The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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SYLLABUS: Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer.

OPINION: This opinion addresses a question regarding whether a lawyer's notes must be relinquished to a client upon the client's request.

> Are a lawyer's notes of an interview with a current or former client considered client papers to which the current or former client is entitled upon request?

This opinion offers advice as to ethical duties of a lawyer responding to a client's request for his or her file or an item in a file. This opinion does not offer advice as to a client's legal entitlement to the file or an item in file. This opinion does not provide advice as to laws or rules governing discovery of work product or a lawyer's response to a discovery

request in a civil or criminal proceeding. The advisory authority of the Board of Commissioners on Grievances and Discipline is limited under Gov. Bar R. V(2)(C) to advising lawyers on the application of the ethical rules.

Introduction

A file request might be made by a client upon completion of a representation, or it might be made during a representation either upon discharge by a client or upon withdrawal by a lawyer. A client's file request might arise after a legal fee is paid in full or in part, or before any legal fee is paid.

The age old question a lawyer faces is how to respond when a client asks for the client file or an item in the file. The answer is that a lawyer must respond to a file request by a current or former client within appropriate ethical standards, no matter what the context of the request.

Ohio Rules of Professional Conduct

A lawyer's ethical duties in response to a client's request for the file or an item in the file are guided by several rules within the Ohio Rules of Professional Conduct. Prof. Cond. Rule 1.4 applies to ethical duties regarding communication during a representation. Prof. Cond. Rule 1.16 applies to ethical duties as part of termination of representation. Prof. Cond. Rule 1.8(i) addresses assertion of a lien authorized by law to secure a lawyer's fee or expenses. Prof. Cond. Rule 1.15 applies to ethical duties as to safekeeping of funds and property.

Keeping a client informed

During a representation a lawyer is required by Prof. Cond. Rule 1.4(a)(3) and (a)(4) to keep a client reasonably informed and to comply with reasonable requests for information.

> Rule 1.4(a) A lawyer shall do all of the following:
>
> > (3) keep the client *reasonably* informed about the status of the matter;
> >
> > (4) comply as soon as practicable with *reasonable* requests for information from the client.

A common way for a lawyer to keep a client informed during a representation is by providing the client with copies of correspondence, pleadings, deposition transcripts, and expert reports as the representation proceeds; but the rule does not expressly require this way of keeping a client informed. The manner in which a client is kept informed is a

determination left to the professional judgment of the lawyer based upon the client's needs and preferences. For example, in some unusual circumstances it may be that a client prefers not to receive copies of correspondence, pleadings, deposition transcripts, and expert reports during the representation. Or, it may be that the lawyer does not believe the release of certain information is warranted in some instances. For example, Comment [7] to Prof. Cond. Rule 1.4 explains that "[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders."

Taking steps to protect a client's interest

Upon termination of a representation, a lawyer is required by Prof. Cond. Rule 1.16(d) to take steps, to the extent reasonably practicable, to protect a client's interest.

> Rule 1.16(d) As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* 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. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

A lawyer's duty to take reasonable steps to protect a client's interest applies regardless of the reason for the termination of the representation. As explained in Comment [9] to Prof. Cond. Rule 1.16(d), "[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client." Pursuant to Prof. Cond. Rule 1.0, " '[r]easonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."

As described in the rule, one of the steps a lawyer must take to protect a client's interest is the prompt delivery of all papers and property to which the client is entitled.

The conundrum for a lawyer is determining what are the papers and property to which the client is entitled. The rule helpfully explains that papers and property may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation; but, the word

"entitled" is not explained. A lawyer must look to other applicable law and rules to determine to what papers and property the client is entitled.

In Ohio, the law is settled that upon discharging a lawyer in a contingent fee case, a client is entitled to the file and that the lawyer is entitled to quantum meruit compensation but not until the successful occurrence of the contingency. See *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 68 Ohio St.3d 570, 574-75 (1994). In *Reid*, a law firm refused to give a file to a client who discharged the law firm in a contingent fee case and conditioned the release of the file upon the client executing a guarantee modifying the prior contingent fee agreement. Id. at 575. The court noted that for all practical purposes the client was made to execute the guaranty to obtain the file. The court found the guaranty not enforceable because the law firm should not have imposed the condition of the release of the file upon the client's execution of a warranty modifying the contingent fee agreement. Id. at 575. The court stated that "[a]long with the mandatory obligation to withdraw from a case when discharged, an attorney who is discharged must yield the case file. At the time the appellant [client] discharged the law firm, the firm was *required* to return his case file to him, and to cease any and all involvement in the case." Id. at 574.

Asserting a lien over a client's file

Lawyers sometimes attempt to rely on the language of Prof. Cond. Rule 1.8(i)(1) as justification for asserting a lien over a client's file.

