

MRPC 1.4(c)
Communication

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MRPC 1.4 should incorporate additional language addressing the ownership and copying of lawyers' files and records as paragraph (c) of the Rule:

Lawyer's Files and Records; Ownership and Copying.

- (1) A lawyer's file is owned by the lawyer maintaining the file, including any document, film, tape or other paper or electronic media. A client has the right of access to information contained in a file relating to that client's representation.
 - (2) The lawyer is entitled to the original, physical material in the file, unless the client has a special need or a pre-existing proprietary right in the original.
 - (3) When necessary for full use of a document, the client's "access" may include at least temporary custody or non-destructive use of the original document, film, tape or other paper or electronic media.
 - (4) Unless specifically agreed or required by law, the client is not entitled to the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.
 - (5) The client is responsible to pay the cost of copying and delivering copies of the file records.
 - (6) In accordance with Formal Opinion R-5, a lawyer shall have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file which belong to the client or for which the client has a need.
 - (7) Issues relating to file ownership and access, copy charges for information requests, and file destruction practices, may be described by the lawyer, and agreed by the client, in the terms of engagement or some other disclosure."
- (a) Yes.
 - (b) No.

Synopsis

There is no rule defining the duties of the lawyer, nor the rights and responsibilities of the client, regarding communicating the information in the lawyer's files, delivering file contents in response to a client request, and the allocation of cost when doing so. This Proposal will conform the legal status of, and access to, a lawyer's files to that which is already legally recognized for the files of other Michigan professionals. It will also clarify issues relating to file ownership, access, and who pays for the copies when parts of the file are provided to the client.

Supreme Court and ADB Versions

Neither the ADB nor the Supreme Court versions address ownership or copying rights of a lawyers' file or the papers therein.

Additional 1.4(c)

This proposal is needed, especially in light of new issues raised by the accelerated migration to electronic documents. It will also provide needed guidance to clients, lawyers, and the disciplinary authorities, with which these frequent disputes might be more quickly resolved. The Proposal is intended to apply to electronic as well as paper documents, and is intended to clarify these issues which frequently serve as topics for Requests for Investigation to the AGC.

Earlier Informal Ethics Opinions were incorrect in concluding that the "original" file belongs to the client, producing the exotic conclusion that the lawyer's C-drive (if the "original" is electronic only) may be the client's property. Lawyer file ownership is an issue of law, and the MRPC is a proper place for the Supreme Court to clarify the law on this topic.

This Proposal also clarifies that the file is owned by the lawyer, and the client's right is one of access to the information in the file. This is the same principle applied by Michigan law to medical records. The lawyer is entitled to the original and the client is entitled to a copy, unless the client has a special need or a pre-existing proprietary right in the original. When necessary for its full use (such as handwriting identification), the client has a right of temporary, non-destructive access to the original. The lawyer's file also includes the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work. The Client pays for the copies.

The lawyer is required to have a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file which belong to the client or for which the client has a need. This is not new, and is already required by Michigan Formal Ethics Opinion R-5. The lawyer and client are also encouraged to further define these issues in the terms of engagement or some other disclosure.