Ethical and Liability Concerns When the Client Relationship Ends

Miranda K. Mandel
Attorneys’ Liability Assurance Society, Inc.,
A Risk Retention Group
Chicago, Illinois

I. Introduction

Client relationships end. Sometimes it is expected and cordial, such as when a transaction or litigation matter concludes (we hope to the client's satisfaction), and no further work is contemplated. Other times, however, it is unexpected and not so amicable, such as when a conflict develops that requires a lawyer to withdraw or the relationship between the client and lawyer breaks down to the point where one or both of them decide to part ways. In either situation, there are ethical and professional liability considerations that should inform how the lawyer proceeds in wrapping up an engagement. This article provides an overview of some of these issues. All references in this article to rules of professional conduct are to the American

This article was prepared to assist lawyers in addressing ethical and professional liability concerns. The content of this article does not constitute legal advice and is not intended to suggest or establish standards of care applicable to lawyers in any given situation. The recommendations contained in this article are not necessarily appropriate for every lawyer or for every situation it refers to or describes.

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Bar Association’s Model Rules of Professional Conduct (Model Rules), versions of which have been adopted in 49 states (all except California) and the District of Columbia. Lawyers should always refer to the applicable jurisdiction’s rules of conduct when evaluating a specific situation. Other sources for information on this topic include the Restatement Third, The Law Governing Lawyers (Restatement) §§ 31-33 (2000), and the ABA/BNA Lawyers’ Manual on Professional Conduct 31-1001, 31-1101, 31-1201.
II. The Basics—Model Rule 1.16

Model Rule 1.16 sets forth the basic ethical responsibilities when terminating a client relationship. Under Model Rule 1.16(a), a lawyer must withdraw from a representation if its continuation will result in a violation of the rules of professional conduct or other law; when the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or when the lawyer is discharged. Although the third circumstance requiring mandatory withdrawal is clear, the first two are not always straightforward in practice. A lawyer suffering from substance abuse or cognitive impairment may not be able to evaluate whether he or she can adequately represent a client. Law firms need to be alert to possible indicators that a lawyer may be struggling and be prepared to intervene if necessary. Similarly, determining when withdrawal is required because continuing the representation would violate the ethical rules often involves judgment calls. For example, under Model Rule 1.2(d), a lawyer may not assist a client in conduct that is criminal or fraudulent. Knowing when a client’s conduct crosses the line, or when a lawyer’s work on a matter constitutes “assistance,” however, may not be easy to discern. Often, the best approach is to apply “hindsight in real time” by assessing how the client’s proposed conduct and the lawyer’s involvement will be judged after the fact by a disciplinary authority or jury. When in doubt, seek the advice of a lawyer knowledgeable on professional responsibility matters who can objectively evaluate the situation.

Model Rule 1.16(b) sets forth specific bases for permissive withdrawal, including when a client persists in conduct involving the lawyer’s services that the lawyer “reasonably believes” is criminal or fraudulent; has actually used the lawyer’s services to perpetrate a crime or fraud; insists on taking action that the lawyer finds repugnant; or fails to substantially fulfill an obligation to the lawyer (e.g., fails to pay the lawyer’s invoices) after being given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or when the representation will result in unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client. Under Model Rule 1.16(b), and in most jurisdictions, however, a lawyer need not articulate a specific justification for terminating the representation but can withdraw for any reason so long as the withdrawal can be accomplished without material adverse effect on the interests of the client.

When a representation is terminated, whether by the lawyer or the client, the lawyer has certain responsibilities. Under Model Rule 1.16(c), a lawyer must comply with applicable law requiring notice to or permission of a tribunal before withdrawing. Model Rule 1.16(d) requires that the withdrawing lawyer take steps, to the extent reasonably practicable, to protect the client’s interest, including giving reasonable notice, allowing time for the client to engage other counsel, surrendering papers and property to which the client is entitled, and refunding any unearned retainer. Some of these responsibilities are discussed in more detail below.

