104 SURRENDER OF FILE TO THE CLIENT UPON TERMINATION OF THE REPRESENTATION

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Introduction and Scope

The Colorado Bar Association Ethics Committee (Committee) has received numerous inquiries concerning the responsibility of a lawyer to surrender the client's file to the client when the representation terminates. These inquiries generally relate to the lawyer's obligations to deliver the file and involve discussion of the file's contents or portions thereof to which the client is entitled. These discussions can be especially difficult when the client's newly-retained counsel requests the file from the terminated lawyer and the terminated lawyer's prior representation is being challenged or questioned.

The purpose of this opinion is to address the lawyer's general obligations to surrender the file upon demand after termination and to discuss what does, or does not, constitute the portion of the file to which the client is entitled. This opinion does not address those situations in which a lawyer has not been fully paid and the lawyer is asserting a retaining lien on the client's file. For a discussion of the lawyer's duties in those circumstances, *see*, CBA Formal Op. 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (1989, addendum issued 1995).[1] For purposes of this opinion, the Committee assumes the lawyer has not asserted such a lien. This opinion also does not address the lawyer's specific obligations to retain and preserve files after the representation terminates, or whether, and under what circumstances, all or any part of the file may be subject to disclosure or discovery in civil and criminal proceedings.[2]

Syllabus

A lawyer's primary ethical obligation upon the representation's termination is to take the steps necessary, to the extent reasonably practicable, to protect the client's interests. One of these steps involves the lawyer's duty to surrender the file to the client. Lawyers are consistently disciplined for blanket refusals to surrender the file to the client on demand. Since the client may be uninformed about what is, or is not, contained in the file, the lawyer may inquire as to the client's needs; however the lawyer should understand that it may be difficult for the client to define what is needed. Interrelated with the obligation to protect the client's interests is the lawyer's duty to define the client's needs liberally. In this context, the client's entitlement is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access the file related to the representation so as to enable continued protection of the client's interests.

Under Colo. RPC 1.16(d), the portions of the file to which the client is entitled must be surrendered upon demand within a reasonable time, regardless of duplication costs and inclusive of documents in accessible or editable electronic format when such documents exist. In the event that the lawyer decides to retain a copy of the file for the lawyer's own purposes, the duplication costs for these items are not properly billed to the client. However, in the event that the lawyer voluntarily produces practice-related material, it is appropriate for the lawyer to charge the duplication costs of these documents to the client.

It is undecided under Colorado law whether an agreement between the lawyer and the client regarding duplication costs is binding as a matter of contract. While the payment of such charges may be purely a contractual matter, the Committee believes that the terms of such an agreement must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct

(Colo. RPC or the Rules). However, retention of papers and property to which the client is entitled until such costs have been paid is subject to the same exceptions to the right of retention as under a properly asserted retaining lien. *See* CBA Formal Op. 82.

There are two primary types of material the lawyer may retain because they constitute portions of the file to which the client is not entitled. The first type of material includes documents in which a third party, e.g., another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model from which to draft documents for the present client. However, the product drafted by the lawyer for the present client may not be withheld.

The second type of material involves those documents that would be considered practice-related materials relating to the business of representing the client. These include, for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is not needed to protect the client's interests and does not constitute a portion of the file to which the client is entitled.

Defining this second category in detail is difficult, as it is factually specific to each situation. In making these determinations, the lawyer should be guided by the principle that he or she has a duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information. Generally, that duty favors production.

In the event that practice-related materials are intertwined with information that should be surrendered, the lawyer should produce factual information in the form of a summary or with personal impressions redacted if necessary. Given the variety of factual circumstances that may arise and the fact that Colorado courts have not addressed this area, the Committee provides its

own analysis together with a summary of authorities from other jurisdictions to assist the lawyer in analyzing the particular situation which the lawyer may face. In the event of a dispute regarding production of documents in the context of litigation, a review of the documents *in camera* may be necessary.

Analysis

I. Discussion of the Lawyer's General Obligations

Colo. RPC 1.16(d) states:

> Upon termination of representation, *a lawyer shall take steps to the extent reasonably practicable to protect a client's interests*, *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.

