

OPINION INTERIM NO. 19-0004
CLIENT FILE RELEASE AND RETENTION DUTIES OWED TO FORMER CLIENT

ISSUES

How long is a lawyer ethically obligated to retain client files in closed civil and criminal matters? What ethical obligations does a lawyer have with respect to the destruction of former clients' files in closed civil and criminal matters?

DIGEST

California Rules of Professional Conduct do not specify a fixed retention period for closed client files. A lawyer's file retention duties in closed civil matters generally turn on the lawyer's obligations as the bailee of the former client's papers and property and the lawyer's duty to avoid reasonably foreseeable prejudice to the former client. Original documents and property furnished to the lawyer by the former client and items of intrinsic value must be retained by the lawyer and cannot be discarded or destroyed without the former client's consent. Other client materials and property in civil cases may be destroyed, absent a contrary agreement, after the lawyer uses reasonable means to notify the former client of their intended destruction and gives the former client a reasonable time to respond. If the former client cannot be located or fails to respond to reasonable notice of intended destruction of the file, the lawyer may destroy items whose retention is not required by law and is not necessary to avoid reasonably foreseeable prejudice to the former client. Items that the lawyer believes are necessary to avoid reasonably foreseeable prejudice to the former client may be preserved in electronic form only, unless the lawyer believes the loss of physical copies will injure the former client.

In criminal matters involving a conviction for a serious or violent felony resulting in a sentence of 15 years or more, trial counsel must retain a copy of the former client's files for the term of his or her imprisonment. Cal. Pen. C. § 1054.9(g) (amended Stats. 2018, Ch. 482; eff. Jan. 1, 2019). The files may be retained in electronic form only "if every item in the file is digitally copied and preserved." *Id.* (emphasis added). In other criminal matters (i.e., misdemeanor cases, felony cases resulting in a sentence of less than 15 years), absent a contrary agreement or client consent, a convicted client's file should be retained until the expiration of the sentence, all appeals, or any statute of limitations on actions against the lawyer, whichever is longest. During this recommended retention period, the files may be retained in electronic form if every item is digitally copied and preserved.

**AUTHORITIES
INTERPRETED**

Cal. R. Prof. Conduct 1.4, 1.15(d), 1.16(e)(1), 3.8(f); Bus. & Prof. Code §§ 6068(e), 6149; Pen. Code § 1054.9(g)

STATEMENT OF FACTS

Lawyer A, a solo practitioner in general practice, plans to retire in the next few years. Lawyer A would like to dispose of the hundreds of boxes of closed client files in storage, some of which date back decades, with minimal time, effort and expense. Lawyer A has not reviewed the files in storage in years, but each box is indexed for content, including the client/matter information and general descriptions (e.g., pleadings, discovery, transcripts, estate planning documents). Given the age of the files, Lawyer A

49 believes there is very little chance that any of the lawyer’s former clients would have a need for the
50 contents of the files. Lawyer A therefore plans to have all of the boxes picked up by a data management
51 company for secure destruction without review.

52
53 Lawyer B handles a wide range of criminal matters, from serious felony to misdemeanor cases. Lawyer
54 B is in the process of going paperless and disposing of closed client files. Lawyer B plans to digitalize the
55 contents of the files in closed felony cases before delivering them to a data management company for
56 secure destruction; files in closed misdemeanor cases will not be digitalized before destruction.

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DISCUSSION

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A. Background

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61
62 Client file retention and disposal can be challenging for California lawyers, due in no small part to the
63 absence of a clear rule on the topic. California Rules of Professional Conduct and State Bar Act do not
64 specify how long a lawyer must retain a former client’s file in a closed or inactive matter, or expressly
65 address ethical obligations with respect to the destruction of closed client files.

