



ISBA Professional Conduct Advisory Opinion

Opinion No. 19-03
April 2019

Subject: Client Files; Client Funds and Property; Confidentiality

Digest: A lawyer may not produce banking records, client trust account records, ledger and client billing records requested by spouse's lawyer in a pending divorce between lawyer and spouse, absent a court order. In the event of a court order ordering the production of the documents, the lawyer may reveal information only to the extent reasonably necessary to comply with the order and should seek protective action when appropriate.

References: Illinois Rules of Professional Conduct, Rule 1.6
Illinois Rules of Professional Conduct, Rule 1.7
Illinois Rules of Professional Conduct, Rule 1.9(c)
Illinois Rules of Professional Conduct, Rule 1.15
Illinois Rules of Professional Conduct, Rule 1.16
ABA Formal Ethics Opinion 473 (Feb. 17, 2016)
ABA Formal Ethics Opinion 479 (Dec. 15, 2017)
ISBA Opinion 97-01 (July 18, 1997)
NV. Op. 41 (June 24, 2009)

FACTS

Lawyer and spouse are divorcing. Spouse's lawyer requests, via a Request to Produce, lawyer's client trust account bank records, ledgers showing all receipts and disbursements from the trust account, and all billing statements sent to clients and to former clients.

QUESTIONS

Will the lawyer violate the lawyer's duty of confidentiality by producing the requested records absent a court order?
May the records be produced in a redacted form?

ANALYSIS

Client confidentiality is the cornerstone of the attorney-client relationship. The breadth of what information is considered confidential is broad. Illinois Rule 1.6(a) prohibits a lawyer from revealing any information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b) or is required by Rule 1.6(c).

The duty of confidentiality extends beyond the end of the attorney-client relationship. *See* Rule 1.6, Comment 20. Rule 1.9(c) specifically extends a lawyers' duty of confidentiality to former clients. *See also* ABA Formal Ethics Op. 479 (2017).

The information requested in the Request to Produce in the divorce matter falls within the scope of protected information under Rule 1.6(a) and 1.9(c). Generally, the clients' identities and information related to the settlements of their claims or receipt of money on their behalf constitutes protected information under 1.6. *See, e.g.,* ISBA Op. 97-01 (stating that a lawyer cannot disclose client names without client consent). Upon receipt of the Request to Produce, the lawyer must notify the clients, consult with the clients and determine how best to proceed. ABA Formal Ethics Op. 473 (2016). Accordingly, given that the requested information is confidential, the information should not be voluntarily disclosed by the lawyer, absent client consent.

Moreover, Rule 1.15 requires that the lawyer hold the property of clients with the utmost care. Comment 1 to Illinois Rule of Professional Conduct 1.15 states: A lawyer should hold property of others with the care required of a professional fiduciary. The funds remain the property of the clients until earned. Illinois Rule of Professional Conduct 1.15(a) and (c). Funds in the Trust account belong to the clients, not the attorney. We note that those funds actually paid to the attorney can be ascertained without viewing the activity and confidential information in the trust account.

If the clients and lawyer disagree as to how to respond to the Request to Produce, then the lawyer may be required to withdraw pursuant to Rule 1.16. Particularly in this situation, where the lawyer is party to the underlying lawsuit, if a client and lawyer disagree as to how to respond, the lawyer may have a conflict of interest with his or her clients. *See*, Rule 1.7.

The inquirer asks if the information may be produced in a redacted form. In most circumstances, redaction of client names will be sufficient. However, as stated in Comment 4 to Rule 1.6, the prohibition against disclosure of confidential information under Rule 1.6 also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. Accordingly, there may be circumstances where redaction of the clients' names alone will not be sufficient to protect the clients' information under Rule 1.6. While most of the permitted disclosures under Rule 1.6(b) are not applicable to this situation, Rule 1.6(b)(6) permits, but does not require, a lawyer to disclose confidential information to comply with other law or a court order. Accordingly, a lawyer may be permitted to disclose the requested information if ordered to do so by a court. However, as noted in Comment 15, "Absent informed consent of the client to do otherwise, the lawyer

should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.” *See also* ABA Formal Ethics Op. 473 (2016).

Should the lawyer decide to disclose the information pursuant to a court order, the disclosure should be limited to the information ordered to be produced and the lawyer should make all reasonable efforts to protect the information from disclosure to the public. As stated in Comment 16 to Rule 1.6, “If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.”

CONCLUSION

A lawyer may not voluntarily, and without client consent, provide client trust account bank records, ledgers showing receipts and disbursements from the trust account or billing statements, to an opposing party. In the event of a court order ordering the production of the documents, the lawyer may be permitted to reveal client information only to the extent reasonably necessary to comply with the order and should seek protective action when appropriate.

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