THE BAR ASSOCIATION OF SAN FRANCISCO

Legal Ethics
Ethics Opinions

OPINION 1984-1

Under no circumstances is it ethical for a lawyer is a civil case who has either withdrawn or been discharged by the client to withhold, pending payment of costs or unpaid fees, all tangible materials generated in the course of the representation except to the extent these materials are absolutely protected from disclosure by court order or privilege personal to the attorney. These materials include all pleadings, correspondence, discovery, reports, research notes, and notes regarding witnesses and strategy. Furthermore, an attorney must relinquish certain intangible materials generated as a consequence of the work consisting of general impressions of the case, tactics, and legal theories, except to the extent these materials are likewise protected from disclosure by court order or valid privilege personal to the attorney. Except to the extent required to comply with Rule 8-101 (B)(3), an attorney does not have to relinquish materials relating to billing information for fees and disbursements.

QUESTION:

A. Under what circumstances, if any, is it ethical for a lawyer in a civil case who has either withdrawn from representation or who has been discharged by the client to withhold from the client [1] some or all materials contained in the case file pending payment of the lawyer's fees and/or costs advanced?

For the purpose of this opinion the case file consists of the following items:

1. All tangible non-billing materials [2] (pleadings, correspondence, discovery, reports, research notes, notes regarding witnesses, strategy and tactics and any other items) generated in the course of the representation except if and to the extent that these materials are absolutely protected from disclosure by a court order or valid privilege which the lawyer may and has properly invoked: [3]
2. Lawyer's billing information, including notes concerning time spent on phone calls, research, drafting, copying, etc., and costs disbursed, including bills from third parties;
3. Intangibles, obviously not literally contained in the case file, but generated as a consequence of the work for which the lawyer was retained prior to withdrawal or discharge, consisting of the lawyer's general impressions of the case, *i.e.,* mental impressions of witnesses and others, the strategy, tactics and legal theories of the case except if and to the extent that these materials are absolutely protected from disclosure by a court order or valid privilege which the lawyer may and has properly invoked; [3]

B. If all or part of the case file cannot be withheld from the client pending payment for fees and/or costs advanced, is the lawyer or the client entitled to the originals of the case file materials, and if the client is entitled to any copies of such materials, is the lawyer or the client to bear the cost of duplication?

C. Does the lawyer's ethical obligation change depending on the nature of the fee agreement, *i.e.,* contingency fee, hourly rate, flat rate, or any combination thereof?

OPINION

A. It is the opinion of this Committee that under no circumstance is it ethical for a lawyer in a civil case who has either withdrawn from representation or who has been discharged by the client to withhold from the client the case file consisting of items (1) and (3), pending payment of.the lawyer's fees and/or costs advanced.

B. It is the further opinion of this Committee that the originals of all portions of the case file consisting of item (1) which the client provided the lawyer or for which the client has paid (including materials for which the lawyer has advanced unreimbursed costs) must be turned over to the client at the client's request. All other portions of the file must be either copied for the client, delivered to the client for copying or delivered to the client for the client's use, whichever is most convenient to the client. The cost of copying is to be borne by the lawyer unless at the beginning of the lawyer-client relationship the parties agreed or contemplated that the client would be charged for such copying.

As to item (2), assuming no such material was provided by or paid for by the client (including materials for which the lawyer has advanced unreimbursed costs), then this Committee believes such material need not be delivered to the client except as is necessary to comply with California Rules of Professional Conduct, Rule 8-101 (B)(3) (hereinafter, Rule) [4] , regarding appropriate accounting to the client.

With respect to item (3) it is the opinion of this Committee that the lawyer's general impressions of the case must be communicated to the client upon request, and unless more than such information is requested or an unreasonable amount of the lawyer's time is expended in supplying this information, the cost of providing such information to the client is to be borne by the lawyer. The circumstances of the case should dictate the amount of time and the type of information which is reasonable for a lawyer to supply the client, anything more may be considered new employment for which the lawyer, if the client is able to pay, may require a reasonable fee to be paid in advance.

