RETURNING ELECTRONIC DATA TO CLIENTS AT THE END OF A REPRESENTATION: COMPLYING WITH THE NEW ETHICS OPINION

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Introduction

When starting a new business (or personal) relationship, few of us focus on the end of that relationship. As lawyers, we rarely start representing a new client by thinking what will happen when the representation ends. But the State Bar of California just made the end of this process potentially much more expensive for attorneys who do not think and plan ahead.

Specifically in August 2007, The State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC"), following a trend started in a handful of other jurisdictions, decided that, if so requested by the client, attorneys are required to return e-mails, electronic versions of pleadings and other digital files at the end of a representation. *See* Formal Op. No. 2007-174 (8/14/07), available at www.calbar.ca.gov/calbar/pdfs/ethics/2007-174.pdf.

This article analyzes the content and implications of the Standing Committee's Advisory Opinion, and it identifies steps you can take to reduce the cost and burden of complying with the Opinion.

The COPRAC Decision

The opinion is easy to summarize and is deceptively straightforward in its tone. The context was a client that had been represented by an attorney on two unrelated matters, one a litigation matter and the other transactional. The Committee was asked whether, at the client's request, an attorney is obligated to release to the client five categories of electronic data at the end of a representation. The five categories of information were electronic versions of (1) e-mail correspondence; (2) pleadings; (3) discovery requests and responses; (4) a deposition and exhibit database; and (5) transactional documents.

The Committee started its analysis by citing to Rule of Professional Conduct 3-700, which governs an attorney's obligations when a client representation is terminated. In pertinent part, Subsection D of that Rule requires attorneys to return client papers and property:

> (D) Papers, Property, and Fees.
>
> A member whose employment has terminated shall:
>
> (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

Cal. Rule Prof. Conduct 3-700(D)(1).

The Committee noted that three of the five categories at issue were either explicitly mentioned in the language of Rule 3-700(D) (i.e., pleadings and correspondence), or were subsumed within categories mentioned in the Rule (i.e., deposition databases, which fall within the category of deposition transcripts). The Committee had opined in 1992 that a lawyer was obligated to turn over hard copy versions of discovery requests in responses because such documents "were reasonably necessary to the client's representation" because they were created with the

expectation that they would continue to be used during the representation.[1]

Thus, the Committee concluded that an attorney is also obligated to turn over the electronic versions of discovery requests and responses. Similar reasoning lead the Committee to conclude that transactional documents, which a client may need to review to monitor compliance with the terms of an agreement, are reasonably necessary for the client's representation, and thus must be turned over in hard copy and electronic form. As one writer summarized the Opinion, the Advisory Committee's basic assumption is that "Files are Files Whether Paper or Electronic."[2]

The Committee extended the analogy between paper and electronic files in three important respects. First, before providing the electronic documents to the client, the attorney must make sure that confidential information relating to other clients is removed. Second, the attorney must provide the documents, electronic and paper, at no cost to the client unless the attorney has entered into an agreement that the client will pay for the cost of making copies of the files. Third, the attorney may not condition returning the files, electronic or paper, on either the client's paying for the attorney's unpaid fees or on paying the costs of making the copies of the electronic and paper files. The attorney is obligated to promptly return such files, paper or electronic, and if necessary, may pursue "a claim for the recovery of the member's expense in any subsequent legal proceeding."[3]

The Committee did, however, recognize that the return of electronic documents differs from the return of paper documents in at least one respect: an attorney is not required to change the format of an electronic document before returning it to the client. An attorney's basic obligation is to maintain documents and not create them. Thus, for example, an attorney is not required to convert a Word document to WordPerfect or vice versa, even if requested to do so by the client.

