

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 05-0006**

ISSUE: Is an attorney ethically obligated, upon termination of employment, promptly to release to a client, at the client's request, (1) an electronic version of the pleadings, (2) an electronic version of discovery requests and responses, (3) an electronic deposition and exhibit database, and/or (4) an electronic version of transactional documents?

DIGEST: An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of the pleadings, because such items come within a category subject to release; (2) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (3) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (4) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. Prior to release, however, the attorney is ethically obligated to strip from each of these electronic items any metadata reflecting the confidences and secrets of any client other than the client to whom they belong.

AUTHORITIES

INTERPRETED: Rule 3-700(D) of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e)(1).

STATEMENT OF FACTS

Attorney A was originally retained by Client to represent Client in negotiating and executing an agreement with BiotechCorp, under which Client entrusted a secret invention to BiotechCorp for development, patenting, and commercialization in exchange for payment of royalties. In the course of the representation, Attorney A prepared transactional documents, including the agreement itself, using a commonly available word-processing computer program to create manipulable files, and preserving such files in a readily-searchable electronic document management system, in both final form and antecedent drafts.

Subsequently, Attorney A was retained by Client in a separate matter to file and prosecute an action on Client's behalf against Landlord relating to Landlord's breach of a lease to commercial premises occupied by Client. In the course of the representation, Attorney A prepared pleadings and discovery requests and responses, using the same commonly available word-processing computer program to create manipulable files, and preserving such files in the same readily-searchable electronic document management system, in both final form and antecedent drafts. Attorney A also created an electronic database, which is electronically searchable by word-queries and other queries, containing deposition transcripts and exhibits.

Client has now chosen to terminate Attorney A's employment and to employ Attorney B in Attorney A's place. Client has requested Attorney A to release to Client all of Client's papers and property. In particular, Client has requested an electronic version of the pleadings in the action against Landlord, expressing an intent to make them available to Attorney B for reuse, by electronic "cutting" and "pasting," in drafting new documents in the litigation as it progresses, and an electronic version of the discovery requests and responses, expressing the same intent. Client has also requested the electronic deposition and

exhibit database, expressing an intent to make it available to Attorney B for use in discovery, trial preparation, and trial itself. Finally, Client has requested an electronic version of the transactional documents in the BiotechCorp matter, expressing an intent to make them available to Attorney B to safeguard Client's interests as questions or disputes arise concerning the scope and purpose of the agreement, including specifically BiotechCorp's obligation to pay royalties under licensing agreements. Attorney A has refused to release any of these items, claiming that each contains metadata reflecting the confidences and secrets of other clients. Attorney A has made no assertion in support of his refusal based on the attorney work product doctrine of section 2018.010 et seq. of the Code of Civil Procedure.

DISCUSSION

1. **Rule 3-700(D) of the Rules of Professional Conduct Obligates an Attorney Promptly to Release Client Papers and Property, at the Client's Request, Upon Termination of Employment**

Rule 3-700(D) of the Rules of Professional Conduct ("rule 3-700(D)")^{1/} provides that, as a general matter, an attorney "whose employment has terminated shall: . . . 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 . . ." (Rule 3-700(D) & (D)(1).)^{2/} The attorney must make such release of client papers and property at no cost to the client.^{3/}

Rule 3-700(D)'s scope is evident. Among "[c]lient papers and property," the rule includes certain items coming within listed categories and also any other items that are "reasonably necessary to the client's representation." (Rule 3-700(D)(1).)

^{1/} Unless otherwise indicated, all references and citations hereafter to any "rule" or "rules" are to the Rules of Professional Conduct of the State Bar of California.

^{2/} Accord, e.g., State Bar Formal Opn. No. 1994-134 (quoting rule 3-700(D)(1)); State Bar Formal Opn. No. 1992-127 (same; construing "client papers and property" within the meaning of rule 3-700(D)(1) to include the "entire contents of the file"); cf. Los Angeles County Bar Association Formal Opn. No. 362 (1976) (construing the predecessor to rule 3-700(D)(1), in accordance with an earlier opinion of the same local bar association, in line with rule 3-700(D)(1)); San Diego County Bar Association Formal Opn. No. 2001-1 (concluding that, under rule 3-700(D), an attorney may not withhold client papers and property for nonpayment of the attorney's bill).

To different effect from rule 3-700(D) is section 43(1) of the Restatement (Third) of the Law Governing Lawyers (2000). Section 43(1) provides that a "lawyer may decline to deliver to a client or former client an original or copy of any document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client." Section 43(1) differs from rule 3-700(D) in allowing an attorney to decline to deliver a document to a client or former client, albeit only a document that (1) is not fully paid for and (2) whose nondelivery would not unreasonably harm the client or former client.

