Client Records

Whose Files Are They, Anyway?

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The legal profession must often address and readdress presumably settled issues to keep in step with advances in technology. This is particularly true as we move into the digital age, where paperwork is actually less and less "paper." Electronic filings, scanned documents, files, mail, and docketing entries sometimes make defining a client's "file" a challenge. Further compounding this issue are the trends of frequent law firm changes by attorneys, frequent representation changes by clients, and client status changes through mergers and acquisitions. So we ask: How should attorneys in Michigan define "files"? Further, how should we decide who owns the file, or parts of the file, absent an attorney lien or retainer agreement with provisions on point?

Generally, two standards have emerged from various court decisions and ethics opinions. One standard places ownership of the entire file with the client by focusing on the fiduciary nature of the attorney-client relationship and on the benefit the attorney owes the client. The other standard divides ownership between the attorney and client. Courts adopting the latter standard have distinguished the tools of the attorney from the end product created by these tools and have sought to protect an attorney's thoughts and ideas from intrusion.[1]

FAST FACTS:

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What is a Client File?

In any given client matter, a number of documents are generated, collected, and otherwise associated within an attorney-client relationship. The physical file contents usually include memoranda, pleadings, correspondence, and end products (e.g., wills, deeds, and patents). A firm often generates other client-specific documents (such as client lists, matters, and associated numbers) and billing documents (such as invoices, disbursement forms, and cover letters).

Additionally, a growing number of intangible, or electronic, items are created on behalf of a client during representation. These can include electronic mail (including electronic attachments), electronic filings, scanned documents, saved electronic files, and docketing entries. These items may exist in tangible paper form as well, but as a matter of convenience, a client may request electronic versions when he or she changes firms. Such requests can usually be easily accommodated, except when the items are part of a firm-wide database, which may include records of other clients.

For example, in intellectual property (IP) matters, there typically exist electronic docket entries for patent and trademark applications. The accuracy of these docket entries is critical, and they may number in the hundreds or even thousands. Inaccurate dates could mean missed filing deadlines, leading to irreparable loss of IP rights for the client and major claims for professional liability against the attorney. When a client changes firms, the former firm might only offer to provide hard copies of these docket entries to the client, requiring manual re-entry at the new firm. This would increase the risk of missed deadlines and inaccurate files.

The American Bar Association (ABA) Model Rules of Professional Conduct define "writing" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photo-stating, photography, audio or video-recording and e-mail."[2] Nevertheless, under present authority in Michigan, are the electronic items that relate to representation of a client part of the client's "file"? Would the hypothetical former law firm previously referenced breach any ethical obligations by refusing to offer electronic dockets that the new law firm could import accurately and efficiently into its docketing system?

Michigan Authority

Although no Michigan case is directly on point, the State Bar of Michigan Ethics, Judicial and Professional Committee, in its Formal Ethics Opinion R-19 (August 4, 2000), stated that the file, including any documents, etc., belongs to the attorney, but that information in the file must be shown to the client when requested, and copies made at the client's expense. Distinguishing file material ownership from access to the resident information, the opinion maintained that the client's right is one of access, not custody or possession. Thus, it is properly the client who should bear the cost of copying and delivering copies of the file records.

In April 2006, the State Bar of Michigan Representative Assembly considered a proposed amendment to the Michigan Rules of Professional Conduct Rule 1.4(c) to address ownership and copying of attorneys' files. The proposed language of MRPC 1.4(c) was as follows:

> (1) A lawyer's file is owned by the lawyer maintaining the file, including any document, film, tape or other paper or electronic media. A client has the right of access to information contained in a file relating to that client's representation.
>
> (2) The lawyer is entitled to the original, physical material in the file, unless the client has a special need or a pre-existing proprietary right in the original.
>
> (3) When necessary for full use of a document, the client's "access" may include at least temporary custody or non-destructive use of the original document, film, tape or other paper or electronic media.
>
> (4) Unless specifically agreed or required by law, the client is not entitled to the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.
>
> (5) The client is responsible to pay the reasonable cost of copying and delivering copies of the file records.
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> (6) A lawyer shall have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file which belong to the client or for which the client has a need.
>
> (7) Issues relating to file ownership and access, copy charges for information requests, and file destruction practices, may be described by the lawyer, and agreed by the client, in the terms of engagement or some other disclosure.

The Assembly rejected recommending this language to the Supreme Court by a vote of 57 to 48. While the language would have settled the issue as a matter of ethics, as noted in comments before the Assembly, these Rules govern attorney conduct and not client rights. In contrast, the proposed rule addressed an area of substantive law.

The current Rules, however, are not completely silent on this matter. MRPC 1.16(d) states:

> Upon termination of representation, a lawyer shall take reasonable steps 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 law.

