

Rule 1.16(d) and the Entire File Rule

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October 11, 2023

I.R.P.C. 1.16: DECLINING OR TERMINATING REPRESENTATION

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

I.R.P.C. 1.16 (cont.)

- Rule 1.16(d) and the comments are silent with respect to the scope of records a former client is entitled to from the lawyer upon termination of the representation.

Entire File Approach

- Followed in a majority of jurisdictions.
- It presumes that the client is entitled to everything in their file, including attorney work product, with certain narrow exceptions.
- The narrow exceptions vary depending on the jurisdiction.

End Product Approach

- Followed in a minority of jurisdictions.
- It presumes that the client is entitled only to public documents that are the end product of the attorney's representation – e.g., pleadings, correspondence, etc., – but not the attorney's work product, including documents and notes that the attorney used to reach the end result.

In the Supreme Court of the State of Idaho

In Re: Grievance Against Attorney
John Doe I.

JOHN DOE (2022-41)

Petitioner,

v.

JOHN DOE I,

Respondent.

Order Dismissing Idaho State Bar Grievance
Complaint

Supreme Court Docket No. 50065-2022

Idaho State Bar No.
[REDACTED]

BACKGROUND

THIS MATTER comes before the Court on an Idaho State Bar Grievance filed by Petitioner, [REDACTED], against his former attorney, [REDACTED]. The Grievance, submitted to the Idaho State Bar on January 13, 2022, and filed with this Court on September 15, 2022, alleges that Respondent [REDACTED] violated the Idaho Rules of Professional Conduct (IRPC) by refusing Petitioner's requests for copies of all "work product" Respondent generated in connection with his representation of Petitioner in a criminal case. [REDACTED]

[REDACTED] Bar Counsel submitted Petitioner's Grievance directly to this Court in accordance with Idaho Bar Commission Rule (IBCR) 508(a).

On October 12, 2022, this Court entered an ORDER APPOINTING SENIOR JUSTICE HORTON TO COMPLETE AN INVESTIGATION AND REPORT. Pursuant to that Order, Senior Justice Horton was appointed to investigate Petitioner's Grievance and to report the facts of the case and make a recommendation for disposition of the Grievance to this Court.

EXHIBIT

Doe v. Doe

- Client believed the I.R.P.C. were violated because the former attorney would not provide copies of their “work product.”
- Senior Justice Horton was assigned to investigate the grievance.

Doe v. Doe (cont.)

- Respondent's position was that the work product was the property of Respondent's employer and therefore appropriate to withhold.
- The Court noted that Respondent's position was consistent with the position taken by Bar Counsel's Office when faced with similar complaints.

Doe v. Doe (cont.)

- Senior Justice Horton observed that the Comments to Rule 1.16 were silent on the scope of documents to which a former client is entitled.
- The decision notes that neither the Court nor Bar Counsel's Office have issued formal opinions on the subject.

Doe v. Doe (cont.)

- Senior Justice Horton made alternative recommendations:
 - Dismiss the grievance if the Court agrees that a lawyer has no ethical duty to disclose work product to a former client; or alternatively
 - If the Court adopts the entire file approach and believes a sanction is warranted, remand the matter to Bar Counsel's Office with direction to issue an informal admonition.

Doe v. Doe (cont.)

“Regarding the scope of documents a lawyer is ethically required to surrender to a former client in a criminal case under IRPC 1.16(d), the Court adopts the majority ‘entire file’ rule, pursuant to which the client is presumptively entitled to everything in his or her file, including attorney work product, subject to narrow exceptions.”

Doe v. Doe (cont.)

“However, because the scope of the document disclosure provision of IRPC 1.16(d) has previously been undefined, and because Respondent’s refusal to surrender attorney work product to Petitioner was consistent with the position historically taken by Bar Counsel, the Court finds that no sanction is warranted in this case. Accordingly, the IDAHO STATE BAR GRIEVANCE filed by Petitioner against Respondent is DISMISSED.”

Doe v. Doe (cont.)

“FURTHER, the Court suggests that the Board of Commissioners of the Idaho State Bar develop and submit for this Court’s approval a proposed comment to IRPC 1.16(d) that reflects the Court’s adoption of the ‘entire file’ rule as it relates to a lawyer’s duty to surrender papers to a former client in a criminal case. Consideration should also be given to addressing the application of IRPC 1.16(d) in civil cases.”

Now what?

- There is no uniform rule on appropriate narrow exceptions under the entire file rule.
- Working on a proposed rule change consistent with the Court's Order in *Doe v. Doe*.

- What are appropriate narrow exceptions?
 - Records which, by law or court order, are prohibited from being provided to the client?
 - Drafts of unfiled or unsigned documents?
 - Metadata?
 - Internal firm communications about conflicts or possible malpractice claims?
 - Information that could endanger the health/safety of the client or others?

- What types of notes are appropriate to withhold?
 - Notes for drafting documents intended to have legal effect?
 - Notes from witness interviews?
 - Notes from fact investigations?
 - Notes regarding depositions, meetings, hearings or trial?