

Frequently Asked Questions for File Retention (Updated April 27, 2017)

- QUESTION: To whom does the file belong?

ANSWER: The original file belongs to the client, cover to cover. “The client's files belong to the client, not to the attorney representing the client. The client may direct an attorney or firm to transmit the file to newly retained counsel.” *In the Matter of Cupples*, 952 S.W.2d 226, 234 (Mo banc 1997). See also, Formal Opinion 115, as amended. Upon termination of the representation, Rule 4-1.16(d) requires the lawyer to surrender papers and property to which the client is entitled.

- QUESTION: What if a client or former client asks for the file?

ANSWER: A client must be given the original file without charge within a reasonable period of time after request, “except for those items contained within the file for which the attorney has borne out-of-pocket expenses such as, but not limited to, transcripts. The attorney may retain those items until such time as he is reimbursed for the out-of-pocket expense and then they must be immediately delivered to the client.” Formal Opinion 115, as amended. “The lawyer may retain papers relating to the client to the extent permitted by other law.” Rule 4-1.16(d). “If a lawyer wishes to keep a copy of the file for his own use or protection, then the lawyer must bear the costs of copying the file.” Formal Opinion 115, as amended.

- QUESTION: May attorney work product be removed before the file is given to the client?

ANSWER: “Those items which have commonly been denominated as ‘work product’ of the attorney actually belong to the client because those are the result of services for which the client contracted.” Formal Opinion 115, as amended. *See also* Informal Opinion 980141.

- QUESTION: How long must a lawyer keep a client file?

ANSWER: Where representation was completed or terminated on or after July 1, 2016, a lawyer shall securely store a client’s file for six years after completion or termination of the representation, absent other agreement between the lawyer and client through informed consent confirmed in writing. Rule 4-1.22. *See also* Rule 4-1.0 (defining “informed consent” and “confirmed in writing.”) Where representation was completed or terminated prior to July 1, 2016, a lawyer shall

securely store a client's file for 10 years after completion or termination of the representation, absent other arrangements between the lawyer and client. Rule 4-1.22. A lawyer's obligation to maintain trust account records is governed by Rule 4-1.15(f). See rule 4-1.22 for additional file retention requirements. A lawyer's malpractice carrier may have recommendations about how long files or copies of files should be kept for other purposes.

- QUESTION: May an attorney store a file electronically?

ANSWER: Rule 4-1.22, Retaining Client Files, allows a client file, except for items of intrinsic value, to be maintained by electronic, photographic, or other media if printed copies can be produced and the records are readily accessible to the lawyer. Formal Opinion 127 permits destruction of the paper file (except for items of intrinsic value) before the expiration of the required retention period if the file is maintained electronically for the required period in accordance with the requirements in the Formal Opinion. Those requirements continue to be applicable to electronic storage of client files where the lawyer does not maintain a paper file for the file retention period.

- QUESTION: If a client requests his or her file, in what format should the file be provided to the client?

ANSWER: The client file belongs to the client. Formal Opinion 115, as amended; *In the Matter of Cupples*, 952 S.W.2d 226, 234 (Mo banc 1997). If a client requests an electronically maintained file during the file retention period, Formal Opinion 127 requires the file be "provided to the client in a manner in which the client will be able to access it using commonly used, relatively inexpensive, software and hardware Alternatively, the attorney may provide the file to the client in paper format, unless that is contrary to an agreement between the attorney and client." Upon termination of representation, Rule 4-1.16(d) requires a lawyer to take steps to the extent reasonably practicable to protect the client's interests, including surrendering papers and property to which the client is entitled. When a client requests the file in a particular format, a responding lawyer should prioritize protection of the client's interests and take reasonably practical steps to accommodate the client's format request.

- QUESTION: How should an attorney handle a closed file that has been retained longer than the file retention period required by Rule 4-1.22?

ANSWER: If the client does not request the file within the file retention period specified in Rule 4-1.22, the file shall be deemed abandoned by the client and may be destroyed in a manner that preserves client confidentiality. Rule 4-1.22 should be consulted for circumstances under which a file or portions of a file must not be destroyed, even after the retention period expires.

- QUESTION: When should a lawyer discuss file retention and destruction with a client?

ANSWER: Best practice is to discuss file retention and destruction with a client out the outset of representation and remind the client of the policy or agreement at the conclusion of the representation. Any consent by the client to early file destruction must be obtained through the client's giving of informed consent confirmed in writing. *See* Rule 4-1.22.

- QUESTION: What are items of intrinsic value?

ANSWER: Missouri's Rules of Professional Conduct do not define "items of intrinsic value." Examples may include securities; negotiable instruments; and original wills, deeds, and trust documents.

- QUESTION: How should an attorney respond to a file request when the attorney has represented two or more clients in the same matter?

ANSWER: Each of the commonly represented clients is entitled to a copy of the file upon request. The original file may not be provided to one client in response to that client's request without the informed consent, confirmed in writing of the other commonly represented clients. *See* Rule 4-1.22. If the original file becomes the subject of a dispute between the commonly represented clients, the disputed portions of the file should be handled according to the procedure in Rule 4-1.15(e). *See* Informal Opinion 2015-10; *see also* Rule 4-1.7 and Comments [18] and [29-33].

Requesting an Informal Advisory Opinion:

Missouri attorneys may request an informal advisory opinion from the Legal Ethics Counsel. Guidelines for requesting an informal advisory opinion, in writing or by telephone, are at <http://molegaethics.org/requesting-an-informal-advisory-opinion/>. The Office of Legal Ethics Counsel may be reached by telephone at 573-638-2263.