^{3/} Although the attorney must release client papers and property to the client at no cost, the attorney may enter into an agreement providing that the client will pay for the cost of making a copy of such papers and property for the attorney to retain in his or her own files. See Rule 3-700, Discussion (stating that rule 3-700(D) is "not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, *nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding*"). (Rule 3-700(D), italics added.)

Rule 3-700(D)'s purposes include respecting the client's ownership interest in his or her papers and property and preventing "reasonably foreseeable prejudice" to the client's interests generally. (Rule 3-700(A)(2).)^{4/}

The obligation imposed on an attorney by rule 3-700(D) with respect to the prompt release of a client's papers and property, at the client's request, upon termination of employment, and the scope and purpose of that obligation, are consistent with the principles that a client may terminate an attorney's employment freely,^{5/} and that the attorney owes a duty of loyalty to the client, albeit limited, even after termination of employment.^{6/}

In imposing on an attorney an obligation promptly to release a client's papers and property, at the client's request, upon termination of employment, rule 3-700(D) expressly extends its coverage to "*all* the client papers and property." (Rule 3-700(D), italics added.) It does not draw any distinction based on the *form* of any item, whether electronic or non-electronic. Neither can it reasonably be read to do so. That is because "client papers and property" is not a "static" "concept," but rather one whose "content will change depending upon circumstances,"^{7/} covering items in electronic form as well as non-electronic form.

2. Rule 3-700(D) Obligates An Attorney, Upon Termination of Employment, Promptly to Release to A Client, at the Client's Request, (1) Electronic Versions of the Pleadings, (2) Electronic Versions of Discovery Requests and Responses, (3) Electronic Deposition and Exhibit Databases, and (4) Electronic Versions of Transactional Documents

The question before the Committee is whether, upon termination of employment, an attorney is obligated by rule 3-700(D)(1) promptly to release to a client, at the client's request, (1) electronic versions of the pleadings, (2) electronic versions of discovery requests and responses, (3) electronic deposition and exhibit databases, and (4) electronic versions of transactional documents.

As for the *nature* of the items in question: Among the "client papers and property" included in rule 3-700(D)(1), pleadings come within the listed category of "pleadings" expressly. Likewise, deposition and exhibit databases come within the listed categories of "deposition transcripts" and "exhibits" by implication, inasmuch as deposition and exhibit databases, by definition, contain deposition transcripts and exhibits. The same, however, cannot be said of discovery requests and responses or transactional documents, which do not correspond to any listed category either expressly or by implication. Nevertheless, discovery requests and responses and transactional documents comprise items that are "reasonably necessary to the client's representation." (Rule 3-700(D)(1).) An item is "reasonably necessary to the client's representation" if it is "generated during the representation" for continuing use therein.^{8/} Discovery requests and responses satisfy this definition, since they may give rise to *further* discovery requests and responses and may also be included as exhibits to motions and as exhibits at trial.

^{4/} See State Bar Formal Opn. No. 1994-134 (implying that "client papers and property" within the meaning of rule 3-700(D)(1) is not a "static" "concept," and stating that its "content will change depending upon circumstances"; "the attorney's ethical responsibilities do not turn on the physical contents of the client's 'case file,' but rather on the ethical obligation . . . to act reasonably to avoid reasonably foreseeable prejudice to his or her former client"); see also Bar Association of San Francisco Formal Opn. No. 1996-1 (reaffirming Bar Association of San Francisco Formal Opn. No. 1990-1, which implies that "client papers and property" within the meaning of rule 3-700(D)(1) includes any item whose release is necessary to avoid reasonably foreseeable prejudice to the client's interests).

^{5/} See, e.g., *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1005 [124 Cal.Rptr. 668].

^{6/} See, e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950 [203 Cal.Rptr. 879]; State Bar Formal Opn. No. 1993-133.

^{7/} State Bar Formal Opn. No. 1994-134.

^{8/} State Bar Formal Opn. No. 1992-127.

Transactional documents satisfy this definition as well, since they are used for purposes including monitoring performance under the original agreement underlying the transaction in question and any related agreement between the parties to that transaction and third parties who subsequently become involved.

As for the *form* of the items in question, that proves immaterial. As explained, rule 3-700(D)(1) expressly extends its coverage to “*all* the client papers and property,” without distinction based on the form of any item, whether electronic or non-electronic.

