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Eliminating Conflict at the Termination of the Attorney-Client Relationship: A Proposed Standard Governing Property Rights in the Client's File

Brian J. Slovut

Note

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A client dismisses her attorney and requests that her file be transferred to her new attorney. The first attorney transfers the file but withholds handwritten notes and research memoranda. The client protests, asserting that the entire file is her property. The attorney contends that only the end products, such as finalized contracts, filed motions, and correspondence, belong to the client. The winner between these two claimants will vary from state to state, and in many states, because no clear standard exists, the parties must go to court to determine their respective rights.

Only a few courts have addressed this ownership issue, and they have come down on opposite sides of the question.[1] A few state professional responsibility boards and bar associations have also adopted guidelines.[2] From these court decisions and ethics opinions, two general standards emerge. One places ownership of the entire file with the client. Courts adopting this standard have focused on the fiduciary nature of the attorney-client relationship and on the benefit the attorney owes the

1. *Compare, e.g.*, Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 650 (N.D. Tex. 1989) (holding that the client was entitled to all file contents) *with* Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss.) (holding that the client was entitled only to the end products in the file), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989).

2. *See, e.g.*, Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989) (distinguishing documents that are clients' property from those that are not); State Bar of Mich., Informal Op. CI-722 (1982) (stating that clients are entitled to all documents in the file, including all notes and memoranda).

This Note uses the phrase "end product standard" to describe any standard which does not place ownership in the entire file with the client. Courts and ethics opinions adopting the end product standard articulate somewhat distinct standards.

client. The other standard divides ownership between the attorney and client. Courts adopting this standard have distinguished the tools of the attorney from the end product created by those tools, and have sought to protect an attorney's thoughts and ideas from intrusion.

To eliminate the potential disputes between an attorney and a client upon termination of their relationship, clear standards governing the ownership of client files must be developed. This Note seeks to illustrate the problems of competing attorney and client interests over ownership of client files. Part I of this Note examines the conflicting ethics opinions and court decisions, the policies behind the case law, and the underlying ethical considerations. Part II examines the extent to which current approaches satisfy an attorney's ethical duties and further underlying policies. Part III offers a scheme that balances the policies and provides a standard that precisely defines the boundaries of attorney and client ownership. This Note concludes that attorneys should have ownership rights in notes and intraoffice communications, and that clients should have an ownership interest in the rest of the contents of the file. This interest should be absolute for some documents and conditional for others.

I. THE UNCERTAIN AND CONFLICTING CURRENT STATE OF THE LAW

Two problems impede the determination of who owns the documents in a client's file.[3] First, in many states, no clear standard defines who owns which documents within the client's file.[4] Second, the standards that do exist are inconsistent.[5]

3. Several situations may require a determination of who owns documents within the file. These include a client changing attorneys, a bankrupt client's trustee seeking access to the file, and a widow claiming the property left her by her husband included her husband's legal file. *See infra* part I.B. The ownership issue commonly becomes significant when the client terminates the attorney-client relationship. Note that the attorney's duty remains the same regardless of the reason for the termination. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. (1983) ("Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.").

4. *See infra* part I.A.2. (describing the opinions issued by the few state ethics boards that have addressed this issue) and part I.B. (discussing the sparse case law on the issue).

5. If every state had a definitive standard, the inconsistency among the various standards would be inconsequential. Many states, however, lack a standard. The inconsistency becomes significant when states without standards look to other states for guidance.

In general, current standards fall into one of two categories. The "entire file" standard gives the client ownership of all documents within the client's file.[6] Under this standard, the attorney must turn over the entire contents of the file upon the client's request.[7] In adopting this standard, courts have rejected the contention that attorneys should have a property interest in all or some of their work product.[8]

The "end product" standard divides ownership in the file between clients and their attorneys. Clients own the end products, and their attorneys own some or all of their work product. The precise articulation of this standard varies among courts and ethics boards.[9]

A. THE ETHICAL CONSIDERATIONS

Attorney conduct both during the representation of a client and at the termination of the attorney-client relationship is defined in part by the attorney's ethical duties.[10] Therefore, any ownership standard affecting the attorney-client relationship must be consistent with these ethical duties.

1. The Model Rules of Professional Conduct as a Guideline

Disputes over the ownership of client files generally arise at the termination of the relationship. The American Bar Asso-

6. *See, e.g.*, Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 650 (N.D. Tex. 1989).

7. *Id.* The courts holding that the attorney has no ownership interest have responded to a variety of arguments. For example, one attorney asserted that to force him to give up the file would violate his right not to incriminate himself. *See In re* Grand Jury Proceedings, 727 F.2d 941, 941 (10th Cir.), *cert. denied*, 469 U.S 819 (1984). Another attorney made multiple claims, including the work product doctrine, the attorney-client privilege, and straight ownership rights. *See Resolution Trust*, 128 F.R.D. at 648.

8. *Resolution Trust*, 128 F.R.D. at 650; *see also In re* Kaleidoscope, Inc., 15 B.R. 232, 244 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982).

9. *See* Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss.) (holding an attorney's work product to be his or her personal property), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo. Ct. App. 1992) (holding that the client has tangible property rights only in final documents); Gries Sports Enters. v. Cleveland Browns Football Co., Nos. 49184, 49197, 1985 WL 7995, at *13 (Ohio Ct. App. Apr. 25, 1985) (holding that clients are not entitled to their attorneys' internal notes or memoranda), *rev'd on other grounds*, 496 N.E.2d 959 (Ohio 1986).

10. The Model Rules of Professional Conduct describes itself as part of a "larger context shaping the lawyer's role." MODEL RULES OF PROFESSIONAL CONDUCT scope (1983).

ciation's Model Rules of Professional Conduct (Model Rules) provides that upon termination:

> [A] lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.[11]

In addition, the attorney's ownership rights are limited by the attorney's duty of confidentiality, which continues after representation has concluded.[12] The Model Rules also require that the attorney keep the client "reasonably" informed.[13] Although the rules require only that the attorney provide information to the client, not necessarily documents,[14] the rules raise ethical questions about what information within the documents must be disclosed.[15]

2. ABA and State Ethics Board Opinions

The ABA and some state ethics boards have issued opinions treating ownership of the client file as a matter of profes-

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11. *Id.* Rule 1.16(d). Note that the rule does not state to which papers the client is entitled. The ABA has more specifically addressed the issue in ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977). *See infra* note 20.

Courts have looked to state rules similar to Model Rule 1.16(d) when addressing the ownership question. *See, e.g., Kaleidoscope*, 15 B.R. at 241; *Corrigan*, 824 S.W.2d at 97.

Note that these rules are meant as guidelines, not rules of law, and may subject an attorney to professional sanction. *See* MODEL RULES OF PROFESSIONAL CONDUCT scope (1983).

12. Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." The comment following Rule 1.6 reiterates that "[a]fter withdrawal, the lawyer is required to refrain from disclosure of the client's confidences."

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983). The Rule requires that:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

14. *Id.*

15. Courts adopting the entire file standard have reasoned that the attorney's duty of disclosure compels attorneys to turn over to their clients all documents in the legal file. *See, e.g.*, Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 648-49 (N.D. Tex. 1989). An end product standard court has interpreted this duty differently, focusing on the conveying of information rather than on the turning over of documents. *See Corrigan*, 824 S.W.2d at 98.

sional ethics.[16] Just as court decisions have been inconsistent,[17] so too have the opinions of ethics boards.[18] Ethics opinions generally serve as guidelines for lawyers, and violating them may subject an attorney to discipline.[19]

Interpreting the Model Rules, the ABA issued an informal ethics opinion adopting an end product standard for client files.[20] The opinion states that attorneys are not obliged to de-

16. *See, e.g.*, Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989) (defining which documents are "client files, papers, and property"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) (describing which documents the attorney must deliver to the client). This Note treats opinions defining those documents to which the client is entitled as equivalent to opinions which define those documents the client owns.

17. *See infra* part I.B.

18. *Compare* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) (adopting an end product standard) *with* State Bar of Mich., Informal Op. CI-722 (1982) (adopting the entire file standard).

