

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 471**

**July 1, 2015**

## **Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled**

*Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.*

This opinion addresses the ethical duties of a lawyer pursuant to the ABA Model Rules of Professional Conduct, when responding to a former client's request for papers and property in the lawyer's possession that are related to the representation. The opinion does not address a client's property rights or other legal rights to these materials.

A lawyer has represented a local municipality for 10 years pursuant to a contract for legal services. The contract term expired. After publishing a request for proposals, the municipality chose a different lawyer to provide the municipality with future legal services. The municipality requested that the lawyer provide the municipality's new counsel with all files – open and closed. The lawyer has been paid in full for all of the work.<sup>1</sup> The lawyer asks what materials must be provided to the former client.<sup>2</sup>

The scope of a lawyer's ethical duty pursuant to the Rules of Professional Conduct to provide a former client with papers and property to which the client is entitled at the termination of the representation arises with regularity. Many jurisdictions, through case law on property rights, agency law, or ethics opinions under the jurisdiction's Rules of Professional Conduct, have examined the question and determined which papers and property a lawyer must return, reproduce, and/or provide to a client. There may be other obligations defined in a jurisdiction's case law or court rules.<sup>3</sup> Lawyers are cautioned to review the law in the jurisdiction in which

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1. Because the lawyer has been paid in full, this opinion does not address retaining liens.

2. The ABA Model Rules of Professional Conduct do not directly address the length of time a lawyer must preserve client files after the close of the representation. Many jurisdictions provide guidance on this issue through court rule or ethics opinions.

3. See, *Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus*, 824 S.W.2d 92 (Mo. 1992) (client has a conditional right of access to a lawyer's notes, research, and drafts if the client needs the notes, research, and drafts to understand completed documents).

they practice because lawyers have been disciplined for failing to surrender to the client papers and property to which the client is entitled.<sup>4</sup>

ABA Informal Ethics Opinion 1376 (1977) addressed a lawyer's ethical duty to deliver files to a former client. The opinion interpreted Rule 9-102(B)(4) of the Model Code of Professional Responsibility that read, "A lawyer shall: [P]romptly pay or deliver to the client as requested by the client the . . . properties in the possession of the lawyer which the client is entitled to receive." It concluded: "The attorney clearly must return all of the materials supplied by the client to the attorney. . . . He must also deliver the 'end product' . . . On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem."

That opinion was issued prior to the adoption of the Model Rules of Professional Conduct and prior to advances in technology that have affected virtually all aspects of the practice of law, including how lawyers create, communicate, use, and store materials related to client representations. This opinion clarifies and updates a lawyer's ethical duty to provide a former client with papers and property pursuant to Model Rules of Professional Conduct 1.15 and 1.16, and addresses practical considerations attendant to those obligations.

Model Rule 1.15 provides that a lawyer must safeguard a client's property and promptly deliver it to the client upon the client's request.<sup>5</sup> By its terms, Rule 1.15 applies to a client's and third party's money and to "other property" that comes into a lawyer's possession in connection with a representation.<sup>6</sup> Although not specifically defined in the Rule, "other property" may be fairly understood to include, for example, (a) tangible personal property, (b) items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills, or deeds and (c) any documents provided to a lawyer by a client.<sup>7</sup> Therefore, as an initial matter, and in the absence of other law<sup>8</sup> or a valid dispute under Rule 1.15(e), the lawyer must return all property of the municipality that the municipality provided in connection with the representation. *See* ABA Informal Ethics Opinion 1376 (1977). This would necessarily include original documents provided by the client.

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4. *See In re Brussow* 286 P.3d 1246 (Utah 2012). In *Brussow*, the respondent represented a client in post-dissolution matters and was publicly sanctioned for refusing to turn over the file to the client. *Brussow* argued that the client owed him money for the cost of deposition transcripts which the client's second husband agreed to pay. The Utah Supreme Court noted that Utah's Rule 1.16 "differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses." *Id.* at 1252. *Brussow* was also admonished for failing to account for fees paid in advance. *See also In re Thai*, 987 A.2d 428 (D.C. 2009). *Thai* delayed returning a client's file and "actively obstructed the efforts of his former client and the successor attorney to obtain the file." *Id.* at 430. *Thai* was disciplined for violating Rule 1.16 as well as for violations of Rules 1.1, 1.3, and 1.4 involving the same client matter.