(emphasis added.) Rule 1.16A, comment 1, states that the client's file "consists of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." For purposes of this opinion, the Committee uses the term "file" to include papers, e-mails, property, electronic data, and documents (including documents in editable format) as usually maintained in the ordinary course of practice except as otherwise specifically defined in the Colo RPC.[3]

The Colorado Supreme Court has consistently recognized the client's right to the prompt delivery of the portions of the file to which the client is entitled upon the representation's termination and has consistently disciplined lawyers for failing to do so.[4] In each of these cases, the Court disciplined the lawyer for refusing or failing to deliver, after client request, the file to which the client was entitled. The emphasis has been on recognizing the lawyer's duty to protect the client's interests rather than in defining in detail what constitutes the "papers and property to which the client is entitled" under Rule 1.16(d).

Indeed, Rule 1.16(d) does not define what constitutes the "papers and property to which the client is entitled."[5] The Committee believes the definition should be derived from the Rule's purpose to reasonably protect the client's interests. In this context, it is the Committee's opinion that the file to which the client is entitled is not necessarily defined by traditional concepts of property and ownership. Rather, the file is defined by the client's right to access the information related to the representation and the lawyer's duty to protect the client's interests.

This duty includes providing documents in accessible and editable electronic format, where the documents are already maintained in that format and the client requests them in that format. This distinction is one of format, not substance; the client can easily retype or optimize (i.e., OCR) a PDF to make it editable. But providing them in the requested format is a "reasonably practicable step" a lawyer must take under Colo. RPC 1.16(d). This duty should not be read to expand the scope of documents to which the client is entitled or to impose a further duty on the lawyer to create documents that do not already exist. The Committee is of the opinion that the lawyer is obligated to provide only those editable electronic documents maintained in the ordinary course of practice that exist in the client's file as of the date the lawyer-client relationship is terminated.[6] This is consistent with other jurisdictions that have addressed similar questions.[7]

Therefore, subject to the narrow qualifications outlined below, upon termination of the attorney-client relationship, the client should be provided with the file.[8] The file includes, but is not limited to: those documents and other property the client provided; originals and copies of other papers and documents the lawyer possesses relating to the representation that the client reasonably needs to protect the client's interests; and documents in electronically accessible and editable format, when such documents exist as of the date of the representation's termination and are requested. Where a lawyer has asserted a valid retaining lien, this duty may be deferred until

such time as the lien is resolved.

This position is consistent with the majority of cases and ethics opinions that conclude that upon termination of the attorney-client relationship, the client has the right to full access to the file on the represented matter, subject to a few qualifications discussed below.[9] The lawyer must deliver originals and copies of other documents that the lawyer has which relate to the representation and which the client reasonably needs.[10]

The Committee notes that Rule 1.16(d) requires the lawyer, to the extent reasonably practicable to protect the client's interest, to "surrender" the file to the client. The use of this term is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand. While it is appropriate for a lawyer to request a reasonable period to produce the file, a lawyer may not ignore or refuse a client's request for such papers and property.[11] When provided with an ambiguous request from a client, the lawyer should seek further clarification.[12]

Numerous questions may arise concerning the costs of duplicating the file at the time of delivery. Consistent with recognition that the file must be surrendered to the client, it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy.[13] The fact that copies of documents may have been previously provided to the client does not eliminate the lawyer's responsibility to provide the client with the file. If the lawyer wishes to keep copies of the documents to which the client is entitled, the lawyer may do so at the lawyer's own expense.

Unless there is a valid agreement to the contrary, the Committee believes that refusal to provide the file until the client pays duplication costs restricts the client's right to the file and is improper.[14] Note, however, that this responsibility would not necessarily apply to those portions of the file to which the client is not entitled (as further discussed below) in the event that the lawyer

voluntarily decides to make these documents available to the client.

The Committee is aware that many fee agreements seek specifically to establish the obligations of the lawyer and client for payment of duplication costs.[15] While the payment of such charges may be purely a contractual matter,[16] the Committee believes that such terms must be reasonable and otherwise must not violate the Rules. Retention of documents contingent upon payment of duplication costs is subject to the same exceptions that apply to a properly asserted retaining lien as discussed more completely by the Committee in CBA Formal Opinion 82.[17]

II. Documents to Which the Client is Not Entitled

A. Documents Protected from Disclosure Based Upon Third Party Interests

The client is not entitled to documents obtained from or prepared for a third party, usually another client, that the lawyer used as a guide or model in the current representation. The lawyer is not required to disclose documents that may violate the duty of confidentiality and nondisclosure owed to some third party, or otherwise imposed by law.[18] In the event that a pleading from a file related to a third party's representation was used as a draft for the requesting client, it may be properly withheld. However, the pleading that was drafted for the requesting client from that model is not within this exception. Drafts of pleadings, if maintained in the file and not destroyed in the normal course of the representation, should be produced.

