

Utah Ethics Opinions

1996.

96-02. USB EAOB Opinion No. 96-02

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 96-02

Approved April 26, 1996

Issue: How long must an attorney retain a client's file after the attorney's representation of the client has been completed or terminated?

Opinion: The Utah Rules of Professional Conduct require that an attorney retain or otherwise dispose of a client's file so that all property is returned to its owner, the client's foreseeable interests are protected, and other legal and ethical requirements are met. The attorney's precise ethical obligations will vary depending upon several factors discussed below.

Discussion: Two principles should guide an attorney's disposition of a client's file upon completion of representation or termination. (fn1)

Client Property. An attorney must return all property to its owner. (fn2) What constitutes "property" is a matter addressed by other laws and rules and constitutes an issue beyond the scope of this opinion. (fn3) Generally speaking, however, a client's property is likely to include at least the material the client has given the attorney, the material the client has directed the attorney to obtain or procure and for which the client has paid, as well as that which constitutes the primary object of the representation. (fn4)

Client Interests. An attorney must dispose of a client's file so that the client's foreseeable interests are protected. (fn5) In addition to "property," as discussed above, a client is especially likely to be interested in materials related to an ongoing matter or one that might foreseeably arise in which the applicable statute of limitations has not run, especially when the materials (1) have not previously been given to the client, (2) are not readily available from other sources, or (3) are those the client reasonably expects the attorney to retain. (fn6)

The obligation to protect client interests is intimately related to discussing disposition of the client's file with the client (or with the client's legal representative, if the client is deceased or incapacitated). Such discussions should

better define the client's interests as well as the client's reasonable expectations regarding, and reliance upon, the attorney's disposition of the file. (fn7)

One method by which an attorney might discharge the obligation of protecting all foreseeable client interests is to tender the entire file to the client (or to the client's legal representative, if the client is deceased or incapacitated). (fn8) The propriety of such an offer depends upon whether the client is capable of appropriately securing or disposing of the file and whether the client reasonably expects that the attorney will continue retaining the tendered materials. Defining what must be returned to the client in such situations is the subject of other rules and opinions and lies beyond the scope of this opinion. (fn9)

Another method of protecting client interests vis-à-vis the client's file is to retain the file for as long as necessary to protect those interests. Such considerations lie within the sound judgment and discretion of the attorney. (fn10) The period of retention might depend upon numerous factors, including applicable statutes of limitations for actions that might foreseeably affect the client (including statutes that might be tolled for interested minors), the uses for which the materials might be put, and client expectations. An attorney, for example, is likely to retain probate or adoption files longer than a file related to eviction of a month-to-month tenant.

To the extent other laws or rules require an attorney to retain all or part of a client file, the attorney must comply with such requirements. (fn11) For example, Rule 1.15(a) requires the attorney to retain certain records related to the property of others for five years.

Conclusion: There is no specific time period governing retention of a client's file. The guiding principles are the ultimate return of the portions of the file that are the client's property under Rule 1.16 and the reasonable protection of the client's foreseeable legal interests.

Footnotes

1. "File," as used in this opinion, includes materials an attorney is likely to compile and produce within the course of representing a client, including correspondence, agreements, notes, legal research, evidentiary materials, and official documents.

2. Utah Rules of Professional Conduct 1.15(b) (renumbered from Rule 1.13(b) in 1995); *see also* Utah Code Ann. § 78-51-42 (1992).

3. *See, e.g.*, Utah Rules of Professional Conduct 1.16 cmt.
4. *E.g.*, ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1376 (1977) (client in trademark dispute entitled to "end-product," including certificates or other evidence of registration and related search results).
5. Utah Rules of Professional Conduct 1.16(d). "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests." *See also id.* Rules 1.1-1.3; *see, e.g.*, ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1384 (1977); N.Y. State Bar Op. 460; reported in 49 N.Y. St. B.J. 259 (1977).
6. ABA Informal Op. 1384.
7. *E.g.*, ABA Informal Op. 1384; Fla. State Bar Assoc. Op. 63-3, 1963 WL 7601, reported in Am. Bar Found. Dig. of Bar Assoc. Ethics Op. at 91 (1970); N.Y. State Bar Op. 460; N.Y. County Bar Op. 624 (1974), reported in 1975 Supp., Dig. of Bar Assoc. Ethics Op. 368 (1977).
8. Maine Bar Assoc., Op. 74, ABA/BNA Lawyers' Manual on Prof. Conduct [1986-90] 901:4203 (1986).
9. *See, e.g.*, Utah Rules of Professional Conduct 1.16 cmt; ABA Informal Op. 1376; ABA Informal Op. 1384; Wis. Bar Assoc., Memo Op. 4-78 (1979), reported in 1980 Supp., Dig. of Bar Assoc. Op., at 620; Bar Assoc. of San Francisco Op. 1989-1, ABA/BNA Lawyers' Manual on Prof. Conduct [1986-90] 901:1851 (1989); L.A. Bar Assoc. Op. 362 (1976), reported in 1980 Supp., Dig. of Bar Assoc. Op., at 73.
10. ABA Informal Op. 1384.
11. *See* Utah Rules of Professional Conduct 8.4(a)-(c).

Rule Cited:

1.16