speaking of ethics

By Saul Jay Singer

On File

Mick Wiggins

"Boy, You're Gonna Carry that File . . . Carry that File . . . A Long Time."
—The Beatles, *Abbey Road*, circa 1969 (slightly revised)

Barry Barrister, Larry Lawyer, and managing partner Angela Attorney had been partners in a general civil practice firm for more than 20 years when Barry, who has been largely inactive for some time due to an unfortunate illness, comes in one day and announces his retirement. "As you know," he says, "I only have a few active matters pending, and I assume the two of you will have no problem taking over those cases. As for the hundreds of files from my old cases, I will have no use for them while playing shuffleboard in sunny Miami, so you can just toss them." In fact, the firm was running out of storage space, and Larry had planned to raise the issue of disposing of old case files at the next partners' meeting.

When an agitated Calvin Client learns of Barry's retirement, he calls Angela to find out what would happen with his case. When Angela advises that she would personally take over the case, the distressed Calvin says, "Barry has been my lawyer in this complex matter for more than seven years, and I don't know you from a hole in the wall. If I can't have Barry, I may as well have my cousin represent me. I want you to immediately send my entire file to my cousin's California office. And I mean *all* of it."

Angela tells Calvin: "Frankly, you are calling at a terrible time, as we are all under great stress dealing with transitioning from Barry's departure. First, even in the best of circumstances, your file contains thousands of documents, and we will have to review the file and sort through it before we can turn it over; that will take at least a few weeks and cost at least a few thousand dollars. Second, we will charge you five cents a page for copying your file, well below the going market rate. Third, you have an outstanding invoice of $30,000, and we will expect payment in full before we can turn over any documents in your file."

All of which begs the following questions:

What is the "client file," and, specifically, which documents and materials are considered part of that file?

Every last piece of paper—*all of it.* Specifically included are, for example, the yellow "stick-it" notes attached to documents and your hand-scrawled and deeply personal observations, thoughts, and notes.[1] Moreover, "the file" includes documents in electronic form—every e-mail, every scan, every digital photograph, etc.[2]

However, this broad "entire file" approach applicable under the D.C. Rules of Professional Conduct specifically excludes documents unrelated to the representation, and documents which, if withheld, will not cause any foreseeable prejudice to the former client. This includes, for example, social calendars, internal law firm deliberations and strategies regarding staffing, general case management policies, and the like.

I have many hundreds of client files, some that are very old, and I am running out of storage space. For how long must I retain these files? May I charge the client for reasonable storage costs?

The duty to protect client files is a subset of a lawyer's general duty under Rule 1.15(a) to protect client property, which requires a lawyer to "appropriately safeguard" property of clients "in the lawyer's possession in connection with a representation." In Legal Ethics Opinion 283, the Legal Ethics Committee determined that, when a former client cannot be found, "absent special circumstances, . . . a five year retention period beginning at the termination of representation generally is sufficient to protect the client's interests with respect to closed files."

However, as the opinion notes, "A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitation period has not expired." Thus, if the case remains active even after the lawyer has withdrawn from the case or been fired by the client, the lawyer may have to retain and protect the client file for far longer than five years.

Moreover, documents which, in the language of Opinion 283, have "intrinsic value or that directly affects valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills," are subject to a far higher standard of care than ordinary documents. A lawyer is obligated to preserve and maintain such valuable documents *indefinitely* until they can be delivered to the client or to an appropriate client representative or successor in interest.[3]

Notwithstanding the five-year document retention rule, the best practice, as is virtually always the case, is to seek informed consent before taking action, which may impact the former client's interests. The lawyer should seek permission from the former client before destroying documents—even if the documents do not have intrinsic value and the matter was rendered final well over five years ago.[4] The former client may, for whatever reason, decide that he wants the file and be very pleased to be offered the option. In addition, reaching out to former clients in this manner may afford the lawyer an opportunity to discuss the former client's current legal needs and perhaps generate some business, surely a "no-lose" proposition all around.

As to charging storage fees to clients, Rule 1.5(b) (Fees) requires that a lawyer specify in writing, *inter alia*, "the expenses for which the client will be responsible." Thus, absent a specific contractual provision regarding such expenses, a lawyer cannot charge a client for storage.

My client has fired me and has retained new counsel who is demanding that I immediately turn over the file to her. May

I charge a reasonable fee for the costs of: (a) copying the file; (b) organizing and preparing the file; and (c) delivering the file? May I withhold the file until the client pays her outstanding legal fees?

Rule 1.16(d) provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to . . . surrender [ ] papers and property to which the client is entitled . . . The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

The black-letter rule of legal ethics applicable here: *the file belongs to the client* and, thus, a lawyer may not charge a client for it. Lawyers who would like to retain a copy of the file may do so—but at their own expense.[5]

In the ordinary course of a representation, a lawyer is required to maintain documents and files in a reasonably organized manner, and there should generally be no need for a lawyer to charge a departing client for "organizing and preparing" the file. As Opinion 283 notes, "good management practices during the course of the client representation . . . should be employed to minimize time and expense associated with reviewing voluminous client files," and any attempt by a lawyer to run up the bill of a departing client will be scrutinized critically. However, if the client gives specific directions regarding how to produce the file, or if the lawyer can show that some review is necessary for the benefit of the client, or if some reason otherwise exists to necessitate a review of the file before producing it, the lawyer may charge a reasonable fee for such work.