66

67 With respect to closed civil matters, ethics opinions generally agree that, absent an agreement or other
68 legal proscription to the contrary, certain file contents may be destroyed after the lawyer makes
69 reasonable efforts to notify the former client of their intended destruction, but disagree on whether
70 there should be a fixed, minimum retention period applicable to all file contents. Cal. State Bar Form.
71 Opn. 2001-157; *compare* Los Angeles Cty. Bar Ass’n Form. Opn. 475 (1994) (recommending 5-year
72 retention period for closed client files by analogy to 5-year retention requirement for client accounting
73 records), *with* Bar Ass’n of San Francisco Form. Opn. 1996-1 (declining to suggest a bright-line rule
74 relating to the retention of client files and concluding that a lawyer may dispose of any writing in the
75 client file, except to the extent necessary to avoid reasonably foreseeable prejudice to the client’s legal
76 rights) and Cal. State Bar Form. Opn. 2001-157 (declining the adopt a fixed retention period).

77

78 Client files in closed criminal matters raise unique considerations due to the criminal defendant’s liberty
79 interests and the possibility of post-conviction review long after the representation ends. Accordingly,
80 prior ethics opinions have uniformly recommended that the contents of a closed file be retained for the
81 life of the former client, unless the former client expressly consents to their destruction. *See* Cal. State
82 Bar Form. Opn. 2001-157; Los Angeles Cty. Bar Ass’n Form. Opns. 420 (1983) & 475 (1994). Since then,
83 there have been new developments with respect to file retention duties in criminal matters. First, in
84 2018, the legislature signed into law amendments to California Penal Code section 1054.9 to expand
85 criminal defendants’ right to access post-conviction discovery materials to include cases where the
86 defendant is convicted of a serious or violent felony and sentenced to 15 years or more. The amended
87 section 1054.9 now requires trial counsel in such cases to maintain a copy of a former client’s files “for
88 the term of his or her imprisonment.” Cal. Pen. Code § 1054.9(g). Second, as discussed in greater to
89 detail below, in June 2020, the California Supreme Court approved amendments to California Rule of
90 Professional Conduct 1.16 [Declining or Terminating Representation] and Rule 3.8 [Special Duties of a
91 Prosecutor], expressly reminding defense attorneys of their file retention obligations and prosecutors of
92 their obligations to preserve evidence.¹

¹ These amendments resulted from the legislature’s request, in connection with its enactment of the amendment to Penal Code section 1054.9, that the State Bar “study and issue of closed-client release and retention by defense

93
94 Notwithstanding these developments, there is still no clear rule, statute, or case law that define file
95 retention duties in criminal cases that fall outside the scope of section 1054.9 (e.g., misdemeanor cases,
96 felony cases resulting in less than 15-year sentence).

97
98 This Committee last addressed a lawyer’s ethical obligations relating to the retention and disposition of
99 former clients’ closed files in its 2001 opinion, prior to the effective date of the current Rules of
100 Professional Conduct and amended Penal Code section 1050.9. Given these changes, as well as the
101 great advances made in digital file storage since 2001, this opinion revisits a lawyer’s file retention and
102 disposal duties in closed or inactive civil and criminal matters where there is no existing agreement
103 regarding the retention period and disposal of closed file contents.²

104
105 **B. Contents of Closed “Client File”**

106
107 A lawyer’s file retention and release duties in closed matters stem from Rule 1.16 of the California Rules
108 of Professional Conduct, which provides that upon the termination of a representation for any reason:

109
110 Subject to any applicable protective order, non-disclosure agreement,
111 statute or regulation, the lawyer promptly shall release to the client, at
112 the request of the client, all client materials and property. “Client
113 materials and property” includes correspondence, pleadings, deposition
114 transcripts, expert’s reports and other writing, exhibits, and physical
115 evidence, whether in tangible, electronic or other form, and other items
116 reasonably necessary to the client’s representation, whether the client
117 has paid for them or not[.]

118
119 Cal. R. Prof. Cond. 1.16(e)(1).

