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Ethics of Handling Client Files and Information

April 2024

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Who Owns the File?

The CLIENT owns the original file "from cover to cover"

> "The client's files belong to the client, not to the attorney representing the client." *In the Matter of Cupples*, 952 S.W.2d 226, 234 (Mo. 1997)

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Missouri Formal Opinion #115

May Missouri Attorney ethically withhold from his client papers, books, documents, or other personal property which belong to the client and came to the attorney in the course of his professional employment to enforce payment of fees or expenses owed to the attorney by the client?

Answer: No.

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Formal Opinion #115

- The client's file belongs to the client, **from cover to cover**.
- Items considered attorney "work product" also belong to the client because it is the result of services for which the client contracted.

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Rule 4-1.15(d)

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.

Except as provided in Rule 4-1.145 to Rule 4-1.155 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

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Rule 4-1.16(d)

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

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Exception – Formal Opinion #115

The clients should receive everything ". . . except for those items contained within the file for which the attorney has borne out-of-pocket expenses such as, but not limited to, transcripts. The attorney may retain those items until such time as he is reimbursed for the out-of-pocket expense and then they must be immediately delivered to the client."

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Question

Attorney represented Client in estate planning work before Client discharged attorney. Client fully paid all of Attorney's bills, but hinted at a possible malpractice action.

Client has now demanded a copy of their entire file. Attorney is considering billing Client for making a copy of the file if obligated to provide Client with file.

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Formal Opinion #115

If a lawyer wishes to keep a copy of the file for his own use or protection, then the lawyer must bear the costs of copying the file.

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Questions

If client was forwarded documents during representation, should client also receive full file upon demand?

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Missouri Informal Opinion 20030047

- If Attorney sends a client a courtesy copy of all pleadings at the time of filing and a copy of all pleadings filed by opposing counsel (with a notation that it is a courtesy copy for the client's information and safekeeping), is it necessary to copy the file and provide the documents again to the client?
- May attorney charge for copies of documents previously sent to client?

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Informal Opinion 20030047 – Answer

- It is permissible for copies provided to the client during the course of the representation to serve as client's file, or a portion of the client's file, if two conditions are met.
- First, Attorney would have had to provide an explanation of this process prior to sending the copies.
- Second, the original of the file belongs to the client.
- Therefore, if there is an original in the file, a copy does not fulfill the obligation to the client unless the attorney and client have agreed that it will.
- If both conditions are not met, attorney should provide the file to the client and keep copies at Attorney's own expense.

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Question

If file is kept electronically, and client requests paper copy, must must lawyer give paper copy to client?

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Missouri Informal Opinion 2020-90

- Attorney stores client files electronically.
- In what format should Attorney provide the client file to Client upon request?

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Informal Opinion 2020-90 – Answer

- The client file belongs to the client. . . .
- If a client requests an electronically maintained file during the file retention period, Formal Opinion 127 requires the file be "provided to the client in a manner in which the client will be able to access it using commonly used, relatively inexpensive, software and hardware . . . . Alternatively, the attorney may provide the file to the client in paper format, unless that is contrary to an agreement between the attorney and client."
- Upon termination of representation, Rule 4-1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect the client's interests, including surrendering papers and property to which the client is entitled.
- If Client has requested the file in a particular format, Attorney should prioritize protection of Client's interests and take all reasonably practicable steps to accommodate Client's format request.

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Question

- If multiple clients request copies, who pays for the copies?

- If client requests a second copy, who pays for that copy?

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Missouri Informal Opinion 2015-10 – Question #2

[If only one of two jointly-represented clients demands a copy of the file], who bears the cost of copying the file?

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Informal Opinion 2015-10 – Question #2

- The Rules of Professional Conduct do not address the issue of who bears the cost of copying a file under these circumstances.
- If a lawyer in the firm is making a copy of a file for the lawyer or firm's own use or protection, the lawyer or firm must bear the costs of copying the file. Mo. Formal Op. 115.
- If the client file becomes the subject of a dispute between the jointly represented clients, Rule 4-1.15(e) requires the lawyer or firm to distribute any portion of the file as to which there is no dispute and hold the disputed portion separately until the dispute is resolved.
- If the dispute is not resolved within a reasonable period of time, the lawyer or firm may file an interpleader action. See, e.g., Mo. Informal Ops. 990152 and 990150.

