

RESOLUTION 4-07-2002

DIGEST

Duties of Attorney: Length of Time to Keep Client's Files

Amends Business and Professions Code section 6068 to specify the length of time attorneys must keep their clients' files after completion of the matter.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons:

This resolution amends Business and Professions Code section 6068 to specify the length of time attorneys must keep their clients' files after completion of the matter. This resolution should be disapproved because a uniform rule is unnecessary and dangerous.

Business and Professions Code section 6068 lists an attorney's duties to the State Bar and to his or her client. This resolution would add to this list of duties a specific length of time an attorney must "maintain and keep" his or her client's files. Specifically, this resolution proposes the attorney keep a client's files either five years after completion of the matter in which the attorney has agreed to provide the services, or 90 days after giving written notice of intent to discard files to client by registered mail to the client's last know address, whichever occurs first.

Making maintenance of a client's files a statutory requirement is unnecessary. As a bailee of the client's personal property, an attorney has an obligation to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client. In satisfaction of those duties, attorneys make individualized arrangements with their clients regarding the retention of files. These arrangements are tailored to fit the nature of the records, the area of the law in which the legal services were rendered, and the particular needs and desires of the client. What is appropriate in light of the abbreviated timeline of a lien dispute would not be appropriate when the time horizon is more distant, such as an estate plan for a young testator or a conviction of a criminal defendant exposed to a life sentence.

While at first glance this resolution may appear to protect clients' interests in having their files maintained, the result would be to encourage attorneys to adopt a "one-size-fits-all" mentality toward file retention. Because clients and their needs for file retention come in all varieties, this would not serve clients well.

The resolution suffers from other problems as well. It permits the attorney to discard the files 90 days after sending a registered letter to the client's last known address, without any duty of investigating whether that address is still accurate, and without conditioning that right on the client acknowledging receipt of the notice by returning the green card. No rule should sanction the destruction of the client's files without reasonable attempts to provide actual notice to the client.

SECTION/COMMITTEE REPORT

THE STATE BAR OF CALIFORNIA (Professional Competence Unit)

Recommendation: DISAPPROVE

Reasons:

The issue raised by the sponsor is addressed by State Bar Formal Opinion No. 2002-157 and other formal ethics opinions issued by bar association ethics committees. Previously, a similar conference proposal (Resolution 08-05-1996 [Standards for Retention of Client Papers and Property]) sought an explicit standard on closed client files retention and the following groups submitted reports to the Conference of Delegates disapproving the proposal: Committee on Professional Responsibility and Conduct; Committee on the Administration of Justice; and the State Bar Litigation Section. In part, the Conference's consideration at that time led to the development and publication of a State Bar formal ethics opinion on closed client files retention.

A rationale often advanced against an explicit disciplinary rule in this area is that any retention period selected as the minimum amount of time to retain closed client files will be arbitrary and will not distinguish between the many different substantive areas of practice or the various circumstances that are present in any individual client's case.

On this point, State Bar Formal Opinion No. 2002-157 cites with approval Opinion 1996-1 of the Legal Ethics Committee of the Bar Association of San Francisco which states:

"There is no rule that provides . . . a time period [after which client papers may be destroyed] and, in our view, no rule should. The key to retention of client papers, absent client agreement to other arrangements, is the attorney's obligation as a bailee of the client's personal property and the need to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client. This duty cannot be discharged merely by reference to a fixed time period."

The State Bar affirms the rationale of its Opinion No. 2001-157 and believes that if any rule should be developed it should not simply set a "one size fits all" retention period.

The proponent has the option of presenting a revised proposal to the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. This Commission is charged with conducting a cover-to-cover review of the entirety of the rules and proposing comprehensive amendments. Professional Competence staff believes that a rule approach is more appropriate than a legislative proposal because of the primacy of the Supreme Court's role in establishing attorney ethical standards upon the recommendation of the State Bar Board of Governors and following appropriate study. (See Bus. & Prof. Code §§6076-6077.)