120
121 A “client file” is not a “static” concept, and its contents will change depending upon circumstances. Cal.
122 State Bar Form. Opns. 1994-134, fn. 1 & 2007-174. In closed matters, a former client’s “client file”
123 generally includes items necessary to preclude “reasonably foreseeable prejudice” to the rights of the
124 former client. See Cal. R. Prof. Cond. 1.16(d); Bar Ass’n of San Francisco Form. Opn. 1996-1 (key to

attorneys and prosecutors in criminal cases.” This Committee studied the issue and recommended the amendments to Rules 1.16 and 3.8, which were approved by the Board of Trustees and approved by the California Supreme Court on April 23, 2020.

² There is no rule expressly permitting (or prohibiting) a file retention agreement, but ethics opinions have consistently recognized that a lawyer’s file retention and disposal duties may be defined by an agreement with the client. See, e.g., Cal. State Bar Form. Opn. 2001-157 (a file retention provision in a fee agreement specifying the duration of time for preserving closed client files may be appropriate in certain circumstances); Los Angeles County Bar Ass’n Formal Opn. No. 475 (1994) (file retention recommendations stated in the opinion apply unless there is a contrary agreement with the client). Sample fee agreement provisions concerning file retention and disposal are provided on the State Bar website. See Attorney Forms, Sample Fee Agreements forms and instructions, available at <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Forms-Resources> (last visited July 15, 2020).

125 retention of client papers in a closed matter is the need to retain those papers that are necessary to
126 preclude reasonably foreseeable prejudice to the client).

127
128 While not exhaustive, the following items are typically considered part of the former client’s “client
129 materials and property” for purposes of release to the client at termination of representation:

- 130
- 131 • **Original client papers and property** – original materials furnished to the lawyer by the
132 former client and in behalf of the client
 - 133
 - 134 • **Communications to and from lawyer** - letters or emails to and from the client, opposing
135 counsel, witnesses or third parties, and notes of telephone or in-person conversations
 - 136
 - 137 • **Filed documents, discovery materials and transcripts** - pleadings and other documents
138 filed with the court, court orders and opinions, discovery, verbatim transcripts of the
139 proceedings
 - 140
 - 141 • **Investigation and research reports** – investigation and research reports prepared at the
142 lawyer’s direction (both legal and factual) prepared by the lawyer or at the lawyer’s
143 direction
 - 144
 - 145 • **Attorney work product generated in the course of the representation** - research notes,
146 notes regarding witnesses, strategy and tactics, similar items generated in the course of the
147 representation³
 - 148
 - 149 • **Electronic files and digital data** – intangible data in the form of electronic files and digital
150 data, whether stored on hard drives, local or remote server, or cloud platforms, and
151 whether maintained solely in electronic/digital format or copies of physical files⁴
 - 152

³ Attorney work product may be part of the former client’s “client file” if the information is necessary to avoid “reasonably foreseeable prejudice to the client.” See San Diego Bar Ass’n Form. Opn. 1997-1 (lawyer may not withhold work product “reasonably necessary” to client’s representation); Bar Ass’n of San Francisco Form. Opns. 1990-1 & 1996-1; Los Angeles Cty. Bar Ass’n Form. Opns. 330 (1972) (work product for which client can be billed belongs to client); San Diego Bar Ass’n Form. Opn. 1984-3 (although client not entitled to attorney’s absolute work product, “such disclosure is recommended as a matter of professional ethics and courtesy”). Whether uncommunicated a lawyer is obligated to release to the former client attorney work product not previously communicated to the client remains an open question. See Cal. State Bar Form. Opn. 2001-157; cf. *Matter of Regan*, 4 Cal. State Bar Ct. Rptr. 844, 855 (Rev. Dept. 2005) (client file, “absent uncommunicated attorney work product,” must be surrendered to client upon termination of representation). How this “open question” should or will be decided is beyond the scope of this opinion. For purposes of the facts presented in this opinion, it is assumed that closed client files consist only of the former client’s “materials and property” which, had the former client requested them, would be required to be released to the former client under Rule 1.16.

