

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 08-05

The Committee received a request for an opinion seeking advice if the Requesting Attorney is required by North Dakota Rule of Professional Conduct 1.19 to pack and pay postage on a client's file when representation has been terminated and all appeal periods have run. Also, may the former client be required to bring his own paper and copy the files under supervision of the Requesting Attorney's assistant?

ASSUMED FACTS

The Requesting Attorney was retained on an immigration action and had represented his client at the Ninth Circuit Court of Appeals and in Immigration Court in Montana. The Requesting Attorney resides in Fargo, North Dakota, and the client resides in Great Falls, Montana. Following completion of the action, in which his client owed him in excess of \$9000 in legal fees, the client requested a copy of his file. The Requesting Attorney responded to the client that the file is available at the Requesting Attorney's office and the client can pick up the file whenever the client wishes. Also, the Requesting Attorney would not charge the former client for cost of the copier or toner, but would request that the client provide their own paper. The copying of the file would be completed under the supervision of the Requesting Attorney's assistant.

The following questions were asked of the committee:

1. Is the Requesting Attorney required pack and ship the file back to the client when the Requesting Attorney is no longer being retained or is the attorney only required to make the file ready for the client for retrieval at the Requesting Attorney's office?

2. May the former client be required to bring their own paper and copy the files under supervision of the Requesting Attorney's assistant?

DISCUSSION

Disputes regarding the return of a client's file have been an issue for quite some time.

Upon termination of representation, an attorney has a duty to provide papers and property to the client. N.D.R. Prof. Conduct 1.16(e) provides that:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client only to the extent permitted by N.D.R. Prof. Conduct 1.19.

The comments that immediately follow N.D.R. Prof. Conduct 1.16(e) also provide that the "lawyer must take all reasonable steps to mitigate the consequences to the client."

Comments, N.D.R. Prof. Conduct 1.16(e) (2006). Furthermore, N.D.R. Prof. Conduct 1.15(d) provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive."

The question remains as to which documents the client is entitled after termination of representation. Rule 1.19 was enacted to provide guidance regarding items to which a client is entitled and questions associated with lawyer and client issues regarding files and property.

Comments, N.D.R. Prof. Conduct 1.19 (2006). N.D.R. Prof. Conduct 1.19(b) defines what constitutes a client's files, papers or property:

1. All papers and property provided by the client to the lawyer other than as payment.
2. All pleadings, motions, discovery, memoranda, and other litigation materials which have been executed and served or filed regardless whether the client has paid the lawyer for drafting and serving and/or filing the document(s).
3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
4. All items of potential evidentiary value regardless of whether the client has reimbursed the lawyer for any costs or expenses which the lawyer has advanced,

including depositions, expert opinions and statements, business records, and witness statements.

Items which are not client's files, papers, or property are defined in N.D.R. Prof. Conduct 1.19(e)

and include:

1. Pleadings, discovery, motion papers, memoranda, and correspondence which have been drafted but not filed, sent, or served, unless the client has already paid for the drafting and creating of the item(s).
2. Drafted but unexecuted or undelivered estate plans, title opinions, contracts, documents regarding the formation, operation, dissociation, dissolution, or termination of business or other associations or governing the relationship of those involved in them, or any unexpected or undelivered document, unless the client has already paid for the drafting and preparation of the item(s).
3. Any lawyer work product not expressly defined as client files, papers, or property by paragraph (b).

Both Rule 1.15, which governs turning over papers during representation, and Rule 1.16, which governs turning over papers when declining or terminating representation, "impose an obligation to deliver or surrender items to which the prospective client is entitled." Comments, N.D.R. Prof. Conduct 1.19(1) (2006).

While the above cited rule does not provide any guidance as to whether the Requesting Attorney is required to pack and ship the file to the client, the issue was addressed in Disciplinary Board v. Anseth, 1997 ND 66, 562 N.W.2d 385. In Anseth, after termination of employment, an attorney practicing in Williston, North Dakota had failed to turn over to the client also located in Williston, North Dakota the original files upon termination of representation. Id. at ¶¶ 2-5. The Court stated that a "lawyer who has withdrawn or has been discharged by the client has a duty to surrender promptly all papers and other property to which the client is entitled." Id. at ¶ 23 (quoting Ann. Model Rules of Prof'l Conduct R. 1.16(d) ann. at 256 (3d ed. 1996)). However, the Court continued by stating that the attorney did not have to bear the cost of returning the documents, the attorney should just have them readily available for pick up by the client. Id. (citing Maine State Bar Ass'n, Prof'l Ethics Comm'n, Op.120 (1991), which states "since the transfer of the file would ordinarily be for the benefit of the client, it

seems reasonable to require the client to assume the cost of mailing or other form of delivery if he is unwilling to pick (the file) up at the attorneys' office.”).

