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ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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ISBA Committee on Professional Conduct

Opinion No. 01-02

July 2001

Topic: Permissive withdrawal;
disposing of client's files
after termination of
representation

Digest: Lawyer may properly terminate representation if client's conduct makes it unreasonably difficult for lawyer to carry out employment effectiveness or client fails to substantially fulfill agreement to pay lawyer's fees or expenses; however, lawyer must take reasonable steps to avoid foreseeable prejudice to client as a result of termination. Discarding client's files if client does not retrieve them after 30 days due notice will not likely comply with lawyer's duty to avoid prejudice to client upon termination of representation.

Ref.: Rules of Professional
Conduct, Rules 1.15 and 1.16

ISBA Advisory Opinion on Professional Conduct No.
94-14

Hazard, "The Law of Lawyering"

ABA Annotated Rules of
Professional Conduct, 4th
Ed., Rule 1.16

FACTS

During the course of a lawyer's representing a client in a matter, the client stops communicating with the lawyer and stops paying for the services of the lawyer that the client agreed to pay. The lawyer wishes to terminate the representation and discard the client's files if the client does not retrieve the files after being given 30 day notice to do so.

QUESTIONS

1. May the lawyer properly withdraw and terminate the representation?

2. If the lawyer may properly terminate the representation, may the lawyer "discard" the client's files if the client does not retrieve the files from the lawyer after being given due notice of the lawyer's intent to discard the files if the client does not retrieve them within 30 days?

3. If the matter in which the lawyer is representing the client has been concluded, and the representation has been inactive, may the lawyer terminate the representation of a client when the client's conduct "renders it unreasonably difficult for the lawyer to carry out the employment effectively," Rule 1.16(b)(1)(D); or when the client "substantially fails to fulfill an agreement or obligation to the lawyer as to expenses or fees," Rule 1.16(b)(1)(F).

OPINION

Under Rule of Professional Conduct 1.16, Declining or Terminating Representation, and principles of permissive withdrawal from a

matter, a lawyer may terminate the representation of a client when the client's conduct "renders it unreasonably difficult for the lawyer to carry out the employment effectively." Rule 1.16(b)(1)(D), or when the client "substantially fails to fulfill an agreement or obligation to the lawyer as to expenses or fees," Rule 1.16(b)(1)(F).

If the lawyer has made reasonable efforts to communicate with the client about the representation and the client then ceases to communicate with the lawyer about the matter, the lawyer may properly terminate the representation. The client's conduct in failing to communicate with the lawyer will thus have made it unreasonably difficult for the lawyer to carry out the employment effectively. However, the lawyer in terminating the representation must comply with Rule 1.16(d) and take reasonable steps to avoid foreseeable prejudice to the client as a result of the termination. See Hazard, "The Law of Lawyering," Sec. 20.11, 20.12 (mitigation of harm to client upon mandatory or permissive withdrawal).

Similarly, if the client substantially refuses to fulfill the client's agreement to pay the lawyer's reasonable fees and expenses, the lawyer may properly terminate the representation for that reason, provided that the lawyer complies with the Rule 1.16(d) requirement to take reasonable steps to avoid foreseeable prejudice to the client as a result of the termination. Rule 1.16(b)(1)(F).

However, if the lawyer is representing the client in a matter pending before a court and the lawyer has filed an appearance with the court, the lawyer must obtain permission of the court to withdraw the lawyer's appearance and to cease representing the client in the matter before the court, even if the lawyer is otherwise entitled to terminate the representation. See ABA Annotated Model Rules of Professional Conduct, 4th Edition, Rule 1.16, pp. 244-255. Hazard, "The Law of Lawyering," Sec. 20.11, Illustration 20-7, Attempting to Withdraw from Representation During Litigation."

If the representation is an inactive matter, the lawyer may properly terminate the representation but must also comply with Rule 1.16's requirements to avoid foreseeable prejudice to the client.

Thus, given the requirements of Rule 1.16(d) to avoid foreseeable harm to the client caused by termination, it would not be proper for a lawyer,

even after giving notice to the client of termination and an intent to discard the client's files, to discard the files if the client does not retrieve them within the 30 day period specified in such notice.

Rule 1.15, Safekeeping Property, also imposes certain obligations on the lawyer with respect to property of the client held by the lawyer. In ISBA Advisory Opinion No. 94-14, this Committee stated that, "in general" under Rule 1.15, the client is entitled "to the return of all materials that the client has provided to the lawyer, and the lawyer's obligation extends to both active and inactive files." That opinion further states that upon termination of the representation, all "original papers delivered to the lawyer by the client must be returned to the client," but that the lawyer was entitled to reasonable expenses incurred in returning files.

Where the lawyer terminating representation is having difficulty locating the client or communicating with the client, the lawyer must take reasonable steps to avoid foreseeable prejudice to the client and to effect delivery of the client's files to the client.

A lawyer who wishes to lessen problems with disposing of client files for both active and inactive matters after termination of representation could consider providing for reasonable file disposition procedures in the initial contract of employment with the client.

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