

**FIRST DISTRICT APPELLATE PROJECT  
TRAINING SEMINAR  
January 17, 2014**

**ETHICAL REQUIREMENTS OF  
DOCUMENT RETENTION & DISPOSAL**

**ANYA EMERSON  
Staff Attorney  
First District Appellate Project  
January 2014**

# **Ethical Requirements of Document Retention & Disposal**

1:00 pm – 1:30 pm

Presented by

Anya Emerson, FDAP Staff Attorney

First District Appellate Project

January 17, 2014

# Presenter

- Anya Emerson
  - Dependency Staff Attorney at the First District Appellate Project
    - aemerson@fdap.org
    - 415-495-3119
- Many thanks to Staff Attorney Fran Ternus for her earlier article, *Obligations of Appellate Attorney to Turn Over Files to Appellant/Successor Counsel* (Jan. 24, 2004) First District Appellate Project <[http://www.fdap.org/downloads/seminar-p\\_and\\_e/seminar\\_1\\_04\\_client\\_files\\_materials.pdf](http://www.fdap.org/downloads/seminar-p_and_e/seminar_1_04_client_files_materials.pdf)>

# Contents of a Client Case File

- **Communications with appellant** - typically, letters or emails to and from appellant and notes of telephone conversations with appellant
- **Formal documents and transcripts** - such as filed pleadings and briefs, court orders and opinions, as well as discovery and the verbatim transcripts of the proceedings.
- **Work product** - defined as “a writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories.” (Code Civ. Proc., § 2018.030, subd. (a).)
- **May be in electronic and/or hard copy format** – Client case files are now typically comprised of manila folders, bound briefs, records, and transcripts, along with electronic files on hard drives, laptops, CDs, DVDs, memory sticks, and on- and off-site servers.

# Ethical Standards on Client Case Files

- ***The File Belongs to the Client***
  - As a general rule, the entire contents of the case file other than attorney work product belong to the client and must be provided to the client or successor counsel at the client's request. (Cal. State Bar Formal Opn. 1992-127; see also Rules Prof. Conduct, rule 3-700(D)(1).)
- ***Work Product Exception***
  - There is no ***bar*** against giving a former client access to work product. The only question is whether the attorney can withhold the work product from the former client.
  - ***An attorney has an ethical obligation to deliver work product to a former client, upon request, where the failure to do so will result in reasonably foreseeable prejudice to the rights of the former client*** or where a court orders the work product produced. (Cal. State Bar Formal Opn. 1992-127 ["Thus, the attorney must turn over all papers and property in the client's file to the client or to successor counsel. This would include the entire contents of the file . . . and includes work product reasonably necessary to the client's defense."].)

# Rule 3-700: “Client Papers and Property”

- **Rule 3-700(D)(1)** of the Rules of Professional Conduct of the State Bar of California provides as follows:

Subject to any protective order or non-disclosure agreement, **promptly release to the client, at the request of the client, all the client papers and property.** “Client papers and property” includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not . . . (Rules Prof. Conduct, rule 3-700 (D)(1).)
- The attorney must make such release of client papers and property **at no cost to the client.**

# Electronic Client Case Files Must Also be Released at Client's Request

- “Client papers and property” is *not* a “static concept.” It **includes items in electronic as well as non-electronic form.** (Cal. State Bar Formal Opn. No 2007-174.)
- “Upon client’s request, **Attorney must release to the client the electronic versions of all papers and property in question, at Attorney’s expense**, after first stripping each document of any and all metadata that contains confidential information belonging to other clients.” (*Id.* at 3, citing Bus. & Prof. Code, § 6068, subd. (e)(1).)

# Preserving Confidentiality

- **Transferring, retaining, and disposing of electronic and non-electronic client case files implicates confidentiality concerns.**
- A lawyer has a duty to “maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of his or her client.” (Bus. & Prof. Code, § 6068, subd. (e)(1)).
- “A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client.” (Rules Prof. Conduct, rule 3-100(A).)
- The client’s confidential information may not be revealed absent the informed written consent of the client. (Rule 3-100(A); Cal. State Bar Formal Opn. No. 2010-179; Cal. State Bar Formal Opn. No. 2012-184.)

