

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

ISSUES

How long is a lawyer ethically obligated to retain client files in closed civil and criminal matters?

Under what circumstances may a lawyer discard or otherwise destroy closed client files in civil and criminal matters?

DIGEST

There is no specific time period for retaining all of the contents of a closed civil file. Absent an agreement to the contrary, before purging any closed client file in a civil matter, a lawyer must make all reasonable efforts to locate the former client and advise the client of the existence of the file, of the client's right to examine and retrieve the file, and of the lawyer's intent to destroy the file. If, despite the lawyer's diligent efforts, the former client cannot be located or fails to respond to reasonable notice of intended destruction of the file, the lawyer may destroy only those items in the closed file that the lawyer has no reason to believe the former client would need, provided that the disposal does not violate state or federal document retention requirements (e.g., Probate Code sections governing certain estate planning documents held by a lawyer for safekeeping). Absent an agreement to the contrary, closed client files in criminal matters should be retained for the duration of the client's life. Considerations unique to criminal matters, i.e., the client's liberty interest and the possibility of post-conviction review years after the conviction, support this conclusion. Trial counsel in criminal matters involving a conviction for a serious or violent felony that results in a sentence of 15 years or more is also subject to Penal Code section 1054.9(g) (eff. Jan. 1, 2019), which requires that trial counsel keep a copy of the client file for the term of the client's imprisonment. The Committee concludes that this statutory obligation is not altered by the client's consent or instructions to the contrary. In purging closed client files, a lawyer must preserve original materials that clients may need, preserve client confidentiality, and maintain an index of destroyed records for future reference. See Cal. State Bar Form. Opn. 2001-157 n.9; D.C. Bar Form. Opn. 283 n.14.

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(g)

STATEMENT OF FACTS

Scenario 1. Lawyer A has represented Corporate Client in various litigation matters over the years. Corporate Client recently informed Lawyer A that all litigation matter will now be handled inhouse and has requested an immediate transfer of "all of our files," including the files in closed matters. Unbeknownst to Corporate Client, certain physical files in closed matters were recently destroyed at Lawyer A's direction after being digitalized. Before marking the materials for destruction, Lawyer A reviewed the contents and determined that Corporate Client would have no need for the physical copies.

Scenario 2. Lawyer B, a solo practitioner in general practice, is planning to retire in the next few years. He would like to dispose of the hundreds of boxes of closed client files in storage. Lawyer B has not reviewed these files in years, but each box is indexed for content, including the client/matter information and the general category of documents (i.e., pleadings, discovery, transcripts). Given the age of the files, Lawyer B does not believe that any of the former clients would have the need for the files. Lawyer B plans to discard all of the boxes without review.

Scenario 3. Lawyer C represented Client in an armed robbery case in which Client was found guilty and sentenced to 25 years. Lawyer C's representation of Client ended shortly after the sentencing. Lawyer C has not kept track of the status of Client's case and does not know whether Client remains incarcerated. Lawyer C is currently in the process of going paperless and plans to digitalizes all physical client files in closed matters, including Client's, and deliver the physical files to a data management company for secure destruction.

INTRODUCTION

The contents of a client file in a closed matter belong to the former client, and the former client is entitled to a "prompt" release of "all client materials and property" upon request. Cal. R. Prof. Cond. 1.16(e). But what if the client does not demand the return of the closed file after the representation ends? How long must a lawyer preserve closed client files? Under what circumstances can a lawyer destroy or otherwise purge closed client files? Can a lawyer digitalize the contents and destroy the physical files? These commonly asked questions present a unique challenge for California lawyers because there is no clear rule on the topic of closed client file retention and disposal.

Ethics opinion addressing file retention duties have given varying recommendations as to how long a lawyer should retain closed client files in civil matters. *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 (declining to dictate the exact number of year a lawyer must retain client papers); Cal. State Bar Form. Opn. 2001-157 (rejecting a "bright line" rule for determining how long a lawyer must retain closed client files in favor of "good common sense" approach in light of the client's needs for the file contents) (citing ABA Informal Opn. 1384 (1977)).

With respect to closed client files in criminal matters, advisory opinions are generally in agreement that, absent a client's authorization, the closed files should not be destroyed during the client's lifetime. *See* Cal. Opn. 2001-157; LACBA Opn. 475. 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. 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.

DISCUSSION

A lawyer's ethical obligations pertaining to closed client files stem from Rule 1.16 of California Rules of Professional Conduct, which provides that, upon termination of a representation for any reason, the lawyer must "promptly" release "all client materials and property" to the client, "at the request of the client." Cal. R. Prof. C. 1.16(e)(1) (former Rule 3-700(D)(1)) (emphasis added).

