ALASKA BAR ASSOCIATION ETHICS OPINION NO. 2008-1

MAY LAWYERS MAINTAIN ELECTRONIC COPIES OF BUSINESS RECORDS IN LIEU OF PAPER COPIES?

QUESTION PRESENTED

The Rules of Professional Conduct require certain records to be kept under Rules 1.4, 1.15 and 7.2. The Committee has been asked to give an opinion as to whether it is permissible for a lawyer to maintain electronic copies of these documents in lieu of paper copies.

CONCLUSION

It is the committee's opinion that lawyers may maintain electronic copies of documents, but may not destroy or otherwise alter "original" client documents.¹

DISCUSSION

The Rules of Professional Conduct require lawyers to maintain records of certain client communications. In this age of electronic communication and the advancing "paperless office" the question for lawyers is whether the Rules of Professional Conduct permit electronic recordkeeping.

For example, Rule 1.4(c) requires a lawyer to inform a client in writing if the lawyer does not have at least minimal malpractice insurance or if the lawyer's coverage falls below certain minimums.² The lawyer must maintain records of written disclosures for a period of six years from the end of representation. Similarly, under Rule 1.15 lawyers must maintain records

¹ This Opinion is directed to the lawyer's "business records" rather original documents supplied to a lawyer by the client. As with all records, lawyers are encouraged to safeguard their records and keep them in an unalterable form. Thus, scanning of records to a non-alterable file format rather than maintaining a word processing copy would be preferred. Further, if a lawyer chooses to keep electronic, rather than paper records, the lawyer is encouraged to make adequate backups to assure the preservation and integrity of the lawyer's records.

² Lawyers must inform clients in writing if they do not maintain malpractice insurance in the amount of \$100,000 per claim and \$300,000 in the aggregate.

relating to client property, including trust funds, for a period of six years following termination of the representation. Finally, lawyers must maintain copies of advertisements under rule 7.2. Records must be maintained showing where and when advertisements were used for a period of two years following the last dissemination.

In each of the rules just mentioned, a lawyer has an obligation to maintain the <u>records</u> for a period of time. Except in the case of advertisements, nothing in the rules or professional conduct dictates the specific form of the records.³

Historically, courts preferred the "original" of a document to be introduced for evidentiary purposes to prove its contents.⁴ However, courts also recognize that a duplicate or copy may be equally admissible in many circumstances.⁵ With updates in technology and the advent of "paperless offices" scanning technology has in recent years become popular for record keeping.⁶

The Alaska legislature has answered many questions relating to Electronic record-keeping and the admissibility of electronic records in passing the Uniform Electronic Transactions Act in 2004.⁷ "If a law requires a record to be in writing, an electronic record satisfies the law. If a law requires a signature, an electronic signature satisfies the law."⁸ "If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information"⁹ A record or signature may not be denied legal

³ Here, the rule specifically contemplates that something other than a paper copy may be maintained, as the advertisement itself may not be in print. Thus, it is specifically permissible to maintain an electronic or other recording of television or radio advertisements.

⁴ See Evidence Rule 1002 ("The Best Evidence Rule.")

⁵ See Evidence Rules 1003 and 1004.

⁶ See Moreland, Admitting Scanned Reproductions into Evidence, 18 Rev. Litig. 261 (1999).

⁷ See AS 09.80.010-195. The act provides that a record retained in electronic form satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted <u>after July 1, 2004</u> specifically prohibits the use of an electronic record for the specified purpose. AS 09.80.090(f).

⁸ AS 09.80.040(c) and (d).

⁹ AS 09.80.090(a).

effect or enforceability simply because it is in electronic form."¹⁰ Similarly, "evidence of a record or signature may not be excluded solely because it is in electronic form."¹¹ Finally, the statute recognizes that even notarized or verified documents may be maintained with an electronic signature.¹² Consequently, the statute concludes that electronic records are permissible for evidentiary purposes. The Committee believes that electronic records are equally acceptable for ethical purposes.

Simply because a lawyer may keep electronic records of his or her own business records, that does not mean the lawyer is free to discard "original" records. Rule 1.15 requires the lawyer to safeguard and hold a client's property separate from the lawyer's own property. Thus, for example, if a lawyer scans client documents for electronic document management, that does not relieve the lawyer from the obligation to maintain and safeguard the client's property. Further, the Uniform Electronic Transactions Act recognizes that certain types of documents must be maintained in original form. These include wills, testamentary trusts, and certain documents created under the Uniform Commercial Code. ¹³

In the Committee's view, the Alaska Rules of Professional Conduct by analogy to the Alaska Uniform Electronic Transactions Act permit lawyers to maintain any records required to be kept pursuant to Rules 1.4, 1.15 and 7.2 in electronic form. The lawyer must still maintain in original form any client documents entrusted for safekeeping.

Approved by the Alaska Bar Association Ethics Committee on January 3, 2008.

Adopted by the Board of Governors on January 31, 2008.

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¹¹ AS 09.80.100.

¹⁰ AS 09.80.040.

¹² AS 09.80.080.

¹³ AS 09.80.010(b).