

BBA Ethics Opinion 92-2

Summary:

When the FDIC takes over a failed bank the FDIC may be "a former client" of a lawyer who previously represented the bank in conveyancing and other matters for purposes of applying DR 2-110(A)(4). Thus, when the FDIC requests that the attorney turn over a large volume of files created during the course of the attorneys representation of the bank and the lawyer wishes to retain copies of "investigatory documents" or "work product" in his files, the lawyer may not require the FDIC to pay the copying costs with respect to work product for which the bank has paid but has not received copies. With respect to title abstracts and related work product prepared in connection with the attorneys performance of services as agent for a title insurance company with respect to a real estate transaction financed by the bank, the bank is not entitled to the attorney's work product unless the work was also performed for the bank and paid for by or on behalf of the bank. To the extent that any of the work product pertains to matters as to which the attorney has not been paid, the attorney may require the FDIC to pay copying costs to the extent of such non-payment unless such a course would unfairly prejudice the FDIC.

Facts:

The inquiring lawyer reports that he represented a bank during the period from 1979 through 1991 providing professional services in connection with conveyancing, foreclosure and collection matters. In 1991 the bank was taken over by the FDIC. The attorney was asked to turn over all active files to successor counsel and he complied with this request.

The attorney later received a call from the FDIC requesting that he assemble all files for services that had been rendered since 1978 for the FDIC to pick up. The attorney estimates that he has between 1200 and 2000 files. Most of the files were in storage and most concerned conveyancing matters.

The attorney's title insurance carrier and malpractice carrier advised the lawyer to retain the original files concerning title certifications because of the possible later assertion of claims regarding the attorney's work in that regard. He informed the FDIC of this and offered the FDIC access to the documents and an opportunity to make copies of them. The FDIC insisted that the attorney pay the copying charges associated with this duplication effort.

The attorney surmises that the FDIC's interest in these files stems in part from the FDIC's investigation into the activities of former officers and/or directors of the failed bank. During the past three years several of the requested files were reviewed by the FBI and agents of federal and state banking authorities.

The attorney reports that there are no original documents in the files other than the attorney's own work product, principally the attorney's title examinations, copies of title insurance policies and original correspondence. It was the attorney's practice to turn over to the bank all original documentation concerning the real estate closings in which the attorney represented the bank.

Questions Presented:

1. Are the files requested by the FDIC "client files?"
2. If they are client files, who bears the cost of copying those files?

Discussion:

The question of rights in files created during the course of legal representation is addressed in DR 2-110(A)(4) which became effective on January 1, 1992. That rule provides in relevant part:

(4) An attorney must make available to a former client, within a reasonable time following the clients request for his or her file, the following:

(a) All papers, documents, and other materials the client supplied to the attorney. The attorney may at his or her own expense retain copies of any such materials.

(c) All investigatory or discovery documents for which the client has paid the attorney's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The attorney may at his or her own expense retain copies of any such materials.

(d) If the attorney and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the attorney's work product (as defined in paragraph (f) below) for which the client has paid.

(f) For purposes of this Disciplinary Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the attorney or at the attorney's direction by his or her employee, agent, or consultant, and not described in paragraphs (b) [which deals with pleadings and other court filings] or (c) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence.

(g) Notwithstanding anything in this Disciplinary Rule to the contrary, an attorney may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly.

The inquiring attorney's first question is whether the files described above are "client files." We do not here decide whether the FDIC has stepped into the shoes of the failed bank as the attorney's "former client" as that term is used in DR 2-110(A)(4). *See* 12 U.S.C. secs. 1821, 1823; *FDIC v. Cherry, Bekaert & Holkmd*, 129 F.R.D. 188 (M.D. Fla. 1989). This question turns at least in part on federal banking law and is thus beyond the scope of this committee's authority. We render this opinion making the assumption, as the inquiring lawyer appears to assume, that the FDIC has assumed sufficient rights of the failed bank to be considered the 'former client' for purposes of the rule.

Next, we analyze whether the kind of files that the FDIC has requested fall into any category addressed in DR 2-110(4). We infer from the inquiring lawyer's letter that the bulk of the files involved conveyancing matters.¹ We will therefore, focus our discussion on the type of attorney files that are commonly generated in such transactions.

Our understanding of the customary practices of attorneys representing banks in conveyancing matters is that the bank will send to its closing attorney a transmittal letter of instructions, a copy of the loan commitment, forms of note and mortgage and other documents setting forth the requirements of the bank for the closing. Original copies of the note, mortgage, certification of title, and possibly other documents² are typically furnished to the bank immediately after the closing.

There are other categories of documents that the closing attorney commonly keeps in his or her files without furnishing copies to the bank. Included in this category would be a title abstract or title certification, the attorney's notes of the title search, correspondence with the borrower or borrower's counsel, and with the providers of such things as the title abstract, the plot plan, insurance binders, lien certificates, inspection certificates and the like.

