



Client File Questions and Answers

1. To whom does the file belong – the client or the lawyer?

ER 1.16 was changed in 2003 to state explicitly that the lawyer, at the termination of representation, must “provide the client with all of the client’s documents, and all documents reflecting work performed for the client.” The 2003 change also added Comment 9:

Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client already has received one copy of them.

This Comment is unique to Arizona and is not part of the ABA Model Rules of Professional Conduct. While other jurisdictions may conclude the file belongs to the lawyer, Comment 9 makes it clear that that is not the case in Arizona.

2. Is there a rule that requires lawyers to keep client files for a specific length of time after the termination of representation?

Arizona does not have a bright-line court rule. The closest we come is Ethical Rule 1.15(a), which requires that lawyers keep “[c]omplete records of [trust] account funds and other property” for five years after termination of representation. It’s difficult to set a hard-and-fast rule for how long to keep client files because each representation or type of representation is unique.

3. I always thought lawyers had to keep client files for five years. If we don’t have a rule, where does the five years come from?

Ariz. Ethics Op. 98-07 concluded that “materials owned by the client may not be destroyed until, and if, a reasonable effort to return such property has been made and a reasonable notice of destruction has been given. After reasonable notice, such materials must be safeguarded for a period of time equal to that under Arizona law for the abandonment of personal property.” It then cited a 1991 ethics opinion and footnoted the Uniform Unclaimed Property Act, A.R.S. § 44-301 *et seq.*,

which at that time set a five-year holding period.¹

4. May I set my own retention period that deviates from the five-year standard?

Yes. With client consent and under appropriate circumstances, lawyers may establish more flexible, individualized file-retention periods. The comment to ER 1.16 provides that file-retention policies should be disclosed to the client, preferably in writing and at the inception of the relationship.

Here's a sample file-retention policy, using three years:

During the time we represent you, we will maintain a file relating to your legal matter. At the conclusion of the representation, we will give your file to you. After we give your file to you, information contained in your file will no longer be available through our firm. Take measures to protect your file. If we are unable to return your file to you at the conclusion of the representation, we will maintain your file for three years after representation ends. By signing this fee agreement you agree that your file may be destroyed after that three-year period ends.

If you have malpractice insurance, you may also need to consult with your malpractice carrier to ensure that your retention period adheres to your policy terms.

5. May I give the entire file to the client at the end of representation and not keep any files?

You could tender the file to the client. Ariz. Ethics Op. 08-02 described tendering the file as “assembling the entire file -- both paper and electronic documents and any other materials -- and delivering it to the client.” Make sure that no statute of limitations or substantive law requires you to keep the file and that surrendering the file to the client adequately protects the client's interests.

6. Do I need to preserve every document generated in the course of representing the client, so that I am able to tender at the end of the representation?

Ariz. Ethics Op. 15-02 clarified that documents that are duplicative of other documents generated or received during the representation, incidental to the representation, or not typically maintained by a working lawyer, may be purged by the lawyer and not preserved as part of the file, unless the lawyer has reason to believe that the client's interests require that these documents be preserved for eventual turning over to the client.

¹ Effective January 1, 2001, Arizona adopted the Revised Uniform Unclaimed Property Act, A.R.S. § 44-301 et seq., which currently sets forth a general three-year holding period.

7. I want to keep a copy in case I need to defend myself against a bar complaint.

If you want to keep a copy of the file for your own purposes, you bear the cost of doing so.

8. What if I've already given the client the original file and I kept a copy for myself but the client asks for a second copy?

You could ethically charge the client for the second copy. Comment 9 to ER 1.16 says that a lawyer may not charge a client for the cost of copying documents “unless the client already has received one copy of documents.” Ariz. Ethics Op. 15-02 reaffirms this by holding that a lawyer may charge a client for subsequent copies of documents that the client already received free of charge during the representation.

9. I've never had a file-retention policy and have a storage unit full of old files. May I destroy those old files?

You first need to make reasonable efforts to return the files or notify the clients that you want to destroy the files. If those reasonable efforts are not successful, then you hold the files for a period of time equal to that under the Revised Uniform Unclaimed Property Act, A.R.S. § 44-301 *et seq.*, which now generally provides a three-year holding period. Once that period ends, the files may be considered abandoned. You then review the files, as Ariz. Ethics Op. 08-02 states, “to confirm that no procedural or statutory requirements obligate [you] to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file.”

If you have malpractice insurance, you may also want to consult with your malpractice carrier to ensure compliance with your policy terms before you destroy client files.

10. Is it true that if I can't return some files or get client consent to destroy them I have to keep them indefinitely?

Ariz. Ethics Op. 98-07 identified certain files -- such as those involving estate matters -- that should be kept indefinitely if you can't get client consent to destroy them or return the files. Ariz. Ethics Op. 08-02 re-examined this conclusion and determined that those types of files eventually may be appropriately destroyed if the lawyer concludes that he or she has fulfilled all ethical obligations regarding return of property, has met all legal retention requirements, no future possibility of litigation exists, and retaining the file serves no other substantial purpose.

11. I send clients copies of documents throughout the representation. For example, when I receive or file a motion, I send it to the client; when I write a letter, I copy the client. As a result, haven't I already given the file to the client?

In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. If the lawyer furnished

contemporaneous copies of documents to his or her client during the representation, then lawyer does not act unethically by charging the client for additional copies of documents provided to the client previously. Ariz. Ethics Ops. 08-02, 15-02.

12. **May I digitize client files?**

Yes, except that if the client provided you with original or copies of documents, you can't digitize and then destroy them without the client's consent or unless it was clear that you could destroy them. For example, you couldn't digitize and then destroy an original birth certificate or the client's only copy of the birth certificate.

Conclusion

File retention may look difficult, especially for those lawyers who have kept lots of client files or original client documents such as wills. Dealing with the client file is a cost of doing business for lawyers and is an ethical and professional obligation. There may not be an easy and inexpensive solution for many of you.

But file retention *can* be straightforward:

- Adopt a file-retention policy for your office
- Get client consent to that policy when you sign up a new client
- Confirm that any documents the client provides you are for your use and can be destroyed
- Consider tendering the entire file to the client at the termination of representation
- Do not keep original client documents, such as wills and other estate-planning documents, unless you also diligently keep track of the clients to whom they belong. That way, you can return those documents if you need to, such as if you close your practice.

For more help:

- **Read Ariz. Ethics Op. 15-02 (discussion on maintaining client files and providing duplicate copies of documents to clients at the end of the representation), Ariz. Ethics Op. 08-02 (comprehensive discussion about files and file retention), and Ariz. Ethics Op. 07-02 (digitizing client files), available on the State Bar's website, www.azbar.org.**
- **Call the State Bar's ethics hotline (602-340-7284) when you have questions.**