⁴ A lawyer’s ethical obligation to release electronic items does not require the lawyer to *create* such items if they do not exist or to change the application if they do exist. Cal. State Bar Form. Opn. 2007-174.

153 See Cal. R. Prof. Cond. 1.16(e)(1); Cal. State Bar Form. Opns. 1994-134, fn. 1 (listing items considered
154 contents of the client file in other ethics opinions) & 2007-174 (discussing a lawyer’s ethical obligation to
155 release electronic items).

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157

158 **C. File Retention Duties In Closed Civil Matters**

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160 Absent an agreement to the contrary, there is no blanket retention period applicable to the entire
161 contents of a client file in a closed civil matter. Cal. State Bar Form. Opn. 2001-157. Instead, the length
162 of time that a lawyer must retain the file contents depends on the nature of the items, the nature of the
163 services rendered to the client, and any other factors relevant to determining whether prejudice to the
164 client would arise by destruction of the items. *Id.*; see also Cal. State Bar Form. Opn. 1996-1. These
165 obligations cannot be measured by a fixed retention period. Cal. State Bar Form. Opn. 2001-157; Bar
166 Ass’n of San Francisco Form. Opn. 1996-1.⁵

167

168 **Original papers and property.** In the absence of an agreement to the contrary, a lawyer’s obligations as
169 to original papers and property received from a client are determined by the law of bailments, or law of
170 deposit. Cal. State Bar Form. Opn. 2001-157; Cal. Civ. Code. §§ 1813-1847.⁶ Unless the deposit is
171 terminated as permitted by the governing statute, the lawyer remains responsible for the safekeeping of
172 the items at all times and has no right to destroy them without the client’s consent. Cal. State Bar Form.
173 Opn. 2001-157. For example, California probate law governs the preservation of estate planning
174 documents held by attorneys for safekeeping, and a deposit of estate planning documents with counsel
175 may only be terminated by complying with the statute. See Cal. Prob. Code §§ 730-735. Thus, if a
176 lawyer is in possession of an original will, digitalizing it and purging the original would be prohibited.

177

178 **Intrinsically valuable items.** A lawyer may not destroy materials of intrinsic value without the former
179 client’s consent. Cal. State Bar Form. Opn. 2001-157. Intrinsically valuable materials are those that have
180 value, or may have value, in and of themselves (e.g., money orders, travelers checks, stocks, bonds,
181 original deeds, original notes, judgments, etc.). Los Angeles Cty. Form. Opn. 475.

182

183 **Other file contents.** Items that a lawyer has no reason to believe the former client would need may be
184 destroyed after the lawyer has used reasonable means to locate the client and notify the client of the
185 existence of the file, of the client’s right to examine the retrieve the contents, of their intended

⁵ California Rule of Professional Conduct 1.15(d)(5) contains a five-year retention requirement for client *accounting records*. One California bankruptcy case has applied this five-year rule to client files but without analysis. *Ramirez v. Fuselier*, 183 BR 583, 587 fn. 3 (9th Cir. BAP 1995). Ethics opinions disagree on whether Rule 1.15 is intended to address retention duties with respect to client *files*. Los Angeles Bar Ass’n Form. Opn. 475 (1994) (recommending 5-year retention period for client files “by analogy” to former rule 4-100(B)(3) (now rule 1.15(d)(5)); Cal. State Bar Form. Opn. 2001-157 (5-year retention rule not intended to address client file retention obligation); Bar Ass’n of San Francisco Form. Opn. 1996-1 (same; unless attorney and client otherwise agree, attorney may dispose of any writing except when needed to avoid reasonably foreseeable prejudice to client’s rights under former rule). The Committee sees no reason to deviate from its previous conclusion that Rule 1.15 does not apply to client files.