The Committee's conclusions are unremarkable in many respects. Given the volume and scope of electronic data created in a typical practice, it would be unthinkable to exempt all electronic data from the attorney's obligation to return documents and files to clients at the end of a representation. Indeed, in many circumstances, almost all the files attorneys have today are in electronic form. Thus, it is not surprising that the Standing Committee followed opinions issued by bar associations in Orange County, New Hampshire and Illinois, which have also broadly recognized an attorney's obligation to return electronic information at the end of a representation.[4]

Yet, as indicated below, there is more to complying with the obligation to return electronic data than the matter-of-fact tone reflected in the Opinion. Absent a pre-existing overall electronic information management regime, a firm may be faced with numerous deceptively complicated aspects of complying with the Opinion.

What Kind of Electronic Documents Must be Turned Over?

First, under the Opinion and its reasoning, the size of the set of electronic documents that an attorney may need to provide to a client is potentially vast. That potential scope is only likely to increase, in light of computers' ever-expanding information generation and storage capacities.[5]

In addition to the five categories of documents discussed in the Opinion, the express terms of Rule 3-700 also require an attorney to turn over physical evidence and expert reports. The Opinion's reasoning also strongly suggests that the electronic versions of any categories of documents specifically mentioned in Rule 3-700 would also need to be turned over. Those categories would include expert's reports (presumably testifying and non-testifying experts), along with potentially any pertinent electronic information storage media. Likewise, theoretically electronic forms of pertinent communication other than e-mail, such as text messages, would also need to be turned over. Perhaps the State Bar should adopt a rule of reason, perhaps exempting intra-firm communications that lack substantive discussion of the client's matter. Absent such a restriction, firms could be forced to engage in costly, time-consuming reviews of the vast data sets that might have been generated.

In addition, any electronic document that might allow a client to monitor compliance with obligations resulting from the representation or might help the client in any way in the future would also seem to be covered. Thus, given that electronic communications and data continue to become ever more pervasive, varied and dynamic, the

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scope of electronic information potentially subject to the Opinion is likely to grow.

There are at least two categories of information, whether in electronic or paper form, that may not need to be turned over. The Opinion explicitly assumes that the documents at issue were not subject to the protections of the work product doctrine. This simplifying assumption is understandable in the context of an advisory ethics opinion. Nonetheless, attorneys might be asked to produce memoranda or other documents that convey a lawyer's thoughts, opinions or mental impressions. California law is currently far from clear about whether such documents need to be returned to the client. As aptly noted by the Orange County Bar in the opinion cited in the August COPRAC Opinion, "California law is unresolved whether an attorney must turn over to the client his core work product upon termination of the representation."[6]

The recent COPRAC Opinion also assumes that no one other than the client can assert an ownership or property right over any of the documents requested by the client. However, there are at least two circumstances in which conflicting rights might come into play. One is where the documents are subject to a protective order in, for example, a trade secrets and/or intellectual-property infringement lawsuit. Often, documents turned over during discovery by a client's litigation opponent can be subject to the "attorney's eyes only" tier of a protective order. Under that scenario, care must be taken not to disregard the rights of non-client third parties.[7] Given that Rule 3-700 explicitly operates with respect to documents that are not subject to "any protective order or non-disclosure agreement," it seems that an attorney may be obligated to uphold the protective order or non-disclosure agreement, even in the face of a client request for the documents. At a minimum, the attorney may need to seek guidance from a court (including asking for an *in camera* review) or turn over the protected documents directly to successor counsel, if any.

Second, electronic documents are particularly likely to be subject to licensing arrangements. For example, many family law and estate planning attorneys prepare certain documents, such as trusts, that are created using software that is licensed to the attorney. Turning over the hard copy of the document is not likely to implicate the license agreement. However, turning over the electronic template that creates the documents might be more problematic. At least one advisory opinion in another state has indicated that lawyers do not need—and may not be permitted—to turn over any software that was used by the attorney to create the documents.[8]

The authors are unaware of a California decision or State Bar Opinion that has addressed the template/software issue. Nonetheless, if you create templates via licensed software, it might behoove you to review the underlying licensing agreement before turning over any electronic files. Note that, in the electronic discovery setting, federal courts have generally required a responding party to compile *existing* information into a particular format or structure requested by the opposing party, and sometimes even go as far as ordering a litigant to provide requisite proprietary software.[9] It is questionable at best whether the broad discovery duties placed on a litigant should be imposed on an attorney vis-à-vis his/her client upon the end of a representation.

