Advisory Opinion: 202401

Year Issued: 2024

RPC: 1.6, 1.7, 1.15A,1.16(d)

Issue: What documents does RPC 1.16(d) require a lawyer to surrender upon termination of representation?

SUMMARY

This opinion supplements Advisory Opinion 181 by addressing several categories of documents commonly found in a client file. Advisory Opinion 181 established a presumption that a client has full access to their file with limited exceptions. The format of a document – whether paper or digital, or whether handwritten, typed, texted, or voice recording – is not material to the issue whether it must be included in a file transfer. Advisory Opinion 181 directs that "the client's interests must be the lawyer's foremost concern," which means the proper focus is on the content of the document and the relevant question is whether the document might foreseeably have value in protecting the client's interests in the instant matter or a future one. When in doubt, the lawyer should provide all documents that may be useful to the client in benefiting fully from the services provided by the lawyer.

DISCUSSION

When a lawyer or client terminates representation, Rule 1.16(d) of the Washington Rules of Professional Conduct (RPC) requires the lawyer to take reasonable steps to protect the client's interests, including but not limited to, surrendering papers "to which the client is entitled." Neither that rule nor its comments elaborate on the meaning of that phrase or define the commonly used term "file." [n.1] Comment [9] adds that "a lawyer must take all reasonable steps to mitigate the consequences to the client."

Washington Advisory Opinion 181 (Asserting Possessory Lien Rights and Responding to Former Client's Request for Files), [n.2] issued in 1987 and amended in 2009, discusses the documents that a lawyer must deliver in response to a former client's request for the file. It states: "Subject to limited exceptions, this Rule obligates the lawyer to deliver the file to [sic] client." In discussing exceptions, the opinion notes that a protective order or confidentiality obligation might take precedence over the client's demand and then applies the following standard: *whether the lawyer can reasonably conclude that the withholding of particular documents would not prejudice the client*. Advisory Opinion 181 notes that "the client's interests must be the lawyer's foremost concern," and it offers the following examples of documents that might reasonably be withheld based on lack of prejudice: "drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable parties." This opinion provides guidance regarding the application of Advisory Opinion 181's standard to a broader range of documents typically associated with a lawyer's representation of a client. [n.3]

A. Documents to Which the Client Is Entitled

Clients expect to receive and lawyers should transfer at least the following types of documents: documents provided by the client, communications between the lawyer and parties outside the lawyer's firm [n.4], documents filed with a tribunal or agency (or completed but not yet filed), court orders and records, transactional documents (executed or ready for execution), corporate records, legal opinions, documents received from third parties (including but not limited to discovery [n.5] and due diligence), and third-party reports or assessments. Such documents are clearly necessary to protect the client's interests. The client is entitled to receive these documents except in certain limited instances when, as recognized in Advisory Opinion 181, the lawyer owes a superseding duty to a third-party – for example, under a court order or a confidentiality agreement. See also Washington Advisory Opinion 2211 (2011).

B. Documents to Which the Client Is Typically Entitled

Advisory Opinion 181 identified drafts, copies of research material, and certain types of notes as documents that might be withheld, but only if the lawyer reasonably concludes that withholding the documents will not prejudice the client. In evaluating whether a document may be withheld, the lawyer should – consistent with the guidance in that opinion that the client's interests must be the lawyer's "foremost concern" – ensure that the client receives all the material that would be useful in benefiting fully from the services the lawyer was engaged to provide.

Drafts. Draft documents circulated outside the lawyer's firm will be transferred as part of the lawyer's external communications. Internal drafts of documents not yet finalized will presumably have value to the client or successor counsel in minimizing both delay and cost in continued representation. With regard to internal drafts of completed documents, this opinion does not address the lawyer's ordinary practice of preserving or discarding such documents during the course of representation. [n.6] However, if the lawyer has retained such drafts in the file that has been requested, the client would generally be entitled to them. CBA Ethics Opinion 104 Surrender of File to the Client Upon Termination of Representation (Colorado 1999; revised 2018) at 8, FN 22 and FN 23; Alaska Bar Ass'n Ethics Op. 2003-3 (2003) at 3; Arizona RPC 1.16 Comment [9].

Copies of Research Material. Advisory Opinion 181 identified photocopies of research material in the client file as items that a lawyer may withhold if the lawyer reasonably concludes there is no prejudice to the client. Ordinarily, however, protecting the client's interests will entail transferring the research material that has been maintained in the client file so to avoid duplication of effort or expense and provide the client the full benefit of the lawyer's legal services. An exception is noted below in the case of research that discloses confidential information of another client.