19. *See, e.g.*, Minnesota Lawyers Professional Responsibility Bd., Op. 1 (1972) (amended 1987) (describing the effect of opinions). The authority of ABA ethics opinions depends on whether a state adopts their reasoning. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978); *see also* Gries Sports Enters. v. Cleveland Browns Football Co., Nos. 49184, 49197, 1985 WL 7995, at *13 (Ohio Ct. App. Apr. 25, 1985) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977)), *rev'd on other grounds*, 496 N.E.2d 959 (Ohio 1986).

20. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977). This opinion, although prepared in response to an inquiry regarding a trademark case, is phrased in general terms and has been used as authority in a non-trademark case. *See Gries Sports*, 1985 WL 7995, at *13 (stating that "the standard set forth [in the ABA opinion] is appropriate in most, if not all, instances involving any attorney-client relationship"). The ABA opinion states:

> The attorney clearly must return all of the material supplied by the client to the attorney. He must also deliver the 'end product'—the certificates or other evidence of registration of the trademark which he was employed to procure and for which the client has paid. Such items as searches ordered for the client's matter and likewise paid for by the client presumably may have utility to the client and should be delivered to the client.
>
> On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem.
>
> Between these extremes are the items about which you may be uncertain. In the Committee's view, upon request by the client you should deliver all other material which is useful to the client in benefiting fully from services he has purchased from you. From your description, this would appear to include all significant correspondence, applications and material filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question.
>
> It must be kept in mind that the Committee cannot answer ques-

liver their "internal notes and memos" to a client.[21] The attorney must, however, deliver the end products to the client. In addition, the attorney should deliver to the client "other material which is useful to the client in benefiting fully from services he has purchased."[22] The opinion explains, however, that the precise question of what is the attorney's property and what is the client's property is one of law.[23]

The Minnesota Lawyers Professional Responsibility Board also has adopted a form of the end product standard.[24] In con-

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tions of law. In the gray areas, what is the lawyer's property and what is the client's property in a particular case are questions of law governed by the law of the applicable jurisdiction. The ethical principles involved are simple. The client is entitled to receive what he has paid for and the return of what he has delivered to the lawyer. Beyond that, the conscientious lawyer should not withhold from the client any item which it could reasonably be anticipated would be useful to the client. How these principles are to be applied in individual cases is, of course, not easy. The respective interests of the lawyer and client can be protected by court order in an adversary proceeding or by a private agreement if the parties can agree.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) (citation omitted).

21. More specifically, the opinion states that "the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977).

22. *Id.*

23. *Id.* As noted above, however, a court has cited the opinion as support for its decision on ownership of a client file.

24. Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989). This Minnesota opinion states:

> Client files, papers and property, whether printed or electronically stored, shall include:
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> 1. All papers and property provided by the client to the lawyer.
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> 2. All pleadings, motions, discovery, memorandums, and other litigation materials which have been executed and served or filed regardless of whether the client has paid the lawyer for drafting and serving and/or filing the document(s).
>
> 3. All correspondence regardless of whether the client has paid the lawyer for drafting or sending the correspondence.
>
> 4. All items for which the lawyer has advanced costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses including depositions, expert opinions and statements, business records, witness statements, and other materials which may have evidentiary value.
>
> Client files, papers and property, whether printed or electronically stored, shall not include:
>
> 1. Pleading, discovery, motion papers, memoranda and correspondence which have been drafted, but not sent or served if the client has not paid for legal services in drafting or creating the documents.
>
> 2. In non-litigation settings, client files, papers and property shall not include drafted but unexecuted estate plans, title opinions,

trast to the ABA opinion, the Minnesota opinion defines precisely what documents the client owns.[25] The opinion grants clients ownership of documents used strategically, either filed in court or sent to an adversary.[26] In addition, clients own drafted documents not yet filed or sent for which they have paid.[27] The opinion also forbids attorneys from withholding documents when to do so would "substantially prejudice" their clients' interests.[28]

In contrast, the Michigan State Bar Association issued an

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articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer for the services in drafting the document(s) .... [T]he lawyer [may not] condition the return of client files, papers and property upon payment of the lawyer's fee. *See* Opinion 11 of the Minnesota Lawyers Professional Responsibility Bd.

A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).

Id. Other entities that have adopted end product standards include committees in Connecticut and Wisconsin and in the city of San Diego. Connecticut's opinion distinguishes between "whatever was produced for dissemination to the client or others outside the attorney's office, and whatever was the attorney's personal work product (typically, handwritten notes, internal drafts or memoranda, and the like). The client is entitled to the former but not the latter." Committee on Professional Ethics, Informal Op. 82-4 (Conn. 1981).

Wisconsin's opinion states that clients are entitled to papers they have supplied to the attorneys and end products for which they have paid. Committee on Professional Ethics, State Bar of Wis., Op. E-82-7 (1982), *reprinted in* Laws. Man. on Prof. Conduct (ABA/BNA) 801:9106.

San Diego's opinion states that the client is not entitled to "papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories." These documents, "which constitute absolute attorney work product ... are the 'property' of the attorney, rather than client." Legal Ethics and Unlawful Practices Comm. of the San Diego Bar Ass'n, Op. 1984-3 (1984).

The Mississippi State Bar Association issued an opinion stating that attorney ownership of specific documents in the file is a matter of law, but further stated that "the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product." Mississippi State Bar Ass'n, Op. 144 (1988), *reprinted in Ethics Opinions*, MISS. LAW., Mar./Apr. 1988, at 14-16.

25. Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989).
26. *Id.*
27. *Id.*
28. *Id.*

opinion stating that attorneys have an ethical duty to deliver the entire contents of the file to the client upon request.[29] A separate Michigan ethics opinion, however, articulated a possible exception for documents containing the attorney's views on the client's character or competency.[30]

The majority of state ethics committees, however, appear to be silent on this issue or have expressly stated that the issue is a matter of law and thus outside of their jurisdiction.[31]

B. TREATMENT BY THE COURTS

1. The Entire File Standard

The courts in *Resolution Trust Corp. v. H—, P.C.*[32] and *In re Kaleidoscope, Inc.*[33] adopted the entire file standard for simi-

29. Committee on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-722 (1982). The opinion states: "Where a former client requests the file and the attorney has possession of the file, the attorney has an ethical duty to deliver the file to the former client, or his newly retained counsel .... [A]ll notes, memoranda, correspondence and other items in the file should be included ...." *Id.*

30. Committee on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-743 (1982). The opinion, after stating that "[s]ubstituted counsel is entitled to the benefit of the lawyer's 'work product' for which the client has paid a fee," asserts that: "[The client] is not entitled *per se* to any and all documents contained in a lawyer's legal file. Specifically [documents containing] a lawyer's personal observations ... with respect to a client's character or competency traits particularly if and when negative, probably should not be released." *Id.*

31. *See* Ethics Comm. of the Ky. Bar Ass'n, Op. E-300 (1985) (asserting that the ownership question is one of law and that the ethics committee lacked jurisdiction to decide legal questions (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1384 (1977))). In addition, some committees simply state that the lawyer must turn over client files or papers to which the client is entitled, but do not define which papers those are. *See* Professional Ethics Comm. of the State Bar of Tex., Op. 395 (1980) (stating that "[a] lawyer may not refuse to relinquish his client's files"), *reprinted in* Laws. Man. on Prof. Conduct (ABA/BNA) 801:8301.

32. 128 F.R.D. 647 (N.D. Tex. 1989).

33. 15 B.R. 232 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982). The district court reversed the bankruptcy court's decision because it believed the ownership question to be governed by state law, and the law on the issue was not decided in Georgia. *In re* Kaleidoscope, Inc., 25 B.R. 729, 742-43 (N.D. Ga. 1982).

This Note will discuss the bankruptcy court's opinion for two reasons: first, the bankruptcy court extensively discussed the rationale for the entire file standard, and second, although the opinion lacks authority within Georgia, other courts have cited the opinion regarding the ownership issue, generally without giving reasons for doing so. *E.g., In re* Michigan Boiler & Eng'g Co., 87 B.R. 465, 468 (Bankr. E.D. Mich. 1988); *In re* Investment Bankers, Inc. v. Davis, Gillenwater & Lynch, 30 B.R. 883, 886-87 (Bankr. D. Colo. 1983). In addition, the *Resolution Trust* court cited *Kaleidoscope* as support, stating that "its

lar reasons. The courts focused on the fiduciary nature of the attorney-client relationship, the financially created obligations of the attorney, and the traditional practices of attorneys.

