

Effect of Word Processing on Ethical Obligations When the Relationship Ends

Technical problems can cause difficulty when attempting to comply with ethical rules regarding retainer of client files

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Many articles on ethical issues arising from new technology exist, including several that have been published in this column.¹ Let's examine how a common technology—word processing—may affect ethical obligations at the termination of the attorney-client relationship.

An attorney prepares a retainer letter for a new client named Jones. The attorney has prepared many retainers over the years for many clients. When preparing the retainer for Jones, the attorney simply modifies the retainer used for a former client named Smith.

Before the computer era, the attorney would make a photocopy of Smith's retainer and then made handwritten edits. The attorney would provide this edited photocopy to the secretary, who would type up a retainer for Jones. The draft was sent to Jones for comments or edits. Eventually, after several revisions, the retainer was finalized and executed by the attorney and Jones. The attorney kept all the draft versions of the retainer in Jones' file, including the original edited version of Smith's retainer.

Now, in the computer era, things have changed somewhat. Instead of going to the file cabinet to obtain Smith's retainer, the attorney simply pulls up an electronic version of Smith's retainer on the computer and saves it in Jones' electronic directory. The attorney creates Jones' retainer by overwriting the newly saved version of Smith's retainer. Then, whenever anyone requests an edit, the attorney can simply overwrite the electronic version of the retainer.

But what happens when the attorney-client relationship ends? The technology used by the attorney—common word processing—creates a problem that did not exist before the use of computers: how to remove Smith's confidential information from the electronic documents contained in Jones' file. The attorney has a duty to preserve Smith's confidential information² and so cannot deliver the edited version of Smith's retainer to Jones. But the attorney has a duty to provide Jones with all "papers and property" upon request, including electronic versions of documents.³ What to do about the edited copy of Smith's retainer that contains Smith's confidential information?

Before the use of computers, the attorney had no problem preserving Smith's confidential information. Since the attorney had simply edited a photocopy of Smith's retainer, the attorney could remove Smith's confidential information by using a product such as Wite-Out or a marker to redact the marked-up version of Smith's retainer. The attorney could simply make a photocopy of the redacted version and provide that to Jones with the file.

Today, removing Smith's confidential information presents a technical challenge. It may not be easy to redact Smith's confidential information from all the documents in Jones' electronic file. The original version of Smith's retainer may still be electronically stored within the version of the retainer created for Jones; in fact, the entire original version of Smith's retainer, including Smith's confidential information, may be contained in metadata attached to the electronic versions of Jones' retainer.⁴

Although the attorney must ensure that none of Smith's confidential information is included with the electronic version of Jones' retainer when any electronic files are transmitted to Jones,⁵ the ability to remove Smith's confidential information from the electronic versions of the file may be subject to technical limitations. Each electronic version of the retainer may contain Smith's confidential information in metadata form, which may have become electronically intermingled with new metadata each time Jones's retainer was modified. It may be impossible to remove the metadata containing Smith's confidential information from the electronic file while leaving Jones' metadata intact.⁶ Existing technology may preclude the attorney from fulfilling the duty to maintain Smith's confidences while at the same time fulfilling the duty to transfer the entire file to Jones.

As is often the case, an ounce of prevention may be worth more than a pound of cure. Attorneys may wish to consider taking steps to avoid the intermingling of confidential information between clients in electronic versions of documents. One method, of course, would be to go back to the before-the-computer-era method: Print out Smith's version, edit it, and have a new document typed up on the computer without any of Smith's information. Another method might be to create a new blank document on the computer, pull up Smith's document as a separate document, and then cut and paste the relevant passages from Smith's document into Jones' document, taking care not to copy any confidential information related to Smith.

There may be other solutions; computer consultants may have them readily available. Practitioners should take care to understand the technology they are using so as to avoid these types of emerging ethical issues.

¹ See, e.g., James Ellis Arden, *Staying Abreast of the Latest Technology Even If You Don't Use It*, County Bar Update (L.A. County B. Ass'n, Los Angeles, Cal.), Dec. 2007, at 6; David L. Brandon, *Who's Watching? Beware the Vulnerabilities of Communicating through Advanced Technology*, County Bar Update (L.A. County B. Ass'n, Los Angeles, Cal.), Jan. 2006, at 5; Joel A. Osman, *Technology and the Challenge of Maintaining Client Confidences*, County Bar Update (L.A. County B. Ass'n, Los Angeles, Cal.), Oct. 2005, at 3.

² Bus. & Prof. Code §6068(e)(1); Cal. Rules of Prof'l Conduct R. 3-100(A).

³ Cal. Rules of Prof'l Conduct R. 3-700(D); Comm. on Prof'l Responsibility and Conduct Formal Op. 2007-174.

⁴ Metadata is electronic information that can remain attached to an electronic file even if that information does not appear on the version shown on a computer screen or printed on paper. See, e.g., Hricik and Jueneman, *The Transmission and Receipt of Invisible Confidential Information*, 15 No. 1 Prof. Law 18 (2004).

⁵ An "attorney is ethically obligated to take reasonable steps to strip from...electronic items any metadata reflecting confidential information belonging to any other client." Comm. on Prof'l Responsibility and Conduct Formal Op. 2007-174.

⁶ Removing all the metadata may not be acceptable; information related to the various versions of the retainer, such as the sequence of changes or the identity of the person who suggested the change (all of which may be discernable by reviewing the metadata) may be of importance to Jones.