# File Belongs to Client: Practical Implications

- **During the pendency of the appeal:**
  - Clients should be contemporaneously sent copies of pleadings and opinions as filed.
- **When the appeal is over:**
  - Send client (or designee) the record on appeal (reporter's and clerk's transcripts). Doing so will help reduce costs and risks associated with long-term file storage.
  - Upon the client's request, send client (or designee) the entire client case file, including attorney work product if withholding it would be prejudicial to the client.
- **What this means in practice:**
  - Affirmatively **encourage your client to accept the transcripts**, if possible.
  - **Ensure confidentiality:** If your client cannot or will not accept the transcripts (e.g., is incarcerated and the records reveal him to be a child molester), ask him/her if you can send them to a designated friend or family member.
    - Where cases involve long records or sensitive information, ***make sure to get permission first from your client before sending the transcripts***.
  - **Redact confidential information** as appropriate (see below).
  - **Remove metadata** if sending electronic files (see below).
  - **Send transcripts** (***make sure to verify address first***).
    - Optional: Scan and retain an electronic copy of the transcripts for your own records.
  - **Retain remainder of case file in long-term storage**, including attorney work product, billing documents, etc.

# Required Redactions

- **Certain information must be redacted before releasing to the client case file materials and transcripts:**
  - **Jurors' names** must be redacted from the record. (Code Civ. Proc., § 237.)
  - Further redaction may be required if, for example, you obtained files or documents (including police reports) from trial counsel.
    - For instance, **victims' and witnesses' addresses and phone numbers** received by trial counsel in discovery pursuant to section 1054.1, subdivision (a) of the Penal Code cannot be disclosed to anyone, including the defendant. (See Pen. Code, § 1054.2.)
    - A **victim of a sex offense** may request nondisclosure of his/her name and/or address as well. (See Pen. Code, § 293; Gov. Code, § 6254, subd. (f)(2).)
  - Dependency cases: **Identity of mandatory reporters** (Pen. Code, § 11167) and **names and addresses of foster parents** may be confidential. (See e.g. Welf. & Inst. Code, § 308(a), Cal. Rules of Court, rule 5.715, 5.720, 5.725.)
- See FDAP's *Appeals Checklist*, <<http://www.fdap.org/t-checklist.shtml>>
- See Elaine Alexander, *Confidential Records* (Dec. 2011) Appellate Defenders Inc. <[http://www.adi-sandiego.com/news\\_alerts/pdfs/2011/CONFIDENTIAL RECORDS PDF version.pdf](http://www.adi-sandiego.com/news_alerts/pdfs/2011/CONFIDENTIAL RECORDS PDF version.pdf)>

# Turning Over Electronic Files to Clients: Removing Metadata

- **What is metadata?**
  - “Data about data”
  - “Metadata” is hidden information about the document, which may include, for instance, comments, revisions, versions, annotations, document properties, invisible content and hidden text. Much metadata may be considered attorney work product, and may be treated the same as work product found in paper files, and may not need to or should not be disclosed to clients. (Orange County Bar Formal Opn. 2005-01.)
- **All word processors attach metadata by default.**

# Removing Metadata cont.

- Metadata should be removed from electronic documents released to clients
- “Upon client’s request, *Attorney must release to the client the electronic versions of all papers and property in question, at Attorney’s expense, after first stripping each document of any and all metadata that contains confidential information belonging to other clients.*” (Cal. State Bar Formal Opn. No 2007-174.)

# How to Remove Metadata: Instructions & Links

- **General guide (Incl. OpenOffice):**
  - <http://lawyerist.com/how-to-quickly-and-easily-remove-meta-data/>
- **Official Microsoft instructions on removing hidden data from 2010/2013 editions of their software:**
  - **Word:** <http://office.microsoft.com/en-us/word-help/remove-hidden-data-and-personal-information-by-inspecting-documents-HA010354329.aspx>
  - **Excel:** <http://office.microsoft.com/en-us/starter-help/remove-hidden-data-and-personal-information-by-inspecting-workbooks-HA010354331.aspx?CTT=1>
  - **Powerpoint:** <http://office.microsoft.com/en-us/powerpoint-help/remove-hidden-data-and-personal-information-by-inspecting-presentations-HA010354330.aspx>
- **Removing metadata from earlier editions of MS Word:**
  - <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Subjects/4CBEBFE4C3C37ED7852574CE005ACE92>
- **Removing metadata from Word 2011 for Mac:**
  - <http://oregonlawpracticemanagement.com/2012/02/13/scrubbing-metadata-from-word-2011-for-mac/>
- **Removing WordPerfect metadata:**
  - **X3:** [http://apps.corel.com/lp/wpx3/4627/Metadata\\_Removal.pdf](http://apps.corel.com/lp/wpx3/4627/Metadata_Removal.pdf)
  - **Any edition:** <http://wptoolbox.com/tips/UndoRedo.html>
- **Note that WordPerfect editions 13 and later have the option of choosing “Save without metadata”**

\*FDAP has not tested, nor does it endorse, any of these products or procedures.

