

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 491: OCTOBER 20, 1997

SUMMARY

ATTORNEY OFFICE FILES-DESTRUCTION WHEN CLIENT DECEASED.

Before a Law Firm may destroy its office files of a deceased client where there is no preexisting agreement or statutes governing disposition thereof, the Law Firm is obligated to give or attempt to give notice to the legal representatives or residuary legatees of the deceased client that the Law Firm intends to destroy the office files, except where (i) there is no pending matter or any reasonably foreseeable possibility that the files may be necessary to pursue or protect legal interests of the deceased client; and (ii) there is a reasonable belief that there are no documents of significant pecuniary or intrinsic value. In the event the legal representative or residuary legatees seek to inspect or obtain return of documents from Law Firm's office files, this must be done without compromising the Law Firm's duty to maintain the deceased client's confidence and secrets.

AUTHORITIES CITED

Business & Professions Code, § 6068(e).

Evidence Code §§ 953(c) and 954(c).

Moeller vs. Superior Court, 1997 Lexis 7904, 97 Daily Journal D.A.R. 14679.

Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal.App.3d 999.

In Re Soale, 31 Cal.App. 144, 153-154 (1916).

California Rules of Professional Conduct, Rule 3-700(D).

Bar Association of San Francisco, Legal Ethics Committee, Formal Opinions Nos. 1996-1 and 1984-1.

L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion Nos. 330, 362, 405, 414, 436, and 475.

San Diego County Bar Formal Opinion No. 1977-3.

State Bar Formal Opinions Nos. 1988-96 and 1994-134.

Witkin, California Evidence, "Representative or Successor", § 1116 (3rd. ed. 1996).

Hood, "The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client", 7 Geo.J.Legal Ethics 741 (1994).

FACTS AND ISSUES

A private Law Firm has been in existence for many years. All of the members of the Law Firm have died or are in the process of retiring from the practice of law.¹ During the course of the Law Firm's representation of a now deceased client for over twenty-five years in a wide variety of matters, members of the Law Firm received letters and documents with confidential information addressed to members of the Law Firm. The deceased client was a person of renown whose papers may have some significant pecuniary value. These letters and documents are still in the possession of the Law Firm as part of the contents of its deceased client's files. There is no

written agreement or written instructions from the deceased client concerning Law Firm's file retention obligations.

The issues presented to the Committee are as follows:

May Law Firm be permitted to destroy the papers it still retains relating to the deceased client without notice to the personal representatives or residuary legatees of the deceased client?

If Law Firm is not permitted to destroy the papers it still retains without notice, may the Law Firm file a petition with a court, with notice to the personal representatives and residuary legatees, to determine the disposition of the letters and documents containing confidential information?

DISCUSSION

The question of what constitutes client papers and property contained within an attorney's office files is not addressed by this inquiry. This question has been addressed in prior ethics opinions.² For purposes of the facts presented in this opinion it is assumed that the Law Firm's files consist only of the deceased client's papers and property which, if they had been requested by the deceased client, would be required to be returned in compliance with Rule 3-700(D) of the Rules of Professional Conduct [See State Bar Formal Opinion No. 1994-134].

The question of when an attorney may dispose of client files has been addressed in Bar Association of San Francisco, Legal Ethics Committee, Formal Opinion No. 1996-1 and L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion No. 475. Neither of these opinions dealt with the contents of a deceased client's office file.

In Formal Opinion 475 this Committee stated that the "file belongs to the client. Further the client may, for reasons known or unknown to the lawyer, find something of significant economic or personal value in the file even after the case is over. ... [There is] an ethical obligation to try to return the files to the former clients or to try to obtain authorization to destroy the files." This Committee went on to provide that after notice or diligent effort to give notice, and if sufficient time has elapsed after the matter was closed [which was recommended to be not less than five years for a civil matter and the life of the client in a criminal matter], the file could be destroyed unless a request to the contrary was received from a former client.

Bar Association of San Francisco, Legal Ethics Committee, Formal Opinion No. 1996-1 rejected the concept that files should be retained for a minimum time period in favor of a recommendation that the attorney should retain the client's papers so long as is necessary to preclude reasonably foreseeable prejudice to the client: "As indicated in Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal.App.3d 999, an attorney has a duty to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of his client. This duty includes the need to make available to the client all client papers, necessary to meet this obligation, including attorney work product and the attorney's general impressions of the case. (See discussion Formal Opinion 1990-1). All other client papers, except those in the possession of the attorney as bailee, can be destroyed by the attorney at will."³

With respect to the subject inquiry, whether the past matters handled were civil or criminal in nature, the client is deceased, there is no pending litigation or apparent other reasonably foreseeable possibility that legal interests of the deceased client will be pursued or need be

protected, and a sufficient time appears to have passed consistent with this Committee's Formal Opinion 475. Therefore, it appears to the Committee that the Law Firm may destroy the deceased client's files without notice,⁴ other than documents of intrinsic value⁵ or documents of significant pecuniary value. The fact that the documents in the file may have significant pecuniary value due to the deceased client's renown requires reasonable efforts consistent with the Committee's opinions expressed in Formal Opinion 475, to notify⁶ the deceased client's legal representatives or legatees of the proposed destruction of the files and an opportunity to inspect or take any documents of significant pecuniary or intrinsic value, subject to the obligations of the Law Firm to protect the deceased client's secrets and maintain the deceased's confidence as mandated by Business and Professions Code § 6068(e).