In *Resolution Trust*, a client suspected that its attorneys might be altering certain documents within the client's file and later demanded possession of the file.[34] The law firm refused to transfer the entire file, claiming ownership in some documents.[35] The court rejected the law firm's claim, and decided that under Texas law the entire contents of the file belong to the client.[36]

In *Kaleidoscope*, a bankruptcy trustee moved to have the debtor's law firm turn over all legal files created during representation.[37] The court rejected arguments advanced by the law firm in opposition to the motion, stating that the client "is entitled to the *entire* file."[38] Because the trustee's and client's rights to the files are equivalent, the court reasoned, the trustee is entitled to the entire contents of the file.[39]

The *Resolution Trust* and *Kaleidoscope* courts offered a number of rationales in support of the entire file standard, many of which centered on the nature of the attorney-client relationship.[40] Both courts relied on the fiduciary nature of the attorney-client relationship.[41] As the client's fiduciary, the attorney must exercise "the highest duty of good faith and diligence."[42] The *Resolution Trust* court asserted that the

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reasoning and conclusion fully support this Court's analysis." 128 F.R.D. at 649.

34. 128 F.R.D. at 647.

35. *Id.* at 648.

36. *Id.* at 651.

37. *In re* Kaleidoscope, Inc., 15 B.R. 232, 234 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982). Other courts have also followed the entire file standard in bankruptcy situations. *See, e.g.*, *Michigan Boiler*, 87 B.R. at 469 (stating that where legal files are amassed jointly, "the entire contents of those legal files belong jointly to the clients in question" (quoting *Kaleidoscope*, 15 B.R. at 244)); *Investment Bankers*, 30 B.R. at 887 (stating that "[t]he trustee is the successor in interest to the debtor, and [therefore] has a right to the production of the files and disclosure of all information pertinent to that representation"); *In re* Calestini, 321 F. Supp. 1313, 1316 (N.D. Cal. 1971) (reasoning that because the bankrupt client had a property interest in all materials in the legal file, this property interest passed to the trustee).

38. *Kaleidoscope*, 15 B.R. at 234, 241.

39. *Id.* at 240.

40. Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 648-49 (N.D. Tex. 1989). The *Kaleidoscope* court spoke of "a common sense analysis of the relationship between attorney and client." 15 B.R. at 240.

41. *Resolution Trust*, 128 F.R.D. at 648; *Kaleidoscope*, 15 B.R. at 244.

42. *Resolution Trust*, 128 F.R.D. at 649 (quoting *Kaleidoscope*); *Kaleido-*

fiduciary duty required the attorney to "disclose all information to the client."[43] Both courts asserted that this duty prohibits the attorney from limiting the documents to which a client may have access.[44] Therefore, the courts concluded, the fiduciary duty requires that the clients be owners of all documents in the file.[45]

The *Resolution Trust* court grounded the requirement of total access on the need for an attorney's actions to be subject to close scrutiny.[46] According to the court, complete openness is necessary for clients, and possibly courts, to ensure that attorneys are upholding their fiduciary duties.[47] The court reasoned that if attorneys may choose what documents to hand over to their clients, attorneys will be able to shelter themselves from scrutiny.[48]

Both the *Resolution Trust* and the *Kaleidoscope* courts pointed to the financial relationship between attorney and client as another rationale to support the entire file standard.[49] The courts asserted that clients hire and pay attorneys to repre-

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scope, 15 B.R. at 244. The courts correctly described the attorney as a fiduciary. *See generally* 7 AM. JUR. 2D *Attorneys at Law* § 119 (1980) ("The relationship between an attorney and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith.").

43. 128 F.R.D. at 649.

44. *Id.* at 649-50; *Kaleidoscope*, 15 B.R. at 244.

45. *Resolution Trust*, 128 F.R.D. at 650; *Kaleidoscope*, 15 B.R. at 244. According to these courts, if the attorney could withhold documents from the client, information might be withheld, thereby violating the attorney's fiduciary duty.

Entire file courts have also used the agency nature of the attorney-client relationship as support. *See In re* Grand Jury Proceedings, 727 F.2d 941, 943-44 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984); *Resolution Trust*, 128 F.R.D. at 648 (stating that allowing an attorney to withhold documents from a client that he or she would be required to turn over to a new attorney violates the "agency nature of the [attorney-client] relationship"); *Kaleidoscope*, 15 B.R. at 239 (asserting that the attorney "is an agent of the highest rank for his principal—his client"). *See generally* 7 AM. JUR. 2D *Attorneys at Law* § 119, ("[I]n a limited and dignified sense the relation between attorney and client is essentially that of principal and agent.").

46. *Resolution Trust*, 128 F.R.D. at 649 (stating that the attorney-client relationship must be of "[t]he most abundant good faith; absolute and perfect candor or *openness* and honesty; the *absence of any concealment* or deception, however slight").

47. *Id.*

48. *Id.*

49. *Id.* at 650; *Kaleidoscope*, 15 B.R. at 240-41; *see also Grand Jury Proceedings*, 727 F.2d at 944 (stating that "any ownership rights that inure in the file belong to the client who has presumably paid for the professional services and preparations made by the attorney").

sent their interests.[50] Therefore, the courts reasoned, clients pay for all attorney actions, and this gives the clients a property interest in everything their attorneys produce, whether it be notes, internal memoranda, or final contracts.[51] Withholding any documents from clients deprives them of services for which they have paid.[52]

Finally, both courts looked to the traditional practice of transferring a client's file to a new attorney upon request.[53] In *Resolution Trust*, the court stated that it was "virtually universal practice" for attorneys to transfer the entire file without withholding any materials.[54] The court rejected the attorney's argument that this mandate applied only when the transfer was between attorneys, and not between an attorney and client.[55] The court reasoned that such a practice would be contrary to the attorney-client relationship.[56] Complete openness characterizes the relationship between client and attorney, and therefore, the court concluded, anything one lawyer must transfer to another must also be available to the client.[57] The *Kaleidoscope* court said that when the attorney-client relationship terminates, the client receives "full and free access" to the legal file.[58]

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50. *Resolution Trust*, 128 F.R.D. at 650; *Kaleidoscope*, 15 B.R. at 240-41.

51. *Resolution Trust*, 128 F.R.D. at 649-50. The *Kaleidoscope* court stated that clients hire attorneys to use their "brain power," and that clients are entitled to all manifestations of this power "[r]egardless whether the lawyer's efforts remain, as in simple matters, in his head, or in more complicated matters, take on tangible form as correspondence, memoranda, notes and the like." 15 B.R. at 240-41. In rejecting a work product doctrine defense, the *Grand Jury Proceedings* court stated that clients have rights in their attorneys' thought processes because they pay for the "labors and efforts" that produce them. 727 F.2d at 945. The *Resolution Trust* court referred to the cost of legal services and asserted that "[t]o allow the attorney to decide which materials may or may not be revealed to the client from its files would deny the client the full benefit of the services for which he paid, often dearly." 128 F.R.D. at 650.

52. *Resolution Trust*, 128 F.R.D. at 650; *Kaleidoscope*, 15 B.R. at 240-41.

53. *Resolution Trust*, 128 F.R.D. at 648-49; *Kaleidoscope*, 15 B.R. at 239.

54. 128 F.R.D. at 648.

55. *Id.* at 648-49.

56. *Id.*

57. *See id.* To allow otherwise would "impl[y] a more trusting relationship between law firms than between a firm and its client." *Id.* at 649. The *Resolution Trust* and *Kaleidoscope* courts cited no law on the issue of what an attorney is required to transfer to the new attorney upon request. The *Resolution Trust* court stated that "the parties admitted . . . the virtually universal practice of transferring the entire client file to new counsel." 128 F.R.D. at 648. The *Kaleidoscope* court merely stated that "it is the Court's understanding" that the entire file is transferred. 15 B.R. at 239.

