

ISSUE OUTLINE – Opn. 19-0004
Client File Release and Retention Duties Owed to Former Client
(revised for February 28, 2020 meeting)

ISSUES/QUESTIONS

- What ethical duties does a lawyer have regarding the retention and release of former clients' files in civil and criminal matters?
- How long should the lawyer retain closed-client files after the completion of representation?
- What materials should be included in the closed-client files that are released to the former client?
- Is the lawyer required to retain and release a closed-client file in any particular format?

AUTHORITIES TO BE INTERPRETED

Rules 1.15(d), 1.16(e)(1), 3.8(f)
Bus. & Prof. Code §§ 6068(e), 6149
Pen. Code § 1054.9

PROPOSED FACTS

Scenario 1) Lawyer has represented Corporate Client in various litigation matters over the past 15 years. Corporate Client recently informed Lawyer that, going forward, all litigation matters will be handled by its inhouse litigation department. Corporate Client's files are extensive and span multiple closed and ongoing matters. Some of the materials in the files were kept in physical formats, while others only exist exist only in digital formats. Corporate Client requests that Lawyer release "all of our files immediately," including those in closed matters. Unbeknownst to the client, some of the client's papers in the oldest closed matters were recently digitalized and the originals destroyed at Lawyer's direction.

Scenario 2) Lawyer in Scenario 1 wants to first remove certain internal communications, personal working notes and draft documents that Lawyer generated for Lawyer's own purposes that were never communicated to Corporate Client, including those that Lawyer generated in an ongoing action against Corporate Client.

Scenario 3) Ten years ago, Lawyer represented Client in an armed robbery case involving the use of a firearm in which Client was found guilty and sentenced to 25 years in prison. Lawyer's representation of Client ended shortly thereafter. Lawyer has not kept track of Client's case

the status of Client’s case or incarceration. Lawyer is currently in the process of going “paperless” and plans to digitalizes over 100 boxes of closed-client files, including Client’s, and deliver the physical files to a data management company for secure destruction.

BACKGROUND

Generally, the contents of a client file, other than attorney work product in certain circumstances (discussed below), belongs to the client, and *on request*, must be promptly provided to the client. Rule 1.16(e)(1); Cal. State Bar Form. Opn. 1992-197 (interpreting formal rule 3-700(D)(1)). But what if the client does not request the return of such materials? And what if the representation spanned several years, or even decades, and consequently, the client’s “files” are extensive? Does the lawyer really need to preserve and retain every piece of client paper? If so, for how long and in what format? Can a lawyer digitalize all client materials and destroy the physical files?

There is no clear rule on when and how a lawyer may purge closed-client files. Similarly, there is no California statute, rule of professional conduct or case law that specifies an express time period for file retention in civil matters. As this Committee noted in its 2001 opinion, there is “no shortcut, ‘bright line’ rule” for determining how long a lawyer must retain items in a closed matter because “the need to maintain client papers cannot be measured in all cases by a fixed time period.” COPRAC Opn. 2001-157. In the absence of specific authority on file retention duties, over the years, local bars have issued advisory opinions in an effort to provide some practical guidance on file release and retention, with varying recommendations. *See, e.g.*, Los Angeles County Bar Association Prof. Resp. and Ethics Comm. (LACBA) Opn. 475 (client files in civil matters should be retained for at least five years but files with intrinsic value to the client should not be destroyed without the client’s consent); Bar Association of San Francisco Legal Ethics Comm. (BASF) Opn. 1996-1 (in recommending that a lawyer should retain client papers necessary to preclude reasonably foreseeable prejudice to the client, stressing that no rule does or should dictate the number of years a lawyer must retain client papers).

With respect to closed-client file release and retention duties in criminal matters, advisory opinions have been more clear and consistent. *See* COPRAC Opn. 2001-157 (client files in criminal matters should not be destroyed during the client’s lifetime absent client’s authorization to destroy or otherwise release the files); LACBA Opn. 475 (client files in criminal matters should be retained for the life of the former client).

Against this backdrop, in 2018, the California State Legislature expanded post-conviction file retention duties in criminal matters involving a conviction for a series or violent felony resulting in a sentence of 15 years or more by amending Pen. Code section 1054.9. Effective January 1, 2019, in all such matters, “trial counsel” must now retain a copy of the former client’s files for the term of the client’s imprisonment.

