

## Board Opinion No. 13 Revisited

by  
**Timothy M. Burke, Senior Assistant Director**  
**Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (June 12, 2000)

Lawyers Professional Responsibility Board Opinion No. 13 details a lawyer's obligation to surrender papers and property to which the client is entitled upon termination of representation. Although the parameters of this opinion are well delineated, some attorneys continue to confuse their obligations to their clients. In a matter before the Office of Lawyers Professional Responsibility, a lawyer attempted to withhold unexecuted estate planning documents from a client after the termination of his representation while he continued to bill the client for the time he had spent in preparing those documents. Opinion No. 13 prohibits such actions, and the lawyer was issued an admonition.

The client had retained the lawyer for representation on estate planning matters. The lawyer prepared multiple drafts of a number of estate planning documents, but none of the documents was ever executed. The client ultimately discharged the lawyer and asked the lawyer to return her file to her. The lawyer did not return the drafted but unexecuted estate planning documents, but instead claimed that the client had never approved any of the drafts as the "final" draft to be executed. He continued after termination of representation to bill the client for his work in preparing the draft estate planning documents.

Opinion No. 13 divides a lawyer's file into two categories: documents that constitute client property, and documents that do not constitute client property.

At issue here were estate planning documents which the lawyer drafted but which the client never executed. Opinion No. 13 defines drafted but not executed estate planning documents as documents which do not constitute client property:

Client files, papers and property, whether printed or electronically stored, shall not include:

1. Pleadings, 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, 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).

Opinion No. 13 gives a lawyer two options pertaining to documents which are not client property. The lawyer may either (1) return the documents and continue to bill the client for the attorneys' fees incurred in preparing the documents or (2) retain the documents but cease billing the client for preparation of the documents. A lawyer may not both retain the documents and continue to bill the client for the preparation of the documents. Opinion No. 13 states that "[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)."

The lawyer claimed that the client never approved the unexecuted documents as the final drafts to be executed. The lawyer stated to the Director that no "unexecuted documents in final have ever existed." Therefore, according to the lawyer, Opinion No. 13 did not apply to these documents.

This argument appears to miss the forest for the trees. Opinion 13 does not distinguish between documents which are unexecuted and in final and those which are unexecuted but in a more preliminary draft form. All such documents are subject to Opinion No. 13. Moreover, all documents either are, or are not, client property. In this case, the documents in question did not fit the definition of client property. If they did, the lawyer would have had to return them, which he did not.

In short, after termination of representation a lawyer may retain documents which are not client property or she may return the documents to the client.

Only in the latter case, however, may she continue to assert a claim against a client for the fees incurred in the preparation of the documents in question.