

For October 25, 2019 Committee Meeting

**Preliminary Issue Outline for Opinion Regarding Retention of Client Files (AB 1987)**

**I. ISSUES**

- Attorney's ethical duties regarding the retention of former clients' files
- Whether Attorney is ethically required to retain clients' files for any specific length of time following the completion of representation
- Ethical duties regarding the retention of clients' files that are specific to criminal defense attorneys
- Ethical duties regarding the retention of case files that are specific to prosecutors (if any)
- Guidance regarding digitalization of client files
- Guidance regarding treatment of attorney work product

**II. POINTS FOR DISCUSSION**

**A. Background**

In 2018, Former Governor Jerry Brown signed into law Assembly Bill 1987, which amends section 1054.9 of the California Penal Code. The amended section 1054.9 expands post-conviction discovery provisions to include cases involving the conviction of serious or violent crimes resulting in a sentence of 15 years or more. (Previously, section 1054.9 applied only to cases involving a sentence of death or life without the possibility of parole.) Thus, any defendant convicted of a serious or violent felony and sentenced to at least 15 years (determinate term or life term) may now seek post-conviction discovery materials in the possession of the prosecution or law enforcement after showing that good faith efforts were made to obtain discovery materials from trial counsel and that those efforts were not successful.

The amended section 1054.9 also imposes a file retention obligation on "trial counsel" (i.e., defense counsel) in such matters. Specifically, the statute mandates:

In criminal matters involving a conviction for a serious or a violent felony resulting in a sentence of 15 years or more, **trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment.** An electronic copy is sufficient only if every item in the file is digitally copied and preserved.

Penal Code § 1054.9, subd. (g) (emphasis added).

Section 3 of the enacted law directs the State Bar to determine whether the revised CRPC sufficiently address “an attorney’s duties related to file release and retention upon finality of the case or termination of the attorney-client relationship,” and if not, to consider whether a clarifying advisory ethics opinion should be issued and whether new or amended rules should be proposed to address the deficiency.

In response, in July 2019, the Committee submitted a memorandum to the State Bar Board of Trustees that addresses the issues identified by the legislature. The Committee concluded, *inter alia*, that, notwithstanding its 2001 opinion regarding client file retention, an updated and expanded opinion would be useful to both civil and criminal defense attorneys.

## **B. Selected Existing Authority**

As the Committee noted in its July 2019 memorandum, the current rules do not have clear or extensive provisions relating to file retention or release obligations owed to former clients, and none squarely addresses the issue. For example, Rule 1.16, subsection (e)(1), provides that, upon termination of representation, the attorney must promptly release “client materials and property” at the request of the client, but imposes no file preservation duty. It is also silent on how long client files must be retained if the client has not requested them and offers no guidance on when, if ever, a particular item may be discarded. Likewise, until the amendment to section 1054.9 of the Penal Code, no California statute expressly addressed client file retention obligations.

The Committee’s 2001 opinion does address file preservation duties in criminal matters and concludes that “client files in criminal matters should not be destroyed without the former client’s express consent while the former client is alive.” Cal. State Bar Formal Opn. No. 2001-157, p. 5. *See also* Los Angeles County Bar Assn. Formal Opn. No. 420 (Because “the attorney cannot foresee the future utility of information contained in the file [in criminal matters], it is incumbent on the attorney . . . 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.”).

Other ethics opinions have expressly refused to mandate a definitive time period during which a lawyer must preserve all files. For example, a 1996 opinion by the San Francisco Bar Association’s ethics committee notes that the length of time papers must be maintained depends upon the nature of the document, the nature of the services rendered to the client, and any other factors to determine whether prejudice to the client would arise by destruction of the papers. San Francisco Bar Assn. Formal Opn. 1996-1 (“We must stress that [the State Bar rules] do not address the number of years which an attorney must retain client papers. There is no rule that provides such a time period and, in our view, no rule should. The key . . . is the attorney’s obligation as a bailee of the client’s personal property and the need to retain papers which are necessary to preclude reasonably foreseeable prejudice to the client. **This duty cannot be discharged merely by reference to a fixed**

**time period.”** (Emphasis added.) *See also* ABA Comm. On Ethics & Prof. Resp. Informal Opn. No. 1384 (1977) (advising that an attorney use “good common sense” in determining the length of time for file preservation, while cautioning against the destruction of original documents belonging to the client, the discarding of information that may be useful in the assertion or defense of the client’s position, or the destruction of information that the client may need).

