

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

ISSUES What ethical duties does a lawyer have regarding the retention and release of former clients' files in civil and criminal matters? When and how may a lawyer discard or destroy closed client files?

DIGEST [To be added]

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

STATEMENT OF 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. 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 is contemplating retirement and does not know what to do about the current storage space for closed client files. Lawyer would like to discard them as soon as possible without review.

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 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.

INTRODUCTION

Most lawyers are generally aware that the contents of a client file in a closed matter belong to client and that they must be "promptly" released to the client at the request of the client. Cal. R. Prof. Cond. 1.16(e). But what if the client does not request the file after the representation ends? Or the representation spanned several years, or even decades, and consequently, the client's "files" are extensive? Must a lawyer retain and preserve every piece of client paper and

other materials generated during the representation? If so, for how long and in what format?
Can a lawyer ever destroy or otherwise purge closed-client 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. 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).

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 the Penal 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. As with civil matters, however, no existing rule or statute clearly defines a lawyer’s file retention duties in other criminal matters that do not fall under Penal Code section 1054.9.

This Committee last addressed a lawyer’s ethical obligations relating to the disposition of former client’s closed files in 2001. Given the subsequent adoption of the new Rules of Professional Conduct and advances in technology and electronic file storage, the Committee believes it appropriate to revisit a lawyer’s client file retention and release duties in both civil and criminal matters. The purpose of this opinion is to provide guidance to lawyers to ensure the ethical disposition of closed-client files in today’s technological world.

DISCUSSION

I. CLOSED CLIENT FILE RETENTION AND RELEASE DUTIES IN CIVIL MATTERS

A. Defining client files

- Rule 1.16(e)(1) provides that a lawyer must promptly release to the client, at the request of the client, “all client materials and property,” which includes

86 “correspondence, pleadings, deposition transcripts, experts’ reports and
87 other writings, exhibits, and physical evidence, whether in tangible,
88 electronic or other formers, and other items reasonably necessary to the
89 client’s representation, whether the client has paid for them or not[.]”¹
90

91 **B. Duration of file retention duty in closed matters**
92

- 93 – If the client requests the files: “[A]ll client materials and property” must be
94 “promptly” provided to the client. Rule 1.16(e)(1).
95
- 96 – If the client does not request the files: There is no California rule or case law
97 establishing a specific length of time a lawyer must retain client files in a civil
98 matter after completion of the client matter if the client does not request
99 their return.
100
- 101 – LACBA has advised that, because the client’s right to the file continues after
102 termination of the attorney-client relationship, absent an agreement, five
103 years is a reasonable time to retain “potentially significant” materials in the
104 civil matter. LACBA Opn. 475 (1994).
105
- 106 – BASF, on the other hand, declined to recommend a fixed duration for
107 retention of closed client files in civil matters. BASF Opn. 1996-1. Instead,
108 BASF approached the issue of file retention in terms of “reasonably
109 foreseeable prejudice to the client,” and suggested that, as a bailee of the
110 client’s personal property, a lawyer should retain those client papers
111 necessary to preclude reasonably foreseeable prejudice to the client.
112
- 113 – LACBA’s five-year retention rule is derived from Rule 1.15 (former rule 4-100)
114 governing a lawyer’s duty to preserve the identity of funds and property of a
115 client, not rule 1.16 governing a lawyer’s duty to return closed-client files
116 upon request. As the Committee noted in its opinion 157, however, Rule
117 1.15 refers not to client file retention but to a lawyer’s duty to retain records
118 of “funds, securities and other properties of a client or other person coming
119 into the possession of the lawyer[.]”
120

¹ Whether a lawyer is obligated to release to the client attorney work product not previously communicated to the client is still an open question and is beyond the scope of this opinion. 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”). The Committee nevertheless recommends that, in determining whether a particular work product should be treated as a client property for the purposes of file retention/disposition, the lawyer consider whether such an item is “reasonably necessary to the client’s representation.” Cal. R. Prof. Cond. 1.16(e)(1).

- The Committee accordingly declined to adopt the recommendation of LACBA and instead adopted BASF’s conclusion that there should not be a fixed duration for the retention of client files in civil matters.
- The Committee’s reasoning for rejecting a “bright line” rule as to the length of time a lawyer must retain a closed client file remains sound. The Committee thus reaffirms its prior conclusion that there is no fixed time period for which any particular item in a closed-client file must be retained.
- As the Committee suggested in its 2001 opinion, to ease “the burdens and expense of preserving former client files,” “[lawyers] handling discrete matters such as claims or litigation *might* consider including in their fee agreements a provision the following termination of the representation the contents of the file may be destroyed without review at the end of a specified and reasonable period of time, unless the client has requested delivery of the files to the client.” **[Question: What would be “reasonable period of time” in this instance? Should the opinion specify? Make a recommendation?]**

C. Format of client files for retention

- **[Question: Should this issue be addressed under its own subheading, or discussed as a part of the duties with respect to destruction of closed client files below? The latter may make more sense.]**
- Lawyers are advised to exercise “good common sense” in determining the appropriate duration for file retention. COPRAC Opn. 2001-157 (citing ABA Informal Opn. 1384 (1977)). In exercising “good common sense,” lawyers should also question whether it is appropriate to maintain files only in electronic form. It is easier and likely more cost-effective to maintain electronic files than to preserve hard-copy files, which may require offsite storage.
- But absent client consent, certain items should never be destroyed, i.e., original papers and materials of “inherent value,” i.e., original stocks, bonds, wills, deeds, notes, or judgments. LACBA Opn. No. 475.
- Before going paperless and destroying hard-copies, lawyers should **[must?]** make reasonable efforts to notify the client and obtain the client’s consent before destroying any hard copies in the client’s file.

