

You have indicated that an attorney was court-appointed to represent an individual in a criminal case. You advise that, throughout the presentation of the case and appeal through the state court system, the criminal defendant was supplied with copies of all correspondence, pleadings, briefs, and other documents that had been prepared and filed in the case. Simultaneously, the attorney, fearful of possible allegations of ineffective assistance of counsel and in anticipation of possible further litigation, maintained a diary which set forth certain observations in a timely manner during the course of the case.

Furthermore, you indicate that the client has now exhausted all legal remedies and has filed a writ alleging, among other things, ineffective assistance of counsel. The client now asks that the former appointed counsel provide him with the original of all the documents at no cost, and include among his demands, that the attorney produce any notes or diaries maintained by the attorney.

You have asked the Committee to opine, under the facts you have provided, (1) whether the court-appointed counsel, after the conclusion of the case-in-chief, is required to provide to the criminal defendant, upon demand, all documents, including diaries or memoranda prepared in anticipation of possible ineffective assistance of counsel allegations; (2) whether the cost of producing the documents can be charged to the defendant; and (3) whether the documents provided must be the originals.

The appropriate and controlling disciplinary rule related to your inquiry is DR:2-108(D) which provides, in pertinent part, that upon termination of representation, a lawyer shall take reasonable steps for the continued protection of a client's interests, including delivering all papers and property to which the client is entitled while retaining papers relating to the client to the extent permitted by applicable law.

The Committee has earlier opined that any legal definition of "work product", as applied in the Rules of Evidence or elsewhere in a legal context, is inapposite to the question of the delivery of the contents of a client's file to the client. The Committee indicated that, rather, "work product" refers to all materials prepared or collected by the attorney, or at the attorney's direction, in relation to any legal services for which the client engaged the attorney or the law firm over the entire period of the provision of such services. Furthermore, the Committee went on to opine that, in relation to the issue of ownership of a client's file, where no fees are outstanding, "work product" includes attorney's notes, internal memoranda and multiple drafts, and any other documents which lead to final documents or which resulted in advice given as to a particular matter. The Committee found that such ownership of the file was irrespective of any earlier provision of copies to the client. (See LE Op. 1366.)

Thus, with regard to the first question you raise, the Committee is of the opinion that, if the materials requested are generically related to the attorney's practice, e.g., if the diary

Committee Opinion
May 14, 1991

referenced is maintained as a log of activities conducted with or on behalf of all the attorney's clients, such materials would not be part of any specific client's file. Therefore, those materials would need to be provided to the client only if applicable rules of discovery require and if the appropriate procedures have been followed. If, however, the diary referenced was separate and germane only to the specific client, or if the materials were dictated or prepared in relation to the client's specific case, they must be provided to the client who requests them.

With regard to the question related to costs of producing the documents, the Committee has earlier opined that it is improper for an attorney to condition the release of a client's file upon payment of copying charges, where the copies are for the benefit of either the attorney or the client, absent a prior agreement to the contrary. (See LE Op. 1171.) The Committee is of the opinion that, in the facts you present, where the attorney has been court-appointed, any such agreement is not relevant since all costs would be borne by the Commonwealth. Thus, the Committee opines that any costs incurred in the production of any documents which must be provided to the client may not be charged to the defendant.

Finally, the Committee is of the view that your question regarding whether the documents provided must be originals rather than copies requires a legal determination, to be made under any applicable discovery and/or evidentiary rules, and is beyond the scope of the Committee's authority.

Legal Ethics Committee Notes. – Rule 1.16(e) governs a lawyer's duty to provide files to a former client.