III. Withdrawal in Litigation

Deciding whether to attempt to withdraw from pending litigation, particularly in a matter that is close to trial, can be difficult. It typically requires permission of the tribunal, and under Model Rule 1.16(c), the lawyer must continue the representation when ordered to do so by the tribunal even if good cause for withdrawal otherwise exists. The consequences of failing to properly complete the withdrawal process can range from embarrassing to severe. See, e.g., Lawyer Disciplinary Board v. Burke, 737 S.E.2d 55 (W.Va. 2013) (finding ethics violation for lawyer's negligent failure to advise bankruptcy court of his withdrawal from related proceeding); Poindexter v. Kentucky, 389 S.W.3d 112 (Ky. 2012) (affirming finding of criminal contempt against lawyer who failed to appear at client’s arraignment).

A few courts have refused to grant motions to withdraw despite a client's failure to pay counsel. *See, e.g.*, *The Walman Optical Co. v. Quest Optical, Inc.*, Civ. No. 11-0096 (PJS/JJG) (D. Minn. Nov. 15, 2011) (magistrate judge refused to allow firm to withdraw from representing defendant in patent infringement case despite client's outstanding account balance of nearly $278,000); *Though Unpaid, Petters Legal Team Must Stay on the Job, Says Judge*, Associated Press, Apr. 13, 2009, available at [www.law.com](http://www.law.com) (last visited Jan. 7, 2014—subscription required). *Cf. Alzheimer’s Inst. of Am., Inc. v. Avid Radiopharm.*, 2011 U.S. Dist. LEXIS 140345, 2011 WL 6088625 (E.D. Pa. Dec. 7, 2011) (refusing to allow withdrawal despite conflict of interest). To avoid this unfortunate situation, lawyers may want to obtain or reserve the right to request a realistic pre-trial retainer as part of the initial engagement. They should also pay close attention to any build-up of accounts receivable so that payment issues can be addressed well in advance of trial.

When a lawyer withdraws from a litigation matter, it may be good practice to advise the client of upcoming deadlines. It is no different if the withdrawal occurs before suit is filed. *See, e.g.*, *Wood v. Hollingsworth*, 603 S.E.2d 388 (N.C. Ct. App. 2004) (former client may maintain malpractice action against former lawyer who failed to notify client of statute of limitations that ran one month after lawyer withdrew). In fact, a Texas appellate court upheld sanctions against a lawyer who failed to protect her client's interests when withdrawing, even though the lapse did not harm the client's case. *See Allison v. Comm’n for Lawyer Discip.*, 374 S.W.3d 520 (Tex. App. 2012). In that case, the lawyer failed to either file an application for relief or obtain an extension of the filing deadline in an immigration case. The lawyer argued that replacement counsel also failed to prevent the client's deportation, suggesting that her action did not cause
the client’s harm. Rejecting that argument, the court found that causation was “immaterial” to deciding whether the lawyer took reasonable steps to protect the client’s interests.


**IV. Withdrawal to Avoid Conflicts of Interests**

Lawyers sometimes consider terminating a client representation in order to accept an engagement adverse to that client. In some instances, the lawyer wants to jettison a small client to accept a more lucrative assignment from a new client. In others, the adverse representation is for another current client of the firm. One might look at Model Rule 1.16(b) and conclude that the lawyer may terminate representation of the disfavored client so long as doing so will not have a material adverse effect on that client’s interests. Not so fast. The so-called “hot potato” doctrine may frustrate the lawyer’s attempt to disengage.