# Retention of Client Case Files

- General rule for criminal attorneys: the client case file must be retained *for the life of the client* – not the life of the attorney.
- Many of your clients may outlive you!
- Your obligation to retain client case files will likely persist after your death or incapacitation.

# Reasons to Retain Client Case Files

- Criminal defense attorneys should retain files for the life of the client for multiple reasons, including:
  - Habeas petitions, including ineffective assistance of counsel;
  - malpractice claims;
  - three-strikes defense; and
  - actual innocence claims.

# Retention of Files Cont.

- **Juvenile Delinquency Case Files**
  - Same standards apply as in criminal cases
  - Should also be retained for the life of the client
- **Juvenile Dependency Case Files:**
  - Gray area between civil and criminal
  - Should be retained for a substantial time period, if not the life of the client(?)
  - Previous dependency cases may impact current and future dependencies (See e.g. Welf. & Inst. Code, § 361.5, subds. (b)(10), (b)(11).)

# Statutory Law on File Retention

- No California statute expressly governs client file retention
  - BUT: *A lawyer has a duty to “maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of his or her client.”* (Bus. & Prof. Code, § 6068, subd. (e)(1)).

# State Bar Rules of Professional Conduct

- California's professional standards are generally silent about lawyers' duties to maintain former clients' files.
  - For instance, rule 3-700(D)(1) does not establish a fixed time period for which any particular item must be retained. Moreover, it does not provide guidance on when, if ever, a particular item may be discarded.

# State Bar Formal Opinion on File Retention

- Although not binding authority, the State Bar of California Committee on Professional Responsibility and Conduct has issued a formal opinion on attorneys' duties in retaining clients' files. Specifically, the committee held that *"client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive."* (Cal. State Bar Formal Opn. No. 2001-157.)

# Other Ethics Opinions on File Retention

- ***In a criminal matter, the lawyer must maintain the file for the life of the former client***, unless authorized by the former client to destroy it or otherwise release it. Considerations pertaining to the criminal defendant's liberty interest in the proceedings and to the possibility of review of a criminal convictions by appeal or writ (even many years after conviction) warrant especially cautious treatment of criminal case files. (L.A. County Bar Assn. Formal Opn. No. 420.)

# Other Ethics Opinions cont.

- If the client does not request the file, **the client's right to the file continues after termination of the attorney-client relationship.** Opinion No. 475 suggests file retention for at least five years after the matter is closed may be appropriate in some civil cases, but quotes Op. No. 420 that ***criminal files must be maintained for the life of the former client.*** (L.A. County Bar Assn. Formal Opn. No. 475 and No. 330.)

# Other Ethics Opinions cont.

- The length of time papers must be maintained depends upon the nature of the document, the nature of the services rendered to the client, and any other factors to determine whether prejudice to the client would arise by destruction of the papers. “We must stress that [the State Bar rules] do not address the number of years which an attorney must retain client papers. There is no rule that provides such a time period and, in our view, no rule should. The key ... is the attorney’s obligation as a bailee of the client’s personal property and the need to retain papers which are necessary to preclude reasonably foreseeable prejudice to the client. ***This duty cannot be discharged merely by reference to a fixed time period.***” (S.F. Bar Assn. Formal Opn. 1996-1.)

# Ethics Opinions cont.

- In a 1977 informal opinion, the ABA Committee on Ethics and Professional Responsibility specifically refused to mandate a definitive time period during which a lawyer must preserve all files and beyond which s/he is free to destroy all files, advising instead that ***an attorney must use “good common sense.”*** While noting that “a lawyer does not have a general duty to preserve all of his files permanently,” **the Committee cautioned against the destruction of original documents belonging to the client, the discarding of information that may be useful in the assertion or defense of the client’s position, or the destruction of information that the client may need**, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the lawyer. (ABA Com. on Ethics & Prof. Resp., informal opn. No. 1384 (1977)).

# The Million Dollar Question: Can I retain my criminal client case files solely in electronic format?

- For example, may I scan client files, save them in pdf format, and then destroy the hard-copy documents?
  - No California statute, ethical standard or bar opinion has yet to *directly* address this issue.
  - The State Bar has clearly opined that “criminal case files should not be destroyed without the former client's express consent while the former client is alive.” (Cal. State Bar Formal Opn. No. 2001-157.)

