THE BAR ASSOCIATION OF SAN FRANCISCO

Legal Ethics
Ethics Opinions

OPINION 1990-1

An attorney may not ethically withhold materials or information, including the attorney's work product and items not physically contained in the client's file, from a present or former client or the client's new attorney, when to do so would reasonably foreseeably prejudice the client's representation.

QUESTIONs:

1. May an attorney ethically withhold from the client or the client's new attorney any materials relating to the client's representation, including the attorney's uncommunicated work product?
2. May an attorney ethically assert the absolute work product protection in C.C.P. § 2018(c) against a client or former client?

CONCLUSION

An attorney may not ethically withhold materials or information, including the attorney's work product, from the client which reasonably foreseeably prejudices the client's representation. [1] Information in the attorney's possession necessary to the client's representation is not limited to items physically contained in the client's file.

An attorney may ethically assert the absolute work product protection in C.C.P. § 2018(c) against a client or former client unless doing so will result in reasonably foreseeable prejudice to the rights of the client or unless a court orders otherwise. [2] The principles determining the attorney's ethical obligation are not different when the client seeks the attorney's work product in a malpractice action against the former attorney. [3]

The attorney, however, has no ethical obligation to reveal uncommunicated work product if the sole issue is whether or not the attorney committed malpractice. This conclusion is based on the Committee's construction of the phrase, "prejudice to the rights of the client," as it is used in California Rule of Professional Conduct 3-700(A)(2). In particular, the Committee does not believe that failure to aid the client's pursuit of a liability claim against the former attorney constitutes "prejudice" within the meaning of the Rule.

INTRODUCTION

The issues addressed in this opinion present one of the most difficult and frequently recurring ethical dilemmas for members of the Bar. The Committee has had these issues under consideration for more than three years.

The Committee is aware that the California Supreme Court has recently granted petitions for review in two decisions by two different panels of the Fourth Appellate District of the California Court of Appeal. The panels reached opposite conclusions as to whether an attorney may shield absolute work product under C.C.P. § 2018(c) from the attorney's own client where the client sues the attorney for legal malpractice: Neeb v. Superior Court (1989) 214 CalApp.3d 693 (review granted 1/4/90), and Platt v. Superior Court (1989) 214 CalApp.3d 779 (review granted 1/4/90).

The Committee is also aware of the recent enactment of SB 2668, which amends C.C.P. § 2018, effective January 1, 1991, to require the production of work product to a client or former client where the work product is relevant to an alleged breach of the attorney's duty to the client or former client arising out of the attorney-client relationship. [4]

The Committee recognizes that the Supreme Court may resolve the issues addressed in this opinion and that the legislature may enact laws that affect a lawyer's obligations to a client or former client in certain situations. The Committee's opinion, however, addresses the attorney's ethical obligations under the Rules of Professional Conduct, rather than the attorney's legal responsibilities under the California Civil Discovery Act, and is not limited to the situation where the client seeks discovery of the attorney's work product in a malpractice action against the former attorney.

DISCUSSION

We begin with a discussion of the applicable Rules of Professional Conduct. Rule 3-700(A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including ... complying with rule 3-700(D). [5]

Rule 3-700(D)(1) governs termination of employment and provides in part:

> (D) A member whose employment has terminated shall:

(1) Subject to any protective order or nondisclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . (Emphasis added.)

The discussion to Rule 3-700 states: "What such steps would be included of course, will vary according to the circumstances." The discussion also states that Rule 3-700(D) was intended to codify existing case law.

A. The Attorney's Dilemma

Prior to the Fourth Appellate District's conflicting decisions (decided one week apart) in Neeb v. Superior Court, supra , and Platt v. Superior Court, supra , no California court had directly addressed the ethical considerations involved where a client seeks his or her former attorney's absolute work product. Indeed, prior to Neeb and Platt, courts had gone out of their way to avoid having to decide this issue. Ethics opinions of various bar associations have come down on both sides of the issue. A brief review of the existing authority will demonstrate the dilemma presented to attorneys when faced with a discovery demand or informal request by a former client for the attorney's unqualified or absolute work product.

B. Authorities Supporting the Position That An Attorney's Opinion Work Product is Absolutely Privileged Even As Against A Client

C.C.P. § 2018(c) provides that any writing that reflects an attorney's impressions, conclusions, opinions, or legal researcher theories shall not be discoverable "under any circumstances." C.C.P. § 2018(a) states that:

> It is the policy of the state to (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.

