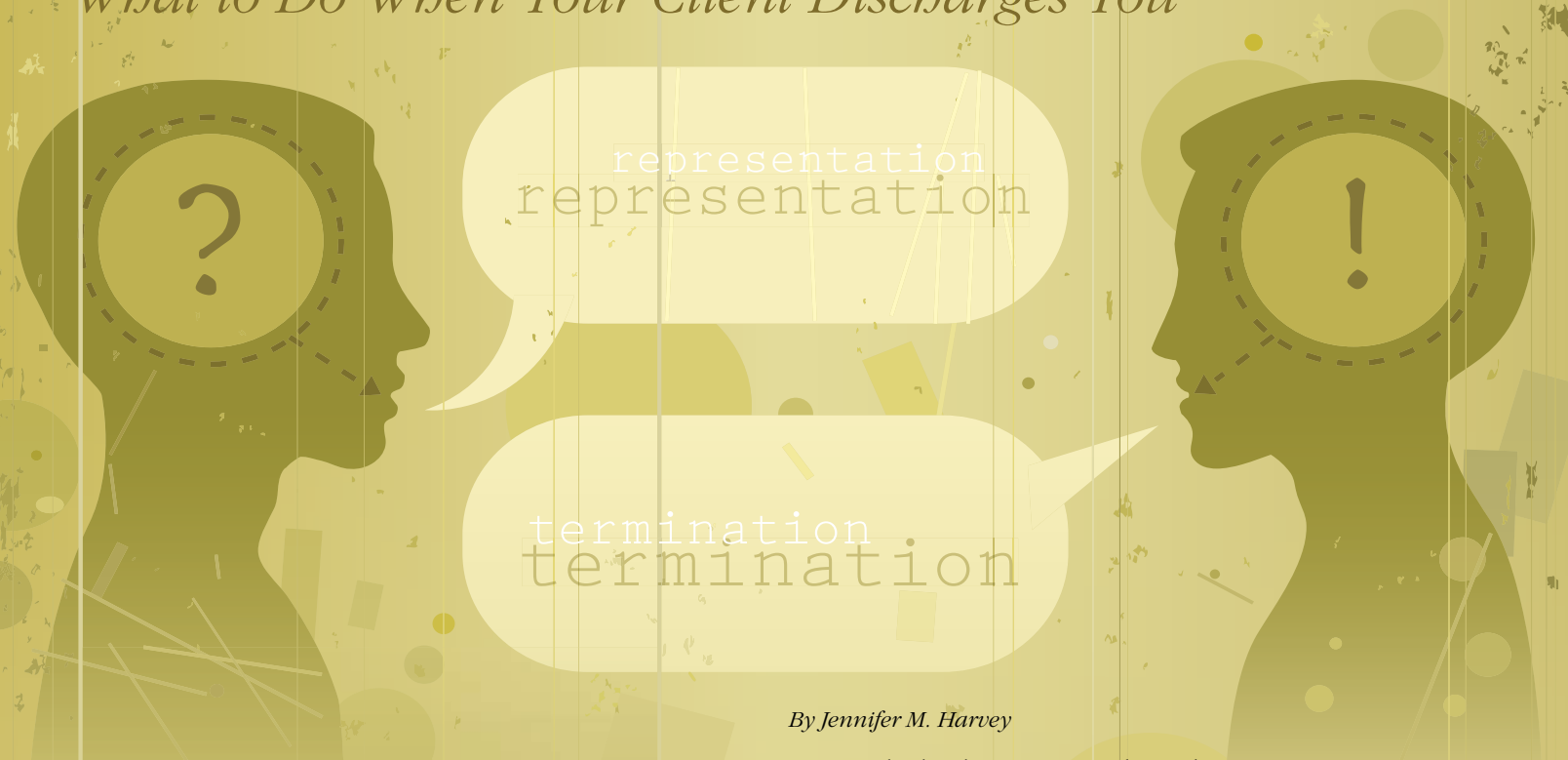
Lawyer in Limbo

What to Do When Your Client Discharges You



By Jennifer M. Harvey

Several ethical issues arise when a lawyer is representing a client and the representation is terminated. Experienced lawyers often disagree over the most appropriate and ethical ways to handle this process. Reviewing the Michigan Rules of Professional Conduct and State Bar ethics opinions is essential when a lawyer is making an ethical decision, but all ethical questions are fact-dependent.