Thus, if the client hires another attorney, the former attorney cannot harm the client by retaining information that the client needs. This rule does not address efficiency or accuracy, though. For example, in many IP practices, information relating to patent or trademark applications is placed in electronic docketing systems. If the client transfers the files, it would often be advantageous to the client to export the electronic docketing entries, especially when there are hundreds of records.

Persuasive Authority

In several representative states, case law and ethics opinions relating to file possession and access provide no clear trend.[3] Typically, prejudice to the client is balanced against the burden to the attorney. Not surprisingly, most agree that the client is at least entitled to access to the information, if not the actual information itself.

In January 2006, the New Hampshire Bar Association addressed the question of providing electronic records in its Ethics Opinion 2005-06/3. The issue was whether a law firm has the obligation to relinquish all electronic communications and electronic documents maintained in the firm's computer network concerning its representation of former clients to an attorney who has left the firm and who will continue to represent the clients in a different law firm.

By way of background, and in contrast to Michigan, the New Hampshire Supreme Court has already held that the contents of a client's file belong to the client and that, upon request, an attorney must provide the client with the file, irrespective of burden.[4] Moreover, Rule 1.16(d) of the New Hampshire Rules of Professional Conduct provides that, upon termination of representation, an attorney must "take 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 New Hampshire Bar Association stated that the ABA Rule 1.0 Terminology[5] reflects that, with the increased presence of electronic communications and records in the practice of law, it is

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expected that a client's file would include electronic communications. Thus, the mere existence of a paper file does not necessarily allow a firm to automatically exclude from the "client's file" electronic communications and other computer-based writings.

Therefore, under this opinion, in New Hampshire, the obligation imposed by *Averill* can be managed through computer word-search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.

Parallels—Medical Records

Other professions' treatment of these issues involving technical documents, intangible records, and need for confidentiality may be useful to this analysis. Michigan case law concerning healthcare files provides that the patient is not entitled to the file itself—the patient does not own the file; rather, he or she is entitled to access to the information that is in the file. In *McGarry v J.A. Mercier Co,*[6] the Court concluded that the records belong to the physician, citing the lack of utility of the files to a lay patient:

> It is a matter of common knowledge that X-ray negatives are practically meaningless to the ordinary layman. But their retention by the physician or surgeon constitutes an important part of his clinical record in the particular case, and in the aggregate these negatives may embody and preserve much of value incident to a physician's or surgeon's experience.

Solutions?

In view of this discussion, ownership of client files and records should include additional circumstances surrounding the accumulation of these documents, such as client expectations and letters of engagement.

"What did I pay for?!" a client often asks when reviewing invoices for legal services. A typical invoice is usually divided into services and expenses (such as copy charges, filing fees, and phone charges). When a client pays for expenses, he or she may consider it reasonable to expect ownership of the records. But from the analysis in *McGarry,* the client's files also may be reviewed based on the utility of the documents to the client. A distinction may also be made by the attorney between documents created by the attorney or merely copied records from third parties.

Thus, the trend in Michigan is to allow an attorney to retain possession of client files, while allowing the client access to the files at client expense. Guidance as to the treatment of electronic files from the ABA and New Hampshire seems to indicate that clients should have access to their electronic files as well.

A good engagement letter remains the best way and the best time to address issues of possession and access to a file. Since Michigan currently provides no clear guidance concerning electronic records, the ABA definition of a "writing" may also warrant inclusion in the engagement letter. ■

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FOOTNOTES

1. Slovut, *Eliminating conflict at the termination of the attorney-client relationship: A proposed standard governing property rights in the client's file,* 76 Minn L R 1483 (1992).
2. ABA Model Rules (2006 ed), Rule 1.0 Terminology.
3. File possession and access findings favorable to clients may be found in ethics opinions in Alaska, North Dakota, South Carolina, New Hampshire, New York City, and New Jersey. See Attorney's File Unless the Client Pays for Copying Files, Alas Bar Ass'n Ethics Comm, Ethics Op No 95-6 (September 7, 1995); ND Att'y Gen Op No I-174 (1995); SC Bar Ethics Advisory Comm, Ethics Advisory Op No 92-37 (1993); Who Should Retain the Files if the Attorney Leave the Employ of a Corporation?, SC Bar Ethics Advisory Comm, Ethics Advisory Op No 02-17 (2002); NY City Bar Ass'n Comm on Prof & Jud Ethics, Formal Op No 1986-4 (April 30, 1986); NJ Bar Ethics Op No 445 (1979). Treatment favorable to the attorney in state ethics opinions may be found in New York and Michigan. See NY Bar Ethics Op No 780 (December 8, 2004); Mich Bar Ethics Op No R-19 (August 4, 2000).
4. *Averill v Cox,* 145 NH 328, 339-400 (2000).
5. ABA Model Rules, *supra.*
6. *McGarry v J.A. Mercier Co,* 272 Mich 501, 502; 262 NW 296, 297; 100 ALR 549 (1935).