58. *Kaleidoscope*, 15 B.R. at 239. A different scenario and distinct reason-

2. The End Product Standard

The courts in *Federal Land Bank v. Federal Intermediate Credit Bank*[59] and *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*[60] adopted the end product standard, yet reasoned differently.[61] The *Federal Land Bank* court focused primarily on the nature and purpose of an attorney's work product,[62] while the *Corrigan* court focused on the nature of property rights and the ethical obligations of attorneys.[63]

In *Federal Land Bank*, a bank sought to compel its former law firm to produce certain documents.[64] The bank contended

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ing gave rise to the Tenth Circuit Court of Appeals's decision in *In re* Grand Jury Proceedings, 727 F.2d 941 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984). In that case the court asserted that the client has sole property rights to the file. *See id.* at 944. The court did not state that the entire *contents* of the file belong to the client. It did, however, state that "any ownership rights which inure in the file belong to the client." *Id.* In addition, the court rejected the claim that attorneys might have any privacy interest in their work product in a non-litigation setting, thus implying that when referring to the file, the court was including all work product such as notes and memoranda used in representing the client. *Id.* at 945. The fact that the court did not expressly speak in terms of specific documents in the file may indicate that the ownership issue is not firmly decided in the Tenth Circuit.

In *Grand Jury Proceedings*, the court cited an attorney for contempt when he refused to produce a client's file for a grand jury hearing despite the client's consent. *Id.* at 942. In addition to unsuccessfully claiming that the work product doctrine applied, the attorney contended that producing the file would violate the attorney's Fifth Amendment privilege against self-incrimination. *Id.* at 943, 945-46. The court disagreed, stating that because the attorney holds the file in a purely representational capacity, the privilege does not apply. *Id.* at 945. The court reasoned that the attorney would need an ownership interest in the file to assert the Fifth Amendment privilege successfully. *Id.* The court stated that "fifth amendment assertions have to focus on the surrender of property which is ' "the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." ' " *Id.* at 944 (quoting Bellis v. United States, 417 U.S. 85, 90 (1974) (in turn quoting United States v. White, 322 U.S. 694, 699 (1944))).

59. 127 F.R.D. 473 (S.D. Miss.), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989).

60. 824 S.W.2d 92 (Mo. Ct. App. 1992).

61. An Ohio court followed the end product standard, but did not articulate its reasoning for doing so. *See* Gries Sports Enters. v. Cleveland Browns Football Co., Nos. 49184, 49197, 1985 WL 7995, at *13 (Ohio Ct. App. Apr. 25, 1985), *rev'd on other grounds*, 496 N.E.2d 959 (Ohio 1986). The court simply compared conflicting ethics opinions and followed the standards adopted by the ABA and the Connecticut Bar Association. *Id.*; *see supra* notes 20-24 and accompanying text (describing the ABA and Connecticut Bar Association ethics opinions).

62. 127 F.R.D. at 478-80.

63. 824 S.W.2d at 97-99.

64. 127 F.R.D. at 474.

that the documents were created in the course of the firm's representation of the bank and therefore were the property of the bank.[65] The law firm, however, claimed an ownership right in the documents, contending that it owned its work product.[66] The court ruled in favor of the law firm, holding that the firm held the ownership rights in its work product.[67]

In *Federal Land Bank*, the court contrasted the nature and purpose of the attorney's work product with the nature of the end product.[68] The court described an attorney's work product as merely a tool created and used by the attorney, and therefore personal property of the attorney.[69] The court reasoned that the attorney must use rough notes and opinions to represent the client properly, and thus the client is entitled only to the finished product.[70]

The *Federal Land Bank* court also supported the end prod-

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65. *Id.*

66. *Id.*

67. *Id.* at 478. The court relied primarily on a San Diego Bar Association ethics opinion as support for its reasoning and conclusion. *Id.* at 478-79 (citing Legal Ethics and Unlawful Prac. Comm., San Diego Bar Ass'n, Op. 1977-3 (1977)). In addition, the court cited the Mississippi State Bar Association as agreeing with the San Diego opinion. *Id.* (citing Ethics Comm., Miss. State Bar Ass'n, Op. 144 (1988)).

68. *Id.* at 478-80. The court defined work product as follows:

> Notes taken by the lawyer or others in his firm in conducting . . . investigation or research, notes made by the lawyer in preparation for or while attending a deposition or a trial or meetings, internal memoranda and other documents prepared by the lawyer for his use in providing services to his client constitute the lawyer's work product and are the property of the lawyer. Likewise, preliminary drafts of contracts, briefs, opinions, pleadings and other documents, the final drafts of which constitute the lawyer's end products, are the lawyer's work product and are the property of the lawyer.

Id. at 480.

69. *Id.* at 479 (citing Legal Ethics and Unlawful Prac. Comm., San Diego Bar Ass'n, Op. 1977-3 (1977)).

70. *Id.* The court characterized "end product" as documents strategically brought to light and "work product" as informal and candid documents, and asserted that the client expects to have a property interest in the end product, not the work product. *Id.* (citing Legal Ethics and Unlawful Prac. Comm., San Diego Bar Ass'n, Op. 1977-3 (1977)).

The former client in *Federal Land Bank* claimed that the ethics opinion relied on by the court was inapplicable because it was issued in response to a question concerning a contingency fee arrangement. *Id.* The court rejected this assertion, stating that the method of compensation is irrelevant to the attorney's duty to the client or the respective ownership interests of the attorney and client. *Id.* The court asserted that fee arrangements are merely methods of calculating an attorney's fee and do not alter the nature of the attorney-client relationship. *Id.* The court stated that "[u]nder both arrangements, the client is paying for the end result. Under both arrangements, the

uct standard to protect attorneys' thoughts and ideas from intrusion.[71] The district court in *Kaleidoscope* expressed this interest in dictum while reversing the bankruptcy court, stating: "A lawyer who cannot record freely all of his ideas without fear of later examination by his client may be less likely to consider fully what both lawyer and client should do in particular situations and may therefore provide less-informed or ill-considered representation."[72]

In its recent *Corrigan* decision, the Missouri Court of Appeals faced the ownership issue when a widow claimed that she had a right to her late husband's legal file.[73] The widow contended that because her deceased spouse bequeathed to her all of his tangible property, she was entitled to his file.[74] The court held for the attorney, stating that the deceased husband had held no proprietary interest in the file.[75]

The *Corrigan* court concluded that a client may have a right of access to information contained in an attorney's notes and memoranda, but that this right does not translate into an ownership interest.[76] The court reasoned that the attorney is

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lawyer's work product is the tool used by the lawyer to reach the end result." *Id.*

71. *Id.* (asserting that the attorney must use "rough blemished opinions" to "construct the appropriate legal representation," and that the client should not be entitled to these opinions (quoting Legal Ethics and Unlawful Prac. Comm., San Diego Bar Ass'n, Op. 1977-3 (1977))).

72. *In re* Kaleidoscope, Inc., 25 B.R. 729, 743 (N.D. Ga. 1982), *rev'g* 15 B.R. 232 (Bankr. N.D. Ga. 1981). The court stated that this interest in providing attorneys with freedom of thought must be balanced against the danger that attorneys could use such a freedom to hide possible breaches of their fiduciary duty to their clients. *Id.* The court abstained from deciding the ownership issue, asserting that "substantial state interests must be considered." *Id.*

The desire to ensure that attorneys may freely and creatively pursue the representation of clients is not unique to the issue of file ownership. For example, the drafters of the Federal Rules of Civil Procedure stated that Rule 11's provisions for sanctions are "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." FED. R. CIV. P. 11 advisory committee's note.

73. Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo. Ct. App. 1992).

74. *Id.* at 94.

75. *Id.* at 95. The end products in the file, such as wills, trusts, and contracts, were not at issue in *Corrigan* because the attorney already had delivered them to the client. *Id.* at 93.