C. It is the opinion of this Committee that the lawyer's ethical obligation does not change whether the lawyer has been paid, partially paid, or unpaid for services or costs advanced, nor does it differ depending upon the nature of the fee agreement-between the lawyer and client.

DISCUSSION

At common law two types of attorney liens were recognized: (1) a retaining lien which permitted an attorney to maintain possession of the client's documents and other tangible property until fees and costs due were paid; (2) a charging lien which permitted an attorney to recover fees and costs from the fund or judgment recovered by the client (including the right to prevent payment by the judgment debtor to the creditor client in derogation of the attorney's lien). See, Opinions of the Com. on Legal Ethics of the L.A. County Bar Assn. (hereinafter L.A.) Opn. No. 38, December 15, 1927 and the cases cited therein.

Prior to any definitive California court ruling on the subject, the L.A. Committee (in Opinion No. 48 (December 15, 1927), 103 (August 27, 1936) and 197 (August 3, 1952)) opined that a lawyer did not possess a retaining lien upon the client's file and was adequately protected by a civil action to collect money due for services and costs. Aside from reaffirming these prior opinions, L.A. Opinion No. 330 (November 30, 1972), finding no guidance in ABA Code of Professional Responsibility DR 2-110(A)(2) (hereinafter, ABA) [5] opined that the originals of that portion of the file for which the client has paid should be delivered to the client, that if the lawyer, wishes to retain copies he/she does so at his/her own expense, and that the remainder of the file, including the lawyer's work product, is to be turned over to the client for use or copying. Alternatively, that Committee considered it proper for the lawyer to make copies of such material for the client, the cost to be borne by the client although the lawyer should not profit from such copying.

At about this time the California Supreme Court expressed the strong public policy in favor of a client's absolute right to discharge his/her lawyer. In *Fracasse v. Brent* (1972) 6 Cal.3d 784,786, 100 Cal.Rptr. 385, the Court rejected the 108 year old damage formula which permitted a lawyer, discharged without cause, to recover the full contract price, concluding that such a formula was:

> . . . inconsistent with the strong policy, expressed both judicially and legislatively, in favor of-the client's absolute right to discharge his attorney at any time, and that the attorney should be limited to a *quantum meruit* recovery for the reasonable value of his services, upon the occurrence of any contingency contemplated by his contract.

The Court reasoned that to hold otherwise may frequently force a client to continue the employment of a lawyer in whom he/she has lost faith simply to avoid paying higher fees, thereby tending to undermine the client's absolute right to discharge his/her lawyer.

Combining the client's absolute right to discharge his/her lawyer, with the lawyer's obligation to guard the interests of his/her client, the Court in *Hulland v. State Bar* (1972) 8 Cal.3d 440, 105 Cal.Rptr.105, affirmed the State Bar's determination that discipline was warranted against a lawyer who had used a confession of judgment against his client to collect a fee. In finding this conduct alone sufficient to warrant discipline, the Court stated at 448-449:

When an attorney, in his zeal to ensure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client.

The effort to collect unearned fees becomes highly oppressive and detrimental to the client when the attorney arms his demands with the force and weight of a judgment obtained on a confession of judgment, and thus prevents his client from contesting the reasonableness of the fees before judgment enters against her.

Relying, to a large degree, on *Hulland* and *Fracasse,* - the Court in *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 124 Cal.Rptr. 668 decided that a lawyer may not even assert a