Attorney Don Campbell, a prominent ethics practitioner in Michigan, notes that ending representation of a client poses "many complicated questions for a lawyer." He directs our attention to MRPC 1.16, which states in part:

> 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.

In Campbell's words, "a lawyer must not take action or refrain from action which would prejudice his client." The ethical issues that arise when a lawyer is discharged by the client but is still the attorney of record include issues related to retaining the file, collecting fees, billing, and what file information to turn over to a client.

Fast Facts:

Your duty to not prejudice the client is supreme.

"Most clients aren't truly paying for a lawyer's time on the clock. Instead, they are paying for the advice evidenced by notes and other memoranda in the file."

Your duty to the client does not end until the court signs an order removing you from the case.

Turning Over the File and Collecting Fees

At common law, lawyers had an attorney lien on their client files. This meant that the lawyer could retain the file regarding a client's case to secure payment of legal fees. Under common law, the lawyer did not need to turn the file over when demanded by a client until the lawyer's fees were paid.

A lawyer's duties under the Michigan Rules of Professional Conduct, however, always trump common law. Pursuant to MRPC 1.15(b)(3), an attorney must "promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person…." But does the client file belong in this category? Ethics Opinion R-19, issued August 4, 2000, noted that some items in a file may belong to a client while others belong to the lawyer, but the opinion drew no absolute line: "The Committee's formal ethics opinions correctly conclude that ownership of materials in a lawyer's or law firm's file is a matter of law, not ethics. [Ethics Opinion] R-5, and R-12. There is no legal support in Michigan for the proposition that the files are the property of the client." Much of the information and many of the documents contained in the file, however, will likely belong to the client. The attorney is obligated to turn these items over, regardless of whether he or she has been paid by the client, so as to not prejudice the client.

May an attorney hold on to a client file? Timothy Dinan, a Grosse Pointe practitioner and University of Detroit Law School professor, sheds light on this issue. A lawyer "has no right to hold on to a client file. If the client makes a demand for the file, the lawyer must make reasonable accommodations to get the file to the client," comments Dinan. He notes that you should copy the client on all e-mails and letters so that the client has the same materials as those in your file. When a client wants the file, Dinan explains that it is good practice to give the client the original file and charge the client by the page to make a copy of the file for yourself. "This [provision] should be placed in the retainer agreement," states Dinan.

Don Campbell agrees, but places a different spin on the issue. "Is there a 'client' file?" asks Campbell. "Perhaps you should define it in the retainer agreement as a 'representation file' and further define who owns the file, what belongs to the client and what your duties are to the client regarding the file." He notes that this follows Ethics Opinion R-5 by defining the representation, but also emphasizes that your duty to not prejudice the client is supreme.

If what is left of your retainer is greater than what the client owes you, promptly return the excess fee to the client by a check from your law firm. If the client owes an outstanding balance, try to get the client to drop off the fee when he or she picks up the file. If the client doesn't want to pay, then what? Clearly, it is better to lose even thousands of dollars in client fees by surrendering the file to the client than fight a grievance. How much money would you pay to get away from a nightmare client? Probably more than you'd lose by forgiving the fees that the client owes. Ridding yourself of a problem client truly is "addition by subtraction" in terms of your practice.

