New York State Bar Association

Committee on Professional Ethics

Opinion 780 (12/8/04)

Topic: Retaining copies of client's file over client's objection; limitation of attorney liability.

Digest: Generally proper for a lawyer to retain copies of a client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.

Code: DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

QUESTIONS

1. May a lawyer retain copies of the client's file over the objection of the client?

2. May the lawyer demand a release from liability as a condition of not retaining copies?

OPINION

1. May copies of file documents be retained by the lawyer?

When a lawyer's employment by a client ends, whether because the lawyer withdraws, the client terminates the engagement or the matter is completed, the lawyer is required to deliver to the client property, including files, which the client is entitled to receive as a matter of law. The New York Code of Professional Responsibility (the "Code") does not provide guidance on which documents the client is entitled to receive as a matter of law. Rather, the Code provides in various sections only that the lawyer is ethically obligated to return to the client that which the client is legally entitled to receive. DR 2-110(A)(2) of the Code, governing withdrawal from employment, requires a lawyer contemplating withdrawal to "[deliver] to the client all papers and property to which the client is entitled." Similarly, DR 9-102(C)(4) of the Code provides that a lawyer shall "[p]romptly pay or deliver to the client or third person as requested by the client or third

person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

The question of which documents the client is entitled to receive is "generally a question of law, not ethics." N.Y. State 766 (1993). *See* N.Y. State 623 (1991) ("Which documents may be deemed to belong to the lawyer is not always easy to ascertain; in certain instances, the lawyer's ownership of such documents may be a complex issue of both law and fact."). *See* Restatement (Third) of the Law Governing Lawyers §46(2).

Although the Code does not explicitly address the issue of whether the *lawyer* has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest. As a preliminary matter, nothing in the Code prohibits a lawyer from retaining copies of the file, while EC 4-6 refers to "personal papers of the client" as distinguished from "papers of the lawyer." DR 4-101(C)(4) of the Code provides as an exception to the general rule of confidentiality the lawyer's right to reveal a client's confidences or secrets in order to collect fees or defend against an accusation of wrongful conduct. Implicit in that rule is the lawyer's right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct New York case law appears to recognize that both the client and the lawyer have an interest in the file.[1] Finally, the lawyer's right to retain copies of the file may be reflected in a retainer agreement or an engagement letter.

In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense.[2] This general rule

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[1] In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d 30, 37 (1997), the Court of Appeals observed that courts have "refused to recognize a property right of the attorney in the file superior to that of the client." The New York Supreme Court case cited in *Sage* for that proposition is *Bronx Jewish Boys v. Uniglobe, Inc.*:

> Under New York law, an attorney has a general possessory retaining lien which allows an attorney to keep a client's file until his/her legal fee is paid. Implied in this is the rule that attorneys have no possessory rights in the client files other than to protect their fee. *In other words, the file belongs to the client.*

Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 350, 633 N.Y.S. 2d 711, 713 (Sup. Ct. 1995) (citation omitted, emphasis added). Although *Bronx Jewish Boys* held that the "file belongs to the client", the Court of Appeals in *Sage* observed that both the lawyer and client have an interest in the "client's" file. *See also In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 944-45 (10th Cir.) ("So far as we can determine, it is a general principle of law that client files belong to the client . . . the attorney's interest is only that of a retaining lien and his interest at best is a pecuniary one, not an interest of ownership, nor privacy"), *cert. denied sub nom*, *Vargas v. United States*, 469 U.S. 819 (1984); *Matter of Calestini,* 321 F. Supp. 1313, 1316 (N.D. Ca. 1971) ("In the instance of a legal file, the client has the right to the file. It is therefore 'property' of the client"). *But see* Michigan Ethics Committee Op. R-19 (2000) ("There is no legal support in Michigan for the proposition that the files are the property of the client. The applicable legal precedent involving other professionals closely analogous to lawyers demonstrates that the courts have recognized that such professionals provide services, not goods.")

[2] For instance, Nebraska adopted the rule that "a client is entitled to (1) the documents he gave the lawyer; (2) anything acquired in discovery; (3) all correspondence; and (4) all notes, memorandums, and briefs generated by the lawyer," although "*[t]he lawyer may retain copies of the file*, but may not charge

may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances.

