

**Pennsylvania Bar Association Committee on Legal
Ethics and Professional Responsibility
Formal Opinion 2007-100
Client Files – Rights of Access, Possession and Copying, Along with Retention
Considerations**

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility frequently receives questions from lawyers on the topic of ethical considerations relating to rights to client files. These inquiries include questions regarding the proper definition of the client “file”, lawyer responsibilities to maintain and return the file, and lawyer and client rights to the contents of the file. A number of authorities and commentators have addressed these issues in the years since the Committee issued Formal Opinion 99-120 on this topic. Accordingly, the Committee believes that an update and restatement of the Committee’s views is appropriate.

This Formal Opinion supersedes all prior inconsistent opinions of the Committee and should be reviewed for guidance by Pennsylvania lawyers when they are opening, closing or taking other action with respect to the contents of a client's file. For guidance on attorneys’ retaining liens and charging liens and the circumstances under which a client is entitled to the return of a file, see Formal Opinion 2006-300, Ethical Considerations in Attorneys' Liens.¹

A. Rights to the Client File

It is generally accepted that client files are maintained by a lawyer for the benefit of his or her principal, the client.² In Pennsylvania, there is authority for the proposition that not only does the client have a right of access to the file, but also the client has an ownership interest in the contents of the file.³ This issue has not, however, been adjudicated by the Supreme Court of Pennsylvania. In the case of *Maleski v. Corporate Life Insurance Co.*, the Commonwealth Court stated: "once a client pays for the creation of a legal document, and it is placed in the client's file, it is the client, rather than the attorney, who holds a proprietary interest in that document."⁴

¹This Formal Opinion does not address a lawyer’s obligations with regard to incriminating property received from the client as discussed in *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. 1986). The Formal Opinion also does not address client funds or other property within the scope of Pa. R.P.C. 1.15. The Committee believes that although some of the considerations involved with respect to client files are the same as those involved with respect to other client property governed by Pa. R.P.C. 1.15, the provisions of Pa. R.P.C. 1.15 do not directly apply to the complete client file. By way of example only, if Pa. R.P.C. 1.15 applied directly to the entire client file, it would mean that a client file would have to be kept separate from the lawyer’s own property, and each item of the file would be subject to recordkeeping and maintenance requirements that would be impossible to meet.

² See PBA Informal Opinion 89-75; PBA Informal Opinion 94-146.

³ *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994). *Maleski* involved a statutory liquidator’s claim to legal files held by a former law firm for an insurance company in liquidation proceedings. The law firm asserted, among other things, a work product basis for refusing to turn over the requested documents, arguing that the law firm had a proprietary interest in the files. In part based on Pa. R.P.C. 1.15(b), the court reasoned that the client held a proprietary interest in the legal files and that the firm had no right to withhold the files from the former client’s statutory successor in interest.

⁴ *Maleski*, 163 Pa. Commw. at 47, 641 A.2d at 6.

Client files also are business records of the lawyer. Absent some agreement or duty to the contrary, the lawyer should have the right to maintain copies of all file materials, if only as a basis for documenting the course of the representation.⁵ Therefore, in the view of the Committee, the lawyer may, at his or her own expense, make and retain copies of client files.⁶ Obviously, however, the lawyer is bound by any applicable duty of confidentiality with respect to the documents or their contents.⁷

Questions can arise both in the context of requests for possession of the client file and requests for access. Requests for possession generally will follow termination of the lawyer-client relationship, whereas requests for access without possession might occur during or after the relationship.⁸ Generally speaking, even if a client does not seek to take possession of the physical file, the client should be given reasonable access to the file.⁹ Except for situations involving attorneys' liens, disputes between a lawyer and client concerning possession of or access to the file generally can be settled by photocopying the file materials. In the case of documents with independent legal significance, determining who gets the original and who gets the copy will require some care but should not present difficult choices. In general, items such as original client business records, deeds and other real estate records, estate papers, insurance policies, and personal papers should be returned to the client unless there is a specific agreement or other reason for the lawyer to retain custody.¹⁰

B. The Contents of the "Client File"

In *Maleski*, the Commonwealth Court took a very broad view of the contents of the client's file. There, the court concluded that lawyer notes and memoranda are part of the goods and services "purchased" by the fee paying client and thus belong to the client.¹¹ Based on *Maleski*, the Legal Ethics and Professional Responsibility Committee stated in Formal Opinion 99-120 that a lawyer's file notes and, possibly, drafts of documents are part of a client's file.¹² Based in part on the continuing inquiries on this topic, however, the Committee believes some elaboration is appropriate.

