



HAND IT OVER

THE ETHICS OF TURNING OVER THE CLIENT FILE UPON TERMINATION OR WITHDRAWAL

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The attorney-client relationship can come to an early end for a variety of reasons. Examples include the development of a conflict, client dissatisfaction with the lawyer's services, or the client's failure to pay fees and expenses. Regardless of the reasons resulting in the conclusion of the representation, however, the client's right to obtain the client file is absolute. As succinctly stated by the Supreme Court of Ohio: "an attorney who is discharged must yield the case file." *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 68 Ohio St.3d 570, 574, 629 N.E.2d 431 (1994).

The requirement is confirmed in Ohio Rule of Professional Conduct 1.16, which requires an attorney upon the termination of representation to "take steps, to the extent reasonably practicable, to protect a client's interest" — specifically including by "delivering to the client all papers and property to which the client is entitled." Prof. Cond.R. 1.16(d); *see also* Prof. Cond.R. 1.4(a) (4) (requiring lawyer to promptly comply with a client's request for information). While the mandate to provide the client file is clear, whether certain materials are to be considered part of that file, or may be excluded from production, will often require the exercise of the attorney's professional judgment.

Determining what constitutes the client file.

As a threshold matter, what materials the client is entitled to receive upon termination varies by state. ABA Model Rule 1.16 does not specifically delineate the "papers and property to which the client is entitled," and jurisdictions have interpreted the requirement in different ways. Some states take an "entire

file" approach with limited exceptions, while others have implemented an "end product" approach. *See, e.g.*, ABA Formal Opinion 471 (discussing different approaches).

In Ohio, initial guidance is provided by Ohio's version of Rule 1.16, which includes additional language stating that "[c]lient papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation." Prof. Cond.R. 1.16(d). Other materials generally considered to be "reasonably necessary to the client's representation" include all documents initially provided by the client, court filings and orders, discovery and evidentiary materials, and third-party investigatory reports or records paid for by the client. *See* Ohio Advisory Opinion 92-8 (interpreting predecessor to Rule 1.16); ABA Formal Opinion 471 at 2, 4. Drafts of yet unfiled briefs or motions, along with relevant research, may also be deemed reasonably necessary to the client's representation — and thus part of the client file — especially if the provision of those documents are necessary to protect the client's interest moving forward (e.g. due to an impending filing deadline or the cost the client would incur to have successor counsel re-create the work). *See* ABA Formal Opinion 471 at 4.

Whether a client is entitled to a lawyer's notes and internal memoranda after termination is dependent on whether those materials are reasonably necessary to the client's representation. That issue is addressed in Ohio Advisory Opinion 2010-2, which states in pertinent part:

A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. *Id.* If a particular note contains both information that is reasonably necessary, and information that is not, then the attorney may partially redact the note or prepare a new note for the client containing only the pertinent information.

The file must be provided promptly, regardless of unpaid fees or other disagreements.

Rule 1.16 states that a client's file "shall be promptly delivered to the client." There is no exception in Ohio permitting an attorney to retain the file due to unpaid fees or other disagreements. "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." Prof. Cond.R. 1.16, Comment 9; Prof. Cond.R. 1.4, Comment 7 (a lawyer "may not withhold information to serve the lawyer's own interest or convenience"). Thus, while Ohio common law historically permitted attorney retaining liens, Ohio's version of Rule 1.16 has precluded them with respect to the client's file. *Recovery Ltd. Partnership v. Wrecked & Abandoned Vessel S.S. Cent. America*, 790 F.3d 522, 530 (4th Cir.2015) ("[I]t appears that the Ohio Rules

of Professional Conduct, which subsequently were adopted by the Ohio Supreme Court, have displaced the retaining lien by obligating an attorney to turn over files to the client upon the termination of a representation.”); *In re Hadley*, 541 B.R. 829, 845 (Bankr. N.D. Ohio 2015) (noting Rule 1.16, “undermines the ability of an attorney to ‘embarrass’ a client or former client into making payment by holding onto the client’s property.”).

Expenses incurred in turning over the file must be borne by the lawyer.

Ohio Advisory Opinion 2010-2 advises that any expenses incurred in turning over a

client’s file “must be borne by the lawyer.” See also Prof.Cond.R. 1.16, Comment 8[A] (“Clients receive no benefit from a lawyer keeping a copy of the file and therefore can not be charged for any copying costs.”). An attorney may not avoid these costs by claiming that he or she already sent copies of pertinent documents as they were created/received throughout the course of representation. *Lake Cty. Bar Assn. v. Kubyn*, 121 Ohio St.3d 321, 2009-Ohio-1154 (2009) (lawyer publicly reprimanded for conduct that included refusing to turn over client file based on claim he sent the client copies of all paperwork as generated or received).

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