B. Practice-Related Materials

Authorities differ as to the lawyer's responsibility to produce practice-related materials contained in the file.[19] These discussions focus on varying definitions of what constitutes those materials and the lawyer's responsibilities related to various portions of documents identified as such.

Virtually all authority that has discussed this category recognizes that practice-related

materials does not include documents belonging to the client or documents which are the "end product" of the lawyer's services. These documents must be produced to the client. End product items include pleadings filed in the action, correspondence with the client, opposing counsel and witnesses, and final versions of contracts, wills, corporate records, and similar records prepared for the client's actual use.[20]

While there is some authority to the contrary,[21] the majority of authority asserts that a lawyer may not retain preliminary drafts, legal research, and legal research memoranda as practice-related material and must be surrendered.[22] The Committee agrees with this view.[23]

Internal firm administration documents, such as conflicts checks and personnel assignments, are properly retained as practice-related material. The lawyer may withhold certain firm documents that were intended for law office management or use because they are unnecessary to protect the client's interests in the matter.[24]

It is much more difficult to address documents, in any form, containing the lawyer's personal impressions and comments. While recognizing that clear direction in this area depends on the specific circumstances the lawyer may encounter, the Committee reminds lawyers that the client's interests must be protected to the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect both the client's and the lawyer's interests.[25]

The lawyer should err on the side of production. If documentation is retained and production requests persist, a court may need to resolve *in camera* disputes concerning access to documents which the lawyer perceives to be practice-related material.[26]

NOTES

[1] CBA Formal Opinion 82 recognizes that a lawyer ethically may assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may not be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Rules; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

[2] The Committee notes that the duty to surrender papers to the client to the extent reasonably practicable to protect the client's interests is not identical to the obligations of the lawyer to preserve the file. While certain documents might be withheld since they are contained in one of the exceptions addressed in this opinion, the fact that the lawyer has retained these documents does not diminish the obligation to preserve the file as that obligation is defined by agreement or by law. *See* Colo. RPC 1.16A (setting forth lawyer's obligation to retain client file). Discussion of this obligation is beyond the scope of this opinion.

[3] This definition is consistent with the Colo. RPC's definition of "document." *See* Colo. RPC 1.0(b-1) (defining document to mean "email or other electronic modes of communication subject to being read or put in readable form.").

[4] *See People v. Garrow*, 35 P.3d 652, 655 (Colo. 2001) ("The Colorado Supreme Court has consistently recognized the client's right to the prompt delivery of papers and property to which the client is entitled upon termination of the representation, and the Court has consistently disciplined lawyers for failure to do so."); *see also People v. Greene*, 276 P.3d 94, 110-11 (Colo. 2011); *People v. Rishel*, 956 P.2d 542, 543 (Colo. 1998); *People v. Holmes*, 951 P.2d 477, 479 (Colo. 1998); *People v. Davis*, 950 P.2d 596, 597 (Colo. 1998); *People v. Kuntz*, 942 P.2d 1206, 1207-08 (Colo. 1997).

[5] Colo. RPC 1.16A sets forth a lawyer's obligations concerning client file retention. Colo. RPC 1.15 sets forth a lawyer's general duties regarding client property, including funds and "other property." In cases addressing violations of Rule 1.16(d), the Colorado Supreme Court has not defined with precision what comprises a client file. Generally, the Court has broadly interpreted "papers and property to which the client is entitled" as those "files generated during (the) representation." *Garrow*, 35 P.3d at 655. In the limited number of cases addressing attorney discipline for violating Rule 1.16(d) where the Colorado Supreme Court has identified the contents of a client file in question, the file has included abandoned trademark applications, *People v Webb*,

306 P.3d 120, 123 (Colo. 2013); files of disability payment recipients when a tax refund on such payments was contested, *Garrow*, 35 P.3d at 654; estate documents, *People v. Smith*, 93 P.3d 1136, 1138 (Colo. 2004); financial documents provided during the representation, *People v. Lynch,* 35 P.3d 509, 512 (Colo. 2000); and immigration papers, *People v. Romero*, 35 P.3d 164, 167 (Colo. 1999).

