

January 24, 2004

**OBLIGATIONS OF APPELLATE ATTORNEY  
TO TURN OVER FILES TO  
APPELLANT/SUCCESSOR COUNSEL**

**Fran Ternus**

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**FIRST DISTRICT APPELLATE PROJECT TRAINING SEMINAR**  
**January 24, 2004**

**OBLIGATIONS OF APPELLATE ATTORNEY  
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**I. Contents of A Typical Appellate Case File**

**A. Communications with appellant** - typically, letters to and from appellant and notes of telephone conversations with appellant.

**B. Formal documents and transcripts** - such as filed pleadings, court orders and opinions, as well as discovery and the verbatim transcripts of the proceedings.

**C. Work product** - defined as "any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc. § 2018(c).)

**II. Obligation to Turn Over File if Requested to Do So<sup>1</sup>**

**A. File Belongs to Client** - As a general rule, the contents of the case file *other than attorney work product* belongs to the client and must be provided to the client or successor counsel at the client's request.<sup>2</sup> As seen below, work product is treated a bit

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<sup>1</sup>This material on work product summarizes a longer discussion Jonathan Soglin of FDAP prepared regarding work product, which will shortly be available in the Articles and Outlines area of the FDAP website.

<sup>2</sup>Cal. State Bar Opn. 1992-127; see also Rules of Professional Conduct of the State Bar of California, rule 3-700, (D) (1) which 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

differently.

**B. Obligation to turn over work product to client** 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. In summary, 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.

**C. Three levels of protection for work product in California:**

**1. Purely factual material** is entitled to no protection.

**2. Qualified protection exists for work product which is an amalgamation of facts and attorney thoughts, impressions, conclusions** (*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217.) Such derivative material would include charts and diagrams, audit reports, compilations of entries in documents, records and other databases, appraisals, opinions, and reports of experts employed as nontestifying consultants. Derivative work product will be ordered disclosed if denial of discovery would unfairly prejudice the other party or result in an injustice. (Code Civ. Proc., § 2018, subd. (b); *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1250.)

**3. Core work product**, i.e., material solely reflecting “an attorney’s impressions, conclusions, opinions, or legal research or theories,” is, by statute, “not discoverable under any circumstances.” (Code Civ. Proc., § 2018(c).) Work product, unlike other parts of a case file, is the property of the attorney, not the client. However, the case law on whether core work product is discoverable by a former client is somewhat muddled and there is some uncertainty as to the extent to which core work product is privileged.<sup>3</sup>

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to the client's representation, whether the client has paid for them or not.

<sup>3</sup>Courts have noticed “that California has two conflicting absolutes, the absolute right of a client to his attorney’s work product, and the absolute right of an attorney to protect his or her impressions, conclusions, opinions, and legal research or theories from disclosure.” (*Metro-Goldwyn-Mayer, Inc. v. Superior Court* (1994) 25 Cal.App.4th 242, 248, citing *Roberts v. Heim* (N.D.Cal. 1988) 123 F.R.D. 614, 634), and noting conflict between San Francisco and San Diego bar-association opinions.)

Some of this conflict was cleared up when, in 1990, the Legislature added

## **D. Specific Contexts**

**1. Federal Habeas** - A former client of a California criminal appellate attorney might request work product when the client, or a successor counsel, is preparing or investigating a federal habeas corpus petition. Whether the appellate attorney had effectively represented the client in the state court appeal may be at issue in the federal habeas proceedings. If the former client shows that withholding the work product could result in reasonably foreseeable prejudice in the habeas litigation, the work product should be produced. (BASF Legal Ethics Com., Ethics Opn. No. 1990-1.) When the client shows that the work product might be related to a possible ineffective assistance of counsel claim, subdivision (f) of section 2018 seems to require production.

**2. Malpractice** - Procedure seems to require production of work product relevant to a malpractice claim, i.e. if the work product is “relevant to an issue of breach by the attorney of a duty to the attorney’s client.” This provision, however, appears to apply only when there is a pending case. On its face, subdivision (f) applies “[i]n an action between an attorney and his or her client or former client.” It appears that production of work product might not be required where the former client is merely contemplating a malpractice claim.

**F. Summary** - Thus, a reasonable interpretation is that when it is reasonably foreseeable that the client would be prejudiced by the withholding of the work product, the attorney is ethically obligated to produce the work product upon the request of the former client. Likewise, core work product is discoverable in an action between an attorney and former client when the work product is relevant to an issue of breach of a duty the attorney owed the former client.

## **III. In Absence of Request, What Should be done with the File.**

### **A. Transcripts, Original Documents and Personal Papers of Client -**

When a case ends, immediately send the transcripts, documents (opinions, court

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subdivision (f) to section 2018 of the Code of Civil Procedure, providing that in an action between an attorney and former client there is no work product privilege if the work product is relevant to an issue of a breach by the attorney of a duty arising out of the attorney-client relationship:

**In an action between an attorney and his or her client or former client, no work product privilege under this section exists if the work product is relevant to an issue of breach by the attorney of a duty to the attorney’s client arising out of the attorney-client relationship.**

orders, etc., not previously sent) and client's personal papers, such as his/her notes regarding the case, to client (or designee) and store the remainder of the file in long-term storage. In a case with a very large record or which contains sensitive information (e.g. child molestation) that might make the client vulnerable in prison, you should inquire from the client as to where she/he would like the records sent. <sup>4</sup>

## **B. Other Materials - Pleadings, Correspondence, Attorney Work Product, Billing Documents, etc. - How Long Should They be Kept?**

While the trend in recent ethics opinions is that, because of the use of prior convictions under the Three Strikes law and other criminal statutes, the file in a criminal case should be kept for the life of the client, there are no professional standards which set out the length of time a criminal file should be kept.

