

DO YOU HAVE A FILE
RETENTION POLICY?
IF NOT, YOU SHOULD
PUT ONE IN PLACE.

FILE RETENTION AND RETURN

BY SUSAN HUMISTON ✉ susan.humiston@courts.state.mn.us



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

File retention and return is a frequent topic on our attorney ethics help line.¹ The Office of Lawyers Professional Responsibility has addressed the topic in this column on previous occasions,² but refreshers are helpful, and new readers likely have questions.

The starting point

You should start from the perspective that the client’s file belongs to the client. While the ethics rules do not use the term “file,” the Minnesota Supreme Court did in the course of a discipline case almost 30 years ago (*In re XY*, 529 N.W.2d 688 (Minn. 1995)), stating: “[t]he file belonged to the client and was appropriately returned to her upon her request.” The Court further stated that copies of the file were for the *lawyer’s* benefit. Starting from the proper perspective about whose property it is usually helps resolve a lot of client-lawyer issues relating to the return and retention of the client file.

The rules

The issue of document retention often comes up when addressing an attorney’s obligation to return the client file after termination of representation, covered by Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).³ In 2005, Minnesota adopted ABA model rule 1.16(d) for the most part but went on to adopt additional provisions, not contained in the model rule, to provide further ethical guidance to lawyers on the topic of file return obligations. This guidance was framed with the phrase “papers and property to which the client is entitled,” which is defined in Rule 1.16(e), MRPC. You should review that rule, as well as my 2018 article and Martin Cole’s 2015 article (see note 2) on the topic, if you have questions about what to return.

One thing we get a lot of questions about is whether providing copies of documents to the client as the representation progresses as necessary under Rule 1.4 (your communication obligation), relieves you from providing a copy of the entire client file upon their request at the conclusion of the representation or at a time thereafter when the client seeks a copy of their file. This Office has consistently taken the position that it does not. Even if you have provided copies as you go, if the client requests a copy of their file, you should

provide it, most notably because the papers and property to which the client is entitled under the rule are broadly defined, and may not be co-extensive with what has already been provided.

Because of your Rule 1.16 obligation, you should have good systems in place to be able to convey the client’s file to them easily and accurately at the conclusion of the representation. We see so many complaints that start with the allegation that the lawyer did not timely provide a copy of the file upon request. Such a complaint will prompt an investigation, and can be a basis for discipline, but it can also lead us to uncover additional issues. Thus, good file return practices allow you to comply with the ethics rules and can serve as an effective risk management technique.

Retention obligations

The ethics rules do not, however, expressly tell you how long you must keep the client’s file. You should be careful not to read into this absence of a specific timeline the prerogative to destroy client files at will because, as noted above, the file is presumptively the client’s and they have a right to obtain it upon request. What should a lawyer do?

The best advice I can give you on this topic is to establish reasonable file retention procedures in your retainer agreement so that the client knows what your practices are and can plan accordingly. You can reiterate those retention policies in your file-closing letter, if you send one. With more and more files being maintained electronically, storage capacity is usually not an issue, but it’s also important to have in place safeguards for backing up electronically stored files and procedures for ensuring that files are not inadvertently deleted. Your malpractice carrier may have retention guidelines that you can take into consideration, usually dictated by the time period under which a malpractice claim can be stated against the lawyer. In setting retention time policies, however, do not forget to consider the client’s potential need for the documents.

If you do not have retention policies that have been clearly communicated to your client, you may be left to wonder whether you are able to ethically destroy client files, and if so, when you may do so. Kenneth Jorgenson’s article from 2004 (see note 2) provides some good guidance for your consideration.

You should also take care with original items provided to you by the client or items that you prepare that have intrinsic value or legal effect. Rule 1.15(c), MRPC, requires you to safekeep client property provided to you; this rule is not limited in time. You should always return client originals or other property you received from the client or a third party to the client or third party at the time the representation ends, so that you are not ethically obligated to safekeep them indefinitely. The same goes for items created by you where the original has independent value or legal effect. This is the client's property. Wills and trusts are the main items that come to mind for me in this category. I recommend you do not keep them for the client because, if so, you are undertaking a commitment that will be difficult if not impossible to modify as time goes by.

Do you have a file retention policy? If not, you should put one in place.

Other related questions

A couple of other questions that we get frequently: Do the ethics rules require you to provide multiple copies of the client's file to the client? The answer is no. If you have provided to the client a complete copy at the conclusion of the representation, we have taken the position that you are not ethically obligated to keep providing file copies to the client. That said, having good records of prior file productions is a good idea to avoid a dispute regarding what was produced and when.

Am I required to provide a paper copy of the client file since it is maintained electronically? The ethics rules do not expressly address this question, but we have generally taken the position that providing a copy of the file as maintained by the lawyer, provided it is usable and accessible to the client, satisfies the ethics rules. Thus, if you only have an electronic copy of the file, you can provide the file electronically provided it is produced in a form that is accessible and usable by the client. Similarly, if you only have a paper copy of the file, the rules do not require you to scan it and provide an electronic copy just because the client asks for an electronic copy.

Can I charge the client for providing copies of their file, whether in paper form or electronically? The answer is maybe. Pursuant to Rule 1.16(g), MRPC, you may charge for copies

only if the client, prior to termination of the lawyer's services, has agreed in writing to pay such a charge. Having this provision in your fee agreement may also moot a lot of disputes regarding production of the file. Most lawyers are happy to accommodate multiple and varied requests relating to return of the client file if they can charge for duplicating and retrieving the file.

Finally, always remember that you cannot condition payment of fees or copying costs on the return of the client file. In 2005, Minnesota adopted Rule 1.16(g), MRPC, which makes such conduct unethical. Notwithstanding this express prohibition, lawyers continue to receive discipline for requiring payment on production. I know it is frustrating to be required to provide the client with their file when they owe you money, but it is short-sighted to pick this battle with your client.

Conclusion

Lawyering creates a lot of paper, mostly electronic nowadays. Having good policies and procedures regarding the handling of that paper for your law practice—particularly relating to file return and retention—really pays dividends. It is not only a crucial element of customer service, but part of your ethical obligation. If you have questions regarding this topic, please call our Office. ▲

NOTES

¹ Attorneys who have questions about their ethical obligations under the Minnesota Rules of Professional Conduct may call us at 651-296-3952 for confidential ethics advice free of charge

² Prior Director columns on this topic can be found on the lprb.mncourts.gov website under Articles For example, Susan Humiston, *File Contents and Retention*, Bench & Bar (August 2018); Martin Cole, *Client Files: The ABA Weighs In*, Bench & Bar (September 2015); Kenneth Jorgensen, *File Retention Policies and Requirements*, Bench & Bar (December 2004)

³ Rule 1.16(d), MRPC, provides "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 fees or expenses that has not been earned or incurred" (emphasis supplied)