# Million Dollar Question cont.

- Cal. State Bar Formal Opn. No. 2001-157, which concluded that client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive, does not appear to bar electronic storage and destruction of hard copies.
  - It was in answer to a different question (primarily length of file retention, not format), and is now more than a decade old.
  - Its warning about electronic documents was a caveat to a statement allowing storage by microfilm or “similar means”:
    - **“Not all recording by electronic means will suffice to protect the client from reasonably foreseeable prejudice.** As indicated by Government Code section 26205 et seq., not all devices used to reproduce records accurately reproduce the originals in all details without permitting additions, deletions, or changes to the original document images.” (Cal. State Bar Formal Opn. No. 2001-157.)

# Retention of Particular Hard Copy Documents

- Particular hard-copy documents may need to be retained or should be retained by law:
  - Current Rules of Court require the retention of certain original **documents signed under penalty of perjury** or by multiple parties (e.g., stipulations) for electronic filing purposes. (Rules of Court, rule 8.77(a), 8.77(c).)
  - **Original declarations** (especially by lay people or witnesses) should be retained (e.g., in habeas cases, to ensure authenticity)
  - Original **documents of independent legal significance** (wills, trusts, etc.) must be maintained pursuant to the Probate Code.
  - Death certificate (e.g., in appeal abated)
  - Exculpatory letter from a third-party to the defendant
  - Naturalization records and certificates of citizenship may not be copied (18 U.S.C. § 1426.)

# Other Ethics Opinions on Electronic Document Retention

- **Arizona Opinion 07-02 (6/2007)**
  - “In appropriate cases and with appropriate safeguards, a lawyer ethically may keep active and closed client files as electronic images in an attempt to maintain a paperless law practice, with the understanding that he or she may need to provide paper versions to the client and any subsequent attorney.”
  - “However, until the file legitimately may be destroyed . . . a lawyer may not, without client consent, destroy original paper documents [except for letters to the attorney from the client] that belong to or were obtained from the client. Similarly, a lawyer may not, without client consent, convert to digital images and then destroy photocopies or facsimiles of documents obtained from the client if the lawyer has reason to know the client expects the lawyer to keep the paper documents.”

# Other Ethics Opinions cont.

- **Maine Opinion 183 (1/28/04)** finds that a lawyer may store client correspondence and documents in electronic format without keeping a paper copy, but must retain them in a way that permits the client and the lawyer to access them in the future. For example, the lawyer may need to retain old versions of software in order to ensure access to particular documents.

# Other Ethics Opinions cont.

- **Missouri Opinion 20010147 (11/01-12/01)** advises that a lawyer who wants to scan closed client files onto a CD-ROM may not then dispose of the hard copy of the files without the clients' permission. The hard copy of a file belongs to the client.

# Other Ethics Opinions cont.

- **Virginia Ethics Opn. 1818 (9/30/05)** – Finding no per se ethical prohibition against maintaining paperless client files, the panel concluded that lawyers generally may destroy paper copies of documents if the client consents and may retain only scanned electronic copies, except for items that have independent legal significance such as testamentary documents and marriage certificates. Subject to the need to preserve such documents, lawyers may even require clients to consent to electronic files as a condition for representation in the first place.

# Ethical implications of electronic document storage

- **Attorney must take reasonable steps to protect and secure the client's information** (Cal. State Bar Formal Opn. No. 2012-184; Cal. State Bar Formal Opn. No. 2010-179.)
- Must **ensure confidentiality** (e.g., choose data service providers with care, and use firewalls, secure user names & passwords, encryption, anti-virus software etc.)
- Must ensure **digital backups** exists (extra hard drive, storage in the “cloud”, off-site server, etc.)
- Must ensure electronic files are maintained in **readily-accessible format** (i.e., no more floppy disks!)
- Must ensure your designated successor counsel knows how to access the information if necessary (identity of passwords, location of hard drives)
- Try to save documents in non-modifiable format (e.g., pdf rather than Word version).

# Ethical Obligations for Document Destruction and Disposal

- If, in your professional judgment, a document (or copy thereof) can be discarded, what ethical obligations apply?
  - **Duties of confidentiality and client secrets continue** (Prof. Conduct, rule 3-100(A).)
  - “Thus, the duty stated in section 6068, subdivision (e) applies to the storage, handling, and ultimate disposition of the files and papers of former clients. Accordingly, **the attorney is obliged to use a method of destruction that will ensure no breach of confidentiality.**” (Cal. State Bar Formal Opn. No. 2001-157.)