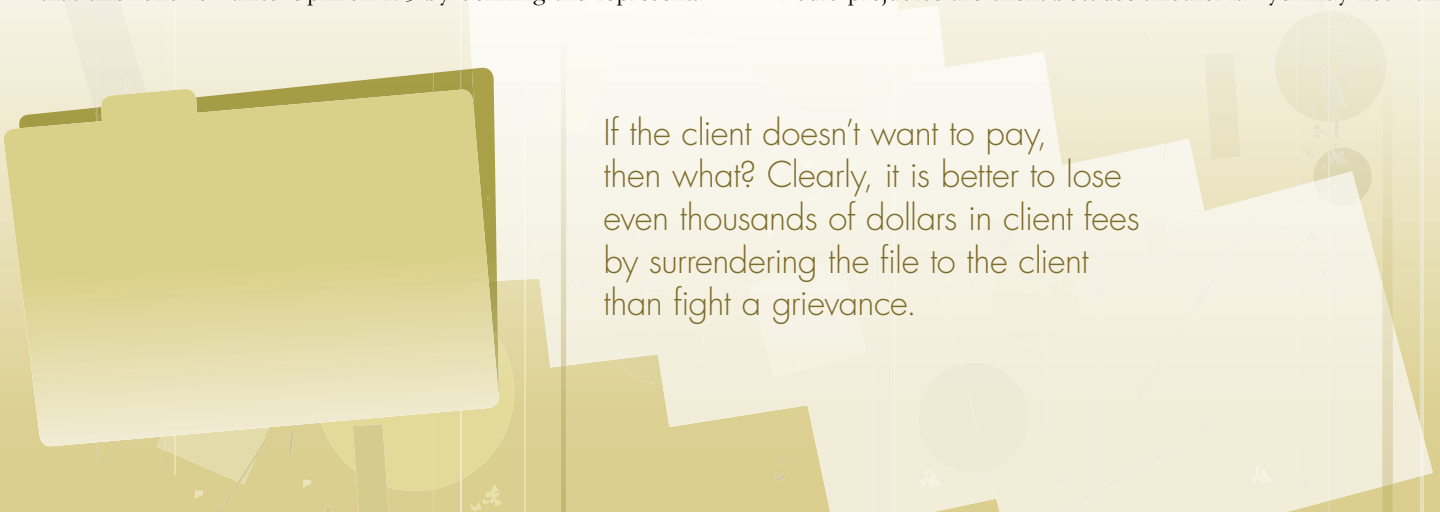
Northville practitioner John C. Stevenson notes that there are other reasons to promptly turn over the file. "Clients and the new counsel are more willing to cooperate with you when you turn over the file promptly. There is a better chance that you will be paid and that the new counsel will assist you in making this happen."

How Much of the File Must You Turn Over?—The Work Product Doctrine

The work product doctrine is an evidentiary rule, not a rule of professional conduct. Many attorneys want to strip attorney work product out of the file, including file memoranda, advice to the client, and notes, before giving the file to the client. May a lawyer do so and still be considered to be "turning over" the file?

Don Campbell takes his familiar approach and asks, "Will the client be prejudiced without this information? If so, the information must be turned over to the client." In many cases, this information is beneficial to the subsequent counsel—and in turn, the client—so it is important to turn this information over. "Most clients aren't truly paying for a lawyer's time on the clock. Instead, they are paying for the advice evidenced by notes and other memoranda in the file," states Campbell.

A lawyer must determine the benefits and risks of both holding and releasing portions of the file. A lawyer's file memorandum expressing concern over a client's mental state may not be material to the case. It would be of interest and perhaps importance, however, to subsequent counsel. Would the client be prejudiced by having or not having this memorandum? Perhaps it would prejudice the client because another lawyer may not want



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to take the case; conversely, the question of the client's mental state revealed in attorney notes might assist the client and his new counsel under certain circumstances. Whether to turn over these portions of a file is not an ethics question. It is a lawyer's question. If there will be no damage to your firm, why wouldn't you turn over the entire file?

