How to Handle Requests for Copies

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One of the most appreciated services the State Bar offers its members is a toll free ethics helpline, available during normal business hours, Monday through Friday. By calling 1-877-558-4760, lawyers can obtain guidance on ethical questions pertaining to their own prospective conduct. Among the most frequent topics to the helpline is how to handle client requests for copies from files. In the lawyers' words, "Can I charge for copies? Must I provide copies at all? How long must I maintain closed files? Can I require prepayment for copies before they are made and delivered?"

The answers we provide are grounded in the Michigan Rules of Professional Conduct (MRPC) and previous ethics opinions, tempered by whether the client has a current, ongoing need for what is being sought.

A complete answer involves an examination of both the nature of what is being sought and the circumstances under which the request is received. In addition, to the extent that the lawyer has entered into an agreement with the client that addresses reproduction costs and a retention/destruction policy, such an agreement may modify what is otherwise required or expected.

The best place to establish protocols about the provision of copies, the costs associated with reproduction, and the length of time that the lawyer will maintain copies of the file after conclusion of the representation is in a written engagement agreement entered into with the client at the outset of the representation. Beyond the obvious advantage of giving clarity on those topics, the inclusion of a record retention/destruction schedule lays the groundwork for being able to destroy the contents of the file without having to give notice as a predicate to doing so years afterward.[1] Best

[1] Formal ethics opinion R-5, dated December 15, 1989, notes that:

practices would advocate providing the client with a copy of all pertinent documentation as it is generated and received, documenting the delivery of copies through itemized letters as a record of what is being provided. Imposing no charge for the initially-provided copies would render as reasonable charging for subsequent duplications in the engagement agreement.

Where the client seeks copies when the representation is terminated, two ethical rules apply – MRPC 1.15(b) and MRPC 1.16(d).

MRPC 1.15(b) provides:

> A lawyer shall:
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> (1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;
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> (2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and
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> (3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

MRPC 1.16(d) states:

> Upon termination of representation, a lawyer shall take reasonable steps 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 fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

A law firm, including a solo practice, is obligated to have a record retention policy or plan in order to meet ethical obligations. Components of a retention policy should include at a minimum: (1) instructions to lawyer and nonlawyer personnel concerning their obligations under the policy; (2) information concerning the location of storage facilities; (3) methods for the eventual disposition of records and files; (4) information concerning retention periods and the establishment of retention periods; and (5) a system for monitoring lawyer and nonlawyer employee compliance with the plan.

A subsequent opinion, R-12 (September 27, 1991), set forth a requirement that on files closed prior to October 1, 1988 (the implementation date of the Michigan Rules of Professional Conduct), a lawyer was to make "reasonable efforts" to obtain client input regarding the disposition of the file and its contents before destruction. For files closed after that date, lawyers must give each client notice regarding the disposition of the file either when the lawyer-client relationship is established or at the conclusion of the representation.

The commentary to MRPC 1.15 makes clear that the "funds or property" being referred to are tangible types of property – such as deeds or securities – as distinguished from paperwork that is generated during the course of the representation. Original documents provided by a client are client property, to be returned at the appropriate time when not required to be delivered elsewhere as a part of the representation. Records pertaining to funds and property received from or on behalf of the client must be maintained for five years after termination of the representation. Other types of documentation – copies of pleadings, correspondence, etc. – can be the subject of the document retention/destruction policy described in the engagement agreement.[2] The length of time prescribed should not be unreasonably short for the client nor burdensomely long for the lawyer, taking into consideration the storage requirements that will flow from the length of time established for retention. From the lawyer's vantage point, records should be retained at least until all applicable statutes of limitation expire for any claim that may be brought by the former client against the lawyer or arising from the representation.

The request for a "complete copy" of the file can be made when the attorney-client relationship ends or much later, leaving the lawyer to ponder whether duplicates must be provided if copies were provided during the representation. A secondary question is whether providing a "complete copy" includes copying the lawyer's handwritten notes or providing a copy of a deposition transcript that may or may not have been paid for by the client at the time that the request is made.

Formal ethics opinion R-19 (August 4, 2000) notes that, "the determination of what papers the client is entitled to receive and what information is the property of the client are questions of law beyond the jurisdiction of the Committee," but also asserts that, "There is no legal support in

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[2] Language describing the record destruction/retention policy should be reiterated in billing statements and a final closing letter, to maximize the argument that the client was given appropriate notice of the policy.

Michigan for the proposition that the files are the property of the client," concluding that the client's right is "in general, one of access, not custody or possession." The opinion concludes that a lawyer may charge a reasonable fee for the service of searching the files to determine and identify those portions of the file that are the client's property and for reproducing copies from the files.

Callers to the Bar's ethics helpline seeking guidance about what they must provide and whether they can charge for it are asked an additional question, which factors in MRPC 1.16(d), before a response is given. The question is whether, at the time the request is being made, the client's matter is ongoing or completed.

If the client's matter is truly completed (whether by the lawyer or a subsequent lawyer), consistent with R-19 and whatever language in the engagement agreement that established a charge for copying, the lawyer can reasonably seek the costs of research and copying in advance of doing that work.

If the client's matter is ongoing such that the lack of documentation the lawyer possesses will jeopardize the client's ability to pursue his or her remedies, then the lawyer must consider his or her obligations under MRPC 1.16(d). If holding the copies hostage pending a prepayment of copying expenses or payment of an already past due billing statement will impair the former client's ability to, for example, adequately prepare for an eminent trial setting with a newly hired lawyer, the lawyer possessing the records might not be viewed as having taken "reasonable steps to protect the client's interests" by "surrendering papers and property to which the client is entitled." The question is not whether those documents "belong" to the client but whether withholding them would defeat the client's ability to go forward, a consequence presumably disportionate to the reproduction costs.

Commentary to MRPC 1.16 notes, "even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law."

One way to avoid being faced with a request for a "complete copy" on the client's timetable at some time subsequent to the representation is to develop and maintain a protocol for providing copies both during and at the conclusion of representation. By the time the representation concludes, the client will have been provided with copies of any pertinent documents and any original documentation (particularly, title instruments and wills) will have been returned and acknowledged as returned. In the event any final copies or originals are delivered at the conclusion of representation, the lawyer should send a closing letter that describes what is being provided; note any steps the client must take to complete any transaction; describe any steps the lawyer will be taking or, when appropriate, articulate that no further actions will be taken; include a final bill or acknowledge payment of the final bill; and again notify the client of the lawyer's record retention/destruction policy and the date after which the file may be destroyed.

Regardless of the length of the retention/destruction policy articulated to clients, the lawyer should maintain a core file that contains, at a minimum, a copy of any significant document not otherwise accessible through courthouse records until the expiration of any application statute of limitations for claims that might be brought by the client or third parties regarding the subject of the representation. Trust account records should be maintained for at least five years.

A well-crafted and executed retention/destruction policy affords clients a reasonable period of access after the representation has ended while not binding the lawyer to lengthy and expensive storage requirements; assures that clients are fully informed about these policies; and follows through with a destruction method that protects the confidentiality of client information.