has radically altered the form and location of what may constitute a client file." This means that "even text messages" may be part of the file.²

But not every text message between an attorney and client need be considered part of the client file. Communica-

tions that "do not so much bear on the merits of the client's position in a matter as they do on the lawyer-client relationship" are not deemed to be part of the client file. OSB Formal Ethics Op. No. 2017-192. For example, a text message in which a client agrees to meet her attorney for lunch or comments on the latest sports scores would have little bearing on the representation, and need not be included. In contrast, text messages in which a client directs the lawyer to file a complaint or agrees to a settlement offer would be part of the file. In sum, text messages that are germane to the lawyer's exercise of professional judgment in the representation are part of the file, and must be treated as such.

2. *You doubt your client wants copies of text messages. Do you really have to produce them?*

If producing text messages sounds like much ado about nothing, there is another option available. The Legal Ethics Committee notes that an "attorney may produce less than the entire client file with appropriate disclosure" as long as the client does not object. OSB Formal Ethics Op. No. 2017-192, n6. This means a lawyer can simply ask a client whether she wants text messages to be produced as part of the file. And if the client says no, the lawyer may make a note of that preference and exclude the text messages from the production.

One note of caution: While coming to an agreement on what documents are produced as part of the client file may be an attractive option, savvy lawyers should still consider maintaining a full copy of the client file for themselves for the period of time recommended by the Professional Liability Fund.³

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Email Messages

3. You have also exchanged emails with an asset valuation expert that you planned to have testify at trial. The emails are stored in .pst files in Outlook. May you provide the new attorney electronic copies of the messages in their native format, or do you have to print them out?

As noted above, emails are another kind of electronic document that may be part of a client's file. The emails described, exchanged between the attorney and an asset valuation expert, are germane to the continuing representation of the client and are appropriately included in the client file.

Lawyers are generally permitted to simply produce electronic files in the format in which they are maintained. The committee explains, "To the extent that a lawyer has maintained an electronic-only copy of a file, the lawyer may provide the client a copy of the file electronically in the same format in which it was maintained, through a thumb-drive, CD, or other mechanism sufficiently designed to protect client confidentiality under Oregon RPC 1.6." This means that providing new counsel with a copy of the .pst files on disk is sufficient.

On the rare occasion that a client may not have the ability to access electronic file materials, the analysis may shift. For instance, if a client is in custody and does not have the ability to regularly access electronic file materials, it may be necessary for the lawyer to provide the materials in another format such as paper. *Id.*

4. After determining what documents are part of the client file, you decide to have staff burn a copy of the emails to a CD to deliver to the new lawyer. Who pays for the staff time and CD?

Assuming that your fee agreement with the client would have allowed you to charge for staff time and costs associated with making copies, you may charge the client for the staff time and cost of creating the CD. As the committee explains, generally speaking, "a lawyer may charge a client for costs associated with the production of a file to the extent that the lawyer could have charged the client for the same work if the request had been made during the lawyer-client relationship." *Id.*

If a client does not have the ability to pay for a copy of a file and needs it to protect his or her interests, the lawyer's right to payment for copies prior to producing the file, like the lawyer's right to a retaining lien more generally, must yield to the lawyer's fiduciary duty to the client. OSB Formal Ethics Op. No. 2017-192, n. 8. For instance, if an impecunious client needs a file copy in order to meet a statute of limitations deadline, the lawyer would be required to produce the file, despite non-payment, to prevent foreseeable prejudice to the client.

Going Paperless

5. *You and your partners have decided to convert to a paperless practice, but you have 10 years' worth of paper client files. May you scan the client files and shred the paper copies?*

The cost and energy associated with maintaining decades of bankers boxes of client files is not insignificant. Even so, ethical lawyers must be mindful about how they transition to a paperless practice. A new ethics opinion, OSB Formal Ethics Op. No. 2016-191, provides guidance on how to make the transition.