In *Stratagem Development*, the court disqualified the law firm for suing a “former” client, notwithstanding that the firm withdrew from representing the client before actually filing the complaint against it. The court reasoned that merely by discussing with Client B a suit against Client A (or planning that suit), the firm had violated its duty of loyalty to Client A, which it represented on unrelated matters. 756 F.Supp. 789. *See also Atl. Pac. Home Loans, Inc. v. Superior Court of San Diego Cnty.*, 2006 Cal. App. Unpub. LEXIS 11228, 2006 WL 3616997 (Dec. 13, 2006) (not citable) (lawyer leaving firm that represented adverse client was equivalent to dropping that client).
Not all authorities agree with the “hot potato” analysis. In an ethics opinion, the D.C. Bar rejected the “hot potato” rule, at least in certain situations. Distinguishing several of the cases discussed above, the opinion noted that under limited circumstances, a law firm can withdraw from representation of a current client for whom no active matters are pending to represent a long-standing client adverse to the inactive client. D.C. Bar, Op. 272 (1997). See also Metrop. Life Ins. Co. v. Guardian Life Ins. Co. of Am., 2009 U.S. Dist. LEXIS 42475, 2009 WL 1439717 (N.D. Ill. May 18, 2009) (“hot potato” rule does not necessarily apply where firm has no active matters for adverse client and its work for that client was sporadic); McCook Metals L.L.C. v. Alcoa, 2001 U.S. Dist. LEXIS 497, 2001 WL 58959 (N.D. Ill. Jan. 16, 2001) (“hot potato” rule inapplicable because terminated client was not long-standing client and retained client was not more lucrative client); Kaminski Bros., Inc. v. Detroit Diesel Allison, 638 F. Supp. 414 (M.D. Pa. 1985) (conflict analyzed under Rule 1.9 after firm withdrew from one representation); Philbrick v. Chase, 2003 Conn. Super. LEXIS 1661, 2003 WL 21384532 (June 3, 2003) (same).


If a representation has been properly terminated before a conflict arises, a firm is generally permitted to be adverse to the former client on matters unrelated to the prior representation. See Model Rule 1.9. This is one of the reasons that lawyers should consider using disengagement or end-of-representation letters, as discussed in Section V below. Dropping a current client to take on a new matter adverse to the dropped client, however, may be a risky proposition.

V. Notice of Withdrawal or End of Engagement

A lawyer who decides to terminate a representation in an ongoing matter ordinarily should give the client sufficient notice to permit it to retain other counsel. See Model Rule 1.16(d). Of course, advance notice may not be possible if the lawyer’s continued involvement will give rise to an ethical or legal violation. Termination communicated orally should be confirmed in writing. A disengagement letter can set forth the reason(s) for the withdrawal (which may not be necessary, but is often desirable), advise the client that the lawyer will have no further obligation to protect the client’s interests, provide information on upcoming deadlines or other actions that the client may wish to take, and address file transfer and retention issues. Even if a
representation terminates of its own accord following completion of work, a lawyer is will served by documenting the end of engagement.

Disengagement or end-of-representation letters offer important benefits, especially when the firm is not doing additional work for the client. The principal benefits of the disengagement letter in that case are: (1) the former client cannot later claim that he or she was depending upon the firm for future advice; and (2) the party involved will be transformed into a former client for conflicts purposes, which means that the firm should not be disqualified thereafter from taking a position adverse to that party on unrelated matters. A disengagement letter also can be helpful to a statute of limitations or disciplinary action defense. See generally Cuyahoga Cnty. Bar Ass’n v. Ballou, 846 N.E.2d 519 (Ohio 2006) (public reprimand for lawyer who failed to clarify in writing that he was implementing his threats to withdraw due to nonpayment).

Sending an end-of-representation letter can also avoid misunderstandings regarding whether a party is a current client or a former client, which will determine what duties are owed to it by the lawyer. Often the question the court or ethics committee focuses on is whether the client reasonably believed that it was still a current client. See, e.g., Roderick v. Ricks, 54 P.3d 1119 (Utah 2002). Where the status of the lawyer-client relationship is ambiguous, courts frequently blame the lawyer for the ambiguity and hold that the client should be considered a “current” client. See, e.g., SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392 (N.D. Ill. 1992); Int’l Bus. Machs. Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978).

Jones v. Rabanco, Ltd., 2006 U.S. Dist. LEXIS 53766, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006), is an extreme example of where a firm’s failure to clarify client status was construed against the firm and led to its disqualification. Plaintiffs’ firm had represented the defendant in an unrelated matter that settled years earlier and had not had any contact with the defendant for three years. Nevertheless, the court held the defendant was still a current client of the firm and disqualified it from representing plaintiffs because: (1) the settlement agreement resolving the earlier matter provided that copies of future communications regarding the agreement should be sent to the law firm; (2) the firm had not closed its file on the defendant’s matter; and (3) the firm was paying to store 49 boxes of the defendant’s documents in an off-site storage facility. In reaching its decision, the court relied on Comment [4] to Model Rule 1.3, which states, in part:

If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.


