

You Can't Make Clients Keep Their Own Files

by

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There has been a great deal written about an attorney's obligation to provide clients with their files upon termination of representation. This obligation stems from Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).[Ftn 1](#) The Lawyers Board has issued two separate formal opinions dealing with retaining liens on client files, and on copying charges.[Ftn 2](#) Numerous admonitions have been issued by the Director's Office to attorneys who have violated these standards, and the Minnesota Supreme Court has upheld such admonitions on appeal.[Ftn 3](#) Several of these *Minnesota Lawyer* ethics columns have dealt with this topic.[Ftn 4](#) What possibly could be left to write about?

One recurring response heard by the Director's Office to complaints that allege a failure to return a client's file at the end of representation is that the client, throughout the representation, and especially in litigation matters, received copies of all necessary documents related to their representation, such as correspondence and pleadings. Many lawyers advise that their clients were instructed to retain these copies. Some attorneys even go so far as to provide a folder or three-ring binder to the client in which to maintain "their copy" of the file. Therefore, the response to the complaint goes, the client already has a copy of their file and no additional copy need be provided upon request or termination of representation. Despite such claims, attorneys who refuse to provide client files upon request remain subject to discipline.

It is an excellent idea and is an advisable practice to provide a client with copies of correspondence and pleadings throughout the course of a representation. It is advisable because it helps fulfill an attorney's obligation to provide effective communication to the client. See Rules 1.4(a) and (b), MRPC.[Ftn 5](#) It does not, however, eliminate the attorney's independent obligation upon termination of representation. So even if the client has, in fact, been provided such copies, the lawyer has not fulfilled, or nullified, the obligation to the client under Rule 1.16.

In any event, most litigation files in a law office will include more than just court pleadings and correspondence. Telephone messages and notes, witness interviews and notes, and legal research for which the client has paid are all part of what the lawyer would be expected to keep as part of the "client's file." The attorney has an obligation to provide these items as part of the file at the end of representation.[Ftn 6](#) It is highly unlikely that copies of all such items were provided during the representation, so it is not factually accurate to respond to a complaint by asserting that the client already has a complete copy of the file. Even if sending the client copies during the representation fulfilled the obligation as to those items, additional items almost assuredly would need to be provided. Equally important is that those items already provided must be provided again. Since lawyers cannot require clients to retain them, they cannot therefore assume that the client still has them.

More fundamentally, is it fair to expect or ask clients to be responsible for maintaining their own file? Is this not something clients are entitled to expect their attorneys to do as part of the attorney/client relationship? Is it not part of what the attorney is being paid to do?

The Rules of Professional Conduct impose many obligations upon an attorney, including several fiduciary obligations towards a client. These obligations cannot be transferred to the client at the attorney's insistence. Responsibility for maintaining the client file should be one such non-transferable obligation.

1 "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled...."

2 LPRB Opinion 11 states that "[i]t is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client." LPRB Opinion 13 defines what is the client file that must be returned upon termination of representation and further adds that return may not be conditioned upon payment of copying costs.

3 See, e.g., *In re Admonition issued to X.Y.*, 529 N.W.2d 688 (Minn. 1995).

4 See "Don't withhold client files" in the Dec. 12, 1997 edition of *Minnesota Lawyer*; see "Board Opinion No. 13 revisited" in the June 12, 2000 edition of *Minnesota Lawyer*.

5 "A lawyer shall keep a client reasonably informed about the status of a matter...[and] shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

6 See "Is a client entitled to the lawyer's notes?" in the Aug. 23, 1999 edition of *Minnesota Lawyer*.