Discharged, But Not Removed from the Case

An attorney is the attorney of record in a case until the judge signs an order removing the attorney from the case. Even if you receive a discharge letter from a client, you are still the attorney of record. What, then, do you do when the client wants you to take no further action on the case, but you still have the fiduciary duty to the client to continue in the representation? "If you are still the attorney of record, do not let go of the file," notes Timothy Dinan. "Make sure that you are very sensitive to documentation [during this time]. The items in the file may belong to the client, but it is still your file." Dinan advises that the file can be copied and given to the client pursuant to the retainer agreement, but the lawyer may not just walk away from the case. A lawyer who does may be subject to liability.

During the time after you have been discharged but while you are still the attorney of record, you may be required to do some work—or even a lot of work—on the file so as to not prejudice the client. If depositions or motions are scheduled, you may have to attend to protect your former client's interest. Remember, you must always work to avoid prejudicing the client.

If the client sends you a letter discharging you and tells you to take no further action on the case, you would be ill-advised to take action contrary to what the client asked. Be upfront immediately with the other attorneys working on the same case. Advise them to continue sending letters and pleadings to you—as they must since you are still the attorney of record—but to also send copies to your client and provide proof of service for sending documents to your client.

Send the client copies of correspondence from other lawyers on the case, the court, and other interested parties. Enclose with the copies a letter advising the client to comply with court orders and keep in touch with the other attorneys. You should advise the client to attend hearings and respond to motions. Always emphasize in these letters that because the client has advised you to take no further action on the case, you will refrain from further action.

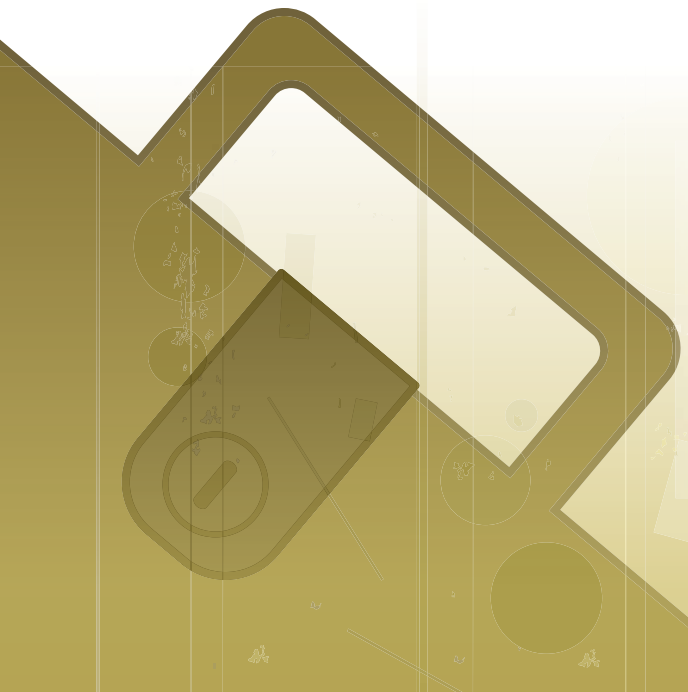
If you were discharged during a conversation and do not have a letter from the client, write the client a letter. In that letter, tell the client that it is your understanding from the conversation that the client has discharged you from further representation and wants you to take no further action on the case. Further, advise the client in the same letter to immediately contact you in writing if this is not the client's understanding.

Can you bill the client for work that you do on the file after you have been discharged? "It depends on what the retainer agreement states," comments Don Campbell. "If you cover this time period in the retainer agreement that you will bill while you are taking steps to remove yourself from the case, you may bill [the client]. Pursuant to [Ethics Opinion R-5], define the scope of your representation as well as the termination of your representation."

