
Wisconsin Formal Ethics Opinion E-00-03: Electronic files; client's demand for electronically stored documents

Professional Ethics Opinion E-00-03 considers whether lawyers must provide clients with disk copies of the clients' documents, including what files belong to clients, who owns the computer files, and who pays for retrieving the documents.

Must a lawyer on demand provide a client with an electronically stored copy (disk copy) of all the client's documents the lawyer has maintained in an electronic format?

Opinion

1) Which documents in a client file belong to the client?

It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. See [Colorado Ethics Opinion 104 \(1999\)](#); [Michigan Ethics Opinion RI-203 \(1994\)](#); [Kansas Ethics Opinion 92-05 \(1992\)](#); [Alaska Ethics Opinion 95-6 \(1995\)](#); *In re: Admonition Issued in Panel File No. 94-24, 533 N.W.2d 853 (Minn. S. Ct. 1995)*. However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive.

There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld.

A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled.

Detailed definition of this second category is difficult. The distinction in this area is factually specific to each situation and must be determined by the lawyer, realizing that the lawyer has the duty to take those steps reasonably practicable to protect the client's interests by surrendering the

necessary information. Generally, such duty favors production. See [Colorado Ethics Opinion 104 \(1999\)](#).

2) Who owns the computer files on which client materials are stored or that are used to generate client documents?

The committee opines that hardware and software that a law firm uses to store documents is the property of the law firm, even though they may be used to store documents belonging to clients. It may violate copyright or other contractual restrictions to copy software to provide information to a third person. In the committee's opinion, a client does not have a right to receive a copy of software programs that a law firm uses to store and/or permit manipulation of documents in a client's file. The client's right to recover its file on demand applies only to those documents that are the client's property.

3) Does a law firm have the duty to provide, at the client's request, an electronic disk copy of client's materials that have been maintained in an electronic form by the law firm?

In [Wisconsin Ethics Opinion 82-7](#), this committee opined that a lawyer is not required to provide, at his or her own expense, a duplicate of those materials in a client file that the lawyer previously sent to the client. The committee now reaffirms that position.

However, even if a lawyer may charge for the actual cost of making a second copy of materials previously sent to the client, the materials must be provided at the client's request to comply with the lawyer's obligation to, upon the termination of a representation, take steps to the extent reasonably practicable to protect a client's interest, such as surrendering papers and property to which the client is entitled. See [SCR 20:1.16\(d\)](#).

The committee opines that when a client requests materials from his or her file that a lawyer has not previously sent to the client, the lawyer must provide those materials to the client at the lawyer's expense unless the lawyer and client had agreed to a different arrangement. In effect, if a lawyer chooses to retain a copy of the client's documents, which a lawyer may do, the lawyer must bear the cost of making the copy of the client's documents.

Today, clients may request documents in an electronic form (either in addition to or in lieu of hard copies) for reasons of convenience and cost saving. Nothing requires the lawyer to provide two sets of copies of the client's documents (hard copies and electronic copies). However, when the client requests documents be provided on a computer disk which the lawyer has maintained electronically, the lawyer should provide those documents in the requested format, so long as it is reasonably practicable to do so. Depending on the manner in which the lawyer maintains electronic documents, much of what a client would request in this format should be easily retrievable by the lawyer and be no more costly to duplicate than hard copies of documents. However, depending on such factors as how electronic files are maintained, the scope of the client's request, the age of files, and other factors relating to the storage of electronic documents, the identification and segregation of those requested documents or files may involve more significant staff and/or professional time in identifying documents for production. Professional and staff time also may be needed to resolve issues such as the effect of production on the confidentiality rights of other clients and issues of attorney work product.

4) To what extent can a lawyer charge a client for costs of producing electronically stored documents?

A lawyer may charge a client for the cost of producing electronic documents that previously were provided to the client in either hard copy or electronic formats. Normally, copying an identifiable set of electronic documents onto a computer disk can be done at little or no expense.

A more difficult situation arises when a client requests documents whose production may require staff or professional time to search databases in order to locate the documents and to make judgments about whether the documents fall within the scope of the request, whether production affects confidentiality rights of other clients, or whether the documents are a lawyer's work product that may not require production. The committee opines that a lawyer may charge a client for staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request. Such costs are incurred in providing a service for the benefit of that particular client. Costs must be reasonable and must not impair the client's practical access to its file. Before undertaking such a search, a lawyer should consult with the client and inform the client, to the extent possible, of the costs likely to be incurred in such a search.

However, when the time expended in searching a client's electronic files is directed to determining whether the release of documents to that client may adversely affect the lawyer's interests or that of his or her other clients, the costs associated with that endeavor cannot be charged to the client seeking the documents from its file. For example, if staff or other costs are incurred in separating documents to protect other clients' confidences or in identifying which documents may not be subject to production as the lawyer's work product, those costs are the responsibility of the lawyer and may not be charged to the client requesting the file.

5) Focus on prevention.

Requests by clients for electronically maintained materials will be more frequent as the use of technology expands. Lawyers should anticipate such requests and consider ease of access and retrieval of client files when configuring their electronic filing systems. Lawyers also should consider including in their retainer agreements an explanation (consistent with the Rules of Professional Conduct) that clients may access their files, and the costs may be incurred by clients for the retrieval of such files.