

Enduring Ethics Opinion #187. Guidance Concerning the Contents of the Client File that the Client is Entitled to Receive

Issued by the Professional Ethics Commission

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Question

What is an attorney required to provide to a client, or former client, when the client requests the contents of the client file?

Short Answer

If a client, or former client, requests the client file, the attorney is required to provide the entire file, with the exception of (1) documents and information the attorney discloses explicitly and in writing are being withheld and (2) documents or information that the attorney has a good faith belief he or she is entitled to withhold based upon a privilege, doctrine or other legal protection, which shall be disclosed in a privilege log. If the client requests documents or information withheld under exception (1), the attorney must provide those documents unless they are also subject to being withheld under exception (2).

Former Opinion No 187

This Enduring Ethics Opinion follows from, and to some extent supersedes, the Commission's Opinion No. 187. In Opinion No. 187, the Commission addressed the question whether a client who asks an attorney for the file "is entitled to receive everything that the attorney has maintained with respect to the client's matter or whether the attorney is entitled to retain the attorney's notes, internal research memoranda and administrative documents, and similar documents created during the course of representation."

Rather than issuing an Opinion addressing the narrow question raised, the Commission in Opinion No. 187 first found the need to explicate the contours of an attorney's duty to maintain client files, and then expressed the opinion that an attorney has an obligation to provide a client or former client with all files "that the attorney knows or has reason to know is or would be of value to the client." Applying this test, the attorney could presumably choose to withhold documents or information which the attorney did not know or have reason to know would be "of value" to the client. The Commission went on to list categories of documents that ordinarily would need to be provided, and those that ordinarily could be withheld. The Commission counseled that the decision of what information or documents will be "of value" to the client depends upon the timing of the client's request and the overall context.

New Approach Based Upon Maine Rule of Professional Conduct 1.15

Opinion No. 187 contains some thoughtful discussion of the issue that remains somewhat relevant under the Maine Rules of Professional Conduct, but that discussion warrants some clarification.

Rule 1.15 specifically addresses the attorney's obligation to retain and provide "information and data" to a client "upon termination of representation":

Upon termination of representation, a lawyer shall return to the client or retain and safeguard in a retrievable format all information and data in the lawyer's possession to which the client is entitled. Unless information and data are returned to the client or as otherwise ordered by a court, the lawyer shall retain and safeguard such information and

data for a minimum of eight (8) years, except for client records in the lawyer's possession that have intrinsic value in the particular version, such as original signed documents, which must be maintained and safeguarded until such time as they are out of date and no longer of consequence. A lawyer may enter into a voluntary written agreement with the client for a different period. In retaining and disposing of files, a lawyer shall employ means consistent with all other duties under these rules, including the duty to preserve confidential client information.

The purpose and structure of the Rules, if not the express word of Rule 1.15(d), support the conclusion that a current client is entitled to at least the same level of disclosure of information and data as a former client. Access to such information and data is foundational to many of the attorney's ethical obligations to the client and a necessary requisite of the attorney-client relationship. *See, e.g.*, Rule 1.1. ("A lawyer shall provide competent representation to a client."); Rule 1.2 ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation [and] shall consult with the client as to the means by which they are to be pursued."); Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Rule 1.4 (outlining lawyer's obligation to communicate with the client); Comment to Rule 1.4 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interest or convenience of another person.").

Accordingly, we read the Rules to require that, upon the request of a current or former client, an attorney is required to provide the same amount of materials required by Rule 1.15(f)—namely, "all information and data in the lawyer's possession to which the client is entitled."

We must discern, therefore, what the Rules mean by "all information and data in the lawyer's possession to which the client is entitled."

First, it is clear that this phrase was meant to include "information and data" beyond merely client "property" which had been entrusted to the attorney for safekeeping. Rule 1.15(a)-(e), details requirements for maintaining, safeguarding and returning client "property." Those provisions use the term "property." By contrast Rule 1.15(f) does not use the term "property," but rather, refers to "all information and data to which the client is entitled." If the client were entitled merely to restoration of his or her "property," then Rule 1.15(f) would have so stated.

