

ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 2004-1

**LAWYER'S RIGHT TO WITHHOLD EXPERT REPORTS
WHERE THE CLIENT FAILS TO PAY FOR THEM**

The Committee has been asked to give an opinion as to whether it is proper for a lawyer to withhold a copy of an expert or investigator's report if the client has agreed to pay for the report but has failed to do so.

It is the committee's opinion that Ethics Opinion 95-6 controls this issue. The lawyer may not withhold the report if the client would be prejudiced by doing so.

DISCUSSION

A. Prejudice To the Client Is The Determining Factor

In Ethics Opinion 95-6, the Committee previously opined that a client's *files* may not be withheld if prejudice would result to the client. "A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."¹ The previous opinion addressed the propriety of charging a client for copies of his or her file, and the lawyer's right to withhold the file when the client fails to pay the copying charges.

"The lawyer who has not been paid for his or her services is entitled to assert a lien against the file. However, the lawyer's interest in getting paid must be subordinate to the rights of the client. A lawyer may not prejudice a client's rights by withholding property of the client which is essential to the client's case."²

Similarly, in Ethics Opinion 2003-3, the Committee concluded that a lawyer must presumptively accord the client access to *the entire file* upon termination of the representation.³ As noted in Opinion 2003-3, Rule 1.16(d) governs the lawyer's obligation to the client when representation ends. Upon termination of the representation, a lawyer shall take steps to protect a client's

¹ Ethics Opinion No. 95-6.

² Ethics Opinion No. 95-6, emphasis added.

³ Ethics Opinion No. 2003-3.

interest, including surrendering papers and property to which the client is entitled.⁴

The considerations addressed in Ethics Opinions 95-6 and 2003-3 are equally applicable to an expert or investigator's report. In the committee's view, expert or investigator's reports present particular illustrations of the general rules noted in the Opinion 95-6 (prejudice to the client is the paramount concern), and 2003-3 (client is entitled to presumptive access to the entire file upon termination of representation). Each situation must be carefully reviewed to determine whether prejudice will result.

The committee envisions certain instances where prejudice to the client may be readily apparent, but other instances where there is little impact. If the matter is in the middle of litigation, the client is likely to have an immediate and paramount need for an expert's report.⁵ Similarly, an investigator's report may contain information critical to the client's case.⁶ In these examples, prejudice may be readily apparent.

In other situations, withholding the report may inconvenience the client, but is not likely to result in actual prejudice. For example, a personal injury lawyer who consults with a physician to determine whether to pursue a case may be justified in withholding the report if the client fails to pay for it. Similarly, in a real estate transaction, an alternative appraisal may be readily obtained. A probate case may need a duplicate inventory. In each of these examples, it seems again to be readily apparent that prejudice to the client is unlikely. The client may be inconvenienced by having to pay for an alternate report, or valuation, but that inconvenience, or added expense, does not automatically equate to prejudice. In each instance, the lawyer must weigh the possible prejudice to the client against the lawyer's right to reimbursement for the expert's report.

⁴ Alaska Rule of Professional Conduct 1.16(d).

⁵ If the expert's report was prepared by a retained expert for purposes of testimony, it may be subject to mandatory disclosure under the Rules of Civil Procedure, or a court's pretrial order. Failure to make timely disclosure could seriously jeopardize the client's case, or subject the client to potential sanctions.

⁶ For example, a lawyer may retain an investigator to interview witnesses in a personal injury case. If the interviews turn up information adverse to the client's position, the client may proceed with an imprudent case. Here again, if the matter is in litigation, the client may be faced with disclosures required by applicable discovery rules.

B. Attorney Work Product Is Problematic

One variation on the “client’s file” deserves additional mention. There are situations where a lawyer engages an expert to assist in preparation of the lawyer’s strategic work product. For example, many lawyers prepare demonstrative aids for use at trial. Sometimes, such aids are simple posterboards which can easily be duplicated. Another lawyer may commission a detailed electronic presentation. Other times, the demonstrative aids may be complex, expensive working models. In some of these instances, the lawyer may have devoted substantial time and money to preparation of the exhibits. Such exhibits are extremely problematic for the lawyer examining ethical questions because they would clearly *benefit* the client. Whether the absence of such aids would *prejudice* the client, however, is the test. No bright line rules can be pronounced in these instances. In each instance, the lawyer must look to whether the client will suffer prejudice if essential materials are withheld.

C. The Lawyer’s Obligation To Inform

The lawyer’s attempt to withhold an expert or investigator’s report raises an additional issue not addressed in previous opinions. Rule 1.4 governs a lawyer’s obligation to communicate with the client:

“(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client’s behalf and promptly comply with reasonable request for information.

(b) A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . .”⁷

The comment to the model rule provides additional insight:

“The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with a duty to act in the client’s best interest, and the client’s overall requirements as to the character of representation. . . .

A lawyer may not withhold information to serve the lawyer’s own interest or convenience.”

⁷ Alaska Rule of Professional Conduct 1.4(a) and (b).

The Committee notes there are circumstances in which a lawyer may justifiably delay transmission of information to a client. However, those circumstances are limited to situations where harm may come to the client or someone else.⁸

D. Conclusion

In summary, an expert or investigator's report is part of the client's file. Ethics Opinions 95-6 and 2003-3 control. A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount.⁹ The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case.

Approved by the Alaska Bar Association Ethics Committee on November 6, 2003.

Adopted by the Board of Governors on January 15, 2004.

⁸ The example given in the comment allows a lawyer to withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that the disclosure would harm the client. See Alaska Rule of Professional Conduct 1.4, comment, withholding information.

⁹ In this Opinion, the Committee assumes the expert or investigators report has been prepared with the client's consent, and for the client's benefit.