



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Occasionally, we have clients who request that we send them their files, either because the matter is completed, or because for one reason or another they are moving their representation to another law firm. I've also discovered that we are storing a massive amount of closed client files, at considerable cost, and I'd like to return as many of these files to clients as possible (whether we can destroy old files for which we cannot locate the client is a question for another day).

In thinking about these things, however, I am stuck on questions relating to what parts of the client matter files belong to and must be returned to clients, and what parts belong to us? Model Rules 1.15 and 1.16 do not appear to provide specific guidance.

A: You are struggling with some common issues. Let's start with the rules. Rule 1.15(d) requires the lawyer to return to the client "any funds or other property that the client . . . is entitled to receive" and to provide an accounting for them upon request. Rule 1.16(d) similarly provides that upon termination of a representation, the lawyer must "take steps to the extent reasonably practicable to protect a client's interests...surrendering papers and property to which the client is entitled," subject to a caveat that the "[l]awyer may retain papers relating to the client to the extent permitted by other law." This caveat generally relates to rights created under the law of some states to a "retaining lien," but please be careful in withholding client file material in reliance on this provision unless there is clear authority in your jurisdiction allowing you to do so.

You are generally correct that these rules do not specifically define the items to which the client is "entitled," although some jurisdictions, such as Minnesota, have modified the rule to provide more specific guidance on that question, and other states have specific case law or ethic opinions that address the matter. As always, please look at the version of the rules adopted in your jurisdiction and any other jurisdiction-specific guidance.

Subject to these things, ABA Formal Opinion 471 (2015) addresses the issues. It opines that Rule 1.15 requires the lawyer to return moneys belonging to the client, other "tangible personal property", "items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills, or deeds," and documents provided by the client to the lawyer. *Id.* at 2. Concerning Rule 1.16(d), the opinion notes a split of authority as to what parts of a client file the client is entitled to: a majority of jurisdictions take the "entire file" approach, while a minority follow an "end product" approach. Under the entire file approach, everything in a client file belongs to the client subject to limited exceptions, generally materials that would violate a duty of non-disclosure, materials that contain an assessment of the client, materials that if released could endanger health, safety and welfare of the client or others, and materials that are purely internal firm communications and assignments. In contrast, the "end product" approach distinguishes between the final versions of matters created for the client's benefit (correspondence as sent, pleadings and briefs as filed,) investigative/expert reports and discovery for which the client has paid, final versions of wills, trusts, deeds, transaction documents, etc., which must be returned to the client; and notes, drafts, memos, administrative materials and research materials "generated primarily for the lawyer's own purpose in working on a client's matter" that do not need to be surrendered. Formal Op. 471 adopts this "end product approach" as the minimum requirement, subject to more that may be required in specific situations to protect the interests of the client.

In the absence of clear guidance in your jurisdiction, Formal Op. 471 should be followed as a baseline, but the touchstone should be to provide to the client any item that is in their best interest to have in order to protect or advance their interests. Return to the client any items or documents that the client has provided, any moneys or other tangible things that belong to them, any documents that have intrinsic value or govern rights (contracts, wills, trusts, court orders or judgments, patent or intellectual property documents, etc.), any discovery documents, and any documents or communications filed or sent externally. This should encompass both electronic and paper documents. Legal research and memoranda or summaries reflecting legal research that could be useful to the client in protecting the client's interests should also be provided.

Although drafts of documents are generally outside what Formal Op 471 requires to be provided, to the extent they could be useful to the client, the *Ethics Lawyer* recommends they be provided. It is likely safe to exclude purely administrative items such as conflict check or file opening records (which could disclose information about other clients), pre-bill material, etc., as well as notes evaluating or discussing the client (as opposed to the matter) or other purely internal law firm communications. This assessment may vary (requiring more) if there is an issue about the law firm's performance or billing.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.