



# Ohio Board of Professional Conduct

## **OPINION 2019-6**

Issued August 2, 2019

Withdraws Adv. Op. 1992-08

### **Ethical Obligation to Deliver a Former Client's File**

**SYLLABUS:** A lawyer's file related to the representation of a client constitutes the "papers and property" of the client. A lawyer is not required by the Rules of Professional Conduct to maintain a former client's file for a minimum period of time after termination of representation. When a lawyer has maintained a former client's file for a substantial period of time after termination of representation, he or she is required to promptly deliver the file upon the client's request. A lawyer should deliver a former client's file in the same manner it was maintained or in an accessible format if the file was stored digitally.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

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**QUESTION PRESENTED:** Whether a lawyer has an ethical obligation to deliver a client's file upon request of a former client?

**APPLICABLE RULES:** Prof.Cond.R. 1.6, 1.15, 1.16

**OPINION:** A lawyer seeks clarification of her ethical obligation to deliver a client's file to a former client that she has maintained for several years after the termination of representation. The lawyer was fully compensated for her services at the time of termination.<sup>1</sup>

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<sup>1</sup> Withdrawn Adv.Op. 1992-08 included a lengthy discussion about attorney retaining liens. Because the subject of retaining liens is a legal matter not relevant to an analysis of a lawyer's ethical obligations to provide a client file to a former client and because the requesting lawyer was paid for her services at the time the representation was terminated, the Board did not include the previous discussion of retaining liens in this Opinion.

The Rules of Professional Conduct require a lawyer, after termination of representation, to “promptly” deliver to the client all papers and property to which the client is entitled. Prof.Cond.R. 1.16(d). Most often, the obligation of the lawyer to promptly deliver the file is triggered when the representation is abruptly terminated before the underlying legal matter has concluded and the client must retain new counsel to continue the representation. However, it is not unusual after termination of representation for a former client to leave his or her file in the possession of the lawyer or law firm for an indefinite period of time. Even though a lawyer has continued to maintain a client’s file for several years after the termination of representation, the file constitutes the property of the client and it and other client property (*e.g.*, original documents) related to the representation must be delivered to the client upon the former client’s request. Prof.Cond.R. 1.15(d)(a lawyer is required to “promptly deliver to the client \* \* \* any funds or other *property* that the client \* \* \* is entitled to receive.”) (Emphasis added.) *Cincinnati Bar Assn. v. Lawson*, 119 Ohio St.3d 58, 2008-Ohio-3340, 891 N.E.2d 749, ¶51.

Which documents in the client file constitute “client papers and property” and must be delivered is specifically addressed in Prof.Cond.R. 1.16(d). The rule defines “client papers and property” as “correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client’s representation.” However, this list is not all-inclusive, and other documents in the file may need to be delivered in order to protect the interests of the former client at the termination of representation. These other documents may include materials acquired or prepared for the purpose of representing the client, investigatory documents, and filed or unfiled pleadings and briefs. Conversely, certain documents maintained by the lawyer may not constitute “client papers and property.” For example, internal law firm memoranda, firm communications or other administrative materials related to the representation, documentation concerning personnel assignments and conflict checks, the lawyer’s mental impressions, and drafts of pleadings, briefs, or other filings are not considered client papers or property to which the client is entitled. *See Adv. Op. 2010-2*, ABA Formal Op. 471 (2015), ABA Formal Op. 1376 (1977). In addition, “client papers or property” do not include documents that may violate the duty of confidentiality to other persons, the lawyer’s own assessment of the client, or documents shielded from disclosure under state law or court protective order, *e.g.* designated as “counsel only” under Crim.R. 16(C).

*Client files maintained in a digital format*

A lawyer's file relating to a representation commonly includes both paper and digital documents. As a general matter, there are no ethical restrictions against maintaining client files only in a digital form. Many law firms operate "paperless" offices and store client files containing digital documents on local servers or in the "cloud" that can be accessed by the client at any time. A lawyer using an internal or external digital file storage method must ensure that it is secure and take reasonable measures to protect the confidentiality and security of the client property. Prof.Cond.R. 1.6, 1.15.

Absent prior agreement with the client as to the format the client file will be maintained, the Board recommends that lawyers provide the former client's file in the format it is stored. However, if the client is unable to access the digital files, particularly email correspondence, a lawyer must provide the documentation in an accessible format including paper. While a lawyer may not charge a client for copying a paper file, the Rules of Professional Conduct do not specifically address the responsibility for expenses related to the conversion of documents to accessible formats or from digital to paper. See Prof.Cond.R. 1.16, cmt. 8[A]. In order to avoid future misunderstandings, lawyers and clients may enter into agreements addressing how digital files will be provided to the former client if requested, and who will bear the costs associated with providing the file in a particular format or paper. D.C. Bar Op. 357 (2010). If no agreement was entered into prior to termination of representation, a lawyer should comply with a reasonable request from a former client to convert digital files to paper. *Id.*

*Former client file retention in general<sup>2</sup>*

A lawyer does not have a duty to preserve former client files on a permanent basis. ABA Formal Op. 1384 (1977). A records retention policy used in conjunction with other law firm practices can obviate the need to maintain a client's file for a significant length of time after representation. More importantly, the Rules of Professional Conduct do not prescribe a minimum amount of time that a client's file must be maintained after representation has terminated.<sup>3</sup> However, if a lawyer in his or her independent professional judgment chooses to maintain a former client's file, different types of legal

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<sup>2</sup> An in-depth discussion of client file retention is available in the Board's File Retention Guide available at [www.ohio.bpc.gov](http://www.ohio.bpc.gov).

<sup>3</sup> The minimum length of time to maintain a client file is often confused with the required retention period for IOLTA records under Prof.Cond. R. 1.15(a). The mandatory retention requirement for IOLTA records has no bearing on the retention period for client files.

matters may necessitate retaining the client's file for varying periods of time. Unless the file is returned to the client at termination, the retention period of a client file should be determined by whether the file will be needed to protect the interests of the former client or the lawyer knows the file may be necessary in the assertion or defense of a future claim when the applicable statutory limitations period has not expired. For example, files related to minors, probate matters, estate planning, tax, criminal law, corporate formation, should be retained until the files no longer serve a useful purpose to the former client.

To avoid an accumulation of former client files over time, it is recommended that lawyers adopt a records retention policy and office procedures to allow for the delivery of a client's file at the end of representation or at a future date certain determined by the firm's record retention policy. At the outset of representation and preferably in the engagement fee agreement, a lawyer should notify the client about the length of time, if any, the firm will retain the client file. When the firm's records retention policy calls for the destruction of the file, the lawyer should contact the client to claim the physical file or to give advance notice of the impending destruction of a physical or digital file.

**CONCLUSION:** When a lawyer has continued to maintain a client's file for several years after the termination of representation, the file remains the property of the client and it and other client property (*e.g.*, original documents) related to the representation must be delivered to the client upon the former client's request. Not every document maintained by the lawyer constitutes "client papers and property" and is required to be delivered to the client. Any digital client files, including e-mail correspondence, maintained by the lawyer must be delivered to the client in an accessible format. Absent prior agreement, a client may request the conversion of digital files that are not accessible to another digital format or paper at the lawyer's expense. In general, a lawyer does not have an obligation to maintain former client files permanently and the Rules of Professional Conduct do not require a minimum period of time for retaining former client files. Lawyers are advised to transfer the client file to the former client upon termination of representation, or adopt a file retention policy and related procedures for the transfer of client files or their destruction on a date certain.