Several courts in California have held that an attorney's opinion work product is absolutely insulated from discovery by virtue of the "shall not be discoverable under any circumstances" language of C.C.P. § 2018(c) and its predecessor, C.C.P. § 2016(b). e.g., BP Alaska Exploration, Inc. v. Superior Court (1988) 199 CalApp.3d 1240, 1251; Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 CalApp.3d 264, 274; Travelers Ins. Companies v. Superior Court (1983) 143 CalApp.3d 436, 453; Fellows v. Superior Court (1980) 108 CalApp.3d 55, 68; Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 CalApp.3d 496.

The First Appellate District in Travelers Ins. Companies v. Superior Court, supra , 143 Cal. App. 3d at 453, stated "We are aware of no precedent allowing even the former client of an attorney access to writings that reflect that attorney's, impressions, conclusions, opinions, or legal research or theories." The Fourth Appellate District in Rumac, Inc. v. Bottomley (1983) 143 CalApp.3d 810, 812 n.3, stated that because the former client was not a party to the appeal, the court would not address the extent of an attorney's liability for "correctly asserting the absolute privilege against his former client's wishes which proximately causes damage to his former client."

Lasky, Haas, Cohler & Munter v. Superior Court, supra , involved a suit by the beneficiaries of a trust who sought to remove and surcharge the trustee and to have a corporate trustee appointed. The beneficiaries sought discovery of all writings and discussions generated by the trustee's counsel concerning the trustee's activities with regard to the sale of the corpus of the trust. The attorney for the trustee refused to disclose his uncommunicated work product. The Second Appellate District reversed the trial court's order requiring disclosure of previously uncommunicated work product, holding that the attorney is the intended exclusive holder of the work product privilege and that the attorney may assert it, even against the client, in the context of litigation where adversaries of the client seek the material to use against the client. The Lasky court did not "consider the far stronger public policy considerations involved in discovery where the client seeks his former attorney's work product to prepare his own case against that attorney." Lasky, Haas, Cohler & Munter v. Superior Court, supra , 172 CalApp.3d at 279. The Lasky court stated in dictum, however, that "there are strong

ethical considerations for concluding that the client has an absolute right of access to all work product generated by his attorney in representing the client's interest." (Ibid)

The Second Appellate District in Fellows v. Superior Court, supra 108 CalApp.3d at 68, stated, "There is no authorization for the court to weigh or balance any competing interests between the party seeking disclosure and the party resisting disclosure [of the attorney's absolutely privileged work product]." The First Appellate District in Popelka, Allard, McCowan & Jones v. Superior Court, supra , 107 CalApp.3d at 501, upheld a law firm's assertion of absolute work product protection in a malicious prosecution action, stating "If filing a malicious prosecution action (or, by the same logic, a malpractice action) could automatically open an attorney's files to a prior action, then an attorney, anticipating such a future suit, would hesitate to commit his or her doubts about a case to paper."

San Diego County Bar Association Legal Ethics Committee Opinion No. 1977-3 addressed the issue "To which portions of the file is the client entitled?" by dividing a typical client's file into four broad classes of documents: pleadings, correspondence, investigation and research, and attorney's notes. The opinion concludes that personal notes of the attorney are not the property of the client. The Opinion states: "The typical attorney-client relationship presupposes that the rough, blemished opinions of the attorney, whether or not reduced to writing, are the tools of the trade, likened to the tools of a carpenter, without which the attorney cannot construct the appropriate legal representation for which the client has retained him and which the client has every right to expect.... Therefore, these ... documents are ones to which the client is not entitled."

In its Opinion No. 1984-3, the San Diego County Bar Association Legal Ethics Committee concluded that upon withdrawal from representation, an attorney must make available to the client all papers and property in the client's file, other than absolutely privileged attorney work product as defined in C.C.P. § 2016(b), citing Travelers Ins. Companies v. Superior Court , supra . The Opinion states that the conclusion that upon withdrawal an attorney is not obligated to provide a client with papers or property containing the attorney's impressions, conclusions, opinions, or legal theories, is reached as a matter of "legal property rights, rather than professional ethics." The opinion also observes, however, that "the Committee expects that attorneys shall be guided in such matters by traditional standards of professional ethics and courtesy."

The Fourth Appellate District in Neeb v. Superior Court, supra , held that a former client was not entitled to discovery of the attorney's absolute work product under C.C.P. § 2018(c) in a malpractice action by the client against the former attorney. The court concluded: Counsel's absolute work product which, though it might repose in the client's file during the course of the attorney-client relationship, nevertheless remains counsel's personal property after that relationship has ended. Neeb v. Superior Court, supra , 214 CalApp.3d at 697.

C. Authorities Supporting the Position That The Client Is Entitled To The Attorney's Uncommunicated Work Product

There is also a line of authority that supports the proposition that an attorney's work product absolutely belongs to the client when the client demands the attorney's file upon the attorney's discharge. Matull & Associates v. Cloutier (1987) 194 CalApp.3d 1049,1056; Kallen v. Delug (1984) 157 CalApp.3d 940, 950; Weiss v. Marcus (1975) 51 CalApp.3d 590, 599; Academy of California Optometrists, Inc. v Superior Court (1975) 51 CalApp.3d 999, 1004-05.

