

Arizona Supreme Court
Ethics Advisory Committee
Ethics Opinion EO-25-0004

[Date of Issuance]

**Duty to Surrender File to Client at the Termination of Representation;
Candor to the Tribunal; False Information in Client's File**

QUESTION PRESENTED

When providing a former client with the client file, may a lawyer who has withdrawn from representation withhold work product that the client requests and that the lawyer knows contains false information, where that information could be used before a tribunal?

SHORT ANSWER

Yes, provided that at the time the former client requests the work product — here, witness outlines the lawyer prepared for the hearing: (1) the lawyer knows that the outlines contain false information; and (2) the lawyer knows that the former client intends to present the false information to the tribunal. In those circumstances, the lawyer may withhold the witness outlines containing false information from the client file.

ANALYSIS¹

I. BACKGROUND

The inquiring lawyer represented a client in a civil proceeding. In preparation for a hearing before a tribunal, the lawyer's office received evidence showing that the client had previously made false representations during pre-hearing proceedings and intended on presenting this false information to the tribunal. Because the client insisted that he wanted to proceed with the hearing, the lawyer advised the tribunal of his need to withdraw representation, and the tribunal granted this request. The lawyer then provided the client with the case file, excluding witness outlines that he knew were false based upon the information that his office reviewed. The former client sent the lawyer's office an email requesting the witness outlines.

¹ Throughout this opinion, the terms "lawyer" and "attorney" apply equally to a licensed legal paraprofessional. A legal paraprofessional is bound by the Arizona Rules of Professional Conduct to the same extent an attorney is, and the Committee's analysis of ERs 1.16 and 3.3 therefore governs a legal paraprofessional who faces the same question, within the practice areas for which the paraprofessional is licensed. *See* ACJA § 7-210(J)(1); Ariz. R. Sup. Ct. 31.3(e)(4).

II. A LAWYER MAY WITHHOLD WORK PRODUCT CONTAINING FALSE INFORMATION FROM THE CLIENT’S FILE WHEN THE LAWYER KNOWS THE CLIENT INTENDS TO PRESENT IT TO A TRIBUNAL.

A. Former client’s entitlement to entire file

Ethical Rule (“ER”) 1.16(d) of the Arizona Rules of Professional Conduct (the “Rules”) imposes on a lawyer an ethical obligation to “provide the client with all of the client’s documents, and all documents reflecting work performed for the client.” Arizona follows the “entire file” approach, which “assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.” Ariz. Ethics Op. 15-02 (2015) (client is entitled to file in its entirety, and not just portions lawyer “deems to be essential or relevant”); A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 471 (2015). The former client is entitled to the client file “regardless of the circumstances for the withdrawal.” Ariz. Ethics Op. 20-0001 (2020).

B. Exceptions under “extraordinary circumstances”

ER 1.16(d) also provides that a lawyer may retain documents “to the extent permitted by other law only if retaining them would not prejudice the client’s rights.” Comment 10 to that rule provides that the client file “[o]rdinarily” includes “(without limitation) pleadings, legal documents, evidence, discovery,

legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda.” ER 1.16 cmt. 10. That the file “ordinarily” includes these documents implies that extraordinary circumstances may allow the lawyer to withhold some materials.

This opinion addresses whether preventing the presentation of false evidence to the court is such a circumstance. A previous Arizona ethics opinion identified another. It concluded that under limited circumstances, the withdrawn lawyer is permitted to withhold information, such as threats the client made to the withdrawn lawyer, from successor counsel. *See* Ariz. Ethics Op. 20-0001.

As a general matter, lawyers must prevent the presentation of false evidence to a tribunal. Specifically, lawyers are prohibited under ER 1.2(e), from assisting a client “in conduct that the lawyer knows is criminal or fraudulent.” Indeed, under ER 1.16(a)(1), a lawyer “shall withdraw from the representation” if the representation will result in violating another ethical rule. *See also* ER 1.2 cmt. 11. In addition, ER 3.3 prohibits a lawyer from “knowingly mak[ing] a false statement of fact or law to a tribunal.”

These rules, however, do not address a lawyer’s obligations when the lawyer no longer represents the client. Persuasive authority, however, suggests that even for former clients, the interest in avoiding presentation of false evidence could allow a lawyer to withhold false work product that the client intends to use fraudulently. Specifically, Section 46(2) of the Restatement (Third) of the Law

Governing Lawyers provides that a lawyer must allow a former client to “inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.”² Section 46(3) elaborates that delivery of documents to the former client must be done “promptly,” unless “substantial grounds exist for refusing to make [a] delivery.” This “substantial grounds” language mirrors the concept in ER 1.16(d) that in non-ordinary circumstances, lawyers may be able to withhold material from client files.

As to whether false work product provides such a ground or circumstance, the Arizona Supreme Court Ethics Advisory Committee (the “Committee”) looks to an ethics opinion from the D.C. Bar Ethics Committee that addresses the same question presented here. D.C. Ethics Op. 350 (2005). That opinion is particularly relevant because like Arizona, the D.C. Bar follows the “entire file” approach. *Id.* Although that opinion does not address Section 46 of the Restatement, it concludes that D.C.’s version of ER 1.16(d) does not require a lawyer to surrender to a former client material that was fraudulently procured through the client’s factual misrepresentations. It reasons that doing so would violate D.C.’s version of ER 3.3’s prohibition on knowingly making false statements to a tribunal. The opinion

² While there is no Arizona case law adopting this section of the Restatement, we generally follow the Restatement “absent controlling authority to the contrary . . . when it sets forth sound legal policy.” *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 414 ¶ 18 (2014). Additionally, the Committee has adopted approaches from the Restatement (Third) of the Law Governing Lawyers in some of our previous ethics opinions. See, e.g., Ariz. Ethics Op. 19-0010 at 5; Ariz. Ethics Op. 20-0007 at 8.

recognizes that in this scenario, the lawyer lacks actual knowledge that the former client intends to use the fraudulent work product to defraud a tribunal. However, it reasons that the lawyer's actual knowledge of the client's likely fraud, "taken together with his reasonable belief that the client intends to file the documents," is sufficient for the lawyer to refuse to surrender the work product. *Id.* n.3.

