ORANGE COUNTY BAR ASSOCIATION

Formal Opinion 2005-01 (File Transfer and Work Product Rules Applicable to Electronic Files)

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Introduction and Issues

At the termination of an attorney's representation of his client, the attorney is obligated under Rule 3-700 of the California Rules of Professional Conduct to release to the client, at the client's request, "all the client papers and property," which is defined to include "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation." Rule 3-700 does not expressly address whether the attorney also is required to release to the client his electronic files – *e.g.*, emails, word versions of documents, and electronically stored discovery – and the courts have not yet addressed this issue.

Where an attorney maintains certain files only in electronic form, and not in hard copy, the rationale behind Rule 3-700 would require the attorney to turn over his electronic files to the client upon termination of the representation. That is because the electronic files are necessary to create a complete set of the client's "papers and property." The more difficult question is whether the attorney must turn over his electronic files when he already maintains, and intends to turn over to the client, hard paper copies of all of the documents contained in the electronic files. In that case, this Opinion recommends that the attorney balance the client's need for the additional electronic files with the expense (both money and time) to the attorney of having to copy and/or transfer the electronic files.

Although the expense of copying and transferring files generally must be borne by the attorney, the attorney may shift the expense to the client by agreement. The attorney may not, however, condition his transfer of the electronic files on payment by the client.

Finally, some of the attorney's work product may be contained within the client's files. In the case of electronic files, that work product may be embedded in the electronic documents as "metadata." The law is unsettled on the question of whether an attorney may remove his core work product (*i.e.*, impressions, conclusions, opinions, legal research or theories) before returning a client's files, and resolution of this issue is beyond the scope of this Opinion. Nonetheless, whatever rule is followed regarding core work product, the attorney may and should treat such core work product (metadata or otherwise) found in his electronic files the same as he would treat core work product contained in his paper files.

Duty To Transfer Electronic Files

Rule 3-700(D)(1) of the Rules of Professional Conduct provide that, at the termination of an attorney's representation, he shall "promptly release to the client, at the request of the client, all the client papers and property." Rule 3-700(D)(1) defines "client papers and property" to include "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation,...." Absent from Rule 3-700 is any specific mention of electronic files that the attorney may maintain either in addition to or in lieu of certain paper files.

Whether an attorney has the obligation to turn over to his client the electronic files maintained on that client's behalf depends on the circumstances. If the attorney chooses to maintain his files only in electronic format – an attractive and appropriate option for many attorneys otherwise tapped for storage space (*see* North Carolina Formal Ethics Op. 234 (1996)) – then his obligation is to turn over those electronic files to the client upon the client's request. In many cases, that will be enough. The attorney must consider the technological and financial ability of the client, however, to access the documents stored electronically. If the client is at least moderately sophisticated, she likely will be able to find and make use of what she needs in the electronic files. If, on the other hand, the client is unsophisticated or otherwise without the means to access and use the electronic files, then the attorney's duty to turn over the client's papers and property would not be satisfied simply by copying the electronic files onto a disk. In such case, the attorney may have to print certain files for the client in order for those files to have any value to the client. *See* Maine Bd. of Overseers of the Bar Ethics Op. 183 (2004) (attorney "must consider the client's access to technology and comfort with it, as well as the ability of the client to comprehend the nature of the information provided by the attorney."); *but see* North Carolina Ethics Op. 5 (2002) (permitting attorney to turn over emails in electronic format, notwithstanding client's contrary request, because of widespread availability of computers).

Another situation is when the attorney maintains his client's files both in paper format and in electronic format. In general, it is the attorney's obligation to turn over to the client only one copy of the file (*see, e.g.*, Arizona Sup. Ct. Jud. Ethics Advisory Comm. Op. 93-03 (1993)), so the attorney may be able to discharge his obligation by turning over either the paper files or the electronic files. The attorney must consider the stated wishes of the client, however, and if the client expresses a need for the electronic files, the attorney should make an effort to comply with that request. Because the attorney's duty under Rule 3-700 is only to turn over the client's papers and property that are "reasonably necessary to the client's representation," the attorney may consider what the client's actual needs are before incurring any significant expenses in connection with the client's request for either paper or electronic files. In other words, the attorney should balance his cost of providing the client files in the particular requested format against the client's need to have the files in that format. If the client's need does not outweigh the cost, then the attorney may provide the client with copies of the documents in the form most easily turned over by the attorney. As with all matters such as these, however, the attorney is urged to put a slight finger on the scale in favor of complying with the client's reasonable requests.