Is the Burden on the Attorney Relevant?

One of the ostensibly far-reaching aspects of the Committee's Opinion is its discussion of the question whether, when determining what electronic documents an attorney must turn over, it is appropriate to take into account the burden on the attorney to collect and produce such documents. Some advisory opinions, most notably the one promulgated by the Ethics Committee of the Orange County Bar Association, have indicated that the attorney's obligations to return electronic data to the client should be subject to a balancing test:

> When an attorney maintains his client's files both in paper format and in electronic format, . . . and the attorney intends to provide hard paper copies of all the documents contained in the files, . . . the attorney should balance [the] costs of providing the client files in the particular requested format against the client's need to have the files in that format.

Orange County Bar Assoc. Formal Opinion 2005-01.

The State Bar's Standing Committee rejected out of hand this balancing test approach. It essentially concluded that an attorney's burden to comply is not relevant when determining the obligations of an attorney to produce electronic documents:

> [T]he Committee believes that, at least as a general matter, an attorney's obligation under rule 3-700(D)(1) to release items in electronic form is not subject to a "balancing test," . . . . The Committee discerns no apparent support for the applicability of a balancing test either in the rule itself, which is silent on the issue, or in any extrinsic evidence bearing on the rule's meaning.

COPRAC Formal Opinion 2007-174 (citations omitted).

The Opinion's view that a balancing test has no basis in the Rule is a bit difficult to understand given that the Rule expressly states that the client is entitled to receive documents that are "reasonably necessary for the representation." The use of the word "reasonably" suggests that some balancing is necessary to determine when attorneys are required to turn over electronic documents. Moreover, the rationale behind rule 3-700 and its counterparts is to make sure that the client is not prejudiced. It is difficult to see how, across the board in every setting, clients will be prejudiced if they are getting hard copy versions of documents that could be produced electronically.

Moreover, as the Committee itself notes, different bar associations have reached different conclusions about the applicability of the balancing test. For example, New Hampshire has taken the position that the obligation to return documents is absolute, regardless of how much of a burden it places on the attorney.[10] By contrast, Illinois has implicitly recognized that the attorney's ease in producing electronic documents is a relevant consideration by finding that, where "the facts represent that [copying all] client file materials [to disk] is easy to accomplish, it would be far more efficient and cost-effective to proceed in this manner rather than to require [an] Attorney [who was leaving the firm] to search through. . .boxes [of selected] hardcopy documents to figure out what documents may be missing."[11]

Note, though, that even the New Hampshire opinion asserts that the burden on attorneys can be minimized by using appropriate technology, as follows: "That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes."[12] Given that all the opinions discussed above are advisory in nature, the authors suggest that you, or your firm, perhaps working with your IT staff or an IT consultant, implement an overall electronic information management regime that includes a practical approach to deciding what documents to return and in what order.

How to Keep Confidential Information Out of Electronic Documents

The Committee's directive that attorneys remove confidential information relating to other clients is easy to say but can be difficult to apply with respect to electronic documents. Whereas confidential information relating to other clients appears on the face of paper documents, such confidential information often resides behind the scenes in electronic documents. This hidden data—often referred to as metadata—can be used to identify the author, the date the document was created, when it was revised, by whom, as well as all the changes the documents went through before it was finalized.[13]

For example, if you use a document created for one client as the basis of creating a document for a different client, the face of the document won't reveal the identity of the client for whom the document was originally created, but the file system data and/or the embedded data might.[14]

The Committee's Opinion obligates lawyers "to take reasonable steps to strip any metadata reflecting confidential information belonging to other clients from any . . . electronic items prior to releasing them to [the] Client" at hand. Only if a firm has an automated metadata-scrubbing process in place and/or is confident that its employees routinely use metadata-scrubbing software, will it be positioned to comply with its matter-termination scrubbing duty and be confident that it can do so without violating any confidentiality duty owed to other clients.

