

## State Bar of South Dakota

### Ethics Opinion 96-7

October 2, 1996

- **Rule 1.16**
- **Subject: Ownership of client files; Copies of files; Customary practices.**
- **Summary: An attorney must return those items in the file that the client gave the attorney and any items paid for by the client. Attorney's notes/work product are not included. An attorney may charge for copies, etc., if it is the firm's customary practice or by specific agreement. What is property of the client or property of the attorney is a matter of substantive law, no opinion given. See EO 95-16.**

#### FACTS

Your firm was hired to serve as attorneys for a public entity and served for several years. Upon termination of the relationship, your former client demanded that you deliver all inactive original files to them. You ask:

- 1) Must the lawyer deliver the files to the former client?
- 2) May the former client be charged for copying material from the file?

#### OPINION

In the opinion of this committee, your first question does not permit a simple answer. Rule 1.16(d) does clearly provide that upon "termination of representation" a lawyer must, among other things "surrender...papers and property to which the client is entitled...". To what then is the client entitled?

What specifically is client property and what is lawyer property is governed by substantive law rather than ethics. This committee cannot answer questions of substantive law. However, the ethics principles are simple. The client is entitled to the return of what the client delivered to the lawyer and those things the client paid for. Beyond that, the lawyer should, upon request provide the former client any item which could reasonably be deemed useful to the client.

In this committee's view, the lawyer need not deliver his/her internal notes and memos generated primarily for his/her own purposes in working on the client's problem. In between what must be provided to the former client and what the lawyer may refuse to provide, are any number of materials. In the committee's view, a lawyer should deliver all other material which may be deemed useful to the client in benefitting fully from the services he/she purchased from your firm.

Your second question asks whether the attorney can ethically insist on payment for copies as a condition to deliver. Whether the lawyer charges for copies of items or for the time searching for material "to which the client is entitled" is a matter of the lawyer's usual and customary practice with that client or a matter of agreement in the original retainer contract. That question is one of substantive law of which this committee may not opine.

As a matter of practice, it appears to this committee that absent a statute clarifying the obligation for providing records, this issue is a prime subject to be considered in the creation of all retention agreements.

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State Bar of South Dakota