Responding to Requests for Copies from Former Clients

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Frequently, lawyers contact the State Bar's ethics helpline to ask how to respond to a former client's request for copies from the lawyer's file maintained during the representation. The request for a "complete copy" of the file might be made when the attorney-client relationship ends or much later, leaving the lawyer to ponder how long the file must be maintained, whether duplicates must be provided if copies were provided during the representation, and whether the provision of copies can be predicated on prepayment for them. A related 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.

Answering these questions completely requires an understanding of what is being sought as well as an examination of the applicable 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 lawyer's best preparation for answering these questions is the establishment of protocols defining what records will be maintained, the length of time that records will be maintained after conclusion of the representation, and the costs associated with their reproduction in a written engagement agreement entered into with the client at the outset of the representation. In a formal opinion issued on December 15, 1989, the State Bar's Standing Committee on Professional Ethics opined that Michigan lawyers are "obligated to have a record retention policy or plan in order to meet ethical obligations."[1] In addition to providing clarity on these topics, the inclusion of a record

[1] Formal Opinion R-5 (December 15, 1989) provides:

retention/destruction schedule in the engagement agreement 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 after the conclusion of the representation.[2] Providing the client a copy of all pertinent documentation as it is generated and received during the representation and documenting the delivery of copies through itemized letters as a record of what is being provided lays a reasonable foundation for specifying in the engagement agreement that copying charges will be levied for subsequent duplications. Additionally, because future technologies will prompt periodic changes in the format and manner in which records are retained, retrieved, and reproduced, language in the fee agreement pertaining to record retention should give the lawyer the flexibility to modify the way in which records are stored and retrieved as those technologies evolve, consistent with MRPC 1.6.[3]

By establishing expectations in the fee agreement, communicating to the client about them, and reaffirming them through such means as replicating the language in billing statements and in a closing letter sent at the conclusion of the representation, the lawyer is prepared for answering a former client's request for copies years after the representation, by referring the former client to the language in the fee agreement.

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.

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.

[2] A subsequent formal opinion, R-12 (September 27, 1991), sets forth a requirement that for 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, it requires lawyers to 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.

[3] The language of the Rules does not specify a particular format for retention of documents. Lawyers may use paper or electronic means so long as the methodology used is consistent with protecting client confidentiality (MRPC 1.6), and safekeeping (MRPC 1.15) and delivery requirements (MRPC 1.15 and 1.16).

Additionally, original documents provided by a client – documents to which the client has a pre-existing property right or which have intrinsic value (such as a will, promissory note, stock, or certificate of title) should be returned to the client prior to conclusion of the representation when not required to be delivered elsewhere as a part of the representation. To the extent practicable, the lawyer should retain both a copy of the returned documents and some documentation establishing when and how they were returned to the client.

In the absence of such planning, two ethical rules – MRPC 1.15(b) and MRPC 1.16(d) – discuss the retention of records and the delivery of property and papers to the client.

How Long to Maintain Records

There is not a one-size-fits-all answer to how long to maintain records. Although the MRPC provide some guidance, there are other legal as well as practical considerations that impact construction of a record retention policy, such as applicable statutes of limitation, availability of the documentation through third parties, and the limitations of a lawyer's or law firm's capacity to store records.

MRPC 1.15(b) provides:

A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(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 1.15(b) discusses, among other things, the handling of property that the lawyer has received. The commentary to MRPC 1.15 makes clear that the "property" being referred to in paragraph (2) is tangible property – such as deeds or securities – as distinguished from documents

generated by the lawyer during the course of the representation.[4] Records pertaining to funds and property (as that term is used in MRPC 1.15) received on behalf of the client must be maintained for five years after termination of the representation.