As a practical matter, many electronic documents are created by using a document originally generated, or previously modified, in another matter. Most commonly this reuse is done via the "File . . . Save As" command in Word software. By one general estimate, 90% of new electronic files are created in this fashion.[15] Absent *ad hoc* scrubbing at the time, Client A's name could be easily viewable in the Properties

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of a Word file created for Client B; or, less likely but more problematic, in embedded data reflecting prior content of the electronic document when it related to Client A.

The Committee is correct that it is feasible to scrub metadata. Metadata "cleaning" software is readily available[16] and quite inexpensive.[17] Indeed, as a matter of professional responsibility, the universal view of other advisory opinions (even those forbidding "metadata mining" by the recipient attorney) has been to ethically bind an attorney to scrub documents for metadata before disseminating a Microsoft Office file (Word, Excel or PowerPoint) as an e-mail attachment or otherwise.[18]

However, those ethics opinions have established the scrubbing obligation on an *ad hoc* document-by-document basis in the ordinary, day-to-day course of business. Requiring an attorney to scrub a batch of files *en masse* after the fact is another matter. Microsoft's built-in Remove Hidden Data (RHD) tool—now called Document Inspector—is deficient in scope.[19] Furthermore, to the authors' knowledge, the commercially available—and more powerful—scrubbing programs are also not sufficient, off-the-shelf. In the authors' experience, those programs do not generate logs that would give an attorney comfort that metadata, let alone all potentially confidential metadata, has been removed from all of the files in the batch.

Likewise, the technological advances made by Workshare Protect's convert-to-.pdf feature and Adobe Acrobat Professional 8.0's Data Removal tool do not provide a complete solution because they presuppose that it will be acceptable to convert Microsoft Office files to .pdf format before turning them over. The irony is that, to convert to .pdf would require changing the format of the electronic documents; one thing the Committee said attorneys should not have to do.

There are many ways to skin the cat, at least day-to-day. Good communication between a law firm's lawyers and IT leader/consultant can result in an effective across-the-board approach that limits the types of metadata maintained in electronic files—at least those stored in centralized repositories, such as document management system (DMS) databases. Software such as Workshare Protect can also interface with a document management system to control which versions of an electronic document can be shared outside a firm and which cannot. Workshare and PCG's tools can also "handshake" with a centralized e-mail system to provide an automated prompt to clean metadata whenever any attorney or staff member clicks on "Send" in an attempt to e-mail a Microsoft attachment to a recipient outside of the law firm.

How to Minimize the Financial Cost of Complying

Perhaps the most striking yet unmentioned aspect of the Opinion is that the cost of providing electronic documents at the end of a representation could far exceed the costs an attorney incurred a generation ago when ending a representation.

As originally drafted, Rule 3-700 placed the financial obligation on the attorney to eat the costs of providing the documents at the end of the client-matter. In California, for a long time attorneys have been prohibited from using nonpayment of fees as a basis for holding onto the documents. Attorneys must promptly comply with the request to return documents even if the client has not paid its bills. Nor may an attorney condition returning paper or electronic documents on having the client pay for the cost of retrieving them. As indicated in the Opinion itself, attorneys may get the client to pay for duplication costs if there is a prior written agreement with the client to do so: "Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding."

In light of the expansion of the obligation to return electronic documents, it is more important than ever that attorneys include a provision in their fee agreements that obligate the client to pay for the cost of copying the documents provided to the client. The comments on Rule 3-500 explicitly indicate that this is permissible. ("[a] member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents.")

