

Utah Ethics Opinions

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06-02. UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 06-02

June 2, 2006

Issue: Is an unexecuted trust or will or an unfiled extraordinary writ prepared by a lawyer for a client part of the "client's file" within the meaning of Rule 1.16 which must be delivered to the client at the termination of the representation.

Opinion: An 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.

Facts: An attorney accepted a fixed fee engagement to prepare for a client a trust, a will and a petition for extraordinary writ. The lawyer sent a retainer agreement to the client reflecting the fixed fee engagement, but the client did not sign the retainer agreement. The lawyer prepared the trust, will and petition for extraordinary writ, but the client refused to pay the lawyer for the services, and the client terminated the attorney-client relationship. The client is now demanding that the lawyer deliver to the client as part of the "client's file" the unexecuted trust and will, and the unfiled extraordinary writ.

Analysis: Rule 1.16(d) of the Utah Rules of Professional Conduct differs from the ABA Model Rule 1.16(d) in that the Model Rule permits the lawyer to retain the "client's file" following the termination of the attorney-client relationship if state law affords the lawyer a retaining lien against the client's file for purposes of securing the lawyer's fee. Model Rule 1.16(d) states: "The lawyer may retain papers relating to the client to the extent permitted by other laws."

Utah Rule 1.16(d) was amended to delete from Rule 1.16(d) the right of the lawyer to assert a retaining lien against the "client's file". Utah Rule 1.16(d) states: "The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense."

Comment 9 to Rule 1.16(d) explains the amendment to

Utah Rule 1.16(d) as follows: "The Utah Rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer."

The amendment of Utah Rule 1.16(d) followed the Utah Supreme Court's decision in *Jones Waldo Holbrook & McDonough v. Dawson*, 923 P.2d 1366 (Utah 1996). In *Dawson* the plaintiff law firm sued its client for payment of its attorney's fees. In a "postscript" to its decision, the Utah Supreme Court stated that it disapproved of the plaintiff law firm's assertion of a retaining lien in the defendant's file during on-going litigation following the termination of the attorney-client relationship. Although the Court affirmed in part a judgment in favor of the plaintiff law firm for unpaid fees and costs, the Court stated that the plaintiff law firm had failed to "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 (quoting from Rule 1.16(d))" when the law firm refused to surrender to defendant her file during the course of on-going litigation. 1

It is noteworthy that the plaintiff law firm's conduct in *Dawson* was consistent with Ethics Advisory Opinion Committee Opinion No. 91 (May 17, 1989). This Opinion concluded that the use of the common law attorney's retaining lien recognized by the Utah Supreme Court in several cases was not per se improper under Rule 1.14 (currently, Rule 1.16). Relying on decisions of the Utah Supreme Court, Opinion No. 91 permitted use of a retaining lien even in the course of on-going litigation if (i) the lawyer was wrongfully discharged or withdrew for good cause; and (ii) during the representation, the lawyer represented the client with reasonable diligence.

In adopting Opinion No. 91, the Board of Bar Commissioners recommended a Petition for Amendment of Rule 1.14 (currently Rule 1.16) be filed with the Utah Supreme Court "to clarify the attorney's duty to the client in returned documents and papers upon termination of representation".

With Utah's amended Rule 1.16(d), it is clear that if the unexecuted trust and will or the unfiled petition for extraordinary writ are part of the "client's file", then the lawyer is required by Rule 1.16(d) to turn over to the client the trust, will and petition for extraordinary writ upon the termination of the representation, regardless of whether the lawyer has been wrongfully discharged and regardless of whether the lawyer has been paid for these services. It is therefore critical to determine what is the "client's file" within the meaning of Rule 1.16(d).

Comment 9 of 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."

Of significance to the issue before the Committee is the statement in Comment 9 to Rule 1.16 that the client file would not include the attorney's work product and would not include unfiled pleadings. This would exclude the unfiled petition for extraordinary writ from the "client's file" within the meaning of Rule 1.16(d). We interpret Comment 9 to also exclude from the "client's file" unsigned legal instruments such as agreements, trusts and wills. Unsigned legal instruments such as agreements, trusts and wills are the transactional lawyer's equivalent of the litigation lawyer's unfiled pleadings.² This interpretation is not at odds with the Rule 1.16(d) requirement that upon the termination of representation the lawyer takes steps "to the extent reasonably practicable to protect the client's interest". Unlike the pleadings and correspondence files withheld from the client in *Dawson* during on-going litigation, depriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the "client's file", and the client may deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client.

Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution or filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.

Footnotes

¹ *Jones Waldo Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1376 (Utah 1996).

² The punctuation of Comment 9 quoted above is interpreted by the Committee to exclude from the client file unfiled pleadings, whether or not they constitute lawyer's "work product". The Committee interprets the Comment to include as lawyer's "work product" documents containing the lawyer's recorded mental impressions. Unexecuted legal instruments and unfiled legal pleadings are often incomplete or non-final drafts. As such, these documents contain the lawyer's mental impressions (not the lawyer's finalized legal services), and constitute the lawyer's "work product".