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TEST # 62

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LEGAL ETHICS

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Files Are Files, Whether Paper Or Electronic

A new ethics opinion requires lawyers to release electronic versions of documents when requested

By **ELLEN R. PECK**

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As California Joan read the newspaper account of how Peri Maison cracked the Bigg murder case, she was interrupted by the jangling ringing of her telephone.

“Cali! My ex-client’s new counsel has made outrageous demands for proprietary computer materials. Help me, please.” Every Lawyer, the general practitioner who had been consulting with Cali about ethics matters, had another question.

“Fire away, Eve.” Cali grabbed her pen and pad.

“For the last five years, I have represented Itty Bitty Corporation (IBC) in a few transactional and corporate matters and in some commercial litigation. IBC got new management and they brought in their favorite lawyers to represent IBC in all pending matters. I sent them all of my hard copy files promptly.

“During IBC’s representation, I based IBC’s transactional documents on others that I had created using Word Perfect and Microsoft Word word-processing software. The documents could be changed and manipulated to suit IBC’s needs and were stored on my computer in a searchable electronic document management system, both in serial drafts and final form.

“I received a ton of e-mail correspondence that I also filed on my computer.

“I had created model pleadings, discovery requests and responses, and other litigation documents, which I tailored for IBC’s litigation matters, on my word-processing

software, and stored it in my searchable electronic document management system. I saved all drafts and final versions, in both final form and antecedent drafts.

“I created an electronic database so that I could electronically search deposition transcripts and exhibits by single words and other categories.

“IBC’s new counsel has the nerve to request that I provide electronic versions of all pleadings and discovery documents in pending and closed litigation so that they can electronically ‘cut’ and ‘paste’ new documents needed in the pending litigation. They also have demanded the electronic deposition and exhibit database, so they can use it in discovery, trial preparation and trial. Moreover, IBC asked for the electronic versions of all transactional documents so they are available to protect IBC’s interests in the event that questions or disputes arise concerning the scope, meaning and purpose of these agreements. Finally, IBC has requested an electronic version of the e-mail correspondence, for ease of storage and searching its contents, even though I have given IBC a hard paper copy of each message.

“Do I have to give up my proprietary software materials and the electronic version of all of these documents?”

Cali delivered the bottom line: “According to a new ethics opinion (Formal Opinion No. 2007-174, issued by the State Bar’s Committee on Professional Responsibility and Conduct (“CALBAR 2007-174”)), you are required to release these types of electronically stored materials.”

She began to explain: “Rule 3-700(D), California Rules of Professional Conduct (‘CRPC’) provides that subject to any protective order or non-disclosure agreement, after a lawyer is terminated by a client, the lawyer has a duty to ‘. . . promptly release to the client, at the request of the client, all the client papers and property.’”

Eve snorted triumphantly. “See — the electronically stored materials are not paper and they are not the client’s property.”

“I beg to differ,” Cali said. “CRPC 3-700(D)(1) itself defines ‘client papers and property’ as including ‘correspondence, pleadings, deposition transcripts, exhibits, physical evidence, experts’ reports, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not. . .’

“CRPC 3-700(D)’s purpose is not only to preserving the client’s ownership interest in papers and property, but also to prevent ‘reasonably foreseeable prejudice’ to the client’s interests. (CRPC 3-700(A)(2); (CALBAR No. 2007-174.)

“The recent opinion observed that the form of ‘all the client papers and property,’ whether paper or electronic, is irrelevant. The scope of the rule is not static; it recognizes that the content will change depending upon circumstances, including technological changes. It is not limited to either the form of any item or the material from which it is

comprised. Therefore, the rule includes papers and property in electronic as well as non-electronic format.” (CALBAR Nos. 2007-174 and 1994-134.)

Cali told Eve that regarding the nature of IBC’s requests:

- CRPC’s definition expressly lists ‘correspondence,’ as client papers and property, which certainly includes communications through electronic means, including e-mail.
- Pleadings are also expressly included in the definition of client papers and property.
- Deposition and exhibit database, the bar committee opined, come within the listed categories of ‘deposition transcripts’ and ‘exhibits’ by implication, since deposition and exhibit databases contain deposition transcripts and exhibits. (COPRAC No. 2007-174.)

