
E-82-7 Copying client's files

Question

Must an attorney provide, at his or her own expense, a complete duplicate of the file for a former client where the client has previously received copies of all parts of the file, excepting the attorney's personal notes, through routine copying during the course of the representation?

Answer

No, subject to certain limitations.

Facts

A firm had represented a particular individual client in a number of matters. In accordance with the firm's practice, that client received copies of all materials prepared or received by the firm in the course of representation (including incoming and outgoing correspondence, pleadings, briefs, orders, notices, and materials prepared in the course of litigation, excluding only attorneys' personal notes). The client's employment of the firm has terminated and the outstanding attorneys' fees have been settled. The client has requested a complete duplicate of files in the possession of the firm, but has not agreed to reimburse the firm for the cost of photocopying. The client has not indicated that she has lost any of the material sent to her during the course of representation by the firm.

Opinion

Several provisions of the Wisconsin Supreme Court Rules (1982) of the American Bar Association's Code of Professional Responsibility and of certain informal opinions rendered thereunder bear upon the resolution of this issue.

DR 9-102(B)(4), which has been codified as SCR 20.50(2)(d) states that "a lawyer shall":

“Promptly pay or deliver to the client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.”

This provision does not define the particular “funds, securities or other properties . . . which the client is entitled to receive.”

The ABA Committee on Ethics and Professional Responsibility in its Informal Opinion 1376 (2/18/77) recognized the difficulty of precise definition and indicated that a flexible approach be taken in accordance with the following standards:

The attorney clearly must return all of the material supplied by the client to the attorney. DR 9-102(B)(4). He must also deliver the ‘end product. . . .’ 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 benefitting fully from services he has purchased from you. . . .

. . . 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 to 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. . . .

With respect to the issue at hand, i.e., the propriety of insisting on client payment of the cost of duplication of his or her entire file as a condition of delivery of that entire file to the client, the ABA Committee stated that:

The lawyer should return all items which are the client’s property without charge. Whether the lawyer charges for copies of other items . . . is not in the committee’s view a question of ethics, but rather a matter of the lawyer’s usual and customary practice, or, if not, a matter of agreement with his client.

In its Informal Opinion 1461 (11/11/80), the ABA committee stated that “. . . the Model Code (of Professional Responsibility) does not define the items that the client is entitled to receive,” as that phrase is used in DR 9-102(B)(4).

In State Bar of Wisconsin Memorandum Opinion 4/78 entitled “Return of Client’s Files,” a position consistent with that stated by the ABA Committee was enunciated:

An attorney must return to a client all documents and other materials the client has given to the attorney. S/he also must return any ‘end product’ materials for which the client has paid. These items must be returned whether or not the client agrees to pay for photocopies.

The attorney is not required to furnish to the client internal notes and memos generated primarily for the attorney’s own purposes in working on the client’s matters. If the client requests copies of these types of materials and the attorney agrees to furnish them, it would be proper to charge the client a reasonable amount to cover the expense of copying them.

The Professional Ethics Committee reiterates this position with respect to those materials covered by the scope of the aforestated opinion. However, there may be present in a client’s file material not covered by the scope of that opinion, and falling within the so-called “gray areas” identified by the ABA Committee in its Informal Opinion 1376.

An attorney should exercise his or her sound discretion and judgment as to whether or not such materials (or a photocopy thereof) should be returned to the client upon termination of employment, consistent with the principle that delivery should be made to the client of all material “which it could reasonably be anticipated would be useful to the client.”

However, the committee is not of the view that an attorney *must*, under the facts submitted, provide a complete duplicate of the file to the client at his or her own expense at that time, when copies of those materials were routinely sent to the client throughout the course of representation. The practice of providing a client with copies of materials generated or received by his or her attorney during the course of representation is one to be encouraged in the interests of keeping the client fully informed as to the progress of matters which he or she has entrusted to an attorney. *See*, EC 7-8, codified as SCR 20.34(2)(e).

The imposition of a requirement that an attorney at his or her own expense provide a complete duplicate of those materials to the client upon termination of

employment (particularly where the client has made no showing that those copies sent originally by the attorney have been lost) would unduly discourage the practice, and would not serve the interests of the public in any countervailing respect.

Thus under the facts submitted, an attorney would not have the obligation to provide duplicate copies of materials to his or her client not described by the first or second paragraphs of Ethics Opinion 4/78 entitled "Return of Client's Files" where the client has routinely received copies of all such materials during the course of representation, where the client has not made a showing that such materials have been lost, and where the client has not agreed to bear the costs of photocopying of such materials.

However, the committee is of the opinion that should the attorney elect to retain copies of original documents which are being returned to the client as required by SCR 20.50(2)(d), the attorney must bear the cost of preparing such copies.