# Practical Implications

- **All hard copy documents which can be destroyed must be shredded or otherwise rendered indecipherable.** (See Civil Code §§ 1798.80 - 1798.84, which provides for penalties up to \$3000 for a violation of this requirement.)
- **Personal client information cannot simply be thrown in the trash.** Confidentiality must be preserved pursuant to Business and Professions Code § 6068, subd. (e) and Evidence Code §§ 950 et seq. [attorney-client privilege]
- Both paper and “digital” shredding services are commonly available (e.g., Green Citizen, Corovan)

# Disposal of Electronic Data

- **Electronic documents and equipment must also be digitally “shredded.” (Cal. State Bar Formal Opn. No. 2001-157.)**
  - A free program for PCs is a Microsoft product called SDelete, for “secure delete,” which writes over the relevant portions of the hard drive.
    - Download available at: [http://download.cnet.com/SDelete/3000-2092\\_4-95740.html](http://download.cnet.com/SDelete/3000-2092_4-95740.html)
  - A similar free program For Macs is “Eraser”:
    - Download available at: [http://download.cnet.com/Permanent-Eraser/3000-2092\\_4-10668789.html](http://download.cnet.com/Permanent-Eraser/3000-2092_4-10668789.html)

\*FDAP has not tested, nor does it endorse, any of these products.

# Digital “Shredding” cont.

- **Securely delete files from a Mac:**
  - [http://www.macworld.com/article/1166104/how to securely delete files.html](http://www.macworld.com/article/1166104/how_to_securely_delete_files.html)
- **Securely delete files from a PC (with product recs and screen shots):**
  - <http://www.howtogeek.com/72130/>
- **Securely wipe a hard drive or flash drive with Roadkill's Disk Wipe:**
  - <http://www.ricksdailytips.com/roadkils-disk-wipe/>

\*FDAP has not tested, nor does it endorse, any of these products.

# Bibliography

- *Materials on Client File Retention*, ABA Center for Professional Responsibility,  
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- Elaine Alexander, *Confidential Records* (Dec. 2011) Appellate Defenders Inc. [<http://www.adisandiego.com/news\\_alerts/pdfs/2011/CONFIDENTIAL\\_RECORDS\\_PDF\\_version.pdf>](http://www.adisandiego.com/news_alerts/pdfs/2011/CONFIDENTIAL_RECORDS_PDF_version.pdf)

# List of Relevant California Ethics Sources

- Rules Prof. Conduct, rule 3-700(D)(1) [“client papers and property” belong to the client].
- Rules Prof. Conduct, rule 3-100(A) [do not reveal client’s confidential information without informed consent].
- Cal. State Bar Formal Opn. 1992-127 [attorney must release client file to client and/or successor counsel, including work product if otherwise prejudicial].
- Cal. State Bar Formal Opn. No. 2001-157 [retention and destruction of former client files]
- Cal. State Bar Formal Opn. No 2007-174 [electronic files must be released to client without metadata].
- Cal. State Bar Formal Opn. Nos. 2010-179 & 2012-184 [must take reasonable steps to ensure confidentiality of electronic client information].
- S.F. Bar Assn. Formal Opn. 1996-1 [no fixed time period for file retention].
- L.A. County Bar Assn. Formal Opn. Nos. 420 & 475 [criminal files must be maintained for life of client].
- ABA Com. on Ethics & Prof. Resp., informal opn. No. 1384 (1977) [use common sense, but do not destroy documents client may need].
- ABA Com. on Ethics & Prof. Resp., Formal Opn. 92-369 (1992) [solo practitioners must have a plan in place in case of death].

**Editor's Note:**

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
**FORMAL OPINION NO. 2001-157**

**ISSUES:**

What ethical duties does an attorney have regarding the retention of former clients' files? Is the attorney ethically required to retain the files for any specific length of time following the completion of representation?

**DIGEST:**

As to original papers and other property received from a former client, including estate planning and other signed, original documents delivered under Probate Code section 710, the attorney's duties are governed by the law relating to deposits (bailments) or by the Probate Code. With respect to other "client papers and property" to which the former client is entitled under rule 3-700, absent a previous agreement, the attorney has an obligation to make reasonable efforts to obtain the former client's consent to any disposition that would prevent the former client's taking possession of the items. If, after reasonable efforts, the attorney is unable to locate the former client or obtain instructions, the attorney may destroy the items unless he or she has reason to believe (1) that preservation of the items is required by law, or (2) that destruction of the items would cause prejudice to the client, i.e., that the items are reasonably necessary to the client's legal representation. Since the "client papers and property" to which the former client is entitled may include a variety of items, the attorney may have an obligation to examine the file contents before the file is destroyed. No specific time period for retention of a particular item can be specified. Files in criminal matters should not be destroyed without the former client's consent while the former client is alive.