Assembly Bill 1987 amending Penal Code section 1054.9 contains an uncodified section 3 that requests, among other things, the State Bar to “study the issue of closed-client file release and retention by defense attorneys and prosecutors in criminal cases,” and if the existing rules are found to be insufficiently clear with respect to post-conviction discovery, the State Bar to consider issuing a clarifying advisory opinion.

In this context, the Committee has decided that an opinion addressing client file retention and release duties in both civil and criminal matters would be useful.

POINTS FOR DISCUSSION

I. CLIENT FILE CONTENT

- Questions for the Committee

- Should the opinion tackle the issue of what constitutes “client materials and property” under Rule 1.16, including the open question of whether uncommunicated work product should be released to the former client? Or should it focus solely on the duration and format of closed-client file retention/release?

- Does the Committee’s Opn. 2001-157 adequately cover this issue?

- Whether a lawyer is obligated to release to the client attorney work product not previously communicated to the client is still an open question. *See Rose v. State Bar*, 49 Cal. 3d 646, 655 (1989) (whether uncommunicated work product must be turned over to the client is an “open question”); COPRAC Opn. 2001-157 (noting “unresolved division in the authorities as to the client’s right to receive uncommunicated work product of the attorney”). Should the Committee address this issue, which it expressly declined to do in its 2001 opinion?

- If the Committee decides to tackle the work product issue, the opinion should include a discussion on a lawyer’s ethical obligation to include attorney work product if the material is necessary to avoid reasonably foreseeable prejudice to the client’s rights. *See* BASF Opn. 1996-1; LACBA Opn. 330 (1972) (attorney work product that can be billed to the client belongs to the client); San Diego Bar Ass’n Form. Opn. 1997-1 (lawyer may not withhold work product reasonably necessary to client’s representation); ABA Form. Opn. 15-471 (client entitled to “those materials that would likely harm the client’s interest if not provided”). Doing so may lengthen the opinion and expand its scope. Is this a concern for the Committee? Should it be?

- 124 – Should the opinion address release of client’s mental health records where
125 such records might harm the former client or others, a scenarios addressed
126 by LACBA in Opn. 509 (2002)? At a minimum, the issue should be flagged?

127 **II. CLOSED CLIENT FILE RETENTION AND RELEASE DUTIES IN CIVIL MATTERS**

128 • Duration of file retention in closed matters

- 129 – If the client requests the files: “[A]ll client materials and property” must be
130 “promptly” provided to the client. Rule 1.16(e)(1).

- 131 – If the client does not request the files: There is no California rule or case law
132 establishing a specific length of time a lawyer must retain client files in a civil
133 matter after completion of the client matter if the client does not request
134 their return.

- 135 – LACBA has advised that, because the client’s right to the file continues after
136 termination of the attorney-client relationship, absent an agreement, five
137 years is a reasonable time to retain “potentially significant” materials in the
138 civil matter. LACBA Opn. 475 (1994).

- 139 – BASF, on the other hand, declined to recommend a fixed duration for
140 retention of closed client files in civil matters. BASF Opn. 1996-1. Instead,
141 BASF approached the issue of file retention in terms of “reasonably
142 foreseeable prejudice to the client,” and suggested that, as a bailee of the
143 client’s personal property, a lawyer should retain those client papers
144 necessary to preclude reasonably foreseeable prejudice to the client.

- 145 – LACBA’s five-year retention rule is derived from Rule 1.15 (former rule 4-100)
146 governing a lawyer’s duty to preserve the identity of funds and property of a
147 client, not rule 1.16 governing a lawyer’s duty to return closed-client files
148 upon request. As the Committee noted in its opinion 157, however, Rule
149 1.15 refers not to client file retention but to a lawyer’s duty to retain records
150 of “funds, securities and other properties of a client or other person coming
151 into the possession of the lawyer[.]”

- 152 – The Committee accordingly declined to adopt the recommendation of LACBA
153 and instead adopted BASF’s conclusion that there should not be a fixed
154 duration for the retention of client files in civil matters.