Although the ability to sue a client in a legal proceeding offers an attorney some protection, that theoretical benefit is hardly a satisfactory solution. Indeed the Opinion does not discuss the most significant pertinent financial issue. It is not the cost of duplicating hard

copy files or e-mails that is likely to be prohibitive. The cost of copying data onto jump drives, disks or portable hard drives is likely to be measured in the hundreds of dollars in many matters.

The real financial cost for the attorney, however, is the time of the people necessary to review the documents and, where necessary, scrub the metadata. The real question is whether you get a client to pay for this process? The answer is maybe. At least one authority—the Wisconsin opinion—explicitly provides that you can if you get written consent in advance. So make sure that your fee agreement not only references copying costs, but also labor, time and out-of-pocket costs associated with copying, retrieving and processing the clients documents, in both paper and electronic form.

So what to do?

1. Include a pertinent provision in the original fee agreement.
2. Indicate that you will not be creating any new information, just turning over existing information in the form in which it is kept in the ordinary course of business.
3. Indicate an end-date/milestone, at which time you will offer to either return the client-matter file to the client or dispose of the electronic and paper documents pursuant to your firm's Records Retention/Destruction Policy. By doing so, you will alert your client that you are neither obligated to save, nor in the practice of saving client-matter records indefinitely. You will also ensure that, absent an overriding rule of law (such as in the estate-planning setting), you do not take on an excessive, limitless obligation.
4. Have a routinized procedure for maintaining the electronic and paper components of client-matter files.
5. Implement, and periodically audit compliance with a metadata-handling protocol that includes scrubbing software.
6. Organize your firm's electronically stored information so that you can quickly search and surf for electronic communications and electronic versions of client-matter documents.
7. At a minimum, begin the process of turning over key documents promptly. Because the client has the authority to request and receive almost all the electronic documents, subject to the caveats discussed above, you want to avoid annoying the client. The best way to do so is to turn over key documents promptly, and stay on the best possible terms with both the former client and their new counsel. The authors recognize this process may be difficult, especially if the representation ended acrimoniously. Nonetheless, providing documents promptly may be the best way to avoid having to comply with a far-reaching, ongoing request for electronic documents.

Conclusion

As with many aspects of modern law practice, complying with the obligation to turn over electronic documents is part new-fangled technology and part good old-fashioned people skills. You need both to thrive in today's legal marketplace.

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Endnotes

1 California Bar Formal Op. No. 1992-127, available at http://calbar.ca.gov/calbar/html_unclassified/ca92-127.html.

2 Peck, Ellen, *A new ethics opinion requires lawyers to release electronic versions of documents when requested*, Cal. B. J. (Oct. 2007), available at http://Peck-CalBJ-10-1-

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3 Opinion at n. 3 (citing Rule 3-700 (D)) (emphasis in original).

4 *See* Orange County Bar Association Formal Op. No. 2005-01, available at www.ocbar.org/pdf/OCBA200501.pdf; New Hampshire Bar Association Ethics Committee Op. No. 2005-06/3 (2006), available at www.nhbar.org/uploads/pdf/Opinion2005-06-03.pdf%20; Illinois State Bar Association Advisory Op. No. 01-01, 2001 WL 809802 (2001).

5 *See* Lyman, Peter and Varian, Hal R., *How Much Information?* 1 (Oct. 30, 2003), www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf [hereinafter Lyman & Varian 2003] (reporting only 0.01% of new information is stored in paper form). *See also* Moore's Law, namely a fulfilled 1965 prediction that the number of transistors on a computer chip would continue to double about every two years. www.intel.com/technology/mooreslaw/index.htm.

6 Orange County Association Formal Op. No. 2005-01, at 4 (citing *Roberts v. Helm*, 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).

