

First Supplement to Memorandum 2008-34

**Attorney-Client Privilege After Client's Death
(Comments of Paul Gordon Hoffman)**

The Commission has received a second letter from Paul Gordon Hoffman, an attorney in Los Angeles. His first letter was discussed in Memorandum 2008-34 at pages 21-23. Subsequent comments by phone to the staff were discussed in Memorandum 2008-35 at pages 18-19. This supplemental memorandum discusses his second letter, which is attached as an Exhibit. The staff appreciates Mr. Hoffman's further comments.

Mr. Hoffman states that he hopes

the Commission (and the State Bar, if ethical rules must be promulgated) will develop a single, consistent, clear rule to allow lawyers to respond to demands for delivery of files and for disclosure of materials in those files, and to allow for destruction of client files, following a client's death.

Exhibit p. 1.

Mr. Hoffman also reiterates his concern that difficulties can arise if the person entitled to a deceased client's files is different from the deceased client's privilege holder. *Id.* at 2.

Mr. Hoffman's suggestion for a comprehensive rule relating to a client's files, and his concern relating to who is entitled to the deceased client's files, are discussed in turn below.

Comprehensive Rule on Client Files

It appears that there are two issues that Mr. Hoffman would like to see resolved by a comprehensive rule relating to a deceased client's files. One is how an attorney is to respond to demands for a deceased client's files and materials in them without being subject to conflicting ethical and legal duties. See *id.* at 1. The other is to clarify when an attorney may destroy a deceased client's files. *Id.* These two issues are discussed below.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

Demand for Client Files

One reason why Mr. Hoffman would like a comprehensive rule relating to client files is because it would help avoid placing an attorney “in a position where complying with one rule or law might require violation of another rule or law.” *Id.* at 1. He explains:

For example, if the attorney-client privilege were to end on the client’s death, but ethical rules were to prevent a lawyer from disclosing a confidential communication even after a client’s death, then the lawyer would be placed in the difficult position of facing charges of contempt for failing to respond to a valid court order for production of documents if the lawyer were to comply with the ethics rules, or of facing State Bar disciplinary charges for violating ethics rules if the lawyer were to comply with the document production demand.

Id.

In response to Mr. Hoffman’s concern, the staff has researched the issue, and believes that it is unlikely that an attorney’s compliance with a court order to produce a deceased client’s documents would result in disciplinary charges.

The attorney’s duty of confidentiality to the client is codified in Business and Professions Code Section 6068(e) and is set forth in Rule 3-100 of the Rules of Professional Conduct. Section 6068(e) provides that an attorney has a duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Rule 3-100 provides that an attorney may “not reveal information protected from disclosure” in Section 6068(e). These duties continue after the client’s death. Vapnek *et al*, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege* §§ 7:35-7:36 (2007).

While the attorney has duties to the client, the attorney also has duties to the court. See *Williams v. Superior Court*, 46 Cal. App. 4th 320, 330, 53 Cal. Rptr. 2d 832 (1996) (“Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.” (citation omitted)).

Under Business and Professions Code Section 6103, an attorney is subject to discipline for violating a court order. And Rule 5-220 of the Rules of Professional Conduct provides that the attorney may not suppress evidence that the attorney is legally obligated to reveal.

For reasons explained below, it appears likely that the duty of confidentiality yields to a court order to disclose a client's information that is not protected by the attorney-client privilege.

The attorney's duty of confidentiality to the client has been described as "absolute." See, e.g., *People v. Singh*, 123 Cal. App. 365, 370, 11 P.2d 73 (1932). However, Business and Professions Code Section 6068(e) "must be read in conjunction with other statutes and ethical rules which specifically permit the attorney to depart from the usual rules of client confidentiality." *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 313, 106 Cal. Rptr. 2d 906 (2001). The State Bar Court "has held the duty of confidentiality expressed in Business and Professions Code section 6068, subdivision (e) is modified by the exceptions to the attorney-client privilege contained in the Evidence Code." *Id.* (citing *In the Matter of Lilly*, 2 Calif. State Bar Court Rptr. 473, 478 (Review Dept. 1993)). Disclosure of a client's information pursuant to a court order that the information is not protected by the privilege is thus a recognized exception to the duty of confidentiality. See *id.*

Moreover, the discussion following Rule 3-100 on the duty of confidentiality provides room for such an exception. The discussion states:

...
[2] ... [A] member may not reveal [a client's confidential] information except with the consent of the client or as authorized or required by the State Bar Act [Bus. & Prof. Code §§ 6000-6238], these rules, or other law.

