

**Nebraska Ethics Advisory Opinion for Lawyers
No. 17-01**

QUESTION PRESENTED

When a client file is closed, is it permissible to make an electronic copy of the file and then destroy the physical file immediately?

Brief Answer

The Nebraska Rules of Professional Conduct do not prohibit an attorney from keeping a closed client file in electronic form and immediately destroying the physical copy. However, several factors should be considered before a file is destroyed, such as whether it would be in the best interest of the client to keep the physical/paper copy and whether physical/paper copies of documents will be needed to satisfy the original document rule.

FACTS

A legal services organization has asked about file retention requirements under the Nebraska Rules of Professional Conduct. The organization currently retains the physical/paper copy of its clients' files for seven years. Physical storage space has become an issue, so it is considering the use of current technology that involves scanning its closed files and digitally storing the scanned images in lieu of physical storage.

Applicable Rules of Professional Conduct

Section 3-501.15(a): "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation."

Section 3-501.16(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 relating to the client to the extent permitted by other law.”

Discussion

There are no specific rules of professional conduct that address the requirements of lawyers to retain a physical copy of a file instead of an electronic copy. However, some factors should be considered before destroying the physical file and retaining only a digital file. As stated in Opinion 88-3, “the retention or destruction of client files is primarily a matter of good judgment. . .” That decision is no longer controlling, pursuant to Opinion 12-07, but much of the logic and reason of the opinion still offer sound guidance. Since its drafting, the adoption of the Model Rules of Professional Conduct stated a minimum time which files must be retained. The rule now states that other property shall be preserved for a period of five (5) years. Opinion 12-07 listed several factors to consider with regard to the retention of files:

1. The file may include original documents or other property furnished by or on behalf of the client, the return of which might reasonably be expected by the client. Before destroying such documents or property, the client should be asked whether he wants delivery of them. Alternatively, the lawyer may simply deliver such documents to the client with appropriate advice regarding factors which the client should consider in determining which items to preserve. Where unable to contact the client, the lawyer should be guided by the foreseeable need for the documents in determining whether to destroy them.
2. An attorney must use care not to destroy or discard information that he knows or should know may still be necessary or useful in the assertion or defense of the client’s position in a matter for which a statute of limitations has not expired.
3. An attorney must consider the reasonable expectations of the client for the preservation of files.
4. The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their relevance and materiality to matters that can be expected to arise in the future.

5. Disposition of client files must be made in such a manner as to protect full the confidentiality of the contents.

The State Bar of Arizona discussed the digital retention of client files in some detail. Arizona Informal Opinion 07-02 (2007) emphasized that a lawyer must make considerations such as the ability of the client to be able to open and access the electronic file format, assuring that the digitized file is complete and accurate, receiving consent from the client to digitize the file, and returning the hard copy to the client after digitizing it. The Arizona committee found that in appropriate cases, with careful consideration of the effects on a client, a lawyer may digitally store client files.

In considering the obligation of an attorney to provide a file to a client, this committee stated in Opinion 12-09 that production of a file to the client may be accomplished by a scanned or hard copy. This necessarily means that retaining a scanned copy of a client file should comply with the Rules of Professional Conduct. However, there might be unique circumstances where maintaining a paper copy of a client file would outweigh the convenience of an electronically stored copy (e.g. large items such as architectural/engineering plans, large photos, items that might be costly to reproduce from digital to paper). The same considerations should be applied when determining whether the physical file should be destroyed with only a digital copy being retained. The reasonable expectations of the client must be considered.

Other considerations may include, but are not limited to, the potential need for a physical copy at trial, the original document rule, or the client's or lawyer's future use of the physical file. The original document rule states, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Neb. Rev. Stat. § 27-1003 (Reissue 2008). Thus, an attorney should consider if an original document will be needed to satisfy the original document rule in future litigation. In addition, it was stated in opinion 12-07 that an attorney should make reasonable efforts to contact the client regarding the importance of the documents in the physical file after the file is closed.

Conclusion

Given the impact of technology on how files can be retained, it is not reasonable or practical keep physical/paper copies of every client file. Factors to consider include: availability and cost of physical and electronic storage space, ease of access to documents, potential need for originals in future litigation, and preserving confidentiality. It is reasonable for an organization to digitize its closed files. However, the organization must consider the factors noted above and any other considerations that are pertinent to the contents of a particular file. A written procedure for file retention and ultimate destruction of physical and digital copies of the contents of files should be maintained, followed, and revised as needed.