Rule 1.16 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." Cal. R. Prof. C. 1.16(e)(1). A client file thus includes electronic data, as well as physical papers and materials. *Id.*; see also Cal. State Bar Form. Opn. 2007-174 (the rule "does not draw any distinction based on the form of an item, whether electronic or non-electronic") (defining "client papers and property" under former Rule 3-700(D)).

Beyond the information provided above, this opinion does not address the question of what constitutes "client materials and property," which has been addressed in prior ethics opinions. See Cal. State Bar Form. Opns. 1994-134 n. 3, 2001-157; BASF Form. Opns. 1997-1, 1998-1; San Diego Bar Ass'n Form. Opn. 1977-3; LACBA Form. Opn. 509 (2002). For purposes of the facts presented in this opinion, it is assumed that a closed client file consists only of the former client's "materials and property" which, had the former client requested them, would be required to be released to the former client under Rule 1.16.¹

[Query whether the subsection on what constitutes a "client file" should be put back in.]

I. DURATION OF FILE RETENTION DUTIES

A. Closed client files in civil matters

California Rules of Professional Conduct and the State Bar Act do not specify how long a lawyer must retain a closed client file if the client does not request it. The existing ethics opinions offer varying views on the issue.

Opinion 475 of the Los Angeles Bar Association recommends a minimum retention period of five years past the date the matter was closed, with the caveat that files with intrinsic value to the client should not be destroyed absent client consent. LACBA Form. Opn. 475 (1994). As noted in subsequent ethics opinions, however, this five-year period is derived from former rule 4-100(B)(3) (current rule 1.15), which is a preservation requirement applicable to records of client accounting (e.g., records of "funds," "securities," and other properties) and not to the contents of a client file. See BASF Form. Opn. 1996-1 (drawing a distinction between former rule 4-100 governing records of client accounting and former rule

¹ The Committee notes that the issue of whether a lawyer is obligated to release to the former client attorney work product not previously communicated to the client remains an open question. See *Rose v. State Bar*, 49 Cal. 3d 646, 655 (1989); Cal. State Bar Form. Opn. 2001-157. In deciding whether a particular work product should be treated as a client property for the purposes of file retention/disposition, lawyers should consider whether the item is "reasonably necessary to the client's representation." Cal. R. Prof. Cond. 1.16(e)(1); see Cal. State Bar Form. Opn. 1992-127 (lawyer must release client file to client and/or successor counsel, including work product if otherwise prejudicial).

3-700 governing “client papers and property”); Cal. State Bar Comm. Cal. State Bar Form. Opn. 2001-157 (declining to apply the five-year retention rule applicable to client accounting records to retention of client papers).²

Other ethics opinions have declined to adopt any specific period of time for retaining closed client files in civil matters. Opinion 1996-1 of the Bar Association of San Francisco states:

There is no rule that provides . . . a time period [after which client files may be destroyed] and, in our view, no rule should. The key to retention of client papers, absent client agreement to other arrangements, is the attorney’s obligations as a bailee of the client’s personal property and the need to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client. This duty cannot be discharged merely by reference to a fixed time period.

BASF Form. Opn. 1996-1.

The Committee previously agreed with Opinion 1996-1 that a lawyer’s obligations regarding former client files cannot be measured by a fixed time period. See Cal. State Bar Form. Opn. 2001-157 (rejecting a “bright line” test). In lieu of a fixed retention period, the Committee recommended exercise of “good common sense” in determining the appropriate duration for file retention, taking into account the former client’s needs, i.e., whether the information in the closed client file may still be useful in the assertion or defense of the client’s position in a matter for which the statute of limitations has not expired, whether the information is that which the client may need, has not previously been given to the client, and is not otherwise readily available to the client, and which the client may reasonably expect will be preserved by the attorney. *Id.* (citing ABA Informal Opn. 1384 (1977)).

The reasoning and conclusions stated in the Committee’s 2001 opinion remain sound. The Committee thus reaffirms its conclusion that there is no fixed period of time after which a lawyer may dispose of closed client files in civil matters. Instead, a lawyer should exercise “good common sense” and professional judgment in determining the appropriate duration for retention of closed civil files and retain those items that the lawyer believes are necessary to preclude reasonably foreseeable prejudice to the former client.

