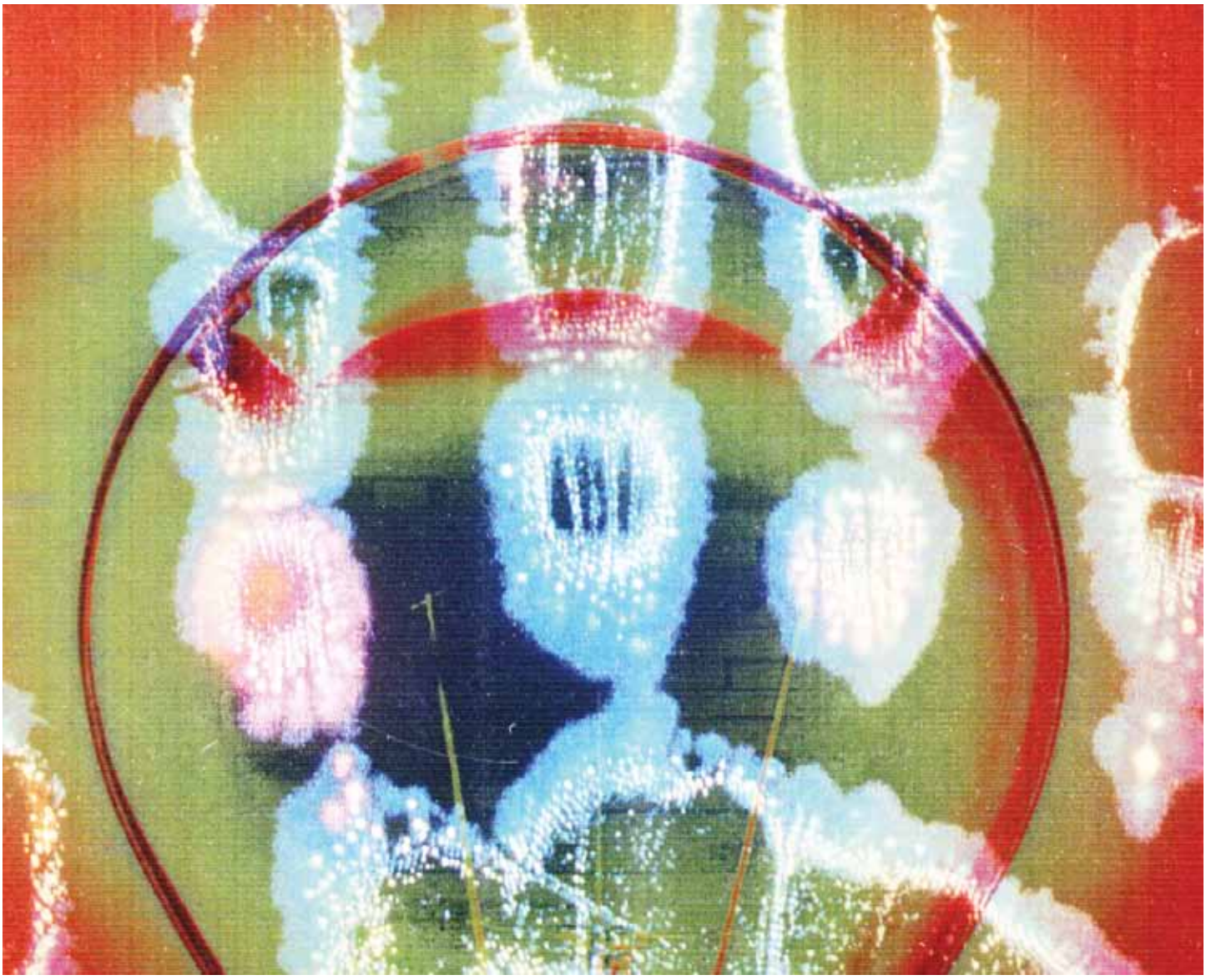
Ownership and Control of Lawyers' Files Relating to Representation

By Shelby L. Drury and Timothy J. Miller



Lawyers are confronted with the question of who "owns" or "controls" files related to the representation of a client – the lawyer, the client, or both – in a variety of situations. For example, the issue may arise because the client has hired new counsel, has been served with discovery, or simply wants a copy of the file.

Under any of those scenarios, the answer relates back to the fundamental question of what documents the lawyer would be *required* to turn over to the client, if the client asked the lawyer. But although the scenarios described above are not uncommon, the Illinois Bar Rules do not provide a clear answer. Nor have Illinois courts offered authoritative guidance as to who owns and controls the files related to client representation.

