By Martin Cole

# Client Files: The ABA Weighs In

What took them so long? The issue of returning client files—or, more technically, what constitutes the papers and property to which a former client is entitled upon termination of representation—is a common source of advisory opinion requests, complaints and even discipline.[1] It is a topic on which not all scholars and ethics experts agree. Yet the American Bar Association has not issued an opinion on this topic since 1977, and that was an informal opinion based upon a set of rules (the former Code of Professional Responsibility) that was abandoned over 30 years ago. Now the ABA has finally weighed in again with the issuance of ABA Formal Opinion 471 (7/1/2015), entitled "Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client in Entitled."[2] (Note that the Rules of Professional Conduct do not discuss a client's "file," even though that is the usual shorthand term most lawyers and clients use.)

The ABA's discussion is premised upon a fact pattern in which a lawyer has represented a municipality for several years pursuant to a contract that has now expired. The city requests that the lawyer provide its new attorney with all files, open and closed. The opinion notes that the lawyer has been paid in full, so there are no lien issues presented. The question, then, is what must be provided to the former client (or its new counsel)?

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The ABA's analysis of this question is, of course, based upon the ABA Model Rules of Professional Conduct, specifically Rules 1.15 and 1.16. Under these rules, the ABA Committee determined that the materials an attorney must provide include all materials given to the attorney by the client, any documents filed with a tribunal on the client's behalf (or those completed and ready to be filed), executed instruments such as contracts, correspondence connected to the representation (including emails retained pursuant to the lawyer's document retention policy), discovery or evidentiary exhibits, and legal opinions and evaluations paid for by the client. All of these seem quite reasonable for a client to expect.

The ABA determined that the lawyer need not return drafts of documents, internal research memos and materials, personal notes, billing statements and most other internal firm materials. The opinion did note, however, that internal notes and memos that might otherwise not need to be provided may have to be if the materials should be disclosed to avoid harming the municipality's interests, using the example of the most recent draft of and the supporting research for a document to be filed to meet a pending filing deadline.[3]

The ABA noted that many states have adopted rules or issued opinions dealing with this subject in the absence of a formal ABA opinion. Oftentimes an ABA formal opinion forms an important basis upon which states expand. Thus, the ABA's analysis may yet be helpful to some jurisdictions.

## Detailed

The Model Rules' versions of Rules 1.15 (Safekeeping Property) and 1.16 (Declining or Terminating Representation) differ in many aspects from the version the Minnesota Supreme Court has adopted. The newly identified ABA standard remains more generic than Minnesota's rules, and lawyers in Minnesota will always need to refer to our state's versions of these rules when trying to determine what a client is entitled to.

Minnesota's Lawyers Board recognized early on that issues involving a lawyer's return of a client file, and thus implicitly what constitutes client papers and property, were a common source of dispute and inquiry. In 1989, Lawyers Board Opinion No. 13 was adopted to deal specifically with the issue of charging for copying client files. In doing so, the board also attempted to define and clarify what items an attorney must return to a client upon termination of representation. The Code of Professional Responsibility in effect prior to 1985 had not defined what the phrase "client papers and property" means, just as the superseding and then-current Rules of Professional Conduct did not. The Lawyers Board opinion attempted to fill that void and for many years succeeded in substantially reducing complaints on these topics.

Although Opinion No. 13 has never been repealed, much of the content of the board opinion was codified in 2005 into Minnesota's Rules 1.16(e) – (g). Rule 1.16(e) clearly states that, "Papers and property to which the client is entitled [upon termination of representation] include the following, whether stored electronically or otherwise...." The rule then sets out a detailed list of what does and does not constitute client papers and property in various situations. Like the ABA, Minnesota's rule states that papers and property delivered to the lawyer by the client must be returned to the client. Minnesota goes further, however, to state that any papers and property for which the client has already paid the lawyer's legal fees or already reimbursed the lawyer's cost expenditure also must be returned.[4] The ABA opinion is premised upon the presumption that the lawyer has been paid in full, yet nevertheless, authorizes withholding of some documents.

## Bifurcated

Minnesota's approach then bifurcates litigation matters from transactional matters in dealing with return of client files/papers. In litigation, the dividing line for returning documents is principally if pleadings, discovery, etc., have been served and filed. If so, then all such items must be released even if the client has *not* paid as yet; to do otherwise would prejudice the client (even if the client could possibly recover most filed documents from the court). If such documents have been drafted but not yet served or filed *and* are not yet paid for, then they may be withheld.[5] This seems a fair balancing of the interests of the client and the lawyer.

Next, items for which the lawyer has agreed to advance costs—such as depositions, other transcripts or any item of

evidentiary value—must be provided, again without regard to whether the client has reimbursed the lawyer. As with those items above that must be returned regardless of payment, the lawyer, of course, retains whatever billing and collection rights she has.

In transactional representations, the rule provides a slightly broader ability to withhold documents. Again, all work already paid for must be returned, but documents such as drafted but unexecuted estate plans, title opinions, articles of incorporation, or contracts (which presumably do not yet have any legal effect) may be withheld if the client has not paid for the work.[6]

Minnesota does not in its rule otherwise distinguish intermediate drafts of documents from final products, as the ABA opinion spends time doing. Minnesota has not stated that such drafts are somehow documents to which a client is not entitled, so it would seem that they may be. Many lawyers may not historically have retained drafts of pleadings, research memos, etc., but in today's electronic world, perhaps they are retained and may contain valuable tracking information about changes made. Maybe this will be an area in which the new ABA opinion can influence Minnesota's rules.

Then, in Rule 1.16(f) and (g), the Minnesota rule addresses two final points relating to return of client files: the issue of requiring the client to pay for copying charges of their file (which originally triggered LPRB Opinion No. 13), which an attorney is allowed to do only if the client has, prior to the termination of the lawyer's services, agreed to such an arrangement in writing. Otherwise, the lawyer must provide all required items to be returned without cost. Finally, the lawyer cannot condition return of client papers upon payment of the lawyer's fee or copying charges. This may seem inconsistent with some of the items noted above, but, in fact, is different. If an item can be withheld pursuant to the rule, so be it, but if it must be returned (even if unpaid for), then it cannot be "held hostage" while awaiting a payment.

## Conclusion

ABA formal opinions have long held an important place in the formation of ethical standards nationally. Minnesota traditionally will follow their guidance absent good cause.[7] In this instance, Minnesota has a long-developed rule on what constitutes client papers and property, so it seems unlikely that any differences that exist with the ABA opinion will result in change.

## Notes

[1] *See, e.g.*, Cole, "Summary of Admonitions," *Bench & Bar of Minnesota*, February 2013.

[2] A copy is available at *http://bit.ly/1fsDriP*

[3] *See* Jorgensen, "Is a Client Entitled to the Lawyer's 'Notes'?" *Minnesota Lawyer*, August 23, 1999. Another interesting aspect of the ABA opinion is that it noted that providing copies of documents to a client during the representation may satisfy an attorney's obligation to communicate with a client under Rule 1.4, but did not mean that the client was not entitled to a copy of the same documents as part of the file upon termination of representation. The Director's Office many years ago took the same position. *See*, Cole, "You Can't Make Clients Keep Their Own Files," *Minnesota Lawyer*, January 8, 2001.

[4] Rule 1.16(e)(1), MRPC.

[5] Rule 1.16(e)(2), MRPC.

[6] Rule 1.16(e)(3), MRPC.

[7] *See* Cole, "Scripting Contacts With Represented Persons," *Bench & Bar of Minnesota*, November 2011.