Yet a third situation is where the attorney maintains files in both paper and electronic format, but the paper files are incomplete. In such a case, subject to the client's needs as discussed in the immediately preceding paragraph, the attorney may produce the paper files to the extent he has them. For any documents (*e.g.*, emails that were not printed) that were not saved in paper form, the attorney has the duty to turn over the electronic version of those files or, in the alternative, to print the files and turn them over in paper form. Again, however, there may be a balancing test. To the extent the expense to the attorney of searching his electronic files for those few documents that may be missing from his paper files is great, the attorney may balance the client's need for those missing paper documents (are they "reasonably necessary to the client's representation?") against his cost of locating and producing them.

In the end, then, although the client is entitled to a return of all of her files, that entitlement is limited to documents "reasonably necessary" to the representation. For practical purposes, that means the client may not always be able to obtain her files in the precise form she wishes. Whenever reasonably practicable, however, the attorney should attempt to comply with the client's reasonable requests.

Compensation for Copying of Electronic Files

Although the Rules of Professional Conduct specify that an attorney must return to the client her files at the termination of the representation, the Rules do not specify who bears the expense of making copies of the files. The answer nonetheless can be inferred from the wording of Rule 3-700, and is supported by rules in other states.

Rule 3-700 provides that the attorney must "release to the client" the client papers and properties. Thus, the attorney must return to the client whatever documents he has, including all originals. To the extent the attorney wants to keep copies of the file for himself, he may do so at his own expense. In other words, absent some prior express agreement, the attorney should not charge the client for the copies because the copies are for the attorney, not the client. *See, e.g.,* Colorado Ethics Op. 104 (1999); South Carolina Ethics Op. 92-37 (1992); Pennsylvania Ethics Op. 96-157 (1996); *see also Averill v. Cox*, 145 N.H. 328, 339 (2000); *In re Admonition of XY*, 529 N.W.2d 688, 690 (Minn. 1995).

Although the rules and cases addressing this issue generally deal with paper files, the reasoning applies equally to electronic files. That is, the attorney's electronic files, like his paper files, belong to the client, and should be returned to the client, upon request, at no cost to the client. If the attorney wants to keep copies of the electronic files, then he must bear the cost of making such copies.

Of course, unlike with paper files, it may be impossible to give the client the "originals" of electronic files. Instead, the attorney may and probably must give the client disks or other media containing the electronic information, or otherwise transfer the data to the client. Still, even though the client may be receiving copies rather than originals, the attorney must bear the cost, if any, of making the copies.

One exception to the rule that the attorney bears the cost of copying paper or electronic files in connection with their return to the client is if the attorney and the client have a prior, express agreement to the contrary. The comment to Rule 3-500 states that the attorney may contract with the client to pass copying costs to the client. There is no reason that rule should not apply to copies made in connection with the termination of the

representation, including copies of any electronic files to which the client may be entitled. Thus, if copying costs are a concern for the attorney, it is strongly recommended that he include a provision in his original retainer agreement providing that the client must pay for copies of any files he requests at the termination of the representation, whether those files be maintained in paper or electronically. *See* Los Angeles County Bar Ass'n. Formal Op. 493 (1998). The attorney must bear in mind, however, that even if he has such an agreement, he may not condition delivery of the client's files upon payment of the copying costs. *See Kallen v. Delug*, 157 Cal. App. 3d 940, 950-51 (1984) (finding attorney's attempt to condition delivery of files on promise to pay after termination is void as contrary to public policy); *Academy of Cal. Optometrists, Inc. v. Sup. Ct*, 51 Cal. App. 3d 999, 1005 (1975) (finding attorney's lien void where client's property was held pending payment); *In re Van Baalen*, 123 Ariz. 82, 83 (1979) (may not condition return of files on client's payment of copying costs); *see also* San Diego County Bar Association Opinion 2001-1 (2001) ("An attorney may not condition delivery of copies of significant documents in the client's files to the client on the client's prior payment of the copying expense regardless of a provision in the fee agreement to the contrary."). Rather, the attorney's only remedy upon the client's refusal to pay is to file an action against the client ***after*** he has returned the files.

Attorney Work Product Issues Regarding Metadata

An attorney's files likely will include some of his core and non-core work product. Core work product consists of the attorney's "impressions, conclusions, opinions, or legal research or theories...." Cal. Civ. Proc. Code § 2018(c) (2005); *see also 2,002 Ranch, LLC v. Sup. Ct.* 113 Cal. App. 4th 1377, 1389-90 (2003). Non-core work product consists of all other work product, including those items covered by Rule 3-700(D)'s definition of the client's "papers and property." In general, non-core work product is entitled to qualified protection under the work product rule, requiring production only if denial would unfairly prejudice the party seeking the information. *See Metro-Goldwyn-Mayer, Inc. v. Sup. Ct.* 25 Cal. App. 4th 242, 249, n.8 (1994). Since non-core work product that would be prejudicial to withhold presumably is "reasonably necessary to the client's representation," it also would have to be turned over to the client under Rule 3-700(D).

