ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.6(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion Number 88-13
May 10, 1989

Topic: Lawyer's duty as to non-privileged information incriminating to client; lawyer's duty with respect to possession of physical evidence incriminating to his client.

Digest: Lawyer has no duty to reveal secret but not privileged information that is incriminating to his client; a lawyer is under no obligation to take possession of physical evidence offered to him by third party; if lawyer takes possession of inculpatory physical evidence from third party he may have to turn it over to the state if it will otherwise likely be destroyed or is contraband or will cause serious injury.

Ref: Rule 4-101(a), (b)
Ill. Rev. Stat., Ch. 38, Sec. 31-4(a)
People v. Doe, 59 Ill.App. 3d 627, 375 N.E.2d 975, 16 Ill.Dec. 868 (1978)

FACTS

A client in police custody retains an attorney after being arrested on a criminal charge involving a non-violent property offense. Later a friend of the client tells the lawyer that he (the friend) went to the client's house in order to feed the client's pets. At the house, the friend finds objects

that are quite probably evidence of the alleged offense or related offenses. The friend tells the attorney that he has taken possession of these objects and offers them to the attorney.

QUESTIONS

1. Does the lawyer have a duty to disclose to authorities incriminating information about his client disclosed to him by the client's friend?
2. Is the lawyer under a duty to take possession of the physical evidence offered to him by the friend?
3. If the lawyer takes possession of the physical evidence from the friend, does he have a duty to turn such evidence over to the authorities?

OPINION

1. The lawyer is under no duty to disclose the information about the client disclosed to him by the client's friend. In fact, the lawyer is under an ethical obligation not to disclose such information. Although it is unclear whether such information could be considered privileged under the attorney/client or work product privilege (since it is not a result of a confidential communication from the client), it is at least a "secret" under Rule 4-101(a) since the information was "gained in the professional relationship" and its disclosure "would likely be detrimental to the client." Accordingly, the attorney is under an ethical duty to keep such "secret" information confidential until released by the client from such obligation or required by valid court order to disclose it.

2. The attorney is under no obligation to take possession of physical evidence offered to him or her. The attorney may wish to take possession because it may not be clear whether the items are helpful or hurtful, but the attorney is under no obligation to take possession. No provision of the Code requires counsel to take such action.

The object which comes into the possession or knowledge of the lawyer is privileged. Exceptions to the general rule are contraband, instrumentalities or "fruits of the crime" that require the lawyer to turn such material over to the state but without any concomitant obligation to inform the state from where such material originated.

3. If the lawyer takes possession of the physical evidence, it may not be privileged under the attorney/client privilege. This is basically a question of law, as opposed to ethics, and the law is not entirely clear on this issue.

In People v. Doe, 59 Ill.App.3d 627, 375 N.E.2d 975, 16 Ill.Dec. 868 (1978), the court held that a suicide note written by the client and turned over to the attorney by the client's family was not covered by the attorney/client privilege, in part because the note was delivered by a third party and was not a confidential communication from client to attorney. The case failed to address the implications of Illinois Revised Statutes,, Ch. 38, §31-4, which states that anyone who conceals evidence is guilty of a class four felony. The applicability of this statute would have to be assessed by any attorney taking possession of items that might constitute evidence.

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