76. *Id.* at 95. As would the entire file courts, the client's widow in this case reasoned that when a client hires an attorney, the client "acquire[s] a right to the 'fruits of [his or her attorney's] labor,' " and that these "fruits" include everything in the file. *Id.* at 94. She also claimed that the Missouri "shop-right" doctrine gave clients a proprietary interest in the file. *Id.* at 95. The court distinguished that doctrine, stating that it applies only when an em-

paid to create final documents and to perform services, and that legal principles give the client ownership in the final documents.[77] Beyond this property interest, however, the client has a right only to receive information necessary to understand and use the final documents and to benefit from the attorney's services generally.[78]

The *Corrigan* court concluded that the ethical duty of the attorney does not create a property right for the client.[79] The court stated that the attorney's ethical duty to the client centers around information, not property.[80] In determining what conduct fulfills the attorney's fiduciary duties, the court stated that the ethics rules must be " 'interpreted with reference to the purposes of legal representation and of the law itself.' "[81] In so doing, the court concluded that an attorney's duty requires her to turn over documents containing information her clients need to protect their interests.[82]

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ployee, using her employer's property, invents something. *Id.* The employer in that situation acquires a "non-exclusive license or privilege" to copy the invention. *Id.* An attorney, although employed by the client, does not use materials or facilities provided by the client. *Id.* at 95-96.

77. *Id.* at 96.

78. *Id.* The court stated that the client's conditional right of access "does not fit within the traditional definition of property." *Id.* Therefore, because the client did not have a property right, he could not bequeath it to his wife. *Id.*

79. *Id.* at 98.

80. *Id.* The court cited Missouri Supreme Court Rule 1.16 as requiring the attorney at termination "to take steps to protect the client's interest, such as 'surrendering papers and property to which the client is entitled . . . .' The attorney, however, may retain papers relating to the client to the extent permitted by other law." *Id.* This rule, according to the court, provides no guide as to which papers the client is entitled; it is a tautology, for "the client is 'entitled' to the papers 'to which he is entitled.' " *Id.*

81. *Id.* at 98 (quoting MODEL RULES OF PROFESSIONAL CONDUCT scope (1983)).

82. *Id.* The court discussed the need at termination of attorney-client relationships to protect both clients' and attorneys' interests in the work product the attorneys create. *Id.* The court detailed what an attorney must do at the end of a relationship with a client:

> Without regard to property rights, the attorney must be required to turn over to his client any documents for which the client has bargained and paid . . . . Moreover, there should be no question that the client has a right of access to the attorney's work product for information needed to understand those documents. Likewise, if the attorney is hired to represent the client in processing or defending a claim, the client at a minimum must be entitled to those papers required by law to be filed in an appropriate tribunal and those related papers essential or necessary to make the former papers meaningful. These may include pleadings, depositions, interrogatories and the like.

Id.

II. COMPARISON AND CRITICISM OF CURRENT STANDARDS

The most important goal in adopting a standard governing ownership of a client file is avoidance of uncertainty at the termination of the attorney-client relationship. Uncertainty breeds conflict and litigation. An authoritative and precise standard avoids uncertainty if it defines the documents to which the attorney and client are entitled at the termination of their relationship. Any examination of the strengths and weaknesses of standards must also inquire into whether they satisfy the ethical duties of attorneys, further the policies asserted by the courts, and infringe on or ignore other valid policy considerations. Such an examination reveals that neither a strict entire file standard nor a strict end product standard satisfactorily meets these objectives.

A. ETHICAL CONSIDERATIONS: ATTORNEY'S DUTY AS FIDUCIARY AT TERMINATION OF THE RELATIONSHIP

Both the entire file standard and the end product standard satisfy an attorney's ethical duties, but the entire file standard requires more disclosure than do the ethics rules. The end product standard satisfies the attorney's ethical duties by focusing on the need to provide information, not the need to provide documents. The *Corrigan* court reasoned that the attorney must disclose whatever the client needs in order to understand the end products created during the representation. This satisfies the Model Rules' requirement that during the relationship the attorney must keep the client reasonably informed, provide information sufficient to allow the client to make reasonable decisions regarding the representation, and take steps to protect the client's interests.[83] Nothing in the Model Rules suggests that at the termination of the relationship the attorney shoulders additional duties beyond those required during the relationship. The end product standard satisfies the attorney's

83. *See supra* notes 10-15 and accompanying text. Nonetheless, an attorney could violate the duty of disclosure by withholding documents from the client. If material information exists in a document, and if the attorney has not disclosed that information to the client because the relationship with the client has terminated, the client should receive either the original document or a copy. The *Corrigan* court interpreted the duty of disclosure to be a "duty to grant [the client] access to the information in [his] files which he may have needed to interpret the documents he requested to be prepared or to otherwise provide access to the information in the files in order for him to understand the services they performed." 824 S.W.2d at 98.

duties at the termination of the relationship by requiring the surrender of end product and by keeping open the flow of information between the attorney and the client. The ABA itself has interpreted the Model Rules consistently with this standard.[84]

Courts that adhere to the entire file standard misconceive the fiduciary duty that an attorney owes to a client. These courts properly define the attorney's duty as one of "good faith and diligence,"[85] but then misinterpret the requirements that this duty imposes. The entire file courts focus on two aspects of the fiduciary duty: the requirement of disclosure and the need for close scrutiny of an attorney's actions.

First, the entire file courts presume that the attorney's duty of disclosure requires the attorney to turn over all documents to the client upon request, both during and at the termination of the attorney-client relationship. The courts base this conclusion on the belief that the attorney has a duty to disclose all information to the client.[86] The case the *Resolution Trust* court cited for this belief stated that an attorney "is obligated to render a full and fair disclosure of facts material to the client's representation."[87] The requirements that material facts be fully disclosed and that the entire file be turned over are distinct. Full disclosure merely requires that the client be informed of material facts, but the entire file standard is likely to exceed that duty by requiring the attorney to surrender even those documents that do not contain material facts.[88]

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84. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977).

85. *See, e.g., In re* Kaleidoscope, Inc., 15 B.R. 232, 244 (Bankr. N.D. Ga. 1981), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982).

86. *See, e.g.*, Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 649 (N.D. Tex. 1989) (citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988)).

87. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

88. Adopting an end product standard, the *Federal Land Bank* court included "rough, blemished opinions" in the attorney's property. Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 479 (S.D. Miss.), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989). Documents containing these rough opinions may not contain any material facts, but the entire file standard requires attorneys to turn these documents over nonetheless. The entire file standard surpasses the duty of disclosure it attempts to further by giving clients ownership rights in all of the documents in the clients' files.

Although the end product will likely include any material information that the attorney produces concerning the client's representation, the attorney has a duty of disclosure that goes beyond mere document ownership. Whether or not attorneys own their work product, they are ethically bound to be open and candid with their clients.

A second policy supposedly furthered by the entire file standard is that of attorney scrutiny. Advocates of the entire file standard contend that placing ownership with the client permits valuable scrutiny of the attorney's efforts.[89] The courts correctly assert that attorneys should be subject to close scrutiny by the client and, if necessary, by the court. The entire file standard, however, reflects the mistaken assumption that ownership of the entire file will allow clients to scrutinize their attorneys' work more effectively. In reality, the standard paints with an unnecessarily broad brush. During representation, the attorney's duty of disclosure satisfies the scrutiny requirement. If the attorney discloses material information and responds openly to the client's inquiries, the client will be able to keep track of the attorney's work. Simply granting a client ownership of all the attorney's notes and memoranda will not further the client's ability to ensure that the attorney acted properly. Much of the work product of the attorney will have little meaning to the client and thus will not help the client to evaluate the attorney's actions.

In addition, when necessary, the rules of civil procedure allow for adequate scrutiny, thereby decreasing the need for the entire file standard. Clients who believe themselves to be injured by their attorneys' conduct may file malpractice actions and receive the documents through discovery regardless of who owns the documents.[90]

Despite its overreaching, the entire file standard generally upholds the ethical framework established by the Model Rules. By providing the client with the entire file at the termination of the relationship, the attorney protects the client's interests, although the attorney may also need to provide additional information to the client. The entire file standard will satisfy the Model Rules requirement of keeping the client "reasonably informed" if the attorney provides the information the client needs, rather than just the documents in the client's file. The property rights established by the entire file standard do not undermine an attorney's ethical duties, and therefore the standard generally upholds these duties.

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89. *See Resolution Trust*, 128 F.R.D. at 649.