> Rule 1.8(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may do either of the following:
>
> (1) acquire a lien authorized by law to secure the lawyer's fee or expenses;
>
> (2) contract with a client for a *reasonable* contingent fee in a civil case.

But, in Ohio such reliance by lawyers may be misguided. Prof. Cond. Rule 1.8(i) applies only to acquiring "a lien authorized by law."

In Ohio, there is no common law lien on a client's files in a contingent fee case. See *Reid,* 68 Ohio St.3d at 574-75. And, in Ohio, there is no statutory lien on client files. The legality of a lien is a question of law outside this Board's advisory authority.

Thus, upon termination of a representation a lawyer's ethical duties as to the client file are guided by Rule 1.16(d): "As part of the termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing *reasonable* 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."

Safekeeping funds and property

Prof. Cond. Rule 1.15 is a rule that primarily addresses a lawyer's duties as to funds (of a client or third person) that are in the possession of the lawyer. But the rule also requires that property (of a client or third person) be safeguarded. Thus, in several cases cited below a violation of the rule was invoked when a lawyer was unable to locate clients' files when requested.

Ethical violations for refusing to turnover files

In Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover client files to the client.

In *Lake Cty. Bar Assn. v. Kubyn*, a lawyer received a public reprimand for violations of Rule 1.16(d) and (e). 121 Ohio St.3d 321, 2009-Ohio-1154. The lawyer was hired to represent a client in divorce and other matters and was paid $5,000. Upon the client's dissatisfaction and discharge of the lawyer, the lawyer did not comply with requests for an itemized bill, the return of any unearned fees, or the client file. The successor attorney had to recreate the file. The lawyer claimed to have no duty to produce the file because he had sent the client copies of all the paperwork as generated or received. The lawyer never did return the file, but did send an itemized bill and a refund of unearned fees. Id. at 322.

In *Disciplinary Counsel v. Bursey*, a lawyer received a permanent disbarment for misappropriating money held in trust for clients, forging clients' signatures, commingling client funds with the lawyer's funds, and committing numerous other acts of professional misconduct, including not returning a client's file as requested. 124 Ohio St.3d 85, 2009-Ohio-6180. The request for the file was made by a client who had hired the attorney for representation on a contingent fee basis in personal injury lawsuit. The lawyer failed to keep her apprised of development and rarely returned her calls. After the client filed a grievance, the lawyer promised to complete the work for a reduced contingent fee and to call the client weekly until the claim was resolved. The lawyer did not honor his promise. The client discharged him. The lawyer never returned the file as requested. The client was forced to retain another attorney with less than six weeks left on the statute of limitations. By this conduct the lawyer violated Prof. Cond. Rules 1.3, 1.4(a)(3) and 1.16(d). Id. at 88-89. In another client's personal injury matter, the lawyer violated Prof. Cond. Rules 1.4(a)(3), 8.4(c), and 8.4(h), for his misconduct which included not responding to the client's requests for his file and by the client not being able to locate the lawyer. Id. at 91.

In *Cincinnati Bar Assn. v. Lawson*, a lawyer received an indefinite suspension for engaging in a pervasive pattern of professional misconduct involving 13 client matters and failing to cooperate with the investigation. 119 Ohio St.3d 58, 2008-Ohio-3340. Four of the client matters included the lawyer's failure to respond to requests by the clients for the files after being discharged by the clients. In one matter, the lawyer, after being discharged by a client who had retained him to file a wrongful-death action on a contingent fee basis, kept the client's file until it was too late to file a claim. The lawyer's associate sent a letter to the client refusing to return the files unless paid an unspecified amount in legal fees and threatened legal action if the client did not pay. The lawyer violated among other rules DR 2-110(A)(2), DR 7-101(A)(3), and DR 9-102(B)(4). Id. at 62. In a second matter, the lawyer, after being discharged by a couple who were never able to speak to the lawyer after paying him $750 to counsel them on the viability of an action to obtain their son's early release from prison, did not respond to the couple's request for the return of their file and a refund, violating DR 7-101(A)(3), DR 9-102(B)(4), and other rules. Id. at 63. In a third matter, the lawyer, after receiving an interim suspension, failed to give up the file until the filing of a grievance. The lawyer had been hired by a woman to represent her son after arrest and was paid $3,000 for which he did some work but not enough to justify the fee. Among violating DR 7-101(A)(3), DR 9-102(B)(4), and other rules, the lawyer was found to have violated Prof. Cond. Rule 1.15(d) by not producing the file promptly, Prof. Cond. Rule 1.16(d) by withdrawing from the case without contemporaneously locating or returning the file, and Prof. Cond. Rule 1.16(e) by failing to repay the unearned portion of the fee. Id. at 65-66. In a fourth matter, the lawyer had to withdraw from a client's case because the lawyer received an interim suspension. The client had hired the lawyer to defend him in a criminal case. The client paid a $4,000 fee for which the lawyer did nothing except file an appearance, move for continuances, and meet twice with a prosecutor. After withdrawing from the case, the lawyer was unable to locate the file. The lawyer violated Prof. Cond. R. 1.15(d) because he was unable to locate the file upon the client's request and Prof. Cond. Rules 1.16(d) and (e) because he withdrew without providing the new attorney the case file and failed to promptly refund the unearned portions of the fee. Id. at 66.

