

**LETTER OPINION**  
**95-L-174**

July 24, 1995

Ms. Robin Thompson Gordon  
Harvey City Attorney  
1420 Advent St  
Harvey, ND 58341

Dear Ms. Gordon:

Thank you for your letter regarding ownership of the legal files of a municipality that are held by a former city attorney.

City attorneys are included among the officers appointed by the governing body of a municipality. N.D.C.C. §§ 40-14-04(1)(c), 40-15-05(3).

Within five days after notification and request, any officer of a municipality whose term has expired shall deliver to his successor in office all property, books, and effects of every description in his possession belonging to the municipality or pertaining to his office. Upon his refusal to deliver such property, books, and other effects, the person shall be liable for all damages caused thereby and subject to a penalty prescribed by ordinance.

N.D.C.C. § 40-13-10 (emphasis added). Thus, this statute requires former city attorneys to deliver to the current city attorney upon request all files that either belong to the municipality or pertain to the office of city attorney, which is described in N.D.C.C. § 40-20-01. See also N.D.C.C. § 44-04-12. As applied to city attorneys, N.D.C.C. § 40-13-10 is consistent with the general requirement that attorneys turn over all property to which a former client is entitled upon request once the representation is terminated, unless otherwise provided by law. See N.D.C.C. § 27-13-05; N.D.R. Prof. Cond. 1.16(e). I will assume for the purpose of your question that the former city attorney has been fully compensated and therefore cannot claim

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a retaining lien for unpaid services under  
N.D.C.C. § 35-20-08(1).

Your letter asks whether the legal files of a municipality belong to the former city attorney, or belong to the municipality and must be turned over under N.D.C.C. § 40-13-10. Neither the North Dakota Supreme Court nor this office has previously interpreted this statute as applied to files held by former city attorneys. However, the North Dakota Supreme Court and several other state courts have concluded, without discussing the type of client represented, that client files belong to the client rather than the attorney.

The North Dakota Supreme Court has held that an attorney who neglected a client's case by failing "to deliver the case files to his clients or their new attorney after several requests have been made" committed a "very serious violation of the Code of Professional Responsibility" regarding prompt return of property the client is entitled to receive. Matter of Jaynes, 278 N.W.2d 429, 434 (N.D. 1979). Implicit in this decision is the conclusion that the client rather than the attorney is entitled to the client's files. Interpreting a similar rule of professional conduct, the Wisconsin Supreme Court also has affirmed the suspension of an attorney for misconduct including "failing to turn over a client's file to successor counsel upon demand." Disciplinary Proceedings Against Roffa, 517 N.W.2d 187, 188 (Wis. 1994).

In the most recent of several California cases, the California Supreme Court held that, with the possible exception of uncommunicated work product protected by an express statutory privilege, "there can be no doubt that the balance of an attorney's litigation file is the property of the client and must be surrendered promptly upon request to the client or the client's new counsel once the representation has terminated." Rose v. State Bar of California, 49 Cal.3d 646, 655, 779 P.2d 761, 262 Cal.Rptr. 702 (1989), citing Finch v. State Bar of California, 28 Cal.3d 659, 665, 621 P.2d 253, 170 Cal.Rptr. 629 (1981); Kallen v. Delug, 157 Cal.App.3d 940, 950, 203 Cal.Rptr. 879 (Ct. App. 1984) ("an attorney's work product belongs absolutely to the client"). A New York appellate court reached the same conclusion. See Application of Greene, 88 A.2d 547, 451 N.Y.S.2d 741, 743 (App. Div. 1982) ("Litigation papers belong to the client, unless the attorney can establish a retaining lien or some other privilege.").

The United States Court of Appeals for the Tenth Circuit also concluded that an attorney holds a client's file only in a representative capacity for the client:

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Any ownership rights which inure in the file belong to the client who has presumably paid for the professional services and preparations made by the attorney. . . . So far as we can determine, it is a general principle of law that client files belong to the client and indeed the court may order them surrendered to the client or another attorney on the request of the client subject only to the attorney's right to be protected in receiving compensation from the client for work done. See, e.g., Restatement (Second) of Agency § 464(b) (1957) and Restatement of Security § 62(b) (1941). . . . The attorney's interest is only that of a retaining lien and his interest at best is a pecuniary one, not an interest of ownership, nor privacy.

In re Grand Jury Proceedings, 727 F.2d 941, 944-45 (10th Cir. 1984) (footnote omitted). See also Annotated Model Rules Of Professional Conduct Rule 1.16 cmt. at 281-82 (2d ed. 1992) (citing cases).

Based on these decisions, it is my opinion that client files held by an attorney belong to the client rather than the attorney. I see no reason why this general principle should not apply when the client is a municipality instead of a private entity or person. Therefore, because the legal files of a municipality belong to the municipality as the client rather than the city attorney, and because these files also pertain to the office of city attorney as described in N.D.C.C. § 40-20-01, it is my opinion that these files must be delivered to the current city attorney under N.D.C.C. § 40-13-10 within five days after notification and request. Failure to do so may subject the attorney to the penalty prescribed by city ordinance as well as violate the rules of professional conduct.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

jcf/vkk