Louisiana State Bar Association
Rules of Professional Conduct Committee

PUBLIC Opinion 05-RPCC-003[1] April 4, 2005

Surrender of Client File Upon Termination of Representation

> *Upon termination of representation, a lawyer must surrender the client's papers and property. Further, upon written request, he must deliver to the client the entire original file, including work product. The lawyer may not condition delivery on payment of his bill or on payment of copying costs. Nor may he unreasonably insist upon a particular place or mode of delivery. If there is a single file for multiple clients, they should decide among themselves who will receive the original file.*

The Committee considers here the ethical concerns regarding the client's property, papers, and the lawyer's file that arise when a lawyer's representation terminates. Under Rule 1.16(d) of the Louisiana Rules of Professional Conduct (2004) (the "LRPC"), a lawyer has a two-part obligation upon termination of representation.[2] The first duty is automatic: he must surrender the

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[2]"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. Upon written request by the client, the lawyer shall promptly release to the client or the

"papers and property to which the client is entitled." The second duty, in contrast, only comes into play upon written request by the client. In that event, the lawyer must "promptly release to the client or the client's new lawyer the entire file relating to the matter." In our view, both parts of the Rule are intended to guide the lawyer in fulfilling what the Rule specifies is an obligation to "take steps to the extent reasonably practicable to protect a client's interests" upon termination of representation.

The duty to surrender "papers and property to which the client is entitled" covers, for example, original documents brought to the lawyer by the client for purposes of administering an estate or for a closing. Money delivered to the attorney to pay a judgment is an example of property to which the client is entitled.

The second sub-part of the Rule relating to the lawyer's file has two sub-parts. The first is that, upon written request, the lawyer must promptly release to the client or the client's new lawyer "the entire file relating to the matter." The second sub-part provides that the lawyer "shall not condition release over issues relating to the expense of copying the file or for any other reason." Failure to comply with the client's request for the file may result in the imposition of sanctions. *See, e.g., In re Turnage,* 790 So. 2d 620 (La. 2001).

A. What Does "Entire File" Mean?

In our view, the specific provision regarding release of the "entire file relating to the matter" must be read in the context of the overall purpose of the Rule, which is protection of the client's interests to the extent reasonably practicable. It serves to clarify the general duty to deliver "papers and property to which the client is entitled." The clarification is intended to emphasize

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client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding."

and insure the obligation to deliver the file expeditiously so that the client's legal claims or rights will not be prejudiced. Its use of the term "entire file" allows no argument that work product containing mental impressions, research, analysis and the like is exempt from inclusion in what must be delivered to the client.[3] The entire file must be delivered. The lawyer has the option of making a copy for his own records.

B. Can the Lawyer Retain the File until His Bill is Paid?

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[3]This is in accord with the majority view on this subject generally. *See, e.g., Sage Realty Corp. v. Proskauer*, 91 NY 2d 30, 689 NE 2d 879 (1997); *Resolution Trust Corp. v. H, PC,* 128 FRD 647 (ND Tes. 1989); *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Cmmw. 36, 641 A. 2d 1 (1994); *Matter of Kaleidoscope, Inc*., 15 Bankr. 232 (Bankr. ND Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (ND Ga. 1982); Colo. Bar Ass'n Ethics Comm. Op. 104 (April 17, 1999); Conn. Bar Ass'n Comm. on Professional Ethics, Op. 94-1 (1994); Ohio Sup. Cr. Bd. Of Commr's on Grievances and Discipline, Op. 92-8 (April 10, 1992); State Bd. Of Ca. Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1992-127 (1992); Oregon State Bar Ass'n, Formal Op.1991-125 (1991); and State Bar of Ga. Formal Advisory Op. 87-5. The minority view is that only the "end products" of the lawyer's work (pleadings, a contract, etc.) belong to the client, while the lawyer owns his mental impressions, research, analysis etc. *See, e.g., Federal Land Bank v. Federal Intermediate Credit Bank*, 127 FRD 473, modified, 128 FRD 182 (SD Miss. 1989); *Corrigan v. Armstrong, Teasdale*, 824 S.W. 2d 92 (Mo. App. 1992); Alabama State Bar, Formal Op. RO-86-02 (Dec. 23, 1987); Arizona State Bar Comm. on Rules of Professional Conduct, Op. 92-1 (March 12, 1992); Illinois State Bar Ass'n, Op. 94-13 (January 1994); North Carolina State Bar Ethics Com. RPC 178 (April 14, 1994). The *Restatement of The Law Governing Lawyers* (2003) sanctions refusal to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The basis for these exceptions is that they are necessary for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation, and the materials are not needed by the client in order to be able to continue to pursue the legal matter for which the client originally retained the attorney. *Accord*, Vermont Ethics Opinion 91-3 (1991) (lawyer may withhold internal notes).