Having a clear understanding with the former client and attending to the administrative aspects of concluding a representation, such as changing the firm’s accounting and client records to reflect its former client status, can go a long way in avoiding an unfavorable outcome like this.

VI. Client Access to Files

The issue of client access to a lawyer’s files arises when a lawyer withdraws from a representation or a client switches lawyers and directs that “the file” be delivered to other
counsel. Although many of the relevant court decisions and ethics opinions speak in terms of ownership or entitlement to the materials in a lawyer’s file, the key issue is access, or the client’s right to retrieve, inspect, and copy such materials.

Overview. The Model Rules do not provide explicit guidance regarding a lawyer’s duty to provide documents or other materials to a client. Model Rules 1.4(a), 1.15(d), and 1.16(d), however, are potentially relevant. Model Rule 1.4, concerning client communication, provides in paragraph (a)(4): “[a] lawyer shall … promptly comply with reasonable requests for information.” Model Rule 1.15, on safekeeping property, states in paragraph (d): "Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.”

Model Rule 1.16 (d) includes as one of the steps a withdrawing lawyer may be required to take to protect a client’s interests is surrendering papers and property to which the client is entitled, except that “[t]he lawyer may retain papers relating to the client to the extent permitted by other law. The reference to “other law” apparently refers to a common law retaining lien or other law authorizing a lawyer to hold a file or other property as security for a fee. See discussion of “Holding Client Files to Secure Fees” below.

By themselves, Model Rules 1.15(d) and 1.16(d) offer little guidance on what materials must be surrendered to a client because they merely provide that the client should be given what the client is “entitled” to receive. Fortunately, numerous court decisions and ethics opinions have addressed the issue. There is substantial agreement among the authorities as to most of the types of documents typically found in a lawyer’s file. Two distinct positions, however, have emerged with respect to internal firm documents, such as lawyer notes, drafts, research materials, internal conflicts and credit memoranda, time records, and other administrative documents, that at first glance would appear to “belong to” the lawyer or firm.

“Entire Contents” Approach. The apparent majority position holds that the client is entitled to the “entire contents” of a lawyer’s file, with only limited exceptions. The “entire contents” of a file would include legal pad notes and other handwritten materials, as well as electronically stored material, such as e-mail messages. The opinions adopting the “entire contents” approach generally do not discuss the types of documents found in a lawyer’s file, but merely discuss the ownership of the file. Section 46(2) of the Restatement generally follows the “entire contents” approach: “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.” As discussed below, however, Comment c to Section 46 permits a lawyer to refuse to disclose certain internal documents relating to a representation, as well as other documents, that may cause harm to a client or third party.

The opinions that have followed the “entire contents” approach regarding files usually are based either on the notion that the client has paid the lawyer’s fee or the assertion that the lawyer is in a fiduciary relationship with the client. See Resolution Trust Corp. v. H----, P.C., 128 F.R.D. 647 (N.D. Tex. 1989). See also Brian J. Slovut, Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client’s File, 76 Minn. L. Rev. 1483, 1499 n.86 (June 1992).

In Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879, 882 (N.Y. 1997), the New York Court of Appeals held that a client was presumptively entitled to a lawyer’s “entire file on the represented matter.” The court specifically rejected the view held by a
minority (although a substantial number) of courts and [s]tate bar legal ethics authorities” that a client is entitled only to a lawyer’s “end product” and may be denied access to intermediate work product, such as internal legal memoranda and preliminary drafts of pleadings and legal instruments. 689 N.E.2d at 881. Like the Restatement, however, the court recognized a “narrow exception” to the entire contents rule for certain internal firm documents, including the firm’s assessment of the client and “tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation.” 689 N.E.2d at 883. The court found that such internal firm documents could be withheld from clients. See N.Y. State Bar Ass’n Comm on Prof’l Ethics, Op. 766 (2003) (adopting Sage analysis). See also N.Y. State Bar Ass’n Comm on Prof’l Ethics, Op. 970 (2013) (discussing disclosure of a deceased client’s file). In Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37 (Ga. 2003), the Georgia Supreme Court recognized this exception, although it held that clients generally were entitled to access to documents created by the lawyer during the course of a representation. Given the nature of this type of material, it seems that those courts and ethics committees that have concluded a lawyer may withhold work product from a client also would find that a lawyer need not disclose other documents created only for internal use.