“Well, the definition does not expressly or impliedly include discovery requests and responses or transactional documents,” objected Eve.

“Yes,” Cali responded, “but discovery requests and responses and transactional documents comprise items that are ‘reasonably necessary to the client’s representation.’ If something is ‘generated during the representation’ for continuing use therein, it is ‘reasonably necessary to the client’s representation.’” (CALBAR No. 1992-127)

Eve nodded. “I can see that discovery requests and responses fall within this definition because (1) they may give rise to further discovery requests; (2) disputes about the nature and extent of compliance with discovery requests may be ongoing; (3) responses may be needed as exhibits to motions and as exhibits at trial.”

“So do transactional documents,” Cali added. “Transactional documents are necessary to monitor performance pursuant to the agreement or any related agreement between the original or third parties who might subsequently become involved, as well as for use in any dispute resolution proceedings arising from the transactions. (Rule 3-700(D)(1); COPRAC No. 2007-174)

“The committee concluded that following termination by and request of the client, a lawyer must release: ‘(1) an electronic version of e-mail correspondence, (2) electronic versions of the pleadings, (3) electronic versions of discovery requests and responses, (4) electronic deposition and exhibit databases, and (5) electronic versions of transactional documents.’ (CALBAR 2007-174)

“The opinion rejected any concept that the lawyer’s obligation to release items in electronic form is not subject to a ‘balancing test,’ under which the client’s need for the electronic versions must be weighed against the lawyers expenditure of money and time of having to copy and/or transfer electronic versions (CALBAR 2007-174),” Cali said.

Eve sighed. "I suppose that any substantial expense in releasing electronic versions of the client's papers and property can be prevented through the use electronic filing systems, which are commonly available." (Cf. New Hampshire Bar Association Ethics Committee Opn. No. 2005-06)

"IBC has requested that I translate all documents into the unique word processing software used by IBC. Do I have to do that?" Eve asked.

"No, the opinion concluded that a lawyer is not obligated to release documents in any application (e.g., Word (.doc); WordPerfect (.wpd) or Adobe Acrobat (.pdf)) other than the application in which the attorney possesses them. Since the lawyer's obligation is to release items under CRPC 3-700(D)(1), there is no duty to create them or to change the application. (CALBAR No. 2007-174 citing *Jicarilla Apache Nation v. United States* (Fed.Cl. 2004) 60 Fed.Cl. 413, 416 and Cal. Rules of Court 342(i))," Cali answered.

"A lot of the electronically stored documents contain metadata reflecting confidential information belonging to my other clients. I have a duty under Business and Professions Code §6068 subdivision (e)(1) to protect my other clients' confidential information. How do I resolve the conflicts between these competing duties?" Eve wondered.

"You are required to take reasonable steps to remove any metadata that contains other clients' confidential information from any of the electronic items prior to releasing them to IBC. I understand that there are a number of commercially available metadata 'scrubbing' software programs," Cali said.

"Thanks, Cali, I have to get busy and transfer those electronic items to IBC," Eve said as she hung up the telephone.

As Cali answered the next call, she heard Paul Probate's voice on the other end of the line. "Cali, after 40 years in the practice of probate, trusts and estate planning, I am retiring. I have some ethics questions on closing my files."

"Paul, after your terrific career, you have earned a great retirement. How can I help?" Cali spoke fondly to a mentor.

"About 25 years ago, I drafted a will for Client and agreed that I would keep the executed original will. I have not heard from Client since then and all my efforts to locate him have been unsuccessful. I would like to make sure that Client can get his will in the future or that Client's heirs can locate the will after his death. My file does not have any notes of client communications and I remember little, if anything about Client or our communications. I would like to know whether I can ethically deposit the original will with a private commercial will depository," Paul said.

"I'm not familiar with private commercial will depositories. How do they work?" Cali asked.

