

Opinion Number 570

May 2006

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer refuse a former client's request to disclose or turn over the lawyer's notes made in the course of and in furtherance of his representation of the client?

STATEMENT OF FACTS

A former client of a lawyer has demanded to see the lawyer's file on the representation of the client. The lawyer has previously provided copies of most of the file to the former client but has withheld copies of the lawyer's notes created during the representation of the client. The lawyer is not claiming a lawyer's lien or other similar right over the notes.

DISCUSSION

Although no lawyer's lien is asserted in this case, the issue here considered has arisen in the past primarily in cases in which the lawyer was asserting such a lien. In the context of cases concerning a lawyer's lien, this Committee has distinguished between matters of legal ethics and matters of law. Specifically, prior Professional Ethics Committee Opinions have recognized that a lawyer is permitted to retain a client file pursuant to a proper legal claim so long as doing so will not prejudice the client in the subject matter of the representation. See e.g. Opinion 411 (January 1984) and Opinion 395 (May 1979, modified March 1980).

It is also important to note that a lawyer's file may contain many different types of documents or records created by the lawyer, documents obtained from the client, documents obtained from third persons, pleadings, court orders and contracts. A lawyer's ethical obligations may vary depending on the type, source, or content of the document and other relevant factors. This opinion is limited to a consideration of the issue with respect to notes created by a lawyer, and this opinion does not address the issue with respect to other types of documents or information contained in a lawyer's file. Rule 1.14(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[e]xcept as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client ... any funds or other property that the client ... is entitled to receive" In *Hebisen v. State*, 615 S.W. 2d 866 (Tex. App. - Houston [1st Dist.] 1981, no writ), the court interpreted the meaning of the predecessor of current Rule 1.14(b), holding that the term "other properties" included the client's papers and other documents that the lawyer had in his file. 615 S.W.2d at 868. Rule 1.15(d) provides as follows:

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation."

Read together, Rules 1.14(b) and 1.15(d) provide that, generally, the documents in a lawyer's file that are property to which the client is entitled must be transferred to the client upon request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

In *In re George*, 28 S.W.3d 511 (Tex. 2000), the Court ruled on the issue of whether the work product of disqualified counsel should be made available to the disqualified counsel's client and successor counsel. The Court struggled with the conflict between the client's right to access work product and the interest in preserving the purposes of the underlying disqualification by restricting access to the tainted work product. In the course of its analysis, the Court noted that "[t]he attorney is the agent of the client, and the work product generated by the attorney in representing the client belongs to the client." 28 S.W.3d at 516, citing Rule 1.15(d) and the opinion in *Hebisen v. State*, discussed above.

In *Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995), the Texas Supreme Court described the work product privilege:

"First, the privilege protects the attorney's thought process, which includes strategy decisions and issue formulation, and notes or writings evincing those mental processes. Second, the privilege protects the mechanical compilation of information to the extent such compilation reveals the attorney's thought processes." 907 S.W.2d at 490.

Work product has been subsequently defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as follows:

"(a) Work product defined. Work product comprises:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents."

In *Resolution Trust Corporation v. H ___*, P.C., 128 F.R.D. 647 (N.D. Tex. 1989), the court considered the issue of the ownership of files generated by a law firm during its representation of a client and determined that the entire contents of the law firm's files concerning the representation of the client belonged to the client and ordered the law firm to turn over the entire contents of the firm's files, including work product generated by the lawyer such as notes and legal memoranda. In reaching this decision the court considered the predecessor to current Rule 1.14(b), this Committee's Opinion 395 (May 1979, modified March 1980), *Hebisen v. Texas*, 615 S.W. 2d 866 (discussed above), and *Matter of Kaleidoscope, Inc.*, 15 Bankr. 232 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (D.C. Ga. 1982). The court considered and rejected arguments

that the files did not have to be turned over when there were allegations of misconduct by the lawyer or because the documents contained information that was attorney-client privileged or work product (including documents produced in anticipation of litigation with the client).

Restatement (Third) of The Law Governing Lawyers (American Law Institute 2000) (the "Restatement") Section 46 addresses a lawyer's duty to provide to the client documents held by the lawyer. A portion of the discussion in Comment c to Section 46 of the Restatement recognizes circumstances that Texas courts have not recognized but that some courts in other jurisdictions have found would justify not providing a portion of a lawyer's client file to the client:

"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"

In light of the Texas cases discussed above that recognize a strong obligation on Texas lawyers to provide files to clients and in the absence of any Texas court decision recognizing a limitation such as that stated in the Restatement passage quoted above, the Committee is of the opinion that the exception described in the quoted passage for internal law-firm materials relating to a client should not apply in the application of Rules 1.14(b) and 1.15(d). As in all other circumstances, the lawyer is an agent of and in a fiduciary relationship with the client. The Committee recognizes that a lawyer's motivation for withholding his notes from a client may be the result of a temptation to put the lawyer's own interests ahead of those of the client. The Committee believes that allowing a lawyer to unilaterally make a decision to withhold from a client notes relating to the client and created in the course of the representation of the client because the notes may reflect the firm's interests vis-à-vis the client undermines the duties owed by the lawyer to the client. In addition, withholding such notes from a client denies the client the full benefit of the services the lawyer agreed to provide to the client.

However, like the Restatement, the Committee recognizes that there are some other unusual circumstances that would justify the withholding of certain lawyer's notes from a client. Examples include notes that contain information obtained in discovery subject to a court's protective order forbidding disclosure of the information to the client, notes where the disclosure would violate the lawyer's duty to another person, and notes containing information that could reasonably be expected to cause serious harm to a mentally ill client. See generally Comment c to Section 46 of the Restatement. These exceptions are based on a lawyer's duties owed to others, including other clients, third persons and courts, or to the client, but are not based on the lawyer's own interests or concerns vis-à-vis the client. Thus, a lawyer may withhold from a client or former client certain specific notes (or portions of notes) when required to do so by a court or when not doing so would violate a duty owed to a third person or risk causing serious harm to the client. Accordingly, documents that the former client is entitled to obtain include a lawyer's notes that constitute work product and relate to the client and the lawyer's representation of the client. Rule 1.15(d) requires that any such documents must be given to the client upon request unless the lawyer is permitted by the exceptions

discussed above or by other law to retain those documents and can do so without prejudicing the interests of the former client in the subject matter of the representation.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer must upon request provide to a former client the notes of the lawyer from the lawyer's file for that former client except when the lawyer has the right to withhold the notes pursuant to a legal right such as a lawyer's lien, when the lawyer is required to withhold the lawyer's notes (or portions thereof) by court order, or when not withholding the notes (or portions thereof) would violate a duty owed to a third person or risk causing serious harm to the client.