Even in jurisdictions that purport to follow the “entire contents” approach, there is a good argument that clients are not entitled to documents intended only for internal review. Most of the cases and opinions that espouse the “entire contents” approach focus primarily on the lawyer’s work product and do not appear to have considered these materials. Just as the reporters of the Restatement excluded such materials from their concept of “any document … relating to the representation,” a thoughtful court or ethics committee might be persuaded to recognize a similar exception. Restatement § 46(2); see also Saroff v. Cohen, 2009 Tenn. App. LEXIS 84, 2009 WL 482498 (Feb. 25, 2009).

Under appropriate facts, a lawyer may have an additional reason for refusing to disclose certain materials. Comment [7] to ABA Model Rule 1.4 states that a lawyer may be justified in delaying the transmission to or withholding of information from a client when the client is likely to react imprudently. The Restatement reaches a similar conclusion in Comments c and d to Section 20, observing that a lawyer may refuse to comply with “unreasonable” client requests for information, including situations where the disclosure might result in harm to the client or others.
“End Product” Approach. The other approach holds that a client is generally entitled only to the “finished product” or “end product” of the lawyer’s work in addition to the return of any materials furnished by the client. The opinions adopting this approach differ in some respects to the specific documents that a lawyer may withhold, but most agree that a client is not entitled to either uncommunicated work product (e.g., research memoranda and memoranda “to the file”), lawyer notes, or internal administrative materials.

The most useful opinions on the “end product” approach discuss the types of materials normally created or maintained by a lawyer with respect to a client matter. A good example is a 1995 Illinois ethics opinion that considered whether a lawyer could withhold from a client certain investigative materials that the lawyer had gathered in a situation where the lawyer was concerned that the client might use the materials to harm another person. Ill. State Bar Ass’n, Op. 94-13 (1995). The opinion assumed that there was no agreement between the lawyer and the client (in an engagement letter or otherwise) concerning the client’s access to the lawyer’s file and separately discussed seven categories of documents typically found in a lawyer’s files. Consistent with other opinions on the subject, the Illinois opinion concluded that the client should have access to documents furnished by the client and correspondence between the lawyer and client and between the lawyer and third parties, court pleadings and other court documents, and contracts or other documents prepared for the client, provided that the lawyer may require the client to reimburse the lawyer for the reasonable cost of copying routine correspondence, administrative filings, and the like. On the other hand, the opinion stated that the client is not entitled to copies of, or access to, internal administrative materials or lawyer work product such as notes, drafts, and research material. The opinion cited various authorities to support its conclusions.

Other authorities that have concluded that a lawyer may withhold the lawyer’s work product include: Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo. Ct. App. 1992); Gries Sports Enters., Inc. v. Cleveland Browns Football Co., Inc., 1985 Ohio App. LEXIS 6545, 1985 WL 7995 (Apr. 25, 1985), rev’d on other grounds, 496 N.E.2d 959 (Ohio 1986); Utah State Bar Ethics Advisory Comm., Ops. 06-04 (Dec. 8, 2006) and 06-02 (June 2, 2006) (unexecuted legal instruments, such as wills and trusts, constitute work product); R.I. Sup. Ct. Advisory Panel, Op. 92-88; Kan. Bar Ass’n Ethics Advisory Comm., Op. 92-05 (1992); Conn. Bar Ass’n Prof’l Ethics Comm., Informal Op. 82-04 (1981). Ohio Sup. Ct. Bd. of Comm’rs on Grievances & Discipline, Op. 2010-2 (2010) advised that whether a client is entitled to receive a lawyer’s notes of an interview with a current or former client depends on whether the notes are “reasonably necessary to the client’s representation,” a question that “requires the exercise of a lawyer’s professional judgment.” The opinion stated that a lawyer’s “thoughts, ideas, impression [sic], or questions” probably would not meet this standard, but that notes containing “facts about the case” probably would. Although it purported to rely only on the “narrow exception” for internal firm documents, the district court in Lippe v. Bairnco Corp., 1998 U.S. Dist. LEXIS 20589, 1998 WL 901741 (S.D.N.Y. Dec. 28, 1998), used the exception to deny access to materials including lawyer research notes, internal housekeeping memoranda, internal research memoranda prepared by junior lawyers for senior lawyers, and a draft outline of research issues. See also N.Y. State Bar Ass’n Comm on Prof’l Ethics, Op. 780 (2004).

