

► The Supreme Court of Texas appoints the chair and the nine members of the Professional Ethics Committee from the bar and the judiciary. According to section 81.092(c) of the Texas Government Code, “Committee opinions are not binding on the Supreme Court.”

Opinion No. 657, May 2016

QUESTIONS PRESENTED

1. *What documents and information must be delivered by a lawyer to a former client convicted of a criminal offense when requested by that former client?*
2. *Who bears the costs of delivering the documents and information to the former client?*
3. *In what form must the documents and information be delivered?*

Statement of Facts

A lawyer represented a former client in a criminal matter in which the client was convicted. All appeals in the matter have been exhausted. The former client requests the lawyer to furnish the entire contents of the lawyer’s file regarding the matter. The lawyer is not claiming a lawyer’s lien or a similar right over the file contents.

Discussion

In general, the documents, papers and other information received from a client or received or generated in the course of representing the client (including the lawyer’s notes and work product) are the property of the client and must be transferred to a former client on request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation. Professional Ethics Committee Opinion 627 (April 2013). As Opinion 570 (May 2006) recognized, exceptions to the former client’s right to some of the contents of a client’s file may arise from the lawyer’s duties to others or the client. The exceptions noted in Opinion 570 include:

“. . . notes that contain information obtained in discovery subject to a court’s protective order forbidding disclosure of the information to the client, notes where the disclosure would violate the lawyer’s duty to another person, and notes containing

information that could reasonably be expected to cause serious harm to a mentally ill client.”

These exceptions would include documents or information that might reveal the identity of the lawyer’s other clients or the nature of the other clients’ representations, such as the results of internal conflict of interest checks and information about other clients contained in “forms” or pre-existing research memoranda placed in the former client’s file during the representation.

A lawyer’s duty to turn over file materials to a former client is also subject to exceptions created by Texas law. In particular, the lawyer’s file in a criminal representation may contain documents and information produced by the state pursuant to Tex. Code Crim. Proc. art. 39.14(a). Article 39.14(f) prohibits defense counsel from providing a copy of such documents to the defendant (other than the defendant’s own statement). Article 39.14(f) also prohibits defense counsel from disclosing to the defendant certain personal information regarding witnesses. Accordingly, a lawyer may not deliver to a former client documents provided to the lawyer pursuant to article 39.14(a) (other than the defendant’s own statement). Further, if the lawyer’s file materials (including notes) contain information that must be withheld from the defendant under article 39.14(f), the lawyer must redact that information before turning over the file to the former client.

Similarly, Tex. Code Crim. Proc. art. 35.29 prohibits the disclosure of personal information about jurors except as permitted by the court upon hearing. A lawyer responding to a former client’s request for the client’s file must therefore ensure that any such information is removed before turning over the file.

Subject to certain exceptions such as those discussed above, the client’s file must be surrendered to the former client by making it available for the former client or a designated representative of the former client. Because the file belongs to the former client, if the lawyer desires to retain a copy of documents and information in the file, that expense must be borne by the lawyer in the absence of an agreement otherwise. The lawyer may tender the client’s file to be picked up during ordinary business hours at the lawyer’s office. In the absence of an agreement otherwise, the former client bears the expense of delivering or shipping the file to another location. See Opinion 627 (April 2013) (costs of complying with a client’s request concerning closed client files beyond what is required by the principles of the Texas Disciplinary Rules of Professional Conduct are borne by the client).

In most cases, the client’s file will consist of paper documents, electronically stored documents or information, or some combination of the two. The lawyer may generally provide such portions of the client’s file to the former client in any format that is reasonably accessible to the ordinary client. The

lawyer may provide the file as it is maintained, or convert (at the lawyer's expense) some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format or print the information in a format that can be read by the client. If the file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form.

Conclusion

In general, the documents, papers and other information received from a client or received or generated in the

course of representing the client, including work product and notes, are the property of the client. When a lawyer receives a request for those materials from a former client, the lawyer must make those materials available for delivery to the former client, except as prohibited by statute, court order or the lawyer's duties to third parties or the client, or unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

A lawyer must make the client's file available for transfer to the client or a designated representative at the lawyer's office. The lawyer may require the client to pay any delivery or shipping expenses associated with delivering the file to the former client at a location other than the lawyer's office. If the lawyer

deems it necessary to retain a copy of the file, that expense will be borne by the lawyer in the absence of an agreement otherwise.

The lawyer may provide the client's file in the form in which it is maintained, or convert some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format, or print the information in a format that can be read by the client. If the client's file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form. **TBJ**

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