

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)¹. 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."²

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.³

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.)⁴ 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.)⁵

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.⁶

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. ⁷

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. ⁸

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.⁹

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.

¹ 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.

² 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.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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).)

⁷ 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.)

⁸ 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].)

⁹ 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.