

**To: State Bar Board of Trustees**

**From: State Bar Board Committee on Professional Responsibility and Conduct  
("COPRAC")**

**Re: Recommendation in Response to Assembly Bill 1987, Section 3; Ethical Duties  
to Preserve and Release Closed-Client Files in Certain Criminal Matters**

## **BACKGROUND**

Assembly Bill 1987 was signed into law on September 18, 2018. This bill amends section 1054.9 of the California Penal Code by expanding the right to access post-conviction discovery materials in cases where the defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more.

Section 3 of the law directs the State Bar of California to ascertain whether the recently revised California Rules of Professional Conduct ("Rules"), which became effective November 1, 2018, are sufficiently clear on this subject matter and, if they are not, to consider issuing an advisory ethics opinion and/or recommend the adoption of an appropriate new or amended Rule for submission to the Supreme Court of California for their consideration and possible approval.

On Wednesday, February 20, 2019, the Co-Chairs of the State Bar of California's Regulation and Discipline Committee assigned to COPRAC the task of studying the issue of closed-file release and retention by defense attorneys and prosecutors in criminal cases and providing a recommendation regarding what action should be taken to address this issue.

## **SUMMARY OF OUR RECOMMENDATION**

We recommend:

- Because the Rules contain no specific directive with respect to how long client files in criminal matters must be retained, we propose that Rule 1.16 (Declining or Terminating Representation) be slightly amended by adding a brief Comment directing defense attorneys to be aware of provisions such as Penal Code section 1054.9.
- With respect to prosecutors, the Rules are silent concerning duties of preservation, and Penal Code section 1054.9 expressly declines to impose any preservation obligation going beyond current law, which is also statutory. Given this

background, which we elaborate further below, we believe that any change in prosecutor's retention obligations should come from the legislature. It may be useful, however, to add a comment to Rule 3.8 referencing the existing statutory obligations.

- Although our committee opined in an ethics opinion published in 2001 (Cal. Formal Ethics Opn. No. 2001-157) that criminal defense files, absent client consent, must be retained throughout the client's life, we believe an updated and expanded opinion would be useful for both civil and criminal defense matters, for the reasons discussed below.
- Our committee has never rendered an opinion on prosecutors' obligations to preserve their own files. Because it is difficult to find a clear and comprehensive statement of existing obligations, an opinion on that topic could be useful, particularly if combined with the discussion of the obligations of criminal defense attorneys.

### **ASSEMBLY BILL 1987**

The preamble to this bill reads:

"The Legislature finds and declares that post-conviction discovery promotes the fair administration of justice in seeking to assure that innocent persons do not remain unjustly incarcerated and that the availability and integrity of a client's file in such cases are necessary to the accomplishment of this important public protection objective." Assembly Bill 1987, Chapter 482.

The new law, codified at Penal Code section 1054.9, provides, pertinent to our discussion:

- Courts shall issue orders allowing defendants who have been convicted of a serious or violent felony resulting in a sentence of 15 years or more reasonable access to "discovery materials" to assist in postconviction habeas corpus proceedings or motions to vacate the judgment. "Discovery materials" is defined as materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled at the time of trial. Section 1054.9(a) and (c). However, this section "does not require the retention of any discovery materials not otherwise required by law or court order." *Id.* at (f).

- Where such sentences have been imposed “trial counsel shall retain a copy of a former client’s files for the term of his or her imprisonment,” *id.* at (g). The specific directive to the State Bar, found in Section 3 of Assembly Bill 1987, reads:

“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 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.”

### **CONSIDERATION BY THE COMMITTEE**

The Rules do not have extensive provisions relating to file retention obligations, and none of them are directly on point. The following provisions in the Rules are of some relevance:

- Rules 1.1, “Competence”, and 1.3 (a), “Diligence”: These Rules state the general duty of competence and diligence but, literally, they apply only during the time the lawyer represents the client.
- Rule 1.9, “Duties to Former Clients”: This Rule is generally intended to protect against subsequent conflicts of interest and the use or disclosure of confidential material adverse to the client’s interests but there are no specific file preservation duties stated here. Comment [1] does, however provide that the lawyer has a continuing duty not to do anything that will be injurious to the former client in any matter in which the lawyer represented that client. Logically, failing to retain the relevant portions of the criminal defendant’s file in these circumstances would be

injurious to the client's interests; but, again, the Rule is generalized and not specific to file preservation obligations.