In some jurisdictions, the lawyer’s ability to withhold work product, usually defined in this context to include drafts, research, and internal memoranda, appears to depend upon whether the lawyer has been paid for such material, even though the rest of the file must be surrendered upon request regardless of payment. See, e.g., Minnesota Rule of Professional Conduct 1.16(e); Massachusetts Rule of Professional Conduct 1.16(e); District of Columbia Rule of Professional Conduct 1.8(i). In these jurisdictions, the lawyer is entitled to withhold work
product only if the lawyer has not been paid for the work and the client’s interests will not be prejudiced. See D.C. Bar, Op. 273 (1997) (retaining liens on client files are “strongly disfavored” and may be asserted “only in the narrowest of circumstances”). The Minnesota and Massachusetts rules also provide some guidance on responsibility for the costs of copying various types of materials. North Dakota Rule 1.19 sets out guidelines for client access to a lawyer’s file, including guidelines on costs of copying.

**Access to Electronic Documents.** A more recent issue is whether a firm must produce electronic documents to a former client or successor counsel, particularly where the documents also exist in paper copies that already have been provided. Such production arguably would be duplicative and subject the firm to unreasonable time and expense in reviewing and organizing its electronic files. The electronic documents, however, likely contain metadata and may differ in other ways from their printed versions. A New Hampshire ethics committee considered whether a law firm had an obligation to produce electronic client documents maintained on its computer network to a lawyer who left the firm and took the client with him. The committee rejected the firm’s argument that the production was unduly burdensome and concluded that the firm had to search its electronic files for the client’s documents. The committee reasoned that the “burden can be managed … through computer word search functions or other means that are routinely used for discovery or other purposes.” N.H. Bar Ass’n Ethics Comm., Op. 2005-06/3 (2006).

A California ethics opinion reached a similar conclusion. The lawyer involved had refused to produce electronic client documents on the grounds that they contained metadata reflecting confidential information about other clients. The opinion rejected that argument, stating the lawyer must take reasonable steps to strip any such metadata from the documents before turning them over. The opinion specifically declined to weigh the inconvenience to the lawyer in producing electronic documents against the client’s need for them, but rather noted that lawyers should avoid undue expense in producing electronic files by installing and using a good electronic filing system. As to the form of the electronic documents, the opinion stated that lawyers are not obligated to change the format or application of existing documents (e.g., from WordPerfect to Word). Cal. State Bar Comm. on Prof’l Responsibility & Conduct, Op. 2007-174 (2007).

A New York City Bar opinion focused on which electronic documents must be provided in response to a client request. Following Sage Realty, the opinion concluded that the client is entitled to all electronic documents that are part of its file with two limited exceptions: those that violate a duty of nondisclosure owed to a third party or imposed by law, and certain electronic documents intended for internal office use that are unlikely to be of any significant use to the client. Examples of the latter category are e-mails that instruct a lawyer or staff member to perform a particular task, preliminarily analyze a factual or legal issue, or discuss an administrative issue. Similarly, inconsequential e-mail to or from a third party, such as an e-mail confirming the time of a deposition or one sent to a testifying expert asking for transcripts of testimony, need not be provided. N.Y.C. Bar Ass’n Comm. on Prof’l & Judicial Ethics, Op. 2008-01(2008).