5. ABA MODEL RULE 1.15, Safeguarding Property.

6. ABA MODEL RULE 1.15(a).

7. This obligation exists with respect to all materials whether in paper or electronic form. *See* ABA MODEL RULE 1.0(n) defining writing as "a tangible or electronic record of a communication . . . including audio or video recording, and electronic communications." *See also* N.H. Bar Ass'n Advisory Op. 2005-06/3 (2005).

8. *See* ABA MODEL RULE 1.15, cmt. [4] for a discussion of third party liens. *See* ABA MODEL RULE 1.16(d) and cmt. [9] and ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1520 (1986) for a discussion of lawyer retaining liens.

When a representation ends, ABA Model Rule 1.16(d) mandates that the lawyer take steps that are “reasonably practicable to protect a client’s interests . . .”<sup>9</sup> “Reasonable,” when used to describe a lawyer’s actions “denotes the conduct of a reasonably prudent and competent lawyer.”<sup>10</sup> These steps include, but are not limited to, “surrendering papers and property to which the client is entitled.”<sup>11</sup>

The Model Rules do not define the “papers and property to which the client is entitled,” that the lawyer must surrender pursuant to Rule 1.16(d). Jurisdictions vary in their interpretation of this obligation. A majority of jurisdictions follow what is referred to as the “entire file” approach.<sup>12</sup> In those jurisdictions, at the termination of a representation, a lawyer must surrender papers and property related to the representation in the lawyer’s possession unless the lawyer establishes that a specific exception applies and that certain papers or property may be properly withheld.<sup>13</sup> Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person;<sup>14</sup> materials containing a lawyer’s assessment of the client;<sup>15</sup> materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others;<sup>16</sup> and documents reflecting only internal firm communications and assignments.<sup>17</sup> The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Other jurisdictions follow variations of an end-product approach.<sup>18</sup> These variations distinguish between documents that are the “end-product” of a lawyer’s services, which must be surrendered and other material that may have led to the creation of that “end-product,” which need not be automatically surrendered. Under these variations of the end-product approach, the lawyer must surrender: correspondence by the lawyer for the benefit of the client;<sup>19</sup> investigative reports and other discovery for which the client has paid;<sup>20</sup> and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and

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9. ABA MODEL RULE 1.16, Declining or Terminating Representation.

10. ABA MODEL RULE 1.0(h), Terminology.

11. ABA MODEL RULE 1.16(d). This duty applies even when the lawyer believes the client’s discharge is unfair. *See* ABA MODEL RULE 1.16, cmt. [9].

12. *See, e.g.,* Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); Alaska Bar Ass’n Ethics Comm. Op. 2003-3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass’n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); Or. Bar Ass’n Formal Op. 2005-125 (2005); Va. State Bar Op. 1399 (1990).

13. This approach is also advocated by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. *See* RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46 (“On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.”)

14. *See, e.g.,* Colo. Bar Ass’n Formal Op. 104 (1999) (“A lawyer has the right to withhold pleadings or other documents relating to the lawyer’s representation of other clients that the lawyer used as a model on which to draft documents for the present client.”); *In re Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883 (N.Y. 1997).

15. *See, e.g., In re Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883 (N.Y. 1997).

16. RESTATEMENT (THIRD) LAW GOVERNING LAWYERS (2000) §46, cmt. c.

17. *See, e.g.,* Colo. Bar Ass’n Formal Op. 104 (1999); D.C. Bar Op. 333 (2005).

18. Ala. Ethics Comm. Advisory Op. 1986-02 (1986); Ill. State Bar Ass’n Advisory Op. 94-13 (1995); Kan. Bar Ass’n Op. 92-5 (1992); Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass’n Advisory Op. 06-02 (2006).

