



The State Bar *of California*

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

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Open Session

Date: July 23, 2019

To: State Bar Board of Trustees

From: Committee on Professional Responsibility and Conduct

Subject: 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 amended 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. It also imposed a file retention obligation on trial counsel in such matters.

Section 3 of the law directs the State Bar of California to ascertain whether the recently revised California Rules of Professional Conduct, which became effective November 1, 2018, are sufficiently clear as to “an attorney’s duties related to file release and retention upon finality of the case or termination of the attorney-client relationship.” This Section also provides that if the rules are found to be insufficiently clear on this subject, then the State Bar is directed to consider: (1) whether a clarifying advisory ethics opinion should be issued and (2) whether new or amended rules should be proposed to address the deficiency.

On Wednesday, February 20, 2019, the Co-Chairs of the State Bar of California’s Regulation and Discipline Committee assigned to the Committee on Professional Responsibility and Conduct (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 RECOMMENDATIONS

- 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 amended by adding a sentence to Comment [5] directing defense attorneys to be aware of the file retention duties contained in Penal Code section 1054.9.

- With respect to prosecutors, the rules do not refer to any special duties of file preservation. We recommend adding a Comment to rule 3.8 (Special Duties of a Prosecutor) referencing the existing statutory obligations with regards to the disposition of evidence in criminal cases as well as the prosecutor's duty to comply with preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions.
- 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.

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." Pen. Code § 1054.9(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." Pen. Code § 1054.9(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

1. ARE THE RULES SUFFICIENTLY CLEAR ON THIS SUBJECT MATTER?

The rules do not have extensive provisions relating to file retention or release 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, "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 rule 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": An attorney who refuses to turn over pertinent and useful file documents to an existing client probably has violated the basic duty of competence. However, again, this rule only applies to existing clients.

- Rule 1.9, “Duties to Former Clients”: Comment [1] makes it clear that 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. In addition, this rule states that a lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. Failing to preserve a criminal file, or ensure its careful transfer to successor counsel could result in a lawyer violating this duty.

There is one relatively broad rule dealing with certain ethical duties specifically related to prosecutors. Rule 3.8(f) states prosecutors have an affirmative, ongoing duty to promptly disclose “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” However, the rule has no provisions specifically mandating that any portions of the file be retained.

Standing alone, these general rules do not provide specific guidance as to file retention or preservation specifically in the context of criminal matters and therefore are not sufficiently clear with regards to the specific context of post-conviction discovery.

2. SHOULD THE STATE BAR ISSUE AN ADVISORY ETHICS OPINION ON THIS SUBJECT MATTER?

Eighteen years ago, our committee published Formal Opinion No. 2001-157, which does deal with file preservation duties in both criminal and civil matters. This opinion states a clear obligation 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).

This 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.

Existing ethics opinions provide useful guidance regarding a criminal defense attorney's obligation to retain client files in criminal matters. However, that discussion is limited to the obligations owed by criminal defense attorneys and the topic has not been addressed in 18 years. Accordingly, an updated and more comprehensive advisory ethics opinion is probably warranted.

3. SHOULD THE STATE BAR PROPOSE NEW OR AMENDED RULES ADDRESSING THIS SUBJECT MATTER?

As noted, there is no Rule of Professional Conduct or existing ethics opinion that directly addresses a prosecutor's duty to preserve their own files or other relevant evidence. Most of 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 must abide by their 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 their 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 a 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, under certain circumstances.

These provisions do not cover non-biological materials that were not introduced at trial—though those materials 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)* (2017) 2 Cal.5th 523; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 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 the 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. The Committee is aware that many post-conviction attorneys believe that these gaps are both substantial and harmful. The Committee does not, however, have sufficient information to form a definitive view on the matter.

RECOMMENDATIONS

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 rule 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, which addresses “Declining or Terminating Representation” to add one sentence to Comment [5], as shown in bold underlined:

[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.) **A lawyer in certain criminal matters may be required to retain a copy of a former client’s file for the term of his or her imprisonment. (Pen. Code, § 1054.9.)**

We also recommend adding a cross-reference to rule 1.16, Comment [5] in Comment [3] to rule 1.4 which addresses “Communication with Clients.” Rule 1.4(a)(3) requires an attorney to comply promptly with a *current* client’s reasonable request for copies of significant documents necessary to keep the client informed. However, rule 1.4(c) allows an attorney to delay transmission of information if he or she reasonably believes the client would react in a way that may cause harm. Comment [3] underscores that this ability to delay only applies to current representations and does not alter the obligations under rule 1.16(e)(1) to release all client materials and property at the termination of representation. Because an attorney is likely to consult the communication rule when determining his or her obligation to provide copies of the file to a current client, and because rule 1.4, Comment [3] already references an attorney’s obligations with respect to releasing a client’s file upon termination of the representation, we recommend amending Comment [3] to rule 1.4, as shown in bold underlined, in order to help

ensure attorneys are aware of their obligation to refrain from releasing certain information in certain circumstances (Pen. Code §§ 1054.2 and 1054.10) and to retain a copy of a former client's file in certain circumstances even after it has been released (Pen. Code § 1054.9):

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1). **See also, Comment [5] to rule 1.16.**)

For similar reasons stated above, we recommend that the following sentence be added at the end of Comment [7] to rule 3.8, which addresses "Special Responsibilities of a Prosecutor," as shown in bold underlined:

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) **Statutes may require a prosecutor to preserve certain types of evidence in criminal matters. (See Pen. Code, §§ 1417.1-1417.9.) In addition, prosecutors must obey file preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions. (See *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523 [213 Cal.Rptr.3d 581]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709 [234 Cal.Rptr.3d 392].)**

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 addresses only 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.

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; and (2) a more comprehensive amendment to the rules.

Arguments in favor of a direct but limited change to the Comments to the Rules of Professional Conduct, include: it is simple, expedient, and should cause no controversy. The message will be clear as it calls direct attention to the new law. It is also consistent with the existing structure of rule 1.16 which makes references to other provisions of the Penal Code and subject matter of rule 3.8 dealing with a prosecutor's duties to disclose evidence pertaining to possible wrongful convictions.

The desirability of a new advisory ethics opinion addressing file preservation and release duties of attorneys seems clear, and the new statute would be an appropriate segue.

Adding a comprehensive amendment to the text of the rules spelling out file preservation obligations in criminal matters is a possible option that has been considered. The argument in favor of placing preservation obligations in the text of the rules themselves is that such obligations are a natural extension of the duties already imposed by the rules, particularly those imposed on prosecutors by rule 3.8. The argument against, starts with the proposition that the legislature has already taken significant steps in this area, and that many of the changes that might be taken to improve matters would require changes to existing legislation..

CONCLUSION

For the reasons stated above, we recommend amending Comment [5] to rule 1.16, Comment [3] to rule 1.4, Comment [7] to rule 3.8, and issuing an updated ethics opinion.