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"The File"— What It Is & What It's Not

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The file that a lawyer maintains during the course of a matter for a client has always been at the heart of most representations. In recent years, the form of "the file" has changed radically—with paper documents largely being replaced by their electronic counterparts. Despite that change, "the file" still occupies its central role in law practice.

In this column, we'll look at what does—and what does not—constitute "the file." In doing so, we'll focus on the most common scenario where the definition comes into play and occasionally into dispute: when lawyers and clients go their separate ways short of the completion of the matter involved and the client asks the lawyer for "the file." The Oregon State Bar addressed this setting in Formal Opinion 2017-192. The opinion notes that there is no definition of "the file" in the Oregon RPCs and that the principal rules governing the transition of representation—including RPCs 1.16(d) on withdrawal and 1.15-1(d) on "safekeeping"—use the older terms "papers" and "property."

What It Is

The OSB in Formal Opinion 2017-192 took an expansive view of what constitutes "the file" and also provided historical perspective for its definition:

> "The term *client file* is not defined in the Oregon Rules of Professional Conduct (RPCs) and that term is only used in Oregon RPC

> 1.17(b), relating to the sale of a law practice. 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 the client.
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> "Therefore, as 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 re Arbuckle*, 308 Or 135, 775 P2d 832 (1989); *In re Chandler*, 306 Or 422, 760 P2d 243 (1988). 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 2-3 (emphasis in original; footnotes omitted).

The OSB's approach in Opinion 2017-192 is similar to ones that it took in two predecessor opinions that have since been withdrawn and superseded—OSB Formal Opinions 2005-125 and 1991-125. It is also broadly consistent with two related opinions addressing electronic files generally (Formal Opinion 2016-191) and cloud-based file storage (Formal Opinion 2011-188).

What It's Not

Formal Opinion 2017-192 also addresses what is not included in its definition of "the file." The opinion addresses five broad categories of material that are excluded and counsels that it is not necessarily an exclusive list.

First, the client may not be entitled to some items—such as a legal research memo prepared for another client that the lawyer simply placed in another file for the lawyer's convenience because it discussed a common legal issue.

Second, the file may include items that go to the business relationship between the firm and the client—such as collection notes—or material that is covered by the firm's own internal attorney-client privilege—such as a consultation with the firm's general counsel regarding an ethics or risk management issue. On this last point, the Oregon Supreme Court recognized internal law firm privilege in *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014). To qualify for internal privilege protection, however, the client should generally not be billed for the consultation. Billing the client may, in effect, turn any resulting notes, emails or other memoranda into the client's work product.

Third, the file may include internal firm administrative items such as work assignments or conflicts review that don't go to the legal services provided.

Fourth, Formal Opinion 2017-192 excludes "electronic documents or information that could be construed as computer metadata, or which would otherwise be too burdensome and expensive to identify, locate, and produce in a readable or accessible format." Electronic templates or proprietary software that does not include client-specific information would ordinarily not be included in the definition of "the file." In other words, a client might reasonably ask for an electronic copy of a will that the client paid for—but not the proprietary template the firm developed to create such documents.

Finally, substantive legal constraints—such as protective orders—may restrict delivery of some documents directly to clients.

ABOUT THE AUTHOR

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