...
[13] ... Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law....

The California Supreme Court decision *HLC Properties v. Superior Court*, 35 Cal. 4th 54, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005), provides further support that an attorney does not breach the duty of confidentiality by disclosing a client's files pursuant to a court order. The Court upheld an order for an attorney to disclose documents relating to a deceased client because the documents were no longer privileged. The Court did not discuss the duty of confidentiality. If the disclosure order would have caused the attorney to violate the duty of confidentiality, the Court would likely have discussed the issue, but it didn't.

Additionally, for practical reasons, it seems that the attorney's duty of confidentiality must yield to the attorney's duty to the court. Otherwise, a court

order finding the attorney-client privilege does not apply would be meaningless: An attorney-client communication that is *not* protected by the privilege could never be disclosed. That would eviscerate the exceptions to the privilege, which are intended to permit such disclosures. See Evid. Code §§ 954, 957, 958, 960, 961 Comments.

Finally, the staff is not aware of any attorney being disciplined for disclosing a client's information pursuant to a court order. (Note: One concurring opinion in a court of appeal case that predated Rule 3-100 stated that an attorney should refuse to comply with a court order and should risk contempt to challenge the order on appeal. See *People v. Kor*, 129 Cal. App. 2d 436, 447, 277 P.2d 94 (1954) (Shin, J., concurring). But it appears that no authority supports that justice's view. See C. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 Fordham Int'l L. J. 529, 536 (1992) (criticizing Justice Shin's concurring opinion and stating no other authority "supports such a monstrous requirement").)

In light of the above, it seems probable that an attorney's disclosure of a deceased client's files pursuant to a court order is not a violation of the attorney's ethical duty. It might be helpful if a rule expressly stated as much. **Because attorney ethical obligations are the bailiwick of the State Bar, the staff recommends that the Commission refer this matter to the State Bar for consideration.**

File Destruction

Another reason Mr. Hoffman would like to see a comprehensive rule governing a deceased client's files is to provide guidance to attorneys on when the files may be destroyed.

An attorney has multiple duties as to a former client's files, governed by several principles (including those in Civ. Code §§ 1813-1847, Prob. Code §§ 700-735, Rule 3-700 of the Professional Rules of Conduct, and others). See State Bar Standing Committee on Professional Responsibility and Conduct Opinion 2001-157.

One rule incorporating all of an attorney's responsibilities relating to deceased client's files may be useful. However, crafting the rule would be complex, and does not fall squarely within the Commission's study of the posthumous privilege. Such a project would be better-suited for the State Bar.

The State Bar is in the midst of multi-year study of the Professional Rules of Conduct. The staff does not know whether a comprehensive rule relating to destruction of a deceased client's files has been proposed. But draft amendments to Rule 3-700, relating to files of a former client, do not seem wholly applicable to a deceased client. See Discussion Draft, Proposed Amendments to the Rules of Prof'l Conduct of the State Bar of Calif., p. 97, available at <<<http://calbar.ca.gov/calbar/pdfs/public-comment/2008/DiscussionDraft.pdf>>>. The deadline to comment on proposed revisions has passed, but the comment form is still available from a link at <<http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842>>.

A comprehensive rule specifying when an attorney may destroy a deceased client's files, however, might be premature before the Commission's study on the posthumous attorney-client privilege is complete, and before any enactment that might follow is in effect. **Again, the staff recommends referring Mr. Hoffman's issue to the State Bar, along with a copy of this memorandum analyzing the issue.**

Concern If Person Entitled to Files Is Different from Privilege Holder

Mr. Hoffman writes that he remains "concerned about problems raised where the holder of the privilege is someone different from the person entitled to possession of the files." Exhibit p. 2. As an example, he states:

Suppose that the holder of the privilege was trying to prevent disclosure of certain information to the person entitled to the files. (This might well arise in connection with an intra-family business dispute.) Would the lawyer have a duty to advise the holder of the privilege that the lawyer intended to deliver the files to the person entitled to them so as to give the holder of the privilege an opportunity to block the delivery?