Some of the materials in the client file may include documents that must be retained for periods specified by state or federal law. See Cal. State Bar Form. Opn. 2001-157. For example, California probate law governs the preservation of estate planning documents held by attorneys for safekeeping, and a deposit of estate planning documents with counsel may only be terminated by complying with the statute. *Id.* (citing Cal. Prob. Code §§ 730-735). Certain papers and property to which a former client is entitled may also include original items that are of monetary or historical interest or that are subject to record retention requirements under state or federal law. *Id.* (discussing law regulating employment

² In *Ramirez v. Fuselier*, 183 B.R. 583, 587 n.3 (9th Cir. BAP 1995), the bankruptcy appellate panel, without analysis, cited former rule 4-100 in support of a dictum that “attorneys are considered fiduciary custodian of client files and are required to keep and main such files for five years after the conclusion of a case.” As noted, however, Rule 4-100(B)(3) does not refer to client files but to a lawyer’s records of funds, securities, and other properties of a client coming into the lawyer’s possession and the obligation to render accounts.

records, tax and corporate records, records relating to environmental matters). The Committee thus recommends that, before disposing of client files, lawyers verify that the disposal will not violate any state or federal document retention requirement. Further, original papers and property (e.g., original testamentary documents) received from a client, acceptance of which are governed by the law of bailments (Civ. Code §§ 1813, 1847), should be returned the client.

The burdens and expense of preserving former client files may be eased by including a provision in the initial fee agreement that states that, after the termination of the representation, the contents of the client 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 and subject to any applicable limitations under the state and federal law. Such a provision is consistent with the existing California ethic opinions. Cal. State Bar Form. Opn. 2001-157; LACBA Form. Opn. 475; BASF Form. Opn. 1996-1.

B. Closed client files in criminal matters³

Effective January 1, 2019, 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.* (emphasis added).

Prior ethics opinions concluded that lawyers must retain client documents related to criminal matters until the client dies or provides express consent to their destruction. Cal. State Bar Form. Opn. 2001-157; *see also* LACBA Form. Opn. 475 (“Considerations pertaining to the criminal defendant’s liberty interest in the proceedings and to the possibility of review of criminal convictions by appeal or writ (even many years after conviction) warrant especially cautious treatment of criminal case files.”); LACBA Form. Opn. 420 (Because a criminal defense “attorney cannot foresee the future utility of information contained in the file” after the representation ends, the attorney “should not undertake the destruction of the client files” absent “specific written instruction from the client authorizing the destruction of the

³ This discussion is limited to criminal defense lawyers’ file retention duties. 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 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, Rule 3.8 is silent on obligation to retain any portions of the prosecutor’s case file.

file.”). The Committee sees no reason to deviate from these opinions and reaffirms that, absent the client’s express authorization to destroy or release the file, a lawyer should preserve all client documents and other materials, including physical evidence, in criminal matters for the life of the client.

Given the unique nature of criminal matters, it is not clear whether including a document retention policy in a fee agreement is acceptable, enforceable or even advisable. Regardless, a criminal attorney is advised to send a letter at the conclusion of a matter, inviting the client to request the file.

II. DUTIES RELATING TO DISPOSAL OF CLOSED CLIENT FILES

California Rules of Professional Conduct and the State Bar Act neither expressly prohibits nor encourages the destruction of closed client files. Regardless, before disposing of any item in a closed client file, a lawyer must take certain precautions to prevent any reasonably foreseeable prejudice to the former client.

Absent an agreement to the contrary, a lawyer’s obligations as to original papers and property received from a client are determined by the law of bailments. *See* Civ. C. §§ 1813-1847; Prob. C. §§ 700-735; *see also* Cal. State Bar Form. Opn. 2001-157. If a lawyer is in possession of an original testamentary document, for example, the original document should not be purged or otherwise destroyed, absent the former client’s clear authorization for destruction.

Similarly, where retention of the items in the closed client file is regulated by state or federal law, a lawyer’s obligations are determined by the applicable law. *See* Cal. State Bar Form. Opn. 2001-157.

Before disposing of any item in a closed civil file, a lawyer must make all reasonable efforts to locate and notify the former client of the existence of the file, of the client’s right to examine and retrieve the file, and of the intended destruction.⁴ Cal. State Bar Form. Opn. 2001-157; *see also* Cal. R. Prof. Cond. 1.4. . LACBA Form. Opn. 491. If, after diligent efforts to notify the former client, a lawyer cannot locate the client or obtain clear instructions from the client, the closed client files in civil matters may be destroyed except for “intrinsically valuable materials” (i.e., stocks, bonds, wills, original notes, original deeds), LACBA Form. Opn. 475, 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, always exercising good common sense judgment. Cal. State Bar Form. Opn. 2001-157; *see also* ABA Informal Opn. 1384 (1977). If the lawyer is without personal knowledge of the contents of the file, the lawyer is strongly advised to examine the file to determine whether there is reason to believe that the client will foreseeably have need for the contents of the file.⁵