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Missouri Formal Opinion #127

When may an Attorney destroy a Client's paper file, without client consent, if Attorney has a complete electronic version of Client's file?

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Rule 4-1.22

A lawyer shall securely store a client's file for six years after completion or termination of the representation absent other agreement between the lawyer and client through informed consent confirmed in writing.

Such informed consent confirmed in writing may be made between the lawyer and the client at any point during the six years after completion or termination of the representation.

If the client does not request the file within six years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed.

The six year client file retention requirement shall apply to all client files where the completion or termination of the representation occurs on or after July 1, 2016. All client files where the completion or termination of the representation occurs prior to July 1, 2016, shall be governed by the previously required 10 years.

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Exceptions to Destruction

A lawyer shall not destroy a file pursuant to this Rule 4-1.22 if the lawyer knows or reasonably should know that:

(a) a legal malpractice claim is pending related to the representation;

(b) a criminal or other governmental investigation is pending related to the representation;

(c) a complaint is pending under Rule 5 related to the representation; or

(d) other litigation is pending related to the representation.

Items in the file with intrinsic value shall never be destroyed.

A lawyer destroying a file pursuant to this Rule 4-1.22 shall securely store items of intrinsic value or deliver such items to the state unclaimed property agency.

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Trust Account Exception – Rule 4-1.22

A lawyer's obligation to maintain trust account records as required by Rules 4-1.145 to 4-1.155 is not affected by this Rule 4-1.22.

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Trust Account Records – Rule 4-1.15(f)

Complete records of client trust accounts shall be maintained and preserved for a period of at least six years after the later of:

(1) termination of the representation, or
(2) the date of the last disbursement of funds.

Client trust account records may be maintained by electronic, photographic, or other media provided that they otherwise comply with Rules 4-1.145 to 4-1.155 and that printed copies can be produced. These records shall be readily accessible to the lawyer.

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Trust Account Records – What are "Complete Records"

Complete records shall include at a minimum:

(1) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(2) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(3) fee agreements, engagement letters, retainer agreements and compensation agreements with clients;

(4) accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(5) bills for legal fees and expenses rendered to clients;

(6) records showing disbursements on behalf of clients;

(7) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(8) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(9) reconciliations of the client trust accounts maintained by the lawyer;

(10) those portions of client files that are reasonably related to client trust account transactions; and
records of credit card transactions with clients to the extent permitted by law and the payment card industry data security standard.

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Method for Preserving File – Rule 4-1.22

Client files, except for items of intrinsic value, may be maintained by electronic, photographic, or other media provided that printed copies can be produced. These records shall be readily accessible to the lawyer.

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Missouri Formal Opinion #127

Issues to consider:

- Will the electronic storage media have integrity for the period the file must be stored?
- Will it be accessible using the hardware and software currently available?
- Is it permissible to destroy the entire paper file?
- How will the file be provided to the client?

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Formal Opinion #127

- If Attorney addresses those issues, it is permissible for the file to be stored solely in electronic format, without obtaining client consent.
- Attorney may destroy most, but not all, of the paper file, if the file is stored electronically.
- Items of intrinsic value and originals that may have legal significance may not be destroyed.
- Attorney should offer paper file to client before destruction.

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Destruction of File – Rule 4-1.22

The file shall be destroyed in a manner that preserves client confidentiality.

A lawyer destroying a file pursuant to this Rule 4-1.22 shall maintain the written record of the client's consent of destruction for at least six years after completion or termination of employment.

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Duty to Protect Information – Rule 4-1.6(c)

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.

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Files at Closure of Practice

Upon dissolution of a law firm, the lawyers shall make reasonable arrangements for the maintenance of client files.

Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of client files, which includes written notice to a client as to the location of the client's file.

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Trust Account Records at Closure

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust account records. Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of client trust account records.

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Rule 4-1.22

A lawyer shall not destroy a file pursuant to this Rule 4-1.22 if the lawyer knows or reasonably should know that:

(a) a legal malpractice claim is pending related to the representation;

(b) a criminal or other governmental investigation is pending related to the representation;

(c) a complaint is pending under Rule 5 related to the representation; or

(d) other litigation is pending related to the representation.

Items in the file with intrinsic value shall never be destroyed.

A lawyer destroying a file pursuant to this Rule 4-1.22 shall securely store items of intrinsic value or deliver such items to the state unclaimed property agency.

The file shall be destroyed in a manner that preserves client confidentiality.

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Items of Intrinsic Value

- Missouri's Rules of Professional Conduct do not define "items of intrinsic value"
- However, examples may include:
  - Securities
  - Negotiable instruments
  - Original wills
  - Original trust documents
  - Original deeds

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Who Is the Client?

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Matters for Three Reasons

1. Ownership of file (“cover to cover”)
2. Attorney’s duty of confidentiality

3. Attorney-client privilege

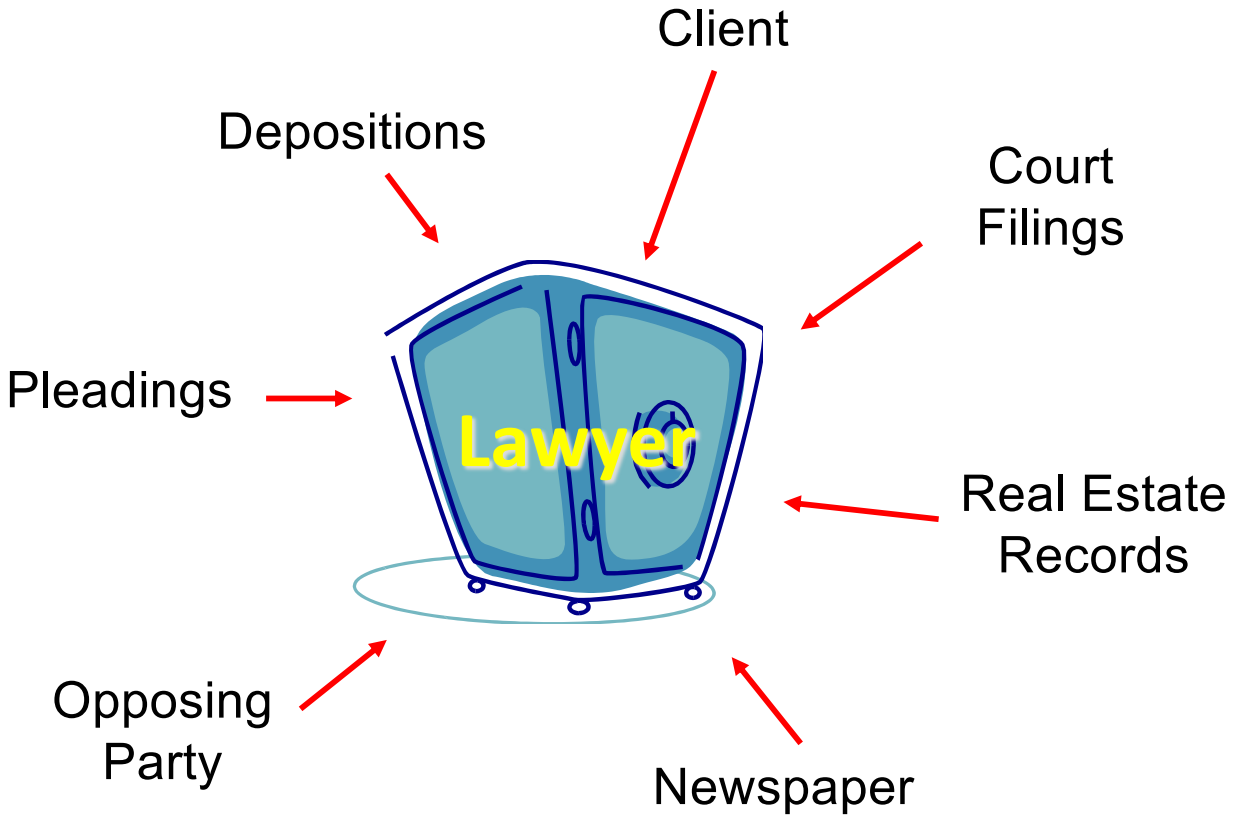
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Duty of Confidentiality – Rule 4-1.6(a)

