Returning Client Files—Another Look

Last summer, the American Bar Association published a formal ethics opinion on the apparently continuing and troubling subject of how much of a lawyer's "file" need be returned to the client at the end of the representation.[1] Representations end when no more work is requested or required in a discrete matter, or when the lawyer is fired, or when the client is fired, or when a court disqualifies a lawyer from continuing the representation. Questions may then arise about the respective rights of the parties to the items in the lawyer's file when the client or successor counsel requests them.

The ethical rules governing these questions are ERs 1.15 (Safekeeping Property) and 1.16 (Declining or Terminating Representation), particularly subsection (d) and Comment [9] thereof.[2] We examined this general topic some years ago[3] just before new ER 1.16 became effective, and when we followed Justice Feldman's prescient concurring opinion[4] to the effect that any item or document whose absence might prejudice the client in some fashion was required to be provided to the client at the end of the representation.

ER 1.16 was subsequently amended in 2003 to add the requirement that upon the client's request at the end of a representation, "[T]he lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client." Most notably, the Arizona Supreme Court added a Comment [9] to ER 1.16, which is not found in the ABA's Model Rules:

> Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client has already received a copy of them.

Comment [9] specifies the parts of the file lawyers need to preserve for the client as required by ER 1.15, and makes it clear that if the client has already been sent a copy of a file document during the representation, he can be asked to pay the copying charges if he wants to be sent another one once the representation has ended.

The ABA opinion points out every lawyer's duty under ER 1.4 (Communication) to keep the client "reasonably informed about the status of the matter," which presumes the lawyer will have already sent the client most of the documents relating to the representation and will have advised the client to maintain what was sent. The opinion also observes that many jurisdictions, by case law or ethics opinions under their versions of the Model Rules, have examined these issues and determined "which papers and property a lawyer must return, reproduce, and/or provide to a client."

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As luck would have it, Arizona is one of those jurisdictions, with a recent ethics opinion right on point.[5] It adopts a rule of reason for when the lawyer decides what to keep during the representation and what he has to provide the client or successor counsel when the representation ends. The opinion recognizes that a lawyer may receive or create documents in the ordinary course of a representation that are neither practical nor necessary to retain. Thoughts written on the back of a napkin or on a whiteboard should not normally need to be preserved, nor should every copy of emails sent to multiple lawyers within the firm, or copies of every discarded draft, be retained. Finally, the opinion withdraws several statements found in prior Arizona ethics opinions that were construed as requiring that everything generated during a matter be kept and provided without charge to the client upon termination of the representation, and which were thus at odds with the

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Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, a current Co-Chair of the State Bar Member Assistance Committee, and practices at David D. Dodge, PLC in Phoenix.

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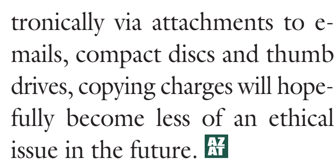
new opinion. The opinion points out the specific provisions of Comment [9] to ER 1.16, allowing a lawyer to charge a client for subsequent copies of documents that a client has previously received free of charge.[6]

If a client can't be charged at the end of a representation for a file document she has not previously received during the representation, wouldn't this mean *a fortiori* that she shouldn't be charged for copies of file documents initially sent to her pursuant to ER 1.4 during the representation? We have no direct authority on that specific question: Read literally, ER 1.16(d) and Comment [9] apply only after the termination of a representation and not before. The safest approach may be to make provision in your engagement letter for copying costs of file documents already provided to the client during the representation. With documents and information now more frequently being transmitted to clients electronically via attachments to e-mails, compact discs and thumb drives, copying charges will hopefully become less of an ethical issue in the future.



endnotes

1. ABA Formal Op. 471, Ethical Obligations of Lawyer to Surrender Papers and Property to Which Former Client is Entitled (July 1, 2015).
2. Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.CT.
3. *Returning a Client's Files: Who Pays the Copying Costs?* ARIZ. ATT'Y (Sept. 2003) at 10.
4. *National Sales and Service Co. v. Superior Court*, 667 P.2d 738 (Ariz. 1983).
5. Ariz. Ethics Op. 15-02, Client Files; Safekeeping of Property; Maintaining Client Files; Termination of Representation (June 2015).
6. Still in full force and effect is untitled Ariz. Ethics Op. 93-03 (March 17, 1993) (an attorney is not obligated under either ER 1.15(b) or ER 1.16(d) to provide extra copies of a client's file free of charge).