

## OPINION 13: COPYING COSTS

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Disputes over fees and costs, and an attorney's right to hold property while the dispute is resolved, have led to numerous professional responsibility complaints over the years. The law needed to resolve these disputes--involving lien rights, contract and personal property law, and the Rules of Professional Conduct--seems disproportionately complex for resolution of what are often small commercial issues.

The Lawyers Professional Responsibility Board has, from time to time, attempted to give guidance on such disputes. The Minnesota Supreme Court has authorized the board to "issue opinions on questions of professional conduct." Among these opinions is Opinion 11, which in part provides, "It is professional misconduct for an attorney to assert a retaining lien on the files and papers of a client."

The board has recently issued Opinion No. 13, which further defines what are and are not "files and papers of a client" and which addresses professional responsibility obligations related to "Copying Costs of Client Files, Papers and Property." The board adopted Opinion 13 on the recommendation of the Board Opinion Committee, consisting of attorneys Rollin Whitcomb and Julius Gernes and public member Gwentyth Jones Spitz.

The issue of who bears copying costs has been addressed by numerous state and local ethics committees around the country. One appellate court, interpreting a statute and Rule 1.16(d), Rules of Professional Conduct, has determined that after termination of representation an attorney must deliver file documents to a client without conditioning such delivery upon copying costs. *McKim v. State*, 528 N.E.2d 484 (Ind. App. 1988). Opinion 13 is consistent with the opinion of a majority of jurisdictions considering the issue.

Subject to certain exceptions, the general views of Opinion 13 are that:

1. File contents belong to the client and must be turned over to the client upon request.
2. Costs of creating a duplicate file for the attorney to retain must be borne by the attorney unless the client agrees in advance to bear the costs.
3. The lawyer may not hold the file until copying costs or legal fees are paid (*See* Opinion 11).

Several exceptions from these general statements are recognized. Unexecuted or unserved documents prepared by the lawyer, but not yet paid for, do not belong to the client; they do not have to be turned over to the client on request unless substantial prejudice, such as expiration of a statute of limitations, would otherwise result. In the nonlitigation setting, documents such as unexecuted estate plans would not have to

be turned over to the client who has not paid for the lawyer's drafting services.

Opinion 13 is rooted in several rules of professional conduct: Rule 1.15(b)(4) (requiring prompt delivery of property "which the client is entitled to receive"); Rule 1.16(d) (providing that on termination of representation a lawyer shall take reasonable steps to protect a client, including "surrendering papers and property to which the client is entitled"); and Rules 1.5 and 8.4(d).

Rule 1.5 (requiring reasonable fees) is the basis for Opinion 13's statement that copying costs must be reasonable. Sometimes lawyers have refused to deliver client files until the client has paid a per page copying cost which greatly exceeds the cost a commercial service would charge. If the attorney cannot copy the file at a reasonable cost, the unreasonable excess should not be passed on to the client.

Rule 8.4(d) (forbidding conduct "prejudicial to the administration of justice") is another, somewhat more remote source for Opinion 13. Disputes between lawyers and clients over access to files can affect third parties. A client may be forced to request a continuance until the file is delivered, thereby affecting both the court and an opposing party. Moreover, a client's freedom to choose counsel can be compromised by a lawyer's withholding documents.

Lawyers routinely advise clients how to plan, during a harmonious business or personal relationship, for defining their rights and duties when the relationship is dissolved, harmoniously or otherwise. Attorney-client relationships also come to an end. It is hoped that Opinion 13, and Opinion 11, will clarify attorneys' rights and duties with respect to a client's file when representation is ended. The text of Opinion 13 is as follows:

### **Opinion No. 13: Copying Costs of Client Files, Papers and Property**

Client files, papers and property, whether printed or electronically stored, shall include:

1. All papers and property provided by the client to the lawyer.
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, and other materials which may have evidentiary value.

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 nonlitigation 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).

A lawyer who has withdrawn from representation or has been discharged from representation may charge a former client for the costs of copying or electronically retrieving the client's files, papers and property only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge. Such copying charges must be reasonable. Copying charges which substantially exceed the charges of a commercial copy service are normally unreasonable.

A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. *See* Opinion No. 11 of the Lawyers Professional Responsibility Board.

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 documents(s).