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

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"Information relating to the representation of a client . . ." Rule 4-1.6



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Rule 4-1.6(b)

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent death or substantial bodily harm that is reasonably certain to occur;

(2) to secure legal advice about the lawyer's compliance with these Rules

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(4) to comply with other law or a court order; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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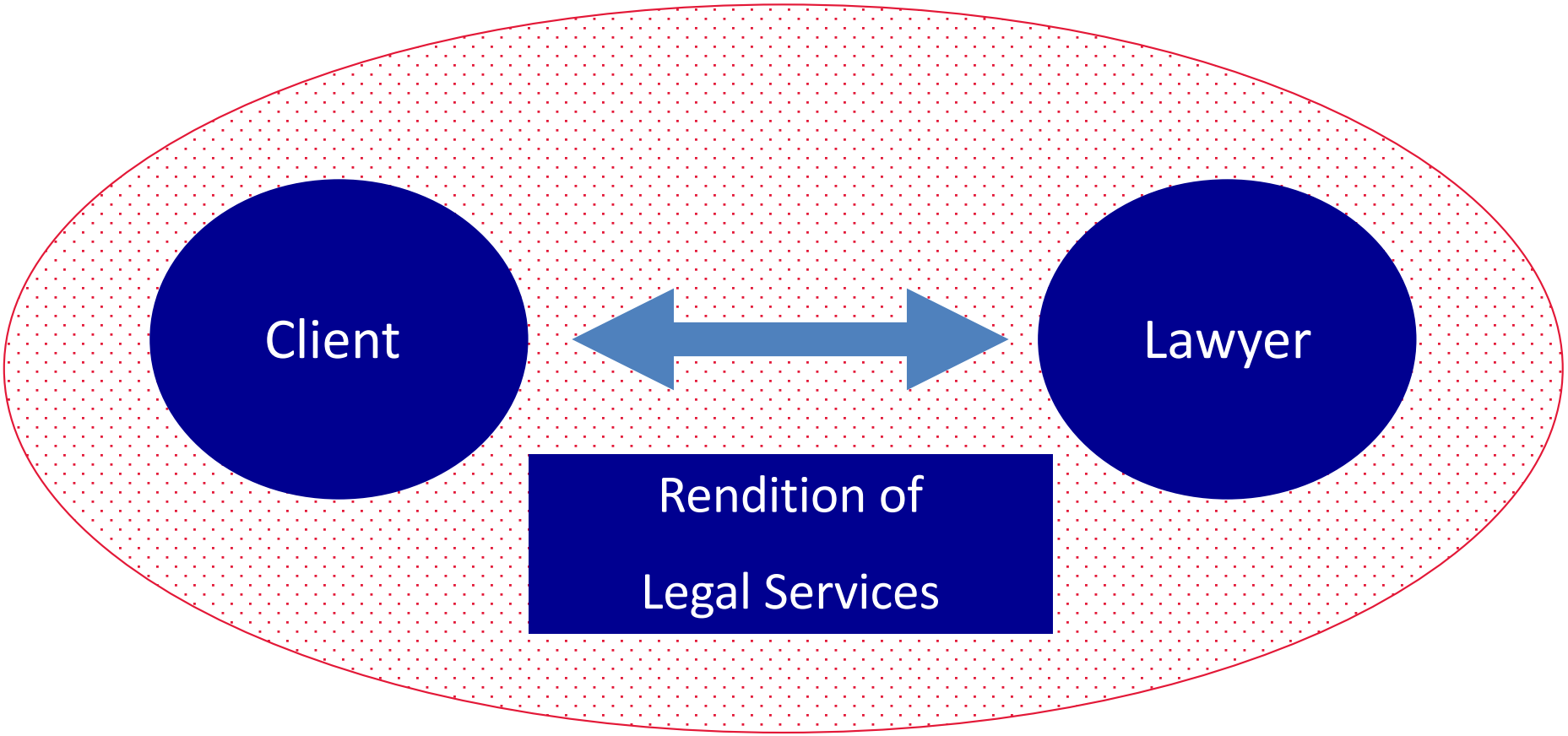
Attorney-Client Privilege