The D.C. Bar Ethics Committee's Opinion is consistent with our understanding of a lawyer's duty of candor to the tribunal under ER 3.3. A previous Arizona ethics opinion addressed the dilemma posed when a lawyer learns that, due to a client's perjury in a civil proceeding, the lawyer has offered false material evidence to the tribunal. *See* Ariz. Ethics Op. 20-0007. There, this Committee concluded that a lawyer's duty of candor to the tribunal overcomes the ethical duty of preserving a client's confidences. While we recognized that "in most instances an attorney's motion to withdraw evidence should be sufficient to remediate the fraud," we concluded that if required to undo "the effect of the false evidence," a lawyer must disclose the fraud to the tribunal. *Id.* at 7, 10; *see also* ER 3.3(a)(3) (duty to remediate false information). The obligation to take reasonable remedial measures goes beyond a lawyer's withdrawal as counsel and only ends "when the tainted proceedings have concluded." *Id.* at 8. Because the duty of candor is broad enough to allow a lawyer to take steps to undo fraud, we believe the duty is also broad enough to enable a lawyer to take steps from preventing fraud in the first instance.

Similarly, because withdrawal is mandatory where the lawyer knows a client is using the lawyer's services to commit fraud, the lawyer who complies with this requirement should also be permitted, in this context, to take reasonable steps to prevent the conduct that necessitated the withdrawal. Doing so could further the lawyer's duty not to assist in criminal or fraudulent conduct.

C. Mental-state requirements

Before withholding work product from a former client, we believe that the lawyer must know that the documents contain false information. Under ER 1.0(f), "knows" denotes actual knowledge of the fact in question. Addressing a lawyer's duty of candor to the tribunal, ER 3.3(a)(3) provides that a lawyer shall not "knowingly" offer evidence that the lawyer knows to be false. We believe that the same mental state should be required here. The lawyer's knowledge should be evaluated at the time the client makes the request. It should be based on all the information available to the lawyer at that time, including information made available to the lawyer after concluding representation of the client.

We also conclude that the lawyer must know that the client presently intends to use the false work product before the tribunal. The lawyer's knowledge can be inferred from the circumstances, such as a client's comments about plans for the work product or from the lawyer's assessment of the client's actions during and after the representation. The lawyer need not be certain that the client will

use the false work product, provided the lawyer knows that the former client has that intent at the time the request for the work product is made. In this respect, our opinion differs from the D.C. Bar's approach, which requires the lawyer to reasonably believe that the former client intends to use the false information. However, we believe that the subjective definition of "know" provides a more workable framework. If the client makes a subsequent request for the false work product, the lawyer should reevaluate whether the client intends to use it. If the lawyer no longer knows that the client intends to use the false material before the tribunal, the lawyer must provide the work product to the client.

D. Redaction of false materials

Finally, circumstances may arise in which only certain parts of a lawyer's work product contain false information. We also adopt the D.C. Bar Ethics Committee's approach for what a lawyer is to do when a former client requests work product containing false information. If practicable and effective, the lawyer should redact the sections of the work product containing misrepresentations and surrender the remaining content, consistent with ER 1.16(d). However, if not practicable or effective, the lawyer may withhold the documents in their entirety, or, with the client's consent, turn the unredacted documents over to the former client's successor counsel with full disclosure of the false material contained therein.

CONCLUSION

For these reasons, a lawyer's ethical obligation under ER 1.16(d) to provide a former client with all the client's documents does not necessarily require the lawyer to surrender work product containing false information, even upon request from the former client. When the lawyer knows that the documents contain false information and that the former client intends to use the documents to defraud a tribunal, the lawyer may conclude that the duty of candor to the tribunal overcomes the ethical duty to surrender the documents. If practicable and effective, the lawyer may redact the sections containing false information and surrender the remaining content. If redaction is not practicable or effective, the lawyer may withhold the documents in their entirety.

We do not suggest that the lawyer faced with these circumstances is always required to withhold the false work product. In some cases, other options may be available. The extent of those options is beyond the scope of this opinion. In addition, this opinion does not address the extent to which lawyers may withhold false work product from a former client where the work product will not be used before a tribunal. Finally, our opinion addresses only the circumstance in which the former client is the source of the false information. We express no opinion on the obligations of a lawyer to provide a former client with work product containing false information obtained from other sources.

RELEVANT ETHICAL RULES

ER 1.0 Terminology

* * * *

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

* * * *

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

* * * *

(h) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

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(l) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

ER 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

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(e) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

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[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.

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ER 1.6 Confidentiality of Information

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

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

* * * *

ER 1.16 Declining or Terminating Representation

(a) A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

* * *

(4) The client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(e) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

* * * *

Comment

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[10] Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda.

* * * *

ER 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

* * *

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

RELEVANT ARIZONA ETHICS OPINIONS

Supreme Court of Arizona, Ethics Advisory Committee, Ethics Ops. 20-0001, 20-0007

State Bar of Arizona, Rules of Professional Conduct Committee, Ariz. Op. 15-02

OTHER RELEVANT ETHICS OPINIONS

State Bar of Washington, D.C., Ethics Op. 350 (2009)

ABA Comm. on Ethics & Pro. Resp., Formal Op. 471 (2015)