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Ex-clients' Files Present A Quandary *California Joan looks at how to maintain old files and document belonging to former clients*

By ELLEN R. PECK
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California Joan caught her breath as the thick, dark door of the warehouse ponderously rolled open. It was worse than she anticipated. "There they are, Cali," said Dar Tanyon, Esq., ". . . thousands of our former client files."

Darlene Tanyon was the managing partner of a medium-sized law firm in California's Central Valley. The firm had been founded in the mid-1960s by three best buddies in law school, Athos, Porthos & Aramis. Through the ups and downs of law practice, they had remained not only law partners but also inseparable friends. Dar, Cali's classmate, had joined the firm 20 years ago to handle family law and estate planning matters. Now they wanted to retire, leaving the firm in Dar's capable hands.

Dar and Cali were soon joined by Athos, Porthos and Aramis. After introductions and handshakes all around, Athos started, "We have always practiced with the 'one for all and all for one' philosophy. We don't want to leave Dar with this file problem."

"We want to do the right thing with all of these old files," chimed in Aramis. "We all want to know what our options are," Porthos added.

Coincidentally, Cali had received three other engagements regarding files in the last two weeks: Five lawyers from a firm undergoing a bitter dissolution after 20 years together, where no one wanted to take charge of the closed client files or pay to have them stored. The tearful widow of a solo practitioner wanted to know what to do with former clients' files stacked to the roof of her three-car garage. A famous entertainment lawyer was being pressured by the heirs of a recently deceased Hollywood legend who wanted the legend's papers to sell to the media.

Retention of former clients' files was becoming a major ethics quandary. The longer lawyers stay in practice, the more clients they represent, the more files they collect, and with the increasing complexity of litigation and transactional work, the more documents end up in files.

Proliferating files from long-gone clients create law office space problems, storage problems, additional financial issues and other unanticipated problems upon dissolution of a law partnership or corporation, relocation of law offices or retirement. And sometimes there are competing claims to the documents in the files. (Los Angeles County Bar Association Formal Op. No. 493)

Even with the technological revolution, it was not cost-effective to scan hundreds or thousands of old files and store them electronically. Moreover, original documents of some value had to be maintained.

"Are there any professional standards which direct how long lawyers are required to maintain client's files?" Dar asked, jolting Cali from her ruminations.

"No. California's professional standards are generally silent about lawyers' duties to maintain former clients' files. However, the Restatement requires that a lawyer 'take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client' (Rest.3d Law Governing Lawyers § 46(1)9(1))," Cali answered.

"There must be some reason all of us thought we had to keep all of these files," Porthos said, rolling his eyes at the thousands of files.

"Ethics opinions talk about the source of our duty to maintain former client files long after a case or engagement has terminated," Cali continued. "One ethics committee observed that the papers in a client's file belong to the client and must be released promptly to the client following termination of the attorney-client relationship, if requested by the client. (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590,599, 124 Cal.Rptr. 297; Rule 3-700(D)(2), Rules of Professional Conduct of the State Bar of California.) However, if the client does not request the file, the client's right to the file continues after termination of the attorney-client relationship." (Los Angeles County Bar Association Formal Op. No. 475 and No. 330 (Nov. 30, 1972))

"Another ethics committee found that an attorney is a bailee of all papers which the client has given to the lawyer. This is based upon lawyers' duties to take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." (Bar Association of San Francisco Formal Opinion 1996-1)

"I heard," said Athos cheerfully, "that lawyers are permitted to destroy former client files five years after conclusion of the representation."

"Not exactly correct," responded Cali quickly. "The Rules of Professional Conduct and State Bar Act do not specifically direct how long an attorney should keep a client's files. But rule 4-100(B)(3) requires records regarding entrusted client property and funds to be maintained five years after the last funds and property has been disbursed to the client. One bankruptcy case has applied this 'five-year rule' to former client files." (*Ramirez v. Fuselier* (9th Cir. BAP 1995) 183 B.R. 583, 587 & fn. 3; Los Angeles Bar Association Form. Opn. 475 (1994) [recommending five-year retention period for client files "by analogy" to rule 4-100(B)(3)])

"But," warned Cali, "another ethics committee opined that the length of time papers must be maintained depends upon the nature of the document, the nature of the services rendered to the client, and any other factors to determine whether prejudice to the client would arise by destruction of the papers." (Bar Association of San Francisco Form. Opn. 1996-1)

"I am trying to divest myself of worldly possessions!" Aramis pleaded with the warehouse rafters. "Am I stuck with the storage of these files forever?"

