MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
October 31, 2011
THE DOLAN COMPANY

What Do You Mean You Want Your Client File?

By Thomas E. Peisch and Erin K. Higgins

PEISCH

HIGGINS

A request by a current or former client for a copy of his file may be perfectly benign, but it is more likely a sign of unhappiness that merits prompt and close attention. The request also may herald a fee dispute featuring the client's refusal to pay his bill or to recognize a contingent-fee arrangement.

Importantly, such a request touches off duties under the Rules of Professional Conduct (SJC Rule 3:07) that the lawyer ignores at his peril.

We will discuss here common mistakes attorneys make in responding to such requests and apply the rules to two representative situations: one involving a lawyer who is handling a small business or real estate transaction, and one in which the attorney is pursuing a motor vehicle tort claim.

The basics

As usual, the Rules of Professional Conduct set forth the basics. Rule 1.16(e) (Declining or Terminating Representation) first establishes a timeline within which the lawyer must respond to the request — "within a reasonable time."

Thomas E. Peisch and Erin K. Higgins are partners at Conn, Kavanaugh, Rosenthal, Peisch & Ford in Boston, where they advise lawyers and law firms on liability and ethical issues. Peisch is a former member of the Board of Bar Overseers and was its vice chairman in 2004. *The authors gratefully acknowledge the assistance of summer associate Christopher K. Sweeney in the preparation of the above article.*

What is "reasonable," of course, depends on the volume of material at issue and the urgency of the client's need for it.

For example, "reasonableness" may be quite different when the request relates to a concluded matter as opposed to one that is active, or to a matter that has been litigated over a period of years versus one that has just been put into suit.

But the rule has teeth to it, and there are plenty of examples of discipline being imposed on lawyers who delay in responding. See *In Re Solomson,* 21 Mass. Att'y Disc. R. 623, 2005 WL 5177254 (Dec. 1, 2005) (one year and one day suspension for multiple violations, including four-month delay in providing client file); *In Re Mancuso,* 24 Mass. Att'y Disc. R. 465, 2008 WL 869675 (Jan. 22, 2008) (public reprimand for failure to respond to client inquiry and six-month delay in producing file); Admonition No. 07-20, 23 Mass. Att'y Disc. R. 973, 2007 WL 2917438 (2007) (admonition for two-month delay and for other violations).

Although the rule does not say so, it is clearly the better course for the lawyer to insist on a written request from the client, rather than rely on a communication from, for example, successor counsel. That avoids any risk of miscommunication of the client's request and any reasons advanced for it.

In communicating with the client or any other person concerning the request, the lawyer should be careful to refrain from disclosing client confidences or secrets. See Rule 1.6(a).

Contrary to other jurisdictions, Massachusetts does not explicitly recognize a "retaining lien," a right by the lawyer to refuse to deliver file materials until the attorney's bills are paid. See generally Douglas R. Richmond, "Yours, Mine, and Ours: Law Firm Property Disputes," 30 N. Ill. U.L. Rev. 1 (2009).

Thus, the existence of a fee dispute does not absolve the lawyer of a duty to produce file materials.

Rule 1.16(e) describes two categories of materials that must be provided in response to any client request:

- all materials given to the lawyer by the client; and
- all pleadings "or other papers" that either have been filed in court or served by or on any party. That includes discovery responses and other papers that typically are not filed in the course of a lawsuit, but which are generated as part of it.

The rule goes on to describe two other categories of materials that must be provided to the client in most circumstances:

- investigative or discovery documents, such as medical records, photographs, expert reports and deposition transcripts. These materials must be provided so long as the client has paid the lawyer's out-of-pocket expenses incurred in obtaining such materials; and
- the attorney's "work product," defined as "documents and tangible things" prepared by the lawyer or by someone at the lawyer's direction in the course of the representation. Among the items included are legal research, memoranda of negotiations or witness interviews, and correspondence. An attorney working on a contingent-fee basis must produce all work product to the client. If a non-contingency-fee arrangement is in effect, the client is not entitled to work product for which the client has not paid, subject to the further exceptions discussed below.

The rule also outlines how copying costs are to be allocated. If the lawyer wishes to retain copies of everything provided to the client, he must pay the cost of copying: (1) materials provided to him by the client; (2) investigatory materials for which the client already has paid the lawyer's out-of-pocket expenses; (3) pleadings or discovery responses that are already part of the client's file; and (4) "work product" for which the client has paid.

In a contingency-fee situation, however, the client may be required to pay the cost of copying the attorney's "work product." That is apparently in recognition of the hardship on a contingency-fee lawyer who is required to pass on his work product to successor counsel without guarantee of any compensation.

While the basic principles may seem straight-

forward, applying them in particular situations frequently is not. There are also two very important caveats that every lawyer should be aware of in the course of responding to a client's request for a file.

First, a lawyer may not decline to provide file materials on grounds of non-payment when such refusal would "prejudice the client unfairly." Rule 1.16(e)(7). It would appear that the resisting lawyer would have the burden of proving lack of prejudice, though no Massachusetts court has addressed the issue. See generally *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 689 N.E. 2d 879, 881-82 (N.Y. 1997) (articulating majority rule presumptively granting client full access to file).