**AUTHORITIES INTERPRETED:**

Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6068(e) and 6149.

**STATEMENT OF FACTS**

Attorneys Smith and Jones are dissolving their partnership. Smith plans to retire; Jones is moving to another state to practice law. Neither wants to pay storage for the closed civil and criminal case files they have accumulated throughout the many years of their practice. All active files have been properly transferred to other attorneys.

**DISCUSSION**

An attorney's obligations with regard to closed client files are derived from rule 3-700 of the Rules of Professional Conduct and Business and Professions Code section 6068, subdivision (e)<sup>1</sup>. Rule 3-700(D)(1) provides that a member whose employment has terminated shall:

"Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not."<sup>2</sup>

Rule 3-700(D) appears to contemplate a situation where the matter in which the attorney has represented the client continues after the termination of the lawyer's employment. But it is settled in California that the client papers and property that the client is entitled to receive belong to the client, not to the attorney. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655 [262 Cal.Rptr. 702, 779 P.2d 761]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 599 [124 Cal.Rptr. 297].) The client's ownership is not altered by the circumstances or the timing of the termination of the attorney-client relationship, or by whether the attorney has been paid for his or her services. (*Academy of California Optometrists, Inc. v. Superior Court* (Damir) (1975) 51 Cal.App.3d 999, 1005-06 [124 Cal.Rptr. 668]; see also Cal. State Bar Formal Opn. No. 1994-134.)

Business and Professions Code section 6068, subdivision (e) requires an attorney, at every peril to himself, to protect the confidential information of the client. Section 6149 declares that a written fee contract is deemed confidential information protected by section 6068, subdivision (e). Thus, the statute and the rule generally impose upon the attorney the ethical obligations:

1. To release to the client on request "all the client papers and property," including all items "reasonably necessary to the client's representation", and
2. To safeguard the client's confidential information protected by Business and Professions Code section 6068, subdivision (e).

This opinion addresses these obligations where there has been no request for the client papers and property and the client is a former client whose whereabouts may be unknown.<sup>3</sup>

## **I. Client Papers and Property in Civil Matters**

Given that an attorney's closed files may contain "client papers and property" to which the former client is entitled, the attorney's ethical obligations in regard to these items, in the absence of an agreement to the contrary, are the following:

- As to original papers and property received from the former client, including estate planning documents delivered to the attorney pursuant to the Probate Code, the attorney's obligations are determined by the law of deposits (bailments), Civil Code sections 1813 to 1847 and Probate Code sections 700 to 735.
- As to other client papers and property to which the former client is entitled under rule 3-700, before disposing of the items, the attorney first must use all reasonable means to notify the former client of the existence of the file, of the former client's right to examine and retrieve the contents, and of their intended destruction. While there is no specific authority as to what such a notice should contain, the purpose of the notice will be advanced if it states plainly that the files in question will be destroyed unless contrary instructions are received by the attorney by a specific date, and gives a reasonable opportunity to respond.
- If the attorney has no reason to believe that the items proposed to be destroyed include things required by law to be maintained or that would be reasonably necessary to the former client to establish a right or a defense to a claim, then if the former client cannot be located by any reasonable means, or fails to respond to the notice after a reasonable time, the attorney may destroy the items.
- If the attorney has reason to believe that the file contains items that are required by law to be retained or that the client will reasonably need to establish a right or a defense to a claim, the attorney should inspect the file for such items and should retain such items for the period required by law or according to the reasonably foreseeable needs of the client. The balance of the file may be destroyed.
- The attorney at all times must protect the confidentiality of the contents of the files, including the fee agreement. (Bus. & Prof. Code, §§ 6068, subd. (e), 6149.)

### ***A. Original materials and materials of inherent value***

Acceptance by an attorney of original papers and other property from a client may create special problems because of potential statutory obligations. In the absence of an agreement to the contrary, acceptance of client papers and property delivered by the client is subject to the law of deposit. (Civ. Code, §§ 1813-1847.)<sup>4</sup> Also, estate planning documents and other original signed instruments delivered to an attorney under Probate Code section 710 are to be held for safekeeping subject to the Probate Code sections 700 to 735. These Probate Code sections provide, among other things, that the deposit may be terminated only as permitted by Probate Code sections 731 to 735. Unless terminated as permitted by

these sections, the attorney remains responsible for the safe keeping of the items at all times and has no right to destroy them, no matter how long they have been held, and regardless of whether there is reason to believe that destruction would cause foreseeable prejudice or injury to the client. If it appears reasonably likely to the attorney that a particular client file contains original papers or other property deposited by the client, the contents should be examined for such items.