Lawyer's Notes. A document is not excepted from transfer if it is written in the lawyer's handwriting or if it is typed but not shared with others. The client's entitlement to such a document depends on its contents. Advisory Opinion 181 identified notes containing subjective impressions, such as comments about identifiable persons, as those that might reasonably be withheld. In contrast, notes containing factual information should be included in the file transfer to ensure the client receives the full benefit of the lawyer's work. If notes contain both subjective impressions and factual information, and if the lawyer wishes to withhold the subjective impressions, the notes

should be redacted or summarized to protect both the client's and the lawyer's interests. CBA Ethics Opinion 104 Surrender of File to the Client Upon Termination of Representation (Colorado 1999, revised 2018) at 8; see also Arizona RPC 1.16 Comment [9]; Iowa Supreme Court Attorney Disciplinary Board v. Gottschalk, 729 N.W.2d 812 (2007) at 820. Finally, some notes may fall into a third category – notes made in the course of brainstorming ideas or planning tasks. Such notes, having only temporary value, need not be included in the file transfer if their value has expired. See Section E below.

Internal Email and Memos. Internal emails and memos created while performing substantive or billable work are not excepted from transfer by virtue of the fact that they have not been circulated outside the lawyer's firm. (In contrast, the client is not entitled to internal administrative documents, as discussed below.) The lawyer's evaluation of whether internal emails or memos might have value to the client must focus on their content. Generally speaking, internal documents created while working to accomplish the client's objective should be transferred to ensure the client receives the full benefit of the services agreed upon with the lawyer. Examples of such documents include, but are not limited to, summaries of conversations and consultations, deposition summaries, reports on due diligence for transactions, and memoranda regarding research or analysis of legal issues. On the other hand, emails about scheduling or filing logistics would ordinarily be considered inconsequential. See Section E below.

C. Documents to Which the Client Is Not Entitled

For convenience, a lawyer may file documents under the client's matter code even though the documents were not generated while performing substantive or billable work on the client's matter. Examples of such documents might include: reports from the lawyer's conflicts database, which may identify other clients and parties involved in the representation of other clients; intake forms and approvals; pre-engagement assessments of the client; documents regarding staffing or personnel matters; time and expense records; and draft invoices created prior to exercise of the lawyer's judgment about billing for services provided. These types of documents are generated as a matter of course in the business of running a law practice, not to accomplish the client's objective in the representation. The client is not entitled to such administrative or practice management documents. CBA Ethics Opinion 104 Surrender of File to the Client Upon Termination of Representation (Colorado 1999; revised 2018) at 7-8; Oregon Formal Op. 2017-192 (2017) at 4.

A lawyer may also, for convenience of reference, place in a client's file a copy of a memo that was prepared for another client or other material containing information relating to the representation of other clients. In this circumstance RPC 1.6 precludes the lawyer from including such material in the file transfer. Alaska Bar Ass'n Ethics Op. 2003-3 (2003) at 2; Oregon Formal Op. 2017-192 (2017) at 3-4.

From time to time a lawyer may seek an ethics consultation, such as with a colleague in the same firm, with the WSBA, or by hiring outside counsel. The purpose of such a consultation is to comply with the Rules of Professional Conduct, not to advance the client's interests. The client is not entitled to documents reflecting such a consultation. ABA Formal Op. 471 (2015) at 6; Oregon Formal Op. 2017-192 (2017) at 3-4. [n.7]

D. Issues that May Arise in Implementation of File Transfers

Charges. It is not uncommon for disputes to arise between lawyers and their former clients regarding charges involved in surrendering or transferring a file. Advisory Opinion 181 states as its summary conclusion: "in the absence of an express agreement to the contrary . . . if the lawyer wishes to retain copies [of the file] for the lawyer's use, the copies must be made at the lawyer's expense." Although the lawyer may have previously given the client copies of important documents, upon the client's first request for surrender or transfer of the file, the lawyer should provide all documents to which the client is entitled. The lawyer may charge for the first copy if an express agreement so provides and charge is reasonable. If the client subsequently requests additional copies of the file, the lawyer may require the client to pay a reasonable charge for each duplicate copy. [n.8] RPC 1.5 (b) states: *The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee* The best practice for the lawyer would be to outline the expenses for extra copies of the file at the beginning of representation in an engagement agreement. The likelihood of a dispute regarding charges associated with a file transfer might be reduced by addressing this scenario in the engagement agreement.

