

Final

Rhode Island Supreme Court Ethics Advisory Panel Opinion No. 2010-06 Issued October 18, 2010

Facts

An insurance company retained the inquiring attorney and his/her law firm to represent two insureds in a civil action. At the conclusion of the case, Client A asked the inquiring attorney to send her/him the file. Client B requested that the inquiring attorney retain the file. The insurer has also requested that the inquiring attorney retain the file. The inquiring attorney states that there are “thousands of pages of documents,” and that the insurer paid all litigation fees and all costs including costs to obtain transcripts and documents from third parties. The inquiring attorney seeks guidance on the proper disposition of the clients’ file.

Issue Presented

The inquiring attorney asks what his/her ethical responsibilities are with respect to returning the clients’ file when faced with conflicting instructions, and who bears the costs of copying and shipping the files.

Opinion

Pursuant to Rule 1.16(d), Client A and Client B are both entitled to the joint file; the inquiring attorney’s obligations are fulfilled by providing one client with a copy and the other client with the original file; the inquiring attorney may not charge the clients for the costs of copying the file; and absent an agreement to the contrary, the inquiring attorney may not charge the clients for the costs of shipping or mailing the client file.

Reasoning

Upon termination of a representation, Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled. Rule 1.16(d) states 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 payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

A client-file is the property of the client. See R.I. Sup. Ct. Ethics Advisory Panel Op. 90-38 (1990). A client is entitled to the contents of the client’s file excluding the attorney’s work product. R.I. Sup. Ct. Ethics Advisory Panel Op. 92-88 (1993).

In Rhode Island Supreme Court Ethics Advisory Panel Opinion 2000-6 (2000), the Panel concluded that in a joint representation of a husband and wife, both clients were entitled to the joint file. The Panel advised the inquiring attorney to turn over copies of the joint file to each client, and to retain the original file until the clients reached an agreement about which one would receive the original. Id.

In the instant inquiry, both Client A and Client B are entitled to the file. There being but one original, the inquiring attorney's obligation under Rule 1.16(d) is fulfilled by making a copy of the file, and then either retaining the copy at his /her law office for Client B and providing the original to Client A; or by retaining the original file for Client B and providing a copy to Client A.

The inquiring attorney next asks who should pay the costs of copying the clients' file. The inquiring attorney may not charge the clients for the costs of copying the clients' file. See R.I. Sup. Ct. Ethics Advisory Panel Op. 96-35 (1996) (attorney may not charge for time or costs in preparing client files for transfer.) The Panel has stated:

It would be unethical under the Rules of Professional Conduct for the inquiring attorney to charge the client for either time or costs relating to the transfer of documents and property to which the client is entitled in the first instance. The inquiring attorney may produce photocopies of the documents for his/her own files at his/her own expense. Id.

Lastly, the inquiring attorney asks who should pay for the costs of mailing or shipping the clients' file to the client. The Rules of Professional Conduct are rules of reason. Where a client lives out-of-state, is ill, or is otherwise unable to retrieve the client's file from a lawyer's office, the Panel believes it is reasonable that the lawyer, having possession of property which belongs to the client, bear the responsibility, and the costs, of transferring the file to the client. Moreover, a lawyer is in the best position at the outset of a representation to define the obligations relating to the disposition of a client's file upon termination of the representation. In the absence of an agreement that defines the financial obligations for mailing or shipping a client's file, the Panel is of the opinion that the attorney may not seek payment for those costs from the client. The Panel notes that there are options that may address concerns about costs of shipping and delivery, such as scanning the file and transmitting it electronically to the client, or copying the file to a disk and mailing the disk to the client.

Accordingly, the Panel concludes that Client A and Client B are both entitled to the joint file; that the inquiring attorney's obligations are fulfilled by providing one client with a copy and the other client with the original file; that the inquiring attorney may not charge the clients for the costs of copying the file; and that absent an agreement to the contrary, the inquiring attorney may not charge the clients for the costs of shipping or mailing the client file.