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A Quarterly Update on Issues Regarding Liability Protection for the Legal Profession

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Whose File is it Anyway?

*(or How to Best Respond if
Your Client Demands the File)*

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At some point during each attorney's career, there will likely be an occasion in which a former or current client "demands the file" from the attorney. This request can occur for a variety of reasons, some seemingly innocuous and others motivated toward making a claim for malpractice. This article will discuss the client's entitlement to "the file," and will further address the manner in which the skilled practitioner should respond to such a "demand."

To Whom Does the File Belong?

Surprisingly, many attorneys believe that the client has an absolute right to his or her file at any time. This misunderstanding is most likely rooted in the confusion relating to the law regarding retaining liens. Although the Rules of Professional Conduct do not address specifically all circumstances surrounding the appropriate tender of client files,¹ Florida case law provides some guidance in this area.

Most attorneys refer to the file that is related to a particular client as that client's file, yet the file and its contents are, in fact, the personal property of the attorney.² While the conditions will dictate the attorney's duty to turn over a file to a former client, it has been held that an attorney does not have a duty to provide pleadings, investigative reports, subpoena copies, or other case preparation documents to the former client free of charge.³ However, asking an already disgruntled client to pay for copying "their file" may only compound the problems with the client and it may be better to provide a copy of the file without any copying charge. The file may contain original documents or other property provided to the attorney by the client which, in most circumstances, must be returned to the client at no charge if the client requests same.⁴

Retaining Liens

Confusion may arise as the unwary practitioner may mistakenly believe that a client's failure to pay fees and costs automatically entitles the attorney to a *retaining lien*, a possessory lien based upon equitable principles that an attorney maintains on the file materials until an outstanding fee has been satisfied or until such time as adequate security for payment has been posted.⁵ However, it is important to recognize that the attorney's rights via a retaining lien are inversely proportional to the client's need for the materials in the attorney's possession;⁶ a court may compel the possessing attorney to disclose information contained within the file to either the client or successor counsel if the client's rights would be compromised absent disclosure, such as in the defense of a criminal case.⁷ Notwithstanding the general rules regarding the propriety of retaining liens, an attorney may not refuse to tender a file to a client where the attorney files suit to recover outstanding fees as the client will necessarily be required to evaluate the work performed to determine the reasonableness of the fee.⁸

In circumstances not involving retaining liens, the attorney may not refuse to provide the file to the client under the guise of privilege. As recognized by Section 90.502(4)(c) of the Florida Statutes, the attorney-client privilege is waived if the communication is relevant to an issue of breach of duty by that attorney.⁹ As such, those file materials related to a particular transaction will be subject to discovery in the event the former client brings a claim of legal malpractice with regards to that transaction; other aspects of the relationship by and between the attorney and client will remain privileged and should not be disclosed absent proper analysis.¹⁰

Preserving the File

Following the evaluation regarding file disclosure, careful attention should be paid to preserving the file's contents. Remarkably, a number of attorneys have provided the entire file to their clients without maintaining a complete copy of the file which, most likely, will be essential to the defense of any claim. If the attorney has failed to copy the file, portions of the file's contents may be altered, redacted,

or supplemented, either intentionally or unintentionally. It is difficult to investigate and defend a potential claim for malpractice if the file is “unavailable,” incomplete, or contains materials different from that which was provided to the client. One sure way to prevent having to investigate whether the file has been altered in any way is to both catalogue the file’s contents and number all pages contained within the file (to include all legal research, attorney’s notes and memoranda, and draft documents) prior to tendering the file. In the event a claim is made, the insured attorney and *Florida Lawyers* will be better prepared to respond to any inquiry regarding the claim if both are certain that the file is complete. Additionally, certain documents may be reviewed by and between the insured and *Florida Lawyers* simply by referencing the file’s catalog and identifying the assigned page number.

Conclusion

While not all client requests for the turnover of the file are indicative of a potential claim for malpractice, some “demands” are decidedly directed toward that end. If an attorney suspects a potential claim for malpractice in conjunction with the demand for the file, the attorney should (1) evaluate the client’s entitlement to the file, (2) photocopy, catalogue, and number all pages of the file before turnover to the client, and (3) contact *Florida Lawyers*. The *Florida Lawyers*’ representative may also provide the attorney with additional recommendations and, importantly, there will likely be no prejudice to the defense of any potential claim.

Endnotes

1. Rule 4-1.6(a) of the Rules of Professional Conduct provides the limited circumstances by which an attorney may reveal information relating to the representation of a client, and those occasions include, among others, when an attorney may reveal information to the extent the attorney reasonably believes is necessary to establish a claim or defense on behalf of the attorney in a controversy between the attorney and client and to respond to the allegations in any proceeding concerning the attorney’s representation of the client. Rule 4-1.6(c)(4) and (5), Fla. Rules of Professional Conduct.
2. *Dowda and Fields, P.A. v. Cobb*, 452 So.2d 1140, 1142 (Fla. 5th DCA 1984).
3. *Donahue v. Vaughn*, 721 So.2d 356, (Fla. 5th DCA 1998).
4. *Dowda and Fields*, 452 So.2d at 1142; see also *Long v. Dillinger*, 701 So.2d 1168, 1169 (Fla. 1997); *Thompson v. Unterberger*, 577 So.2d 684 (Fla. 2d DCA 1991).
5. *Andrew Hall & Assoc. v. Ghanem*, 679 So.2d 60, 61 (Fla. 4th DCA 1996); *Wintter v. Fabber*, 618 So.2d 375 (Fla. 4th DCA 1993).
6. *Andrew Hall*, 679 So.2d at 61; *Wintter*, 618 So.2d at 377.
7. *Andrew Hall*, 679 So.2d at 62; *Wintter*, 618 So.2d at 377.
8. *Fingar v. Braun and May Realty, Inc.*, 807 So.2d 202, 204 (Fla. 4th DCA 2002).
9. Section 90.502(4)(c), Fla.Stat. (2002).
10. *Coyne v. Schwartz, Gold, Cohen, Zakarin & Cotler, P.A.*, 715 So.2d 1021, 1023 (Fla. 4th DCA 1998); see also *Shafnaker v. Clayton*, 680 So.2d 1109 (Fla. 1st DCA 1996).

Nothing contained herein is intended to nor should be relied upon as legal advice. Factual circumstances are different and individualized legal research and analysis is always recommended.

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