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Breaking Up: Who Gets What When Lawyers and Clients Split?

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When a lawyer and a client end their relationship midstream, questions frequently arise over who gets what in the file. The Washington State Bar Association has a very useful ethics opinion—Formal Opinion 181—that deals with handling client property and funds in this situation. Formal Opinion 181 offers practical guidance on the interplay between attorney lien rights and a client’s need for a file, disposition of advance fee deposits, the parts of the file that a lawyer must return and the portions that the lawyer can retain, who pays for copying the file and the “bad things” that can happen to lawyers who don’t follow the rules. Formal Opinion 181, in turn, draws on precepts that are reflected in RPC 1.16(d), which governs withdrawal, and RPC 1.15A, which governs handling client property and funds. Formal Opinion 181 is available on the ethics opinion page of the WSBA web site at www.wsba.org.

Lien Rights. When a lawyer and a client go their separate ways, one of the usual flashpoints is any unpaid fees the lawyer is due. Under RCW 60.40.010(1)(a), a lawyer may hold a client’s file until the client pays the lawyer.¹ At the same time, RPC 1.16(d) requires a lawyer who is withdrawing (whether at the request of the lawyer or the client) to “take steps to the extent reasonably practicable to protect a client’s interests[.]” Putting the two side-by-side, Formal

Opinion 181 concludes that a client's need for the file "trumps" the lawyer's possessory lien rights. Therefore, if the client needs the file, Formal Opinion 181 counsels that the lawyer must turn it over notwithstanding the lawyer's otherwise valid possessory lien rights. In many instances, this is also the "smart thing" for the lawyer to do. By turning the file over to the client, the lawyer is not waiving a possible claim for unpaid fees. But, the lawyer will avoid a possible argument later by a disaffected former client that the lawyer's failure to promptly turn over the client's file somehow damaged the client's continuing ability to handle the matter involved.

Advance Fee Deposits and Flat Fees. On other occasions, a lawyer and a client may separate with the lawyer still holding part of an advanced fee deposit. In that instance, RPC 1.16(d) requires "refunding any advance payment of fee or expense that has not been earned or incurred" upon withdrawal. Under recently amended RPC 1.5(f)(2), which governs "flat fees," the client remains entitled to "a refund of a portion of the fee if the agreed-upon legal services have not been completed." See *In re DeRuiz*, 152 Wn.2d 558, 574-75, 99 P.3d 881 (2004) (same holding prior to amendment). Therefore, if the client has paid an advance fee deposit or a flat fee and work remains unfinished at the point the client moves elsewhere, the lawyer must return the unearned balance to the client.

What Must Be Returned? Apart from financial issues, questions often arise upon withdrawal over exactly *what* must be returned to the client. Formal Opinion 181 succinctly summarizes the rule on file transition: “At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of [a] representation, with limited exceptions, must be turned over to the client at the client’s request[.]” The limited exceptions normally include a lawyer’s notes relating to the business relationship with the client, such as conflict checks and collection notes, that were not charged to the client and general research memoranda, such as a memo prepared in another matter dealing with the same legal issue, that were not billed to the client.² Although Formal Opinion 181 does not address at length the *form* in which a lawyer’s file is maintained, fairly read it suggests that documents maintained in electronic form fall within its scope if not available in corresponding hard copy form. By contrast, routine “metadata” embedded within an electronic copy of a document but not apparent in its hard copy form does not appear to fall within its parameters unless it reflects material attorney-client communications or work product for which the client has a need. See ABA Formal Ethics Op. 06-442 (2006) (discussing electronic metadata).

Who Pays for Copying Costs? When a client moves to a new lawyer, it is often prudent for the old lawyer to make a copy of the file to document where the matter stood when it left the lawyer’s hands should any questions arise later.

Unless the engagement agreement with the client provides otherwise, the lawyer under Formal Opinion 181 must generally bear the cost of creating the lawyer's own "loss prevention" copy because the principal benefit accrues to the lawyer rather than the client. By contrast, if the lawyer has already given the client copies of what makes up the file during the course of the representation and the engagement agreement requires the client to pay for an additional copy, then Formal Opinion 181 would permit a lawyer to charge a client for the costs of what amounts to a "second copy" of the file. Again, however, the client's need for the file "trumps" the lawyer's right to withhold the file pending payment of photocopy charges.

Consequences. Lawyers are subject to regulatory discipline if they mishandle the return of client files or funds at withdrawal. See, e.g., *In re Burtch*, 112 Wn.2d 19, 24-25, 770 P.2d 174 (1989) (failure to return client file); *In re Perez-Pena*, 161 Wn.2d 820, 831, 168 P.3d 408 (2007) (failure to return client funds). As noted earlier, however, lawyers face another danger by holding a client's file in an effort to force payment: the client may contend that the client's position in the matter involved was compromised as a result. Although violation of the RPCs does not give rise to civil liability in and of itself, Washington's appellate courts have held on multiple occasions that the professional rules may be used in proving a lawyer's breach of fiduciary duty. See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). The argument in the withdrawal

setting is that a lawyer has a fiduciary duty to handle file transition in a way that doesn't harm the client. Given that lawyer-client splits are often painted against the backdrop of disputes over case management, results or payment, it doesn't take too much imagination to envision a disaffected former client asserting damage if a lawyer did not promptly release the client's file. A lawyer, therefore, may be buying into more trouble than it's worth in attempting to hang onto a client's file to enforce payment.³

Summing Up. When a lawyer and a client split, tempers can often run hot as they tussle over unpaid fees, the client's file and the many reasons that led to the parting. In that charged atmosphere, the lawyer needs to remain true to the lawyer's fiduciary duty to the client. Although sometimes difficult, that approach may save the lawyer significant grief down the road by insulating the lawyer from a claim by the client later that the lawyer's refusal to cooperate in the transfer of the client's file damaged the client. In short, this is an area where discretion can definitely be the better part of valor.

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¹ Lawyers also have "charging liens" for compensation due on settlements and judgments under RCW 60.40.010(d)-(e). See generally *Ross v. Scannell*, 97 Wn.2d 598, 603-05, 647 P.2d 1004 (1982) (discussing the distinction between possessory and charging liens).

² Under *VersusLaw v. Stoel Rives LLP*, 127 Wn. App. 309, 329-35, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008, 132 P.3d 147 (2006), internal law firm communications regarding potential claims by a client against the firm may be discoverable if the communications took place while the firm was still representing the client. See generally ABA Formal Ethics Op. 08-453 (2008) (discussing in-house ethics consultation).

³ Suing for fees later presents its own risks—principally in the form of a possible malpractice counterclaim that may be asserted by a client as a form of "leverage."