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 Rules of Professional Conduct 1.4, 1.15(d) and Restatement of the Law Governing Lawyers §58 and 20. 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 No. 94-13
January, 1995

Topic: Lawyer's Files; Duty to provide or disclose lawyer's investigative materials to client.

Digest: A lawyer may refuse a client's request for investigative materials prepared by or for the lawyer because, under the facts presented: (1) the materials were the lawyer's property; and (2) disclosure of the materials might harm the client or others.

Ref: Illinois Rules of Professional Conduct, Rules 1.4 and 1.15.
ISBA Opinions 432, 519, 641, 86-1, and 91-6
Restatement, The Law Governing Lawyers, §31 (Tentative Draft No. 5, March 16, 1992).
ABA Model Rule 1.4 (1983).
Restatement, The Law Governing Lawyers, §58 (Tentative Draft No. 4, April 10, 1991).
Federal Land Bank of Jackson v. Federal Intermediate Credit Bank, 127 F.R.D. 473 (S.D. Miss. 1989).
Estate of Johnson, 538 N.Y.S. 2d 173 (1989).
State Bar Association of North Dakota Opinion 93-15 (1993).
State Bar of Arizona Opinion No. 81-32 (1981).

Mississippi State Bar Opinion No. 144 (1988).
Bar Association of Nassau County, New York, Opinion No. 91-31 (1991).
District of Columbia Bar Opinion No. 168 (1986).
ABA Formal Opinion No. 93-379 (1993).
ABA Informal Opinion No. 1376 (1977).

FACTS

The inquiring lawyer is a retired military judge advocate whose practice is now limited to military law. The lawyer is appealing a general court marshal conviction of a client for several offenses, including the maiming of his former wife with a knife. In the course of handling the pending appeal, the lawyer sent paralegal investigators to the former wife's work place to obtain evidence that she defrauded the court as to the extent of her injuries. The lawyer states that the client often appears to act and speak irrationally and has been a difficult person to represent. The client and members of the client's family have recently requested that the lawyer turn over copies of the paralegal's reports and other investigative material relating to the client's former wife. Although the client is still incarcerated, the inquiring lawyer states a good faith concern that the client will use the lawyer's investigative materials to find the client's former wife and that the client may inflict further serious injuries upon his former wife.

QUESTION

The inquiring lawyer wishes to know whether there is an obligation to provide or disclose the investigative materials to the client under the circumstances presented. There is no indication whether any unpaid fees for legal services are due the inquiring lawyer. The Committee therefore assumes that issues concerning a lawyer's retaining lien to secure payment of unpaid legal fees are not involved in this inquiry.

OPINION

At the outset, the Committee notes that this opinion does not deal with the issue of whether all or any part of a lawyer's file is or may be discoverable in civil litigation or criminal proceedings pursuant to applicable law or rules of court. Although some or all of the materials in question might be considered "work product" in the discovery context, the focus of this opinion is whether a lawyer may properly refuse to deliver or disclose such materials to the lawyer's client under the Illinois Rules of Professional Conduct. Therefore, the law governing discovery of "work product" is not relevant to this inquiry.

The principal rules governing a lawyer's duty to provide information and documents or other materials to a client are Rules 1.4(a) and 1.15(b) of the Illinois Rules of Professional Conduct. Rule 1.4(a) provides:

> A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Rule 1.15(b) states:

> Upon receiving funds or other property in which a client or third person has an

> interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Under these rules, the Committee must determine whether the client may reasonably request and is entitled to receive the lawyer's investigative materials created in the course of the representation. In considering these issues, it is useful to review the types of materials normally created or maintained by a lawyer with respect to a client matter. These materials usually include one or more of seven categories of documents:

1. documents and other materials furnished by the client;
2. correspondence between the lawyer and client;
3. correspondence between the lawyer and third parties;
4. copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf;
5. copies of contracts, wills, corporate records and other similar documents prepared by the lawyer for the client's use;
6. administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's creditworthiness, time and expense records, or personnel matters; and
7. the lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including investigative reports, prepared by or for the lawyer for the use of the lawyer in the representation.

The lawyer's duty to turn over or disclose each category of material must be evaluated separately. The Committee's discussion assumes that there is no specific agreement between the lawyer and the client (in an engagement letter or otherwise) concerning the client's access to the lawyer's file.

With respect to the first category, things furnished by the client, Rule 1.15(b) requires that property of the client be delivered promptly upon the client's reasonable request. Again, this opinion does not address any rights that a lawyer may have pursuant to a valid retaining lien.