The term "client file" is easily stated but can be difficult to apply. In the most simplistic sense, the term encompasses the physical items that are placed into a segregated physical storage

⁵ See, e.g., Pa. R.P.C. 1.16(d) (Upon termination of representation, the "lawyer may retain papers relating to the client to the extent permitted by other law.").

⁶ *Quantitative Fin. Strategies Inc. v. Morgan Lewis & Bockius, LLP*, 55 Pa. D. & C.4th 265 (Phila. Cty., March 12, 2002); see also PBA Informal Opinion 96-157; PBA Informal Opinion 94-17.

⁷ See Pa. R.Prf.C. 1.6(a), (d) (lawyer has duty to maintain confidentiality of client information).

⁸ See, e.g., Pa. R.P.C. 1.16(a) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers . . . to which the client is entitled. . .").

⁹ See PBA Formal Opinion 99-120; see also *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1 (1994), *reconsideration denied*, 163 Pa. Commw. 49, 641 A.2d 7 (1994)..

¹⁰ See PBA Formal Opinion 99-120; see also PBA Formal Opinion 2001-300 (stating that a lawyer may retain original estate documents, but only at the client's request).

¹¹ *Id.* at 46-47, 641 A.2d at 6.

¹² See PBA Formal Opinion 99-120.

place, such as a file folder, drawer or box. In reality, however, it is obvious that the file can encompass items that are not physically segregated, or are not themselves “physical” objects. For example, a client’s file might consist in part of a central collection of legal documents (such as copies of pleadings in a litigation matter), documentary evidence, and correspondence. These items should be easy to define. Nevertheless, all but very small matters will have a variety of other documents relating to that particular representation, such as electronic mail messages, telephone notes, research notes, billing materials and other things. Some of these items might be collected in the physical file and others might be maintained elsewhere (as in a lawyer’s desk file for telephone notes). Moreover, some of these items will relate to the substance of the representation and others might have a closer association to the administrative functions involved with running a law practice (such as assignment memos given to subordinate lawyers).

In addition, as a consequence of the proliferation of electronic mail, electronic documents, and the ability to send and receive documents via electronic mail, almost all documents will exist in multiple locations (e.g., on multiple hard drives and on multiple locations on network servers). For example, when an electronic mail message includes multiple recipients and follow-up replies, each person’s retained version of such a string of communications can be extremely similar, yet different (such as when one recipient chooses to reply to only some of the original addressees).

Lawyers will need to consider the circumstances and scope of the engagement when determining the scope of the “file.” Examples of items that might fall outside the scope of the formal “file” are internal memoranda and notes generated primarily for a lawyer’s own purposes in working on the client’s problem.¹³ Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client’s file.

Court and ethics opinions from other jurisdictions have followed two basic approaches in attempting to categorize client files for purposes of determining client rights of access or possession:

- The majority of jurisdictions that have addressed this issue follow the “entire file” approach, concluding that the client is entitled to everything in the lawyer’s possession necessary to the continued representation of the client.¹⁴ Based on

¹³ See PBA Informal Opinion 96-157.

¹⁴ See, e.g., *In re Sage Realty Corp.*, 91 N.Y.2d 30, 35 (NY 1997) (“We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view”; lawyer should disclose documents unless it would violate duty owed to a third party or duty imposed by law; lawyer also not required to disclose “firm documents intended for internal law office review and use” such as notes regarding “tentative preliminary impressions”) (collecting cases); D.C. Bar Opinion 333 (Dec. 20, 2005) (FDIC, as successor to bank client’s interests, is entitled to “entire file”, including “all material that the client or another attorney would reasonably need to take over the representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client’s interests”; attorney not normally required to turn over administrative materials or materials completely unrelated to the substance of the representation); Restatement (Third) of The Law Governing Lawyers, § 46(2) (2000) (client should be given access to all documents relating to the representation unless substantial grounds exist to refuse); Nebraska Advisory Op. No. 2001.3 (general rule is that client is entitled to all documents provided to the attorney, all items obtained via litigation discovery, all correspondence, all notes, memos, briefs and “other matters” generated by counsel on the client’s business, but that precise contents of “file” depends on the nature of the work,