2. <u>May a lawyer demand a release as a condition of not retaining copies of the file?</u>

Although this Committee has previously held that a lawyer may not insist on a general release as a condition of returning the client's file, N.Y. State 339 (1974), it has not addressed the question whether a lawyer's agreement to give up the right to retain copies of the file may be conditioned on such a release. Because we believe that a lawyer has a right to retain copies of the file, if the client objects to the lawyer's retention of copies, we hold that the lawyer may insist on a general release as a condition of acquiescence.

DR 6-102(A) of the Code prohibits a lawyer from "prospectively" seeking to limit liability to a client for malpractice, but does not prohibit a lawyer from seeking a release for work *already completed*, as contemplated here. A lawyer may "ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only

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for photocopying unless the fee agreement provided otherwise." Neb. Op. 2001-03 (2001), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1201:5501 (emphasis supplied). Similarly, Massachusetts demands that an attorney return to the client any "original documents supplied by the client," as well as "any investigatory or discovery documents for which the client has paid out-of-pocket expenses." Mass. Op. 92-4 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:4603. Massachusetts allows the firm to keep copies of those documents at its own expense. *Id*. A similar opinion was reached by San Francisco, which recognized that although "[t]he lawyer must return all materials the client delivered to him … the lawyer may copy a client's file before turning it over." S.F. Bar Op. 1990-1 (1990), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1851. San Francisco also concluded that the lawyer must copy the file at his own expense. *Id*. Alabama allows an attorney to retain a copy of a client's file so long as the attorney bears the cost of reproduction. Ala. Op. 88-102 (1988), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 901:1048 ("A lawyer who previously served as counsel for a client and is replaced by other counsel may keep the client's files only if the client so directs because the files belong to the client. The lawyer may, however, retain copies of the client's file at her own expense").

Likewise, the Ohio State Bar Association requires an attorney to promptly deliver a file to a former client, but permits an attorney to retain copies of the file at the attorney's own expense. Ohio Op. 92-8 (1992), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1001:6856 ("A lawyer whose former client requests receipt of her case file and has paid the lawyer in full must promptly deliver the file to the client. The lawyer may keep a copy of the file but may not charge the client for the copying costs"). The Colorado Bar Association arrived at the same conclusion, requiring that, upon termination, lawyers "surrender papers and property to which the client is entitled." Colo. Op. 104 (1999), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 1101:1902. Colorado permits a lawyer "to retain copies of documents surrendered to a client," but adds that the lawyer "may not charge the client for duplication costs." *Id*. Similarly, the Kentucky Bar Association opined, "When a lawyer is discharged, he should deliver to the client all property and files to which the client is entitled…[t]he lawyer may wish to copy items in the client's file." Ky. Op. E-235 (1980), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:3902.

after the lawyer takes specific steps to insure that the negotiations are fair", which steps include advising the client to seek independent counsel in the negotiation and consummation for the release. N.Y. State 591 (1988).[3]

CONCLUSION

A lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.

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[3] To maintain fair negotiations with a former client, a lawyer must adhere to the following conditions: "a client must be fully appraised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; the lawyer has been discharged or has withdrawn from the representation in accordance with DR 2-110; and the lawyer has advised the client to secure independent counsel in the negotiation and consummation of such an agreement." N.Y. State 591 (1988); N.Y. State 275 (1972). To maintain fair negotiations, an attorney may not retain a lien on a client's papers and documents. *Id*. ("Fair negotiations over a release are not possible while the lawyer retains a position of advantage by withholding the client's papers"). Although an attorney may retain a lien on a client's papers until the client compensates the attorney for any unpaid legal fees, N.Y. State 567 (1984), the attorney may not retain the file as a mechanism to secure a release from malpractice. N.Y. State 591 (1988) ("The lawyer may not retain the client's files as a bargaining chip to secure a release). *See also* Wis. Op. E-85-12 (1986), indexed in ABA/BNA Lawyers' Manual on Professional Conduct 801:9117 ("A lawyer may not condition *the return of client documents* and the settlement of his related fees upon the client's release of any legal malpractice claims … unless the client is advised in writing to secure independent counsel in the negotiation and consummation of such agreement") (emphasis supplied).