#### ***B. Other file contents***

As to other "client papers and property" within the meaning of rule 3-700, there is no shortcut, "bright line," rule for determining how long such items contained in a closed file must be maintained or when they may safely be destroyed. The basic principle is that the attorney may destroy a particular item from a former client's file if he or she has no reason to believe that the item will be reasonably necessary to the client's representation, i.e., that the item is or will be reasonably necessary to the former client to establish a right or a defense to a claim.

Opinion 1996-1 of the Legal Ethics Committee of The Bar Association of San Francisco states:

"There is no rule that provides . . . a time period [after which client papers may be destroyed] and, in our view, no rule should. The key to retention of client papers, absent client agreement to other arrangements, is the attorney's obligation as a bailee of the client's personal property and the need to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client. This duty cannot be discharged merely by reference to a fixed time period."

(*Id.*, at pp. 2-3, fnnts. omitted.)<sup>5</sup>

The Committee agrees with Opinion 1996-1 that the attorney's obligation regarding former client files cannot be measured by a fixed time period. The foreseeability, for example, that an environmental or insurance dispute could arise several years after completion of a particular transaction suggests that the need to maintain client papers cannot be measured in all cases by a fixed time period.<sup>6</sup>

Again, the attorney may have an obligation to examine the file contents before destruction. If the attorney is without personal knowledge of the contents of the file, it may be necessary to examine the file before concluding whether there is reason to believe that the client will foreseeably have need of the contents. If the attorney has reason to believe that the file does contain documents that the client will foreseeably need, the file must be examined and the notification to the client should point out the existence of any such documents. Destruction of closed files requires an exercise of judgment. Where an item has no intrinsic value, but the attorney fears that loss of the item will injure the former client, the item should be retained or the information contained therein preserved by microfilming or similar means.<sup>7</sup>

Informal Opinion 1384 (1977) of the American Bar Association Committee on Ethics and Professional Responsibility states that while there is no specific time during which an attorney must preserve all files and beyond which he or she is free to destroy all files, "good common sense" should provide answers to most questions. Among the considerations set forth in that opinion are:

- Whether the information to be destroyed or discarded may still be useful in the assertion or defense of the client's position in a matter for which the statute of limitations has not expired; and
- Whether the information is that which the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the attorney.<sup>8</sup>

Because of the burden and expense of preserving former client files and the uncertainties that may attend their destruction if contact with the former client has been lost, attorneys handling discrete matters such as claims or litigation might consider including in their written fee agreements a provision that following termination of the representation the contents of the file may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client. Such agreement would not be appropriate in all circumstances: for example, it would be inappropriate if the attorney were being retained to write a will or hold documents for safekeeping under the Probate Code or Civil Code.

## **II. Duties in Criminal Matters**

Formal Opinion No. 420 (1983) of the Los Angeles County Bar Association Committee on Legal Ethics points out:

"Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. The Committee concludes, therefore, that it is incumbent on the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative."

Recent adoption of measures such as California's "Three Strikes" law (Proposition 184 of 1994, codified as Penal Code section 1170.12) could make a client file in a matter resulting a prior conviction more important than ever. The Committee concludes that client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive.

### III. Manner of Destruction

Business and Professions Code section 6068, subdivision (e) obligates the attorney "at every peril to himself or herself to preserve the secrets" of his or her client. Business and Professions Code section 6149 states that the protection of section 6068, subdivision (e) covers the written fee agreement with the client.

In some circumstances, the attorney-client privilege may continue even after the death of a client. (Evid. Code, § 957.) An attorney's obligation under section 6068, subdivision (e) to preserve the client's secrets extends beyond matters covered by the attorney-client privilege. (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, fn. 5 [120 Cal.Rptr. 253]; Cal. State Bar Formal Opn. No. 1993-133.)

Thus, the duty stated in section 6068, subdivision (e) applies to the storage, handling, and ultimate disposition of the files and papers of former clients. Accordingly, the attorney is obliged to use a method of destruction that will ensure no breach of confidentiality.<sup>9</sup>

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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<sup>1</sup> This opinion does not address obligations of government attorneys in regard to government papers and property to the extent that preservation thereof is governed by statute or regulation. Likewise, the opinion does not address obligations of the State Bar or any member thereof acting under appointment in a proceeding in which a court has assumed jurisdiction over an attorney's practice pursuant to section 6180.5 or section 6190.34 of the Business and Professions Code. Finally, this opinion also does not address what disclosures, if any, Smith or Jones should have made or should make to a client or former client in obtaining consent to destroy the file.