[6] *See* Colo.RPC 1.16A, cmt [1].

[7] *See* N.Y.C Bar Ass'n Comm. on Prof'l & Judicial Ethics Formal Op. 2008-01, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation" (2008) (stating lawyers have obligation to provide client with electronic documents created and contained within client's file in that format); State Bar of Cal. Formal Op. 2007-174 (emphasis in original) (concluding "the *form* of the items in question . . . proves immaterial" to a lawyer's obligation to return client paper's upon termination of representation); Ill. State Bar Ass'n Advisory Op. on Prof's Conduct No. 01-01 ("It is also the Committee's opinion that the request to have the client file materials downloaded onto disk is a 'reasonable' request as set forth in Rule 1.4(a), and that the client is entitled to receive his or her files in the format in which the lawyer or law firm maintains such files.").

[8] The lawyer's obligations concerning the client file are different when the lawyer is selling his or her law practice. *See* Colo.RPC 1.17(c)(1)-(3).

[9] For a discussion of situations where these concerns have been addressed, *see In the Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 91 N.Y.2d 30 (1997), citing *Resolution Trust Corp. v. H. P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989); State Bar of Ga., Formal Advisory Op. 875; Massachusetts Rules of Court, Rule 3.07, DR 2110[A][4] (West, 1997); Ohio Sup. Ct. Bd. Of Comm'rs On Grievances and Discipline, Formal Op. 928; *Maleski v. Corporate Life Ins. Co.*, 163 Pa. 36, 641A.2d 1 (Pa. Commw. 1994); State Bd. of Cal. Standing Committee On Professional Responsibility and Conduct, Formal Op. 1992127; Connecticut Bar Ass'n Committee On Professional Ethics, Op. 941; State Bar of Michigan Commission on Professional and Judicial Ethics, Syllabus CI926 (1983); Or. State Bar Ass'n, Op. 1991125.

[10] *See* Restatement (Third) of the Law Governing Lawyers § 58(3), cmt. d (1998).

[11] *See also* Colo.RPC 1.16A & 1.15A.

[12] *See Dubose v. Shelnutt*, 566 So.2d 921 (Fla. Dist. Ct. App. 1990) (client request for "depositions of following witnesses" placed a duty on the lawyer to call the client and find out exactly what the client needed.); *see also Matter of Struthers*, 877 P.2d 789 (Ariz. 1994); *Finch v. State Bar of California*, 621 P.2d 253 (Cal. 1981); *People v. Damkar*, 908 P.2d 1113 (Colo. 1995); *Matter of Kelly*, 655 N.E.2d 1220 (Ind. 1995); *Comm. on Prof. Ethics & Conduct v. Leed*, 477 N.W.2d 390 (Iowa 1991); *Matter of England*, 894 P.2d 177 (Kan. 1995); *Kentucky Bar Ass'n v. Delahanty*, 878 S.W.2d 795 (Ky. 1994); *In re Turissini*, 655 So.2d 327 (La. 1995), *In re Disciplinary Action Against Cowan*, 540 N.W.2d 825 (Minn. 1995); *Matter of DePietropolo*, 603A.2d 951 (N.J. 1992); *Cleveland Bar Ass'n v. Bancsi*, 651 N.E.2d 949 (Ohio 1995); *Matter of Meeder*, 463 S.E.2d 312 (S.C. 1995); *In re McCarty*, 665A.2d 885 (Vt. 1995); *State Bar Committee*

on Legal Ethics v. Karl, 449 S.E.2d 277 (W. Va. 1994).

[13] The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. *See, e.g.,* C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo.RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation).

[14] *See Apa v. Qwest Corp.*, 402 F. Supp. 2d 1247, 1250 (D. Colo. 2005) (citing this Opinion for the proposition that "Rule 1.16(d) of the Colorado Rules of Professional Conduct requires counsel, upon termination of representation, to surrender papers to which the client is entitled, which the Court understands to mean without additional cost to the client."); *see also* ABA Formal Op. 15-471, "Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled" (2015) (stating lawyers should make clear in retention letter who is responsible for the cost of copying the file and under what circumstances); D.C. Bar Ass'n, Op. 357 "Former Client Records Maintained in Electronic Form" (2012) (stating that lawyers and clients may enter into reasonable agreements about who will bear the costs associated with providing files in a particular form).