Maleski, Pennsylvania is usually identified with this majority. Even under the majority approach, however, a lawyer is entitled to exclude from the file those things that the client has no right to receive. A lawyer might have an obligation not to provide parts of the file either due to the rights of a third party, or some other legal obligation. The best example of such a document is one that relates to secret information of a litigation adversary that is disclosed to the lawyer with the understanding that the lawyer's client will not receive the information.¹⁵

- A substantial subset of the “entire file” group of jurisdictions allow other “non-substantive” items, generally those associated with law practice management, to be excluded from the “file” that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel.¹⁶
- A small minority of jurisdictions has adopted a “limited file” approach. Under this view, the client is entitled to “core” materials, such as filed pleadings, correspondence and final memoranda on issues significant to the representation.¹⁷ The remaining materials are not part of the client “file” and the client would not,

(continued...)

agreement between the client and counsel, and the particular circumstances of the case); *see also* Sylvia Stevens, “Client Files, Revisited: What Goes in Them – and Who Owns Them”, Oregon State Bar Bulletin (Jan. 2003) (majority view, giving client access to both end product and lawyer work product and other contents of the file, including electronic documents, is the more sound view); New Hampshire Bar Association Practical Ethics Article (Dec. 1998) (“The Ethics Committee continues to believe that the majority view [giving the client access to the entire file] is the proper view”; rejecting notion that counsel can create a separate “risk management file” to segregate materials that otherwise would be in client file and open to client access); Colorado Ethics Op. 104 (April 17, 1999) (adopting majority view that “entire file” is available to client but stating that “internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product”, and observing that whether client is entitled to personal attorney notes will depend on circumstances, and that redaction or summarization might be appropriate).

¹⁵ *See, e.g.*, Utah State Bar Ethics Advisory Opinion No. 06-04 (Dec. 8, 2006) (discussing circumstances under which a lawyer in a criminal defense context could potentially withhold information from a client, even though requested and part of client’s file).

¹⁶ *See, e.g.*, Maine Ethics Op. No. 187 (Nov. 5, 2004) (“attorney should deliver the client’s property and any material, not otherwise readily available to the client, that the attorney knows or has reason to know is or would be of value to the client”; generally observing that documents such as time sheets, billing records, internal case assignment and conflict check forms would not be important to client need not be delivered, but most other documents, including drafts that contain substantive information not found in later drafts, ordinarily would be important to the client); South Carolina Ethics Advisory Op. No. 92-37 (lawyer’s personal impressions of the client, and documents relating to other representations that were placed into file for potential reference, need not be made available to client).

¹⁷ *See, e.g., Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App. 1992) (client entitled to lawyer’s work product only to the extent it is reasonably necessary to the client’s understanding of the lawyer’s “end product”); Virginia Legal Ethics Op. 1690 (June 5, 1997) (“The sense of the Committee is that, absent exigent circumstances, material prejudice [to the client] does not occur simply because the successor lawyer has to create the workproduct . . . contained in the original lawyer’s files”; supporting lawyer’s ability to decline to turn over work product under some circumstances); *see also* John Allen, Focus on Prof. Resp. – Ownership of Lawyer’s Files About Client Representations Who Gets the “Original” Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (Michigan law does not support client “ownership” of the file but only a right of access to the file, which does not necessarily include “internal firm records”).

in the view of these jurisdictions, be entitled to such materials without some showing of need.

As described more fully in the following paragraphs, the Committee adheres to the majority approach with respect to client access to and possession of file materials.

C. Lawyer-Client Agreements on File Access, Possession and Copying

Given the many fact-specific issues that can arise in the context of the content of client files, rights of access to or possession of client files, and the expense of copying, storing or searching such files, the Committee believes that this is an area that can be addressed by agreement between the client and the lawyer, so long as the agreement is clearly explained and is reasonable. Several ethics authorities from other jurisdictions have observed that a written arrangement with the client can help to define the contents of the file and the circumstances of client access or possession.¹⁸ Nevertheless, it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer.