Practical Tips for Getting Out of the Case

If a client asks for the file and wants you off the case, it is wise to tell the client when he or she may pick up the file from your office. When the client arrives, have staff members present to witness the file being released. That way, the client cannot allege that you said or did anything inappropriate. The client should sign a document stating that he or she received the file and also sign a stipulation and order removing you from the case. This will save you time and a motion fee to be removed from the case. Instead, all you must do is present to the court for entry the stipulation and order signed by you and the client.

If the client refuses to sign a stipulation and order taking you off the case and there is no incoming counsel to sign a substitution of attorney, you must immediately file a motion to remove



If the client tells you that his or her "new lawyer" will handle removing you from the case, do not believe the client. If a new lawyer will be entering the case, why wouldn't the new lawyer contact you?

yourself from the case. File this within a week of being discharged if your client is not working toward getting you removed from the case. Tell the court clerk the circumstances and ask to be heard by the court as soon as possible.

If the client tells you that his or her "new lawyer" will handle removing you from the case, do not believe the client. If a new lawyer will be entering the case, why wouldn't the new lawyer contact you? In many cases, it is likely that the client just wants the file to go ahead with the case on his or her own. It is advisable to ask the client for the new attorney's name and contact information. If the client refuses or you cannot locate the lawyer in the *Michigan Bar Journal* directory or State Bar of Michigan online member directory, it is clear that the client has no new counsel. You should advise the client to have the new counsel contact you and also send this advice to the client in a letter. If you do not receive a response from the client or new counsel within a week, move to withdraw from the case.

If there actually is a new attorney who will be handling the file, a substitution of attorney must be filed with and entered by the court to remove you from the case. At this juncture, it is wise to tell the new counsel when and where to pick up the file from you. Then, have others present so that no one can allege that anything inappropriate was said or done. Have the new lawyer sign the substitution of attorney and sign an acceptance indicating that he or she received the file. Send a letter to the new counsel stating that you expect the substitution to be filed immediately and asking to be contacted immediately if this will not occur.

Make a point of saving a copy of the substitution of attorney, client file, and letter stating that the file and substitution were received. That way, no one can allege that you did not give a complete file or that you neglected to do something in the case. Also, if the substitution is lost or not filed, you can present a copy to the court showing that both counsel signed it, demonstrating the clear intent of the new lawyer to enter the case on behalf of the client.

Keep track of whether the substitution of attorney was filed. Many attorneys taking on a new case are eager to become the new attorney of record and will file it immediately for that reason. In a letter to the new counsel, ask to be sent a true copy of the substitution entered. If you want to get off the case immediately, you may want to have the substitution entered yourself. Remember, you are still the attorney of record until the court enters the substitution. Your duty to the client does not end until the court signs an order removing you from the case.

Finally, if there is new counsel on the case who asks you about the case or the client, be very careful. The lawyer who is new to the case is wise to find out information from the former counsel because no one would know the file better. Still, to protect yourself from revealing information protected by the attorney-client privilege, advise the new counsel that you will discuss the file, client, and other circumstances relating to the case only if you have a release signed by your former client authorizing you to share this information with the new counsel.

Being placed in a situation in which you must leave a case because the client discharged you can be very stressful and frustrating. If you have done your initial work in drafting a very clear retainer agreement that defines your representation of the client and its termination, you have successfully protected yourself and your practice from a grievance, legal liability, and headaches in dealing with those who may become former clients. Just remember to never place your client in a situation that results in prejudice to the client. If you have any questions regarding ethical issues, make sure to contact the State Bar Attorney Ethics Helpline at (877) 558-4760 for an informal opinion regarding your specific circumstance. ■

This article is general information regarding ethical questions when withdrawing from a case. It is not a formal ethics opinion or legal advice, and any questions regarding an attorney's prospective ethical behavior should be directed to the Ethics Helpline for an informal opinion. This article does not necessarily represent the views of the State Bar of Michigan, Ethics Committee, or Young Lawyers Section.

The quotations in this article are from telephone interviews with Don Campbell in August 2008, Timothy Dinan in August 2008, and John C. Stevenson in September 2008.

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