

**LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

**FORMAL OPINION NO. 509: June 17, 2002**

**SUMMARY**

**ATTORNEY OFFICE FILES - RELEASE OF CLIENT PSYCHIATRIC RECORDS  
TO FORMER CLIENT**

Subject to the terms of any applicable court order, an attorney who has received mental health records of a client in the course of representing that client, must release the mental health records to the former client following termination of the attorney-client relationship when requested by the former client to do so. The attorney does not have the discretion to refuse the request of the former client on the basis that the disclosure of the mental health records is not in the best interests of the former client or others.

**AUTHORITIES CITED**

Civil Code §§56, 1798-1798.78, 1798.40(f), 1798.41, and 1798.45-53.  
Health & Safety Code §§ 123100 d - 123149  
California Rules of Professional Conduct, Rule 3-700(D)(1).  
Santa Clara County Counsel Attys. Assoc. v. Woodside (1994) 7 Cal.4th 525.  
Blanton v. Womancare (1985) 38 Cal.3d 396, 406.  
Lee v. State Bar (1970) 2 Cal.3d 927, 939.  
People ex rel. Deukmejian v. Brown (1981) 29 Cal.3d 150, 157.  
People v. Stanley (1995) 10 Cal.4th 764, 804-805.  
People v. Masterson (1994) 8 Cal.4th 965.  
Rose v. State Bar (1989) 49 Cal.3d 646, 655.  
Shephard v. Superior Court (1986) 180 Cal.App.3d 23.  
Sullivan v. Duane (1926) 198 C. 183, 192, 244 P. 343.  
State Comp. Ins. Fund v. WPS, Inc., (1999) 70 Cal. App. 4th 644.  
Stockton Theatres v. Palermo (1953) 121 Cal. App.2d 616.  
Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425.  
Watchumna Water Co. v. Bailey (1932) 216 Cal. 564, 571.  
Yorn v. Superior Court (1979) 90 Cal. App.3d 113, 116.  
State Bar Formal Opinion Nos. 2001-156, 1994-134, footnote 3; 1989-112, 1989-111 and 1987-93, .  
L.A. County Bar Association, Professional Responsibility and Ethics Committee, Formal Opinion Nos. 459, 475 and 491.  
Rest.2nd , Agency §1 and Comment, §261.

## **STATEMENT OF FACTS**

Attorney is a public defender ("Attorney") who represents defendants in criminal prosecutions. In some cases, Attorney obtains mental health records of Attorney's clients to assist Attorney in defending them. A former client ("Former Client") has instructed Attorney to release to Former Client all mental health records of the Former Client obtained by Attorney in the course of Attorney's representation of the Former Client (the "Mental Health Records"). The Mental Health Records include a warning attached by the mental health care provider who transmitted the Mental Health Records to Attorney that the records should not be provided to the Former Client as the records, in the opinion of the originating mental health care provider, contain information which if disclosed to the Former Client, could be detrimental to Former Client's mental health or treatment, or could put others in danger.

## **QUESTIONS PRESENTED**

1. Must Attorney release the Mental Health Records to Former Client as the Former Client has requested?
2. May Attorney withhold those Mental Health Records marked by the mental health provider with a restrictive warning not to disclose the records to Former Client?
3. May Attorney take any action to interfere with Former Client's instructions, such as by bringing the matter to the attention of a court?

## **DISCUSSION**

### **a. Attorney's Professional Responsibilities.**

Rule 3-700 of the California Rules of Professional Conduct deal explicitly with the duties of lawyers whose former clients request their files. Rule 3-700 states: "(D) A member whose employment has terminated shall: (1) 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..."

Rule 3-700 recognizes that the documents and materials created or compiled by a lawyer during the course of a representation belong to the client, and not to the lawyer, and the lawyer has no legitimate interest in those materials except for the purpose of representing the client in conformity with the client's instructions. It therefore creates the general rule that an attorney is subject to professional discipline for failing to promptly release any client papers or property to the former client following a request for them by the former client.

Rule 3-700 does not by its terms authorize the lawyer to exercise any discretion to override the client's instructions to release. This is consistent with our model of the lawyer-client relationship: the lawyer is the agent of the client and is responsible for carrying out the client's lawful instructions on all substantive matters after the lawyer has utilized her training, skill, and experience to counsel the client.

#### b. Mental Health Record Legislation

The California legislature has enacted a comprehensive scheme to encourage and permit patient access to records of their medical condition and treatment, including Mental Health Records. These provisions are found at California Health and Safety Code, Sections 123100 – 123149.5.

Section 123100 states the general rule that each person is entitled to access to his or her own health care records. Section 123100 is based on an explicit legislative finding that "...every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided."