D. Cost of Collecting, Searching, Delivering and Copying Client File Documents

Client requests for file materials, or copies of file materials, can arise in at least three separate contexts: (1) during the course of representation; (2) during transfer of representation between counsel; and (3) following representation.

The Committee believes that, in each of these contexts, the cost of copying and delivering file materials, as well as the cost of compiling and delivery the actual file, should be handled according to the agreement between the lawyer and the client regarding costs. The Committee recommends making some provision for these circumstances in an engagement letter.

If the client is going to be asked to pay for a significant expense created by such a request, such as the expense of extensive electronic sorting or retrieval, the client should be consulted before the undertaking is commenced so that the client appreciates the consequences and expense of the request.

When a client seeks actual possession of the file, the lawyer may retain copies of client papers unless such retention is prohibited by law or other arrangement with the client.¹⁹

¹⁸ See, e.g., New Hampshire Bar Assoc. Ethics Comm., “Clients Are Entitled To Their Files,” Practical Ethics Article (Dec. 1998) (some documents could be excluded from the “file” if so defined in the fee agreement but exclusion of all attorney “personal notes” from the file cuts “too broad a swath;” documents needed for protection of client’s interests could not be excluded from file; lawyer must “tread carefully” and explain effect and rationale for requested agreement); Nebraska Advisory Op. No. 2001.3 (the scope of the “file” to which the client is entitled depends in part on the agreement between the client and the lawyer); see also John Allen, Focus on Prof. Resp. – Ownership of Lawyer’s Files About Client Representations Who Gets the “Original” Who Pays for the Copies?, 79 Michigan Bar J. 1062 (2000) (most difficult issues regarding the scope of the file, rights of access to the file, and allocation of copying costs can be specified in the engagement letter; providing text of suggested sample engagement letter); Nebraska Advisory Op. No. 2001.3 (engagement letters/fee agreements can specify responsibilities for file retention and copying costs, but any such terms must be reasonable and not violate Rules of Professional Conduct).

¹⁹ See Pa. R.P.C. 1.16(d) (“The lawyer may retain papers relating to the client to the extent permitted by other law.”).

However, where the client has paid for the creation of the file, the cost of the lawyer's copy should be borne by the lawyer, absent agreement to the contrary.²⁰ A trial court in Philadelphia County has held that a lawyer may retain copies of client papers, even over the client's objection.²¹

E. Recommended Approach

Due to the numerous, case-specific factors that affect the contents of the "file" and the client interests, any general statement of the rule is likely to require special consideration before it is applied. At least one commentator has attempted to set forth a proposed model statute that would require a different analysis depending upon the context in which the request for file access or possession is sought.²²

Notwithstanding the difficulty in applying any a priori rule, the Committee believes that it will be helpful to set forth a guideline. Accordingly, the Committee reconfirms that the "entire substantive file" approach is the one that best protects the client's interests while accommodating the realities of law practice. As adopted by the Committee, the recommended approach is thus:

A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client.

The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in

²⁰ *Quantitative Fin. Strategies Inc.*, 55 Pa. D. & C.4th at 282; see also PBA Informal Opinion 96-157; Philadelphia Opinion 93-22.

²¹ In *Quantitative Financial Strategies, Inc.*, the court refused to issue a writ of seizure for copies of a client's file retained by a law firm after the representation ended, where the firm returned the complete original file to the client, keeping a copy made at the firm's expense. Even so, the court stated that the copy retained by the law firm should be stored, at the law firm's expense, in an independent repository. The court further stated that the client was entitled to be notified before the firm accessed the file. The court stated that this measure would allow the client to scrutinize access to the file to prevent misuse, while at the same time protecting the law firm from unfounded claims of misuse.

²² Fred C. Zacharias, "Who Owns Work Product?", Vol. 2006 Ill. L. Rev. 127, 163-72 (2006) (setting forth proposed model statute).

response to a generalized request for access to or possession of the “file”, the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer’s personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as “restricted confidential” documents of a litigation adversary that are limited to counsel’s eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request.