- Confidential
- communications
- between an attorney and his [or her] client
- concerning the representation of the client
- are protected by the attorney-client privilege.

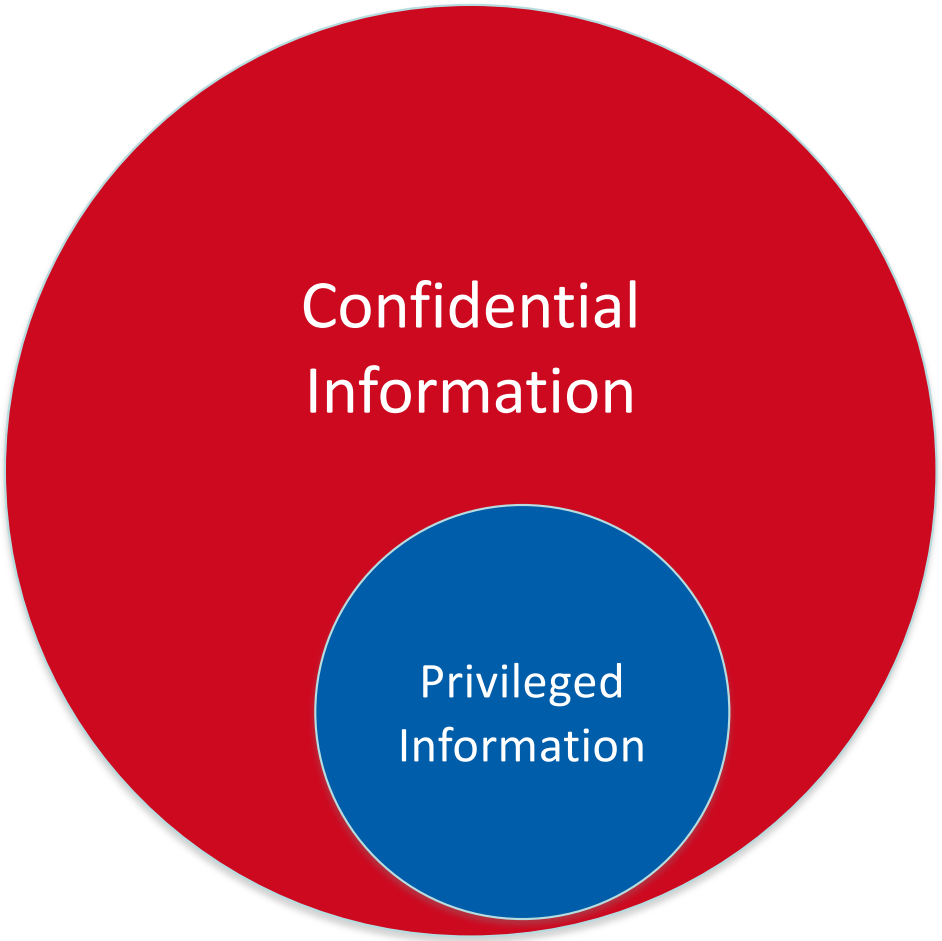
Diehl v. Fred Weber, Inc. (Mo. App. E.D. 2010)

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Attorney-Client Privilege



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Question

- Lawyer represents client
- Client dies

- Who controls confidentiality and privilege?

