

Ohio Grievance Board Clarifies What Documents in the Attorney's File are Considered the Property of the Client



By: David M. Krueger

What are an attorney's obligations with regard to producing client file materials upon withdrawal from representation or the termination of the attorney-client relationship? While no one disputes that the former client is entitled to their file, are there any limitations upon the nature and scope of information the attorney is required to produce? Is counsel required to produce his or her personal notes containing the lawyer's personal theories of the case?

Upon the termination of the attorney-client relationship, a former client may request a file for a myriad of reasons including: the need to retain subsequent counsel to continue litigation; the return of important business or other records; or even the evaluation of a potential professional liability claim based upon the attorney's handling of the client's matter. The response to these questions regarding the information counsel is required to provide to the client may have implications impacting the attorney's potential liability following the termination of the attorney-client relationship.

In an effort to offer some clarity, the Ohio Board of Commissioners on Grievances and Discipline recently addressed the issue of whether a lawyer's personal notes are considered "client papers" to which the client is entitled. In Opinion 2010-2, the Board concluded that whether a lawyer's personal notes are client papers depends on whether the notes are "reasonably necessary" to the client's representation. While an attorney's notes regarding impressions, ideas, theories, and internal memoranda will not fall within the ambit of reasonably necessary information, a lawyer's personal notes regarding facts about the case would most likely be considered necessary to a client's representation and are therefore the client's property.

It is well established under Ohio law and Professional Conduct Rule 1.16 that a client is entitled to "client papers and property" upon counsel's withdrawal or termination of representation. Opinion 2010-2 arises from the unsettled interpretation of what constitutes "client papers." While Rule 1.16 gives examples that client papers include items such as correspondence, pleadings, exhibits, and expert reports, the Rule is silent as to whether an attorney's personal notes made during representation are client papers. No criterion is provided to determine what constitutes a client's "papers and property," and this Opinion provides the means by which that determination can be considered.

The issue is critical to Legal Malpractice litigation. In virtually all legal malpractice matters, the first item considered is to turn the file over to the client, or, just as often, the client's new lawyer. When that occurs, a judgment has to be made as to just what is fairly included within the phrase "client papers and property," as there is often extraneous matter in the file contents. Some of that extraneous matter might be embarrassing, or even damning to the lawyer turning over the file, even though it may not relate at all to what is reasonably necessary to the client's representation. This Opinion seeks to provide guidance on the parameters of what must be turned over, as opposed to what may be withheld.

Of the states that have examined this issue, only a few have found that a client is entitled to an attorney's personal notes. Instead, the majority have found an attorney's personal notes are not client papers and are protected under the attorney work-product doctrine. While Opinion 2010-2 protects an attorney's personal thoughts and theories of a case, the Opinion takes a middle ground in this national split of authority in concluding that notes regarding the facts about a case must be turned over to a client. Opinion 2010-2's compromise position stems from Ohio's unique language in Prof. Cond. R. 1.16(d), which states that "other items *reasonably* necessary to the client's representation" are considered client papers. The Board concluded that in contrast to an attorney's personal theories or impressions about a case, factual recitations are more likely to be "reasonably necessary" to the client's future representation. If an attorney's notes include both factual items and the attorney's thoughts or impressions about a case, an attorney may ethically redact the notes he/she believes are not reasonably necessary to representation.

While Opinion 2010-2 is a non-binding advisory opinion, Ohio courts and Office of Disciplinary Counsel are often influenced by the Board's interpretation of the Rules of Professional Conduct. In the absence of any other pronouncement on the subject, its conclusions are almost certain to become the applicable standard, and it should be viewed as authoritative. Opinion 2010-2 is the first advisory opinion in Ohio to address the scope of "client papers" under Prof. Cond. R. 1.16. Ultimately, the determination of what constitutes "client papers" requires the exercise of the lawyer's professional judgment. Despite the issuance of Opinion 2010-2, considerable ambiguity remains as to the scope of "client papers" which must be returned by an attorney to the client. Therefore, attorneys are wise to err on the side of caution in determining what material is reasonably necessary to a client's representation when returning client papers.

Moreover, Opinion 2010-2 provides guidance, which may limit the scope of potential professional liability claims. For example, an attorney's notes following an auto accident case relative to witness statements, the location of accident reports, or other factual information relative to the litigation are certainly "reasonably necessary" for the client's future representation in the litigation. However, particularly in the context of a threatened legal malpractice action, counsel's opinions and mental impressions contained in the attorney's personal notes should be shielded from production to the client under the ambit of "client papers and property." Of course, counsel's personal notes should not be destroyed because the notes may be relevant at a later date, or may be deemed by a court, viewing them *in camera*, to have been reasonably necessary to a client's representation

Should you desire a full text of Board of Commissioners on Grievances and Discipline Opinion 2010-2 or if you have any questions regarding professional Liability or grievance exposure applicable to attorneys, please contact one of our Professional Liability Practice Group members.

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