### **C. Possible Topics for Analysis in the New Opinion (Non-Exhaustive)**

- Definition of “client’s files”/“client property”

The Committee’s 2001 opinion addresses in detail materials that generally constitute “client papers and property” in civil matters. The new opinion can supplement the prior opinion with any relevant recent authorities, including a discussion on whether and how attorney work product may come within the definition of “client property.”

In criminal matters, section 1054.9 simply states that “trial counsel shall retain a copy of a former client’s files for the term of his or her imprisonment[.]” but does not define what constitutes “client’s files.” [Additional research is needed to determine what authority, if any, exists on this issue.]

Issues relating to the prosecutor’s retention obligations and what materials a defendant is entitled to receive under section 1054.9 are discussed separately below.

- Retention of criminal client case files in electronic format

Based on anecdotal, informal discussions with criminal defense attorneys, it appears that one of the key areas of concerns regarding the file retention obligations under the new section 1054.9 is that many private defense attorneys do not have the necessary storage space. This naturally raises the question of whether a trial attorney in a criminal matter may scan client files and then destroy the hard-copy documents (This question easily lends itself to a useful hypothetical.)

Under the amended section 1054.9, the answer appears to be “yes.” Penal Code § 1054.9 (“An electronic copy is sufficient only if every item in the file is digitally copied and preserved.”) But would doing so without informing the former client and/or without the former client’s consent run afoul of the Committee’s prior opinion that “criminal case files should not be destroyed without the former client’s express consent while the former client is alive”? Cal. State Bar Formal Opn. No. 2001-157. After all, the 2001 opinion also stated that “[n]ot all recording by electronic means will suffice to protect the client from reasonably foreseeable prejudice.” *Id.*, p. 7, n.7.

But the Committee’s 2001 opinion was addressing a different question (primarily length of file retention, not format), and is now more than a decade old. In fact, its warning about electronic documents was a caveat to a statement allowing storage by microfilms or “similar means.”

The new opinion should offer updated and practical guidance on the issues of file digitalization and address ethical implications of electronic document storage, i.e., taking reasonable steps to protect and secure the client's information (Cal. State Bar Formal Opn. Nos. 2012-184, 2010-179), preserving confidentiality (Rule 1.6), ensuring digital backups, ensuring that electronic files are maintained in readily-accessible format (probably not microfilms), saving documents in non-modifiable format (e.g., pdf instead of Word, although pdfs can now be edited).

- Destruction of hard copies of client file documents

The opinion should necessarily address issues related to the destruction of hard copies of client file documents, i.e., duty to preserve confidential client information and privileged communications (B&P Code § 6068(e), Evid. Code § 957, Rule 1.6(a), Rule 1.9(c)(2)), taking all reasonable steps to notify the former client of the existence of the file, of the client's right to examine and retrieve the contents, and of their intended destruction (Cal. State Bar Formal Opn. 2001-157, p. 3).

It would be prudent to note that certain categories of documents may need to be, or should be, retained in the original hard-copies, whether required by law or as best practice (i.e., certain original declarations (e.g., to ensure authenticity in habeas cases), original documents of independent legal significance (e.g., wills, trust documents), an exculpatory letter from a third-party to the criminal defendant, naturalization records/citizenship certificates).<sup>1</sup>

- File retention obligations of prosecutors

As the Committee noted in its July 2019 memorandum to the Board of Trustees, there is currently no Rule of Professional Conduct or ethics opinion that directly addresses a prosecutor's duty to preserve its files or other relevant evidence.

Penal Code section 1054.9 provide that, upon the criminal defendant's showing that good faith efforts to obtain "discovery materials" from trial counsel were made but were unsuccessful, the defendant shall be provided reasonable access to "discovery materials," which is defined as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." Penal Code § 1054.9(a), (c). But section 1054.9 also expressly notes that the statute "does not require the retention of any discovery materials not otherwise required by law or court order." *Id.*, subd. (f).

Aside from section 1054.9, there does not appear to be any authority that imposes any post-conviction discovery obligations. *But see People v. Curl*, 140 Cal. App. 4th 310, 318 (2006) (Even "after a conviction the prosecutor . . . is bound by the ethics of his

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<sup>1</sup> Query whether the opinion should include a more detailed discussion of the risks associated with the destruction of hard copies, i.e., authenticity/credibility of evidence being challenged by the prosecution.

office to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction.). This sentiment expressed in *Curl* is reflected in Rule 3.8(f), which lists certain ethical duties specifically related to prosecutors, including 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,” when such evidence is known to the prosecutor. However, it is plainly silent on obligation to retain any portions of the prosecutor’s case file.

Given such limited nature of the authority regarding prosecutors’ ethical obligations, it is unclear what, if anything, the new opinion can or should state on the matter.