

FORMAL OPINION NO 2017-192

Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files

Facts:

Client *A* terminates Lawyer *A* while a matter is ongoing. Client *A* does not owe Lawyer *A* any fee. Client *A* asks Lawyer *A* to provide a copy of the entire file to Client *A*'s new lawyer.

Lawyer *B* represented Client *B* in a matter some years ago. Client *B* now requests a copy of Lawyer *B*'s entire file. Client *B* does not owe any fee to Lawyer *B*.

Lawyer *A* and Lawyer *B* would like to withhold portions of the client files. Lawyer *A* and Lawyer *B* also would like to keep either the original or a copy of what they do provide to Client *A* and Client *B*.

Questions:

1. What portions of the client files must Lawyer *A* and Lawyer *B* make available to their clients?
2. May Lawyer *A* and Lawyer *B* retain a copy of the client files and charge their clients for expenses related to duplicating the files?
3. When may Lawyer *A* and Lawyer *B* charge costs related to locating and segregating file documents?

Conclusions:

1. See discussion.
2. See discussion.
3. See discussion.

Discussion:

1. *What Must Be Provided?*

Oregon RPC 1.16(d) provides:

(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 or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

Oregon RPC 1.15-1(d) provides, in pertinent part:

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 such property.

The term *client file* is not defined in the Oregon Rules of Professional Conduct (RPCs) and that term is only used in Oregon RPC 1.17(b), relating to the sale of a law practice. Historically, lawyers maintained documents or information needed to represent each client in a paper client file, which was typically stored in a single physical location. Information technology has radically altered the form and location of what now may constitute a client file. It is nevertheless useful to think of a client file, regardless of form or location, as 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.¹

¹ Compare ABA Formal Ethics Op No 471 (2015) (noting that the majority of jurisdictions follow the “entire file” approach to defining the “papers and property to which the client is entitled”; the entire file approach “assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends”). Other than these provisions and the Oregon RPC 1.15-1(a) requirement to maintain certain trust account records, the Oregon RPCs do not identify specific documents or information that a lawyer

Therefore, as a general proposition, and absent viable attorney liens,² a lawyer is obligated to deliver the entire client file to the former client or forward it to the client's new counsel upon receiving client consent. *In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988). In most instances, the entire client file will include documents and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes all electronic documents, records, and information that the lawyer maintained for use in the specific client matter, such as e-mail, word-processing documents on a server, audio files, digital photographs and even text messages.³ Subject to the exceptions discussed below, the entire file includes the lawyer's notes or internal memoranda that may constitute "attorney work-product."

There are a number of circumstances in which a lawyer may withhold documents that are contained within the client file. First, the client file maintained by the lawyer may possess documents or information to which the client is not entitled. For example, Lawyer A may store with Client A's documents, a legal memorandum from a prior case when

must maintain in the representation of a client. Other RPC provisions, however, implicitly impose on lawyers an obligation to maintain information and records related to the lawyer's work for the client. *See, e.g.*, Oregon RPC 1.1 (requiring competent representation); Oregon RPC 1.2(a) (lawyer may take actions impliedly authorized). Other than documents that were given to the lawyer by the client and documents with original significance (such as wills), a lawyer must exercise professional judgment to determine what documents or information are necessary to provide a client competent and diligent representation.

² OSB Formal Ethics Op No 2005-90; ORS 87.445; ORS 87.475; *Potter v. Schlessor Co., Inc.*, 335 Or 209, 63 P3d 1172 (2003).

³ See Oregon RPC 1.0(q), which defines a *writing* as a "tangible or electronic record of a communication or representation" It is worth noting, however, that the production of a "client file" to the client or successor counsel upon request is not judged by the broader discovery standards found in ORCP 36 or FRCP 26 that would be applicable in litigation; for example, a legal malpractice action.

Lawyer A represented Client C and the same or similar issues were present. Because Lawyer A prepared the memorandum in the course of representing Client C, Client A may not be entitled to a copy of the memorandum unless Lawyer A's reliance on the memorandum is relevant to a dispute between Lawyer A and Client A. Indeed, Lawyer A might violate the duty of confidentiality to Client C if Lawyer A provides the memorandum to Client A without at least redacting any confidential information *Cf.* OSB Formal Ethics Op No 2005-96 (rev 2014); OSB Formal Ethics Op No 2005-81 (rev 2014).

Second, a lawyer may possess notes or other communications 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. A lawyer might, for example, have e-mails showing that the lawyer has consulted counsel to explore the lawyer's potential exposure to discipline or malpractice liability to the client. Documents reflecting matters of this type are not part of the client file and need not be produced to the client or provided during a change in representation. *Cf. Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014) (holding that the attorney-client privilege as defined in OEC 503 applies to communications between lawyers in a firm and in-house counsel).

Third, a client file may also include internal firm communication relating to administrative matters, such as work assignments, routine conflicts review, client's creditworthiness, time and expense records,⁴ or personnel matters. Such documents are created for internal use primarily for the lawyer's own purpose and need not be produced to the client.