In *Akron Bar Assn. v. Maher*, the lawyer received an indefinite suspension for professional misconduct, including multiple acts of dishonesty and failing to provide competent representation. 121 Ohio St.3d 45, 2009-Ohio-356. The lawyer failed to return the file in two of the three client matters involved in the disciplinary complaint. In one matter, he was discharged by a couple who had hired him to pursue damages after their disabled son died in a nursing home incident, but he did not honor the request of the client and their new attorney for the files and he did not produce the file until after a grievance was filed. Id. at 48. Among other rule violations in the matter, he violated DR 2-110(A)(2) and Prof. Cond. Rule 1.16(d) by failing without justification to promptly deliver the clients' papers on demand. Id. at 48. In a second matter, he was discharged by a client who had hired him to enforce a civil protection order. He had failed to take action and falsely advised the client that he was attending to the case. Upon discharge he did not return the files for over six months and did not refund unearned fees until the

panel hearing. Id. at 49. In addition to the other misconduct and rule violations, including DR 1-102(A)(6) and Prof. Cond. R. 8.4(h), he violated DR 2-110(A)(2) and 9-102(B)(4) and Prof. Cond. Rules 1.15 and 1.16(d) by failing to promptly return property to which the client was entitled upon discharge. Id. at 49.

Lawyer's notes

None of the above cited disciplinary cases provide guidance as to whether under the ethical rules a lawyer's notes are part of the file to which a client is entitled upon request. Nor, has this Board advised upon the issue of turning over a lawyer's notes to a client upon request.

A past opinion of the Board advised as to a lawyer's duty to deliver a former client's case file to a former client upon request, but did not discuss a lawyer's notes. In Op. 92-8, the Board, applying DR 2-110(A)(2) [the predecessor rule to Prof. Cond. Rule 1.16(d)] and DR 9-102(B)(4) [the predecessor rule Prof. Cond. Rule 1.15(d)] advised that "[a]n attorney has an ethical duty to promptly deliver a former client's case files to the former client upon request. Materials acquired or prepared for the purposes of representing the client and other materials that might prove beneficial to the client should be returned. These materials include, but are not limited to, all significant correspondence, investigatory documents and reports the client has paid for, filed or unfiled pleadings and briefs, and all materials supplied by the client." Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 92-8 (1998).

Part of the difficulty in addressing "lawyer's notes" is that the category is broad and not precisely defined. A lawyer's notes might comprise a range of information from thoughts, ideas, impression, or questions of an attorney, to internal office management memoranda such as personnel assignments or conflicts of interest checks, to facts about a case.

The American Bar Association and various state ethics committees have weighed in on the ethics of turning over a lawyer's notes to a client. The advice is not uniform.

The ABA Committee on Ethics and Professional Responsibility expressed the view that "the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem." ABA, Informal Op. 1376 (1977).

In Arizona, a lawyer's notes fall within the documents to which a client is ordinarily entitled. Comment [9] to Arizona's Ethical Rule 1.16 states in pertinent part that "[o]rdinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda." Thus, an Arizona ethics committee opinion advised: "An attorney may not assert a retaining lien against any items in a

client's file that would prejudice the client's rights. While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file [such as notes] which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests if withheld from the client." State Bar of Arizona, 04-01 (2004).

In California, an ethics committee stated in summary that "[u]pon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessive lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney. However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitutes or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy." San Diego County Bar Assn., Op. 1984-3.

In Colorado, an ethics committee addressed the general obligations of lawyers to surrender the file upon demand after termination and discussed what does, or does not constitute papers and property to which the client is entitled. For purposes of the opinion the committee assumed the lawyer had not asserted a retaining lien. As to notes, the committees view was that "[c]ertain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled." Colorado Bar Assn., Op. 104 (1999).

In the District of Columbia, an ethics committee advised that "[u]pon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the view, thoughts, and strategies of the lawyer." District of Columbia Bar, Op. 333 (2005).

In Illinois, an ethics committee advised that a client is not entitled to internal administrative materials under Rule 1.4(a) or Rule 1.15(b) because those materials are not relevant to the status of the client's matter, are usually prepared for internal use, and are not property of the client that a lawyer must deliver upon request. The committee concluded that the better rule is that a lawyer's notes and factual or legal research

material, including certain types of investigative material are the property of the lawyer and generally need not be delivered to the client. Illinois State Bar Assn. Op. 94-13 (1995).