Id.

However, so long as there is a privilege holder and no waiver of the privilege, *it does not appear that a person other than the privilege holder would be entitled to a deceased client's files.* That is because an attorney, as custodian of the client's files, has a duty to maintain the privileged status of the files, and disclosure to a person other than the privilege holder would cause the files to lose their privileged status. As stated by the California Supreme Court,

[t]he custodian of materials protected by an evidentiary privilege owes a duty to the holder of the privilege to claim the privilege *and*

to take actions necessary to ensure that the materials are not disclosed improperly.

People v. Superior Court (Laff), 25 Cal. 4th 703, 713, 23 P.3d 563, 107 Cal. Rptr. 323 (2001) (emphasis added).

If a person, other than the privilege holder, were somehow entitled to a deceased client's files, that person could seek a court order to compel the attorney to hand over the files. A court order, either granting or denying the request, would resolve conflicting claims between that person and the privilege holder.

Therefore, **the staff does not believe a special rule needs to be crafted to address the possibility of conflicting demands by a privilege holder and another person.** It seems sufficiently clear that an attorney may not disclose files to anyone other than a privilege holder, absent a waiver or valid court order to do so.

Respectfully submitted,

Catherine Bidart
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Law Revision Commission
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File: _____

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Re: Study K-350: Attorney-Client Privilege Following Death

Dear Ms. Bidart:

Thank you for considering my prior comments. I am responding to your request for clarification contained in Memorandum 2008-38.

I hope that the Commission (and the State Bar, if ethical rules must be promulgated) will develop a single, consistent, clear rule to allow lawyers to respond to demands for delivery of files and for disclosure of materials in those files, and to allow for destruction of client files, following a client's death. A lawyer should not be placed in a position where complying with one rule or law might require violation of another rule or law. For example, if the attorney-client privilege were to end on the client's death, but ethical rules were to prevent a lawyer from disclosing a confidential communication even after a client's death, then the lawyer would be placed in the difficult position of facing charges of contempt for failing to respond to a valid court order for production of documents if the lawyer were to comply with the ethics rules, or of facing State Bar disciplinary charges for violating ethics rules if the lawyer were to comply with the document production demand.

Underlying my thinking on this matter is that the attorney-client privilege and the duty of client confidentiality both, may be waived by the client. As I previously indicated, the holder of the attorney-client privilege should be the same

EX 1

A PROFESSIONAL CORPORATION



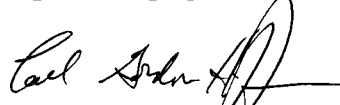
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August 14, 2008
Page 2

person entitled to the client's files. The person entitled to the files should stand in the shoes of the client. A lawyer is certainly free to turn over a client's files directly to the client without concern about breaching any client confidences disclosed in the files. The client can waive the attorney-client privilege if he or she wishes to disclose to third parties the material contained in the file. Similarly, a lawyer should be entitled to turn over the files to the person entitled to receive them after the client's death without concern that doing so breaches the attorney-client privilege. Perhaps the answer lies in a rule that says that the delivery of client files containing confidential communications to the person entitled to ownership of the files does not, in and of itself, violate the attorney-client privilege nor give rise to a waiver of that privilege, nor constitute a breach of a lawyer's ethical duties.

I am still concerned about problems raised where the holder of the privilege is someone different from the person entitled to possession of the files. Suppose that the holder of the privilege was trying to prevent disclosure of certain information to the person entitled to the files. (This might well arise in connection with an intra-family business dispute.) Would the lawyer have a duty to advise the holder of the privilege that the lawyer intended to deliver the files to the person entitled to them so as to give the holder of the privilege an opportunity to block the delivery?

Thank you for your consideration of these matters.

Very truly yours,



Paul Gordon Hoffman

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