

Nebraska Ethics Advisory Opinion for Lawyers
No. 01-3

AN ATTORNEY HAS AN ETHICAL OBLIGATION, UPON DEMAND, TO PROMPTLY PROVIDE A CLIENT WITH THE CONTENTS OF THE FILE BELONGING TO THE CLIENT. WHAT THE CLIENT MAY BE ENTITLED TO RECEIVE DEPENDS UPON THE NATURE OF THE WORK, THE AGREEMENT BETWEEN THE ATTORNEY AND CLIENT AND THE PARTICULAR CIRCUMSTANCES OF THE CASE. AS A GENERAL RULE, HOWEVER, A CLIENT IS ENTITLED TO:

1. ALL DOCUMENTS PROVIDED TO THE ATTORNEY;
2. ALL DOCUMENTS OR RESPONSES ACQUIRED BY COUNSEL THROUGH THE DISCOVERY PROCESS;
3. ALL CORRESPONDENCE IN PURSUIT OF THE CLIENT'S INTEREST;
4. ALL NOTES, MEMORANDA, BRIEFS, MEMOS AND OTHER MATTERS GENERATED BY COUNSEL BEARING ON THE CLIENT'S BUSINESS AND RESULTING FROM THE EMPLOYMENT OF COUNSEL.

THOUGH COUNSEL MAY RETAIN COPIES OF THE FILE, ABSENT AN AGREEMENT FROM CLIENT, SUCH COPIES MUST BE MADE AT COUNSEL'S EXPENSE.

INTRODUCTION

An attorney has requested whether or not the file of the client must be surrendered upon request in its entirety or partially and what charges counsel can seek for the service of providing the file.

STATEMENT OF FACTS

An attorney represented client in certain matters through 1994. Client then went to prison. The attorney next represented client's spouse in certain matters. Client's spouse then sued the attorney for malpractice. The client has requested copies of all of his files. We note that there is no lien

for unpaid services on the file.

STATEMENT OF ISSUES

Does an attorney have a duty under the Code of Professional Responsibility to release to a client the client's files with regard to matters handled by the attorney upon the request of the client, and what charges, if any, may be imposed for copying and delivering the file?

STATEMENT OF APPLICABLE CANON & DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS

- DR 2-110(A)(2) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
- DR 9-102(B)(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.
- DR 5-103(A)(1)(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that he or she may:
- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses.

DISCUSSION

The following is addressed only to the ethical consideration of a lawyer's duty to provide the client's file to the client upon request. Items not required to be surrendered that may have been generated as a part of the attorney's handling of the matters when suit is filed against the attorney are not addressed here, as such are matters subject to discovery rules and court orders.

As a general proposition, attorneys are obligated to turn over a client's files to a client or former client upon request. The issue of what constitutes a client's "files" is not always easily determined, however. The "file" may exist in many forms, may be physically stored in different folders, and the

folders might contain documents which are related to the file but which are not a part of the actual file. Further, the file maintained by the attorney may include documents to which the client is not entitled. Disciplinary Rules 2-110(A)(2) and 9-102(B)(4) set forth a broad duty to deliver to the client papers and property to which the client is entitled. The rule does not define precisely what papers and property must be returned. Therefore, in fulfilling this ethical duty, an attorney must make a determination as to what papers and property the client is entitled to receive.

The American Bar Association Committee on Ethics and Professional Responsibility, in responding to an inquiry about a file in the possession of trademark counsel pertaining to a trademark of a client, advised that counsel must return all of the material supplied by the client to the attorney. ABA. Informal Opinion 1376 (1977). The lawyer must also deliver the "end product" - the certificates or other evidence but, the lawyer need not deliver internal notes and memos generated primarily for his or her own purposes in working on the client's problem. *Id.* The committee acknowledged that between these extremes are the items that create uncertainty; but stated that the ethical principles involved are simple - the client is entitled to receive what he or she has paid for and to the return of what he or she has delivered to the lawyer. *id.*

In Massachusetts, Disciplinary Rule 2-110(A) was amended, effective January 1, 1992, to provide specific guidance by rules as to what a client is entitled to receive. In other states guidance is provided through ethics opinions. A Michigan ethics committee has advised that a lawyer must surrender to the client or substitute counsel the attorney's work product for which the client is obligated to pay a fee; including, but not limited to, all file interview notes, research notes, and unfiled but prepared pleadings. State Bar of Michigan, Op. C1-926 (1993). In Georgia, the duty to release client files and papers includes work product created during billable time and excludes other documents such as time records. State Bar of Georgia, Op. 87-5 (1988).

The physical file maintained by an attorney may include documents to which the client is not entitled. If, for example, the attorney wrote a memorandum in Case A that dealt with a particular issue of law that was also germane to Case B, it would not be uncommon for the attorney to place a copy of that memorandum in the file of Case B. The client has no right to the memorandum in Case B if the file were surrendered. Cf. OSB Legal Ethics Op Nos. 1991-96, 1991-81. Also, personal notes made by the attorney which do not bear upon the strength or weakness of the client's position in a matter need not be produced to the client.

The Alaska Bar Association issued an opinion holding that an attorney may retain a copy of the client's file since the information in the file may be needed in the event of a later dispute between the attorney and the client. The attorney should not charge for the cost of copying the file because the client has no interest in the attorney retaining the copies. Any copies of such documents must be made at the attorney's expense unless the lawyer disclosed to the client at the onset of representation that the fee agreement was for the client to pay for copying charges. Otherwise, no copy charges should be applied to the client. Alaska Bar Ethics Opinion No. 95-6 (1995).

We note that in the course of representing a client, an attorney has an obligation to keep a client informed of the progress of the matter involved. If, during the course of representation, the attorney provides documents to the client, and the client chooses to discard them, and then later requests additional copies, the attorney is not obligated to provide copies at no charge to the client, unless the contract defining the relationship between the attorney and the client creates or anticipates such an obligation.

We further note that the intent of the rule is to insure, to the fullest extent possible, that the client's legal matters are properly handled, that there is continuity in the file as far as representation of the client is concerned, and that the client does not suffer any action detrimental to his or her interests by reason of the client's inability to access the file. If counsel wishes to copy the file materials surrendered, he or she may do so, but may not charge the client for such service, absent an agreement from the client.

CONCLUSION

An attorney has an ethical obligation, upon demand, to promptly provide a client with the contents of the file belonging to the client. What the client may be entitled to receive depends upon the nature of the work, the agreement between the attorney and client and the particular circumstances of the case. As a general rule, however, a client is entitled to:

1. All documents provided to the
2. All documents or responses
3. All correspondence in pursuit of

the client's interest;

4. All notes, memoranda, briefs, memos and other matters generated by counsel bearing on the client's business and resulting from the employment of counsel.

Though counsel may retain copies of the file, absent an agreement from client, such copies must be made at counsel's expense.

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