

# **“The Client File”: Yours, Mine and Ours**

*By Lori R. Behar and Jennifer K. Saunders*

*Professional Errors and Omissions Department of  
Haight, Brown & Bonesteel. The firm has been a leader in the defense  
of professional malpractice claims since 1977. Lori Behar and Jennifer Saunders  
are senior partners with experience in every aspect of the field including  
arbitrations, trials and appeals.*

The maintenance and retention of a properly documented client file is a risk management tool that can be utilized to confirm communications with client(s), improve client relations and provide a record of the representation, if needed for client-related litigation.

The law is settled in California that an attorney’s litigation file is the property of the client and that the client is entitled to receive it. *Rose vs. State Bar* (1989) 49 Cal. 3d 646, 655. But what is the file? Which client does it belong to if you represent multiple parties? What if you maintain client or file information on a computer system? How long do you have to maintain the file? What if a departing attorney wants to take the file?

## **What is the “File”?**

From the inception of the attorney-client relationship the attorney gathers information and paper relative to their client’s cause which typically, for litigation cases, would encompass correspondence, pleadings and discovery, among other things. The form this takes has typically been referred to by attorneys as “the file”. The State Bar and California Supreme Court, however, identify “the file” as “the client paper and property”. This becomes evident by looking at the definition of what these governing bodies have included in “client papers and property” set out in Rule 3-700 to “include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert’s reports, and other items reasonably necessary to the client’s representation...” It may

also include original papers and property received from the client during the representation, such as deeds, original executed contracts/agreements, wills and trusts.<sup>1</sup> Furthermore, in this age of technological advancements and computer capabilities, where an attorney utilizes such systems to maintain client data or communications, recognition that this also becomes part of the client's "papers and property" would be prudent. There is no rule or case authority which specifically addresses computer based data or e-mail. Nevertheless, if such data is "reasonably necessary to the client's representation" as set forth in Rule 3-700, it appears to be covered within the definition of the client's "papers and property".

What may be "reasonably necessary to the client's representation" is broad enough to require the attorney to evaluate on a case-by-case basis whether a particular document may be part of the client's file. Other documents to consider in evaluating what is "the file" are phone message slips, calendars, bills, drafts of bills, internal memos, e-mails and ledgers.<sup>2</sup>

**What are the attorney's duties with respect to the client's "papers and property" on termination of the relationship?**

The principle of what constitutes a client's "papers and property" remains unaffected by the termination of the attorney-client relationship or by the client's failure and/or refusal to pay outstanding legal fees or costs. *Academy of California Optometrists Inc. vs. Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006; Rule 3-700 of the *Rules of Professional Conduct*. There are several circumstances that generally present themselves

---

<sup>1</sup> Some documents received from the client may carry obligations determined by *Civil Code*, Section 1813-1847 and the *Probate Code*, Section 700-735.

<sup>2</sup> Every memo, letter and other form of notation in the file should be written by the attorney with the knowledge that it could one day be read to and judged by a jury in prosecution or defense of a civil action.

to attorneys where special care should be taken with regard to the client's "papers and property" including the following:

- 1) When the client demands the file,
- 2) When there are multiple demands for the file, and
- 3) When the attorney closes the file.

1. Responding to Client Demands for the File:

Rule 3-700(D)(1) of the *Rules of Professional Conduct* provides that it is the attorney's obligation "[S]ubject 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." If the attorney has been terminated, whether by permissive or mandatory withdrawal, care must be taken to gather all the client's "papers and property". This should include any material that may be maintained on any computer base by the attorney.

Does the attorney have an obligation to provide both the hard copy and downloaded versions to the client? Since there is no specific Rule or case authority that addresses this issue, the attorney is under no obligation to download the duplicative data and release it to the client along with the hard copy. However, in the event the attorney maintains different client information or e-mail communications relating to the representation on a computer system, under the definition of "client papers and property" the attorney would be under an obligation to either download the information onto a disc or CD and release it to the client, or print out the information from the system and provide those print-outs to the client promptly.

