By Donald R. Lundberg

File, file, who's got the file? Client rights to return of property

Clients often complain to the Disciplinary Commission that their lawyer won't give them their file. What is a client entitled to and when?

What is 'the file?'

Lawyers possess many different kinds of property in connection with legal representations. I can think of at least five categories of materials:

1. Property the client provides in connection with a representation: documents, like an insurance policy, or a will; or tangible property, like jewelry. This property always belongs to the client or, in some cases, a third party. Rule of Professional Conduct 1.15 imposes on the lawyer a duty to keep this property safe for the client and requires it to be identified and appropriately safeguarded. Furthermore, records of client funds and other property must be preserved for five years after representation ends. (Client funds go into a trust account and will not be addressed further in this article.) Client property must be secured in a manner appropriate to its value. Thus, property with intrinsic value, like jewelry, should be kept in a safe or a safety deposit box. Original documents should be stored where they will not get lost or damaged. The lawyer should ask whether it is even necessary to maintain possession of the property at all. If it is not needed to carry out the representation, perhaps a photocopy or other record will suffice, and the original can be returned to the client for safekeeping.

2. Property the lawyer purchased with client funds, like a transcript. The lawyer will certainly want to keep it to carry out the representation, but it was purchased with client funds. It belongs to the client and should be treated with the same duty of care that Prof. Cond. R. 1.15 requires.

3. Work product that results from the lawyer's work for the client: final work product (a deed, a contract or an appellate brief); or intermediate work product (correspondence with opposing counsel, interrogatories or a complaint) – essentially, anything provided to someone outside the professional relationship.

4. Work that is strictly internal to the lawyer's office – such as memoranda, notes of witness interviews, preliminary document drafts – things not normally shared outside the office, often including the client.

5. Material that comes to the lawyer from third parties during the representation, like the fruits of discovery.

An ethical imperative

Who ordinarily possesses these various types of property is usually not a controversial issue. Either the lawyer doesn't need the property, so the client keeps it, or the lawyer needs it to carry out the representation, so the lawyer holds it. The rub often comes when the representation terminates. What are the client's file rights?

The Rules of Professional Conduct give some guidance: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... 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 to the extent permitted by other law." Prof. Cond. R. 1.16(d).

Note that the duty to return client property does not require a client request or demand. Beyond that, though, the rule basically says that the client is entitled to receive that which the client is entitled to receive. It acknowledges that there may be exceptions, but it doesn't describe them. In both instances, we are referred to external law to give the rule substance.

Statutory duties

External law is only modestly helpful. I.C. §33-43-1-9 states:

> If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

Unlike the obligation in Rule 1.16(d), this statutory duty is triggered by a client demand.

With the exception of the *McKim* case, discussed below, this provision has not been construed by the courts as it applies to papers, rather than money. It requires lawyers to turn over to their clients all papers received *from* them and all papers received *for* them.

In *McKim v. State*, 528 N.E.2d 484 (Ind. Ct. App. 1988), the Court of Appeals stated:

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> During the course of his representation, an attorney may generate and receive a vast amount and variety of documentation on behalf of his client. There are certainly a number of documents within the file pertaining to the criminal prosecution to which McKim is entitled. It was within the trial court's discretion insofar as determining which documents within the file this included. We do not reach this question, however, because neither party chose to address it in their briefs.

Id. at 486.

Referring to Rule of Professional Conduct 1.16(d), the *McKim* court stated:

> In light of this rule we perceive that the granting of a motion to compel the production of documents which an attorney has received for a client in the course of his employment is not discretionary with the trial court. Upon motion by the party represented, the trial court shall require an attorney to deliver all papers he obtained pertaining to the representation to which the client is entitled. Nothing within the language of I.C. §34-1-60-10 [now I.C. §33-43-1-9] indicates that the delivery of such documents is conditioned upon the prepayment of any expenses which may be associated with preparing, copying, and mailing them to the client.

528 N.E.2d at 485-86. *See also, Johnson v. State,* 726 N.E.2d 222 (Ind. Ct. App. 2002).

So there you have it. The client is entitled to receive that which the client is entitled to receive, but the trial court should hold a hearing to figure out what that is.

Giving it up

So what is the client entitled to receive? By statute, the lawyer must return everything the client provided and everything that the lawyer received from third parties "for" the client during the representation. This includes, for example, depositions, discovery materials and the like.

The lawyer's file will also include other documents, such as the lawyer's notations, document drafts and copies of pleadings that the lawyer neither received from the client nor from third parties for the client. I.C. §33-43-1-9 is silent about these documents. In a discipline case, *Matter of Schneider,* 710 N.E.2d 178, 182 (Ind. 1999), the Supreme Court held that it was unreasonable for a lawyer to bill a client for work done for, but not provided to, the client. If the lawyer wants to be paid for the work, the lawyer must be willing to provide it to the client.

There is abundant law from other jurisdictions about the client's right to lawyer-generated documents. A leading case that surveyed the law in other jurisdictions is *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997). A 2007 case on point tracks *Sage Realty* and the Restatement (Third) of the Law Governing Lawyers (2000). *Iowa Supreme Court Attorney Discipline Board v. Gottschalk,* 729 N.W.2d 812, 819 (Iowa 2007).

