

# legal

## *Attorney General Opinion*

—Phillips Borowski, S.C., WCA General Counsel



Attorney General concludes Clerk of Court and Register in Probate cannot charge copy fees when a requester is permitted to make copies of records using a personal device

The Wisconsin Attorney General recently issued a formal opinion<sup>1</sup> in response to a request from the Wisconsin Director of State Courts regarding whether a clerk of court's office or the register in probate may properly charge a fee for copies of court documents when the requester makes copies using his or her own technology, such as a camera phone or handheld scanner. The attorney general concluded that the term "copies" in Wis. Stat. §§ 814.61(10)(a)<sup>2</sup> (regarding clerk of court fees for copies) and 814.66(1)<sup>3</sup> (regarding register in probate fees for copies) includes the use of technologies such as a camera phone or handheld scanner. However, the attorney general also concluded that the statutes do not authorize the collection of fees when a requester makes the copies using those devices with no aid from the clerk or register.

Importantly, the attorney general noted that the court clerk and register are the authorities of the records. Thus, these officials control the method of copying and may choose whether to allow a person to make copies with a personal device.

The attorney general came to his conclusions by examining the statutory language in Wis. Stat. §§ 814.61(10)(a) and 814.66(1). These statutes allow the court clerk and register to charge a fee for "copies." After looking at several dictionary definitions of the word "copy," the attorney general

found that a camera-phone image of a document looks almost exactly like the original document which made it a copy within the plain meaning of the fee statutes.

The attorney general also analyzed recent changes to the Public Records Law<sup>4</sup> to support his conclusion that a camera phone image is a copy under §§ 814.61(10)(a) and 814.66(1). In 2013 Wis. Act 171, the Legislature substituted the word "copy" for "photocopy" in a public records law provision, Wis. Stat. § 19.35(1)(b), in an effort to broaden its meaning:

Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits photocopying copying, the authority having custody of the record may, at its option, permit the requester to photocopy copy the record or provide the requester with a copy substantially as readable as the original.<sup>5</sup>

A note to the Assembly Bill explained the change: "Broadens application of the right to photocopy or receive a photocopy of a record to apply to other forms of copying."<sup>6</sup> Thus, the attorney general reasoned the Legislature understands the word "copy" to be broader than "photocopy," and to include other "forms" of reproduction.

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The attorney general also looked to court cases that endorsed his interpretation of the ordinary meaning of the word “copy.” For example, in the public records context, the Wisconsin Court of Appeals decision in *Grebner v. Schiebel* described the act of taking digital photographs of a court document as “to copy.”<sup>7</sup>

In sum, the attorney general concluded that dictionary definitions, the use of the term in other statutes and court decisions all treat the word “copies” as including the electronic capturing of a document with technologies such as a handheld scanner or camera phone.

Next, the attorney general turned to the question of whether the statutes contemplate a fee when the copy is not made with the assistance of the clerk or register, but rather is accomplished by an individual with his or her personal device. Looking at other fees that the clerk and register may charge in Wis. Stat. §§ 814.61 and 814.66(1), the attorney general reasoned that each fee involved services that implicitly required some action by the clerk or register, such as opening a case or issuing a certificate.

The attorney general observed that when an individual makes a copy using his or her own personal technology, no action by the clerk or register is required. A person may request that a clerk retrieve a file for inspection, and may then examine that file on the premises. While inspecting, if that person decides to copy a page using a camera phone or handheld scanner, it would require no additional action by the clerk in making copies, maintaining copying equipment, or otherwise aiding the requester. The attorney general found that charging a fee when the clerk or register does nothing to make a reproduction is inconsistent with the other fees listed in the statutes. Thus, the attorney general concluded that Wis. Stat. §§

814.61(10)(a) and 814.66(1) do not include fees for copies made without the assistance from a clerk or register.

Finally, the attorney general noted that, while the custodian of court records may not charge an individual for using a cell phone camera to capture a copy of a court document, the custodian of court records may choose the method of copying and need not allow individuals to make their own copies. As support, the attorney general cited the court of appeal’s decision in *Grebner, supra*, where a requester sought to make copies at a county clerk’s office with his own portable copy machine.<sup>8</sup> The county clerk refused and offered to instead have her office make the copies for a fee.<sup>9</sup> The clerk also would have permitted the requester to make the copies himself with a digital camera as long as it would not damage the documents.<sup>10</sup> The court of appeals concluded that the requester needed the clerk’s permission to use his own equipment to copy records.<sup>11</sup> Interpreting Wis. Stat. § 19.35(l)(b), the court held that the public records law “gives *the clerk* the option of allowing the requester to copy the records with the requester’s own equipment or providing the requester with a copy of the records.”<sup>12</sup>

Accordingly, the attorney general concluded that the custodian of court records may choose whether to allow someone to make his or her own copies with personal technology. If the decision is to allow a person to perform that copying unassisted, then the fees in Wis. Stat. §§ 814.61(10)(a) and 814.66(1) do not apply.

## **Guidance for Counties**

Based upon the attorney general’s opinion, county record custodians should establish a policy regarding the use of personal devices to copy records. If the custodian does not allow the use of

personal devices to copy records, then the custodian should post a notice in a place likely to be viewed by record requesters that the use of personal devices to copy records is not permitted. If a record requester makes a copy with his or her personal device in violation of the policy, the custodian should ask the requester to delete or destroy the copy and require that any further copies be made by the custodian. However, if copying with personal devices is allowed, the custodian cannot charge the requester for making the copy with his or her personal device if it was made without assistance from the custodian.

**ENDNOTES:**

1. OAG 12-14.
2. Wis. Stat. § 814.61(10)(a) provides:

In a civil action, the clerk of court shall collect the fees provided in this section.... The clerk shall collect the following fees:

- ....
- (10) COPIES. (a) Except as provided in par. (b), for copies, certified or otherwise, of any document for which a specific fee is not established by this section, or for comparison and attestation of copies not provided by the clerk, \$1.25 per page.
  3. Wis. Stat. § 814.66(1) provides: “The register in probate shall collect the following fees: ... for copies ... \$1 per page.”
  4. Wis. Stat. §§ 19.31-19.39.
  5. 2013 Wis. Act 171, § 10 (revising Wis. Stat. § 19.35(l)(b)).
  6. 2013 Assembly Bill 567, § 10 (Wis. 2014), Note.
  7. *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 6, 9, 14, 240 Wis. 2d 551, 624 N.W.2d 892; see also *United States v. Hampton*, 464 F.3d 687, 690 (7th Cir. 2006) (discussing “a photocopy (or equivalent chemical or electronic copy)”).
  8. 240 Wis. 2d 551, ¶ 1.
  9. *Id.* ¶ 4.
  10. *Id.* ¶ 6.
  11. *Id.* ¶ 9.
  12. *Id.* ¶ 7 (emphasis added); see also *id.* ¶¶ 12-13 (further explaining that the law “does not require the custodian to articulate or explain the reasons for his or her decision”).



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