Differing Approaches: Entire File v. End Result Rules

In other jurisdictions, courts and ethics committees have generally taken one of two approaches to the ownership of files related to representation. The first, taken by the majority, is referred to as the "entire file" approach. In this approach, the client is generally entitled to any documents its attorneys created in connection with the

representation, with narrow exceptions. *E.g., Schmidt v. Kimberly-Clark Corp.*, No. 09-C-0643, 2013 WL 989829, at *2 (E.D. Wisc. Mar. 13, 2013); *In the Matter of Sage Realty Corp v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 882-85 (NY App. Ct. 1997). The minority approach is based on the "end results." Under this approach, the client is generally entitled only to a lawyer's "final" output.

Illinois State Bar Association (ISBA) Advisory Opinion on Professional Conduct No. 94-13 ("Opinion 94-13") embraces the minority's end results approach. *See also Schmidt*, 2013 WL 989829, at *2 (noting that Wisconsin state courts follow the minority rule). And, while bar opinions are not binding authority, Illinois courts do look to them for guidance. *See e.g., Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 194-95 (1st Dist. 2007).

In Opinion 94-13, a lawyer sought advice as to whether he had to turn certain investigative materials over to a client. The Committee looked to Illinois Rules of Professional Conduct (RPC) 1.15(b) (now 1.15(d)), which provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person *is entitled to receive* ..." and RPC 1.4(a), which provides that: "A lawyer shall keep a client reasonably informed about the status of the matter" and "promptly comply with reasonable requests for information." Opinion 94-13, at *2 (emphasis added). Based on the requirements of the RPCs, the Committee concluded that a client is entitled to receive the "end result" or the "lawyer's finished product," and not "the tools used by the lawyer" to reach the end result. In particular, a client *is entitled* to receive the following types of documents:

- documents and other materials the client gave the lawyer;
- correspondence between the lawyer and the client and between the lawyer and third parties;
- "copies of pleadings, briefs, applications and other documents prepared by the lawyer and filed with courts or other agencies on the client's behalf;" and
- *final* "copies of contracts, wills, corporate records and other similar document prepared by the lawyer for the client's use."

A client is not, however, entitled to receive:

- *drafts* of pleadings, briefs, contracts, wills, corporate records and other similar documents;
- "administrative materials relating to the representation such as memoranda concerning potential conflicts of interest or the client's creditworthiness, time and expense records, or personnel matters"; and
- "the lawyer's notes, drafts, internal memoranda, legal research, and factual research materials, including investigative reports, prepared by or for the lawyer for the use of the lawyer in the representation."

As to the administrative materials, the Committee noted that such materials "are usually prepared only for the lawyer's internal use." The Committee further noted that, "'[t]he 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.'" *Id.* (citing Restatement of The Law Governing Lawyers, §58, Comment d (Tentative Draft No. 4, April 10, 1991). Indeed, even "entire file" jurisdictions recognize this exception to a client's access. *See, e.g., Schmidt* & *Sage Realty Corp., supra.*

With respect to the lawyer's drafts, notes and factual or legal research materials and the like, although the Committee recognized that other jurisdictions had taken different positions, it concluded that "the better rule is that these materials are the property of the lawyer ... [and] generally need not be delivered to the client." Opinion 94-13, at *4.

Courts following the majority "entire file" approach disagree with limiting a client's access to end results. For example, in *Schmidt,* the court explained that the "entire file" rule made sense because "it provides the client, not only the end products, but also the discovery his attorneys have developed, as well as any pertinent factual

or legal analysis. Likening the situation to a contractor hired to build a house, the court reasoned that "a contractor hired to build a house does not take back the materials and labor he contributed to the project after he has been paid for them if, because of a dispute with the owner, he does not complete the project."

The Question of Control and Its Effect on Disclosure and Production Requirements

Whether courts take the "entire file" or "end result" approach also dictates what documents a client must produce when the client is served with a subpoena or document requests. For example, if an Illinois court relies on Opinion 94-13, it is likely to conclude that a client "controls" only those documents a client is entitled to receive if the client requested them. On the other hand, documents that the an attorney is not required to give to the client–including administrative materials, drafts, attorney notes and similar non-final documents–are not within a client's control for purposes of an Illinois Supreme Court Rule 214 request. Whether or not they "control" the client files, attorneys should keep in mind that they may have a protected interest in preventing the disclosure of client files in discovery. In *Hobley v. Burge*, 433 F.3d 946, 950 n. 3 (7th Cir. 2006), the Seventh Circuit touched on the issue of the client's "control" over documents in the hands of a former attorney in the discovery context.

