

# Ethics Opinion

950221

**QUESTION PRESENTED:** Under Montana's version of Rule 1.16(d), what are some examples of "papers or materials personal to the lawyer or created or intended for internal use by the lawyer" which a lawyer may retain upon termination of representation?

**ANSWER:** On November 2, 1993 the Montana Supreme Court amended the Montana Rules of Professional Conduct to provide clearer standards regarding possession and control of client property and file materials. The amendments proposed by the State Bar and the Commission on Practice included a revised version of Rule 1.16(d) which now reads as follows:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in rule 1.8(j). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs.

"[P]apers or materials personal to the lawyer or created or intended for internal use by the lawyer" typically include informal and candid items which contain mental impressions, conclusions, opinions, or legal theories. Although not an exclusive list, such papers or materials might include the following:

1. Notes made by the attorney as preparation for drafting documents intended to have legal effect;
2. Notes taken by the attorney during witness or client interviews, except that in cases where no separate statement of the witness is taken, attorney notes of the witness interview should not be considered material personal to the lawyer or created or intended only for internal use by the lawyer;
3. Notes taken by the attorney or others in the firm while conducting a fact investigation;
4. Notes made by the lawyer in preparation for or while attending a deposition, trial, or meeting;
5. Internal notes to other members of the firm;
6. Notes and memos to the file prepared by the attorney;
7. Intraoffice communications except research memoranda.
8. "[P]apers or materials personal to the lawyer or created or intended for internal use by the lawyer" shall not include the following:
  1. Correspondence between attorney and client;
  2. Correspondence between attorney and third parties engaged in by the lawyer for the benefit of the client;
  3. All materials, paper and property furnished by the client;
  4. Finished briefs whether filed or not;
  5. Pleadings and other papers which are filed with the court, and which become part of the public record in the case;
  6. Research memoranda (the client has paid for this research and should not have to pay another attorney to duplicate the same research);
  7. All drafts, whether preliminary or final, of litigation materials, of documents intended to have legal effect, and of any other document intended to be used strategically against another party or for the direct benefit of the client.

Questions regarding what papers or materials a lawyer may retain under this Rule should be resolved in favor of delivery of papers and materials to the former client.

There is a strong feeling on the part of several members of the Committee that notes of witness interviews or taken while conducting fact investigations (items 2 and 3 in the permissible retention list) must be delivered without hesitation where there is any likelihood that they contain information not embodied in correspondence or documents which must be delivered in the foregoing examples.

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for the accuracy of any information in the linked pages. For answers to specific questions, you should consult an attorney familiar with your particular situation.