⁶ The retention period for certain estate planning documents delivered to a lawyer for safekeeping are also subject to the Probate Code sections 700-735, which provide, *inter alia*, that the deposit may be terminated only as permitted by Probate Code section 731 to 735.

186 destruction. Cal. State Bar Form. Opn. 2001-157; Los Angeles Cty. Form. Opn. 475. On the other hand,
187 where the lawyer has reason to believe that the file contains items that will reasonably be needed by
188 the former client or items required by law to be retained, the lawyer should inspect the file for such
189 items and retain those items for the period required by law or according to the client’s reasonably
190 foreseeable needs. Cal. State Bar Form. Opn. 2001-157. The remaining items in the file may then be
191 destroyed. *Id.* Where an item has no intrinsic value but the lawyer nevertheless fears that loss of the
192 item may injure the former client, the item should be preserved electronically/digitally, unless retention
193 of the physical item is required by law.

194
195 As with certain original client documents (e.g., estate planning documents), some of the materials in the
196 client file may include documents that must be retained for periods specified by state or federal law.
197 See Cal. State Bar Form. Opn. 2001-157 (discussing law regulating employment records, tax and
198 corporate records, records relating to environmental matters). The Committee recommends that
199 lawyers verify that the disposal will not violate any state or federal document retention requirement.

200
201 **D. File Retention Duties In Closed Criminal Matters**

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203 **1. Duties of defense counsel**

204
205 As mentioned in Section A, *supra*, effective January 1, 2019, in criminal matters involving a conviction
206 for a serious or violent felony that results in a sentence of 15 years or more, trial counsel must retain a
207 copy of the former client's files for the term of the former client's imprisonment. Pen. Code § 1054.9(g).
208 Counsel may maintain the file in electronic form but “only if every item in the file is digitally copied and
209 preserved.” *Id.* (emphasis added)

210
211 As to client files in other types of closed criminal matter (e.g., misdemeanors or felonies resulting in less
212 than 15-year sentence), prior ethics opinions had concluded that client documents related to criminal
213 matters must be retained until the client dies or expressly consents to their destruction. Cal. State Bar
214 Form. Opn. 2001-157; LACBA Form. Opn. 420 (1983) (Because a criminal defense “attorney cannot
215 foresee the future utility of information contained in the file” after the representation ends, the
216 attorney “should not undertake the destruction of the client files” absent “specific written instruction
217 from the client authorizing the destruction of the file.”); see also LACBA Form. Opn. 475
218 (“Considerations pertaining to the criminal defendant’s liberty interest in the proceedings and to the
219 possibility of review of criminal convictions by appeal or writ (even many years after conviction) warrant
220 especially cautious treatment of criminal case files.”). However, these opinions were issued prior to the
221 enactment of the amendment to Penal Code section 1054.9(g), which imposes an arguably shorter
222 retention period (for the term of the former client’s imprisonment) in the most serious criminal cases
223 than what had previously been recommended in *all* criminal cases (for the life of the former client). The
224 Committee believes its previous recommendation for retention period should be modified to be
225 commensurate with the maximum retention period required under section 1054.9. Accordingly, in
226 closed criminal matters that fall outside Penal Code section 1054.9, absent the former client’s express
227 consent to the contrary, a *convicted* client’s file should be retained until the expiration of the sentence,
228 all appeals, or any statute of limitations on actions against the lawyer, whichever is longest. During this
229 recommended retention period, the files may be retained in electronic form, provided that every item is
230 digitally copied and preserved.

231
232 If, however, the former client was never convicted (or was not incarcerated), then counsel should be
233 permitted to follow the guidelines applicable to closed civil case files and consider all factors relevant to

234 determining whether prejudice to the client would arise by destruction of the items. Even if no
235 prejudice would result, however, a lawyer should use reasonable means to notify the former client of
236 the existence of the file, of the client’s right to examine and retrieve the file, and of the intended
237 destruction thereof.

