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Back to the Future: New OSB Opinion on File Transitions

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Clients and their lawyers go their separate ways mid-matter for many different reasons. Whenever this occurs, a frequent flashpoint is “the file.” The Oregon State Bar has long had a series of ethics opinions dealing with file transitions. When the Bar comprehensively reformulated its ethics opinion library in 1991, Formal Opinion 1991-125 became the “standard” for lawyers seeking guidance on questions ranging from what portion of the file must be released to who paid for copies. When Oregon moved from the former Code of Professional Responsibility to the Rules of Professional Conduct in 2005, this key opinion was reissued in the form of Formal Opinion 2005-125.

Although the 2005 opinion remained the “standard,” it was growing comparatively long in the tooth as lawyers’ files increasingly evolved from paper to electronic media. Earlier this year, therefore, the Bar retired Formal Opinion 2005-125 and replaced it with a more contemporary cousin: Formal Opinion 2017-192. The new opinion retains the core risk management considerations of its predecessors that remain universal regardless of storage form. But, it takes a fresh look at these always sensitive questions from the perspective of modern electronic files.

In this column, we'll survey this new "standard." We'll first look at what constitutes "the file" and what must generally be provided to the client (or the client's new lawyer). We'll then catalog the principal exceptions. Finally, we'll briefly outline other related logistical topics addressed.

"The File"

Like its predecessors, Opinion 2017-192 defines the concept of "file" broadly to include both its paper and electronic components:

> "Historically, lawyers maintained documents or information needed to represent each client in a paper client file, which was typically stored in a single physical location. Information technology has radically altered the form and location of what now may constitute a client file. It is nevertheless useful to think of a client file, regardless of form or location, as the sum total of all documents, records or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing a client."
> (*Id*. at 2; footnote omitted.)

Again like its predecessors, Opinion 2017-192 takes a broad view of what must generally be turned over:

> "[A]s a general proposition, and absent viable attorney liens, a lawyer is obligated to deliver the entire client file to the former client or forward it to the client's new counsel upon receiving client consent. . . . In most instances, the entire client file will include documents and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes all electronic documents, records, and information that the lawyer

> maintained for use in the specific client matter, such as e-mail, word-processing documents on a server, audio files, digital photographs and even text messages. Subject to the exceptions discussed below, the entire file includes the lawyer's notes or internal memoranda that may constitute 'attorney work-product.'"
> (*Id*. at 3; citations and footnotes omitted.)

The Exceptions

Opinion 2017-192 catalogs five principal exceptions.

First, documents that the client is not entitled to have are exempt from transfer. For example, a lawyer may have placed a memorandum from another case dealing with similar legal issues in the file for the lawyer's convenience. Because that earlier work was done for another client, it would not be subject to transfer.

Second, file materials that go to the lawyer-client relationship rather than substantive work on the client's matter may also be withheld. For example, the Oregon Supreme Court held in *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014), that a law firm lawyer's privileged conversations with internal firm ethics or claims counsel concerning the firm's interests are generally not subject to production. To fall within *Crimson Trace*, however, the firm should not ordinarily charge the client for such conversations

lest they otherwise be classified as substantive work for the client rather than within the firm's privilege for internal advice on the firm's own conduct.

Third, internal firm administrative communications, such as work assignments, conflict reviews or credit reports are generally exempt. Again, however, this general position may be undermined if the firm has charged the client for these activities.

Fourth, electronic metadata generally need not be produced. The opinion reasons that in most circumstances such data is itself irrelevant in light of the production of the associated documents.

Fifth, documents that the firm is legally obligated to withhold are exempt. For example, some documents may be covered by protective orders or contractual non-disclosure agreements that prohibit them from being shown to a client. This prohibition, however, may not apply to a former client's new lawyer depending on how the protective order or non-disclosure agreement involved is framed.

Logistics

Opinion 2017-192 also covers two related logistical topics. First, it notes that lawyers have a right to (at their own expense) maintain a copy of a client file (and it is often prudent to do so to document the work involved). Second, it

observes that copy costs are regulated largely by the fee agreement involved (although this is a less frequent flashpoint with electronically stored files).

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