

L.A. COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 493, September 14, 1998

SUMMARY OF OPINION

DISPUTES BETWEEN FORMER CLIENTS OVER TRANSFER OF ORIGINAL CLIENT FILES

When a member's engagement is terminated, the member is ethically obligated to transfer all client files to the former client or the former client's agent promptly upon such former client's request. When an engagement involving the joint representation of multiple clients is terminated, the member is ethically obligated to transfer promptly all client files pursuant to the joint instructions of the former clients. If the former clients have not agreed on which client should receive the original client files, the member should consider whether an interpleader action, a declaratory relief action, or some other action, if any, is authorized and appropriate under the circumstances. Whatever steps the member decides to undertake, however, must be consistent with the member's ethical obligation regarding the transfer of the client files, protection of the former clients' confidence and secrets, and responsibility for not favoring one client over another.

AUTHORITIES CITED

California Business and Professions Code § 6068(e)

California Code of Civil Procedure § 386

California Code of Civil Procedure § 1060

California Probate Code §§ 700 et seq.

California Rules of Professional Conduct, Rule 3-700(D)(1)

Los Angeles County Bar Association Formal Opinion 475

Los Angeles County Bar Association Formal Opinion 362 (October 20, 1976)

Los Angeles County Bar Association Formal Opinion 330 (November 30, 1972)

San Francisco County Bar Association Formal Opinion 1984-1

Weiss v. Marcus (1975) 51 Cal.App.3d 590

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

Franklin v. Municipal Court (1972) 26 Cal.App.3d 884

FACTS AND ISSUES PRESENTED

Attorney has represented two co-trustees of a revocable living trust. A dispute arose between the co-trustees. Attorney advised the co-trustees that Attorney could not represent either in the dispute. Thereafter, each co-trustee retained separate counsel. Both co-trustees have now demanded the originals of the complete trust files from Attorney.

The issues presented to the Committee are as follows:

1. How should a member handle the original client files when former clients in a joint representation dispute which client is entitled to their possession?
2. If an agreement is reached between the former clients whereby one former client will take possession of the original client files and the other will take possession of a copy of the client files, who should bear the cost of providing the copy?

DISCUSSION

Pursuant to California Rules of Professional Conduct rule 3-700(D)(1), a member whose employment has been terminated is ethically obligated to "*promptly release to the client, at the request of the client, all of the client papers and property.*" Rule 3-700(D)(1) defines "*client papers and property*" to include "*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.*" See also Los Angeles County Bar Association Formal Opinion 362 (October 20, 1976); Los Angeles County Bar Association Formal Opinion 330 (November 30, 1972). The purpose of Rule 3-700(D) is to ensure that the interests of the client are not prejudiced. See Formal Opinion 362, supra; see also Weiss v. Marcus (1975) 51 Cal.App.3d 590, 599; San Francisco County Bar Association Formal Opinion 1984-1 (any material in the case file must be made available to the client upon the client's request).¹

In this case, however, Attorney represented more than one client and both former clients in the joint representation have demanded transfer of Attorney's original client files. Furthermore, the Committee understands that in this matter, Attorney does not have a written engagement letter providing for disposition of client files upon termination of the engagement. In the absence of an agreement between the former clients as to disposition of the original client files upon termination of the engagement, Attorney cannot ethically favor one client over another.

The existence of conflicting instructions between former clients regarding the disposition of Attorney's client files does not nullify the ethical obligation to transfer promptly client files imposed by the California Rules of Professional Conduct, rule 3-700(D)(1). Rather, it provides an additional circumstance which Attorney must consider in determining what steps, if any, are necessary under the circumstances to fulfill Attorney's ethical obligation. As an initial matter, in view of Attorney's ethical obligation, Attorney should separate materials among the client files that are themselves copies and promptly transfer copies of such copies to each of the former clients.² With respect to truly original materials within the client files, Attorney may consider, for example, whether an interpleader action pursuant to Code of Civil Procedure section 386³ or a declaratory relief action pursuant to Code of Civil Procedure section 1060⁴ is authorized and appropriate under the circumstances. See, e.g., Franklin v. Municipal Court (1972) 26 Cal.App.3d 884, 897 ("In a proper case, parties with conflicting claims to [a trial] exhibit may be required to interplead their claims."). Whether additional steps are appropriate and what those steps should be in any particular case is essentially a legal

question, rather than an ethical question, which, consistent with its policy, the Committee declines to answer. Whatever steps Attorney decides to undertake, however, must be consistent with Attorney's ethical obligation regarding the transfer of the client files and protection of the former clients' confidence and secrets. See California Business and Professions Code § 6068(e).

Attorney has also requested guidance in the event the former clients agree that one former client will receive the original client files and the other will receive copies thereof. Attorney asks whether in the absence of a provision in the engagement letter, it is ethically permissible for Attorney to pass the cost of copying to one or both of the former clients. In former opinions, the Committee has declined to express an opinion on the issue of who must bear the cost of copying material sent to the client. See Opinion 362, *supra*, ("The Committee expresses no opinion on who must bear the cost of copying material delivered to the former client; this matter of cost is, in the opinion of the Committee, a question of law the answer to which may depend upon the particular facts or documents involved.") For the same reasons, the Committee declines to do so here.⁵

Finally, it may be possible to avoid this type of problem by including appropriate provisions in engagement letters relating to these issues. For example, it is not ethically impermissible to include a provision in an engagement letter relating to disposition of the original client files upon termination of the engagement. Indeed, the Committee has suggested this in other circumstances relating to disposition of client files after the termination of an engagement. See, e.g., Los Angeles County Bar Association Formal Opinion 475. Nor is it ethically impermissible to include in an engagement letter a provision for reimbursement of copying costs. Such measures should substantially decrease, if not eliminate, future disputes regarding disposition of client files and reimbursement of copying costs.

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

¹ The Committee also notes that in view of the type of services performed by Attorney, Attorney may also be obligated to comply with sections 700 et seq. of the Probate Code.

² In a later section of this opinion, the Committee discusses who should bear the cost of copying client files for transfer to former clients.

³ Code of Civil Procedure Section 386 provides, in relevant part, that "*whenever conflicting claims are or may be made upon a person for or relating to personal property ... such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims.*"

⁴ Code of Civil Procedure Section 1060 provides, in relevant part, "*Any person ... who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court...*"

⁵ The Committee notes, however, that Attorney's duty to release client files cannot be made dependent on the former clients' payment of Attorney's fees and costs. The ethical duty with respect to releasing the office files of a withdrawing attorney does not fluctuate based on whether the attorney is fully paid, partially paid, or unpaid. Formal Opinion 362, *supra*; see also *Weiss v. Marcus*, *supra*, 51 or unpaid. Formal Opinion 362, *supra*; see also *Weiss v. Marcus*, *supra*, 51 Cal.App.3d at 599; *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999, 1006 (wherein the trial court was directed to enter an order commanding the former attorney "*to forthwith deliver to petitioner all files, documents, and papers in his possession relating to the action*"). In addition, without the informed consent of both former clients, Attorney cannot ethically impose the cost of copying on one former client and not the other.