contractual (or common law) retaining lien upon the client's file until the lawyer's fee is paid. The lawyer in *Academy* sought to reserve to himself by a written retainer agreement "all general, possessory, or retaining liens . . . known 'to the common law." Further, and more specifically, the written retainer agreement stated, "Counsel shall have a retaining lien on all files, papers and documents in its possession to secure payment of all sums owed to it hereunder, and shall not be obliged to release the same to client or to substitute counsel unless and until all such fees and costs have been paid.' *Academy* at 1004. The file in possession of the lawyer consisted of copies of all documents in the court file including lengthy pleadings (a 101-page third amended complaint) ' interrogatories and answers thereto, 38 depositions, and other similar papers. In addition, the file contained the lawyer's extensive notes, papers, memoranda, and communications collected during five years of representation. After being discharged, and still owed $1,300 in fees and expenses, the lawyer refused to sign a substitution of attorneys and to turn over the file to the client until his fees and expenses were paid. The client needed the files because the five-year mandatory dismissal period provided in Code Civ. Proc., Section 583(b) was about to expire. The court noted that the files contained nothing of pecuniary value, nothing which could be sold by the lawyer to a third person for money to be applied against the disputed claim should the dispute resolve favorably to the lawyer; its sole benefit to the lawyer was to coerce payment by the client. The client, the court explained, is coerced because of the need for the file in preparation for trial and because of the great cost of reproducing the documents in the county clerk's court file. Thus, the court stated that the lawyer was in the untenable position of insisting upon the exercise of his contractual right to the detriment of his client. "The client's cause, sacred as it is to a member of the legal profession, may not be so abused." *Academy* at 1005. Quoting from and citing Rule 2-111(A)(2) [6] and ABA DR2-110(2)(A)(2) and ABA EC2-32 [7] , the court held that the lawyer's duty to the client is not altered by the client's decision to terminate the lawyer-client relationship. The court concluded that such a retaining lien violates a lawyer's ethical duties and it is therefore void.

In a concurring opinion, Justice Friedman voiced his disagreement with that portion of the opinion (which he called *dicta)* which attempted to distinguish between pecuniary and non-pecuniary value of the material withheld by the lawyer, indicating that any withheld material which the client needs would constitute a violation of professional ethics.

In apparent agreement with Justice Friedman's view (with which this Committee concurs), the State Bar of California Committee on Professional Responsibility and Conduct [8] opined that while a lawyer may ethically take a promissory note or obtain a security interest to protect the lawyer's fees, the lawyer may do so only in strict compliance with Rule 5-101 [9] That Committee stressed the lawyer's obligation to avoid a conflict of interest with the client and to continue to exercise his/her independent professional judgment on behalf of the client.

It is the opinion of this Committee, based upon the foregoing authorities, .that any material in the case file, whether of pecuniary value or not, must be made available to the client upon the client's request.

As stated earlier, L.A. Opinion 330 indicated that the lawyer's work product was part of the case file. Indeed, the result in the *Academy* case was that the *Academy* court issued a writ of mandate directing the trial court to enter an order commanding the lawyer "to forthwith deliver to petitioner all files, documents, and papers in his possession relating to the action." *Academy* at 1006. Clearly then, the case file includes materials commonly referred to as "work product. "

On point is *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 124 Cal.Rptr.297 where the court rejected a former lawyer's cause of action which alleged unjust enrichment against new counsel in exploiting the former lawyer's work product. The court explained at 599:

The "work product" of an-attorney belongs to the client, whether or not the attorney has been paid for his services. (See Opinions of the Com. on Legal Ethics of the L.A. County Bar Assn.; Opn. No. 330, Nov. 30, 1972). It follows that no cause of action is stated in the fourth count, which alleged that defendants/respondents exploited the work product of plaintiff.

This Committee concurs with L.A. Opinion No. 330 and the *Weiss* court's decision. It is therefore the opinion of this Committee that the lawyer's work product belongs to the client [10] and cannot be retained by the lawyer upon the client's request, except if and to the extent that these materials are absolutely protected from disclosure by a court order or valid privilege which the lawyer may and has properly invoked. [11]

With regard to materials contained in item (2), since the lawyer does not charge the client for compiling such materials, we believe an accounting in compliance with Rule 8-101(B)(3) fulfills the lawyer's ethical obligation. However, if depriving the client of such material(s) harms the client *e.g.,* client need for third party billing in order to contest such billing, then such material(s) must be delivered to, or made available to the client.

On March 2, 1976 this Committee, approved Opinion No. 1975-4. Amongst the questions answered by us then was "what should happen if the client refused to pay for the cost of duplication" of those materials not paid for by the client. This Committee concluded that the client is entitled to the file or photocopies even if the client does not pay for the same and that the lawyer may seek a civil remedy against the client for such expense. (But see, L.A. Opinion No 362 (modifying L.A. Opinion No 330) wherein that Committee opined that the question of who bears "the cost of copying material delivered to the former client" is a question of law and depends on the facts and the documents involved.)