90. Clients' need for access to work product is one reason courts would not expand the scope of the work product doctrine. To allow an attorney to assert the work product doctrine against a client would effectively shield the attorney's work product from the client. Giving the attorney ownership rights in work product does not interfere with the client's right to use discovery procedures to gain access to the relevant work product if necessary.

Thus, both the end product and the entire file standards satisfy the attorney's fiduciary duty to the client, but the entire file standard surpasses that which is necessary to fulfill the attorney's duties.

B. Full Benefit of Attorney Services

A major difference between the entire file and the end product standards is their divergent characterizations of what the client buys when hiring a lawyer. Under the entire file standard, everything the attorney creates while representing the client belongs to the client. The end product standard, on the other hand, reflects the view that the client pays the attorney for certain end products and services, but not for the documents the attorney used in the process. Neither standard, however, satisfactorily provides clients what they have paid for without giving them a windfall.

The entire file standard may provide the client a greater benefit than the client is entitled to receive.[91] This standard gives the client ownership of documents without regard to whether the client has paid for the creation of the documents. For example, if a client were to dismiss an attorney who had all but completed the drafting of a document such as a will, the draft would belong to the client regardless of whether the client had paid the attorney.[92]

The end product standard, however, may shortchange a paying client who, under a stringent interpretation of the standard such as that articulated by the *Federal Land Bank* court, would not be entitled to the nearly completed will even if the client had paid the attorney.[93]

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91. On the other hand, the entire file standard may actually reduce the benefit of hiring an attorney by diminishing the quality of the attorney's work. *See infra* notes 103-12 and accompanying text (discussing the need to avoid undue infringement on an attorney's creative thought).

In addition, the entire file standard provides the client with documents of little or no worth to the client. The sole benefit of some work product is to assist the attorney in representing the client, while other work product may benefit both the original attorney and the client or a new attorney. For example, a legal memorandum setting forth the applicable factual background of the client's situation would likely be of value to a new attorney. In contrast, rough work product, such as handwritten notes of legal ideas that the attorney intends to pursue, may have value only to the original attorney.

92. *But see supra* note 24 (setting forth the Minnesota solution that bases ownership in some documents on whether the client has paid for their drafting).

93. *See* Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss.) (holding that attorneys own their work product,

The *Corrigan* court articulated a more moderate standard under which the attorney must provide the client with those documents for which the client had bargained and paid, as well as any information necessary to protect the client's interests.[94] Under this standard, the client would most likely receive the unfinished will. This result, however, is not definite, because the *Corrigan* court's approach leaves much open to interpretation.[95]

The standard adopted by the Minnesota Lawyers Professional Responsibility Board provides precise guidance.[96] This standard gives the client unquestioned ownership of the end products,[97] but only a conditional ownership interest in un-

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including "preliminary drafts of contracts, briefs, opinions, pleadings and other documents"), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989). The *Federal Land Bank* court referred to the lawyer's work product as tools of the trade such as "the tools of a carpenter." *Id.* at 479 (citing Legal Ethics and Unlawful Prac. Comm. of the San Diego Bar Ass'n, Op. 1977-3) (1977). The court's analogy is faulty. For example, when a carpenter is hired to build an addition to a house, the carpenter uses hammers, nails, wood, and the like. If the carpenter were fired prior to completing the project, the carpenter would take his or her tools such as hammers and nails, and the client would keep the partially built addition. An attorney preparing an estate plan will most likely use notes, intraoffice communications, and preliminary drafts. The notes and communications closely resemble the carpenter's tools, but the preliminary drafts more closely resemble the partially built addition to the house—the "work in progress." The client should own the preliminary drafts, and the attorney should own his or her tools of the trade.

94. Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 98 (Mo. Ct. App. 1992).

95. If the court's language were interpreted to mean that the client bargained only for the finished will, the client might not be entitled to the unfinished will.

The theories in *Corrigan* are admirable, but they may leave lawyers guessing as to what they must provide to their clients. The court is correct that the focus of a lawyer's ethical obligations at the termination of the relationship is on information, not documents. A standard that defines the documents that attorneys must surrender to their clients provides a much clearer guide for attorneys as well as greater assurance that clients will receive the full benefit of the services for which they have paid.

96. *See supra* note 24 (setting forth the Minnesota's Lawyers Professional Responsibility Board opinion defining client property).

97. Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989). Under the Minnesota standard, the client owns and is entitled to documents falling within the following categories:

1. Documents supplied by the client.
2. Litigation materials that have been executed, served or filed.
3. Correspondence.
4. Items for which the lawyer has advanced costs and expenses which have evidentiary value.

served litigation materials and unexecuted legal documents.[98] Although clearly defined, the standard fails to provide clients with some documents they properly should receive. For example, a client in Minnesota is entitled to "drafted but unexecuted estate plans" if the client has paid for the time spent drafting the document.[99] This implies that the client is entitled to estate plans ready for execution, but not preliminary plans. Interpreted this way, the rule deprives the client of the preliminary draft of the plan even though the client has paid for its drafting.[100]

Moreover, none of the articulations of the end product standard expressly grants the client an ownership interest in

98. *Id.*

99. *Id.*

100. The Minnesota standard is admirable in several respects. First, it specifies the duties of attorneys at the termination of the attorney-client relationship. The opinion lists the documents to which clients are entitled, and it expressly states that attorneys may not withhold the documents, regardless of whether a fee has been paid. It further lists those specific documents to which clients are entitled depending on whether the client has paid.

Second, the opinion implicitly recognizes the competing interests at stake. It does not ignore the interests of attorneys, as does the entire file standard, nor does it undervalue the interests of clients, as does the standard the *Federal Land Bank* court adopted. *See supra* note 93 and accompanying text. The opinion balances the interests by dividing those documents in which the attorney's interest in compensation outweighs the client's interest. The opinion states, therefore, that, "A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents." Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989).

In contrast to the Minnesota opinion, the ABA standard provides a more general framework that could provide the client with the full benefit of the attorney's services to which the client is entitled. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977). It gives the attorney ownership of personal notes and memoranda and it gives the client ownership of end product and other material which may be useful to the client. *Id.* The standard, however, does not precisely delineate clients' and attorneys' documents, and although it acknowledges that clients are entitled to receive documents for which they have paid, it fails to address the effect of payment or nonpayment on property rights. Furthermore, the opinion qualifies the attorneys' rights to their notes and memoranda, leaving open the potential for dispute over specific notes and memoranda. It states that attorneys may retain their "internal notes and memos which have been generated primarily for [their] own purposes in working on the client's problem." *Id.* The question remains as to what "primarily for [their] own purposes" means. In general, the ABA suggests a standard that recognizes both attorneys' and clients' interests, but that is not sufficiently specific. The opinion states, "In the gray areas, what is a lawyer's property and what is the client's property in a particular case are questions of law governed by the law of the applicable jurisdiction." *Id.*

any legal memoranda researched and drafted by the attorney. If a client dismisses an attorney after the attorney has completed a research memorandum on a central point in the client's situation, this document will clearly benefit the client if he or she continues to pursue the same matter with another attorney.[101] Just as the client should receive the partially drafted but paid-for will, the client should receive legal memoranda used in preparing end products if the client has paid for the lawyer's services. The client need not pay another attorney to perform the same research.[102]

C. REASONS FOR PROTECTING ATTORNEYS' THOUGHTS FROM INTRUSION

By limiting the documents to which the client is entitled, the end product standard protects an attorney's thoughts and ideas from intrusion.[103] Attorneys should be free to use notes and intraoffice communications without fear that these personal documents may be claimed by the client. Notes and intraoffice communications used solely for the attorney's guidance provide little benefit if given to the client and may be misunderstood or even offensive to the client.[104] In the medical

101. Even if the client has paid the attorney for the time spent drafting the research memorandum, the memorandum would not be client property under the Minnesota standard. The research memorandum is neither a document to be used in litigation nor a document intended to have legal effect. *See* Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989) (omitting legal memoranda from client property).

