

File contents and retention

What makes up a client's file and how long do I need to keep it? These two questions have been asked frequently on our ethics hotline for decades. Minnesota's ethics rules speak to the first question but offer no direct guidance on the latter. Let's review the current lay of the land.

File contents

Calling it a client's "file" is a bit of a misnomer from an ethics perspective. The ethics rules instead frame the question in terms of the "papers and property" to which the client is entitled.¹ Surrendering such "papers and property" is part of a lawyer's ethical duty upon termination of the representation, and it exemplifies our obligation to take steps, to the extent reasonably practicable, to protect a client's interest after the representation ends.²

Somewhat helpfully, the rule describes what is included within "papers and property."³ I say somewhat helpfully because while Rule 1.16(e) covers a decent bit of ground, it doesn't answer every question that comes up when a lawyer is looking at her file and trying to figure out what should be "surrendered."⁴ While your best bet is to read the rule, "papers and property" (paraphrased) includes, whether printed or stored electronically:

- everything provided by the client or on behalf of the client to the lawyer;
- pleadings and other litigation materials that have been served or filed, regardless of whether the client has paid for the services involved in creating those documents;
- correspondence exchanged with others; and
- for litigation, all items for which the lawyer has advanced costs and expenses regardless of reimbursement, such as depositions, expert opinions and statements, business records, witness statements, and other items of evidentiary value.

"Papers and property" do not include:

- pleadings, litigation materials, and correspondence that have been drafted and not sent if the client has not paid for the legal services in drafting or creating those documents; or

■ in non-litigated matters, drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, and any other unexecuted documents that do not have legal effect, where the client has not paid for the services.⁵

However, there are two important caveats relating to the latter points. First, you should seriously consider not withholding these items if doing so will substantially prejudice the interests of the client—that is, if the statute of limitations is about to run or another deadline is imminent.⁶ This is the

position taken by ABA Opinion 471 (based upon Model Rule 1.16(d)), has long been the position of the LPRB (see LPRB Opinion No. 13), and is generally encompassed within the rule's mandate to "take steps to the extent reasonably practicable to protect a client's interest." Remember, the ethics rule is focused on protecting the client's interest upon termination of the representation. Surrendering defined papers and property is just one aspect of the obligation. Protecting the client's interest in a particular case may require you to provide more than just the defined papers and property.

Second, if you do withhold something as not the client's "papers or property" because it is not paid for, you cannot then assert a claim for fees in drafting the documents.⁷ This is because Minnesota does not allow retaining liens, which is a lien allowing the attorney to retain a client's papers or money until the client pays his bill.⁸ Basically, you cannot hold client documents hostage to get your bill paid. You may not have to give the documents for which payment has not been received to the client, but withholding them means you are relinquishing your right to payment for those items.

A few things are not expressly referenced in the rule. What about attorney notes and similar work product, like chronologies and legal research not reduced to memoranda? Such items appear well within the broadly worded "papers and property for which the client has paid the lawyer's fees" set forth in Rule 1.16(e)(1), MRPC. What about administrative documents in the file such as conflict checks, work-in-progress reports, or internal firm communications regarding account creation and creditworthiness? This is also not expressly addressed, but likely such documents would fall outside of "papers and property," which is the conclusion reached by ABA Opinion No. 471.

File retention

Minnesota's ethics rules are silent as to retention periods for client files. The only retention period referred to in the ethics rules is in Rule 1.15(h), MRPC, which requires that both operating and trust account books and records be retained for six years following the end of the tax year to which they relate or completion of the representation, as applicable.



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In 2004, a former OLPR director wrote a column on file retention in this publication, which provides helpful guidance by identifying the issues you should keep in mind when determining what your file retention policies should look like.⁹ That article remains relevant today. Since then, however, several states have been amending their ethics rules to specify retention periods for client files.¹⁰

For example, Massachusetts' Supreme Court just approved a comprehensive rule amendment that sets a default six-year retention period for most cases—with specific exceptions such as files involving minors (six years after the minor reaches majority)—and, quite helpfully, addresses file retention standards for criminal defense files, an often overlooked category of documents in writings on this topic. For criminal defense files, Massachusetts' new rule requires retention for the life of the client if the matter resulted in a sentence of death or life imprisonment, with or without the possibility of parole, and in all other cases, allows destruction without notice to the client 10 years after the latest of: completion of the representation, the conclusion of all direct appeal, or the running of any incarcerated defendant's maximum period of incarceration.

I really like the specificity of Massachusetts' rule. It provides a lot of guidance on both file retention and file content. Food for thought for a potential rule change in Minnesota?

Lest I forget, if you do decide not to retain a client file, you should ensure file destruction is managed securely in order to protect client confidences.¹¹

Don't forget copying costs

In Minnesota, you can charge a client for the reasonable cost of duplicating or retrieving the client file *only* if the client has, prior to termination, agreed in writing to pay such a charge.¹² Also remember that you cannot make the return of the client file contingent on advance payment of copying costs, just as you cannot make return of the file contingent on payment of your fee.¹³

Minnesota's Rule 1.16(d) and (e) answer a lot of questions that arise when "surrendering" a client file. I also like what other states are doing to provide greater specificity and assistance to their lawyers. As always, if you have any ethics questions, please call our ethics hotline at 651-296-3952. ▲

Notes

² Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).

² *Id.*; see also Rule 1.15(c)(4), MRPC, "A lawyer shall promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

³ Rule 1.16(e), MRPC.

⁴ Another resource is LPRB Opinion No. 13, which provides a bit more guidance and is still an active opinion, notwithstanding the fact that much of its content has been expressly incorporated into Rule 1.16. Lawyers Professional Responsibility Board (LPRB) Opinion No. 13 (amended 1/22/2010).

⁵ See generally Rule 1.16(e)(1)-(3), MRPC.

⁶ LPRB Opinion No. 13; ABA Opinion No. 471 "Ethical Obligations of Lawyers to Surrender Papers or Property to which Former Clients is Entitled" (7/1/2015).

⁷ Rule 1.6(g), MRPC, "A lawyer shall not condition the return of client papers or property on payment of the lawyer's fee or the costs of copying the lawyer's file" LPRB Opinion No. 13; "Board Opinion No. 13 Revisited" by Timothy M. Burke, Minnesota Lawyer (6/12/2000), available on the OLPR website at www.lprb.mncourts.gov/articles.

⁸ See *Village of New Brighton v. Jamison*, 278 N.W.2d 321, 324 (Minn. 1979) (holding that legislative revisions to Section 481.13 of Minnesota statutes in 1976 abolished the retaining lien in Minnesota, leaving only a statutory charging lien on causes of action).

⁹ "File Retention Policies and Requirements" by Kenneth L. Jorgensen, Bench & Bar (December 2004), available on the OLPR website at www.lprb.mncourts.gov/articles.

¹⁰ Mass. R. Prof. C. 1.15A, by Order of the Supreme Judicial Court dated 6/7/2018, effective 9/1/2018; see also Colorado Rules of Professional Conduct 1.16A (effective 3/15/2018); anecdotally, I understand one driver of this trend is the increasing number of aging solo or small firm lawyers with basements full of client files spanning decades, which too often fall to next of kin, partners, or disciplinary offices to address.

¹¹ Rule 1.9(c)(2), MRPC.

¹² Rule 1.16(f), MRPC.

¹³ Rule 1.16(g), MRPC.