In light of the foregoing, the Committee answers the question before it in the affirmative, concluding that, upon termination of employment, an attorney is indeed obligated by rule 3-700(D)(1) promptly to release to a client, at the client’s request, (1) electronic versions of the pleadings, (2) electronic versions of discovery requests and responses, (3) electronic deposition and exhibit databases, and (4) electronic versions of transactional documents.^{9/}

In concluding as it does, the Committee believes that, at least as a general matter, an attorney’s obligation under rule 3-700(D)(1) to release items in electronic form is not subject to a “balancing test,” under which the client’s “need for the . . . electronic [versions]” must be weighed against the “expense (both money and time) to the attorney of having to copy and/or transfer . . . electronic [versions].”^{10/} The Committee discerns no support for the applicability of a “balancing test” either in the rule itself, which is silent about the issue, or in any extrinsic evidence bearing on the rule’s meaning.^{11/} In addition, the Committee notes that an attorney usually has it within his or her power to avoid incurring any substantial expense in releasing electronic versions of the client’s papers and property by putting in place any one of many commonly available electronic filing systems.^{12/}

The Committee also believes that whenever an attorney is obligated by rule 3-700(D)(1) to release items in electronic form, the attorney is obligated to release them *in the format in which the attorney possesses them*. That is because the attorney’s obligation is to *release* items, not to modify them or, less still, to create them anew.^{13/}

^{9/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3 (2006) (concluding that, under the New Hampshire Rules of Professional Conduct, the “contents of a client’s file would necessarily include both paper and electronic forms of communications, documents and other records pertaining to the client”); Illinois State Bar Association Advisory Opn. No. 01-01 (2001) (concluding to similar effect under the Illinois Rules of Professional Conduct).

^{10/} Orange County Bar Association Formal Opn. No. 2005-01.

^{11/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3, *supra* (concluding that, under the New Hampshire Rules of Professional Conduct, an attorney has an “obligation to provide all files pertinent to representation of [a] client,” in “both paper and electronic forms,” “regardless of the burden that it might impose upon the [attorney] to do so”); but cf. Illinois State Bar Association Advisory Opn. No. 01-01, *supra* (concluding that, under the Illinois Rules of Professional Conduct, an attorney, upon termination of employment, may not refuse a request by a client for electronic versions of client file materials when, among other things, electronic versions can be retrieved easily).

^{12/} Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06/3, *supra* (stating that any “burden” that might be imposed upon an attorney to “provide all files pertinent to representation of [a] client . . . can be managed . . . through computer word search functions or other means that are routinely used for discovery or other purposes”).

^{13/} Cf. *Jicarilla Apache Nation v. United States*, (Fed.Cl. 2004) 60 Fed. Cl. 413, 416 (approving and entering a confidentiality agreement and protective order providing for, among other things, the production of “electronic records” “in the format in which [the producing] party routinely uses or stores them”); Cal. Rule of Court 342(i) (providing that, “[u]pon request, a party must within 3 days provide to any other party or the court an electronic version of its separate statement” of undisputed material facts in support of its motion for summary judgment and/or summary adjudication, but is “not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party”).

3. Rule 3-700(D) Obligates Attorney A, Upon Termination of Employment, Promptly to Release to Client, at Client's Request, (1) an Electronic Version of the Pleadings, (2) an Electronic Version of Discovery Requests and Responses, (3) the Electronic Deposition and Exhibit Database, and (4) an Electronic Version of Transactional Documents, But Only After Attorney A Strips Such Items of Metadata Reflecting the Confidences and Secrets of Other Clients

It follows from the foregoing that, upon termination of employment, Attorney A is presumptively obligated by rule 3-700(D)(1) promptly to release to Client, at Client's request, an electronic version of the pleadings, an electronic version of discovery requests and responses, and the electronic deposition and exhibit database, all in Client's action against Landlord, and also an electronic version of the transactional documents in the BiotechCorp matter.

Attorney A's presumptive obligation under rule 3-700(D), however, must be considered in light of Attorney A's claim that each of the electronic items in question contains metadata reflecting the confidences and secrets of other clients. That is because an attorney is obligated under subdivision (e)(1) of section 6068 of the Business and Professions Code "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets," of *each* of his or her clients. Under the compulsion of that obligation, Attorney A would have to strip any metadata reflecting the confidences and secrets of other clients from any of the electronic items prior to releasing them to Client.^{14/} Inasmuch as Attorney A has not invoked the attorney work product doctrine, that doctrine is not implicated on the facts presented.

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.

^{14/} Cf. Illinois State Bar Association Advisory Opn. No. 01-01, *supra* (concluding that, under the Illinois Rules of Professional Conduct, an attorney, upon termination of employment, may not refuse a request by a client for electronic versions of client file materials when, among other things, electronic versions can be retrieved without disclosing the confidences of other clients).