[15] Consistent with the suggestions raised by the authors of the cited article, the Committee encourages lawyers to address matters concerning file disposition in the initial retention letter or fee agreement, or in writing upon the representation's completion.

[16] *See, e.g.*, ABA Formal Op. 15-471, "Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled" (2015) (agreeing with the reasoning in D.C. Bar Op. 357 (2012) that lawyers and clients "may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form;").

[17] *See Kallsen v. Big Horn Harvestore Sys., Inc.*, 761 P.2d 292 (Colo. App. 1988).

[18] In certain areas of practice, lawyers are subject to court orders that prohibit the disclosure of certain documents or certain information to the client. This opinion does not address documents covered by such court orders.

[19] The authorities that discuss this issue unfortunately use the term "work product." The Committee emphasizes that this term may be misleading in that it could be confused with "work product" which is protected against discovery because it relates to mental impressions, conclusions, opinions, or legal theories of a lawyer concerning a matter in litigation. For purposes of this opinion, "practice-related materials" relates to that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting lawyer impressions that is not needed to protect the client's interests in the matter for which the lawyer was retained and, therefore, need not be produced pursuant to Colo. RPC 1.16(d).

[20] *See*, *e.g.*, Ill. State Bar Ass'n, Op. 9413.

[21] *See Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, mod. 128 F.R.D. 182 (S.D. Miss. 1989); *Corrigan v. Armstrong, et. al.*, 824 S.W.2d 92 (Mo. App. 1992); Ala. State Bar, Formal Ethics Op. RO8602; Ariz. State Bar Committee on Rules of Professional Conduct, Op. 921; Ill. State Bar Ass'n, Op. 94-13; N.C. State Bar Ethics Committee, RPC 178 (1994); R.I. Sup. Ct. Ethics Advisory Panel, Op. 92-88 (1993). The Committee disagrees with these authorities to the extent they state that the client is required to establish some specific need for the documents since it may be especially difficult for the client to establish that need when the client is unaware of what the file contains.

[22] Under the majority approach, a client is presumptively entitled to the entire file unless the lawyer can show good cause to withhold certain documents. Under the minority approach, or the "end product" approach, a client is entitled to the end product of a lawyer's services but must make a showing of need to obtain access to the lawyer's personal impressions or relating to law firm administration. Ellen J. Bennett et al., Annotated Model Rules of Professional Conduct 286 (8th ed. 2013).

[23] Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.

[24] *See People v. Preston*, 276 P.3d 78, 89 (Colo. O.P.D.J. 2011) (citing this Opinion for the proposition that extending "personal attorney work product," i.e. practice-related materials, to only "that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting attorney impressions that is not needed to protect the client's interests").

[25] Some authority has applied definitions in this area that do not mirror the Committee's opinion here. Various definitions of "work product" and accompanying discussions can be found in: *In the Matter of Sage Realty Corp.*, *supra*, ("documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purposes of giving internal direction to facilitate performance of the legal services entailed in that representation"); ABA Informal Op. 1376, "Files in Possession of Trademark Counsel Pertaining to Trademark of a Client" (1977) ("lawyer need not deliver [to client] his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem"); Ariz. Ethics Op. 81-32 (papers and documents belonging to client do not include "attorney's own notes and memos to himself; nor his myriad scratchings on note sheets; nor records of passing thoughts dictated to a machine or a secretary and placed in the file; nor ideas, plans or outlines as to the course the attorney's representation is to take"); Del. Ethics Op. 1997-5 (1997) ("lawyer's working notes, impressions and draft documents"); Ill. Ethics Op. 94-13 (Jan. 1995) ("lawyer's notes, drafts, internal memoranda, legal research and factual research materials, including investigative reports, prepared by or for the lawyer for use of the lawyer in the representation"); Kan. Ethics Op. 92-05 (1992) (includes attorney's "recorded mental impressions, research notes, legal theories, and unfiled pleadings included in the client's file"); ABA/BNA Lawyer's Manual on Professional Conduct

31:1206 (examples of lawyer's work product include "recorded mental impressions, research notes, legal theories, and unfiled draft documents").

[26] *See, e.g.*, *People v. Salazar*, 835 P.2d 592, 595 (Colo. App. 1992) (holding that lawyer does not violate ethical obligations by disclosing information *in camera* if ordered to do so).