In Kansas, an ethics committee advised that "[w]hen counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand and interpret documents highlighted above, Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense to the client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule." Kansas Bar Assn. Op. 92-5 (1992).

In Mississippi, an ethics committee advised that "[t]he right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's clause. The ownership of specific items in a client's file is a matter of law. However, ethically the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client." Mississippi State Bar, Op. 144 (1988).

In Pennsylvania, an advisory committee responded to an inquiry from a lawyer who had represented a client in a personal injury action and approximately $6,000 in outstanding costs had not been paid. The former client requested the entire file be surrendered to new counsel to investigate a possible malpractice action against the lawyer who referred the matter to the inquiring lawyer. The lawyer inquired whether he was required to deliver the entire file, including the lawyer's work product such as handwritten notes and outlines of testimony, legal memos and research, and the notes and the work product of the referring counsel. The ethics committee noted that the validity of a retaining lien is recognized in the state, but advised that "[t]here is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you [the lawyer] would be required to surrender the file to your client." As to internal memos and notes the committee stated "the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem. However, again, in the interest of complying with Rule 1.16(d), any doubt about whether materials in your file are of the type to which the client is entitled should be resolved in favor of relinquishment." Pennsylvania Bar Assn., Op. 96-157 (1996). An earlier Pennsylvania advisory opinion identifies factors lawyers should consider in

evaluating whether retaining file materials would be prejudicial to a client and whether such prejudice would be substantial. See Pennsylvania Bar Assn., Op. 94-35 (1994).

In Utah, an ethics committee was asked whether an unexecuted trust or will or an unfiled extraordinary writ, prepared by a lawyer is, for purposes of Rule 1.16, part of the client's file that must be delivered to the client at the termination of the representation. The committee noted that Comment 9 of Utah's Rule 1.16 states: "It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings." The committee's view was that under Comment 9, the unfiled petition for extraordinary writ is an unfiled pleading that is excluded from the client file within the meaning of Rule 1.16(d). The committee interpreted Comment 9 to also exclude from the file unsigned legal instruments such as agreements, trusts, and wills. Thus, the committee advised that "[a]n unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation." Utah State Bar, Op. 06-02 (2006).

In Virginia, an ethics committee, interpreting DR 2-108(D) and assuming that no fees are owing to the firm as a result of its representation of former clients, advised that the client is entitled to the entire contents of the file. The committee expressed the view that "any legal definition of 'work product,' as applied in the Rules of Evidence or elsewhere in a legal context is inapposite to the question of delivery of a client's files since a file may contain additional materials which were not prepared in anticipation of litigation or for trial. Rather, the committee opines that the term's plain meaning is applicable and refers to all materials prepared or collected by the attorney, or at the attorney's direction, in relation to any legal services for which the client engaged the attorney or the law firm over the entire period of the provision of such services. Thus, the committee is of the opinion that, with relation to the ownership of a client's file, where no fees are outstanding, 'work product' includes, as you have enumerated, attorney notes, internal memoranda and multiple drafts and other documents which lead to final documents or resulted in advice given as to a particular matter." Virginia State Bar, Legal Ethics Op. 1366 (1990).

In addition, to these advisory opinions it is also of note that in Montana, the following language is included in Rule 1.16(d): "A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i)." In New York, the state's highest court ruled that "[b]arring a substantial showing by the Proskauer firm of good cause to refuse client access,

petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firm's representation. *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 37, 666 N.Y.S.2d 985, 989, 689 N.E.2d 879, 883.

Lawyer's notes under Ohio's Rule of Professional Conduct

In considering whether under the ethical rules a lawyer's notes are papers to which a client is entitled upon request, the Board considers the language of Prof. Cond. Rule 1.16(d) to be instructive. Prof. Cond. Rule 1.16(d) states that "[c]lient papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation."

In Prof. Cond. R. 1.16(d), a lawyer's notes are not specifically identified in the list of examples of what client papers may include. This omission is considered significant. The drafters of Ohio rules could have easily included a lawyer's notes in the list, but did not. Yet, the list does include a category "items reasonably necessary to the client's representation" and this is the category where a lawyer's notes may or may not fall depending upon the nature and content of the notes.

When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation and if so should be turned over to the client.

Any expense incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer. As explained in Comment [8A] to Prof. Cond. Rule 1.16 "[c]lients receive no benefit from a lawyer keeping a copy of the file and therefore can not [sic] be charged for any copying costs."

Conclusion

In conclusion, the Board advises as follows. Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client

makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.