7 *Cf.* Brownstone, Robert D., Gregorian, Todd and Sands, Michael A., *Secrets Easily Leaked by Friend or Foe In Publicly Filed .PDF Documents,* 9 No. 10 E-Commerce L. Rep. 7 (West Oct. 2007) (discussing multiple situations in which litigation counsel has e-filed a document inadvertently disclosing confidential information belonging to a non-client), available at www.fenwick.com/docstore/Publications/IP/IP_bulletins/IP_Bulletin_Fall_2007.pdf.

8 *See* Wisconsin Bar Professional Ethics Opinion E-00-3 (2000), available at www.wisbar.org/AM/Template.cfm?Section=Wisconsin_ethics_opinions&CONTENTID=48462&TEMPLATE=/CM/ContentDisplay.cfm.

9 *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995-2 Trade Cases (CCH) ¶ 71,218, 1995 WL 649934, *2 (S.D.N.Y. Nov. 3, 1995) ("producing party can be required to design a computer program to extract [aggregate reports] from its computerized business records, subject to the Court's discretion as to the allocation of [design] costs"), also available at http://cyber.law.harvard.edu/digitaldiscovery/library/process/antimonopoly.html.

10 New Hampshire Bar Association Ethics Committee Op. No. 2005-06/3, at 2 (2006) ("if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so").

11 Illinois State Bar Association Advisory Op. No. 01-01, 2001 WL 809802, at *3 (2001).

12 New Hampshire Bar Association Ethics Committee Op. No. 2005-06/3, at 2.

13 *See generally* Workshare, *Dangers of Document Metadata: The Risks to Corporations* (2004) www.workshare.com/collateral/misc/Dangers_of_Document_Metadata.pdf (free registration required).

14 For more detailed descriptions of metadata and the risks it poses, see Brownstone, Robert D. , *Preserve or Perish; Destroy or Drown – eDiscovery Morphs Into EIM*, 8 N.C.J. L. & TECH., No. 1, at 1, 9-11, 45-57 (Fall 2006) available at www.ncjolt.org/content/view/77/62/; Brownstone, Robert D., *The Complexity of Metadata*, EDRM Project (May 2006) www.edrm.net/wiki/index.php/Records_Management_-_The_Complexity_of_Metadata; Levitt, Carole and Rosch, Mark, *Metadata: Making Metadata Control Part of a Firm's Risk Management*, 27 No. 2 The Bottom Line (Apr. 2006).

15 Shankland, Stephen, *Hidden text shows SCO prepped lawsuit against* BofA, CNET (Mar. 18, 2007) (citing "study by market research firm Vanson Bourne titled 'The Cost of Sharing'") www.news.com/2102-7344_3-5170073.html?tag=st.util.print.

16 *See, e.g.,* Workshare Protect www.workshare.com/products/wsprotect/; Payne Consulting Group (PCG) Metadata Assistant www.payneconsulting.com/products/metadataent/.

17 For example, a single workstation license for Payne Consulting Group's Metadata Assistant costs $79.00 www.payneconsulting.com/products/metadataretail/; and a one-year subscription to Workshare Protect Premium costs $39.95 per user http://store.workshare.com/servlet/ControllerServlet?Action=DisplayPage&Locale=en_US&SiteID=workshar&id=ProductDetailsPage&productID=82854000.

18 *See, e.g.*, ABA Formal Ethics Op. No. 06-442 (2006); D.C. Ethics Op. No. 341 (Sep. 2007) http://dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm**.** *See also* Ala. Ethics Op. No. 2007-02 (Mar. 2007) www.alabar.org/ogc/PDF/2007-02.pdf; Fla. Ethics Op. No. 06-2 (Sep. 2006) www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument; Md. Ethics Op. No. 2007-09 (Aug. 2006); NYSBA Op. 782 (Comm. on Prof'l Ethics Dec. 2004) http://NYSBA-Op-782-2004.notlong.com.

19 NSA, *Redacting with Confidence: How to Safely Publish Sanitized Reports Converted From Word to PDF* (Feb. 2, 2006) www.nsa.gov/snac/vtechrep/I333-TR-015R-2005.PDF.