speaking of ethics

By Heather Bupp-Habuda

Surrendering Client Files Upon Termination of Representation

Mick Wiggins

Legal practitioners address ethical issues about client files every day. Although a plethora of guidance exists about the dilemmas relating to client files, a factual twist can lead to a new question.

Recently, a law firm inquired whether an attorney is required to provide copies of notes and internal memoranda to a client's successor in interest. What can make these notes and internal memoranda potentially risky to disclose is the fact that "[v]irtually every malpractice case uncovers a cache of bad documents in the law firm's files. The worst of these are memoranda in which lawyers openly criticize their own clients or colleagues in a pending matter, or speculate about their malpractice exposure if things don't turn out well." Richard M. Zielinski & Timothy J. Dacey, *Traps for the Unwary: Ten Things Every Law Firm Should Know About Legal Malpractice Claims*, *in Practical Answers to Real-Life Ethics Issues* 2005, at tab 2 (D.C. Bar CLE Program 2005).

Rules 1.8, 1.15, and 1.16 of the District of Columbia Rules of Professional Conduct provide the basis of the lawyer's obligations with respect to client files. Rule 1.16(d) states, "In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i)." *See also* D.C. Rules of Prof'l Conduct R. 1.16, cmt. 10.

Rule 1.8(i) creates a narrow exception to the general rule that clients are entitled to their files by allowing a lawyer to secure unpaid fees or expenses by placing a lien "upon the lawyer's own work product, and then only to the extent that the work product has not been paid for." As comment 9 to Rule 1.8 makes clear, "if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product." However, the work product exception does not apply "when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm." D.C. Rules of Prof'l Conduct R. 1.8(i).

Often lawyers place in writing, either through e-mail or hard copy, opinions or information that might be better left undocumented. As soon as a client is billed for this type of writing or as soon as the writing is placed in the client's file, it renders the document property of the client for as long as the file exists. *See also* D.C. Rules of Prof'l Conduct R. 1.15(c) (addressing safekeeping client property). Discovery of this document in ensuing litigation is always a possibility. The future identity of a client's successor in interest may be quite significant, as became evident in a recent inquiry for ethics advice.

A firm had previously represented a client in a variety of matters. After the representation ended, a receiver was appointed for the former client. The receiver's outside counsel requested access to all of the firm's files regarding the former client. After providing access to all client files with the exception of a small folder containing the attorney's handwritten notes and several internal memoranda reflecting the attorney's thoughts, impressions, and strategy ideas, a disagreement arose. Outside counsel for the receiver claimed to be entitled to all of the former client files, including the firm's opinion work product, by virtue of the receiver's statutory assumption of "all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A).

The receiver's counsel did not articulate why the particular material withheld was necessary for its investigation. Instead it argued simply that as the client's successor in interest, it was entitled to those documents. (That argument is consistent with the general legal definition of a successor in interest, a successor to another's interest in property, but not a topic upon which the D.C. Rules of Professional Conduct opine.)

The D.C. Bar Legal Ethics Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work product exception should be construed narrowly. *See* D.C. Bar Legal Ethics Comm. Ops. 250 (1994), 230 (1992). Indeed, for almost 20 years the committee has adopted the majority "entire file" approach, "which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for." D.C. Bar Legal Ethics Comm. Op. 283 n.3 (1998).

The District of Columbia has explicitly rejected the end product approach of some jurisdictions, whereby the client owns only the pleadings, contracts, and reports that reflect the final result of the attorney's work. A minority of courts and state bar legal ethics authorities distinguish between the end product of an attorney's services (e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel, and witnesses) and the attorney's work product leading to the creation of those end product documents, which remains the property of the attorney. *See, e.g.*, *Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989).

In matters where a former client has paid for the work product that a successor in interest is seeking, no basis exists under D.C. Rule 1.8(i) for retaining the portion of the file categorized as notes, analysis, and/or internal memoranda. Although a few jurisdictions have taken a narrower view of the lawyer's obligation to surrender client files at the time the lawyer's representation ends, the District of Columbia

has clearly taken a different, broader approach. Rule 1.16(d) requires a lawyer to surrender to the client the client's entire file, including any material that falls within the work product doctrine, unless there is some basis to withhold the file under Rule 1.8(i). Work product "immunity" is a doctrine of evidence law that may shield attorney work product from discovery by opposing counsel, but does not shield attorney work product from the attorney's own client.

The D.C. Bar legal ethics opinions routinely advise lawyers to provide whatever a client may seek or need to avoid prejudice to the client's interest (i.e., the entire client file). Ethics Opinion 333 (2005) (surrendering entire client file upon termination of representation), for example, holds that "nothing in the matter at hand would justify withholding the relevant file from counsel for the FDIC," as the successor in interest, even though the FDIC was formerly the opposing party in the same matter.

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