With respect to the second category, correspondence between lawyer and client, the nature of the documents suggests that the client has already been provided with these materials. Nevertheless, the Committee believes that the client is entitled under Rule 1.4(a) to reasonable access to copies of such correspondence. However, the lawyer need not recreate or provide new copies of correspondence previously provided the client unless the client is willing to compensate the lawyer for the reasonable expense involved.[1]

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[1] The term "reasonable expense" in these circumstances includes, in the absence of an agreement with regard to such expense, any actual disbursements paid to third-party suppliers of services as well as the direct costs of services such as photocopying. See American Bar Association Formal

With respect to the third category, correspondence between the lawyer and third parties, Rule 1.4(a) suggests that the client should receive copies of significant correspondence, including important correspondence with third parties, in the ordinary course of the representation. The Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative correspondence with third parties, such as correspondence with court reporters or other service providers. A client is entitled under Rule 1.4(a) to reasonable access to copies of correspondence that the client has already received as well as copies of routine administrative correspondence with third parties. However, the lawyer is not required to provide copies of such materials unless the client is willing to compensate the lawyer for the reasonable expense involved.

With respect to the fourth category, copies of pleadings and other documents that have been prepared by the lawyer and filed with courts or other agencies, Rule 1.4(a) again suggests that the client should be provided with copies of significant pleadings and similar documents in the ordinary course of the representation. The Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative court or agency papers such as certificates of service unless, under the circumstances of a particular matter, such administrative documents have an impact on the client's rights in the proceeding. The client is entitled under Rule 1.4(a) to reasonable access to copies of all court or agency documents in the lawyer's file, but the lawyer is not required to furnish the client with either additional copies of documents that the client has already received or copies of routine administrative papers unless the client is willing to compensate the lawyer for the reasonable expense involved.

With respect to the fifth category, copies of contracts other documents prepared for the client, the nature of such materials suggests that the client has or will receive these documents in the ordinary course of the representation. The client is entitled under Rule 1.4(a) to reasonable access to copies of the final version (as distinguished from the lawyer's drafts or working copies) of such documents in the lawyer's files, but the Committee believes that a lawyer is not required to furnish a client with additional copies unless the client is willing to compensate the lawyer for the reasonable expense involved.

With respect to the sixth category, internal administrative materials, the Committee does not believe that a client is entitled to copies of or access to such materials under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use. Nor are these materials property of the client that a lawyer must deliver upon request. Thus the failure of the lawyer to deliver or provide access to such materials will not prejudice the client. See District of Columbia Bar Opinion No. 168 (April 15, 1986);

Opinion No. 93-379 (December 6, 1993). Such "reasonable expense" would also include compensation for lawyer or paralegal time spent in complying with a client's request where the time required was significant. See Restatement, The Law Governing Lawyers, §58, Comment *g* (Tentative Draft No. 4, April 10, 1991). In its Opinions No. 86-1 (1986) and No. 91-6 (1991), the Committee considered other circumstances in which it would be proper to charge clients for paralegal or secretarial overtime expense.

Restatement, The Law Governing Lawyers, §58, Comment *d* (Tentative Draft No. 4, April 10, 1991). In Comment *d* to §58 of the Restatement, the reporters note:

> A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.

The documents in this category are clearly intended only for internal use and may therefore be withheld from the client.

With respect to the seventh category, which comprises the lawyer's notes and factual or legal research material, including the type of investigative materials involved in the present inquiry, the Committee is aware that various courts and ethics committees have taken differing positions on the nature of such materials.[2] In the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client. See *Federal Land Bank of Jackson v. Federal Intermediate Credit Bank,* 127 F.R.D. 473 (S.D. Miss. 1989), affirmed, 128 F.R.D. 182 (S.D. Miss. 1989); *Estate of Johnson*, 538 N.Y.S. 2d 173 (1989); State Bar Association of North Dakota Opinion 93-15 (November 17, 1993); Bar Association of Nassau County, New York, Opinion No. 91-31 (November 18, 1991); Mississippi State Bar Opinion No. 144 (March 11, 1988); State Bar of Arizona Opinion No. 81-32 (November 2, 1981); and ABA Informal Opinion No. 1376 (February 18, 1977).

The rationale for this conclusion is stated in the magistrate's opinion in the *Federal Land Bank* matter, where the receiver for the bank sought the complete files of the bank's former outside lawyers. The receiver argued that when a lawyer is retained on an hourly rate arrangement, all material in the lawyer's file, including notes and internal memoranda, constitute investigative reports for which the client has paid. The court found that regardless of the fee arrangement, the client is paying for the end result that does not include the tools used by the lawyer to reach the result. Thus, pleadings filed in court and correspondence with the client and third parties, for example, are the lawyer's finished product that have been voluntarily and strategically exposed to public light to further the client's interest. "These are documents for which the client has paid, or for which the client can anticipate paying, and they are the type of document which both the attorney and the client expect to become the property of the client." 127 F.R.D. at 479.
In contrast, documents such as the lawyer's personal research, drafts and notes of interviews, which