- Rule 1.16, “Declining or Terminating Representation”: Subsection (e) (1) of this Rules requires the attorney, upon termination of representation, to promptly release “client materials and property” at the request of the client. But it imposes no file preservation duty. It contains no specific directive as to how long client files must be retained if the client has neither requested them nor given permission for them to be destroyed.
  - This subsection defines “client materials and property” to “include correspondence, pleadings, deposition transcripts, experts’ reports and other writings, exhibits and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not....”

Further, as to the attorney’s duty to release files to present or former clients:

- Rule 1.1, “Competence”: Without question an attorney who refuses to turn pertinent and useful file documents with existing client probably has violated the basic duty of competence. However, again, this Rule only applies to present clients.
- Rule 1.3, “Diligence”: Again, clear enough, but it does not apply to former clients.
- Rule 1.9, “Duties to Former Clients”: Again, Comment [1] makes it clear that it an attorney owes a duty to the former client not to do anything that will injuriously affect the client in any matter in which the attorney represented the former client. Without question refusing to turn over needed parts of the criminal file injures the former client.
- Rule 1.16, “Declining or Terminating Representation”: As discussed above, this Rule states a clear obligation to turn over client property and materials.

Eighteen years ago our committee published COPRAC Formal Opinion No. 2001-157, which does deal with file preservation duties in both criminal and civil matters. It is certainly clear enough with respect to criminal matters:

“Recent adoption of measures such as California's "Three Strikes" law (Proposition 184 of 1994, codified as Penal Code section 1170.12) could make a client file in a matter resulting a prior conviction more important than ever. The Committee concludes that client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive.” (Page 5).

Our opinion cited an opinion from the Los Angeles County Bar Association's ethics committee to the same effect, which read in part:

“Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. The Committee concludes, therefore, that it is incumbent on the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative.”

Formal Opinion No. 420 (1983) of the Los Angeles County Bar Association Committee on Legal Ethics.

As noted, there is no Rule of Professional Conduct or existing opinion that directly addresses the prosecutor's duty to preserve her own files or other relevant evidence. Most the Rules relevant to the conduct of a defense attorney including those relating to former clients and termination of representation—have no application to a prosecutor's office.

On the other hand, prosecutors are like defense lawyers in having a duty of competence. It appears that the working assumption has been that in cases where post-conviction litigation can be anticipated the prosecutor's competence-based obligation to her public client provides sufficient assurance that the prosecutor will preserve files and records, both to defend those proceedings effectively and to be able to conduct a new trial if one is granted. The lack of a more formal rule may also reflect a sense that prosecutors, as public servants subject to externally imposed financial constraints, must have latitude to balance the public benefits of retaining records against the cost of doing so. Finally, it should be acknowledged that individual prosecutors rarely remain permanently with a particular district attorney's office and it would be impractical to impose a duty upon them to take prosecution files with them as they move to other offices or industry sectors.

The Penal Code does impose certain direct preservation obligations that prosecutors must honor. Penal Code sections 1417.1-1417.8 deal with trial exhibits. The statutory preservation is short but defendant is entitled to notice and to copy exhibits before they are destroyed. Penal Code section 1417.9 deals with biological evidence, requiring its preservation for the length of the term of the imprisonment. Earlier destruction is permitted on notice to the defendant.

These provisions do not cover non-biological materials that were not introduced at trial—though those would appear to be at the center of many post trial inquiries.

Retention policies for many of these records are set locally pursuant to guidelines promulgated under Government Code Section 12236. Under Section 1054.9, those materials are subject to post conviction discovery if the matter concerns a serious or violent felony with a sentence of 15 years or more. But the prosecutors appear to have no general legal obligation to preserve such materials, other than pursuant to the local record-keeping policy, unless a lawyer for a convicted defendant files a request for a preservation order pending the defendant's appeal and the possible commencement of a habeas proceeding. *People v. Superior Court (Morales)* (2107) 2 Ca. 5<sup>th</sup> 523; *Shorts v. Superior Court* (2018) 24 Cal. App. 5<sup>th</sup> 209.