California law is unresolved whether an attorney must turn over to the client his core work product upon termination of the representation. *See Roberts v. Heim*, 123 F.R.D. 614, 634 (N.D. Cal. 1988) (noting the conflict between Civil Procedure section 2018 and Rule 3-700(D) and the competing line of cases); *see also Eddy v. Fields*, 121 Cal. App. 4th 1543, 1548-49 (2004) (same); *Metro-Goldwyn-Mayer, Inc.*, 25 Cal. App. 4th at 249, n.8 (same); San Francisco County Bar Ass'n., Legal Ethics Comm. Op. 1990-1 (1990) (concluding that attorney had to turn over core work product where failure to do so "would result in reasonably foreseeable prejudice to the client's representation"). The issue of whether an attorney is obligated to turn over to the client his core work product, however, is beyond the scope of this Opinion. Instead, this Opinion is concerned with how these work product disclosure rules – however decided – are impacted by the electronic storage of the client's files.

Just as paper documents may contain an attorney's impressions or opinions, so too may an electronic version of a document contain impressions or opinions. Work product contained in electronic files, however, may be more difficult to find and eliminate than its paper counterpart. For example, if an attorney makes handwritten notes of his impressions on a pleading, those handwritten notes can be redacted before producing or returning the pleading. Notes on electronic documents may be embedded in the text of a document and not immediately apparent. Similarly, an attorney's edits to a document may be embedded in a document, even though they do not show up in the printed final version. This so-called "metadata" often may contain work product that should enjoy the same protections as work product existing in paper form. It may not be as easy to redact, however.

To the extent an attorney is allowed to redact his core work product before returning his files to the client (which, as discussed above, is an unresolved issue), he also may "redact" or otherwise eliminate from his electronic files the metadata that contains core work product. Whether or not the client has agreed in advance to pay for copying of the files, the attorney should bear the cost of reviewing his files – paper or electronic – for work product and undertaking any appropriate procedures for redacting or eliminating the work product before producing copies. *See* Wisconsin Prof'l Ethics Op. E-00-03 (2005). This would include the cost of running any of the computer programs that exist to scrub metadata from electronic documents.

If the attorney is concerned about the existence of metadata, and does not have an effective way to redact or scrub the metadata from his electronic files, it may be appropriate for the attorney to manually print the applicable documents and provide to the client those printed versions. The printed version likely would not show metadata, thus effectively "redacting" both core and non-core work product. Any non-core work product – *e.g.*, grammatical and stylistic edits made to a document – likely would not be "reasonably necessary to the client's representation," so there would be no need to preserve it for the client. To the extent the client specifically requested the electronic files rather than printed versions, the attorney would have to perform the same cost-benefit analysis discussed above to determine whether he had to undertake the work and expense of preparing the electronic files for production, taking into account his need to maintain the confidentiality of the work product at issue, the difficulty and expense in eliminating or redacting that work product, and the client's need for the documents in electronic form.

Conclusion

The advent of electronic file maintenance should not change the basic obligations of an attorney with respect to returning the files to his client at the termination of the representation. Whenever practicable, the attorney should honor his client's reasonable request to turn over the files in the form of the client's choosing – be it paper or electronic. Where the burden on the attorney in producing the files in one form or another would be great, however, the attorney may weigh that burden against the client's need for the particular form, and proceed accordingly.

Absent an express agreement to the contrary, the attorney must bear the cost of copying a paper or electronic file for his client. The attorney may contract to have the

client bear that cost, but the client's refusal to pay does not excuse the attorney's obligation to turn over the files promptly upon reasonable request.

Although the law is unsettled regarding an attorney's obligation to turn over to his client core work product – *i.e.*, impressions, conclusions, opinions, or legal research or theories – the fact that such work product is maintained electronically rather than in hard copy does not change the analysis. Moreover, just as an attorney's handwritten notes on a document may constitute work product that, under certain authorities, may be redacted prior to production to his client, so too can the metadata contained within an electronic version of a document also constitute work product that, under certain authorities, may be redacted or "scrubbed" prior to production.

In short, unless and until a larger body of law develops related specifically to electronic documents and data, attorneys should treat such documents and data much as they would their analogous paper documents and notes.