Initially, we believe that with respect to documents as to which the attorney had furnished either the original or a copy to the bank, the attorney faces no ethical obligation to pay for copying a duplicate, although the documents must be made available for copying by the FDIC. We hold this view even if bank personnel lost or destroyed such documents before the FDIC took over the bank. We do not read the disciplinary rule to require attorneys to furnish clients multiple copies of documents at their own expense and FDIC's rights in this regard are no greater than those of the failed bank that it took over.

With respect to documents in the attorneys' files that were never furnished to the bank, we conclude that the documents constitute either "investigatory documents," within the meaning of DR 2-110(4)(c), or "work product," within the meaning of DR 2-110 (4)(f). The principal distinction drawn in the disciplinary rule between these two categories appears to be that "investigatory documents" are documents prepared by persons other than the lawyer and for which the client is either billed directly by the preparer or billed by the lawyer as a disbursement. "Work product" on the other hand is actually prepared by the lawyer or persons employed and supervised by the lawyer such as paralegals.³

DR 2-110 treats both categories of documents in a similar fashion and for purposes of this opinion it is not necessary to place particular kinds of documents in one category or another. If the materials were prepared as part of or in connection with the attorney's representation of the bank and if the bank has paid for the preparation of the materials, then the FDIC is entitled to their return. The attorney can keep a copy of such materials at his own expense. It follows that if as we have been advised, the FDIC has agreed that the attorney may keep the original files on the condition that the inquiring attorney furnish copies at his own expense, in our opinion the attorney must comply, except as provided below.

In reaching this conclusion, we assume that in most if not all of the transactions in which the attorney represented the bank, the borrower was contractually obliged to pay the bank attorney's fee. Such arrangements are common, and do not result in the borrower supplanting the bank as the attorney's counsel.⁴ In our view, the "client" pays for work even where a third party contractually undertakes with the client to make the actual payments.

Our opinion is qualified in a few respects. Both DR 2-110(A)(4)(c) and (d) entitle the client only to files for which it has paid. The inquiring attorney reports that there are substantial amounts owed to him by the bank for services rendered. In our view, the attorney may insist that the FDIC pay any copying costs associated with the reproduction of "investigatory documents" for which the attorney's out of pocket costs have not been paid and "work product" for the preparation of which the attorney has not been compensated, unless, as provided in DR 2-110(A)(4)(f), retaining the documents "would prejudice the client unfairly." We have a difficult time envisioning how the FDIC would be unfairly prejudiced in this context where government investigators have already had access to the documents, the volume of material requested indicates no particular selectivity and there is nothing to suggest that the FDIC is unable to pay the copying costs.

Moreover, in performing services for the bank, the attorney may have relied on materials prepared in connection with the representation of clients other than the bank. For example, conveyancing attorneys often maintain a "library" of title abstracts for particular properties prepared for prior borrowers or lenders. A later client is not entitled to the work product prepared

by the attorney for other clients. Moreover, in particular transactions, the attorney may have analyzed title, not for the lending bank but for the title insurance company that furnishes a title insurance policy. To the extent the attorney has been compensated for work product by the title company or some client other than the bank, the FDIC is not entitled to a copy of the title and, if the attorney is willing to furnish a copy of the relevant work product, the FDIC may be required, at a minimum, to pay the copying costs.

We expect that these exceptions will not be applicable to the bulk of the requested files because in most instances the bank will have paid for the work associated with their creation. With respect to these files, the financial burden of keeping copies rests with the attorney under DR 2-110(A)(4).

ENDNOTES

¹ To the extent that the attorney has files concerning collection or other matters handled for the bank that involved litigation, DR 2-110(A)(4)(b) applies to "pleadings and other papers filed with or by the court or served by or upon any party." With respect to such files, the lawyer may require the FDIC to pay the attorney's actual copying costs associated with duplicating such files unless the bank "has already paid for such materials." We understand the exception to apply to situations in which the lawyer has copies in his or her files for which the bank was charged the copying costs. We do not understand the rule to require the attorney to pay for copying documents where copies had previously been furnished to the client

² Examples of original documents that would commonly be furnished to the bank by the closing attorney would include: a urea-formaldehyde certificate, plot plan, title insurance policy, mechanic's liens, persons in possession affidavits, financial disclosure forms concerning the borrower, and homeowner's insurance binders.

³ Thus, for example, if the attorney had engaged a title company to prepare a title abstract, we would consider the resulting abstract to be an "investigatory document," whereas if the attorney had prepared the abstract himself, we would consider it "work product".

⁴ We are aware that on some occasions the borrower's counsel is on the bank's list of approved counsel and the bank and borrower will agree that the attorney will represent both parties to the transaction. In such situations, the attorney's obligations with respect to files runs to both. We express no opinion as to the limitations that may be placed upon such practices by DR 5-105.