Second, the structure and purpose of Rule 1.15(f) evince an intent to provide the client or former client broad access to information and data within the client file. Rule 1.15 defines one subset of this data and information as "client records that have intrinsic value in the particular version." These records with "intrinsic value" must be maintained indefinitely, unless the law or client permit otherwise. That leaves a second subset of data and information that does not have intrinsic value, which must be maintained for at least eight years. Thus, the information and data to which a client is entitled goes beyond those materials that have intrinsic value.

Finally, the Comments explain that the eight-year retention period was selected because it is two years longer than the typical six-year statute of limitations for professional malpractice actions. In other words, the retention requirement of Rule 1.15 was enacted, in part, to preserve a client's or former client's ability to review the attorney's representation for a possible professional complaint or malpractice action before the statute of limitations expired. Any rule about what portions of the client file must be provided to the client or former client, therefore, must ensure disclosure of the information

and documents the client would need in order to review the attorney's conduct and representation for a possible complaint or malpractice action.

The problem with any rule that permits an attorney to selectively withhold materials within the client file is that this decision can prejudice the client's ability to review the lawyer's representation. This problem is compounded by any rule that allows the attorney to withhold materials without disclosing to the client what is being withheld, because the client does not know what is in the file to begin with, so there would be no way for the client or former client to know, *generally*, that anything is being withheld, or *specifically*, what is being withheld. Withheld items might come to light in a subsequent complaint or malpractice action, but this cannot satisfy the disclosure requirement, because the attorney's decision to withhold the documents might deprive the client of the very documents and information necessary to support prosecuting the complaint or malpractice action.

Of course, by withholding (otherwise discoverable) documents and prejudicing the client or former client's ability to review the attorney's representation, the attorney is violating the ethical obligation to put the interest of the client ahead of self-interest. Permitting such self-serving behavior by attorneys to shield their own *conduct* from full and searching scrutiny undermines the principles of transparency and trust that form the basis of the attorney-client relationship and impairs the enforcement of the *very* ethical rules that govern attorney conduct.

Accordingly, to the extent Opinion No. 187 purports to permit an attorney to withhold from the client portions of a client's file that the attorney determined unilaterally not to be "of value" to the client, Rule 1.15 appears to differ. Indeed, many of the categories of information deemed in Opinion No. 187 not to be valuable typically, such as billing records, internal documents, and internal emails, are precisely those categories of documents likely to be valuable to a client who is evaluating the conduct of the attorney. These documents are also likely to be discoverable in any subsequent malpractice proceeding, so withholding them from a client who wants to evaluate such a claim only serves to prejudice the client by depriving them of the information they need to bring the claim, and protecting the attorney from legitimate legal scrutiny.

For all of these reasons, the Commission believes that the Maine Rules of Professional Conduct mandate that, upon request of a client or former client, the attorney must furnish the entire client file, withholding only those categories of documents that the attorney (1) specifically discloses in writing are being withheld or (2) which the attorney has a good faith basis to believe are protected from disclosure based upon some recognized privilege, doctrine or other legally-imposed limitation. Documents withheld under category (2) should be identified in a privilege log.

To the extent Opinion No. 187 reaches an inconsistent opinion based upon the former Bar Rules, the Commission believes that the Maine Rules of Professional Conduct now dictate a different result.

Practical Procedure For Producing Less Than The Entire File

The Commission recognizes that a client or former client may have many reasons for requesting a file other than to explore an action against the attorney. A client may simply want copies of certain materials as a record, or to furnish to another professional for legal, accounting or tax services. It would be overly rigid and impractical to endorse a rule that lacked flexibility for a lawyer to accommodate a client or former client's request for the file. Not every request for a file is based upon a client's desire to review every minute detail of the attorney's representation—*however* lengthy and voluminous—and

therefore not every file production by the attorney must include every shred of paper or electronic document associated with representation of that client.

Because there are many situations in which a client or former client may request a file, when it is clear from the context that the client or former client seeks to obtain only a subset of the file, the Commission believes it is appropriate in those situations for the attorney to provide less than the entire file, so long as the attorney clearly discloses the fact that the entire file has not been provided and identifies those categories of documents that are being withheld with sufficient particularity to enable the client or former client to identify and request additional materials if he or she chooses to do so.