So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client’s file and defines the client’s and lawyer’s right to such contents, and the cost for providing access or possession.

The Committee stresses that the touchstone for analyzing the need to provide access or possession is whether a document or other item will be useful to the client for the purpose of protecting the client’s interests. In the overwhelming majority of situations, the client – not the lawyer – will be the party with the right to decide, in the event of a dispute, whether something in the possession of the lawyer is important to the client’s own interests. Therefore, if a client makes a request for a particular item or category of items generated in the course of representing the client, ordinarily the client should be entitled to such information absent prior agreement or some other compelling reason.

F. Opening and Closing Client Files

Disputes over the contents of a lawyer’s file and rights of retention can largely be eliminated by agreements between the client and lawyer set forth in the initial engagement letter. Even after an engagement has begun, the lawyer and client are free to modify their engagement agreement to address these matters. The Committee believes that the following topics are worth considering in connection with opening and closing client files:

(1) A lawyer should consider developing a detailed file storage, management, and retention policy. Such a policy can address the return of client documents, document retention and destruction periods, document destruction methods, and "file closing letters" to clients. A lawyer’s retention policy should establish a procedure for file destruction that protects client confidentiality while ensuring complete destruction (e.g., burning, shredding, electronic shredding, etc.).

(2) A lawyer or the lawyer's assistant (with lawyer supervision when appropriate) should make the decision of how and when to destroy part or all of the file.

(3) A lawyer should consider statutes of limitations, substantive law, tolling agreements or tolling jurisprudence, the nature of the particular case and the client's particular needs when deciding to destroy a file. A dominant consideration should be the instructions and wishes of the client. In the absence of a prior agreement, the client should be consulted regarding the disposition of the file. In some cases, the lawyer may need to give consideration to the law of spoliation insofar as it would affect the client's ability to use or produce documents or data in an unrelated representation. Abandoned property or files should be handled in accordance with the statements below regarding such property.

(4) Client confidentiality obligations continue after the representation ends. File disposition or destruction should be conducted so as to protect client confidentiality.

(5) An index should be maintained regarding all files destroyed or returned to clients. Consideration should be given to permanent retention of the index and to permanent retention of copies of initial engagement letters (and any supplements or modifications), file destruction notices to clients, and client consents to destruction.

(6) The lawyer and client can consider a specific agreement for handling the client file and data in complex cases. In such situations, where client data can consume thousands of square feet of storage space or many terabytes of electronic data, special arrangements may need to be established to properly maintain, transfer or dispose of such data. In addition, in circumstances in which client property requires special handling or care, the lawyer should consider addressing such items in an engagement letter.²³

Typically, client files are closed when the representation is terminated. However, the lawyer and client are encouraged to agree to a specific file closure and retention policy at the outset of their relationship, which can be modified as necessary.

PBA Legal Ethics and Professional Responsibility Committee

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

²³ See PBA Formal Opinion 99-120.

SUGGESTED MINIMUM RETENTION PERIODS

These periods are suggested minimum retention periods only. Lawyers must be guided by the individual interests, needs or requests of their clients, any court orders applicable to the file, along with any other legal standards, such as tolling standards, that may apply.

NOTIFICATION OF PROFESSIONAL LIABILITY INSURANCE Records of required disclosures must be maintained for 6 years following termination of representation. Pa. R.C.P. 1.4(c).

CRIMINAL Retain until all appeals and post-conviction habeas periods have expired.

DIVORCE Following order of dissolution, retain until time periods for performance of any terms under court order or any settlement agreement have expired.

PERSONAL INJURY Retain until all claims against potential defendants are exhausted. Retain files containing settlements for minors until two years following attainment of age of majority.

REAL ESTATE Retain five years after closing on sale or foreclosure.

ESTATE PLANNING Retain until client's death plus probate period.

PROBATE Retain until estate is settled and all IRS audit periods expired.

IRS TAX RECORDS Retain for seven years. IRS regulations give 6 years to pursue any omission of more than 25 percent of income. Add one year for cushion.

CONTRACT LITIGATION Retain five years after satisfaction of judgment or five years after filing if not brought to trial.

BANKRUPTCY Retain five years after discharge or payment or discharge of trustee or receiver.