102. Under the standards articulated by the *Corrigan* court and by the ABA, the client may be entitled to the research memorandum. Under the *Corrigan* standard, or any standard that relies solely on ethics rules regarding disclosure, the attorney must decide what information the client needs and what information the client is entitled to receive. *See* Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo. Ct. App. 1992). With this uncertainty comes the possibility that a client might disagree with the attorney's judgment, which may lead to conflict.

103. The end product standard provides the client only with documents resulting from thought and consideration by the attorney; recorded initial theories or ideas are not the client's property. These initial notes, theories, and ideas are necessary to "construct the appropriate legal representation." Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 479 (S.D. Miss.) (citing San Diego Bar Ass'n, Op. 1977-3), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989).

104. Interestingly, the ethics committee that recognized this had earlier adopted the entire file standard. The Michigan State Bar Association stated that notes or memoranda containing a lawyer's observations concerning "a client's character or competency traits particularly if and when negative, probably should not be released." Committee on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-722 (1982).

profession, a doctor might record in a patient's file that the patient is obese. This term, describing a medical condition, most likely would offend the patient if he or she read her file. Similarly, legal terms such as those involving incompetency might offend a client who read them without understanding their meaning.[105] Although the client pays for the attorney's work, the payment should not give rise to an ownership interest in every thought the attorney has regarding the representation.[106] Attorneys should have some privacy in their work.[107]

Protecting an attorney's notes also avoids chilling an attorney's efforts on behalf of a client.[108] In the initial stages of a legal matter, an attorney must be free to engage fully in creative thought and to consider all possibilities.[109] Lawyers must actively think of potential arguments and counterarguments. In addition, cases and statutes do not always expressly provide a result that furthers the best interest of the client. Therefore, the attorney must try to achieve the desired results creatively. Attorneys should feel free not only to think, but also to record their thoughts. These recorded thoughts may include ideas that, if exposed to the client or other counsel, could embarrass the attorney or damage his or her reputation. If caution chills the attorney's initial thoughts, the representation suffers.[110]

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105. Also, an attorney might characterize a client for the purpose of preparing a fellow attorney to deal with the client. This could be helpful for providing the client with the best service, but would not be something to which the client should have access. For example, the attorney may explain to another attorney that the client needs to have information explained slowly or more than once, that the client is temperamental and needs information carefully worded, or that the client does not make a credible witness.

106. *But see In re* Kaleidoscope, Inc., 15 B.R. 232, 241 (Bankr. N.D. Ga. 1981) (asserting that the client should own everything the attorney produces), *rev'd on other grounds*, 25 B.R. 729 (N.D. Ga. 1982).

107. *But see In re* Grand Jury Proceedings, 727 F.2d 941, 944-45 (10th Cir.) (asserting that the attorney has no privacy interest in the client's file), *cert. denied*, 469 U.S. 819 (1984).

108. *See Kaleidoscope*, 15 B.R. at 743.

109. *See id.*

110. The chilling effect created in this situation is analogous to the chilling effect spoken of in First Amendment situations. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (protecting against chilling effect on robust public debate by limiting state defamation laws). In *New York Times*, the Supreme Court was concerned that the specter of enormous judgments in defamation cases based on a low standard of proof might cause the press to be overly cautious, thereby reducing public debate on certain issues.

The entire file standard places an attorney in a position similar to the newspaper's. The attorney's efforts are chilled by the possibility that preliminary thoughts and ideas might be disclosed to the client, other attorneys, or to the public. As restricting the marketplace of ideas harms society, so too is a

The end product standard, however, surpasses that which is necessary to protect this privacy interest adequately.[111] Many internal memoranda and preliminary drafts protected by this standard result from considered thought, much like finished products. Thus, the possibility that documents such as "preliminary drafts of contracts"[112] may come into the client's possession is unlikely to chill the attorney's efforts.

III. A PROPOSED SOLUTION: PROTECTING THE CLIENT'S AND THE ATTORNEY'S INTERESTS

A. METHODS OF IMPLEMENTING A NEW STANDARD

To create certainty, states should adopt standards that clearly and authoritatively establish which documents the client owns and which the attorney owns. Established standards will reduce conflict at the termination of the attorney-client relationship.

A legislature, state ethics board, or court could adopt an ownership standard. Primarily, any standard must provide a binding guideline for attorneys. In states such as Minnesota where a professional responsibility or ethics board has jurisdiction to rule on this issue, the board could adopt the standard pursuant to its rule-making authority.[113] In many states, however, the ethics boards lack this jurisdiction, and other methods must be used.[114] A statute would provide an authoritative

client harmed by being denied the full benefit of the attorney's creativity. Instead of fearing high punitive damage judgments, the attorney, at the very least, might fear potential conflict with the client or reputational damage.

111. Attorneys are likely to record preliminary thoughts or ideas, or candid comments in notes and intraoffice memoranda. However, such preliminary thoughts are not likely to appear in drafts of contracts or research memoranda. Nevertheless, under the end product standard articulated in *Federal Land Bank* and the Minnesota ethics opinion, the client is not entitled to these documents. *See* Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 480 (S.D. Miss.), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989); Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989).

112. *Federal Land Bank*, 128 F.R.D. at 480.

113. *See* Minnesota Lawyers Professional Responsibility Bd., Op. 13 (1989). The Minnesota Lawyers Professional Responsibility Board adopts "guidelines for the conduct of lawyers," and "[f]ailure to comply with the standards . . . may subject the lawyer to discipline." Minnesota Lawyers Professional Responsibility Bd., Op. 1 (1972) (amended 1987).

114. In these states, ethics boards could issue opinions asserting that the Model Standard proposed in the next section fulfills the attorney's ethical duties. Although this would not have the force of law, it would provide both attorneys and courts with a guideline to follow.

guide to the ownership question. Although state legislatures have acted in some areas of the attorney-client relationship,[115] they have not addressed the ownership issue.

Courts could also adopt a new ownership standard. However, the fact that litigation must create the opportunity for courts to establish an ownership standard raises two problems. First, one purpose of establishing an ownership standard is to avoid litigation and conflict. Second, for the court to establish a useful, precisely defined standard, a case must pose all of the questions needed to flesh out the standard.

A more immediate but inferior solution is to address ownership questions in a retainer agreement. Any retainer agreement could include a provision patterned after the standard this Note proposes. Although this solution would remove uncertainty for some attorneys and their clients, many attorneys do not use retainer agreements.[116] This method of implementation, therefore, is only a partial and temporary solution because it fails to create a uniform, authoritative standard to serve as a

115. For example, state legislatures have addressed the question of whether an attorney can exercise a retaining lien against a client's property. *See, e.g.*, ALA. CODE § 34-3-62 (1991).

116. *See* William C. Becker, *The Client Retention Agreement—The Engagement Letter*, 23 AKRON L. REV. 323, 323 (1990) (reporting that many lawyers do not use retainer provisions except when they are statutorily required).

While many attorneys do not use retainer agreements, that does not negate the value to some attorneys of a retainer agreement with an ownership provision. If the attorney and client discuss property rights prior to representation and delineate those rights in a retainer agreement, they can avoid future conflict. *See id.* at 324 (stating that "a substantial proportion of the number of complaints and disciplinary difficulties seen by disciplinary bodies arise from simple (or complex) misunderstandings between lawyers and their clients"). If a conflict does arise and either party challenges the provision, a court should uphold a retainer agreement patterned after the Model Standard if it does not contradict state law or any authoritative ethics rules. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) (stating that the "respective [property] interests of lawyer and client can be protected . . . by private agreement if the parties can agree"). The Model Rules limit the lawyer's ability to enter into an agreement with a client that limits malpractice liability, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1983), but the Rules do not prohibit defining ownership rights in the file.

Another advantage of including a provision in the client's retainer agreement is that the attorney and client have the freedom to agree to different ways of resolving the ownership conflict. They might create a dividing line based on superficial factors such as whether a document is handwritten or typed. The attorney and client might agree that all documents belong to the client, thereby formally adopting the entire file standard. Whatever method they choose, they will have discussed and resolved the issue before a conflict occurs.

guide for all attorneys.[117]

B. THE MODEL STANDARD

Courts that have adopted the entire file and end product standards have asserted important policies in support of their respective positions. The standards are diametrically opposed, but a standard can be devised that serves to uphold the policies both sets of courts have identified. The Model Standard below upholds the asserted policies by balancing the client's interests and the attorney's interests.