“Will depositories are a type of commercial enterprise that has recently started doing business.” Paul explained. “I understand that a will depository ‘is a private, online resource for locating, storing, and retrieving original wills’ which involves ‘actual delivery of a will to a central privately operated entity or person for safekeeping.’” (CALBAR No. 2007-173)

Cali thought for a moment. “Paul, with your client’s knowing and informed consent, I do not see any ethical prohibition in using a commercial will depository. However, where you lack the ability to obtain Client’s consent because you cannot locate Client, using a will depository would violate your duty to support the laws of California, in violation of Business and Professions Code §6068(a) and the prohibition against intentionally or recklessly failing to perform legal services with competence under CRPC 3-110.” (CALBAR No. 2007-173)

“Are you referring to a violation of Probate Code §§700 et seq. which provide the exclusive legal means for disposition of wills and other estate planning documents held on deposit by an attorney?” Paul asked.

“Yes,” Cali responded. “A lawyer is ethically prohibited from depositing estate planning documents with a private will depository absent consent of the client pursuant to Probate Code §731(c).”

Paul changed the subject slightly. “California’s Probate Code is silent about registering information about the will with a private will registry. A ‘will registry is an online searchable database of vital information about a will, maintained by a private entity or individual. I understand that registry information would typically include the identity of the person making the will, the date the will was executed, the identity of the lawyer who drafted the will and the location of the will at the time of registration, but testamentary documents would not be deposited with the will registry.”

“You are permitted to register certain identifying information about Client’s will with a private will registry if you can determine, ‘based upon knowledge of the client, the client’s matter and investigation of the will registry, that registration will not violate the attorney’s fiduciary duties of confidentiality and competence,’” Cali said.

“I know I have a duty of confidentiality regarding client confidential information and communications . . . (Bus. & Prof. Code, §6068(e); Evid. Code, §950, et seq.; CRPC 3-100),” Paul began.

“Under certain circumstances,” Cali interrupted, “a lawyer’s disclosure of privileged client information when the lawyer reasonably believes doing so will advance the client’s interests, or is appropriate in furtherance of the representation, unless the client instructs otherwise has been permitted.” (See, Evid. Code §912(d); *McKesson HBOC, Inc v. Superior Court* (2004) 115 Cal.App.4th 1229 [9 Cal.Rptr.3d 812].)

“A client’s identity and address is not typically considered privileged information, subject to some exceptions, including where disclosure of a client’s identity would itself reveal the nature of the client’s legal problems for which the attorney was hired,” she added. “But disclosure of Client’s name and information about the will being registered will reveal the reason for my retention, i.e., to prepare a will for Client,” Paul said.

“However,” Cali countered, “the mere execution of a testamentary document is not always considered ‘private information.’ If Client cannot be located, ‘providing general information to a will registry could, in some circumstances, effectively advance the client’s interests by making important information about the location of the will accessible to the client’s representative or benefit potential heirs, beneficiaries or interested persons.”

“Yes, but other circumstances could mean that disclosure of this general information could be detrimental to Client’s interests (e.g., if the disclosure of the existence of a will could engender anxiety or concern among potential heirs),” Paul pointed out. “Additionally, even if the Client’s identity is not protected by the evidentiary attorney-client privilege, it may nevertheless be a client confidence or secret protected by Business and Professions Code §6068, subdivision (e) and CRPC 3-100, or be deemed confidential information protected by the client’s Constitutional right of privacy, (CALBAR No. 2007-173),” Cali said.

“So if information about Client’s will or its execution would be embarrassing or detrimental to the client’s interests, I must, without Client’s express consent, protect the confidentiality of that information,” Paul stated.

“The recent opinion concluded that ‘before registering testamentary documents with a will registry without client consent, a lawyer must determine, from a review of the client’s file and any independent recollection of communications with the client, whether registration would further the client’s objectives as communicated to the attorney during the course of the attorney-client relationship or whether registration would breach the duty of confidentiality either because the client would want to keep the information private, or registration would embarrass the client or likely be detrimental to the client’s interests,’” (CALBAR No. 2007-173) Cali said. “Because of the passage of 25 years, you may not be able to determine whether disclosure of Client’s will location would be embarrassing or likely be detrimental to him. Therefore, you will be acting at your peril.