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In re Estate of Hebbeler, 875 S.W.2d 163 (Mo. App. E.D. 1994)

After the death of a client, the client's representatives may waive the deceased client's **attorney-client privilege**.

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Missouri Informal Opinion 990146

- Attorney prepared a will for a person who has now passed away.
- The will was filed in probate, but an estate was not opened.
- The personal representative has now terminated Attorney´s services.
- The personal representative and the new attorney have requested all of the personal representative´s legal matters be turned over to the new attorney. They have also requested the estate planning file of the deceased be turned over to the new attorney.
- What should Attorney do about the estate planning file of the deceased?

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Informal Opinion 990145

- The duty of confidentiality under Rule 4-1.6 survives death.
- Attorney may not voluntarily provide the estate planning file, or information about the advice provided to the deceased family member, unless that person expressly consented to such disclosure.
- If Attorney is subpoenaed to provide the information, Attorney may only do so after the factual and legal issues related to confidentiality are fully presented to the court and the court orders Attorney to disclose the information.

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Missouri Informal Opinion 20050021

- Attorney prepared a will and deeds for a client. The client has since died.
- The attorney representing the personal representative of the deceased client has requested that Attorney turn over a copy of the file, or the original file to the personal representative.
- May Attorney turn over the deceased client's file to the personal representative or to the attorney for the personal representative?

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Informal Opinion 20050021 – Answer

- Attorney may not disclose information, other than an actual will Attorney considers still valid or a deed that has been recorded, without a court order, unless the client gave express consent to further disclosure.
- The court order must be issued after the issue of confidentiality has been fully presented.

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Missouri Informal Opinion 2010-0052

- Attorney drafted a will for Client. Client is now deceased.
- The original, signed will cannot be located. Attorney now represents an heir.
- May Attorney disclose the contents of the now missing will?

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Informal Opinion 2010-0052 – Answer

- Attorney may not disclose information, other than an actual will, that Attorney considers still valid, without a court order.
- The court order must be issued after the issue of confidentiality, under Rule 4-1.6 has been fully presented.

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Missouri Informal Opinion 20000165

Attorney has been subpoenaed to produce a file that contains information regarding a deceased client.

No estate was opened for the deceased client's estate.

The same file will contain information about another deceased client, the spouse. Attorney does not know if an estate has been opened for that client.

The matter involves the possible misuse of a POA by the holder of a POA some time after the power was prepared. May Attorney disclose this information?

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Informal Opinion 20000165 – Answer

- Under Rule 4-1.6, Attorney may not disclose any information Attorney obtained in course of representing either deceased client.
- However, Attorney may provide a copy of any will or testamentary trust Attorney prepared, to the heirs of the deceased, if Attorney believes that would be consistent with the goals of the deceased.

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Missouri Informal Opinion 20000157

- Attorney represents a personal representative in two decedent´s estates.
- The client refuses to answer the telephone, respond to mail or answer the door when Attorney knocks.
- In the file, Attorney has photocopies of routine statements from mutual funds and an annuity company. These funds and the annuity are assets in the two estates and Attorney has listed the assets in the Inventory and Appraisements filed with the Probate Court.
- The Estates have a creditor, and counsel for that creditor would like to see the statements.
- Attorney is concerned that the statements may be covered by attorney/client privilege.
- Attorney will send a letter to Attorney´s client asking for authorization to show the statements to the creditor´s counsel, but Attorney may not get any response.
- Are such asset statements confidential to the client?

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Informal Opinion 20000157 – Answer

- The statements are confidential under Supreme Court Rule 4.
- Attorney may not disclose the information unless Attorney is ordered to do so by the court, after the issue of confidentiality has been fully presented.

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Missouri Informal Opinion 2004004

May Attorney release a copy of a Will drafted and executed by a client, purportedly deceased, when relatives of the deceased testator say the testator's personal representative has not filed the Will or opened an estate. Attorney has no proof of testator's death.