"Not necessarily." Cali tried to sound soothing. "There are some documents that you cannot destroy without the client's permission or notice to the affected client, including documents of intrinsic value or significant pecuniary value or any documents required to be deposited in court pursuant to Probate Code §700, et seq. Also, criminal files must be maintained for the life of the former client." (Los Angeles Bar Association Form. Opn. 475 (1994), 420)

"What documents must be deposited in court?" asked Dar, with a view to her estate planning practice.

"An original will, declaration of trust, trust amendment or other original document modifying a will or trust; a signed original power of attorney; a signed original nomination of conservator; or any other signed original instrument that the attorney and depositor agree in writing to place on deposit (Prob. Code §704)," responded Cali.

Porthos smiled for the first time. "The firm has always had the policy to return original estate planning documents to the clients. Our files do not contain any of those!"

"What are intrinsically valuable documents?" asked Aramis warily.

"Documents such 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 or which themselves create or extinguish legal rights or obligations (Los Angeles Bar Association Form. Opn. 475 (1994); 491, fn. 5)," answered Cali.

"I'm confused," said Athos. "If a document is not intrinsically valuable and not required to be lodged with a court under the Probate Code, how could it have significant pecuniary value?"

"You're right, Athos! Documents not subject to the Probate Code or which do not have intrinsic value will have no pecuniary value to anyone," Cali responded. "However, if the case is notorious or if the client is a celebrity, then other documents may have significant pecuniary value because the client or the client's heirs can sell the documents or use them to create wealth, for example, by writing a tell-all memoir." (Los Angeles Bar Association Form. Opn. 491)

"Now we are getting somewhere! The first step is to look through each file for documents under the Probate Code, intrinsically valuable documents or for documents in high profile cases or involving celebrity clients. Can we destroy everything else in files that have been closed for 10 years or more?" Porthos asked eagerly.

"There is support for that. One ethics committee opined that all documents not necessary to protect the client from prejudice or intrinsically valuable could be destroyed. (Bar Association of San Francisco Form. Opn. 1996-1) However, another ethics committee opined that a law firm had an ethical obligation to try to return files to former clients or try to obtain client authorization to destroy closed files (Los Angeles Bar Association Form. Opn. 475)," answered Cali.

"I can see that trying to contact former clients is good client relations and good risk management. What kind of effort do we have to make to find our former clients?" asked Aramis grimly.

"You are required to pursue 'all reasonably available means' to notify a former client in writing, preferably by certified mail to the client's last known address." Cali started to explain the process, when Dar interrupted, "What does 'all reasonably available means' require?"

"'Reasonably available means' does not require you to hire an investigator, but you should consult the file, public telephone directories, organizations' membership directories, third parties who might have information to locate the former client's last known address or the internet." (Los Angeles Bar Association Form. Opn. 475)

"So Step Two is trying to locate each former client through reasonably available means. Once we have an address,

what do we say to the client about the file?" Athos asked.

"Obviously the content of former clients' notices may vary depending upon the circumstances of the case or the nature of the relationship. Minimally, your notice should advise (1) that the files are available for release to the client; (2) that you seek the client's instructions concerning the file's disposition; (3) that the file will be destroyed if no contrary instruction or response is received after at least a 90-day period; and (4) when the destruction will occur (after at least a 90-day notice period) (Los Angeles Bar Association Form. Opn. 475)," Cali answered.

"What if the client can not be located or does not respond?" asked the practical-minded Porthos.

