

New York State Bar Association
Committee on Professional Ethics

Opinion 1142 (1/5/2018)

Topic: Delivering client file to client, maintenance of client files in electronic form

Digest: Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them, but the lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

Rules: 1.15.

FACTS

1. The inquirer has a litigation practice in which most documents, such as discovery materials and transcripts, are received or generated in electronic form. The inquirer stores such documents in electronic form. In those instances in which the inquirer receives documents in hard-copy form, such as documents received from clients, he scans the documents and either returns the originals to the client or keeps them separate from the electronic file.
2. Generally, when a former client requests a copy of his or her file, the firm provides a link to a secure, password-protected cloud storage facility containing the client's file. One former client, who retained the firm to represent him in a criminal matter and who is now incarcerated, has requested that the firm send a printed copy of his electronic file to the former client's spouse. The inquirer states that it would be expensive to print out the electronic documents and send the printed copy to the client. The firm has no hard-copy documents for this client.

QUESTION

3. To what extent must a lawyer provide a former client with the client file in the form in which the client requests it?
4. Where a law firm maintains its client files in electronic form, can the lawyer charge the former client for the costs of printing and mailing a copy of the client file to the client?

OPINION

5. The principles that largely govern the answers to these questions have been set forth in a number of court and ethics opinions. First, except where original documents have particular evidentiary or similar value, a lawyer is not required to maintain the client file in any particular form. N.Y. State 940 ¶ 12 (2012) (except for “documents such as wills, deeds, contracts, and promissory notes” or other documents whose legal effect or evidentiary value may be impaired by destroying originals, “the Rules permit electronic copies to be kept in lieu of paper originals”); N.Y. County 725 (1998) (“[I]n some circumstances it may be appropriate for an attorney to record the contents of a client’s file electronically or on microfilm instead of retaining the physical file, so long as the evidentiary value of such documents will not be unduly impaired by the method of storage.”). *See also* N.Y. State 1020 ¶ 8 (2014) (a lawyer may use cloud-based data storage and sharing tools as long as the lawyer “takes reasonable steps to ensure that confidential information is not breached”).

6/ Second, it is well-established that, with some exceptions not relevant here, a former client is entitled to his or her client file. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997) (holding that a former client was presumptively entitled to both “end-product” documents and “work product materials, for the creation of which they paid during the course of the

firm's representation"); N.Y. State 766 (2003) (overturning prior opinion in light of *Sage Realty* and concluding that "a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access"). The lawyer's ethical obligation to deliver to the client the client file upon request derives from Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the "Rules"), which requires a lawyer to "promptly . . . deliver to the client . . . as requested by the client . . . the funds, securities or other properties in the possession of the lawyer that the client . . . is entitled to receive." See N.Y. State 766.

7. Third, it is likewise well-established that a lawyer can generally charge a former client the reasonable fees and expenses of assembling and delivering to the former client those documents that the client is entitled to receive. *Sage Realty*, 91 N.Y.2d at 38 ("as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement"). Where a lawyer gives a client the documents to which the client is entitled, the lawyer is generally entitled to retain a copy, but because the copy is for the lawyer's own protection and not to advance the client's interests, the lawyer must bear the costs of making that copy. N.Y. State 780 (2004) (finding that a lawyer generally has a "right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct," but that the lawyer must pay for that copy).

8. Thus, it is clear that the inquirer must provide the client with a copy of his file, but we have not previously considered whether the lawyer must print out electronic documents if the client so requests. We conclude that where the client is unable to read electronic documents, the lawyer should make reasonable efforts to transmit the file in a form in which the client can access the documents. This conclusion is based on the premise that the property to which the client is entitled is not merely the physical medium on which the documents reside but the information contained thereon. Where a client is incarcerated, the client may not be permitted to receive a computer disk or drive containing the client file, or may not have the equipment to read the documents so they are usable in any further proceedings.

9. However, the lawyer is not obligated to pay the costs of printing out the documents. Rather, as the Court of Appeals concluded in *Sage Realty*, the costs of "assemblage and delivery of documents to the client" are properly chargeable to the client. 91 N.Y.2d at 38. The costs of preparing electronic documents for delivery to the client are analogous to the costs of assemblage of paper documents that were at issue in that case. See N.Y. City 2008-1 ("Although the Court of Appeals' *Sage Realty* decision principally related to paper documents, we do not see any principled reason why a lawyer's fees may not reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access."). As in *Sage Realty*, however, a different answer on who pays for the printing might obtain where "the law firm has already been paid for" printing a copy of documents, as when a lawyer receives a transcript in hard copy form at a per-page fee that was charged to the client. Here, the inquirer states that there are no such hard copy documents for this client, so they are not the subject of his inquiry. Similarly, because the inquirer was retained by a paying client, we have no occasion to consider whether a different result might obtain where the lawyer was appointed by a court to represent an indigent client.

CONCLUSION

10. Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them. The lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

