

South Dakota Ethics Opinions

Ethics Opinion 2001-2

April 13, 2001

Rules:	1.16
Subject:	Client files
Summary:	Upon conclusion of representation, the client is entitled to return of his/her file upon request. The lawyer has a duty to return all property and papers necessary to protect the client's interests. What is property of the client and/or property of the lawyer is a matter of substantive law and no opinion given. See EO 96-7.

FACTS

Attorney was appointed to represent a defendant in a criminal matter. In the course of that representation, attorney thoroughly investigated the facts, interviewed witnesses, conducted research etc. Notes from the interviews, including the attorney's analysis of the evidence and proof required to prosecute the case are included within the file. The defendant has elected to file an appeal and new counsel has been appointed to represent the defendant on appeal. No appellate issues have been identified. The defendant, through his appellate counsel, has made a request for the original attorney's entire file. Original attorney has produced items provided by the client but nothing else and asked for a specific itemization of what other information the prior client is seeking. No specific request has been made and the request remains for production of the former client's entire file.

DISCUSSION

SDCL 16, 18 Appx Rule 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as ... surrendering papers and property to which the client is entitled The lawyer may retain papers and property relating to the client to the extent permitted by other law.

At the onset, the Committee cannot resolve the substantive legal question of what part of an attorney's file is discoverable in civil litigation or criminal proceedings. Ethics

Committee Guideline D(3). While some material may be work product in the discovery context, the focus of this opinion is what the attorney must ethically produce to his/her former client upon request. The standard for determining what may be considered work product or attorney-client privilege for purpose of an adversarial discovery dispute is not the governing standard under Rule 1.16.

The Committee believes that this request is governed by EO 96-7. EO96-7 states that this Committee cannot opine on substantive law, and what is specifically client property and what is the lawyer's property is governed by substantive law. However, EO96-7 stated that "[a] lawyer should deliver all other material which may be deemed useful to the client in benefiting fully from the services he/she purchased from your firm." The attorney's true internal notes and memorandums generated for his/her own purposes in working on the problem need not be produced. If the notes, however, contain both factual information and personal impressions, the notes may need to be redacted or summarized to ensure that the client's interests are protected.

Under Rule 1.16, the focus must be on the duty to protect the client's interest. The obligation is to the client and the duty to protect the interests of the client favors production.

Susan Brunick Simons, Chair
Ethics Committee