### **1. Professional standards**

California's professional standards are generally silent about lawyers' duties to maintain former clients' files. For instance, Rule 3-700(D)(1), Rules of Professional Conduct of the State Bar of California, mentioned above regarding the client file, 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.

### **2. Ethics Opinions**

**a. San Francisco Bar Association Formal Opinion 1996-1:** This committee opined that 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

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<sup>4</sup>Prior to sending the record to the appellant, do not forget to redact jurors' names from the record per section 237 of the California Code of Civil Procedure -- this is mandatory. In addition, 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.) (See *Appeals Checklist* on Practice Tools link on FDAP's website.)

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.***

**b. Los Angeles County Bar Association Formal Op. No. 420:** 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.

**c. Los Angeles County Bar Association Formal Op. No. 475 and No. 330 (Nov. 30, 1972)** 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.

### **3. California State Bar's Standing Committee on Professional Responsibility and Conduct**

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. St. Bar. Comm. Prof. Resp., Formal Opn. No. 2001-157.)

### **4. State Bar Ethics Hotline**

When asked how long a criminal appellate file must be retained, the State Bar ethics hotline operator stated that ***"the file must be kept indefinitely if the Three Strikes Law is implicated."*** The files of a civil case should be kept 5 -7 years, they stated.

The hotline operator said that the attorney must use his or her professional judgment, based on the above ethics opinions, when deciding to destroy client files.

### **5. Malpractice**

Several commentators have suggested that the file be retained until at least the four year statute of limitations for legal malpractice has run. (See *California Bar Journal*, July 2003, "Ex-client's Files Present a Quandry".)

**C. If in your professional judgment a file can be destroyed, what is an Attorney Required to do before Destroying the File?**

**1. Locate client** - An attorney is required to pursue *all reasonably available means to notify a former client in writing*, preferably by certified mail to the client's last known address. '*Reasonably available means*' does not require you to hire an investigator, but you should consult the file, public telephone directories, organizations' membership directories, third parties who might have information to locate the former client's last known address or the internet. (Los Angeles Bar Association Form. Opn. 475)

**2. Contents of Notice** - Minimally, the notice should advise (1) that the files are available for release to the client; (2) that you seek the client's instructions concerning the file's disposition; (3) that the file will be destroyed if no contrary instruction or response is received after at least a 90-day period; and (4) when the destruction will occur (after at least a 90-day notice period). (Los Angeles Bar Association Form. Opn. 475)

**3. What if the client can not be located or does not respond?**

**a. if the matter was a civil case:** if at least five years has passed since the matter was closed, and if at least a 90-day period has elapsed after the sending of a notice, then the file may be destroyed. However, make sure to keep any documents which have value.

**b. if the matter was a criminal case:** in the very unusual situation where a criminal case file may be destroyed without the client's permission, you should proceed as noted for civil cases above. If the client had died, see below.

**c. if the client is a minor:** it is recommend that the file be retained until the minor has reached majority plus four years for the probable time for a legal malpractice action to pass.

**4. What to do if client dies?**

Attorney should make reasonable efforts to notify the deceased client's legal representatives or legatees of the proposed destruction of the files and give them an opportunity to inspect or take any documents of significant value, subject to your obligations to protect the deceased client's secrets and maintain the deceased's confidence. The notice should state that the files may contain documents of significant value (although they need not be identified) and identify any documents of intrinsic value. You must preserve any deceased client's confidential information, since the duty of

confidentiality survives the death of the client. Since the holder of lawyer-client privilege is the client's personal representative on the death of the client, until the personal representative is discharged, a disclosure of confidential information or secrets to the personal representative of the deceased client may be appropriate. (Los Angeles Bar Association Form. Opn. 491 (1998))

### **5. How Must Documents be destroyed**

All documents which can be destroyed must be shredded, pulped or destroyed by other methods designed to make them unreadable or undecipherable through any means. (See Civil Code §§ 1798.80 - 17908.84, 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(e) and Evidence Code §§950 et seq.

### **D. If a File must be Retained, What to do if Space is a Consideration?**

1. Put all the pleadings, documents, notes and letters you generate on disk or CD or latest technology and put in file.
2. Scan all incoming material on a CD or latest technology, as well.
3. Reduce size of documents.
4. But note that paper may last longer than CDs, which have been known to degrade after several years; also note that with the rapid rate of change in technology, documents stored now on CDs or disks may have to be stored on another medium later to be readable in the future.
5. May be easier and quicker to save documents you generate with a second hard-drive. Norton Ghost has been reported by panel attorneys as a good program for this.