

COMMONWEALTH OF MASSACHUSETTS

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At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the seventh day of June, in the year two thousand and eighteen:

present,

<u>HON. RALPH D. GANTS</u>	)	Chief Justice
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<u>HON. BARBARA A. LENK</u>	)	
	)	
	)	
<u>HON. FRANK M. GAZIANO</u>	)	Justices
	)	
	)	
<u>HON. DAVID A. LOWY</u>	)	
	)	
	)	
<u>HON. KIMBERLY S. BUDD</u>	)	
	)	
	)	
<u>HON. ELSPETH B. CYPHER</u>	)	
	)	
	)	
<u>HON. SCOTT L. KAFKER</u>	)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby amended as follows:

- Rule 3:07           By striking the word "seven" in the third sentence of Mass. R. Prof. C. 1.5(c) and inserting in lieu thereof the following word: six
- Rule 3:07           By inserting the new Mass. R. Prof. C. 1.15A, as attached hereto.

Rule 3:07 By striking the current Mass. R. Prof. C. 1.16(e).

Rule 3:07 By striking the current Comment [10] to Mass. R. Prof. C. 1.16 and inserting in lieu thereof the following Comment [10]: Rule 1.15(c) specifies the lawyer's obligation to return funds and other property to which the client is entitled, and Rule 1.15A(b) details the lawyer's obligation to make client files available to a client or former client at the client's request.

The amendments accomplished by this order shall take effect on September 1, 2018, and shall apply only to files still in existence on that date.

ORDERED:

<u>RALPH D. GANTS</u>	)	Chief Justice
	)	
<u>BARBARA A. LENK</u>	)	
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<u>FRANK M. GAZIANO</u>	)	Justices
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<u>DAVID A. LOWY</u>	)	
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<u>KIMBERLY S. BUDD</u>	)	
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<u>ELSPETH B. CYPHER</u>	)	
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	)	
<u>SCOTT L. KAFKER</u>	)	

## **Mass. R. Prof. C. 1.15A: CLIENT FILES**

(a) For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

- (1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;
- (2) all correspondence relating to the matter, whether in physical or electronic form;
- (3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client's claims or defenses;
- (4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence;
- (5) all intrinsically valuable documents of the client; and
- (6) copies of the lawyer's work product.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records. For purposes of this Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by the lawyer's employee, agent, or consultant, and not described in subparagraphs (2), (3), (4) or (5) above. Examples of work product include without limitation legal research, closing binders, records of witness interviews, and reports of negotiations.

(b) A lawyer must make the client's file available to a client or former client within a reasonable time following the client's or former client's request for his or her file, provided however, that:

- (1) the lawyer may at the lawyer's own expense retain copies of documents turned over to the client;
- (2) the client may be required to pay (i) any copying charges for copying the material described in subparagraphs (a)(3) and (a)(6), consistent with the lawyer's actual copying cost, unless the client has already paid for such material, and (ii) the lawyer's actual cost for the delivery of the file;

(3) the lawyer is not required to turn over to the client investigatory or discovery documents for which the client is obligated to pay under the fee agreement but has not paid; and

(4) unless the lawyer and the client have entered into a contingent fee agreement, the lawyer is only required to turn over copies of the lawyer's work product for which the client has paid.

Notwithstanding anything in this paragraph (b) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.

(c) Except for materials governed by paragraphs (d), (e) and (f), a lawyer shall take reasonable measures to retain a client's file in a matter until at least six years have elapsed after completion of the matter or termination of the representation in the matter unless (i) the lawyer has transferred the file or items to the client or successor counsel, or as otherwise directed by the client, or (ii) the client agrees in writing to an alternative arrangement for the file's custody or destruction, provided, however, that files relating to the representation of a minor shall be retained until at least six years after the minor reaches the age of majority. If the client has not requested the file within six years after completion or termination of the representation or within six years after a minor reaches the age of majority, the file may be destroyed except as provided in paragraphs (d), (e), and (f) below.

(d) Intrinsically valuable documents that constitute trust property of the client must be delivered to the client as provided in Rule 1.15(c). All other intrinsically valuable documents must be appropriately safeguarded and delivered in accordance with paragraph (b) above, or retained until such time as the documents no longer possess intrinsic value. If the client cannot be found, the lawyer shall securely retain such documents or, where applicable, deliver such items to an appropriate governmental repository.

(e) A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;

(2) a criminal or other governmental investigation related to the client matter is pending or anticipated; or

(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated.

