

Lawyer May Retain Copies of Client File

BY ROY SIMON

In Opinion 780, issued December 8, 2004, the NYSBA Committee on Professional Ethics considered two questions: 1) May a lawyer retain copies of a client's file over the client's objections?; and 2) May the lawyer insist on a release from liability for past conduct as a condition of giving up his copies?

When a representation ends, the lawyer is obligated to return to the client property and papers to which the client is entitled as a matter of law. Several provisions of the Code make this obligation clear. Thus, DR 2110(A)(2), which deals with a lawyer's withdrawal from employment, conditions the lawyer's withdrawal, among other things, on "delivering to the client all papers and property to which the client is entitled..." DR 9102(C)(4), part of the Rule governing a lawyer's obligation to preserve a client's funds and property, creates the lawyer's duty to: "promptly pay or deliver to the client...the funds, securities, or other properties in the possession of the lawyer which the client...is entitled to receive."

Disputes over specific documents and property between lawyer and client are "questions of law, not ethics." See, NYSBA Opinion 766 (1993), Opinion 623 (1991), Restatement (Third) of the Law Governing Lawyers §46(2).

The New York Code provides no specific guidance on whether a lawyer may make and keep copies of the client's file. However, several factors suggest that the lawyer may retain copies. EC 46, for example, distinguishes between "personal papers of the client" and "papers of the lawyer" when discussing the obligation of the lawyer to protect the client's confidences following the termination of the lawyer's practice. Also, implicit in the lawyer's right to reveal the secrets and confidences of the client in order to collect a fee or to defend against an accusation of wrongful conduct (DR 4101(C)(4)), is the right to retain copies of relevant documents in the client's file. And nothing prevents a lawyer from providing for the retention of file copies in the letter of engagement or in a retainer agreement.

The Committee agreed with opinions in other jurisdictions that, as a general rule, a lawyer may retain copies of the client's files, at the lawyer's expense. This general rule may be subject to exceptions, as when a client has a legitimate and reasonable interest in ensuring that no copies of a particular document be available to anyone under any circumstances.

Lawyer may insist on release

In NYSBA Opinion 339 (1974) the Committee had held that a lawyer may not insist on a general release as a condition of surrendering a client's files. But this is a different issue than whether a lawyer may insist on a release before surrendering his right to retain copies. Because a lawyer has a right to retain copies, he has a right to insist on a release before surrendering that right, even though the release may foreclose any claims for past malpractice.

DR 6102(A) of the Code prohibits a lawyer from seeking to limit liability for malpractice "prospectively" but not for work *already completed*.

A lawyer may “ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair,” which steps include advising the client to seek independent counsel in the negotiation and consummation of the release. (Quoting N.Y. State 591 (1988)).

Opinion 780 concludes:

A lawyer may generally retain copies of documents in the client’s file at the lawyer’s own expense, even over the client’s objections. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.