These cases do not define attorney work product and do not address the assertion of the absolute work product protection in the discovery context. Instead, they concern the ethical duty of a discharged or withdrawing attorney to provide the former client with the case file upon request so that new counsel could prepare the case for trial against the client's adversaries. The court in Weiss v. Marcus, supra , 51 CalApp.3d at 599, held that a client who discharges one lawyer and retains new counsel to consummate pending litigation "remains the owner" of the attorney's "work product" irrespective of whether the attorney was paid for his or her services.

In Kallen v. Delug, supra , the court found it to be a breach of the attorney's duty under former Rule 2-111(A)(2) for a discharged attorney to withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including delivering to the client all papers and property "to which the client is entitled." Kallen v. Delug, sup , 157 CalApp.3d at 950.

The Academy of California Optometrists, Inc. v. Superior Court, supra , involved a dispute between a discharged attorney and a former client as to the enforceability of the attorney's contractually provided retaining lien on the client file for payment of the attorney's fees. Here again, the court referred to work product in the generic, non-privileged sense. No reference was made to the issue of the absolute work product privilege. The court concluded that the attorney's lien on the file was unenforceable because of the attorney's duty under Rule 2-111(A)(2) to provide the client's file to the client.

In Opinion 1975-4, this Committee concluded that there is an ethical duty to release to the client or to the client's new counsel all papers, documents, or other property necessary to the continued representation of the client, including documents or materials for which the client has not yet paid.

It was the opinion of this Committee in Opinion 1984-1 that it is improper for a lawyer in a civil case, who either withdraws from representation or who has been discharged by the client, to withhold from the client the client's file, including attorney work product, except if and to the extent these materials are absolutely protected from disclosure by a court order or valid privilege that a lawyer may and has properly invoked. Opinion 1984-1 thus left open the key question addressed by this opinion.

The Fourth Appellate District in Platt v. Superior Court, supra , concluded that C.C.P. § 2018(c) was never intended to shield attorney work product from the lawyer's own client where the client sues the lawyer for legal malpractice. The court reviewed the legislative history of Section 2018 and its predecessor, as well as the case authorities, commencing with Hickman v. Taylor (1947) 329 U.S. 495, and concluded that the work product protection was intended to allow attorneys to represent their clients adequately and was not intended to be asserted against a client or former client in a legal malpractice action.

The Platt court also relied on C.C.P. § 2018(e), which requires that a client consent to disclosure of work product to the State Bar in disciplinary proceedings, as well as on Business & Professions Code § 6202, which provides that the work product privilege does not prohibit the disclosure and introduction of relevant evidence, including work product, in an attorneys' fee arbitration proceeding. The Platt court also noted that Rule 3-700(D) does not expressly contain an exception for absolute work product from the requirement that the attorney whose employment has terminated must release "client papers and property" to the former client.

The Platt court expressly limited its holding to the situation where the lawyer is sued by the client for malpractice. The court was influenced by the apparent injustice in allowing the lawyer in a malpractice case to disclose favorable absolute work product to defeat the malpractice claim while at the same time denying access by the client to unfavorable absolute work product which could assist the client in establishing the malpractice claim against the attorney. The court, however, apparently did not consider the alternative of ruling that an attorney would be estopped to offer uncommunicated work product in his or her defense, unless the attorney reveals all of his or her work product to the client.

D. An Attorney May Not Ethically Withhold Client Papers and Property, Including The Attorney's Uncommunicated Work Product, In a Litigation Or Non-Litigation Context, Where Such Information and Materials Are Reasonably Necessary To The Client's Representation

The attorney's ethical obligation on withdrawal is to act reasonably to avoid reasonably foreseeable prejudice to his or her former client. The attorney's ethical obligation is distinguishable from the question of the attorney's legal responsibilities under the California Civil Discovery Act and does not necessarily turn on the definition of 'work product" or on the interpretation of C.C.P. § 2018(c). The ethical issue focuses on the tangible and intangible materials and information the attorney must disclose to the client in order to avoid foreseeable prejudice to the rights of that client.

The attorney's ethical obligations with respect to a client arise generally as a result of the employment relationship. The issues presented here contemplate that the attorney-client relationship has been terminated either by withdrawal, discharge or conclusion of the representation. An attorney's obligations to the client do not cease with termination of the employment relationship. Kallen v. Delug (1984) 157 CalApp.3d 940, 950. Regardless of how or why the attorney-client relationship has terminated, Rule 3-700(A) requires that a member shall not withdraw from employment until he or she has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including compliance with Rule 3-700(D) and other applicable laws and rules. Thus, the attorney must turn over to the client or to the successor attorney all papers and property to which the client is entitled.