Recognizing that recordkeeping pertaining to IOLTA and non-IOLTA accounts can be managed independently of other types of documents (such as copies of pleadings, correspondence, etc.), the timeframe for maintenance of records *not* covered by MRPC 1.15(b)(2) can be of a different duration set forth in the document retention/destruction policy described in the engagement agreement.[5] The length of time prescribed for retention of the other types of documentation should be neither 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.[6] From the lawyer's vantage point, records should be retained until all applicable statutes of limitation expire for any claim that may be brought by the former client against the lawyer or that may otherwise arise from the representation.[7] A fine point worth noting is that the length of time a lawyer makes the representation file available to clients through a retention

[4] The commentary notes, "A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of a client or a third person should be kept separate from the lawyer's business and personal property and, if funds, should be kept in one or more trust accounts."

[5]The retention/destruction period for records covered by MRPC 1.15(b)(2) should also be addressed in the engagement agreement, reflecting what the Rule requires so that, at the appropriate time, those records can be destroyed as well.

[6] Formal Opinion R-5 notes, "A number of factors must be considered in the establishment of a law firm's record retention policy or plan beyond legal ethics, such as tax recordkeeping requirements, compliance with malpractice insurer standards, and specific requirements necessary for particular fields of law practice. It is, of course, not within the jurisdiction of the [State Bar of Michigan Professional Ethics] Committee to provide guidance in those areas. An awareness of those factors, however, is important when a policy is established. See, for example, MCL 600.2137, retention of certain court records; MCL 18.1285, et seq., retention of state agency records; MCL 399.5, authority of State Historical Commission; and MCL 600.8344, court retention of civil litigation records." Another example of a statutory requirement pertaining to records is MCL 567.252, which requires the retention of records reflecting the name and last known address of an owner of unclaimed property.

[7] Acknowledging that MCR 9.101, et seq., the Rules pertaining to Professional Disciplinary Proceedings, do not contain a statute of limitations for either the opening of a [disciplinary] investigation or the filing of a [formal] complaint, prudent practitioners may want to consider maintaining indefinitely a copy of any significant documentation pertaining to a representation that is not otherwise accessible through courthouse or other public records necessary to defend against a disciplinary charge arising out of a representation. Additionally, to the extent that a lawyer has possession of property or funds to which a former client is entitled and the lawyer is unable, after good faith efforts, to locate a former client and deliver the property or funds, Michigan's Uniform Unclaimed Property Act may impose recordkeeping requirements descriptive of the unclaimed property and identifying the last known name of and contact information for the former client who owned the unclaimed property.

schedule communicated to them may differ from the lawyer's retention of records for his or her own purposes. The purpose of the former is to afford the former client access for a reasonable period of time, after which there is no reasonable basis upon which to believe that the lawyer will indefinitely provide copies.

The method of storage and means utilized to destroy records should protect client confidentiality, consistent with the requirements of MRPC 1.6. The Rules do not specify the type of system used for recordkeeping.[8]

What Must Be Provided

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.

While 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,"[9] it also asserts that, "[t]here is no legal support in 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."[10] Rather than answering with precision what must be provided from a file, this opinion draws a conclusion about ownership of its contents, placing Michigan with a minority of jurisdictions that have concluded that the lawyer owns the file. Assuming that the lawyer has dutifully returned to the client anything appropriately identified as "client property" at the conclusion of the representation, what remains might include

[8] Formal Ethics Op R-12 discussed the maintenance of microfilm in lieu of paper files, paving the way for acceptance of more recent technologies.
[9] Formal Ethics Op R-19, p 3.
[10] Formal Ethics Op R-19, p 4.

copies of documents generated by the lawyer for dissemination to others (such as correspondence, pleadings and other litigation papers, transactional documents, and billing statements); copies of depositions and transcripts prepared by others; original notes prepared by the lawyer pertaining to client interviews, conversations with witnesses or opposing counsel, and intraoffice communications about the case; and records pertaining to monies received and disbursed. Formal Opinion R-12 (September 27, 1991) makes these suggestions about what should be maintained, referencing Formal Ethics Opinion R-5 (December 15, 1989):

> Those items that should be retained include those which the lawyer knows or should know may still be necessary to the assertion or defense of the client's position in a matter for which the applicable statutory limitation period has not expired; information that the client may need, has not previously been given to the client, is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer; accurate and complete records of the lawyer's receipt and disbursement of trust funds.[11]

