

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1986-87/1
Retention of File Notes When Turning a File Over
to Client or Subsequent Counsel
February 10, 1987

RULE REFERENCES:

- *Rule 1.1(b)(5)
- *Rule 1.1(c)(4)
- *Rule 1.15(d)
- *Rule 1.16(d)

SUBJECTS:

- *Attorney Liens
- *Client Funds and Property
- *Files of Client
- *Termination/Withdrawal of Attorney-Client Relationship

ANNOTATION:

While an attorney-client agreement may provide for the retention of certain parts of an attorneys file (upon termination of representing that client), it cannot broadly include all "personal notes," unless modified to exclude such personal notes which client needs to protect client's interest in the case. (Rules 1.16(d); 1.15(b); 1.1(b)(5), 1.1(c)(4).)

QUESTION:

The attorney sent copies of the two written fee agreements used in the attorney's practice. Both agreements provide that if the attorney's employment is terminated the attorney will deliver the contents of the file to the client, with the exception of the attorney's "personal notes." The attorney explained in the letter of inquiry that such "personal notes" are used to evaluate a client's credibility, and to indicate confidential information obtained from parties who have revealed information to the attorney about a client with the specific agreement that the client not learn the information. The attorney has questioned why the Committee decided to include in the category of information to be returned to the client following termination of employment the attorney's own personal file notes (see, Practical Ethics, Attorneys' Liens) and requests reconsideration of that opinion.

RESPONSE:

Rule 1.16(d) of the New Hampshire Rules of Professional Conduct provides, in part, that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interest, such as...surrendering papers and property to which the client is entitled..." Similarly, Rule 1.15(b) provides that "except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive."

In recognition of these provisions and other authorities, the Practical Ethics article on Attorneys' Liens concludes that "all doubt should be resolved in favor of the client" and that the material constituting the "client file," including "notes and memos to the files prepared by the attorney (containing recitals of facts, conclusions, recommendations)," must be delivered by an attorney to a client at the client's request. Although expressed in absolute terms, this admonishment must be considered in the context of the authorities which support it. The applicable rules speak in terms of property "that the client is entitled to receive" and direct the lawyer to "take steps to the extent reasonably practicable to protect the client's interest." Furthermore, Rule 1.15(b) acknowledges that an "agreement with a client" may provide an exception to the general rule of prompt delivery to the client of property which the client is entitled to receive.

Based upon these considerations, the Committee is of the opinion that there is no per se prohibition against a provision in a fee agreement which excludes certain categories of information, such as an attorney's personal notes or work product, from the contents of the lawyer's file to be made available to the client upon termination of representation. However, any retention of file materials by the lawyer is circumscribed by the lawyer's duties "to protect the client's interests" and to surrender "papers and property to which the client is entitled."

Accordingly, an agreement for blanket retention by the lawyer of all "personal notes" of the lawyer upon termination of the lawyer-client relationship cuts too broad a swath. The Committee believes that the attorney's fee agreements should be modified by expanding the phrase "(except for my personal notes)" therein to read "(except for those of my personal notes which you do not need to protect your interests in the case)."

It is the Committee's opinion that the suggested modified language, or its functional equivalent, be inserted into the attorney's future fee agreements. The Committee is not of the opinion that existing agreements need to be amended, so long as the attorney acts in all cases to protect the client's interests as required by the provisions of Rules 1.16 (d), 1.15 (b), 1.1 (b) (5) and 1.1 (c) (4).