⁴ In the event a former client requests release of the closed file, a lawyer should take reasonable steps to remove any metadata that would reveal confidential information about the lawyer’s other clients. Cal. State Bar Form. Opns. 2010-179, 2012-184. If a client is deceased, notice must be given to the client’s legal representative, heirs and/or beneficiaries, unless there is no reasonably foreseeable possibility that the file may be necessary to pursue or protect the deceased client’s legal interests, and the file contains no documents of significant pecuniary or intrinsic value. The deceased client’s legal representative, heirs and/or beneficiaries may take possession of the file, subject to the attorney’s duty of confidentiality. LACBA Form. Opn. 491 (1998).

⁵ The Committee previously opined that in such circumstances, “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.” Cal. State Bar Form. Opn. 2001-157 (emphasis added). This Committee believes that a lawyer cannot determine

As discussed above, 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. Thus, the files cannot be destroyed under any circumstances – even if authorized by the former client – during the client's imprisonment. Cal. Pen. C. § 1054.9(g). The file may be maintained in electronic form “only if every item in the file is digitally copied and preserved.” *Id.*⁶

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, for the reasons discussed above, the Committee concludes that 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.⁷ Cal. State Bar Form. Opn. 2001-157; LACBA 475 (citing LACBA Opn. 420).

C. Manner of Destruction Conforming to Duty of Confidentiality

Comment [4] to Rule 1.16 reminds lawyers that, in complying with Rule 1.16, they must also comply with Business and Professions Code section 6068, subdivision (e), which requires lawyers, at every peril to themselves, to preserve and protect the confidential information of the client. *See generally Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011) (confirming a lawyer's continuing duty to protect the confidential information of a former client). Thus, a lawyer must use a method of destruction “that will ensure no breach of confidentiality.” Cal. State Bar Form. Opn. 2001-157 n.9. Throwing the client files into the garbage, for example, would not protect client confidentiality, and therefore, not appropriate. On the other hand, “shredding, incinerating or employing a commercial service that guarantees confidential disposal of documents would be sufficient.” D.C. Bar Form. Opn. 283 n.14.

III. ANALYSIS OF THE FACTUAL SCENARIOS

Scenario 1. Lawyer A was ethically obligated to notify Corporate Client before destroying the physical files in closed matters. Failure to do so was a violation of the lawyer's ethical obligations. Although Lawyer A first reviewed the contents of the physical files and determined that the client would have no need for the them before destroying them, thereby avoiding reasonably foreseeable prejudice to the client, the lawyer nevertheless violated the related but independent duty to communicate with the client regarding the planned destruction of client materials.

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. The Committee thus recommends that, in such an instance, the lawyer examine the file.

⁶ For lawyers wishing to go paperless, in light of this requirement, it would be prudent 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).

⁷ A lawyer may be required to redact certain information before releasing to the client case file in criminal matters, for e.g., jurors' names, victims' and witnesses' addresses and phone numbers, victims' names in sex offense cases. *See* Cal. Code Civ. Proc. § 237; Pen. Code §§ 293, 1054.2. Issues relating to recommended or required redaction of information in criminal matters are beyond the scope of this opinion.

Scenario 2. Lawyer B may not discard the closed client files in storage, regardless of their age, without first making reasonable efforts to identify and locate the clients whose files are in storage. Lawyer B must notify each affected client of the existence of the file, of the client's right to examine and retrieve the file, and of the intended destruction. If Lawyer B cannot locate, or obtain clear instructions from, a former client, Lawyer B should determine whether any of the closed client files contain "intrinsically valuable materials" (i.e., stocks, bonds, wills, original notes, original deeds), materials that Lawyer B is required retain by law, and materials that, in Lawyer B's professional judgment, the former clients will foreseeably have the need for. Such materials, if any, must be preserved by Lawyer B, even after retirement. If Lawyer B cannot make the required determination based solely on the indices, Lawyer B should examine the individual files to ensure that the former client(s) will not be prejudiced by the destruction of the closed files.

Scenario 3. Before disposing of any item in the client file, Lawyer C must make all reasonable efforts to find out the status of Client's incarceration. Based on the crime for which Client was convicted and sentenced, Lawyer C is subject to the post-conviction file retention requirement under Penal Code section 1054.9(g), which requires Lawyer C keep a copy of the client file. Unless every item in the closed file is digitalized, Lawyer C is must retain a physical copy of the file. Further, absent confirmation of Client's death, Lawyer C should not destroy any item in the closed client file, regardless of the method of disposal.

III. CONCLUSION

[To be added]