No. 2017-2. Is an estate planning lawyer required, upon request, to provide a former client with estate planning documents in an electronic and editable format? Further, can an estate planning lawyer copyright a client's estate planning documents?

Facts

Your practice is concentrated in estate planning. A former client contacted you requesting that you provide the client with estate planning documents in an electronic and editable format (the format). We assume for purposes of this opinion that the requested documents exist in the client's file in the format at the time your representation was terminated.

Issues

1. When documents are in the format, must the lawyer comply with the request?
2. May a lawyer assert a copyright over documents maintained in the format?

Analysis and Conclusions

Question 1

The crux of your letter concerns whether a lawyer is required under the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) to provide a former client with documents maintained in the format when they exist in that format in the file. The Committee answers the first issue in the affirmative and concludes that the Rules require that, when a former client requests the documents in the format and they exist in that format, the lawyer is obligated to provide them.

Colo. RPC 1.16(d) states:

> Upon termination of representation, a lawyer shall take steps to the extent practicable to protect a client's interests, 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 law.

This rule was "not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document." Colo. RP.C 1.16A, cmt [1]. As used in this rule, a client's file "consist[s] of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." *Id.* Colo. RPC 1.4(a)(4) further requires a lawyer to "promptly comply with reasonable requests for information."

As referenced in your letter, CBA Formal Opinion 104 addresses, in detail, a lawyer's duty upon termination of the representation to surrender the client's papers. *See generally* CBA Formal Op. 104, "Surrender of Papers to the Client Upon Termination of the Representation" (1999). Formal Opinion 104 makes clear that the definition of "papers" under Colo. RPC 1.16(d) "must be derived from the purpose of the rule, which is furtherance of the lawyer's principal ethical duty reasonably to protect the client's interests." *Id.* at 4-314–15. It makes equally clear that Colo. RPC 1.16(d)'s use of the term surrender "is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand," and that "[t]he lawyer should err on the side of production." *Id.* at 4-315.

Private Letter Opinion 2007-02 addresses a lawyer's "Duty to Surrender Client Documents in Electronic Format" and is particularly salient here, given that it addresses estate planning documents. Private Letter Opinion 2007-02 extends Formal Opinion 104's rationale to "documents in accessible electronic format" and concludes that providing documents in that format at the client's request "is a reasonably practical step [a lawyer] should take to enable the continued protection" of the former client's interests. *Id.* While Private Letter Opinion 2007-02 addresses a lawyer's duty to provide documents in "accessible electronic format," without discussion of whether they must be "editable," the Committee finds its rationale persuasive here.

The Committee discerns no meaningful distinction between provision of a client's documents in "accessible electronic format" and "editable electronic format." You do not question that the client is entitled to receive the documents in an uneditable, electronic format (i.e., as PDFs). The distinction is then one of format, and not substance, since the client can simply retype or optimize (i.e., OCR) a PDF to make it "editable." Accordingly, providing the documents as requested is a "reasonably practicable step" a lawyer must take under Colo. RPC 1.16(d) and places the documents within the scope of "papers" that must be surrendered under the same rule. *See* Colo. RPC 1.16(d) (requiring surrender of "papers and property to which the client is entitled").

The Committee appreciates your concern that, as a result of the format, a client may be more likely to use the documents in a manner for which you did not intend them, such as modifying

them himself, using them for family members, or turning them over to new counsel. However, what the client intends to do with the documents does not relieve the lawyer from the responsibility to provide them. The same risks are present when a lawyer provides noneditable documents and can be appropriately addressed through a termination letter that complies with Colo. RPC 1.16. And because the client is a former, rather than current, client, you have no obligation to determine his capacity. *See* Colo. RPC 1.14 (limiting duty to determine client's capacity to "decisions in connection with a representation").

The Committee equally appreciates your concern that in some practices, lawyers subscribe to services that provide copyrighted templates or impose restrictions on use under a licensing agreement. Use of any such services or forms must be consistent with the Rules and does not form a basis for withholding or destroying client files. Accordingly, the Committee interprets "papers" under Colo. RPC 1.16(d) to require only surrender of those editable, electronic forms that have been specifically modified to the client's circumstances. It does not read Colo. RPC 1.16(d) as requiring a lawyer to disclose the unedited or unmodified forms from which those documents originated.

The Committee further cautions that its opinion here should not be read to encourage deleting the editable versions of documents to, as you state in your letter, "avoid the ethical dilemmas outlined" therein. The Committee does not agree that provision of editable electronic documents presents any such ethical dilemma that supports the premature destruction of any client files. Nor would such a practice be permitted under the Rules. *See* Colo. RPC 1.16(a) ("A lawyer in private practice shall retain a client's files respecting a matter unless" certain exceptions not at issue here apply). Presumably, the editable, electronic version of any final document exists within the client's file and must be maintained in accordance with the Rules.

However, the Committee is of the opinion that Colo. RPC 1.16(d) does not require the surrender, in any format, of internal firm administration documents (i.e., conflicts checks, personnel assignments, or documents that were intended for law office management or use); documents protected from disclosure based on third-party interests; and, arguably, personal lawyer notes (especially those containing personal impressions and comments). *See generally* Formal Op. 104. *But see Restatement (Third) of the Law Governing Lawyers* § 90, cmt. c. The Committee is also of the opinion that the lawyer is obligated to provide only those editable electronic documents maintained in the ordinary course of practice that exist in the client's file as of the date the lawyer–client relationship was terminated. *See* Colo. RPC 1.16A, cmt [1].

The Committee's answer here is consistent with other jurisdictions that have addressed similar questions. *See* New York City Bar Ass'n Comm. on Prof'l & Judicial Ethics Formal Op. 2008-01, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents

Relating to a Representation" (2008) (stating lawyers have an obligation to provide clients with electronic documents created and contained within the client's file in that format); State Bar of California Formal Op. 2007-174 (emphasis in original) (concluding "the *form* of the items in question [] proves immaterial" to a lawyer's obligation to return client paper's upon termination of representation); Illinois State Bar Association Advisory Op. on Prof's Conduct No. 01-01 ("It is also the Committee's opinion that the request to have the client file materials downloaded onto disk is a 'reasonable' request as set forth in Rule 1.4(a), and that the client is entitled to receive his or her files in the format in which the lawyer or law firm maintains such files.").

Finally, because your letter does not express any concern regarding disclosure of the metadata contained within those electric documents, or the expense of producing those documents where they exist in solely paper format, we do not address those concerns here.

Question 2

Your second issue raises a legal, rather than ethical, question. Pursuant to the Committee's by-laws, the Committee is tasked with providing ethics advice and is not obligated to respond to questions about law. Accordingly, and respectfully, the Committee declines to address that issue. *See* Rules of the Standing Committee on Ethics of the Colorado Bar Ass'n (last amended April 2007), § F, Rule F-3(e) (stating the Committee "shall not be obliged to answer" an inquiry that involves "opinions on questions of law, other than those arising under the Colorado Rules").