From a defendant or public regarding point of view, the potential holes in this system are: (1) the preservation of court records and biological materials may depend on the effectiveness of notice and the ability of defendants to respond; (2) with respect to 15 year violent felonies, the preservation of non-biological materials not introduced at trial depends on whether defendant has the knowledge and resources to seek a preservation order with respect thereto; and (3) with respect to less serious felonies and misdemeanors, there is no statewide uniform obligation to retain non-biological materials not introduced at trial. How big and consequential those holes are, and whether fixing them would be worth the cost of doing so, are matters on which this Committee lacks sufficient information to render a judgment.

## **RECOMMENDATION**

Assembly Bill 1987 stated a strong public policy supporting preservation of attorney legal files in certain criminal matters. The new Penal Code section 1054.9 imposes a legal duty on at least defense attorneys to preserve and make available criminal files to their clients in such matters. In our previous opinion we clearly stated that criminal attorneys have long-term ethical duty to preserve criminal files.

None of these important ethical and legal obligations are clearly stated in the new Rules. We believe this can be accomplished by a slight change to Rules 1.16, which would be the appropriate locus of such a modification because it deals with the question of attorney duties at end of the legal representation. This site selection makes even more sense because this Rule in its Comment presently has a call-out to attorneys to be aware of other provisions of the Penal Code.

We propose therefore to amend Rule 1.16 to add one sentence to Comment [5], as shown in bold:

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code ¶¶ 1054.2 and 1054.10). **Other statutes impose an affirmative duty of file**

**retention upon attorneys in certain criminal matters. (Penal Code ¶ 1054.9).**

We also believe, given the importance of the subject matter, that an updated and expanded ethics committee opinion on this subject would be useful. The prior opinion is now 18 years old and does not have extensive discussion concerning the duties of criminal defense attorneys. There also has been ongoing debate over the extent to which attorney work product comes within the definition of “client property materials” and our committee would consider whether to address this subject as well. The opinion would address the duties not only in the specific context of Penal Code section 1054.9 but in all criminal defense and civil matters.

With respect to prosecutors, the bulk of the law governing preservation of prosecutor’s files is statutory, and, as section 1054.9 makes clear, the legislature has been unwilling to legislate a general duty to preserve those files, even if the most serious criminal cases. In these circumstances, we think any change in the scope of the prosecutor’s existing obligation to preserve should come as the result of new legislation that reflects input from all relevant constituencies, including prosecutors, defense and post-conviction lawyers, and local fiscal authorities. There may be value, however, in a Comment to Rule 3.8 that identifies the limited statutory bases of the current duties to preserve.

In the meantime, it may also be useful for the Committee to prepare a brief clarifying account of the limited scope of the prosecutor’s preservation obligations, assumedly as part of a longer opinion that also deals with the preservation obligations of defense lawyers.

**ALTERNATIVES CONSIDERED AND PRO’S AND CON’S**

We considered alternatives to the above proposal. They included: (1) introducing no clarification to the Rules and no new COPRAC opinion; or (2) a more comprehensive amendment to the Rules and a full-scale COPRAC opinion addressing the duties of file retention and preservation on both prosecutors and defense counsel.

The arguments in favor of a direct but limited change to the Rules of Professional conduct, as we propose, seem self-evident: it is simple, expedient and should cause no controversy. And the message will be clear enough as it calls direct attention to the new law. It is also consistent with the existing structure of Rule 1.16 which makes reference to other provisions of the Penal Code. It is also time for a new COPRAC opinion addressing file preservation and release duties and the new statute would be an appropriate segue, but with only a limited discussion concerning the duties of prosecutors.

On the other hand, a comprehensive amendment to the Rules would require significant study, work, review and commentary, including reconciliation with existing legislative intent. That undertaking undoubtedly would be prolonged and probably controversial.

## **CONCLUSION**

For the reasons stated above, we recommend a modification to Rule 1.16 and an updated ethics opinion.