The Restatement's approach, reflecting the majority of jurisdictions to have addressed the issue, is that, subject to narrow exceptions, the client is entitled to the entire file, including "such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs." Restatement §46(3). The client's right to the file "extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer ..." *Id.,* cmt. c. According to the Restatement, the primary exception allows a lawyer to refuse to disclose certain law-firm documents reasonably intended only for internal review. The minority view is that the client is

entitled only to the end product of the lawyer's work, not internal or preliminary documents.

Absent clear guidance, Indiana lawyers would be wise to follow the Restatement and relinquish the entire file excepting only purely internal firm documents concerning the representation. This is the safer course because it is more protective of client interests.

Sometimes you gotta pay to play

It doesn't necessarily follow that the client's right to materials means the lawyer must always produce them for free. Generally, property that came from the client or was purchased with the client's funds should be provided at no cost, except for the cost of delivery. However, the lawyer should be able to retain a copy of those materials at the lawyer's expense in the event there is a malpractice claim or a disciplinary complaint. Presumptively, any other documents the client is entitled to receive should also be made available without charging the client for the cost of reproduction. If the lawyer wants to retain copies, she should do so at her own expense.

May a lawyer contract with the client to charge for the cost of providing a file copy? For the case that generates many boxes of documents, the cost of reproduction could be significant.

It is standard practice for lawyers to have their clients agree to pay for copying costs. For example, when a lawyer sends a copy of a brief to a client, the client will often be charged for the cost of reproducing that copy (as well as the copies that were filed with the court and the copy that was retained in the lawyer's file) and the cost of mailing it to the client. There is no reason why it should be any different when the client wants the entire file at the conclusion of the representation. The point is that absent an agreement to the contrary, the file should be returned to the client with the lawyer bearing the cost of retaining a copy of the items produced for the client as he thinks prudent. If the lawyer wants to handle it another way, she should include a provision imposing that cost on the client in the initial fee agreement. Note that Rule 1.5(b) requires lawyers to tell their clients the basis or rate of their fees *and* expenses at the outset of representation.

In keeping with *McKim*, even if lawyers may contractually charge their clients for reproducing the file, they should not make payment of those costs a precondition to releasing the file to the client.

Getting rid of files

The fact that the lawyer keeps the client's file after representation ends does not mean that the file materials cease to be client property. When the lawyer has no need to continue holding it, she should give the client the right to claim the file, with a clear warning that it will be destroyed unless claimed within a reasonable period of time. This is also a good topic to cover in a letter that concludes a representation.

With the exception of records dealing with client funds and property, which must be retained for five years, the rules are silent about how long lawyers must retain client files. *See* Prof. Cond. R. 1.15(a). There is no magic period for how long other file materials should be retained. The best approach is for the lawyer to seek guidance from his legal malpractice carrier.

Attorney retaining liens

There is one major exception to all of the above. In Indiana, and most jurisdictions, a common-law retaining lien permits lawyers to retain client property as a means of securing payment of unpaid fees. It is a retaining lien because it is not foreclosable. *Summit Account and Computer Service, Inc. v. RJH of Florida, Inc.*, 690 N.E.2d 723, 727 (Ind. Ct. App. 1998). It is generally recognized that the client has the

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right to post sufficient alternate security in exchange for release of the property. *Bennett v. NSR, Inc.*, 553 N.E.2d 881, 883 (Ind. Ct. App. 1990).

Indiana law on retaining liens is not well developed. In other jurisdictions, case law has created certain public policy exceptions to asserting liens on client files. The most common is in criminal cases because it violates public policy for a criminal defense lawyer to assert a retaining lien against file materials that might be important to the defense of the case.

The Indiana Supreme Court has discussed retaining liens on only one occasion: *State ex rel. Shannon v. Hendricks Circuit Court*, 183 N.E.2d 331, 333 (Ind. 1962). Several more recent Court of Appeals cases discuss them, *e.g., Four Winds, LLC v. Smith & DeBonis, LLC,* 884 N.E.2d 70 (Ind. Ct. App. 2006); *Stewart & Irwin v. Johnson Realty, Inc.,* 625 N.E.2d 1305 (Ind. Ct. App. 1993) and *Bennett, supra.*

I warned lawyers in my May 2007 column that claiming a retaining lien is a particularly good way to enrage a former client and perhaps provoke a lawsuit. Even so, a lawyer has the right to this remedy, even if it is not always prudent. If a lawyer is going to assert a retaining lien against client papers or property, she should do so explicitly by informing the client of the lien immediately upon termination of the representation. By the time the client complains that the lawyer did not promptly return the file, it's usually too late to claim a lien.

Conclusion

Clients who pay good money for legal help don't understand when their lawyers keep file materials from them. They're right – it isn't fair. It's bad client relations and ethically suspect to boot. Give the file up when the client asks for it, and do it promptly. ⚖

The views expressed do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.