speaking of ethics

By Hope C. Todd

The ELECTRONIC Client File: Distinction Without a Difference?

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In 2009 Carolyn B. Lamm, president of the American Bar Association, created the ABA Commission on Ethics 20/20 to "perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments." As noted on the commission's Web page, "[the Commission's] challenge is to study these issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and well into the future."

For almost 40 years the D.C. Bar Legal Ethics Committee has been providing guidance to assist members of the D.C. Bar in better serving their clients, the courts, and the public by issuing formal ethics opinions on the interpretation and application of the D.C. Rules of Professional Conduct (D.C. Rules).[1] The committee's formal opinions constitute persuasive, but not binding, authority in the District of Columbia; yet, because the language of these ethics opinions often makes its way into the language of local court opinions, a more fair assessment of their weight may be that they are as binding as they are persuasive.

Advances in technology during the past 40 years certainly have altered the *way* lawyers provide legal services to their clients. Computers, e-mail, Internet, online research, BlackBerry devices, e-filing, e-discovery, social media, and beyond have dramatically affected the everyday practice of law. Yet, interestingly, in opinions where the Legal Ethics Committee addressed questions regarding advances in technology, it has consistently concluded that technological advances do not fundamentally alter the ethical duties that lawyers owe to their clients under the D.C. Rules, including competence, communication, confidentially, loyalty, and diligence and zeal.[2]

Indeed, it is the lawyer's continuing duty to protect a client's interests when the attorney–client relationship is ending 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.

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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."[3] In interpreting this provision, the D.C. Court of Appeals has made clear, "a client should not have to ask twice for his file."[4]

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.[5] 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."[6]

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.[7] 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.[8]

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.

2 *See, e.g.,* D.C. Ethics Op. 256 (Inadvertent Disclosure of Privileged Material to Opposing Counsel) (1995); D.C. Ethics Op. 281 (Transmission of Confidential Information by Electronic Mail) (1998); D.C. Ethics Op. 302 (Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web Pages) (2000); D.C. Ethics Op. 316 (Lawyers' Participation on Chat Room Communications With Internet Users Seeking Legal Information) (2002); D.C. Ethics Op. 341 (Review and Use of Metadata in Electronic Documents) (2007); and D.C. Ethics Op. 342 (Participation in Internet-based Lawyer Referral Services Requiring Payment of Fees) (2007).

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 Toan Q. Thai,* 987 A.2d 428 (D.C. 2009), quoting *In re Landesberg* 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 Ops. 206, 230, 250, 283, 333, and 350. While on its face Rule 1.8(i) 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) ("[I]t 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

Original Matters

IN RE MICHAEL J. RIGAS. Bar No. 317909. December 9, 2010. The D.C. Court of Appeals adopted Rigas' amended petition for negotiated disposition and suspended Rigas for one year, nunc pro tunc to January 28, 2007. The negotiated discipline results from Rigas' guilty plea in 2005 to a single violation of section 220(e) of the Communications Act of 1934 (47 U.S.C. § 151, *et seq.*) (willfully making a false entry in a corporate record required to be maintained). Rules 8.4(b) and 8.4(c), and D.C. Bar R. XI, § 10(b).

Interim Suspensions Issued 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.

IN RE RICHARD G. SOLOMON. Bar No. 414054. December 6, 2010. Solomon was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE ALBERT R. ZARATE. Bar No. 444609. December 6, 2010. Zarate was suspended on an interim basis based upon his conviction of a serious crime in Fairfax County, Virginia, General District Court.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*