

# Liening on Clients Part II – The Client’s File

by Keith A. Call

In the last issue of the *Utah Bar Journal*, we discussed a broad array of issues relating to attorney’s liens and how they can impact the attorney–client relationship. But what about the client’s file? Is the lawyer obligated to give the entire file to the client upon termination of the attorney–client relationship, even if the client has not paid the bill?

### Short Answer

Regardless of fee payment status or other reasons for termination of the attorney–client relationship, the lawyer is required to give the “client’s file” to the client. The devil is in defining the “client’s file.”

### Longer Answer

The question is governed by Rule 1.16 of the Rules of Professional Conduct. Utah’s version of the Rule differs from the ABA Model Rule. The relevant part of ABA Model Rule 1.16(d) states: The lawyer may retain papers relating to the client to the extent permitted by other law.

In contrast, the relevant part of Utah’s Rule 1.16(d) states: The lawyer must provide, upon request, the client’s file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer’s expense. Utah R. Prof’l Conduct 1.16(d).

Comment 9 to Utah’s Rule 1.16 elaborates: “The Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client’s file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.” *Id.* R. 1.16, cmt. [9]. Thus, Utah lawyers must give the client’s file to the client upon request. Period. Lawyers have been disciplined for violating this rule.

See, e.g., *In the Matter of Discipline of Brussow*, 2012 UT 53, 286 P.3d 1246.

Utah amended its version of the Rule after the Utah Supreme Court criticized the practice of asserting a lien on the client’s file pending payment. See *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1375–76 (Utah 1996). Notably, the law firm in that case had complied with a Utah State Bar Ethics Advisory Opinion, which applied a prior version of the Rule and opined that an attorney could ethically assert a lien on papers

and documents belonging to the client. See Utah State Bar, Ethics Advisory Opinion Committee, Op. 91 (1989). In light of amendments to Utah’s Rule 1.16(d), Opinion No. 91 is no longer valid.

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An important question remains: What is the “client’s file” that must be returned? Comment 9 to Rule 1.16 partially answers this question:

It is impossible to set forth one all encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation materials such as

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pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.

An ethics opinion has elaborated, stating that "an unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d)."

Utah State Bar, Ethics Advisory Opinion Committee, Op. 06-02 (2006).

Finally, practitioners in criminal law will want to know that they may delay or withhold transmission of certain information in the client's file in the exceptional circumstance where harm to the client would likely result, or where the client may use the information to commit fraudulent or criminal conduct. Utah State Bar, Ethics Advisory Opinion Committee, Op. 06-04 (2006).

So be aware that Utah's rule for retaining liens on the client's file has changed over time and now differs from the ABA Model Rule. Most of your file probably belongs to the client and must be returned upon request. Follow Comment 9 to Rule 1.16 to determine which parts of the file you must return and which parts you may keep regardless of fee payment status.

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