Can I bill my client for archiving and file retrieval costs?

Summary:

Can I bill my client for the costs of off-site archiving?

Can I pass on the cost of scanning files for archiving as a disbursement?

No, unless your costs agreement expressly permits you to make these charges and even if your costs agreement purports to permit recovery, the law practice must be able to show that the client's agreement to pay the charges was "informed".

What is the rule?

Rule 16 of the *Australian Solicitors Conduct Rules 2012* (ASCR) provides that:

> A solicitor must not charge:
>
> - For the storage of documents, files or other property on behalf of clients or former clients …; or
> - For retrieval from storage of those documents …;
>
> UNLESS the client has agreed in writing to such charge being made.

Repackaging retrieval or storage fees as something else does not escape the rule, and demanding the payment notwithstanding the rule is a serious disciplinary matter; see *Legal Services Commissioner v Rose (No. 2) (Legal Practice)* [2007] VCAT 2466.[1]

How do I secure informed consent?

Simply inserting a form of consent somewhere in your costs agreement is unlikely to be enough, especially if it avoids making a clear statement to the client of what their options are.

Any suggestion to the client that they must retain the file for a fixed period, or are obliged in law to pay you to do so is misleading.

Agreement to pay must be "informed", which means that the solicitor has the obligation to ensure that the client both knows of the charge and is in possession of sufficient information to judge whether it is in their interests to agree to it. A costs agreement between a solicitor and client is not just another contract. It is a contract between a fiduciary and the object of that duty. The law presumes asymmetrical knowledge and the potential for undue influence.[2]

The majority of the material on a client's file is the client's property[3], and must be given to them on request.[4]

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[1] The practitioner purported to charge for perusing the request to release and validating the authority to uplift the documents. His argument that this was not a charge for "storage" or "release" was not accepted by the Tribunal.

[2] Dal Pont, *Law of Costs 3rd Ed*, Lexis Nexus Butterworths, 2013 p 37.

[3] *Wentworth v De Montfort & Ors* (1988) 15 NSWLR 348 (Court of appeal, Hope, Samuels & Mahoney JJ).

[4] **Rule 14** ASCR (subject to **Rule 15** ASCR concerning "effective liens").

When the fiduciary principle is applied to this matrix, the solicitor must be able to establish that the client was clearly informed that:

- the file is their property; and
- it can be collected at the conclusion of the matter without charge; and
- uplift and copying charges are unusual charges in that the majority of legal practices do not levy them.

These matters should be brought to the client's specific attention when the agreement is formed. It would be prudent for that specific advice to be acknowledged by the client in writing.[5]

Despite the fact that the amount involved is relatively minor, knowingly charging fees that are not properly payable is unethical,[6] and could even amount to professional misconduct, the more serious classification of disciplinary offence.[7]

What about scanning the file before it is archived?

Traditionally a copy of a client file made before it is given back to the client is treated as being made for the solicitor's own risk management and is not chargeable to the client.

A scan made in preparation for electronic archiving may be different, as the file is being scanned for a dual purpose. One purpose is to make the file available to the client in electronic format should they need it, another is to make it easier for the solicitor to retain a copy should they need to do so.

The fiduciary principle would still apply, however, as the client should be made specifically aware that they can avoid the cost of scanning by choosing to collect it instead.

It is therefore improper to bill the scanning charge to a client as a "disbursement" without specific authority, even if that scanning is being done by a third party provider.

If the scanning is being done in-house it usually can not be charged as a "disbursement" in any event as the usual meaning of that word requires a payment to a third party.[8]

If you are being sold scanning or archiving services on the basis that these can be automatically billed to the client under a "standard" costs agreement, such claims need to be considered carefully.

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[5] A costs agreement may be "evidenced in writing" whereas agreement to pay storage costs must be "in writing". There is no authority as to whether the distinction is significant.
[6] *Council of the Queensland Law Society Inc. v Roche* [2004] 2 Qd R 574.
[7] *Legal Profession Act* 2007 (Qld) s. 420(1)(b).
[8] *In Re Remnant* (1849) 50 ER 949 per Lord Langdale MR, see also *Legal Services Commission* (Qld) regulatory guide No.1.