The Law Firm is also obligated to comply with the provisions of Probate Code §§ 700 et seq. with respect to any estate planning documents on deposit with the Law Firm governed by Probate Code §§ 700 et seq.

The obligation of Law Firm to preserve the deceased client's⁷ confidence and secrets survives the death of the client; however, as the lawyer-client privilege devolves on the death of the client to the client's personal representative until the personal representative is discharged,⁸ a disclosure of confidential information or secrets to the personal representative of the deceased client may not violate Law Firm's duty of confidentiality under the lawyer-client privilege.⁹

In the event that there is an objection to Law Firm's destruction of its files and Law Firm believes there is an issue of client secrets or confidentiality that should prevent Law Firm from turning over any of the papers, Law Firm should consider obtaining appropriate declaratory relief from a court of competent jurisdiction.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.

CONCLUSION

¹ This opinion does not address the duties of public lawyers.

² See State Bar Formal Opinion No. 1994-134, footnote 3; Bar Association of San Francisco, Legal Ethics Committee, Formal Opinion Nos. 1996-1 and 1984-1; San Diego County Bar Formal Opinion No. 1977-3; L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion Nos. 330, 362 and 405.] As noted in State Bar Formal Opinion No. 1994-134, at Footnote 3, "The concept of a 'client file' is not static, and its content will change depending upon circumstances."

³ The Committee notes the comments in Footnote 6 to Bar Association of San Francisco, Legal Ethics Committee, Formal Opinion No. 1996-1; the Committee concurs that the attorney should retain the client's papers so long as is necessary to preclude reasonably foreseeable prejudice to the client and that duty should supersede the arbitrary time periods recommended in Formal Opinion 475; however, the Committee believes that with many matters the client may not appreciate the need for retention of the file and the recommendations in Formal Opinion 475 are there to provide some guidance to attorneys on considering reasonably foreseeable prejudice to the client.

⁴ An attorney who destroys files in such circumstances without providing notice is assuming the risk that he or she is incorrect in the determination that there is no reasonably foreseeable

possibility that the files may be necessary to pursue or protect legal interests of the deceased client and also have no intrinsic value or significant pecuniary value. One way to avoid having a problem respecting destruction of the client's files is to have the subject addressed in a written retainer agreement.

⁵ In Formal Opinion No. 475 this Committee defined intrinsically valuable documents as "money orders, travelers checks, stocks, bonds, wills, original deeds, original notes, judgments and the like which have value, or may have value, in and of themselves [footnote omitted] or which themselves create or extinguish legal rights or obligations."

⁶ Although the Committee does not believe that documents of significant pecuniary value need to be identified in the notice, the Committee does believe that the notice should state that the files may contain documents of significant pecuniary value. Documents of intrinsic value should be identified.

⁷ L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion No. 414 (1983). For comprehensive discussion of this principle see Hood, "The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client", 7 Geo.J.Legal Ethics 741 (1994). Under no circumstances should the Law Firm sell any confidential papers or privileged communications to a third party unless the Law Firm obtains consent of the client's successors in interest and such action does not violate Law Firms duties to the deceased client under Business and Professions Code § 6068(e).

⁸ The privilege survives the death of the client, as against strangers; hence, in controversies between persons claiming under the decedent and others not in privity with the estate, the communications of the decedent to his attorney are protected. [Citations omitted.] The holder in such a case is the personal representative-executor or administrator. (Ev.C. 953(c).) He may therefore claim the privilege, and may waive it where it is in the interest of the estate to do so.

⁹ Where the deceased client had given specific instructions to the attorney not to disclose such matters, such instructions would govern, unless disclosure is required by law. The Committee notes that an attorney's duty under Section 6068(e) is broader and more expansive than the evidentiary privilege under the Evidence Code. L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion No. 436 (1985); State Bar Formal Opinion No. 1988-96; and In Re Soale, 131 Cal.App. 144, 153-154 (1916). The Committee also notes that the California Supreme Court has recently compelled disclosure of lawyer-client communications and attorney work product in the context of a successor trustee seeking documents pertaining to the prior administration of a trust from the former trustee and the former trustee's counsel, holding that the successor trustee is the holder of the privilege. Moeller vs. Superior Court, 1997 Lexis 7904, 97 Daily Journal D.A.R., 14679.