19. *See, e.g.,* Neb. Lawyer’s Advisory Comm. Advisory Op. 12-09 (2012); Ill. State Bar Ass’n Advisory Op. 94-13 (1995).

20. *See, e.g.,* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 98 (Mo. 1992); Neb. Lawyer’s Advisory Comm. Advisory Op. 12-09 (2012).

other similar documents prepared by the lawyer for the client. These items are generally considered the lawyer's "end product."

Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest,<sup>21</sup> the client's creditworthiness, time and expense records,<sup>22</sup> or personnel matters,<sup>23</sup> are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes,<sup>24</sup> drafts of legal instruments or documents to be filed with a tribunal,<sup>25</sup> other internal memoranda, and legal research<sup>26</sup> are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Final documents supersede earlier drafts. Earlier drafts and lawyer notes are part of the process of completing the final draft and, when electronic documents go through a process of continuing changes, it can become difficult or impossible to determine what constitutes a distinct "draft."<sup>27</sup> Thus, drafts and other documents representing work by a lawyer are often of relatively small value to clients and can be burdensome for a lawyer to preserve, catalogue, and maintain.

In ABA Informal Ethics Opinion 1376 (1977), the Committee addressed, under the Code of Professional Responsibility, what properties a lawyer must provide to a client at the conclusion of the representation in a trademark matter. We advised that the lawyer must provide the client with "end product – the certificates or other evidence of registration of the trademark," searches conducted and paid for, "significant correspondence, applications and materials filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question." The Committee noted that the lawyer "need not deliver" to the client "internal notes and memos."

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21. Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010); Colo. Bar Ass'n Formal Op. 104 (1999).

22. *Saroff v. Cohen*, No. E2008-00612-COA-R3-CV, 2009 WL 482498, 2009 BL 39364 (Tenn. Ct. App. Feb. 25, 2009) (Invoices for legal work performed are a law firm's business records, not prepared for the client's benefit, and need not be turned over upon client request. Proper procedure for securing this information when client is suing firm is to make a discovery request.).

23. Colo. Bar Ass'n Formal Op. 104 (1999); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); D.C. Bar Op. 333 (2005).

24. *Womack Newspapers Inc. v. Town of Kitty Hawk*, 639 S.E.2d 96, 104 (N.C. 2007).

25. Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

26. Ill. State Bar Ass'n Advisory Op. 94-13 (1995); San Diego Cnty. Bar Ass'n Op. 1984-3 (1984).

27. This opinion does not address a lawyer's obligations to retain specific material relating to a representation in the first instance (whether in paper or electronic form). However, a lawyer's duty under Rule 1.16(d) to "surrender papers and property to which the client is entitled" at the termination of a representation necessarily requires some consideration of this issue. In general, a lawyer's ethical obligation to retain and safeguard material relating to a representation arises pursuant to a lawyer's duties of competence and diligence and will depend on the facts and circumstances of each representation. *See* ABA MODEL RULE 1.1 and ABA MODEL RULE 1.3. *See also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2008-1 (2008); S.C. Bar Formal Op. 15 (2013). Further, a lawyer's decision whether to retain specific material related to a representation, in most cases, ultimately rests in the professional judgment of a lawyer consistent with his or her ethical and legal duties to the client. For example, in most instances, a lawyer will not need to retain non-substantive email communication to a client such as an email confirming a meeting or providing driving directions to the lawyer's office. By contrast, the lawyer likely would need to retain an email to the client in which the lawyer communicates and evaluates a settlement offer from an opposing party. Consistent with duties under the Model Rules, lawyers are encouraged to develop good document management policies.

