Is a Client Entitled to the Lawyer's "Notes"?

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Even the most successful lawyers and law firms sometimes face the unenviable event of being fired or terminated by a client. In almost every instance where the parting is less than amicable, a dispute or tussle over the file and its contents ensues.

Opinion No. 13 of the Lawyers Professional Responsibility Board attempts to define the file documents that must be returned to the client and those that a lawyer may ethically retain.

Generally, the client is entitled to all documents originally provided by the client, and all documents filed, served or sent by the lawyer to others.

In litigation matters, the client is also entitled to all items for which the lawyer has advanced costs (e.g., depositions, medical, expert or other reports, accident records or any other materials which may have evidentiary value)--regardless of whether the client has reimbursed the lawyer for these costs. See Opinion No. 13 at paragraph 4. Evaluating which of these enumerated documents must be given to the client is relatively straightforward under the opinion.

However, noticeably absent from the litany of documents regulated by Opinion No. 13 is a category of documents lawyers routinely refer to as "attorney notes." Consequently, the subject of attorney notes is a recurring topic of lawyer requests for advisory opinions from the Director's Office.

The exclusion of attorney notes from the opinion was both intentional and unavoidable. While virtually every attorney keeps "notes" in his or her files, very few can agree on exactly what specific information constitutes attorney notes. Lawyers seeking opinions on this topic identify drastically different types of information when quizzed about what they believe qualifies as attorney notes. The answers range from mental case impressions and unflattering cerebral doodling at one end of the spectrum, to conversations with witnesses, damage calculations and settlement discussions at the other end.

Several advisory opinion callers have gone so far as to assert that any documents handwritten by the lawyer are attorney notes! In an age of increasing law practice computerization, defining "attorney notes" according to how the document was created says nothing about the character or nature of the information.

Others have claimed that attorney notes constitute any information produced by the lawyer that was "not intended for viewing by the client or anyone else outside of the firm." Although this definition is somewhat attractive, especially from a lawyer perspective, its application or usefulness is obviously suspect due to its subjective nature.

Moreover, experience has shown it is woefully inadequate to differentiate between information in which the client has an ongoing legitimate legal need and information maintained solely for the lawyer's benefit.

Application of Opinion No. 13

The absence of a legally recognized or universally accepted definition of "attorney notes," and the difficulty in creating a useable and inclusive one, prevented the Lawyers Board from specifically including an "attorney notes" classification in Opinion No. 13. Instead, the Board's Opinion Committee elected to handle the attorney notes dilemma by focusing upon the content of each individual document and analyzing it under guidelines established by Opinion No. 13.

First, lawyers should be aware of how the opinion treats client files in non-litigation or transactional matters differently from files in litigation matters. The opinion provides lawyers greater latitude to ethically withhold file documents for nonpayment of fees in non-litigation representations. The rationale for this distinction is that courts are loath to force litigants to trial when they are without access to their litigation documents. At the same time, crowded court calendars and opposing parties' timely access to justice should not take a back seat to document disputes between litigants and their counsel.

In litigation matters, or those preparatory to litigation, most documents not specifically enumerated in Opinion No. 13, including attorney notes, are capable of being analyzed for ethical compliance under the last paragraph of the opinion, which states:

"A lawyer may withhold documents not constituting clients 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."

Application of the substantial prejudice standard should resolve most attorney-notes disputes. If not, paragraph 4 of the opinion provides additional guidance in litigation matters. This provision requires the return of "other materials which may have evidentiary value" regardless of whether the client has paid for the items. Applying both standards leaves very few documents in the proverbial "gray area."

For example, assume the file documents characterized as attorney notes include (1) a page of handwritten attorney notes containing information obtained from the client; (2) handwritten notes from an interview with a witness who probably will not testify; (3) an initial draft of a motion which was later finalized and filed with the court; and (4) an internal firm memo about the client's failure to pay fees and the possibility of withdrawal.

Although these documents are not expressly mentioned in Opinion No. 13., scrutinizing each document under the substantial prejudice and evidentiary value standards yields a distinct line between the documents that may be retained and those which must be forwarded to the client.

In this situation, the client is entitled to items 1 and 2 since both may have evidentiary value and the client may suffer prejudice due to their absence from the file. On the other hand, the law firm may retain the draft motion since drafts of filed motions typically have no ongoing case value. The firm could also retain the internal memo about the client's fee-paying habits since it lacks any evidentiary value, and is immaterial to the client's ongoing case.

Practical Considerations

Simply because the opinion authorizes retention of a particular document does not necessarily mean that

retention is always a good idea or a prudent practice.

One of the most overlooked provisions of Opinion No. 13 is its last sentence prohibiting lawyers from asserting claims for fees generated in the preparation of any document that is withheld. Withholding documents from a non-paying client makes little economic sense in light of this provision if the sole purpose for doing so was the client's failure to pay fees.

Moreover, culling through client files and retroactively adjusting billing statements for the services rendered in generating withheld documents can be a formidable task for which no further time can billed. In the end, few lawyers can economically or professionally justify this time-consuming and oftentimes retaliatory endeavor.

Finally, few litigation lawyers would profess the ability to forecast accurately the value of each piece of information, especially when the case is in its fetal stages. Withheld documents or information that later turn out to be valuable may not only be cause for an ethics complaint, but also a professional liability claim.

While it is true that lawyers may ethically retain certain file documents, even in litigation matters, the potential benefits associated with retention appear to be outnumbered by the disadvantages.