The Rules do not prohibit the attorney from making and retaining copies of papers released to the client, at the attorneys expense, or prohibit a claim for payment of this

expense in subsequent litigation. [See Discussion of Rule 3-700, *Rules of Professional Conduct*] While there is no rule requiring the attorney to keep a copy of the file, nevertheless, in the long run keeping a copy all notes, memorandums, billings, and other documentation in the file that may not later easily be replicated or obtained from public records would be prudent practice. This may not only assist the client later, but may assist the attorney if questions are raised about the quality of the representation provided or reasonableness of the fees charged.

## 2. Multiple Claims to the File:

If the attorney has represented multiple clients in the subject litigation and one or more of the clients asks for the file, the attorney has the obligation to provide that client(s) with the file as discussed above. So as to avoid issues relating to which of the client's should receive the original of the "file", the attorney may be wise to write to each of the clients informing them of the request and seeking authorization to release the original file. At that time the attorney should inquire as to whether any of the other clients want a copy of the file. At a minimum the attorney should retain a copy of the file. A consideration for new clients may be to include in the initial retainer agreement or the conflict waiver letter, a provision for release of the original file as well as payment for duplication of the files (including electronic downloading) in the event of termination of the relationship. Custody and control of the file may also create disputes in partnership dissolutions or departures from the firm. As the file belongs to the client, direction should be obtained from the client prior to the attorney or firm's release of the file. While there is no California case that addresses this issue, the American Bar Association issued an opinion finding it to be unethical conduct for an attorney to remove files without the knowledge

of either the partnership or the client.<sup>3</sup> A Maryland Court of Appeals has recently found that a lawyer may not delete computer records or take client files from the firm without authorization. Such conduct was found to constitute an ethical violation of the State Bar's rules.<sup>4</sup>

### 3. File Retention:

There is no set time requirement mandated by the State Bar of California directing attorneys to maintain their records for any specific length of time. In fact, State Bar Opinion No. 2001-157 states that the attorney's obligation regarding a client's files **cannot** be measured by a fixed time period. The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee, on the other hand, has issued a recommendation of a minimum of five years. [Opinion 475, 1994].

### Risk Management Tips:

Implementation of the following risk management tools may be your first line of defense against potential claims:

- 1) In an initial engagement letter with the client consider including the firm's policy and practice regarding retention of case files;
- 2) Bear in mind that every writing in the file may later be scrutinized by a judge or jury. This includes memorandums, bills, e-mails, drafts, notes and inter-office communications;
- 3) E-mails may be considered part of the file. Make it a practice to include downloaded e-mails as part of the file.
- 4) Promptly release the file to the client upon request. The file belong to the client.

---

<sup>3</sup> *ABA Comm. on Professional Ethics*, Informal Op. C-787 (1964)

<sup>4</sup> *Maryland Attorney Grievance Comm'n v. Potter*, Md., Misc. Docket AG No. 92, 3/9/04)

- 5) Inventory the file prior to its release. Consider date-stamping the file so there is no confusion later as to what was provided. In some circumstances it is recommended that you consider obtaining a receipt from the client as well.
- 6) When representing multiple parties provide notification to each client of the request for the file, consider who has a claim to the original client documents and keep a complete copy of the file prior to its release.
- 7) Departing attorneys need consent of the client prior to obtaining custody of the file.
- 8) Maintain your files for a minimum of five (5) years.

**This article is intended to inform the reader of potential liability exposures for attorneys. This article reflects general principles only and does not render legal advice. Readers should consult legal, financial, insurance and other advisors if they have specific concerns. Neither the Los Angeles County Bar Association, Aon and its affiliates or the authors assume any responsibility for how the information in this article is applied in practice or for the accuracy and completeness of the information. Reproduction without written permission is prohibited. This article is made available by Aon Direct Insurance Administrators, administrators of the LACBA Sponsored Aon Insurance Solutions Program to the LACBA Members. [www.aonsolutions.com](http://www.aonsolutions.com)**