The Committee affirms the position taken in Informal Ethics Opinion 1376 as it states the minimum required by the Rules. However, there may be circumstances in individual representations that require the lawyer to provide additional materials related to the representation. For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

As noted above, Model Rule 1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect a client's interest. Such steps include "surrendering papers and property to which a client is entitled..." Comment [9] to Rule 1.16 further clarifies that the lawyer "must take all reasonable steps to mitigate the consequences [of withdrawal] to the client." Although surrendering papers and property which the client is entitled to receive does not necessarily give rise to a client's entitlement under the Rules of Professional Conduct to *all* materials in the lawyer's custody or control related to the representation, at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.<sup>28</sup> We agree with Colorado Ethics Opinion 104 (1999) that in this context, unless the law of the jurisdiction provides otherwise, "the ethical entitlement is based on the client's right to access the document related to the representation to enable continued protection of the client's interest."<sup>29</sup>

Therefore, on the facts presented, at a minimum, Rule 1.16(d) requires that the lawyer must surrender to the municipality:

- any materials provided to the lawyer by the municipality;
- legal documents filed with a tribunal - or those completed, ready to be filed, but not yet filed;<sup>30</sup>
- executed instruments like contracts;<sup>31</sup>
- orders or other records of a tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy;

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28. The Committee recognizes that while Model Rule 1.16(d) specifies "papers and property," many lawyers have moved or are moving to a paperless practice in which few documents are available in tangible form. The use of the term "paper" in Rule 1.16(d) includes all communications noted above, whether tangible or electronic. *See* ABA MODEL RULE 1.0(e) defining writing as a "tangible or electronic record of a communication." While this opinion does not address whether and in what circumstances a lawyer must convert an electronic document into paper for a client or who will bear the cost of this conversion, the Committee agrees with the reasoning in D.C. Bar Op. 357 (2012) which explained, "Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings."

29. *See also* Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus, 824 S.W.2d 92, 97 (Mo. 1992) ("The purpose of the Rule, however, gives it meaning. The Rule is designed to protect a client's interest. It imposes a duty upon the attorney 'to take steps to protect' a former client's interest. 'Surrendering papers and property to which the client is entitled' is one example of a step an attorney must take to protect that interest. But, this duty 'to surrender papers and property' need not be supported or justified by any property concepts.")

30. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

31. *Id.*

- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- legal opinions issued at the request of the municipality; and
- third party assessments, evaluations, or records paid for by the municipality.

In contrast, under these facts, it is unlikely that within the meaning of Rule 1.16(d), the client is entitled to papers or other property in the lawyer's possession that the lawyer generated for internal use primarily for the lawyer's own purpose in working on the municipality's matters.<sup>32</sup> This is particularly true for matters that are concluded.

Therefore, under the facts presented, under Rule 1.16(d) the lawyer need not provide, for example, the following to the municipality:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;
- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the municipality or the municipality's matter; and
- documents that might reveal the confidences of other clients.

The Committee notes that when a lawyer has been representing a client on a matter that is not completed and the representation is terminated, the former client may be entitled to the release of some materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.<sup>33</sup>

In this fact scenario, if the lawyer has materials that are: (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

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32. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (1977).

33. A number of jurisdictions approve lawyer generated "summary of facts" or redacted memorandum that essentially provide the "useful" part of the documents to the client while preserving the internal thoughts/impressions of the lawyer as unnecessary for protecting the clients' interests. See Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010).

Finally, as part of the lawyer's duty pursuant to Rule 1.4 to keep the client "reasonably informed about the status of the matter," a lawyer may already have provided much of this information to a former client during the course of the representation. As Comment [4] to Rule 1.4 explains, "A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation." The Committee encourages lawyers to regularly provide clients with information and copies of documents during the course of the matter and encourages lawyers to advise clients to maintain these documents. The fact that copies of certain materials may have been previously provided to a client is not dispositive of whether the lawyer must also provide such materials at the termination of a representation.<sup>34</sup> This fact may not, however, be dispositive of who – the lawyer or the client – should pay for the time and cost of duplication of such materials upon termination of the representation.<sup>35</sup>

## Conclusion

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled such as materials provided to the lawyer, legal documents filed or executed, and such other papers and properties identified in this opinion. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

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34. *See generally* Travis v. Comm. on Prof'l Conduct, 306 S.W.3d 3 (Ark. 2009) (the client has no duty to maintain a file on his or her own behalf).

35. Lawyers are encouraged to explain in their retainer letters who is responsible for the costs of copying and under what circumstances.

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### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

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