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239

2. Duties of prosecutor

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241
242 In light of their responsibility to see that justice is done, prosecutors owe certain ethical, constitutional
243 and statutory duties with respect to evidence in criminal proceedings. However, there is no specific
244 Rule of Professional Conduct or ethics opinion directly addressing prosecutors’ duty to preserve their
245 files or other relevant evidence.

246

247 Penal Code section 1054.9 provide that, upon the criminal defendant’s showing that good faith efforts
248 to obtain “discovery materials” from trial counsel were made but were unsuccessful, the defendant shall
249 be provided reasonable access to “discovery materials,” which is defined as “materials in the possession
250 of the prosecution and law enforcement authorities to which the same defendant would have been
251 entitled at time of trial.” Penal Code § 1054.9(a), (c). But section 1054.9 also expressly notes that the
252 statute “does not require the retention of any discovery materials not otherwise required by law or
253 court order.” *Id.*, subd. (f). Aside from section 1054.9, there does not appear to be any authority that
254 imposes any post-conviction discovery obligations. *But see People v. Curl*, 140 Cal. App. 4th 310, 318
255 (2006) (Even “after a conviction the prosecutor . . . is bound by the ethics of his office to inform the
256 appropriate authority of . . . information that casts doubt upon the correctness of the conviction.). This
257 sentiment expressed in *Curl* is reflected in Rule 3.8(f), which lists certain ethical duties specifically
258 related to prosecutors, including an affirmative, ongoing duty to promptly disclose “new, credible and
259 material evidence creating a reasonable likelihood that a convicted defendant did not commit an
260 offense of which the defendant was convicted,” when such evidence is known to the prosecutor. Rule
261 3.8 is silent on obligation to retain any portions of the prosecutor’s case file, however.

262

263 Effective June 1, 2020, California Rule of Professional 3.8 has been amended to add the following two
264 new sentences to Comment [7]:

265

266 Statutes may require a prosecutor to preserve certain types of evidence
267 in criminal matters. (See Pen. Code, §§ 1417.1-1417.9.) In addition, prosecutors must
268 obey file preservation orders concerning rights of discovery guaranteed by the
269 Constitution and statutory provisions. (See *People v. Superior Court (Morales)* (2017)
270 2 Cal.5th 523 [213 Cal.Rptr.3d 581]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th
271 709 [234 Cal.Rptr.3d 392].)

272

273 This amendment resulted from Assembly Bill 1987 amending Penal Code section 1054.9, by which the
274 legislature requested that the State Bar “study the issue of closed-client file release and retention by
275 defense attorneys and prosecutors in criminal cases.”⁷ While the amended Comment does not create

⁷ Uncodified section 3 of Assembly Bill 1987 provides in full:

Consistent with the obligation of the State Bar of California to make public protection its highest priority, the State Bar is requested to study the issue of closed-client file release and retention by

276 new file preservation duties, the added sentences highlight prosecutors’ existing obligations regarding
277 the disposition of evidence in criminal matters and compliance with file preservation orders.

278
279 **E. Duties Relating to Disposal of Closed Client Files**

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281 California Rules of Professional Conduct and the State Bar Act are also silent on the destruction of closed
282 client files. Regardless, before disposing of any item in a closed client file, a lawyer must take certain
283 precautions to prevent any reasonably foreseeable prejudice to the former client.

284
285 Before disposing of any item in a closed civil file, a lawyer must make all reasonable efforts to locate and
286 notify the former client of the existence of the file, of the client’s right to examine and retrieve the file,
287 and of the intended destruction.⁸ Cal. State Bar Form. Opn. 2001-157; *see also* Cal. R. Prof. Cond. 1.4. .
288 LACBA Form. Opn. 491. If, after diligent efforts to notify the former client, a lawyer cannot locate the
289 client or obtain clear instructions from the client, the closed client files in civil matters may be destroyed
290 except for “intrinsically valuable materials” (i.e., stocks, bonds, wills, original notes, original deeds),
291 LACBA Form. Opn. 475, unless the lawyer has a reason to believe that a file contains items required by
292 law to be retained or that the client will reasonably need to establish a right or defense to a claim,
293 always exercising good common sense judgment. Cal. State Bar Form. Opn. 2001-157; *see also* ABA
294 Informal Opn. 1384 (1977).