THE MODEL STANDARD

I. Documents the Client Owns

A. All documents supplied by the client.

B. All litigation materials filed or served.

C. All correspondence to and from an opposing party.

D. All documents of evidentiary value, such as records of depositions; expert opinions; witness statements; and business records, including attorney notes recording information from depositions, witness statements, or expert opinions.

E. All executed legal documents, including valid wills.

II. Documents the Client Owns if the Client has Paid for Their Creation

A. All drafts, whether preliminary or final, of litigation materials, of documents intended to have legal effect, and of any other document intended to be used strategically against another party or for the direct benefit of the client.

B. All research memoranda concerning the client's legal situation, whether in completed or in preliminary draft form.

C. Any other documents not within Parts I or III that were created in the course of representation.

III. Documents the Attorney Owns

A. All notes recorded in the course of the representation except those defined in Part I(D).

B. All intraoffice communications except research memoranda.

IV. Provisions That Apply Under this Standard

A. The attorney must turn over to the client the documents listed in Part II even if they have not been paid for if withholding the documents would result in substantial prejudice to the client. Upon turning over documents under this subdivision, the attorney may as-

117. A major benefit of a legislative or judicial solution would be that it would cover informal attorney-client relationships. Many attorney-client relationships begin without any written agreement. A statutory or common law rule would cover all attorney-client relationships, whether formal or informal.

sert a claim against the client to recover fees owed for the time spent drafting the documents.

B. The attorney may file a claim for unpaid fees for time spent drafting documents under Part II even if the attorney retains possession. If the attorney is successful in collecting the fees the documents must be turned over to the client.

C. If the attorney is to be paid on a contingency basis and the relationship terminates, the lawyer is presumed to have been "paid" for the purposes of Part II, but may still file a claim for unpaid fees on a quantum meruit basis or any other basis state law permits.

C. THE MODEL STANDARD PROMOTES ETHICS, VITAL POLICIES, AND CERTAINTY

1. The Ethics Foundation of the ABA

By using the Model Standard, attorneys will fulfill their ethical obligations as articulated in the Model Rules. Upon dismissal, the attorney must take steps to promote a client's interests. The Model Standard ensures this by giving the client an unconditional ownership interest in certain important documents,[118] and by entitling the client to other documents, regardless of whether the client has paid, if being deprived of them would substantially prejudice the client's interest.[119]

In addition, the Model Standard satisfies the attorney's duty of disclosure. As the *Corrigan*[120] court and the Model Rules[121] indicate, the attorney's duty of disclosure centers on information, not documents, and the duty remains the same regardless of who has ownership.

Moreover, the Model Standard is consistent with the ABA's interpretation of the Model Rules. In an informal opinion, the ABA ethics committee stated that the client is entitled to end products but is not entitled to the attorney's notes and memoranda.[122] The Model Standard follows these guidelines, precisely defining "end product" and "notes and memoranda."

2. The Model Standard Balances and Promotes Policies

The Model Standard considers both the client's and the at-

118. *See* Model Standard, *supra* p. 1508 (Part I).

119. *See* Model Standard, *supra* p. 1509 (Part IV(A)).

120. Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92, 97 (Mo. Ct. App. 1992).

121. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) (using phrases such as "keep client reasonably informed" and "reasonable requests for information").

122. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977).

torney's interests and upholds the policies articulated by the entire file and end product courts. The Model Standard, like the end product standard, categorizes documents as attorney and client property,[123] but the Model Standard also expands the scope of documents to which the client may be entitled.[124] Once the client has paid the attorney for the work the attorney has done, the attorney owns only notes[125] and intraoffice communications. All of the other documents the attorney created during the representation belong to the client if the client has paid for the time spent drafting the documents. For example, if the client dismisses the attorney after the attorney has spent ten hours on answers to interrogatories but has not yet completed them or sent them to the adversary, the client has an interest in these answers once the client pays for the attorney's efforts.[126] The Model Standard protects clients' interests because they do not lose their right to the answers simply because the answers are not finished. It protects attorneys' interests because the clients do not gain their property right in the answers until they pay. Of course, attorneys will have to give up the answers if withholding them will cause substantial prejudice to the clients' interests.[127]

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123. Part I of the Standard is patterned after the Minnesota end product standard. Part II of the Standard expands on a similar provision in the Minnesota end product standard. *See supra* note 24 (setting forth the Minnesota standard).

124. This brings the standard closer to the entire file standard, with differences including the requirement of payment for documents in part II and the granting of limited property rights in part III.

125. This does not include notes taken while recording witness statements, depositions, and expert opinions, as set forth in part I(D) of the Model Standard.

126. *See* Model Standard, *supra* p. 1508 (Part II).

127. *See* Model Standard, *supra* p. 1509 (Part IV(A)). The requirement that the client pay the attorney before the client may own certain documents avoids the potentially inequitable result of the entire file standard. The attorney's ethical duty to protect the client's interest at termination of the relationship does not amount to a requirement that the attorney ensure that the client receives the greatest possible benefit from the attorney regardless of whether the client has paid. If such a requirement existed, the attorney would need to complete any work he or she had started prior to termination so that the client would not be harmed while looking for a new attorney. The Model Standard adequately protects the client's interests by giving the client all documents with legal effect, documents used strategically in litigation, and correspondence. Beyond this, the client's interest must be in danger of substantial prejudice for the client to be entitled to additional documents from the attorney.

In addition, unlike the Minnesota standard, the Model Standard allows the attorney to assert a claim against the client regardless of whether the at-

The Model Standard satisfies both the attorney's duty of disclosure and the need for close scrutiny of the attorney. As discussed above, the attorney's duty of disclosure requires the attorney to disclose information rather than provide documents, and an ownership standard does not affect this duty. Nevertheless, the entire file courts equate this duty with ownership, and the Model Standard nearly rises to the level that those courts require. The Standard denies clients ownership of most attorney's notes and intraoffice communications,[128] but grants them all research memoranda, drafts of documents, and other material of this nature for which the client has paid. The information the entire file courts demand concerning the representation is most likely within these documents, for any pertinent information in the attorney's notes will manifest itself in some other document. Similarly, the client's interest in a vast majority of the documents satisfies the entire file courts' call for scrutiny and limits attorneys' ability to shield their work from their clients.[129]

The Model Standard avoids the potential chilling effect the entire file standard creates, but the Standard limits its protection to documents that both the attorney and client have an interest in keeping private. Attorneys should be free to record in their notes any ideas or thoughts they have without fear of later examination. Furthermore, attorneys should be free to communicate openly and candidly with other attorneys in their offices concerning clients and their legal situations. Both of these valuable activities will be chilled if attorneys must consider the potential for exposure whenever they write a note or

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torney supplies the client with the documents. Assuming the attorney acted in the client's interest until the relationship ended, the attorney should be compensated for the time spent working regardless of whether the attorney surrenders the document before an action to collect unpaid fees.

128. The tools of the trade analogy used in Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473 (S.D. Miss.), *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989), applies to the Model Standard, but with a different interpretation of what makes up the attorney's tools. Under part III of the Model Standard, attorneys' notes and intraoffice communications are the tools they use to create legal documents and to construct arguments.

129. The *Resolution Trust* court was concerned that without an entire file standard, attorneys would be able to choose which documents to turn over to the client. Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647, 649 (N.D. Tex. 1989). Under the Model Standard, attorneys lack discretion over which documents they may withhold; the standard narrowly defines the documents that the attorney owns. Of course, attorneys do have discretion to decide whether to give clients documents that the attorneys own.

memorandum. The Model Standard avoids this chilling effect by giving attorneys a property interest in their notes and memoranda where the risk of a chilling effect is greatest.

CONCLUSION

The ownership interests of clients and attorneys should be precisely defined to balance the attorneys' and clients' interests with the attorneys' ethical duties. This Note suggests dividing the documents in clients' files into three categories: documents owned by clients without condition, documents owned by clients only to the extent the clients have paid, and documents owned by attorneys. This balancing of the policies involved recognizes the interests of attorneys and clients, enhancing the quality of representation and diminishing the potential for conflict.