As to what must be provided from among those categories of records, Formal Ethics Opinion R-5 (December 15, 1989) notes that, "Some documents in files assembled for the representation of clients 'belong' to the law firm or lawyer, e.g., attorney work product. The law firm and lawyer may properly maintain and destroy the documents which 'belong' to the lawyer or law firm without consultation with the client."[12] Presumably, this would include handwritten or otherwise self-generated notes or memoranda prepared by the lawyer, or distributed within or among members and employees of the law firm. Exempting these types of records from what is copied for the client is a departure from the position taken in earlier ethics opinions written under the Code of Professional Responsibility, such as CI-743 (June 30, 1982).[13]

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[11] Formal Ethics Op R-12, p 2.

[12] Formal Ethics Op R-5, p 4.

[13] Formal Ethics Op R-5 notes CI-743 as one of several opinions that "remain worthy of consideration" wherein it states that "an attorney in possession of a file concerning a former client has an ethical duty, upon request from the former client, to deliver the file, including but not limited to, all 'write-ups,' 'work-up or intake sheets,' and 'file interview notes,' to the former client or newly retained counsel, with the possible exception of the lawyer's personal observation notes or memos with respect to the client's character or competency traits and, particularly, if and when negative," before later concluding that a law firm and lawyer may properly maintain and destroy the documents which "belong" to the lawyer

To the extent that some of the records might be equally obtainable from other sources, such as a clerk's office or a court reporting service, the lawyer may wish to redirect the former client to those third parties rather than continuing to maintain copies of those types of records. No existing ethics opinion specifically addresses whether a lawyer who in fact has duplicates on hand of court-filed documents, deposition transcripts, or hearing transcripts must produce copies of them as a part of copying the file.

R-19 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. However, whether it is *prudent* for a lawyer to require a former client pay or even prepay for copies before tendering them depends upon whether the client's matter is ongoing or completed. The reason for this is the requirements set forth in MRPC 1.16(d).

If the client's matter is truly completed (whether by the lawyer from whom copies are sought or a subsequent lawyer) at the time the request for copies is made, the lawyer can reasonably seek the costs of research and copying in advance of providing the copies, consistent with MRPC 1.16(d), R-19, and language in the engagement agreement addressing what will be charged for copies.

If the client's matter is ongoing such that the lack of documentation the lawyer possesses will jeopardize the client's ability to pursue or protect his or her legal interests, then the lawyer must consider his or her obligations under MRPC 1.16(d) in responding to the request for copies. If holding the copies hostage pending payment or prepayment of copying expenses or payment of a past due billing statement will impair the former client's ability to, for example, adequately prepare for an eminent trial setting or timely pursue an appeal with a newly-hired lawyer, the lawyer's withholding of copies might not be viewed as having taken "reasonable steps to protect the client's

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or law firm without consultation with the client. (*Id.,* pp 2 and 4). To the extent those positions may seem inconsistent, the distinction that may be drawn in a particular case is whether, at the time of the request for copies, the former client's matter has been completed or is ongoing. Where it is ongoing, the former client may have a more compelling need for information that perhaps has not been captured in any way other than the lawyer's notes.

interests" by "surrendering papers and property to which the client is entitled." In that circumstance, the pertinent question is not whether those documents "belong" to the client but whether withholding copies of them would prejudice 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."

How Many Times Copies Must Be Provided

Neither the MRPC nor the existing ethics opinions provide a bright line rule about how many times a lawyer must provide duplicates of what has previously been provided, even if the former client is willing to pay for the copies. Arguably, so long as the request for copies comes within the record retention time period communicated in the engagement agreement, it is a reasonable expectation that the lawyer will produce copies consistent with that policy, which may include a requirement of prepayment consistent with R-19 and MRPC 1.16(d).

Summary

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 documents not otherwise accessible through courthouse records or third party vendors until the expiration of any applicable statute of limitations for claims that might be brought by the client or third parties regarding the subject of the representation. Trust account records must be maintained for at least five years.

A well-crafted and well-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. Once in place, it provides a way for the lawyer to be equipped to answer subsequent requests for copies from former clients.