It is the opinion of the Committee that there is no ethical obligation upon an attorney to disclose his or her uncommunicated or absolute work product, unless the failure to do so would result in reasonably foreseeable prejudice to the client's rights, as described above. Because of the myriad of situations that may occur, it is not within the purview of this opinion to define what may constitute "foreseeable prejudice," except to exclude, as we have, above, those instances in which the sole issue is the attorney's alleged malpractice. It is the Committee's view, however, that the attorney's ethical responsibility is the same regardless of the specific situation in which the request or discovery demand for the information is made.

As described in more detail below, the issue of reasonably foreseeable prejudice may well be different in the situation where the client or the client's successor counsel requests the file prior to completion of the matter for which the attorney was retained, in contrast to the situation where the client or the client's successor requests a

closed file long after the matter has been completed. Where the client contemplates suit against the attorney for professional negligence, the circumstances presented may lead to a different conclusion on whether prejudice is reasonably foreseeable. In the Committee's opinion, however, if production of the work product is necessary to avoid prejudice, the client's or former client's desire also to use the materials or information for the purposes of pursuing litigation against the attorney does not permit the attorney to withhold the work product from the client or former client.

The ethical obligation in each situation, however, remains the same. Whether it is in a litigation context where the attorney has been served with a deposition notice or formal inspection demand pursuant to California Civil Discovery Act, or whether the client makes an informal request, the ethical considerations for the lawyer are the same.

In the opinion of this Committee, the attorney's ethical responsibility also does not depend on the physical contents of the client's case file, or, therefore, "legal property rights." In actual practice, the information that is physically in the client file is often arbitrary. The "client papers and property" include both materials and information that are generated in the course of the representation, wherever they are kept by the attorney.

Moreover, the concept of a "client file" is not static, and its "content" will change depending upon circumstances. All documents delivered by the client to the attorney belong to the client, no matter how long these materials reside in the client file, unless the client intends otherwise. Other material, information, attorney work product, and matter comprising the client file depends upon the point in time and the specific circumstances prevailing when the issue arises.

The content will depend upon what is "reasonably necessary" in order to avoid reasonably foreseeable prejudice to the client. Thus, the client file contents one week prior to trial would be different from the contents of the file if the trial date were 2-1/2 years hence.

With respect to materials delivered by the client, the attorney is a bailee and remains responsible to return these materials to the client/bailor, no matter how long the materials are kept, absent an agreement between the client and the attorney to the contrary. Depending on the underlying matter for which the attorney was retained, the obligation to surrender other materials or information to the client may entirely disappear after a substantial amount of time has passed after the engagement has terminated, eg., a collection matter ending in payment in full to the client. Assuming the return to the client of whatever the attorney received as a bailee, the "client file" disappears if there is no longer anything in the file "reasonably necessary" to the client representation.

Although not in the "client file," intangible information may also be part of the attorney's work product. Withholding that information may also reasonably prejudice the client. Therefore, an attorney should consider whether to inform successor counsel or the client about such intangible information, even if no Rule of Professional Conduct requires such disclosure. The answer to this question may not always be immediately obvious. For example, an attorney who withdraws for conflicts of interest may not ethically be able to cooperate with the client in the future because it will prejudice the rights of another client. Each circumstance must be decided on its own facts, and no generalization can be made.

Footnotes:

1. For the purpose of this Opinion, "client" refers to a present or former client or the client's new attorney when acting at the direction of the client.
2. See footnotes 3 and 4, infra
3. The Committee's opinion is limited to circumstances in which the underlying representation was in a civil context. In criminal cases, the duty of an attorney may well be broader in view of the liberty interests and Constitutional rights implicated. This Opinion does not consider what, if any, effect such interests and rights may have on the conclusions reached here.
4. SB 2668 provides: "In an action between an attorney and his or her client or former client, no work-product privilege under this section (C.C.P. section 2018) exists if the work-product is relevant to an issue of breach by the attorney of a duty to the attorney's client arising out of the attorney-client relationship."

   The ethical responsibilities of a lawyer to his or her client or former client, although clearly affected by legislation such as SB 2668, go beyond the legal requirements of a particular statute, and in regard to the issues addressed in this Opinion are not limited to the evidentiary aspects of C.C.P. § 2018, as recently amended .
5. Former Rule 2-111 provides in subsection A(2):

"A member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client including, . . . delivering to the client all papers and property to which the client is entitled .... "

The Bar Association of San Francisco, 301 Battery Street, Third Floor, San Francisco, CA 94111 | 415-982-1600