In addition to the general right of a patient to obtain full information about his or her own health and health treatment, the legislative scheme gives the patient certain specific rights. For example, §123111(a) gives a patient, who believes his or her health care records are incomplete or inaccurate, the right to require that an addendum be attached to his or her records to complete or correct them.

The general rule is subject to two exceptions set forth in Section 123115 limiting patient access to their health care records. The first involves health care records of minors and is not applicable to this inquiry. The second exception is contained in §123115(b), which provides: "When a health care provider determines that there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions: (1) The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reasons for refusing to permit inspection or provide copies of the records, including a description of the specific adverse consequences or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted. (2) The health care provider shall permit inspection by, or provide copies of the mental health records to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by request of the patient [who signs a receipt for the records acknowledging that he or she] shall not permit inspection or copying by the patient."

Thus, the health care provider is given the right in particular circumstances to prevent his or her patient's access to Mental Health Records either by refusing to release them to the patient or by releasing them to other health care providers only when they have agreed not to release them to the patient. To the extent the records are maintained by a state agency, there is a similar statutory scheme that is part of the Information Practices Act, Civil Code §§1798-1798.78, at Civil Code §§1798.40(f), 1798.41, and 1798.45-53.

Neither of these statutory schemes grants to the health care provider any authority to limit the use or disclosure of Mental Health Records by the patient's attorney, to whom the health care provider has given the records. Nor do these statutory schemes grant the patient's attorney any authority to limit the release of the Mental Health Records, even if the attorney believes such action would be dangerous to his or her client or to others.

As a result, the written notice that the health care provider has placed on the file provided to Attorney appears to have no legal effect and, if not, the notice does not alter Attorney's general duty under Rule 3-700. We recognize that the health care provider is authorized by §123113(b) to refuse to allow his or her patient to see the records if the health care provider determines that such disclosure would create "...a substantial risk of significant adverse or detrimental consequences to [the] patient..."

If this had occurred, then Attorney, on behalf of her client, might have been able to object to the health care provider's decision not to release the Mental Health Records under §123120. This section gives the patient a right of court action. We do not address the legal issue of whether this procedure might allow a court to limit the right of Attorney to release the Mental Health Records, or portions of them. If a court had issued an order limiting Attorney's disclosure of the Mental Health Records to Former Client, Attorney would have been obligated to comply with that order under Rule 3-700(D), which states that the duty to make client files available to the client is subject to any applicable protective order.

c. Former Patient's Possible Lack of Competence.

The law recognizes that insane and incompetent clients do not have the same control over substantive issues possessed by other clients.; For example, although the client normally controls all substantive decisions, it has been held that counsel may waive jury trial in an incompetency trial over the client's express objection and may urge the client's incompetency even though the client expressly directs that counsel argue that the client is competent. Shephard v. Superior Court (1986) 180 Cal.App.3d 23, approved in People v. Stanley (1995) 10 Cal.4th 764, 804-805; and People v. Masterson (1994) 8 Cal.4th 965.

The foregoing cases do not create any general rule allowing a lawyer to make substantive decisions on behalf of a client, and they do not state a specific rule that a lawyer may withhold a former client's mental health records from the former client based on the lawyer's opinion of the mental condition of the client.<sup>6</sup>

d. Does Attorney Have the Right to Seek Court Intervention to Interfere with Former Client's Instructions to Attorney?

In its Opinion 1989-112, the California State Bar Committee on Professional Responsibility and Conduct faced a similar issue: May an attorney institute conservatorship proceedings on a client's behalf, without the client's consent, where the attorney has concluded the client is incompetent to act in his best interest? That Committee concluded this would be unethical for the attorney because, by doing so, the attorney would be divulging the client's secrets and representing either conflicting or adverse interests.

Our situation is not precisely the same as that in Cal. State Bar Opinion 1989-112 because here the attorney-client relationship between Attorney and Former Client already has ended. We therefore are dealing with Attorney's duties to a former client rather than a current client. Nevertheless, it is implicit in Opinion 1989-112 that the attorney could not terminate his attorney-client relationship with his client and then institute conservatorship proceedings against the client. We reach the same conclusion here.

"[T]he attorney-client relationship involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between a client and his attorney." Cal. State Bar Opinion 1987-93. Because of the duties of confidentiality and undivided loyalty, an attorney may not use or disclose to the disadvantage of a former client any information obtained by the attorney in the course of that relationship, and an attorney may not act against a client in any matter in which the attorney formerly represented the client. Watchumna Water Co. v. Bailey (1932) 216 Cal. 564, 571; Yorn v. Superior Court (1979) 90 Cal. Appl.3d 113, 116; and Stockton Theatres v. Palermo (1953) 121 Cal. App.2d 616.7

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.