As to the method of delivery, Rule 1.16(d) and Opinion 283 require the lawyer merely to "surrender" the client's files. As such, the lawyer may simply make the files available for pick-up; in the vernacular, "your file is ready, c'mon in and get it." If the client requests that the file be delivered by other means (e.g., messenger, U.S. mail, etc.), the lawyer may charge the client for costs incurred in facilitating such delivery.[6] However, at the end of the day, as Opinion 283 makes clear, the lawyer must surrender the file to the former client and may not withhold it on the grounds that the client refuses to pay for its delivery.

The client is entitled to receive "all material that the client or another attorney would reasonably need to take over representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client's interests."[7] In almost all cases, it will be unethical for a lawyer to withhold any part of the "papers and property to which the client is entitled" due to nonpayment. While Rule 1.8(i) does expressly permit a lawyer to impose a lien upon work product[8] for which he or she has not been paid, the rule effectively shuts the door on even this very narrow exception by prohibiting the withholding of unpaid-for work product "when the client has become unable to pay" or when "withholding the lawyer's work product would present a significant risk to the client of irreparable harm." In general, a lawyer will face a most difficult burden to support a refusal to produce documents to the client; courts will view such refusal to produce with great skepticism, and lawyers should think long and hard before seeking refuge under Rule 1.8(i).[9]

Finally, an important practice tip: Most problems related to the preservation and production of client files can be effectively avoided if lawyers "make arrangements with their clients for the disposal of clients' files either in the initial representation [i.e., in the retainer agreement] or in the agreement terminating the attorney–client relationship . . . Similarly, the parties' respective obligations regarding delivery, storage or destruction costs may be set forth in this agreement."[10]

Sage advice, indeed.

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e–mail at ethics@dcbar.org.

Notes

1 *See* D.C. Bar Legal Ethics Committee Opinion 333, where the committee held that handwritten notes and memoranda reflecting the lawyer's internal thoughts and case strategies are part of the file that the former client is entitled to receive.

2 As to the retention and destruction of electronic files, *see* Legal Ethics Opinion 357 (Former Client Records Maintained in Electronic Form).

3 However, recognizing the difficulty of imposing a burden upon lawyers to protect certain client property *forever*, the Legal Ethics Committee permits a lawyer who is unable to locate the former client to invoke any state law procedures for escheat funds or unclaimed property depositories. *See* Legal Ethics Opinion 359 (Disposition of Missing Client's Trust Account Monies in the District of Columbia).

4 *See* Legal Ethics Opinion 283, note 12 (minimum efforts to be expended to reach the former client).

5 *See* Legal Ethics Opinion 250, note 2 ("If the lawyer wishes to keep copies of files sent to a former client, the lawyer must bear the cost of making such copies.").

Many lawyers consider it prudent practice to retain a copy of the file, particularly where the lawyer has been fired and it may become necessary to protect against a Bar complaint and/or malpractice suit. *See* Rule 1.6(e)(3), which suggests that a lawyer may retain a copy of the file even in the face of a direct client command not to do so.

6 Similarly, if, for whatever reason, the former client wants the lawyer to store the file, the lawyer may charge for incurred storage costs.

7 *See* Legal Ethics Opinion 333.

8 *See* Comment [18] to Rule 1.8 for a discussion on what constitutes "work product" in this context and the types of documents a lawyer would be required to return under all circumstances.

9 *See* Legal Ethics Opinion 250 ("[I]t seems clear to us that retaining liens on client files are now strongly disfavored in the District of Columbia, [and] that the work product exception permitting such liens should be construed narrowly…").

10 *See* Legal Ethics Opinion 283.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE PAUL SHEARMAN ALLEN. Bar No. 167940. August 23, 2012. The D.C. Court of Appeals disbarred Allen by consent, effective October 1, 2012.

IN RE SAMUEL N. OMWENGA. Bar No. 461761. August 16, 2012. In five consolidated cases, the D.C. Court of Appeals disbarred Omwenga for intentional misappropriation in one matter. In addition, the court required Omwenga to make restitution to one client in the amount of $550, with interest at the legal rate, as a condition of reinstatement and deferred consideration of the issue of restitution to Omwenga's other clients pending an application for reinstatement. The court adopted the Board on Professional Responsibility's report that found Omwenga committed intentional misappropriation in one matter and 57 other violations of the disciplinary rules in four matters. The fifth matter was dismissed.

In the first matter, Omwenga represented a client in connection with her immigration removal proceeding and in her application for permanent residence status. Omwenga failed to communicate with the client or to file papers with the U.S. Citizenship and Immigration Services. Omwenga advised the client not to appear at an immigration hearing, which Omwenga also did not attend and at which the immigration court ordered the client removed in absentia from the United States. Omwenga then drafted an affidavit for the client's signature that falsely stated the reason the client did not attend the hearing. Omwenga did not advise the client that his incorrect advice not to attend the hearing might have formed a basis for relief from the removal order. In addition, Omwenga made numerous false statements in his answer to the ethical complaint, and testified falsely before the Hearing Committee.