Editable Format. If a client requests that documents be provided in an accessible and editable electronic format, the lawyer must provide such documents as already exist in that format. The client is entitled to receive the file in the format in which it is maintained. Providing documents in an editable format is a "reasonably practicable" step the lawyer is obligated to take to protect the client's interests. RPC 1.16(d); CBA Ethics Op. 104, Surrender of File to the Client Upon Termination of Representation (Colorado 1999; revised 2018) at 5.

Surrendering a File to Former Joint Clients. When a lawyer represents multiple clients in a single engagement, the engagement agreement will typically reflect the clients' express agreement to share all information. RPC 1.7 Comment [31]. If such a joint representation terminates, each client is entitled to receive the entire file. In situations where there is a different express agreement among the clients, or where the lawyer has commingled documents from the joint representation with documents from separate representation of one of the joint clients, the lawyer will need to segregate the portions of the file to which one or more of the multiple clients is not entitled. New York State Bar Ass'n Opinion 1249 (2023).

Safeguarding the File During Transfer. As required by RPC 1.6(c) (Confidentiality) and RPC 1.15A (Safeguarding Property), the lawyer should transfer the file in a secure manner. When transmitting a physical file, the lawyer should use a delivery method that deposits the package in a safe location and permits the package to be tracked. A digital file should be secured through use of appropriate technology, such as by encryption of mobile media or requirement of credentials to access a file-sharing service.

E. Additional Observations

Neither RPC 1.16(d) nor this opinion requires a lawyer to review every document in the file to apply this standard. This opinion explains how a lawyer should approach an evaluation of individual documents or categories of documents if the lawyer wishes to transfer only the minimum number of documents required by RPC 1.16(d). For other reasons, such as maintaining positive relationships with former clients, avoiding disputes, or improving law firm efficiency, a lawyer may prefer to limit the scope of the file review and decide to transfer more documents than the Rule minimally requires.

Similarly, neither RPC 1.16(d) nor this opinion requires a lawyer to retain documents that the lawyer would not retain if the lawyer were continuing representation of the client in the matter. In other words, during the representation the lawyer may prune the file of documents that have outlived their temporary value if the client's interests do not require preservation. Alaska Bar Ass'n Ethics Op. 2003-3 at FN 3 ("[T]his opinion does not create any new duty to retain any particular document"); Arizona Op. 15-2 ("The lawyer may restrict 'the file' to documents that actually assist the lawyer in competently and diligently representing the client"); Oregon Formal Op. 2017-192 (2017) at 2 and FN 1 (a client file is "the sum total of all documents . . . that the lawyer maintained in the exercise of professional judgment for use in representing the client"); ABA Formal Op. 471 at 5 ("the lawyer must surrender . . . correspondence issued or received . . . on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy").

Endnotes

1. The scope of this opinion is limited to interpretation of the Washington Rules of Professional Conduct. Legal issues regarding ownership of property are outside its scope.

2. For a discussion of possessory lien rights, refer to Advisory Opinion 181.

3. Washington Advisory Op. 1185 (1988) applied a similar standard in the related context of file retention. It stated that "a lawyer has an obligation to determine whether anything in [sic] file may have a reasonably foreseeable benefit to the client in the future" and, if so, to retain it or return it to the client.

4. Washington Advisory Op. 181 treats documents stored electronically in the same way as paper documents. Accordingly, the written communications subject to transfer include email, voicemail recordings, and text messages as well as formal letters, if they meet the standard set forth in this opinion. Oregon Formal Op. 2017-192 (2017) at 3. See also ABA Formal Op. 471 at 5 (deliver "correspondence issued or received … on relevant issues, including email *and other electronic correspondence* … " (emphasis added).

5. This opinion does not address a criminal defendant's request for discovery, which is governed by the state rules of criminal procedure and case law. See, e.g., State v. Padgett, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018); State v. Murry, 24 Wn. App 2d 940, 523 P.3d 794 (2022). This opinion addresses documents that would normally be provided in routine transitions between counsel and a client. It does not purport to establish standards for discovery in criminal or civil litigation cases.

6. This opinion does not address documents subject to a litigation hold.

7. This opinion does not address discovery in litigation of documents relating to an ethics consultation. See VersusLaw, Inc. v Stoel Rives, LLP, 127 Wn. App. 309, 111 P.3d 866 (2005).

8. Courts in some narrow circumstances involving clients being held in custody at facilities that prohibit electronic devices have sometimes required that electronic file materials be provided to the clients concerned in paper form even if the clients were given electronic copies earlier. We do not suggest that this is a general standard outside limited circumstances. *See State v. Wallmuller*, No. 37347-9-III (Wash. Ct. App. May. 26, 2020), *Washington State Advisory Opinion 2117 and prior Footnote 5*. Note GR 14.1 (a) – "*Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate*."