<sup>2</sup> Rule 4-100(B)(4) requires a member of the State Bar to promptly deliver, as requested by the client, "any funds, securities, or other properties in the possession of the member which the client is entitled to receive". While "properties . . . which the client is entitled to receive" within the meaning of rule 4-100 could be contained in a client file, this Committee does not believe that rule 4-100 applies to "client papers and property" to which rule 3-700 is specific. Other subparts of rule 4-100, in particular the requirement for records itemizing each separate property held by the member, are not, in the Committee's opinion, intended to address the retention of files.

<sup>3</sup> The issue as to what "client papers and property" must be released at the request of the client is beyond the scope of this opinion. There is an unresolved division in the authorities as to the client's right to receive uncommunicated work product of the attorney. (*Metro-Goldwyn-Mayer, Inc. v. Superior Court* (Tracinda Corp.) (1994) 25 Cal.App.4th 242, 248-249 [30 Cal.Rptr.2d 371][issue not resolved]; *Rose v. State Bar*, *supra*, 49 Cal.3d 646, 655 ["an open question"].) It is assumed, for the purposes of this opinion, that the former client files that Attorneys Smith and Jones no longer wish to preserve contain some papers and property that their former clients would be entitled to receive upon request. It is the obligations of the attorneys with respect to those papers and property that are the subject of this opinion.

<sup>4</sup> Papers and property to which the former client is entitled may include original items that are of monetary or historical interest or that are subject to record retention requirements under state or federal law. While required retention periods of no more than three years are most common, California law imposes requirements of as long as eight years for certain

employment records and six years for certain tax and corporate records. A maze of state and federal regulations govern retention of records relating to environmental matters (See Legal Requirements for Business Records: State Requirements (Skupsky and Montana edits., Information Requirements Clearing House, 4th ed. 1997); and Legal Requirements for Business Records: Federal Requirements (Skupsky and Montana edits., Information Requirements Clearing House, 4th ed. 1996).

Because of the attorney's deposit obligations with respect to original client papers, among other reasons, some attorneys' office policies and practices discourage retention of original client records and urge instead that accurate copies be made promptly and the originals returned to the client so that the client has responsibility for retention.

<sup>5</sup> Opinion No. 475 (1994) of the Los Angeles County Bar Association, Professional Responsibility and Ethics Committee, recommends a minimum retention period of five years past the date the matter was closed for attorneys' client files. The five-year period is drawn by analogy to rule 4-100(B)(3), Rules of Professional Conduct, requiring that attorneys preserve for five years records and accountings of funds, securities, and other properties of clients coming into their possession. As stated in footnote 2 above, this Committee does not believe that rule 4-100 is intended to address the retention of files; nor does the Committee believe that a file retention period of five years is in all cases required.

<sup>6</sup> In *Ramirez v. Fuselier* (9 Cir. BAP 1995) 183 Bankr. 583 [1995 Bankr. LEXIS 813], where the files of a bankrupt debtor (an attorney) had been seized in violation of the automatic stay, the court (in dicta) read rule 4-100(B)(3) as requiring an attorney "to keep and maintain files for five years after the conclusion of a case." As noted above, rule 4-100(B)(3) does not refer to client files but to an attorney's record of funds, securities, and other properties of a client coming into the attorney's possession, and the obligation to render accounts. It is those records and accounts that the attorney is required to maintain "for a period of no less than five years after final appropriate distribution of such funds or properties; and [to] comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar." (Rule 4-100(B)(3).)

<sup>7</sup> Not all recording by electronic means will suffice to protect the client from reasonably foreseeable prejudice. As indicated by Government Code section 26205 et seq., not all devices used to reproduce records accurately reproduce the originals in all details without permitting additions, deletions, or changes to the original document images.

There are certain documents the law does not allow to be copied, e.g., naturalization records and certificates of citizenship. (18 U.S.C. § 1426.)

<sup>8</sup> The ABA Model Rules of Professional Conduct "do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own. [Citations.]" (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656 [82 Cal.Rptr.2d 799].) Yet "the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California [Citation.]" (*Id.* at p. 656, emphasis in the original.) Similarly, ABA Formal Ethics Opinions are "not controlling," but may provide "guidance in the formulation of a standard . . . ." (*Ibid.*; cf. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153 [86 Cal.Rptr.2d 816, 980 P.2d 371].)

<sup>9</sup> Likewise, attorneys that dispose of client files stored in electronic form (e.g., tapes, floppy disks, hard drives) must exercise care to use a method of destruction that will ensure no breach of confidentiality.