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Informal Opinion 2004004 – Answer

- Attorney should request evidence of testator's death.
- Unless Attorney has reason to believe that the testator revoked the Will prior to death, Attorney may provide a copy of the Will to a member of the testator's family or any other interested person who expresses intent to bring the matter to the attention of the probate court.
- Attorney may not disclose any other information related to the Will, unless ordered to do so by a court the issue of confidentiality has been fully presented.

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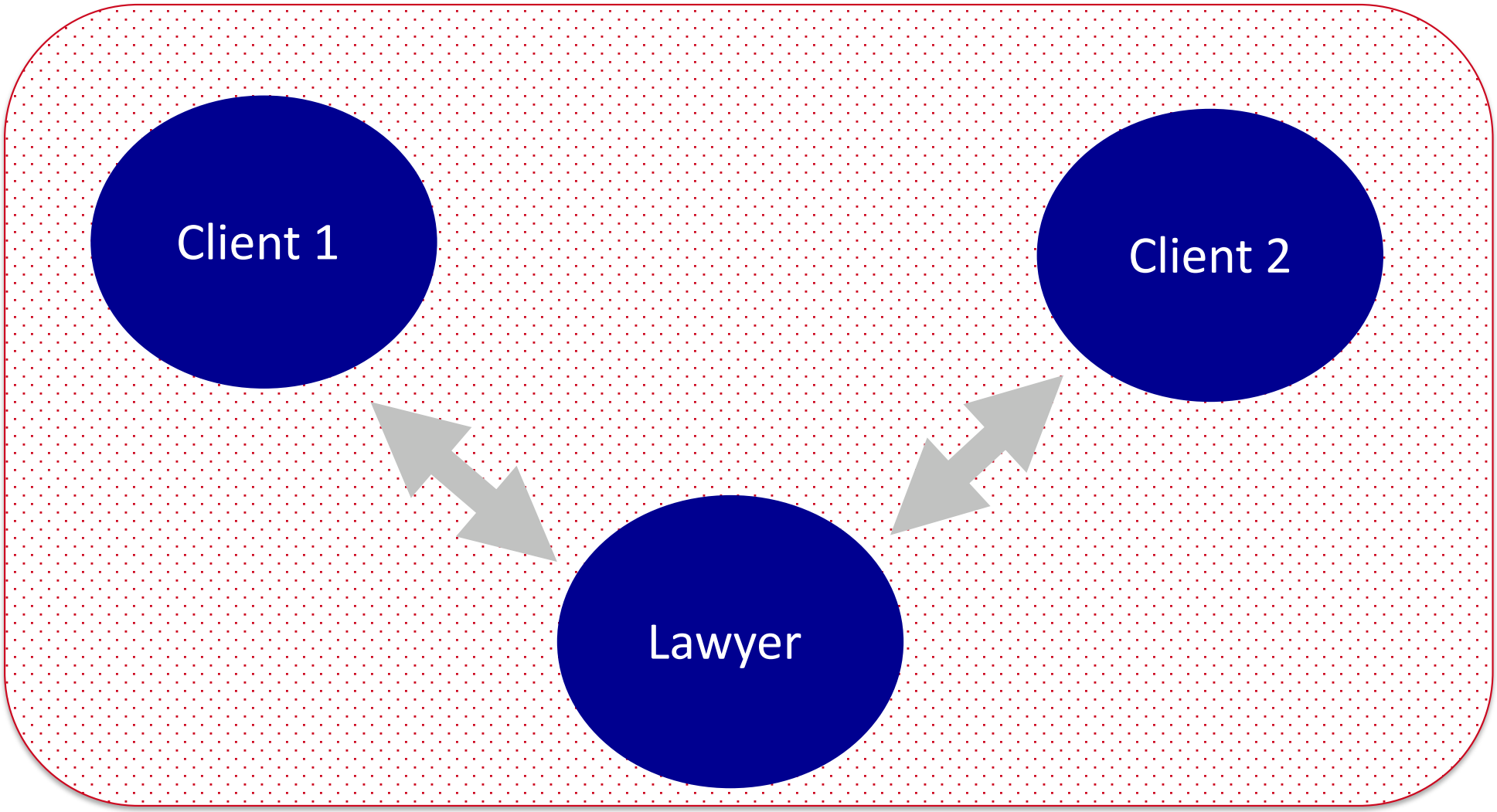
Question

- Lawyer represents Husband and Wife on joint representation relating to estate planning
- Husband dies
- May Wife access file?