“Your duty to act competently includes the duty to ascertain whether the registry adequately protects Client’s interests and otherwise complies with California law, including as the opinion noted, Civil Code §1798.82, et seq., ‘pertaining to system security breaches of businesses that own or maintain computerized personal information,’” Cali added.

“The opinion concluded that a lawyer who has no recollection of client communications or notes to refresh his recollection regarding Client’s desires, does not have sufficient information to determine whether publication of information in a will registry would (1)

advance Client's interests or (2) is likely to be embarrassing or detrimental to Client and should therefore not disclose the information," (CALBAR No. 2007-173) she concluded. Paul determined that his circumstances were so similar that he did not want to risk his professional obligations to Client by registering the will with a will registry or by depositing it with a will depository. Paul decided to transfer the unclaimed will to a much younger lawyer after following the provisions of notice to Client set forth in Probate Code §732(b) (CALBAR No. 2007-173).

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Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

- 1.** A lawyer has no duty to release any type of electronically stored materials relating to an ex-client's representation as requested by the ex-client.
- 2.** Following termination of a client representation, a lawyer may withhold documents in a client's files that are subject to a non-disclosure agreement, even though requested by a client.
- 3.** Following termination of a client representation, a lawyer may not withhold documents in a client's files that are subject to protective order of non-disclosure to that client, when demanded by the ex-client.
- 4.** Subject to certain defined exceptions, a lawyer must promptly release to the client, at the request of the client, all the client papers and property.
- 5.** "Client papers and property" include correspondences such as copies of e-mail between a lawyer and client.
- 6.** "Client papers and property" do not include deposition transcripts or exhibits.
- 7.** Because "client papers and property" do not include deposition transcripts or exhibits, an electronic version of a deposition and exhibit database need not be released to an ex-client at the request of that ex-client.
- 8.** After termination of a lawyer-client relationship, physical evidence relating to a client's case must be released to a client at the request of a client.
- 9.** After termination of a lawyer-client relationship, reports relating to a client's matter need not be released to a client at the request of a client, even though the reports are not subject to a protective order or non-disclosure agreement.
- 10.** After termination of a lawyer-client relationship, other items reasonably necessary to the client's representation must be released to a client at the request of a client.
- 11.** CRPC 3-700(D) requires the release of certain client papers and property whether the client has paid for them or not.
- 12.** The purposes of the duty to release requested files and papers to former clients include the prevention of 'reasonably foreseeable prejudice' to the client's interests.

13. Pleadings in electronic format are not required to be released to the requesting client after termination if a hard copy has been transmitted.

14. Electronic versions of discovery requests and responses in a litigated matter must be released to the requesting former client if they are ‘reasonably necessary to the client’s representation’ in ongoing litigation.

15. Electronic versions of transactional documents are not required to be released to a requesting former client.

16. The release of items in electronic form to a former requesting client is subject to a balancing test, weighing the client’s need for the electronic versions against the lawyer’s expenditure of money and time of having to copy and/or transfer electronic versions.

17. A lawyer has a duty to release documents in a word processing application (e.g., Word (.doc); WordPerfect (.wpd) or Adobe Acrobat (.pdf)) other than the application in which the lawyer possesses them.

18. A lawyer never has a duty to scrub metadata from electronic versions of a former requesting client’s papers or property prior to their release.

19. A lawyer may always deposit a will or other testamentary document with a commercial will depository even in the absence of the client testator’s consent.

20. Before registering testamentary documents with a will registry without client consent, a lawyer must determine, from a review of the client’s file and any independent recollection of communications with the client, whether registration would further the client’s objectives as communicated to the attorney during the course of the attorney-client relationship or whether registration would breach the duty of confidentiality either because the client would want to keep the information private, or registration would embarrass the client or be detrimental to the client’s interests.

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LEGAL ETHICS

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