Fourth, a client file may contain electronic documents or information that could be construed as computer metadata, or which would otherwise be too burdensome and expensive to identify, locate, and produce in a readable or accessible format. Such data need not be produced as part of the client file.

⁴ Note that lawyers still have an obligation to provide an accounting of funds as provided under Oregon RPC 1.15-1(d).

Fifth, there may be substantive legal reasons, such as law or court order, that prohibit the delivery of certain documents, either in whole or part, to clients.⁵

The Committee cannot say that there are no other possible classes of documents or information that may be withheld. As a general proposition, however, unless there is a valid reason for not providing documents as discussed above, all documents from the client file should be provided.⁶

2. *May Lawyer Retain a Copy of the Client File and Charge for Duplication Expenses?*

A lawyer has a right to retain a copy of the client file.⁷ The question then is when and under what circumstances the lawyer can charge a client to duplicate all or part of the client file. The lawyer cannot charge for copies of original documents given by the client to the lawyer. The lawyer also cannot charge for copies of original documents prepared by the lawyer for the client and held by the lawyer at the client's request (e.g., the original of a client will or trust agreement). Any copies of such documents to be retained by the lawyer upon providing the original to the client must be made at the lawyer's expense.

With respect to all other documents, the question of duplication expenses depends primarily on the fee agreement between the lawyer and

⁵ An example might be when disclosure of materials would violate a duty of nondisclosure to another person.

⁶ A lawyer may, however, produce less than the entire client file with appropriate disclosure and without client objection.

⁷ The Oregon RPCs 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. Whether and how long a client file must be maintained is a matter of substantive law and therefore beyond the scope of this opinion. The Professional Liability Fund (PLF) generally recommends that files be kept for a minimum of 10 years to ensure the file will be available to defend the lawyer against malpractice claims. See, for example, "File Retention and Destruction," part of the PLF practice aid and form collection in the "File Management" category on the PLF's website, <www.osbplf.org>.

the client. If the fee agreement provides for duplication charges to be paid by the client, there is generally no reason to apply a different standard just because the lawyer-client relationship has ended.⁸ If, on the other hand, the fee agreement provides that the client is entitled to copies of documents without separate charge, the client is entitled to one copy, without charge, of any documents not previously provided to the client. To the extent, however, that a client wants duplicate copies of documents or information previously sent to the client, the lawyer is entitled to charge for those costs.

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 1.6.⁹ In some limited situations, such as when an in-custody client may not have regular computer access, a lawyer may be required to provide a file maintained in an electronic-only format in a format that can be accessed or read by the client.

Finally, some lawyers and law firms use propriety software in the practice of law. Among other things, proprietary software may manipulate, organize, and search data, or may populate information into docketing or other programs. Specific licensing agreements between the lawyer and the software provider may dictate the terms under which the data created by the software may be produced, and whether it may be produced at all. To the extent a summary or report can be created by the software, the lawyer should include that as part of the client file. The cost

⁸ The only circumstance in which we can presently foresee a different result would be a matter of timing. Suppose that a lawyer-client relationship ends in mid-matter and that an impecunious client needs documents immediately to protect the client's interest. In this circumstance, the lawyer's right to charge for photocopies, like the lawyer's right to a retaining lien more generally, would yield to the client's immediate need in light of Oregon RPC 1.16(d). *See* OSB Formal Ethics Op No 2005-90. The lawyer would, however, be free to pursue collection of photocopy charges at a later date just as a lawyer who cannot enforce a retaining lien is free to sue for past-due fees.

⁹ *See, e.g.*, OSB Formal Ethics Op No 2016-191.

of extraction or conversion of the data to a different proprietary format may be burdensome for a lawyer and, absent an agreement to the contrary, the client is not required to bear that cost.

3. *When May the Lawyer Charge the Client for Costs Related to Locating and Segregating File Documents?*

A lawyer may not charge clients for costs related to identifying and segregating the materials that the lawyer chooses not to produce. However, a lawyer may charge clients for the costs related to segregating materials that the lawyer is legally prohibited from producing, or if the client has requested only certain portions of the file. Subject to this limitation and to the limitation noted above, 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. In addition, a lawyer may charge the client if the lawyer is asked to reproduce documents or information already made available to the client.

As is true in other circumstances, “clearly excessive” or “unreasonable” fees or charges are prohibited. *Cf.* Oregon RPC 1.5(a); Oregon RPC 1.8(i); OSB Formal Ethics Op No 2005-124.

Approved by the Board of Governors, February 2017.

COMMENT: This opinion replaces OSB Formal Ethics Op No 2005-125. For additional information on this general topic and other related subjects, *see The Ethical Oregon Lawyer* § 3.4-6 (fees and costs), § 12.4-1 to § 12.5 (client property), § 16.4-3(f) (file retention) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 33, 38, 44–46 (2000).

