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Parting Company: Who Gets What When Lawyers and Clients Split?

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When a lawyer and a client end their relationship in midstream, questions frequently arise over who gets what in the file. The Oregon State Bar has two very useful ethics opinions that sort out these issues. Both focus on RPC 1.16(d), which governs withdrawal, and RPC 1.15-1(d), which deals with handling client property and funds.[i] The first, Formal Ethics Opinion 2005-90, addresses a lawyer's possessory lien rights over a client's file. The second, Formal Ethics Opinion 2005-125, covers file transition generally. When read in concert, 2005-90 and 2005-125 offer 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. Both opinions are available on the Oregon State Bar's web site at www.osbar.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. 2005-90 outlines a lawyer's possessory lien rights over a client's file to secure unpaid fees.[ii] Under ORS 87.430, a lawyer may hold a client's file until the client pays the lawyer. At the same time, RPC 1.16(d) requires a lawyer who is withdrawing to "take steps

to the extent reasonably practicable to protect a client's interests." Putting the two side-by-side, 2005-90 concludes that a client's need for a file "trumps" the lawyer's lien rights. Therefore, if the client needs the file, 2005-90 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 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. On other occasions, a lawyer and a client may separate with the lawyer still holding part of an advance fee deposit. In that instance, RPC 1.16(d) requires "refunding any advance fee payment that has not been earned or incurred" upon withdrawal. *See* OSB Formal Ethics Op 2005-90; *accord* OSB Formal Ethics Op 2005-151 ("[E]ven a fee designated as 'nonrefundable' is subject to refund if the specified services are not performed."). Therefore, if the client has paid an advance fee deposit to the lawyer and work remains unfinished at the point the client moves elsewhere, the lawyer must return the unearned balance of the deposit to the client.

What Must Be Returned? Apart from monetary issues, questions often arise upon withdrawal over exactly *what* must be returned to the client. 2005-125

takes the position that the client should generally be entitled to the entire file: "By *entire file* we mean papers and property the client provided to the lawyer; litigation materials including pleadings, memoranda and discovery materials; all correspondence; all items 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 principal exceptions are for a third party's materials that the lawyer placed in the file for the lawyer's convenience and items that relate to the business relationship between the lawyer and the client rather than to the representation itself. A legal research memo prepared for another client dealing with the same issue is an example of the former and a conflict check or collection note the lawyer did for the lawyer's own purposes are examples of the later.

Who Pays for the 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 provides otherwise, the lawyer 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 copies, then 2005-125 finds that the lawyer can charge the client for both copying and associated labor for providing the client with what is essentially 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 bar discipline if they mishandle the return of client files or funds at withdrawal. *See, e.g., In re Devers*, 317 Or 261, 855 P2d 617 (1993) (lawyer disciplined under the analogous former DR for failing to return a client's file); *In re McKnight*, 9 DB Rptr 17 (1995) (lawyer disciplined under the corresponding former DR for failing to refund unearned portion of fee). As noted earlier, however, lawyers face another danger by holding a client's file in an effort to enforce payment: the client may contend that the client's position in the matter involved was compromised as a result. Although a violation of the RPCs does not give rise to civil liability in and of itself, the Oregon Supreme Court held in *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992), that the professional rules may be used in proving a lawyer's breach of fiduciary duty. The argument in the withdrawal setting is that a lawyer has a fiduciary duty to handle client files 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 client asserting damage if a

lawyer didn't 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.[iii]

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 context, 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 harmed the client.

ABOUT THE AUTHOR

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[i] RPC 1.16(d) provides:

> "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable 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 or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law."

RPC 1.15-1(d), in turn, reads:

> "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. 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 or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

[ii] In contrast to possessory or "file" liens, ORS 87.445-490 create monetary or "charging" liens on litigation proceeds "to the extent of fees and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney." ORS 87.445. *See generally Potter v. Schlesser Co.*, 335 Or 209, 63 P3d 1172 (2003) (discussing the broad sweep of "charging" liens).

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