

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

A

tabbles

Senior Justice Horton filed a REPORT AND RECOMMENDATION with this Court on November 28, 2022. Based upon his investigation, Senior Justice Horton found that Petitioner's Grievance implicates IRPC 1.16(d), which states:

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 law.

(Emphasis added). Senior Justice Horton observed that the Commentary to Rule 1.16(d) is silent with respect to the scope of documents to which a former client is entitled. Moreover, neither this Court nor the Office of Bar Counsel with the Idaho State Bar has ever adopted a formal statement as to the scope of documents that must be provided to a former client pursuant to the rule.

Senior Justice Horton explained that other jurisdictions considering the issue have adopted varying approaches regarding the breadth of documents a lawyer is ethically required to surrender to the client upon termination of representation. The "entire file" approach, followed by the majority of jurisdictions and endorsed by THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, presumes that, with certain narrow exceptions, the client is entitled to everything in his or her own file, including the attorney's work product. In contrast, the "end product" approach, followed by a minority of jurisdictions, presumes that the client is entitled only to public documents that are the end product of an attorney's representation—*e.g.*, pleadings, correspondence, etc.—but not to the attorney's work product, including documents and notes that the attorney used to reach the end result. Senior Justice Horton also suggested consideration of a third, intermediate approach that would require disclosure of some, but not all work product, with the precise contours of such approach to be developed by an as-yet formed court committee.

In this case, Respondent refused Petitioner's requests for production of any notes or emails Respondent may have generated in connection with his earlier representation of Petitioner in a criminal case, asserting that such work product was the property of Respondent's employer, [REDACTED]. Senior Justice Horton observed that Respondent's position on the matter is consistent both with the policy of the [REDACTED] and with the position that Bar Counsel has taken when faced with complaints similar to those made by Petitioner in this case.

Ultimately, Senior Justice Horton made the following, alternative recommendations for disposition of Petitioner's Grievance: (1) if this Court concurs with the position of Respondent and Bar Counsel that a lawyer has no ethical duty to disclose work product to a former client, Petitioner's Grievance should be dismissed; alternatively, (2) if this Court adopts the majority view that, with narrow exceptions, an attorney is obligated to surrender the entirety of a case file to a former client upon request, and if the Court determines that a sanction is warranted in this case, the matter should be remanded to Bar Counsel with directions to informally admonish Respondent.

DECISION

This Court has now reviewed the entire record, including Petitioner's Grievance and Senior Justice Horton's REPORT AND RECOMMENDATION, along with its attachments. Based thereon, and being fully advised,

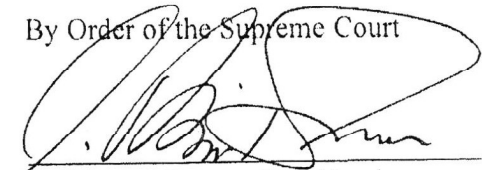
IT IS ORDERED that the REPORT AND RECOMMENDATION by Senior Justice Horton is ACCEPTED IN PART. Regarding the scope of documents a lawyer is ethically required to surrender to a former client in a criminal case under IRPC 1.16(d), the Court adopts the majority "entire file" rule, pursuant to which the client is presumptively entitled to everything in his or her own file, including attorney work product, subject to narrow exceptions. 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.

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.

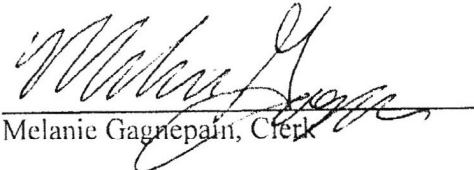
DATED this 25th day of January, 2023.

By Order of the Supreme Court



G. Richard Bevan, Chief Justice

ATTEST:



Melanie Gagnepain, Clerk