- May Wife waive confidentiality and privilege for husband?

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Joint Representation



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Missouri Informal Opinion 2015-10

Where an attorney is departing a law firm and has jointly represented two clients in a matter using a single file, and only one of the clients directs the firm to transfer the closed file to the departing attorney, may the firm comply with the client's request?

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Informal Opinion 2015-10 – Answer

- According to Missouri Formal Opinion 115, the file belongs to the client, cover to cover, with limited exceptions not applicable here.
- Upon termination of the representation, an attorney is obligated to surrender papers and property to which the client is entitled. Rule 4-1.16(d).
- In the absence of a client request or another agreement with the client, a lawyer shall securely store the file in compliance with Rule 4-1.22.
- Where two or more clients have one file in common, the lawyer or firm who is custodian of the file must continue to comply with the custodian's obligation under R. 4-1.22. In response to a file request to the firm from one client only, the firm may release a copy of the file's contents to the requesting client or to the departing attorney per the client's direction and maintain the original file per the Rule.

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Question

- Lawyer prepared joint estate plan for husband and wife
- Husband and Wife divorce
- Husband now demands legal file from joint representation

- Does it matter if Lawyer continued to provide legal services to Wife?

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Missouri Informal Opinion 950256

Attorney is personal representative and attorney for the estate.

Attorney has been asked to sign an authorization for release of medical records of the deceased.

May Attorney do so?

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Informal Opinion 950256 – Answer

Because Attorney served not only as personal representative but as attorney for the deceased, such a release would involve disclosure of confidential information by attorney.

Attorney´s duty to maintain confidentiality of client information under Rule 4-1.6 does not end with the death of the client.

Therefore, Attorney may not consent to the disclosure of any confidential information without a court order.

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Question

- Lawyer provides legal services to Client
- Client now has diminished capacity

- Client requests file. Can Client obtain it?
- Child requests file for Client. Can Child obtain it?

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Rule 4-1.14(a)

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

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Rule 4-1.14(c)

- Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6.
- When taking protective action pursuant to Rule 4-14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Rule 4-1.14(b)

When the lawyer reasonably believes that the client

- has diminished capacity;
- is at risk of substantial physical, financial or other harm unless action is taken; and
- cannot adequately act in the client's own interest,

the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a next friend, guardian ad litem, conservator or guardian.

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Rule 4-1.4 cmt [6]

- In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.
- Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.
- A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4-3.4(c) directs compliance with such rules or orders.

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Conclusory Matters

- ***Questions*** – If you have questions after the program, please email them to Paige Tungate at ptungate@DowneyLawGroup.com

- ***Post-Program Survey*** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

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- ***Certificate of Completion*** – Available through the Post-Program Survey

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Future Programs – Free CLEs

April 30 - Tuesday at 3:00 PM - ***Addressing Bias - Age Discrimination and Generational Issues***

May 8 - Wednesday at 12:00 Noon CT - ***Ethics of Dealing with Difficult Clients***

May 23 - Thursday at 12:00 Noon CT - ***Legal Ethics and Technology 2024***

June 5 - Wednesday at 12:00 Noon CT - ***Addressing Bias - Age Discrimination and Generational Issues***

June 11 - Tuesday at 3:00 PM CT - ***Ethics Rules for Handling Trust Funds***

June 26 - Wednesday at 12:00 Noon CT - ***Addressing Bias - Age Discrimination and Generational Issues***

June 28 - Friday at 12:00 Noon CT - ***Legal Ethics Update 2024 - Part 2***

June 28 - Friday at 3:00 PM CT - ***Addressing Bias - Age Discrimination and Generational Issues***

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Register at www.downeyethicscle.com

Thank you

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