295
296 If the lawyer is without personal knowledge of the contents of the file, the lawyer is strongly advised to
297 examine the file to determine whether there is reason to believe that the client will foreseeably have
298 need for the contents of the file.⁹

defense attorneys and prosecutors in criminal cases. If the State Bar studies the issue, it shall ascertain whether an attorney's duties related to file release and retention upon the finality of a case or the termination of the attorney-client relationship are clear in light of the Rules of Professional Conduct that become operative on November 1, 2018. To the extent the State Bar finds there are generally applicable file release and retention duties that are not sufficiently apparent in the specific context of post-conviction discovery, the State Bar shall consider issuing an advisory ethics opinion that makes those duties evident. If the State Bar finds that any file release or retention duties in the new rules are deficient in protecting clients and the public in the context of post conviction discovery, the State Bar shall consider adopting an appropriate new or amended Rule of Professional Conduct for submission to the Supreme Court of California for the Supreme Court's consideration and possible approval.

⁸ In the event a former client requests release of the closed file, a lawyer should take reasonable steps to remove any metadata that would reveal confidential information about the lawyer’s other clients. Cal. State Bar Form. Opns. 2010-179, 2012-184. If a client is deceased, notice must be given to the client’s legal representative, heirs and/or beneficiaries, unless there is no reasonably foreseeable possibility that the file may be necessary to pursue or protect the deceased client’s legal interests, and the file contains no documents of significant pecuniary or intrinsic value. The deceased client’s legal representative, heirs and/or beneficiaries may take possession of the file, subject to the attorney’s duty of confidentiality. LACBA Form. Opn. 491 (1998).

⁹ The Committee previously opined that in such circumstances, “it *may* be necessary to examine the file before concluding whether there is reason to believe that the client will foreseeably have need of the contents.” Cal. State Bar Form. Opn. 2001-157 (emphasis added). This Committee believes that a lawyer cannot determine whether the closed file contains any item that the client may need if the lawyer is without personal knowledge of the contents of the file. The Committee thus recommends that, in such an instance, the lawyer examine the file.

299
300 As discussed above, in criminal matters involving a conviction for a serious or violent felony that results
301 in a sentence of 15 years or more, trial counsel must retain a copy of the former client's files for the
302 term of the former client's imprisonment. Thus, the files cannot be destroyed under any circumstances
303 – even if authorized by the former client – during the client’s imprisonment. Cal. Pen. C. § 1054.9(g).
304 The file may be maintained in electronic form “only if every item in the file is digitally copied and
305 preserved.” *Id.*¹⁰
306

307 Any decision regarding the disposal of closed client files must also reflect due consideration of the duty
308 of confidentiality mandated by Business and Professions Code section 6068, subdivision (2), which
309 requires a lawyer “[t]o maintain inviolate the confidence, and at every peril to himself or herself to
310 preserve the secrets, of his or her client.”
311

312 Comment [4] to Rule 1.16 reminds lawyers that, in complying with Rule 1.16, they must also comply
313 with Business and Professions Code section 6068, subdivision (e), which requires lawyers, at every peril
314 to themselves, to preserve and protect the confidential information of the client. *See generally Oasis*
315 *West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) (confirming a lawyer’s continuing duty to
316 protect the confidential information of a former client). Thus, a lawyer must use a method of
317 destruction “that will ensure no breach of confidentiality.” Cal. State Bar Form. Opn. 2001-157 n.9.
318 Throwing the client files into the garbage, for example, would not protect client confidentiality, and
319 therefore, not appropriate. On the other hand, “shredding, incinerating or employing a commercial
320 service that guarantees confidential disposal of documents would be sufficient.” D.C. Bar Form. Opn.
321 283 n.14.
322

