



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-10

October 2013

Subject: Communication with Client

Digest: Under those circumstances identified in Supreme Court Rule 415(c), a lawyer may not provide a copy of discovery materials to a defendant client but nevertheless has an ethical obligation under RPC 1.4 to discuss the content of those materials with the client.

Reference: Illinois Rule of the Professional Conduct Rule 1.4

Illinois Supreme Court Rule 415

ISBA Opinion 94-13 (January 1995)

People v. Savage, 361 Ill. App. 3d 750, 838 N.E. 2d 247 (4th Dist. 2005)

People v. Shores, 2012 IL App (5th) 100196, 975 N.E. 2d 774

People v. Davison, 292 Ill. App. 3d 981, 686 N.E. 2d 1231 (4th Dist. 1997)

Virginia Legal Ethics Opinion 1864 (2012)

People v. Mena, 337 Ill. App. 3d 868, 792 N.E.2d 790 (1st Dist. 2003)

FACTS

Attorney represents a defendant in a felony case. Pursuant to Supreme Court rules, the prosecutor provides to Attorney copies of “discovery” which includes police reports, witness statements, results of scientific testing and other materials. Defendant asks Attorney for copies of the discovery materials. Attorney shows the discovery to Defendant but does not provide a copy to Defendant, citing Illinois Supreme Court Rule 415(c).

QUESTION

Is an attorney's obligation not to provide to Defendant a copy of discovery in a felony criminal case inconsistent with an attorney's ethical obligation to communicate and explain matters to the client?

OPINION

Both Rule 1.4 of the Illinois Rules of Professional Conduct and 1.4 of the American Bar Association state, in part:

(a) A lawyer shall:

- ... (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; ...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

These rules require a lawyer to reasonably consult with a client and to provide the client with sufficient information to participate intelligently in decision-making. Important legal documents such as the criminal charges and other pleadings that had been filed with the Court may be given to a Defendant. These documents are outside the scope of the criminal discovery rules. *See* ISBA Opinion 94-13. However, comment [7] to Illinois Rule 1.4 provides: "Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client..." The Illinois Supreme Court did just that in Illinois Supreme Court Rule 415(c) which provides that any materials furnished to an attorney pursuant to its discovery rules "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case." These discovery materials would include, but not be limited to: names, addresses and other identifying information of persons whom the State intends to call as witnesses.

The purpose of Rule 415(c) is outlined broadly in the Committee Comments, which states, in part:

"Paragraph (c). If the materials to be provided were to become, in effect, matters of public availability once they had been turned over to counsel for the limited purposes which pretrial disclosures are designed to serve, the administration of criminal justice would likely be prejudiced. Accordingly, this paragraph establishes a mandatory requirement in every case that the material which an

attorney receives shall remain in his exclusive custody. While he will undoubtedly have to show it to, or at least discuss it with others, he is not permitted to furnish them with copies or let them take it from his office.”

The issue of whether a defense attorney is permitted to make a copy of discovery and provide it to a defendant has been decided. In *People v. Savage*, 361 Ill. App. 3d 750, 838 N.E.2d 247 (4th Dist. 2005), the Court held that Rule 415(c) does not involve a fundamental right or suspect class and therefore the question is “whether the means employed by the rule, i.e. regulation of attorney conduct, is rationally related to its stated purpose of preventing public dissemination of pretrial discovery.” The Court held that preventing a lawyer from making copies of discovery for clients did not violate equal protection provisions. In *People v. Davison*, 292 Ill. App. 3d 981, 686 N.E.2d 1231 (4th Dist. 1997), the Court held that a defendant does not have the constitutional right to read discovery and an attorney’s decision whether to provide defendant with such materials is an attorney’s strategic decision. In *People v. Shores*, 2012 IL App (5th) 100196, 975 N.E.2d 774, the defendant claimed that due process was violated by not allowing him to have copies of discovery. Defendant claimed that he needed the copies to assist in his own defense. The appellate court, citing *Savage* and *Davison*, again held that there was no constitutional violation because Rule 415(c) requires the attorney to keep discovery in his exclusive custody and this provision is rationally related to the purpose of not making such materials public. The *Shores* court also noted that there was no allegation presented by defendant that he was denied an ample opportunity to inspect, view and examine the discovery materials in the presence of his attorney.

Even though Supreme Court Rule 415(c) prevents an attorney from making copies of discovery and giving it to a defendant, Rule 1.4 of the Illinois Rules of Professional Conduct requires an attorney to communicate with a client and keep that client reasonably informed about the case. Virginia Legal Ethics Opinion 1864 (2012) involved a prosecutor’s agreement with defense counsel that counsel had to maintain control of discovery and return it to the prosecutor at the conclusion of the case. The issue presented was whether or not this agreement violated the defense lawyer’s duty to keep a client reasonably informed about the status of the matter. The opinion held that defense counsel would not violate this rule to keep a client informed because the lawyer could show the documents to the client and discuss the facts to enable the client to be fully informed and make reasoned decisions about the case.

A defendant cannot make informed decisions about the case unless the attorney discusses the discovery with the defendant. Attorneys must review discovery with defendants to ensure that clients are aware of the evidence against them and to afford the defendant an opportunity to assist in their defense. *Cf. People v. Mena*, 337 Ill. App. 3d 868, 792 N.E.2d 790 (1st Dist. 2003)(Failure to comply with RPC 1.4 by not keeping the client informed or explaining the steps needed for an appeal that resulted in the failure to perfect an appeal held objectively unreasonable.) This may be done in many ways: reading the discovery to the client or allowing the client to read the discovery in the attorney’s presence. When attorneys are reviewing the discovery with Defendants, they may take steps such as redaction of witness addresses and phone numbers should the

attorney believe that such disclosure could result in great bodily harm to a witness or witness intimidation or harassment. Defendants are often in the best position to know facts about the case such as who witnesses are, the layout of the crime scene and knowledge about evidence that is found by police. After reviewing discovery, Defendants are able to assist in their defense by telling their attorney about facts that may not be true or witness statements that can be impeached. They may be able to help put the evidence in better perspective so that the attorney can better grasp how to prepare for trial such as the filing of motions to suppress evidence or other motions.

CONCLUSION

Attorney may not provide a copy of discovery to Defendant in a felony criminal case, even if the Defendant requests it. Attorney nonetheless has an ethical obligation, under Rule 1.4, to discuss with Defendant the contents of the discovery materials so that the Defendant is reasonably informed about the case and can make informed decisions on his or her own behalf.

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