Generally speaking, a lawyer is permitted to convert paper client files to electronic files, but common sense still applies. A lawyer must be careful not to destroy paper documents that have intrinsic significance or are valuable originals, such as securities, negotiable instruments, deeds, and wills. This means that lawyers will have to review files and segregate valuable paper originals before completing a wholesale conversion. Lawyers who delegate this task will need to supervise nonlawyer staff to ensure the staff acts in conformance with lawyers' duties to safeguard client property. RPC 5.3; 1.15-1(a).

Once a paperless practice is in place, lawyers should talk with clients about how files are maintained. Explicit agreements on file maintenance will reduce ethical quandaries in decades to come. As the committee notes, "Lawyers and clients may enter into reasonable agreements regarding how the lawyer will maintain the client's file during and after the conclusion of a matter." OSB Formal Ethics Op. No. 2017-192. A lawyer and client may enter into an engagement agreement that outlines the format in

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which the file will be maintained, and for how long.

Absent an express agreement with the client, the rules “do not mandate a retention period for client files, although the client file is considered client property that the lawyer must safeguard pursuant to Oregon RPC 1.15-1 during the period the file is retained.” *Id.* at n. 7. Generally speaking, the rules do “implicitly impose an obligation to maintain information and records related to the lawyer’s work for the client.” OSB Formal Ethics Op. No. 2017-192, n. 1. (citing Oregon RPC 1.1 (requiring competent representation); Oregon RPC 1.2(a) (lawyer may take actions impliedly authorized)). Lawyers seeking to set a retention schedule must look to substantive law to determine their obligations.⁴ *Id.* at n. 7. For this reason, lawyers who communicate up-front with clients about their electronic files will have more certainty about their obligations and more freedom to manage their virtual file room in years to come.

6. *You look online for a cloud-based vendor to store your client files and are overwhelmed by the options. What are the ethics issues to consider when making a decision?*

Changing the format of a client file does not alter a lawyer’s ethical obligations. The duties to safeguard client property and ensure confidentiality remain the same. RPC 1.6; 1.15-1(a).

This means when making the switch to paperless client files, lawyers must be careful about engaging a cloud-based vendor that will “reliably secure client data and keep information confidential.” OSB Formal Ethics Op. No. 2011-188; RPC 5.3. If you are tempted to retain a fly-by-night service operating out of a war-torn country, think twice. Review the proposed terms of service, and consider whether a vendor meets industry standards relating to confidentiality and security.

In addition, the lawyer must take reasonable steps to ensure the “security and availability of electronic file documents” during the representation and after it concludes. OSB Formal Ethics Op. No. 2016-191. Ask what happens if there is an outage and you need access to client files to meet a deadline. What happens if the service goes out of business? Are the files backed up? Consider how you will react

if your electronic file is not available and what recourse you may have to protect your clients’ interests.⁵

After you retain a cloud storage vendor, reconsider the quality of the service from time to time, and evaluate whether it has kept pace with industry-standard technological advances. OSB Formal Ethics Op. 2011-188. Consider how you can effectively remove files from the cloud when it is time to purge client files.

While electronic client files give lawyers opportunities for increased efficiency and flexibility, lawyers who switch to paperless must keep in mind their ethical obligations to safeguard client files and produce copies to clients.

Ethics opinions are published and updated on the bar’s website at www.osbar.org/ethics/toc.html.

An archive of Bar Counsel columns is available online at www.osbar.org/ethics/bulletinbarcounsel.html.

Endnotes

1. OSB Formal Ethics Op. No. 2017-192 is a revised and reissued version of withdrawn OSB Formal Ethics Op. No. 2005-125.
2. This conclusion is consistent with Oregon RPC 1.0(q), which defines a “writing” broadly to include any electronic record of a communication.
3. For specific file retention recommendations, see “File Retention and Destruction,” available to OSB members who log into and view the PLF practice aid and form collection in the “File Management” category on the PLF’s website, www.osbplf.org.
4. For information about PLF recommendations on retention schedules, see note 3, above.
5. The PLF practice aid “Online Data Storage Providers” provides an excellent checklist for lawyers selecting a cloud-based vendor and is available in the PLF’s practice and form collection in the “Technology” category at www.osbplf.org.

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