The immediate predecessor to the current Rule[4] (and now the current Rule[5] has) changed the law that existed prior to its amendment on May 24, 2001. Retaining liens are now forbidden. Upon termination, a lawyer who receives a written request by the client for the file must promptly release it to the client or the client's new lawyer, and may not condition release **for any reason**. See generally "Rule 1.16(d) of the Louisiana Rules of Professional Conduct—No 'Hostages' Allowed," ***Louisiana Bar Journal***, Vol. 50, No. 3, at p. 216.

C. What if There are Multiple Clients Represented Jointly?

To the extent that the clients have delivered papers or property to the lawyer, these should be returned to the proper owners. However, given that the Rule contemplates delivery of the entire original file to the client, multiple clients must determine among themselves who gets the original. If they are unable to do so, the lawyer may file a concursus proceeding.

D. Where Must the File be Delivered?

If a file contains photographs, original notes and other original documents, a lawyer may not wish to mail it to the client. On the other hand, there may be circumstances where the client is uncomfortable coming to the lawyer's office or finds it inconvenient or difficult to do so. Therefore, while making the file available at the lawyer's reception desk for in-person retrieval by the client normally would not be unreasonable, and the lawyer's concern regarding the possibility of loss or damage in the event of mailing is legitimate, it would be improper to insist on in-office pickup without further inquiry and dialogue.

Two reasons compel further inquiry and dialogue. First, absent an investigation of alternatives, insisting on in-office pickup could be seen as placing a condition on the release, in violation of Rule 1.16(d). (On the other hand, a client's unreasonable demands, such as in-person delivery in

[4]Rule 1.16(d) of the Louisiana Rules of Professional Conduct (1987), as amended effective May 21, 2001.

[5]Rule 1.16(d) of the Louisiana Rules of Professional Conduct (2004), effective March 1, 2004.

Outer Mongolia, do not have to be acceded to.) Second, a lawyer has a duty to communicate with his client, including a duty to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4. While the lawyer-client relationship may technically be over, Rule 1.16(d) envisions a continuing obligation to accomplish certain specified and limited objectives, one of which is surrender of the file.

In our opinion, therefore, the lawyer should not simply stand pat on delivery/pick-up at the office, but should inquire whether any alternate method of delivery would be appropriate and acceptable to the client (e.g., private courier, commercial courier, hand-delivery, etc). The cost of such delivery could, like the copying costs specifically mentioned in the Rule, be determined in an appropriate proceeding if a resolution cannot be achieved directly with the client. Alternatively, the client may be willing to sign a written release, authorizing the use of the mails and agreeing to hold the lawyer harmless in the event of the file's loss or damage as a result of that requested mailing. Written inquiry to the client on this subject would serve to provide support for the reasonableness of the lawyer's efforts in trying to release the file to the client while protecting his interests to the extent reasonably practicable.

Similarly, unilaterally electing to deposit the file with a copy service and then requiring the client to pay the copying charges prior to or upon retrieval of the file from the copy service would be a violation of the Rule. The lawyer should not use a third party, such as a copying service, to try to accomplish what the Rule prohibits her from doing herself: conditioning "release over issues relating to the expense of copying the file." The lawyer should pay the copying costs to obtain a copy of the file to keep, as well as any other costs associated with promptly delivering the file to the client, and then seek reimbursement of those charges from the client, if allowable under the lawyer's fee agreement or contract law.[6]

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[6]There is a split of authority in other jurisdictions over who must pay for the copies, depending on whether the file is seen as belonging to the lawyer or the client. In the latter view, the copying is strictly for the lawyer's

No matter how delivery is accomplished, it would be prudent to obtain a signed and dated receipt evidencing safe delivery of the file to the client.

E. Can the Lawyer Charge for Organizing the Files Prior to Delivery to the Client?

If it is reasonable for the client to expect the files to be relatively organized based upon the fees paid prior to termination, it would be unreasonable to charge additional fees for any time required to organize the files to that level—i.e., to do what the lawyer has presumably already been paid to do.

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benefit. Compare "Ownership of Lawyer's Files: Who Gets the 'Original'? Who Pays for the Copies?", 79 Mich. B.J. 1062 (August 2000), with *In re X.Y.*, 529 N.W. 2d 688 (Minn. Sup. Ct. 1995), *McKim v. State*, 528 N.E. 2d 484 (Ind. Ct. App. 1988) and Kansas Ethics Opinion 92-05 (1992).