"If at least five years has passed since the matter was closed, if the matter was a civil case and if at least a 90-day period has elapsed after the sending of a notice, then the file may be destroyed. However, make sure to keep any documents which have value or must be deposited with the probate court," answered Cali. "There are some matters which should not be destroyed until a longer time period has passed. For example, if the former client was a minor, I recommend that the file be retained until the minor has reached majority plus four years for the probable time for a legal malpractice action to pass."

"I understand that documents mentioned in the Probate Code can be deposited with the Probate Court. But what should we do with intrinsically valuable documents which should not be destroyed without the consent of the client, if the former client cannot be located or does not respond?" Dar queried.

"If they have been abandoned by the client for a period of three years, they may escheat to the state (Code Civ. Proc. §§1500 et seq). So you can deposit those with the California Controller's office," answered Cali. "In the unlikely event that a former client comes looking for the documents down the road, the client can still go through a procedure at the Controller's Office to claim the abandoned property."

"One of my clients would be devastated if she read a psychiatric report in her file. If she requests it, do I have to give it to her?" asked Dar. "Yes," responded Cali. (Los Angeles Bar Association Form. Opn. 509)

"What if the client is deceased? We can't notify a dead person," said Athos.

"You should make reasonable efforts to notify the deceased client's legal representatives or legatees of the proposed destruction of the files and give them an opportunity to inspect or take any documents of significant pecuniary or intrinsic value, subject to your obligations to protect the deceased client's secrets and maintain the deceased's confidence. The notice should state that the files may contain documents of significant pecuniary value (although they need not be identified) and identify any documents of intrinsic value. You must preserve any deceased client's confidential information, since the duty of confidentiality survives the death of the client. Since the holder of lawyer-client privilege is the client's personal representative on the death of the client, until the personal representative is discharged, a disclosure of confidential information or secrets to the personal representative of the deceased client may be appropriate." (Los Angeles Bar Association Form. Opn. 491 (1998))

"Step Three was sending a notice to clients who will claim their file, give instructions that we can destroy the file or not respond. Some papers may have to be retained and/or escheat to the state. What about all the files and documents that we can dispose of? Can we rent a dumpster and throw them in?" asked Aramis.

"All documents which can be destroyed must be incinerated, shredded or some other means used to preserve confidential information pursuant to Business and Professions Code §6068(e) and Evidence Code §§950 et seq," responded Cali firmly.

"Step Four is to destroy the documents by preserving client confidentiality. I think I will go buy 10 paper shredders," remarked Porthos.

At first Athos, Porthos, Aramis and Dar Tanyon were a bit gloomy about the effort needed to accomplish the four steps to file destruction. However, their desire to do right by their former clients prevailed. They decided to have several staff "file closing" parties with free pizza and overtime pay to motivate firm members to go through all the old files.

On reflection, they believed that sending notices to former clients and their heirs would add to their reputation of being good, responsible lawyers in the community and might even generate some business. They also decided to implement a file retention policy with their current and future clients, either in a fee agreement or developed in writing during the relationship. (Los Angeles County Bar Association Formal Op. Nos. 491, 330 and Bar Association of San Francisco Formal Op. Nos. 1996-1 and 1990-1. See Form 5:M, Vapnek, Tuft, Peck & Wiener, *California Practice Guide — Professional Responsibility* (The Rutter Group 2002))

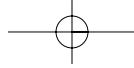
"Our heirs and firm successors will never have to face this again!" Porthos promised. The four partners cheered: "One for all and all for one!"

■ *Ellen Peck is a former judge of the State Bar Court, a past chair of the State Bar's Committee on Professional Responsibility and Conduct and a member of the Commission to Revise the Rules of Professional Conduct. A private practitioner in Escondido, she is a co-author of The Rutter Group's California Practice Guide — Professional Responsibility.*

