

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2003-3**

**Documents to be Included in File Returned to Client on Termination
of Services**

The Committee has been asked the following question: A client decides to discharge his lawyer and asks the lawyer to provide a copy of the lawyer's file so that the client can take the file to a new lawyer. The lawyer's file contains original documents from the client, copies of pleadings and correspondence, investigator's reports, notes of the lawyer's conversations with opposing counsel, witnesses, and experts, sample pleadings from other cases, and notes by the lawyer regarding the lawyer's impression of the client and the client's often contentious communications with the lawyer. Must the lawyer provide a copy of everything in the file to the client?

Discussion

Rule 1.16(d) governs the lawyer's obligations to the client upon termination of the representation:

(d) 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

ALASKA R. PROFESSIONAL CONDUCT 1.16(d) (emphasis added). The comment to the model rule provides:

Assisting the Client Upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Alaska law provides for a statutory attorney's lien. *See* AS 34.35.430. Thus, a lawyer who has not been paid for his or her services may be entitled to assert a lien against the file. However, discussed in Ethics Opinion No. 95-6, the lawyer's interest in getting paid must be subordinate to the rights of the client. This opinion does not offer further elaboration upon the retention of papers as security. Rather, this opinion addresses the question of what items to return to the client when a transfer occurs unhampered by considerations of retaining liens.

The Committee concludes that the attorney must presumptively accord the client access to the entire file unless substantial grounds exist to refuse. Thus, addressing the items referenced in the question presented, in most instances the lawyer is required to accord access to original documents from the client, copies of pleadings and correspondence, investigator's reports, and notes of conversations with opposing counsel, witnesses and experts.

There are instances, however, where the physical file maintained by the lawyer will include documents which the lawyer need not disclose. For instance, a lawyer should not be required to disclose documents violating a duty of nondisclosure owed to a third party, or otherwise imposed by law. If the lawyer 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 lawyer to place a copy of that memorandum in the Case B file. Since the memorandum was not prepared in whole or in part for the client in Case B, that client has no right to receive that document. Indeed, the lawyer might well be violating a duty of confidentiality or secrecy owed to the client in Case A if the memorandum were surrendered to the client in Case B.

Additionally, access may be denied to documents intended for internal law office review and use. This might include, for example, preliminary impressions of the legal or factual issues presented in the representation, that are recorded primarily for the purpose of giving internal direction to staff. Access might also be denied to notes relating to the lawyer's impression of the client. These documents may be withheld unless to do so would significantly prejudice the client.

The Committee declines to join a minority of legal ethics authorities distinguishing between the "end product" of an attorney's services and the attorney's "work product" leading to the creation of those end product documents.¹ "End product," under the minority view, includes such items

¹ *See, e.g.*, Alabama State Bar, formal Ethics Opn. RO-86-02; Illinois State Bar Assn., Opn. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 [1994].

as pleadings actually filed in an action, correspondence sent or received by the attorney, or other papers exposed to public light by the attorney to further the client's interest. The attorney's "work product," to which the client is not entitled access under the minority view, includes all preliminary documents used by the attorney to reach the end result, such as internal legal memoranda and preliminary drafts of pleadings and legal instruments. As to these and similar documents, the minority view is that the client is only entitled to access to the extent of a demonstrated need in order to understand the end product documents, with the burden of justification on the client.

The Committee finds in accordance with a majority of other ethics authorities that affording the client presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions, represents the sounder view.² As a general proposition, unless there is a strong reason for not producing or providing documents, a former client is to be accorded access to any documents possessed by the lawyer relating to the representation.³

Approved by the Alaska Bar Association Ethics Committee on May 1, 2003.

Adopted by the Board of Governors on May 6, 2003.

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² See, e.g., State Bd. Of Cal. Standing Comm. On Professional Responsibility and Conduct, Formal Opn. No. 1992-127; Connecticut Bar Assn. Comm. On Professional Ethics, Opn. No. 94-1; State Bar of Ga., Formal Advisory Opn. No. 87-5; State Bar of Mich. Comm. On Professional and Judicial Ethics, Syllabus CI-926 [1983]; Ohio Sup. Ct. Bd. Of Comm'rs on Grievances and Discipline, Opn. No. 92-8; Oregon State Bar Assn., Formal Opn. No. 1991-125.

³ By addressing the ethical requirement to produce documents that are in the attorney's files, this opinion does not create any new duty to retain any particular document.