

LEGAL ETHICS OPINIONS 1818

WHETHER THE CLIENT'S FILE MAY
CONTAIN ONLY ELECTRONIC
DOCUMENTS WITH NO PAPER
RETENTION?

You have presented a hypothetical involving an attorney with a practice concentrated in an area of administrative law. The practice includes representing clients before a federal agency. During the course of each representation, the attorney generates a large number of paper documents; also, a number of electronic documents are exchanged between the agency and the attorney. The attorney's clients have generally indicated a preference for, and in some cases, a requirement for the attorney to assist in minimizing the clients' file maintenance and storage costs by providing documents from the attorney to the client in an electronic format. Due to technological and economic trends, the attorney expects more clients to require that the attorney provide all documents in only an electronic format. Accordingly, the attorney proposes the following procedure:

- 1) Scan each paper document into an industry-standard electronic format for which free "reader" software is readily available;
- 2) Transmit the electronically formatted document to the client via e-mail, and
- 3) Subsequently destroy the paper document to prevent a disclosure of any confidence contained therein.

Under this process, paper documents would be destroyed only if the particular client consented to the destruction; otherwise, the attorney would provide the client with the paper documents. At the termination of the representation, upon client request, the attorney would provide to the client any retained paper documents and an electronic copy of the electronically formatted documents.

Under the facts you have presented, you have asked the committee to opine as to the following:

- 1) Must an attorney maintain a paper copy of a client's file during the representation?
- 2) May an attorney destroy paper documents in a current client's file once the client consents?
- 3) May an attorney request that a client provide such consent as a condition of the representation?

Committee Opinion
September 30, 2005

Your first question asks whether an attorney must maintain a client's file in the form of paper. The committee believes the answer is "no." The Rules of Professional Conduct do not contain a provision specifically directing what items a lawyer must keep in the client's file or in what form.¹ Rule 1.16's paragraphs (d) and (e) address what items in a client's file must be provided to the client, upon request at termination of the representation. However, they do not dictate the form in which such items must be kept.

In determining whether an attorney is meeting his ethical responsibilities for a particular client, it matters not generally what form the documents in the file take, but instead whether all the documents necessary for the representation are present in the file. This is not to say that there are not instances where a paper document might be required. There may be any number of circumstances where keeping an original paper document in the file is critical, for example, testamentary documents, marriage certificates, or handwriting exemplars, to name a few. Clients without access to computers would require the attorney to keep a paper file. As to file materials other than documents, such as physical evidence, an attorney must always safeguard, maintain and account for such items. Any other instances where lack of a physical item may prejudice the interests of the client would also mean that an exclusively electronic file would not be permissible. The committee opines that there is not a *per se* prohibition against electronic files in all instances. However, when making decisions as to what to keep in the file and in what form, while an attorney may consider storage expediency, those decisions must be made such that the attorney's duties of competence, diligence, and communication are not compromised.² See Rules 1.1, 1.3, and 1.4. The preference for electronic storage cannot reduce a lawyer's obligation to fulfill these ethical duties for each client.

Your second question is whether the attorney can destroy paper documents with the client's consent. The committee's answer is generally "yes." As discussed above, the Rules of Professional Conduct do not specify the form of file maintenance. In line with the response to Question One, an attorney may ask for the client's consent to destroy the paper documents, retaining only the scanned version, so long as that procedure does not prejudice that client's interests. The attorney is in the better position to know in what circumstances there may be legal significance in keeping the paper versus the electronic version of file contents; the attorney's recommendation to the client should be consistent

¹ Note that Rule 1.15 does provide such direction for trust account records; however, there is no equivalent provision for client files.

² The Committee notes that an electronic storage system frequently brings with it a need for outside technical assistance and support. The Committee cautions that in such instance the attorney should be mindful of the requirements of Rule 1.6(b)(6), which permits an attorney to disclose:

information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, *provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.*

(Emphasis added).

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with that determination. In determining what to destroy or retain in the client's file, the attorney should be mindful of the committee's recommendations in LEO 1305 that before destroying a client's paper file the lawyer should review that file to make sure that any documents that may be of continued use or benefit to the client only if they are maintained in paper form are not destroyed. In deciding whether to destroy a paper document that was provided by the client to the lawyer, for example, the lawyer should consult with the client and obtain consent to destroy it, after it has been converted to an electronic document.

Your third question is whether the attorney can require, as a condition for representation, that each client consent to an "electronic-only" file. Again, the committee's answer is generally "yes," so long as the client's interests are not prejudiced by such a condition for representation. As with Questions One and Two, the committee concludes that there is no *per se* prohibition against such a condition; nevertheless, if the choice to destroy a hard copy of a particular item would prejudice that client, then in that instance, the attorney should not require the client to agree to that destruction to obtain legal representation. Such a condition in that instance would violate Rule 1.3's directive not to "intentionally prejudice or damage a client."

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.