We reaffirm our Opinion No 1975-4 concerning the matter of payment for duplication costs. We concur with that portion of the San Diego Bar Association Ethics Committee (S.D.) Opinion 1977-3 which concluded that the cost of copying such material must be borne by the lawyer, unless, at the beginning of the lawyer-client relationship, the parties agreed or contemplated that the client would pay for such costs. The S.D. Committee relied on *Lady v. wworthingham* (1943) 57 Cal.App.2d 557; *Davis v. State Bar* (1942) 20 Cal.2d 332; *Cooley v. Miller & Lux* (1909) 156 Cal. 510, cases which closely scrutinize a lawyer's dealing with his/her clients after the lawyer-client relationship has begun. [12]

In our opinion even when the client should bear such costs, because of a prior agreement or the contemplation of the parties, the client's refusal to do so does not alter the lawyer's obligation to provide the material; the lawyer may later seek whatever civil remedy is available to obtain reimbursement.

The materials described in item (3) have not been squarely dealt with by the courts. Rule 2-111(A)(2) and ABA DR 2-110(A)(2) both require a lawyer, whether discharged or terminated by the client (see, *Academy)* to take " reasonable steps to avoid foreseeable prejudice to the rights of his client." [13] Further, ABA EC2-32 states that "a lawyer should protect the welfare of his client by.cooperating with counsel subsequently employed. [14]

Failure to communicate with and inattention to the needs of a client, standing alone, may constitute proper grounds for discipline. *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978, 126 Cal.Rptr. 801. See Also, 1 Witkin, Cal.Proc. (2d ed. 1970) Sections 55-74.

In our opinion material contained in item (3) ought properly be regarded as the client's property. Such material would not exist but for the lawyer-client relationship and the client is billed for it regardless of the method of billing. It is, to a large degree, the very expertise a client is purchasing. Therefore, it is our opinion that the lawyer's general impressions of the case, upon request, must be communicated to the client, and unless otherwise agreed or contemplated, the cost of providing such information is to be borne by the lawyer. Even when the client should bear such costs, because of a prior agreement or the contemplation of the parties, the client's refusal to do so does not alter the lawyer's obligation to communicate such material; the lawyer may later seek whatever civil remedy is available to obtain a fee for such services. (But see, S.D. Opinion 1977-3 which apparently exempts from production written as well as intangible "work product.")

It should be emphasized that the circumstances of the case should dictate the amount of time and type of information which must be communicated to the client. Should the client request more, then we believe it is proper for the lawyer to consider such a request as a request for new employment and charge a reasonable fee, including requiring an advance for such work. [15]

In conclusion, this Committee believes that a lawyer must take reasonable steps to avoid foreseeable prejudice to his/her former client. Such steps include providing the client with the entire case file (except for certain billing materials) and communicating to the. client the lawyer's general views and impressions concerning the case.

Footnotes:

1. Client refers to tile client or the client's new, counsel.
2. Excluding medical reports implicated by our Opinion No. 1979-3.
3. See footnote 11.
4. Rule 8-107(B) (3) provides: Rule 8-107. Preserving Identity of Funds and Property of a Client (B) A member of the State Bar shall: (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.
5. ABA DR 2-110(A) (2) provides: DR 2-110 Withdrawal from Employment. • In general. (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. The equivalent California Rule (Rule 2-111 (A) (2) as with all California Rules, did not become effective until January 1, 1975.