- 155 – The Committee’s reasoning for rejecting a “bright line” rule as to the length
156 of time a lawyer must retain a closed client file remains sound. This opinion
157 should reaffirm the Committee’s conclusion that there is no fixed time period
158 for which any particular item in a closed-client file must be retained.

- Duties with respect to destruction of closed client files
 - Absent an agreement on the disposition of client materials after completion of a client matter, a lawyer must make reasonable efforts to obtain the client's consent before destroying any items in the client's file. COPRAC Opn. 2001-157.
 - The opinion should set forth in detail steps that a lawyer should take to notify the client regarding the existence of the closed client files and any plan for destruction thereof.
 - If the lawyer cannot locate the client or obtain clear instructions from the client, the lawyer may destroy the items unless the lawyer has a reason to believe that a file contains items required by law to be retained or that the client will reasonably need to establish a right or defense to a claim. *Id.* See also ABA Informal Opn. 1384 (1977). This requires an exercise of judgment. COPRAC Opn. 2001-157.
 - "If the attorney is without personal knowledge of the contents of the file, 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." COPRAC Opn. 2001-157 (emphasis added) [Question: How would a lawyer 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? Should the Committee recommend more strongly that, in that instance, the lawyer *should* examine the file?]
 - The opinion should include a brief discussion re recommended file destruction practice.

- Duties with respect to digitalization of closed-client files [To be developed further.]

III. CLOSED CLIENT FILE RETENTION AND RELEASE DUTIES IN CRIMINAL MATTERS

- Closed client file retention duties for defense counsel
 - Existing ethics opinions recommend that client documents related to criminal matters should not be destroyed during the client's lifetime absent authorization from the client to destroy or release the file. COPRAC Opn. 2001-157; LACBA 475 (citing LACBA Opn. 420).
 - In criminal matters involving a conviction for a serious or violent felony that results in a sentence of 15 years or more, trial counsel must retain a copy of the former client's files for the term of the former client's imprisonment.

193 Pen. Code § 1054.9(g). The file may be maintained in electronic form but
194 “only if every item in the file is digitally copied and preserved.” *Id.*

195 – Question: Notwithstanding defense counsel’s duty to retain client files for
196 the duration of the former client’s imprisonment under the Penal Code
197 section 1054.9, query whether the Committee should recommend that client
198 files in all criminal matters should be retained during the client’s lifetime,
199 absent authorization from the client to destroy or release the file.

200 • Closed client file retention duties for prosecutors

201 – There is currently no Rule of Professional Conduct or ethics opinion that
202 directly addresses a prosecutor’s duty to preserve its files or other relevant
203 evidence.

204 – Penal Code section 1054.9 provide that, upon the criminal defendant’s
205 showing that good faith efforts to obtain “discovery materials” from trial
206 counsel were made but were unsuccessful, the defendant shall be provided
207 reasonable access to “discovery materials,” which is defined as “materials in
208 the possession of the prosecution and law enforcement authorities to which
209 the same defendant would have been entitled at time of trial.” Penal Code §
210 1054.9(a), (c). But section 1054.9 also expressly notes that the statute “does
211 not require the retention of any discovery materials not otherwise required
212 by law or court order.” *Id.*, subd. (f).

213 – Aside from section 1054.9, there does not appear to be any authority that
214 imposes any post-conviction discovery obligations. *But see People v. Curl*,
215 140 Cal. App. 4th 310, 318 (2006) (Even “after a conviction the prosecutor . . .
216 is bound by the ethics of his office to inform the appropriate authority of . . .
217 information that casts doubt upon the correctness of the conviction.). This
218 sentiment expressed in *Curl* is reflected in Rule 3.8(f), which lists certain
219 ethical duties specifically related to prosecutors, including an affirmative,
220 ongoing duty to promptly disclose “new, credible and material evidence
221 creating a reasonable likelihood that a convicted defendant did not commit
222 an offense of which the defendant was convicted,” when such evidence is
223 known to the prosecutor. However, Rule 3.8 is silent on obligation to retain
224 any portions of the prosecutor’s case file.

225 – Given the limited nature of the authority regarding prosecutors’ ethical
226 obligations, it is unclear what, if anything, this opinion can or should state on
227 the matter.

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