A D.C. Bar opinion advised that when a lawyer has maintained a former client’s files only in electronic form, absent prior agreement to the contrary, the lawyer must comply with the former client’s request to convert those files to paper. Normally, the opinion held, the former client should bear the cost of such conversion, unless the client cannot access the documents “without undue cost or burden” and the client’s need outweighs the burden on the lawyer. D.C. Bar, Op.357 (Dec. 2010).
Other ethics opinions might reach different results regarding a request for electronic documents unless a showing can be made that the request is unduly burdensome and the files are largely duplicative of printed versions. This potential problem is yet another reason for firms to have a well-organized document management system for their electronic files.

**Transferring Files.** Transferring files to the client or another lawyer involves both practical and ethical issues. Some questions a lawyer or firm should consider are whether the client has authorized the transfer to another lawyer (client authorization should always be obtained and documented, even when the files are being transferred to a lawyer leaving the firm); whether the firm’s fees have been paid and, if not, whether the firm is permitted or wishes to invoke a possessory lien or take other action to seek payment; whether there are any documents that may or should be withheld; whether all or part of the file should be copied or the firm should request an agreement permitting it to access the files for a period of time; and whether the matter presents any malpractice or other professional liability issues. Even if the client does not request that all of its files be transferred (i.e., it only requests transfer of files on open matters), the firm may want to address disposition of the client’s closed files at the same time. If the firm releases the file without retaining copies, it should consider “Bates stamping” or other marking to ensure the integrity of the file in the future.


Professional conduct rules and the authorities interpreting them have addressed the ethical implications of retaining liens. Model Rule 1.8(i)(1) permits a lawyer to obtain a lien to secure the lawyer’s fees or expenses. As noted earlier, under Model Rule 1.16(d), a withdrawing lawyer may retain a client’s property and papers that it would otherwise be required to surrender to protect the client’s interests only to the “extent permitted by other law.” States have dealt with these somewhat conflicting ethical principles in different ways.

Several states have either adopted a limited version of Model Rule 1.8(i) or interpreted it narrowly. District of Columbia Rule of Professional Conduct 1.8(i), for example, allows a retaining lien only to secure a lawyer’s work product and then only if the client can pay and will not suffer irreparable harm. Even that rule has been construed narrowly. *See D.C. Bar, Ops. 250 (1994) and 273 (1997)*. Similarly, Rule 1.16(e) of the Massachusetts Rules of Professional Conduct provides for a retaining lien for work product only to the extent the client will not be unfairly prejudiced. North Dakota and Minnesota have gone so far as to adopt a rule that prohibits retaining liens entirely. North Dakota Rule 1.19 states: “[a] lawyer shall not assert a
retaining lien against a client’s files, papers, or property[,]” including electronically stored items. Minnesota Rule 1.16(g) states that a lawyer may not condition the return of client papers on payment of the lawyer’s fee. The Utah Supreme Court recently made it clear that Utah’s Rule 1.16(d), which provides that upon termination, a lawyer “must provide, upon request, the client’s file to the client,” expressly rejects the notion that a lawyer can assert a retaining lien. See In re Discipline of Brussow, 286 P.3d 1246 (Utah 2012) (lawyer disciplined for holding client’s file on grounds that client failed to pay for certain expenses).

In addition, disciplinary boards and ethics committees in several states have either rejected or severely limited the use of retaining liens. See, e.g., Haw. Disciplinary Bd., Formal Op. 28 (updated 2001) (until retaining liens are explicitly recognized by law, imposing one is an ethics violation); Alaska Bar Ass’n Ethics Comm., Op. 2004-01 (2004) (lawyer may not withhold expert’s report if client would be prejudiced). Restatement § 43 permits a law firm to withhold documents prepared by the firm only if “nondelivery would not unreasonably harm the client.”

As demonstrated above, whether a firm can impose a retaining lien for unpaid fees and expenses can only be determined by reference to the applicable state law and professional conduct rule. The majority of states allow some sort of retaining lien. Given the Restatement language and recent ethics opinions and rules, however, lawyers should be judicious in asserting lien rights.

VII. Conclusion

A lawyer has ethical obligations in all aspects of the attorney-client relationship, including whether and when to terminate a representation, and what actions are required of the lawyer when the representation ends. Lawyers should understand the rules of professional conduct and other governing authority in the applicable jurisdiction before embarking on a course of conduct that could be inconsistent with those obligations.