323 F. Analysis of Facts

324

325 Lawyer A should not dispose of the closed client files without first determining their contents. The facts
326 indicate that, as a solo practitioner in general practice, Lawyer A handled various civil matters, including
327 estate planning matters. Notwithstanding Lawyer A’s belief that there is very little chance that any of
328 the lawyer’s former client would have a need for the contents of the files, and therefore, will not be
329 prejudiced by their destructions, Lawyer A’s file retention duties with respect to client’s original papers
330 and property, including testamentary documents, are governed by the law of bailments/deposit.
331 Cal. State Bar Form. Opn. 2001-157; Cal. Civ. Code. §§ 1813-1847. Unless the deposit is terminated as
332 permitted by the governing statute, the lawyer remains responsible for the safekeeping of the items at
333 all times and has no right to destroy them without the client’s consent.
334

335 Lawyer A must make reasonable efforts to locate and notify the former clients of the existence of the
336 file, of the client’s right to examine and retrieve the file, and of the intended destruction.¹¹ Cal. State

¹⁰ For lawyers wishing to go paperless, in light of this requirement, it would be prudent to have a clear digitalization plan and follow it, for e.g., scanning all incoming documents and returning originals to the client immediately (unless the original is needed for representation).

¹¹ In the event a former client requests release of the closed file, a lawyer should take reasonable steps to remove any metadata that would reveal confidential information about the lawyer’s other clients. Cal. State Bar Form. Opns. 2010-179, 2012-184. If a client is deceased, notice must be given to the client’s legal representative, heirs and/or beneficiaries, unless there is no reasonably foreseeable possibility that the file may be necessary to pursue

337 Bar Form. Opn. 2001-157; *see also* Cal. R. Prof. Cond. 1.4. . LACBA Form. Opn. 491. If, after diligent
338 efforts to notify the former client, a lawyer cannot locate the client or obtain clear instructions from the
339 client, the closed client files in civil matters may be destroyed except for “intrinsically valuable
340 materials” (i.e., stocks, bonds, wills, original notes, original deeds), LACBA Form. Opn. 475, unless the
341 lawyer has a reason to believe that a file contains items required by law (e.g., estate planning
342 documents). Cal. State Bar Form. Opn. 2001-157; *see also* ABA Informal Opn. 1384 (1977). Since Lawyer
343 A is without personal knowledge of the contents of the boxes in storage, Lawyer A should, at a
344 minimum, review the file indices for general descriptions of their contents and determine whether any
345 of the files contains original or intrinsically valuable items, and whether there is reason to believe that
346 any former client will foreseeably have a need for any item(s) in the closed files.

347
348 Lawyer B may properly destroy the original papers in felony cases, provided that every item in the
349 closed criminal files is digitalized and Lawyer B make reasonable efforts to locate and notify the former
350 clients of the existence of the file, of the client’s right to examine and retrieve the file, and of the
351 intended destruction. With respect to misdemeanor cases, Lawyer B should first use reasonable means
352 to notify the former clients before destroying the contents of the files. If the former clients cannot be
353 located through reasonable means (i.e., via last known address found in the file), and Lawyer B
354 reasonably believes that the former clients will not be prejudice by the destruction of the closed files,
355 Lawyer B may destroy them in a manner consistent with the lawyer’s ongoing duty of confidentiality
356 owed to the former clients.

or protect the deceased client’s legal interests, and the file contains no documents of significant pecuniary or
intrinsic value. The deceased client’s legal representative, heirs and/or beneficiaries may take possession of the
file, subject to the attorney’s duty of confidentiality. LACBA Form. Opn. 491 (1998).