In the second matter, Omwenga was retained to file an I-130 immigration application to adjust a client's immigration status, but Omwenga failed to file the application. In addition, Omwenga lied when he told the client on multiple occasions that he had filed the I-130 petition. Thereafter, immigration authorities arrested the client and placed him in removal proceedings. The client then retained Omwenga to represent him at the immigration removal hearing in addition to the adjustment of status matter. Omwenga told the client that he would be out of the country, but that he had filed a request for a continuance, and Omwenga advised the client that he had to attend the hearing, but Omwenga failed to prepare the client for it. At the hearing, the immigration judge, after questioning the client, ordered him removed from the United States, noting that an I-130 petition has not been filed and that Omwenga had not been excused from attending the hearing. Omwenga thereafter appealed to the Board of Immigration Appeals (BIA), but he did not file a timely brief. Omwenga failed to return his client's property upon termination of the representation. Finally, Omwenga was untruthful in his responses to Bar Counsel and testified falsely at the hearing.

In the third matter, Omwenga was retained to represent a client in an asylum case before the immigration court. Omwenga advised the client of the incorrect time of the hearing, resulting in the immigration court ordering the client to be removed in absentia because of the client's failure to appear at the hearing; in addition, Omwenga failed to appear at the hearing. Omwenga thereafter drafted an untruthful affidavit for the client to sign in support of a motion for reconsideration and filed that affidavit with a false notarization page. Omwenga's several posthearing motions were denied because, inter alia, Omwenga failed to comply with applicable rules. Omwenga thereafter notified the client of the denials and that the client would need to pay him an additional $1,000 to appeal the case to the BIA. Omwenga filed a brief with the BIA without reviewing the brief with the client or giving him a copy. Omwenga was untruthful with the immigration court, the BIA, and in his testimony to the Hearing Committee.

In the fourth matter, a client retained Omwenga to represent him in connection with the purchase of a laundromat business. Omwenga negotiated for the purchase of the equipment at a price of $48,050, and the client delivered a certified check in that amount to Omwenga. After signing a bill of sale, Omwenga continued to negotiate with the seller and reached agreement on a reduced price of $46,000. Omwenga then paid the $46,000 to the seller and withdrew the remaining $2,050 in cash without the client's knowledge or consent. Omwenga did not transfer the funds to another account or provide them to the client. The client repeatedly asked for copies of the laundromat sales documents, but Omwenga failed to provide them. At a subsequent meeting, the client demanded the return of the $2,050. Omwenga gave the client a check for $1,500, but stated that he was retaining the remaining $550 as additional legal fees because he had negotiated a better sales price. At hearing, the client testified

that he did not agree to pay the additional legal fees, but he did not challenge Omwenga for fear that he would not provide the client with documentation of the sale. In addition, Omwenga made false statements to his client, the courts, and Bar Counsel. Omwenga also testified falsely at the hearing.

Omwenga violated numerous rules in the four client matters, which in the aggregate included Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 1.5(b), 1.7(b)(4), 1.7(c), 3.3(a)(1), 3.4(c), 1.15(a), 1.15(b), 1.15(d), 1.16(d), 8.1(a), 8.4(c), and 8.4(d), and D.C. Bar R. XI, § 2(b)(3).

IN RE KEVIN M. SABO. Bar No. 435676. August 16, 2012. The D.C. Court of Appeals reinstated Sabo. The court adopted Bar Counsel's recommendation to condition Sabo's reinstatement on continuing mental health treatment, in a fashion recommended by his mental health provider, for the next five years. Sabo was ordered to direct his mental health provider to submit a notice of compliance or noncompliance every six months to Bar Counsel and the Board on Professional Responsibility. One judge dissented, denying reinstatement.

Reciprocal Matters

IN RE MICHAEL R. CARITHERS JR. Bar No. 434113. August 16, 2012. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Carithers, effective November 17, 2011. The Maryland Court of Appeals found that Carithers engaged in dishonesty, misappropriated fees from clients that should have gone to his firm, and commingled personal funds with entrusted funds.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE MICHAEL W. COOPET. Bar No. 392884. August 20, 2012. Coopet was suspended on an interim basis based upon discipline imposed in Minnesota.

IN RE RICHARD A. FAIRBROTHERS. Bar No. 426442. August 27, 2012. Fairbrothers was suspended on an interim basis based upon discipline imposed in Massachusetts.

IN RE RANJI M. GARRETT. Bar No. 469682. August 23, 2012. Garrett was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE ERWIN R. E. JANSEN JR. Bar No. 477715. August 20, 2012. Jansen was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE SANDY V. LEE. Bar No. 361460. August 9, 2012. Lee was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's May 11, 2012, recommendation of disbarment.

IN RE LOUIS P. TANKO JR. Bar No. 434000. August 27, 2012. Tanko was suspended on an interim basis based upon discipline imposed in Maryland.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*