(f) Criminal defense counsel and defense counsel in delinquency cases shall retain a client's files as follows:

(1) for the life of the client if the matter resulted in a conviction and a sentence of death or life imprisonment with or without the possibility of parole; and

(2) in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client.

(g) A lawyer shall take reasonable measures to ensure that the destruction of all or any portion of a client file shall be carried out in a manner consistent with all applicable confidentiality obligations.

## Comments

[1] In order to represent clients competently in a matter, lawyers customarily maintain a file of papers and electronically stored information that will in the lawyers' judgment aid in the representation. This Rule governs lawyers' obligations with respect to the custody and destruction of client files. A lawyer's obligations with respect to client funds are governed by Rule 1.15 and, with specific respect to trust property such as jewelry and other valuables entrusted to the lawyer by the client, by Rule 1.15(b)(4). Lawyers are encouraged to address disposition of client files in the written engagement letter required by Rule 1.5(b)(1) and, in instances where particular arrangements for disposition or transfer have not been made, in the lawyer's final communication to the client at the conclusion of a matter.

[2] The client's file in a given matter consists of those items that must be made available upon the client's direction to the client or successor counsel to provide a reasonably complete record of the services provided and, if the matter is unfinished, to give successor counsel what is needed to complete the representation. Thus, the client file for a litigation matter would include the pleadings and court filings, rulings and other documents issued by the court, all correspondence including with the client and opposing counsel, deposition transcripts, documents produced or received in discovery (subject to applicable protective orders), investigatory materials and expert reports, the trial record, memorialized legal research and analysis, and any settlement documents. In a case with a limited number of parties, the pleadings would include all the material pleadings. In a large case with many parties, such as a large bankruptcy proceeding, the pleadings would only include those directly relevant to the client's claims and defenses. The client file for a transactional matter would include all correspondence, including with the client and counterparties and the exchange of drafts, contracts and other documents establishing the terms of the transaction (often gathered into a "closing binder"), and memorialized legal research and analysis.

[3] Multiple copies or drafts of the same document ordinarily do not constitute part of the client's file unless the matter is unfinished, and the client and successor counsel must have the drafts to complete the representation. Similarly, a lawyer's personal notes ordinarily do not constitute part of the client's file unless the notes are the only record of a witness interview, a settlement negotiation, a meeting with regulators or prosecutors, or some similar event. Once a document is finalized or personal notes of an event are memorialized, this Rule does not require preservation of the drafts or notes. However, documents that are part of the client's file at the time of a request for the file must thereafter be preserved and produced. Except as provided in Comment 4, this Rule does not require preservation of any physical documents that have been converted to electronic form.

[4] Unless other applicable law requires a particular document to be physically preserved for its legal effectiveness, a lawyer may maintain a client's file in electronic form, provided, however, that, for documents stored only in electronic form, the lawyer must make reasonable efforts to store such electronic files in a form that can be read with available technology for any period during which the file must be retained. If the original form of the document is important, however, it should not be destroyed without the client's permission.

[5] The client's file does not include a lawyer's administrative files such as conflict checks, billing and accounting records, and communications within a law firm concerning matters of administration such as account creation, billing and collections, logistics, and the assignment and evaluation of personnel assigned to the matter. Such documents may be subject to discovery in a dispute concerning the representation, but ordinarily do not need to be provided to the client or successor counsel at the client's direction.

[6] Rule 1.15A does not supersede obligations imposed by court order, rules of a tribunal, or other law including discovery rules in civil cases, subpoenas and other mandatory process, and the law of spoliation and obstruction of justice. Similarly, Rule 1.15A does not supersede specific retention requirements imposed by other rules of professional conduct. *See, e.g.*, Rule 1.5(c). The maintenance of records required for trust property and trust accounts is governed exclusively by Rule 1.15. A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[7] Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable documents under paragraph (d), or if the lawyer has agreed otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. *See* Rule 1.6(c). A lawyer may destroy a client's file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.

[8] The lawyer's obligations under this Rule to retain and return files to the client are not excused because the lawyer forwarded papers to the client from time to time during the course of the representation.

[9] Nothing in this Rule is intended to mandate that a lawyer destroy a file. A lawyer appropriately may decide to retain certain types or portions of files, or portions of files for longer than six years, such as files relating to a structured settlement or other matters creating long-term obligations to or by the client. Unless the lawyer and the client have otherwise agreed, a lawyer may retain a copy of the file or any document in the file.