

Since your inquiry requested that the Committee adopt your position, it became necessary to consider overruling an earlier legal ethics opinion which the Committee does not do without full committee review and approval.

You have advised that your firm represents a governmental entity which is currently investigating a corporation pursuant to federal statutory authority. The corporation has authorized the release of its entire client file currently in the possession of the corporation's former legal counsel, including all of its books, records, and other documents, and, further, the corporation waived the attorney-client privilege for the file. After receiving written notice from the corporation to release to your client, the governmental entity, the entire client file, including notes, memoranda, and other attorney work-product, the former legal counsel refused to allow the corporation or your client to take any documents constituting work-product unless copies were made for retention by the firm, at the corporation's or your client's expense.

You have inquired as to whether the committee is still of the opinion expressed in LE Op. 431, i.e., that it is not a violation of the Virginia Code of Professional Responsibility to charge the client for copying costs upon relinquishment of the file to the client, where the purpose of creating that copy of the file is for the attorney's rather than for the client's benefit. Your second question, to be answered if the response to the first question is that attorneys may still ethically charge clients reproduction costs, is whether it is ethical to charge a client for reproducing the file if that client has already paid, through the attorney's regular billing procedure, for photocopying the documents comprising the file.

Disciplinary Rule 2-108(D) is the appropriate and controlling rule in this situation. Under that rule, the lawyer is required, upon termination of representation, to "deliver all papers and property to which the client is entitled" and he may "retain papers relating to the client to the extent permitted by applicable law." It is the opinion of the committee that the applicable law to which DR:2-108(D) presently refers is that which relates to an attorney's lien for legal fees owed by the client. Based upon the facts you have presented, the Committee's opinion is predicated on the assumption that the corporation does not have outstanding unpaid legal fees owing to its former legal counsel. Thus, the Committee assumes that no statutory or common law possessory lien arises upon which the former legal counsel may base its retention of the corporation's file.

The Committee is of the opinion that, in addition to the obvious fact that items in the file which were originally provided to the lawyer by the client continue to be the property of the client, items in the client's file which constitute attorney work-product were purchased by the client by the payment of legal fees. Thus, the client owns the attorney work-product whether in tangible, documentary form or in the intangible provision of the attorney's expertise in having applied the law to the client's fact situation during the course of the representation. *Scroggins v. Powell, Goldstein, Frazier & Murphy*, 15 B.R. 232, 240-241 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 B.R. 729 (N.D. Ga. 1982). Since the file is thus the property of the [former] client, the Committee opines that it must be surrendered to the client or his designee. It is further the opinion of the Committee that, absent a prior agreement to the contrary, it is improper to condition the release of the client's file upon payment of copying fees where the copies will be made for the use of the attorney. The attorney may retain copies of the materials delivered to

the client; however, the creation and cost of the copies are the attorney's responsibilities. See District of Columbia Bar Opinion No. 168 (April 15, 1986).

The general provision of DR:2-108(D) requires that, upon termination of representation, the lawyer must take reasonable steps for the continued protection of a client's interests (emphasis added). The client in this situation should be reminded by his former counsel that once the file is released to the third party with no copies having been made, neither the client nor the counsel will then have any of the client's file available. The former counsel may require the former client's acknowledgment of the hazards involved or, with the client's approval, may make the necessary copies and charge the client accordingly. Even in those circumstances, the Committee is of the opinion that it is improper to condition the release of the file upon payment of copying charges, absent a prior agreement to the contrary. The lawyer may avail himself of the usual legal remedies where those charges are not paid.

Since the Committee's opinion relative to your first question is dispositive of the matter, consideration of your second question was not reached by the Committee.

Committee Opinion
February 13, 1989

Legal Ethics Committee Notes. – Rule 1.16(e) governs a lawyer's duty to provide files to a former client.