

## PRODUCTION OF CLIENT FILE OR DOCUMENTS

Lawyers receive requests for client documents or for entire client files for many reasons. These requests may happen while a case is active, or long after a matter is closed. Knowing how to properly respond to these requests can help you avoid malpractice claims and ethics complaints.

When responding to requests for client files or documents, consider the following:

- Is the person making the request entitled to any client documents or information?
- If yes, do any restrictions apply on what information you can provide?

### Clients Are Entitled to Their File

Generally speaking, client documents and the client file are client property. Unless a lawyer is exercising valid lien rights under ORS 87.430, a client is entitled to the return of their property upon demand.<sup>1</sup> Lawyers should be aware that even valid lien rights may yield to other circumstances.<sup>2</sup> Also, a lawyer must take steps to protect the client's interests at the termination of representation, including surrendering papers and property to which the client is entitled.<sup>3</sup>

Whenever possible, document the client's request for their file in writing. Be sure to retain a complete copy of the file for yourself, and have the client sign an acknowledgement that they received their file. Refer to our practice aids, Request for File, Acknowledgment of Receipt of File, and File Retention and Destruction Guidelines, available on the PLF website ([www.osbplf.org](http://www.osbplf.org)), for examples.

### Attorney Liens

ORS 87.430 allows attorneys to hold a lien against client papers, property, and money, if the client owes outstanding legal fees. However, placing a lien on the client file may result in a conflict between the lawyer's right to the lien and the lawyer's ethical duty to protect the client's interests at withdrawal. When deciding whether to provide the client a copy of their documents in the face of a valid lien, consider the following.<sup>4</sup>

- Does the client have sufficient resources to pay the outstanding attorney fees in full?
- Is delivery of the documents or file necessary to avoid foreseeable prejudice to the client?

If the client does not have sufficient resources to pay the outstanding fees, and a copy of the file is necessary to avoid prejudice to the client, the attorney's lien right must yield to the attorney's fiduciary duty, and the attorney must provide the client a copy of the file.

ORPC 1.16(d) also permits a lawyer to retain papers and property at the termination of representation, to the extent permitted by law. This may include court determinations regarding lawyer ownership over papers or documents created during representation, as well as statutory lien rights. Remember, the lawyer's right to retain papers is subject to other obligations, like the

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<sup>1</sup> *In re: Arbuckle*, 308 Or 135, 138 (1989).

<sup>2</sup> See the article, *Difficult Paradigm: Are lien rights absolute?* by Helen Hierschbiel, Oregon State Bar Bulletin (May 2006).

<sup>3</sup> Oregon Rule of Professional Conduct 1.16(d).

<sup>4</sup> Formal Opinion No. 2005-90, *Client Property: Attorney Liens*.

lawyer's fiduciary duty to avoid prejudicing a former client. Be aware too, a court may compel an attorney to turn over documents and papers pursuant to ORS 9.360.

### **The Entire Client File**

Lawyers may be surprised to learn that the client is entitled to the entire client file, including lawyer notes that may represent attorney work-product.<sup>5</sup> However, there may be some documents the client is not entitled to receive. Before turning over the contents of a client file, the lawyer is responsible for reviewing the file to determine whether there are any documents the client is not entitled to, for example:

- Memoranda written for another case;
- Documents or notes that do not pertain to the merits of the client's matter, but to the lawyer-client relationship; or
- Papers and other materials which are prohibited from disclosure by law or court order.<sup>6</sup>

### **Cost and Availability of the File**

Production of documents can come with a cost, both for locating and for copying the documents. OSB Formal Ethics Opinion 2017-192 discusses when lawyers may charge clients for the cost of making copies and providing documents to clients. As explained in Formal Opinion 2017-192, the fee for copies generally depends on the language of the fee agreement. If the fee agreement entitled the client to copies without charge, the client is entitled to one copy, without charge, of any documents not previously provided to the client. Subject to the limitations of 2017-192, a lawyer may charge the client for duplicate copies, and for the labor to reproduce documents and information already made available to the client. If the client does not have sufficient resources to pay for a copy of the file, and the client would suffer foreseeable prejudice without the file, then the attorney must provide a copy of the file without payment. For more discussion, see the article, [Client Files Revisited: More light on a topic that won't go away](#), by Helen Hirschbiel, Oregon State Bar Bulletin (January 2006).

OSB Formal Ethics Opinion 2016-191 reminds lawyers to take reasonable steps to ensure electronic documents from the client file are available during appropriate time periods. The opinion also advises lawyers to consider the client's circumstances when making an electronic-only file available to the client, and whether that format might present a hardship for the client if the client needs to access the documents.

### **Third Party Requests**

Lawyers have a duty to maintain confidentiality. Except as authorized by ORPC 1.6, a lawyer must have informed consent from the client before revealing confidential information. Pursuant to ORPC 1.6, a lawyer may reveal information relating to the representation of the client, if the lawyer believes the disclosure is impliedly authorized in order to carry out the representation of the client. In the event the client is deceased, a lawyer must carefully consider whether

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<sup>5</sup> OSB Formal Ethics Opinion 2017-192, *Client Property: Duplication Charges for Client Files, Production or Withholding of Client Files*.

<sup>6</sup> Consider, for example, ORS 135.815 regarding prohibited disclosures to defendants of personal identifiers of victims or witnesses.

disclosure is impliedly authorized when producing the file of the deceased client, as the duties of confidence and loyalty both survive the death of the client.<sup>7</sup>

When a third party asks for information from the client file, get the client's informed consent in writing. When transferring a file to client's new counsel, have the client sign an authorization for the transfer. Retain a complete copy of the file for yourself. Also, have the receiving attorney sign an acknowledgement that they received the file. See our practice aids, Authorization for Transfer of Client File, and Acknowledgment of Receipt of File, available on the PLF website ([www.osbplf.org](http://www.osbplf.org)), for examples.

If you receive a subpoena, or someone requests information, documentation, or testimony about your representation of a client, contact the PLF at (503) 639-6911 and speak with a Claims Attorney.

### IMPORTANT NOTICES

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<sup>7</sup> See ORS 40.225 regarding lawyer-client privilege, as well as *Swindler & Berlin v. U.S.*, 524 U.S. 399 (1998), holding that attorney-client privilege survives the death of the client.