TEXT OF RESOLUTION

Resolved that the Conference of Delegates recommends that legislation be sponsored to amend Business and Professions Code section 6068 to read as follows:

- 1 § 6068
- 2 It is the duty of an attorney to do all of the following:
- 3 (a) To support the Constitution and laws of the United States and of this state.
- 4 (b) To maintain the respect due to the courts of justice and judicial officers.
- 5 (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal
- 6 or just, except the defense of a person charged with a public offense.
- 7 (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as
- 8 are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false
- 9 statement of fact or law.
- 10 (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the
- 11 secrets, of his or her client.
- 12 (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by
- 13 the justice of the cause with which he or she is charged.
- 14 (g) Not to encourage either the commencement or the continuance of an action or proceeding from
- 15 any corrupt motive of passion or interest.
- 16 (h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or
- 17 the oppressed.
- 18 (i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary
- 19 proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an
- 20 attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any
- 21 other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to
- 22 cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply
- 23 with a request for information or other matters within an unreasonable period of time in light of the time
- 24 constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege
- 25 shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.
- 26 (j) To comply with the requirements of Section 6002.1.
- 27 (k) To comply with all conditions attached to any disciplinary probation, including a probation
- 28 imposed with the concurrence of the attorney.
- 29 (l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with
- 30 attorney discipline.

31 (m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably
32 informed of significant developments in matters with regard to which the attorney has agreed to provide legal
33 services.

34 (n) To provide copies to the client of certain documents under time limits and as prescribed in a rule
35 of professional conduct which the board shall adopt.

36 (o) In the absence of an express agreement between the attorney and the client to the contrary, to
37 maintain and keep the client's files for either a period of: (1) five years after completion of the matter in which
38 the attorney has agreed to provide the services, or (2) 90 days after giving written notice of intent to discard
39 files to client by registered mail to the client's last known address, whichever occurs first.

40 (p) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the
41 attorney has knowledge of any of the following:

42 (1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or
43 other wrongful conduct committed in a professional capacity.

44 (2) The entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach
45 of fiduciary duty, or gross negligence committed in a professional capacity.

46 (3) The imposition of any judicial sanctions against the attorney, except for sanctions for failure to
47 make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

48 (4) The bringing of an indictment or information charging a felony against the attorney.

49 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of
50 any felony, or any misdemeanor committed in the course of the practice of law, or in any manner in which a
51 client of the attorney was the victim, or a necessary element of which, as determined by the statutory or
52 common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or
53 other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or any
54 misdemeanor of that type.

55 (6) The imposition of discipline against the attorney by any professional or occupational disciplinary
56 agency or licensing board, whether in California or elsewhere.

57 (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly
58 incompetent representation, or willful misrepresentation by an attorney.

59 (8) As used in this subdivision, "against the attorney" includes claims and proceedings against any
60 firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct
61 complained of and any law corporation in which the attorney was a shareholder at the time of the conduct
62 complained of unless the matter has to the attorney's knowledge already been reported by the law firm or
63 corporation.

64 (9) The State Bar may develop a prescribed form for the making of reports required by this section,
65 usage of which it may require by rule or regulation.

66 (10) This subdivision is only intended to provide that the failure to report as required herein may serve
67 as a basis of discipline.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: The Orange County Bar Association

STATEMENT OF REASONS

Existing Law: California law is currently silent on how long an attorney must maintain client's files.

This Resolution: This resolution amends the Business and Professions Code to provide to attorneys guidance on how long client's files must be maintained in the absence of an agreement to the contrary.

The Problem: In the absence of any legal requirements, attorneys are expending substantial resources storing client's files.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

BEVERLY HILLS BAR ASSOCIATION

The resolution fails to take into account the needs and concerns of certain kinds of law practices, including criminal matters, probate and estate matters, which do not fit neatly into either a fixed five year term or 90 days after notice of intent to discard. In criminal matters, particularly ones which may ultimately involve a "third strike" issue, the need for access to files that pertain to previous convictions may become vital in the defense of a client facing the harsh imposition of a third strike penalty. In the estate and trust field, giving notice to an executor, trustor or trustee may not satisfy the concerns or interests of beneficiaries who might become aware of issues many years after files would be destroyed under the proposed scheme. As proposed, the amendment to Section 6068 fails to adequately deal with the many potential interests in the files proposed for destruction.