There, the plaintiff, in a Section 1983 action, sought certain documents from the defendant City of Chicago (the City)–including documents in the possession of the City's former attorney, Jones Day. Prior to the lawsuit, Jones Day had produced 52 boxes of documents from an underlying police board proceeding in which Jones Day represented the City to the City's current attorney in the Section 1983 action. Jones Day withheld from that production five boxes of work product documents. Jones Day did not know about the Section 1983 action or the request for documents therein. The City's attorney produced the 52 boxes of Jones Day documents to the plaintiff in the Section 1983 action, but did not mention the documents withheld on work product grounds. When the court later learned of those documents, the court ordered the City to produce them.

Jones Day then appeared and asked the court to reconsider and allow it to assert its work product claim. The court held that Jones Day had not timely asserted its privilege and therefore waived it. The Seventh Circuit disagreed. It held that because Jones Day was never served with a non-party subpoena or given notice by the City of the document request, Jones Day did not waive its right to assert work product protection. Moreover, the court noted that an attorney has an independent interest in privacy, and thus may assert work product privilege even when the client has waived it.

In considering whether the City–the client–had "control" over the withheld documents, the court noted that "[b]ecause [the law firm] has an independent interest in privacy, we believe its privilege claim would have negated the [client's] 'control' of the documents for purposes of this litigation." The court further stated that Federal Rule of Civil Procedure 34 request for documents directed to the client did not encompass, and was not the

UPCOMING YLS EVENTS

Bundled Blessings Diaper Drive

The YLS will be collecting diapers of all sizes to be donated to Bundled Blessings. Bundled Blessings is an all-volunteer diaper pantry whose mission is to supply diapers to families in need through partnerships with local social service agencies in Evanston, Illinois.

Federal programs such as LINK (f/k/a Food Stamps) and WIC (Women, Infant and Children) do not allow for the purchase of diapers. Local agencies that are supported by Bundled Blessings include Connections for the Homeless, Family Residential Program and the Infant Welfare Society of Evanston at Evanston Township High School's Teen Baby Nursery. Donations may be dropped off at the CBA building (321 S Plymouth Ct.) thru December 13. Monetary donations will also be accepted and will go towards the purchase of diapers. Checks should be made payable to "First United Methodist Church of Evanston" with "Bundled Blessings" in the memo.

Dreams and Echoes: Drawings and Sculptures in the David and Celia Hilliard Collection

Join the CBA for a special look at the "Dreams and Echoes" exhibit at the Art Institute of Chicago on Thursday, November 21. YLS Founder David Hilliard and his wife Celia's impressive collection contains over 115 artworks ranging from 16th-century drawings to 20th-century works on paper and sculpture. Artist works on display include Odilon Redon, Edgar Degas, Jean-Francois Millet, and Henri Matisse.

The evening will begin with a wine and cheese reception at Association Headquarters at 5:00 p.m. During the reception, Suzanne Folds McCullagh, curator of prints and drawings at the Art Institute of Chicago, will be hand to discuss the exhibit with attendees. At 6:30 p.m. buses will depart the CBA for a viewing of the exhibit at the Art Institute of Chicago. Bus transportation will be provided back to the CBA. $45 per person. Make a reservation by November 18 with Tamra Drees, CBA Events Coordinator, at 312/554-2057.

correct discovery tool for gaining access to, work product held by an attorney. Rather, generally, a subpoena is the proper method of seeking documents from a nonparty, including "work product held by a non-party attorney."

The court declined to address Jones Day's "more ambitious argument" that its work product constitutes the firm's "exclusive property" and that its former client has no entitlement to it for any purpose. The court noted that since there was no dispute between Jones Day and the City, that it "need not decide the scope of a law firm's work-product rights against a current or former client."

In short, Opinion 94-13 is the only Illinois authority on the issue of what parts of an attorney's file a client is "entitled to receive" under the rules of professional conduct. Based on the Opinion, generally, a client is entitled to the attorney's' "end results," such as final pleadings, briefs, contracts and the like, and routine matters, such as correspondence with the client and third parties. A client is not entitled to the attorney's administrative files about the client, drafts, notes and other documents that are likely to be the attorney's work product. In discovery, an Illinois court is likely to consider the client to have "control" over (and therefore be required to produce if requested) only those documents in the possession of the attorney that the client is "entitled to receive." ■

Timothy J. Miller is a Partner, and Shelby L. Drury is Of Counsel to Novack and Macey LLP