164 **D. Duties with respect to destruction of closed client files**

- 165
- 166 – Absent an agreement on the disposition of client materials after completion
- 167 of a client matter, a lawyer must make reasonable efforts to obtain the
- 168 client’s consent before destroying any items in the client’s file. COPRAC Opn.
- 169 2001-157.
- 170
- 171 – If the lawyer cannot locate the client or obtain clear instructions from the
- 172 client, the lawyer may destroy the items unless the lawyer has a reason to
- 173 believe that a file contains items required by law to be retained or that the
- 174 client will reasonably need to establish a right or defense to a claim. *Id.* See
- 175 also ABA Informal Opn. 1384 (1977). This requires an exercise of judgment.
- 176 COPRAC Opn. 2001-157.
- 177
- 178 – Absent an agreement on the disposition of client materials, if the lawyer is
- 179 without personal knowledge of the contents of the file, the lawyer is advised
- 180 to examine the file to determine whether there is reason to believe that the
- 181 client will foreseeably have need of the contents. **[Question: The**
- 182 **Committee previously opined that in such circumstances, “it *may* be**
- 183 **necessary to examine the file before concluding whether there is reason to**
- 184 **believe that the client will foreseeably have need of the contents.”**
- 185 **COPRAC Opn. 2001-157 (emphasis added) But how would a lawyer**
- 186 **determine whether the closed file contains any item that the client may**
- 187 **need if the lawyer is without personal knowledge of the contents of the**
- 188 **file? Should we recommend more strongly that, in that instance, the**
- 189 **lawyer *should* examine the file? Or that the lawyer is “advised to” or**
- 190 **“strongly advised to” examine the file?]**
- 191
- 192 – Lawyers should follow these rules before going “paperless,” i.e., “scan-and-
- 193 purge.” No authority specifically addresses whether the firm must notify
- 194 *current* clients of the existence of a paper file, the right to examine and
- 195 retrieve the contents, or the lawyers’ or the firm’s plan to scan-and shred.
- 196 But as such is required as to former clients, it would be prudent to take the
- 197 same steps as to current client’s papers and property.
- 198
- 199 – **Manner of destruction/Confidentiality:** “The attorney is obliged to use a
- 200 method of destruction that will ensure no breach of confidentiality.”
- 201 COPRAC Opn. 2001-157. To ensure confidentiality, a lawyer should use
- 202 appropriate security, make sure digital backup exists, and before purging any
- 203 hard copies or other physical materials, make sure they are properly
- 204 shredded, rendered undecipherable and securely disposed. **[Question:**
- 205 **Should this be its own subsection?]**
- 206
- 207

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

A. 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. Pen. Code § 1054.9(g). The file may be maintained in electronic form but “only if every item in the file is digitally copied and preserved.” *Id.*
- Notwithstanding defense counsel’s duty to retain client files for the duration of the former client’s imprisonment under the Penal Code section 1054.9, client files in all criminal matters should be retained during the client’s lifetime, absent authorization from the client to destroy or release the file.
- For an lawyer wishing to go paperless, in light of Penal Code § 1054.9(g) (permitting maintenance of client file in electronic format “only if every item in the file is digitally copied and preserved), it would be prudent for the lawyer 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).

B. Closed Client File Retention Duties for Prosecutors

- 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).

- 251 – Aside from section 1054.9, there does not appear to be any authority that
252 imposes any post-conviction discovery obligations. *But see People v. Curl*,
253 140 Cal. App. 4th 310, 318 (2006) (Even “after a conviction the prosecutor . . .
254 is bound by the ethics of his office to inform the appropriate authority of . . .
255 information that casts doubt upon the correctness of the conviction.). This
256 sentiment expressed in *Curl* is reflected in Rule 3.8(f), which lists certain
257 ethical duties specifically related to prosecutors, including an affirmative,
258 ongoing duty to promptly disclose “new, credible and material evidence
259 creating a reasonable likelihood that a convicted defendant did not commit
260 an offense of which the defendant was convicted,” when such evidence is
261 known to the prosecutor. However, Rule 3.8 is silent on obligation to retain
262 any portions of the prosecutor’s case file.
263

264 **[Question: Should “Paperless” office be addressed separately under its own subheading and**
265 **discussed with respect to both civil and criminal matters?]**
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267 **III. ANALYSIS OF THE FACTUAL SCENARIOS**

268
269 [To be added]