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Tug of War: Fights Over Files

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Clients and their lawyers go their separate ways mid-matter for many different reasons. Whenever this occurs, however, a frequent flashpoint is “the file.” Statistics compiled by the Oregon State Bar Client Assistance Office list “return client file” as accounting for approximately five percent of all bar complaints filed annually over the past few years. Fights over files are not new, with cases from the 1980s disciplining lawyers for their failure to release files to their clients (*In re Arbuckle*, 308 Or 135, 775 P2d 832 (1989)) or replacement counsel (*In re Chandler*, 306 Or 422, 760 P2d 243 (1988)). Although lawyers have possessory lien rights for unpaid fees over a client’s file under ORS 87.430, the wisdom of asserting those lien rights in most instances is questionable as even successfully defending a bar complaint can quickly erode the economic value of the receivable involved. Moreover, because our regulatory duties under the RPCs reflect our fiduciary duties to clients (see, e.g., *Kidney Ass’n of Oregon, Inc., v. Ferguson*, 315 Or 135, 843 P2d 442 (1992)), a client harmed in a tug of war over a file may also assert a civil claim for breach of fiduciary duty against the lawyer.

In this column, we’ll look at the basic rules governing file transitions, what constitutes “the file,” and who pays for copying.

Ground Rules

RPC 1.15-1(d) states our basic duty to return client property:

“Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive[.]”

RPC 1.16(d), which addresses duties when withdrawing, echoes this by counseling that lawyers must take reasonable steps to protect the client in the process, including “surrendering papers and property to which the client is entitled[.]”

OSB Formal Ethics Opinion 2005-125 describes “the file” as belonging to the client even though it is maintained by the lawyer. ORS 87.430 grants lawyers a possessory lien over a client’s file to the extent of unpaid fees and RPC 1.16(d) notes that “[t]he lawyer may retain papers, personal property and money of the client to the extent permitted by other law.” But, OSB Formal Ethics Opinion 2005-90 concludes that under RPC 1.16(d) a client’s need for the file “trumps” the lawyer’s possessory lien rights (at least when the client is otherwise unable to pay the lawyer or to secure a bond as provided in ORS 87.435-.440).

ORS 9.360 provides clients with a judicial remedy to obtain their files and ORS 9.370 outlines accompanying procedural avenues for resolving related possessory lien claims. Formal Ethics Opinion 2005-90 notes, however, that clients do not necessarily need to avail themselves of these judicial remedies to obtain their files. The appellate courts (*see Crawford v. Crane*, 204 Or 60, 282

P2d 348 (1955); *Lee v. Lee*, 5 Or App 74, 482 P2d 745 (1971)) have also concluded that these statutory procedures only apply to client property the lawyer actually possesses and are not a means to enforce a separate “charging” lien.

The File

Formal Opinion 2005-125 (at 332) succinctly summarizes what constitutes “the file”:

“By *entire file*, we mean papers and property that the client provided to the lawyer; litigation materials, including pleadings, memoranda, and discovery materials; all correspondence; all items that the lawyer has obtained from others, including expert opinions, medical or business records, and witness statements. The client file also includes the lawyer’s notes or internal memoranda that may constitute “attorney work-product.” (Emphasis in original.)

The limited exceptions mentioned in Formal Opinion 2005-125 are for items prepared for other clients (such as a legal research memo) that the lawyer has temporarily placed in the file concerned for the lawyer’s convenience and materials (such as conflict checks and collection notes) that do not relate to the legal services provided.

Copy Costs

Because Formal Opinion 2005-125 classifies the file as property of the client, it also frames the copy cost issue from that perspective. The opinion notes that the lawyer may retain a copy (at the lawyer’s expense)—and, in many instances, that is a prudent loss prevention tool so that the firm can document the work performed “on its watch.” Under RPC 1.15-1(d), original documents

provided by the client must be returned in any event. Once the lawyer has furnished the equivalent of a complete file to the client, however, Formal Opinion 2005-125 generally permits the lawyer to charge for what amounts to additional copies of the same file.

Formal Opinion 2005-125 (at 334) addresses associated labor costs as well and concludes: “[A] lawyer may charge a client for labor costs associated with the production of a file to the extent that the lawyer could have charged the client for the same work if the same request had been made during the lawyer-client relationship.” Formal Opinion 2005-125 also finds that a firm could charge for labor costs associated with producing additional copies of the same file.

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