Second, Rule 1.16(d) contains detailed requirements as to what a lawyer must do after termination of the relationship so as to protect a client's interests. Included is a requirement that the attorney "surrender" any papers or property to which the client is entitled.

Reading those two provisions together, in most cases the cautious lawyer will provide a complete copy of the client's file, even if a part of the lawyer's bill is unpaid, to avoid a dispute as to whether the attorney's delay prejudiced the client or failed to protect the client's interests. That is particularly true in instances in which it is difficult or impossible for the lawyer to determine what the client has paid for and what he has not.

Keeping a record

It is usually desirable for the lawyer to retain copies of materials he gives the client so that a record exists in the event of further proceedings, including but not limited to a malpractice claim.

The exceptions are situations in which the lawyer can easily and without contradiction establish precisely what he has turned over to the client, or situations in which the client's urgent need for the file or the costs of copying the file make it impractical to do so.

In such situations, the attorney should keep an index of materials not copied and retained.

Finally, the lawyer must take steps to insure the preservation of client secrets and confidences in the process of producing a copy of the file. See *In Re Pepe,* 2010 WL 5670404 (Dec. 21, 2010) (public reprimand for delay in producing client file *and* for leaving file with a third-party copy service without client consent).

Common mistakes

There are three reactions that lawyers sometimes have to clients' requests for their files, each of which, although perhaps justified, can lead to bad consequences.

The first is simple inattention due to the press of business or other reasons.

The second is anger and frustration at the client's ingratitude and the loss of an income-generating opportunity, resulting in hostile interactions with the client and possibly successor counsel.

The third is a temptation simply to release the entire file to the client, without cataloging the file's contents or making copies of what is delivered.

The dangers of inattention to a request have been discussed previously. A lawyer clearly will not be well-served by exhibiting hostility toward the client and taking steps to make the file transfer difficult. The temptation to "dump" the file on the client also should be resisted.

Instead, the smart lawyer will respond professionally and promptly to the client's request, take the time to get the file in order before it is copied, and copy or index everything that is delivered to the client or successor counsel.

The rule has teeth to it, and there are plenty of examples of discipline being imposed on lawyers who delay in responding.

Application to particular situations

Let's now apply the basics to the personal injury case and real estate transaction mentioned at the outset.

In the motor vehicle tort case, the lawyer presumably has entered into a written contingent-fee agreement with his client that complies in full with (recently amended) Mass. R. Prof. C. 1.5.

Further assume that, shortly before trial, the client decides to engage other counsel, terminates the lawyer and demands a copy of "the file." In that instance, the lawyer must provide, within a reasonable period of time:

- any materials given him by the client;
- all pleadings and discovery requests/responses filed and/or served in the action;
- any medical records or other investigative materials acquired in the course of the litigation, unless the lawyer is still owed his out-of-pocket costs incurred in obtaining the materials;
- all work-product, including memoranda, research memos and other materials.[1]

The fact that the client has not paid any fee to the lawyer is irrelevant. Likewise, the client's intention of retaining other counsel, who may not recognize the attorney's contingent-fee interest, does not absolve the lawyer of the duty to produce the file.

Rather, the lawyer has other remedies, including resorting to the attorney's lien statute, G.L.c. 221, §50.

In the second example involving the small business or real estate transaction, the lawyer's obligations are pretty much the same, with a significant exception. The attorney may withhold production of any "work product" for which the client has not paid.

Presumably, that would include drafts of an offer to purchase or purchase and sale agreement, the billing for which clearly can be demonstrated as being unpaid.

As noted above, however, the client may take the position that the transaction will fall through if the attorney is not cooperative, possibly implicating Rule 1.16(e)(7) and/or Rule 1.16(d).

Any doubt on that front should be resolved in favor of making the materials available to the client in a timely fashion.

Practice points

Given the uncertainties presented by a request for a client's file, it is wise for a lawyer who receives such a request to get legal advice, either from an internal risk manager or outside counsel. That can go a long way toward defusing what may be a volatile situation and avoiding the unpleasantness of a claim.

However irritating the client's behavior, the lawyer should avoid letting that irritation color his judgment in formulating a response. The following are some general rules to be applied:

- Get the request in writing from the client.
- Respond to the request professionally and promptly.
- Be careful to avoid compromising client confidences or secrets in responding.
- Review Rule 1.16(e) and decide whether you want to raise non-payment as an obstacle to your delivering parts of the file.
- If there is a colorable claim that withholding a part of the file could prejudice the client's matter, promptly surrender the materials.
- Take the time to review and organize the client file, so that the file looks great when it goes to the client or successor counsel.
- Maintain copies or an index of materials released to the client or successor counsel.

It is never pleasant to get the call from a client asking for his file or requesting that the file be transferred to successor counsel. If the advice discussed here is kept in mind, however, the lawyer can avoid making an unhappy situation even worse. MLW

Endnote

[1] It bears remembering that a terminated contingent-fee lawyer who intends to claim entitlement to a fee upon the conclusion of the matter also must provide the client, within 20 days of the termination, with a written itemized statement of services rendered and expenses incurred. Mass. Rule Prof. Conduct 1.5(c).

CKR P&F Conn Kavanaugh Rosenthal Peisch & Ford, LLP
www.connkavanaugh.com