Test

1 Hour Legal Ethics

1. Barry Barrister handled successful real estate development deals for the Marx Brothers for 20 years. One night at an opera gala, the brothers developed irreconcilable differences and have decided to sever all business relations. Groucho, Harpo and Chico have each requested that Barry give them the original file and not give it to any other brother. Barry can ethically give the original files to Groucho, the eldest brother.
2. Cathy Crimlawyer decided to scan and store electronically all of her former clients' criminal files. Since there are no original documents in her file, electronic storage is ethically appropriate.
3. The Rules of Professional Conduct require that a lawyer "take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client."
4. Alice Attorney has no duty to maintain the files of former clients that have not requested files after Alice completed their engagements and with whom she no longer has an attorney-client relationship.
5. An attorney is a bailee of papers which the client has given the lawyer.
6. The ABC Law Firm can destroy former client files five years after conclusion of the representation.
7. Some original documents are required to be deposited in court.
8. An original will, declaration of trust, trust amendment, or other original document modifying a will or trust are examples of the kinds of documents which must be deposited in court.
9. A signed original nomination of conservator may be destroyed five years after termination of the attorney-client relationship.
10. The ABC Law Firm can destroy intrinsically valuable original documents, as long as the attorney-client relationship has been terminated for five years or more.
11. In going through a file that had been closed for 10 years, Amos Attorney found Former Client's original deed of trust to the Lost Dutch-man's Mine dated 1898. Assuming that the deed had been superceded, or was a fake, Amos shredded the deed appropriately.
12. In going through Former Client's closed file, Carla Counsel found an original stock certificate for 10 shares in Microsoft Corp. Carla located an address for Former Client, sent her a notice that Carla had the original Microsoft Corp. stock certificate and requested instructions about what to do with the stock. Former Client did not respond. After three years, if Former Client does not respond, the stock will escheat to the state of California.
13. David Deal, an entertainment lawyer, had represented now- deceased Carrie Cute, one of the most popular child movie stars of the last century. In Carrie's files were a number of drawings Carrie made while sitting in his office with her parents and correspondence between Carrie and David. David is retiring and does not want to pay for storage of Carrie's files. Since there are no estate planning original or intrinsically valuable documents in Carrie's file, David may destroy the file to preserve Carrie's privacy.
14. After looking through each former client's file and finding no documents under the Probate Code, no intrinsically valuable documents, no documents in high profile cases or involving celebrity clients and no documents necessary to protect a client from prejudice, at least one ethics committee maintained that a lawyer still had an ethical obligation to try to return files to former clients or try to obtain client authorization to destroy closed files.
15. The ABC Law Firm is required to pursue "all reasonably available means" to notify a former client in writing about proposed destruction of its file.
16. Kevin Kounsel sent his former clients a notice advising them (1) that their files concerning completed engagements were available for release to them; (2) that Kevin sought the client's instructions concerning the file's disposition; (3) that the file would be destroyed if no contrary instruction or response was received within two weeks; and (4) that the file destruction would occur three weeks after the date of the client notice.
17. Annie Advocate's former client, Velma Kelley, asked for her file from a civil matter concluded 10 years ago. Annie believes that Velma's mental health is hanging by a slender reed and that she would be devastated by reading the psychiatric reports in her file. Annie may retain the psychiatric reports from the file she turns over to Velma if Annie reasonably believes that they may be harmful to Velma's fragile mental health.
18. Sammy Soliciter found some original documents in his former client, Tim Tycoon's, old files relating to transactional matters Sammy handled 10 years ago. Sammy wants to get rid of Tycoon's documents and files, but discovered that Tycoon was dead. Sammy can make reasonable efforts to notify Tycoon's legal representatives or legatees of the proposed destruction of the files and give them an opportunity to inspect or take any documents of significant pecuniary or intrinsic value.



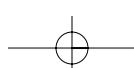
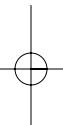
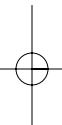
19. The XYZ Law Firm has instructions from 3,000 former clients authorizing the destruction of their old files. Managing Partner appropriately instructed File Clerk to throw 100 files in the building's trash bin every night.

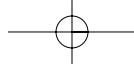
20. One of the best ways to lower the cost of former client storage of client files and to eliminate the requirement of former client notification is to implement a file retention policy by having the client give instructions, either in a written fee agreement or other writing during the relationship, concerning the length of retention of closed files and papers and when you will destroy closed files.

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TEST #40 — Ex-clients' Files Present A Quandary

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