6. Rule 2-111(A) (2) provides: Rule 2-111. Withdrawal from Employment. • In General. (2) In any event, a member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.
7. ABA EC2-32 provides: A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of **his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably** withdraws, a lawyer should protect tile welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.
8. Formal Opinion No. 1981-62
9. Rule 5-101 provides: Rule 5-101. Avoiding Adverse Interests A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.
10. The "work product" rule or qualified privilege was established in the famous case of Hickman v. Taylor (1947)329 U.S. 495; 67 S.Ct. 385; 91 L.Ed.451. The California version of the rule can be found in Code Civ. Proc.; Section 2016. In formulating the "work product" rule the Supreme Court indicated that such a rule was necessary for the continued vitality of the adversary system. Two rationales were provided: (1) without such a rule one side could simply wait for the other to gather information (form trial tactics and strategy) and then simply obtain such information upon request, thus destroying the adversarial model, wherein each side prepares and presents the best possible case; (2) the lawyer who gathered the information might be called as a witness by his/her adversary should information the lawyer provided be inconsistent with certain trial testimony, once again destroying the adversarial model by forcing advocates to become witnesses (perhaps even against their own clients). The rationales for the work product rule do not apply to the situation here presented. The discharged lawyer, or the lawyer that has withdrawn, is not compelled to provide such materials to his/her adversary, on the contrary, it is the client that seeks such information, and since the lawyer no longer represents the client, there is no fear that the client's p resent advocate will become a witness in the case.
11. This opinion is subject to any privilege, if applicable, which the lawyer, under the circumstances involved, may properly invoke. See, Mack v. Superior Court (1968) 259 Cal.App. 2d 7, 66 Cal. Rptr.280; Merritt v. Superior Court (1970) 9 Cal. App.3d 721, 88 Cal. Rptr. 337 ; American Mutual Liability Ins. Co. v. Superior Court (1974) 38 Cal.App.3d 579, 113 Cal.Rptr. 561 ; Lohman v. Superior Court (1978) 81 Cal.App.3d 90, 146 Rptr. 171 ; Fellows v. Superior Court (1980) 108 Cal.App. 3d 55, 766 Cal.Rptr. 274 ; Popelka v. Superior Court (1980) 107 Cal.App.3d 496, 165 Cal.Rptr. 748; Travelers v. Superior Court (1983) 143 Cal.App.3d 436, 791 Cal.Rptr. 871 ; Rumac v. Bottomley (1983) 143 Cal.App.3d 810, 192 Cal.Rptr. 104.
12. Such scrutiny, if anything, is stronger today. In Baron v. Mare (1975) 47 Cal. app.3d, 312; 120 Cal.Rptr.675 the court, in addressing a subsequent fee agreement change claimed by the lawyer, stated: Cases involving the question of lawyer's fees are matters in which the court has more to do than merely explain and apply ordinary rules of contract law. It is the duty of the courts to prevent unconscionable contracts between lawyers and clients (footnote citing Rule 5-101 omitted) In accord, is Hawkins v. State Bar (1979) 23 Cal.3d 622; 153 Cal.Rptr.234; Jackson v. State Bar (1975) 15 Cal.3d 372; 124 Cal.Rptr.185; Ames v. State Bar (1973) 8 Cal.3d 910; 106 Cal. Rptr. 489, Clancy v. State Bar (1969) 71 Cal.2d 140; 77Cal. Rptr.657; Sayble v. Fienman (1978) 76 Cal.App.3d 509; 142 Cal.Rptr.895.
13. See footnotes 5 and 6.
14. See footnote 7.
15. A related issue was raised in L.A. Opinion; No. 360 (August 25, 1976). There, a corporate clien t discharged the lawyer without paymen t for the lawyer's services. Tile lawyer was asked to provide the client's auditor with information necessary to the client's legal obligation to a California regulatory agency The L.A. Committee, citing its Opinion No 330, opined that the lawyer must supply the, information to the third party where refusal to do so could reasonably be expected to prejudice the client. However, that Committee further indicated that the lawyer could

charge a client who is able to pay, a reasonable fee for the services required, reasoning that such work was new employment, and that consistent with a reasonable fee arrangement, the lawyer may require a reasonable advance in respect to the new services to be rendered. That Committee made it clear that under no circumstances could the lawyer condition such work on the payment of the client's past due bill. The L.A. Committee reached its decision by interpreting Rule 2-111(A)(2) as requiring the attorney, even though terminated by the client, to take "reasonable steps to avoid foreseeable prejudice to the rights of his client.."

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