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[2] These materials are often described in ethics opinions and court decisions as the "work product" of the lawyer. As noted above, some or all of the materials in question might be considered "work product" in the discovery context. However, this opinion concerns only the lawyer's duty under the Rules of Professional Conduct.

reflect the candid, rough and blemished private thoughts of the lawyer are the tools of the lawyer's trade to which the client has no entitlement. With regard to investigative reports, the court found specifically that:

> ...the investigative reports which become the property of the client are the final reports which are delivered to the lawyer and which are prepared by persons whose fees are paid directly or indirectly by the client, such as appraisal reports, expert witness reports, etc. Any reports which the lawyer prepares for, and sends to, the client to inform the client of the result of his investigation of facts, or his research of legal issues, would be considered the lawyer's end product, and would become the property of the client. Notes taken by the lawyer or others in his firm in conducting such investigation or research, notes made by the lawyer in preparation for or while attending a deposition or a trial or meetings, internal memoranda and other documents prepared by the lawyer for his use in providing services to his client constitute the lawyer's work product and are property of the lawyer. Likewise, preliminary drafts of contracts, briefs, opinions, pleadings and other documents, the final drafts of which constitute the lawyer's end products, are the lawyer's work product and are property of the lawyer. 127 F.R.D. at 480.

Like the documents in the sixth category discussed above, these materials are usually prepared only for the lawyer's personal use and internal review. For these reasons, the Committee believes that the seventh category of documents in a lawyer's files are the lawyer's property that need not be provided or disclosed to a client. To the extent that the Committee's prior Opinion No. 432 (June 3, 1974), No. 519 (October 15, 1975) and No. 641 (April 23, 1979) are inconsistent with this conclusion, those opinions are expressly overruled.

In the present inquiry, the investigative materials in question were obtained by the lawyer's paralegal assistant as part of the lawyer's factual research relating to a potential ground for appeal. As such, these materials are the property of the lawyer rather than the client and need not be delivered under Rule 1.15(b) to the client or his family.

The Committee notes that those opinions that have reached contrary conclusions regarding the nature of a lawyer's file are usually based either on the notion that the client has paid the lawyer's fee, the argument advanced by the receiver in the *Federal Land Bank* case discussed above, or the assertion that the lawyer is in a fiduciary relationship with the client. See *Resolution Trust Corp. v. H___, P.C.,* 128 F.R.D. 647 (N.D. Tex. 1989).[3] In the Committee's view, the fact that the lawyer

[3] The decision in *Resolution Trust* is based in part on a bankruptcy court opinion in *Matter of Kaleidoscope, Inc.,* 15 B.R. 232 (Bankr. N.D. Ga. 1981), which was reversed by the district court in 25 B.R. 729 (N.D. Ga. 1982) with directions to abstain in favor of a pending state court action on the issue of ownership of the lawyer's "work product" file materials. Other opinions, like Nolan v. Foreman, 665 F.2d 738, 742 (5th Circ. 1982), merely state that "a client has the right to return of his papers on request" without considering the issue of what materials constitute a cleint's papers.

and client may be in a fiduciary relationship is simply not relevant to the question of whether any particular materials in a lawyer's file are the lawyer's property. For example, the existence of a fiduciary relationship would not determine whether the lawyer's yellow pads, accounting ledgers, library books or office furniture are the property of the lawyer or the client. As discussed above, the nature of the specific materials and not the lawyer-client relationship itself determines the client's entitlement to any particular document.

Under the facts of the present inquiry, the Committee believes that the lawyer may have an additional reason for refusing to turn over the materials in question. The lawyer has expressed a good faith concern that the client may use the lawyer's information to inflict further injuries upon his former wife, whom the client has maimed in the past.

The official comment to American Bar Association Model Rule 1.4, from which Illinois Rule 1.4 is derived, states that a lawyer may be justified in delaying the transmission of information when the client is likely to react imprudently. The reporters of the Restatement of the Law Governing Lawyers reached a similar conclusion in Comments *c* and *d* to §31 (Tentative Draft No. 5, March 16, 1992), observing that a lawyer may refuse to comply with unreasonable client requests for information, including situations where the disclosure might harm the client or others. In the situation presented, the lawyer would be justified in refusing the client's request for the investigative materials to prevent the real threat of future criminal acts by the client and harm to the client's former wife.

In summary, the Committee concludes under the facts presented that the lawyer may properly refuse to provide or disclose the lawyer's materials to the client because the materials in question are the lawyer's property and disclosure to the client could lead to harm to the client and his former wife. The Committee also notes that the lawyer could, in the exercise of the lawyer's professional judgment, release the materials to the client, but the lawyer is not required to do so by the Rules of Professional Conduct.

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