Anseth was decided in 1997, six years prior to the adoption of N.D.R. Prof. Conduct 1.19. Comment 1 of N.D.R. Prof. Conduct 1.19 provides, “Rule 1.15 governing turning over papers during the representation, and Rule 1.16 governing turning over papers when declining or termination representation, impose an obligation to deliver or surrender items to which the client or prospective client is entitled.” Although the comments to Rule 1.19 provide that an obligation is made to surrender or deliver the items to which the former client is entitled, it is unclear what impact, if any, Rule 1.19 would have on a situation similar to the one posed by Anseth.

In 1999, the Ethics Committee of the Colorado Bar Association took a different stance on surrendering papers to the client upon termination of representation. Colorado RPC 1.16(d) provides that upon termination of employment, a lawyer shall surrender papers and property to which the client is entitled. The committee further states that the use of the term “surrender” is intentional and establishes an affirmative obligation to relinquish possession after demand.

In the matter involving the Requesting Attorney, the Requesting Attorney has a duty to turn over the file to the client and make the file readily available for the client's retrieval as outlined by N.D.R. Prof. Conduct 1.16. The Requesting Attorney is also required to “promptly deliver to the client” property that the client is entitled to receive. N.D. R. Prof. Conduct 1.15(b) (2006). However, as provided in Anseth, surrendering or delivering to the client his or her file does not entail the cost of shipping. But note that both the client and attorney in Anseth resided in the same city in North Dakota while the Requesting Attorney and client reside approximately 700 miles apart. Due to the distance between the requesting attorney and his client, a question arises whether the Requesting Attorney should ship the file to his client. The Committee is not in a position to determine whether a particular distance would necessitate the mailing of the file.

The second issue involves whether the Requesting Attorney may require the client to bring his own paper and copy the files under the supervision of Requesting Attorney's assistant. In this case, the client has requested a copy of the file from the Requesting Attorney. The original file as outlined in Rule 1.19(b) should be turned over to the client. If the Requesting Attorney wishes to make copies of the file, he or she may do so, but the client should not be charged for the copies. N.D.R. Prof. Conduct 1.19(f) provides that:

In connection with the return of any file or paper, including client files or papers, a lawyer may make copies for the retention by the lawyer. The client may not be charged for the copies.

Additionally, N.D. R. Prof. Conduct 1.19(c) provides that a "lawyer may not condition the return of client files, papers, or property on payment of copying costs." The Requesting Attorney is seeking to split the cost of copies into various parts and charge the client for the cost of the paper. As provided by N.D. R. Prof. Conduct 1.19(c) and (f), the client should not be charged for the copies made by the Requesting Attorney.

If the client has requested a copy of their file, the Requesting Attorney may only charge for the cost of copying for the client, or electronically retrieving for the client, the client's files, papers, and property, when the client has, prior to termination when the client has previously agreed to in writing to reimburse the lawyer for the copying and retrieval expenses. N.D.R. Prof. Conduct 1.19(d) (2006). However, this requirement under N.D.R. Prof. Conduct 1.19(d) is only applicable where the attorney has not previously provided a copy to the client.

CONCLUSION

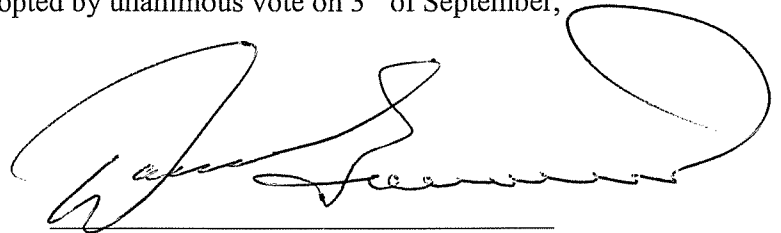
The Requesting Attorney shall surrender and deliver the client's file to the client if requested by the client upon termination of representation as provided under N.D.R. Prof. Conduct 1.19(b) and (e). However, the Requesting Attorney is not under a responsibility to pack or ship the file to the client.

If the client requests a copy of their file, unless a copy has been previously provided to the client, the Requesting Attorney may charge for a copy of the file if the client has previously agreed in writing to reimburse the client pursuant to N.D.R. Prof. Conduct 1.19(d).

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Dale Rivard and adopted by unanimous vote on 3rd of September, 2008.

A handwritten signature in black ink, appearing to read "Dann E. Greenwood", written over a horizontal line.

Dann E. Greenwood, Chairman