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**Parting Company:
Who Gets What When Lawyers and Clients Split?**

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When a lawyer and a client end their relationship in midstream, questions frequently arise over who gets what in the file. The Oregon State Bar has two ethics opinions that deal with these issues. The first, Legal Ethics Opinion 1991-90, addresses a lawyer's possessory lien rights over a client's file. The second, Legal Ethics Opinion 1991-125, covers file transition generally. When read in concert, 1991-90 and 1991-125 offer very practical guidance on the interplay between attorney lien rights and a client's need for the file, the parts of the file that a lawyer must return and the portions that the lawyer can retain, and who pays for copying the file. Both opinions are available on the Oregon State Bar's web site at www.osbar.org.

Lien Rights. 1991-90 outlines a lawyer's possessory lien rights over a client's file to secure unpaid fees. Under ORS 87.430, a lawyer may hold a client's file until the client pays the lawyer. At the same time, DR 2-110(A)(2) requires a lawyer who is withdrawing to avoid "foreseeable prejudice" to the client. Putting the two side-by-side, 1991-90 concludes that a client's need for a file "trumps" the lawyer's lien rights. Therefore, if the client needs the file, 1991-90 counsels that the lawyer must turn it over notwithstanding the lawyer's otherwise valid possessory lien rights. In many instances, this is also the "smart

thing” for the lawyer to do. By turning the file over to the client, the lawyer is not waiving a possible claim for unpaid fees. But, the lawyer will avoid a possible argument later by a disaffected client that the lawyer’s failure to promptly turn over the client’s file somehow damaged the client’s continuing ability to handle the matter involved.

What Must Be Returned? 1991-125 takes the position that the client should generally be entitled to the entire file subject to narrow exceptions. The principal exceptions are for a third party’s materials that the lawyer placed in the file for the lawyer’s convenience and items that relate to the business relationship between the lawyer and the client rather than to the representation itself. A legal research memo prepared for another client dealing with the same issue is an example of the former and a conflict check or loss avoidance note that the lawyer did for the lawyer’s own purposes are examples of the latter.

Who Pays for the Copying Costs? When a lawyer and a client go their separate ways, it is often prudent for the lawyer to make a copy of the file to document where the matter stood when it left the lawyer’s hands should any questions arise later. Unless the engagement agreement provides otherwise, the lawyer must generally bear the cost of creating the lawyer’s own “loss prevention” copy because the principal benefit accrues to the lawyer rather than the client. By contrast, if the lawyer has already given the client copies of what makes up the file during the course of the representation and the engagement

agreement requires the client to pay for copies, then 1991-125 finds that the lawyer can charge the client for both copying and associated labor for providing the client with what is essentially a “second copy” of the file. Again however, the client’s need for the file “trumps” the lawyer’s right to withhold the file pending payment of photocopy charges. Like issues surrounding unpaid fees, it is often wiser to simply provide the client with the file (while making a loss prevention copy) rather than open the door to a claim that the client’s position was damaged by the delay caused by a fight over copy charges.

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