

ETHICS OPINION 84-3

A client retained a lawyer to represent him/her in a litigation matter. After trial, the client is dissatisfied and an appeal is filed and is pending. The client changes counsel and has sued his/her former lawyer. The former client now seeks return of his/her file. At issue is what portions of the file must be returned and whether a fee can be charged for copies of items turned over to the client.

The Statewide Grievance Committee has adopted Opinion 1977-3 of the San Diego County Bar Association, as published in 25 *Dicta*, May 1978, at 19.¹ That decision provides, in relevant part, as follows:

¹ *Dicta* is a journal published by the San Diego County Bar Association.

"A typical client's file contains, broadly speaking, the following categories of documents:

(a) pleadings and other papers filed with the court, which become a part of the public record;

(b) letters to the client, to the opposition, to witnesses, and to the attorney from the same;

(c) notes written by the attorney to himself preparatory to drafting other documents or as preparation for disposition or notes of interviews—all these typically characterized by their informality, candor, and containing mental impressions, conclusions, opinions, or legal theories;

(d) investigative and research reports (legal and factual) prepared at the attorney's direction for the attorney's preparation of a particular matter.

Such personal notes as are described above 'and by class (c) documents' are not the property of the client. This is so because the typical attorney-client relationship presupposes that the rough, blemished opinions of the attorney, whether or not reduced to writing, are the tools of his trade (likened to the tools of a carpenter) without which the attorney cannot construct the appropriate legal representation for which the client has retained him and which the client has every right to expect. Therefore, these class (c) documents are ones to which the client has no entitlement.

Class (a) and class (b) documents are the attorney's finished product or responses thereto and have been voluntarily and strategically exposed to public light by the attorney to further his client's cause. These documents are of the type that both attorney and client expect to become the property of the client, documents for which the client has paid or can anticipate paying. Class (a) and class (b) documents must be returned to the client, even if the attorney's fee remains unpaid, if the failure to return the documents would jeopardize the client's claim. Variations among class (d) documents are so numerous that it is not possible to comment generally about specifics. On the whole, however, investigative reports and written expert opinions should be turned over to the client. Where the attorney is under a duty to make copies of documents and return them to his client and no prior agreement between the parties contemplates such copying costs, the attorney would have to overcome the appearance that he is extorting his fee from his client in return for documents he is under a duty to return. In this context, the cost of copying such documents is analogous to the cost of telephone calls incurred by the attorney on behalf of his client. Both expenses are reasonably necessary and foreseeable in the course of the attorney-client relationship. Therefore, copying costs cannot properly be charged to the client absent a prior agreement to the contrary."

The Committee considered Ecs 2-32 and 9-2 as well as DRs 2-110 (A) (2) and 9-102 (B) (4) in reaching its decision.