

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? What ethical obligations does a lawyer have with respect to the destruction of former clients' files in closed civil and criminal matters?

DIGEST

California Rules of Professional Conduct do not specify a fixed retention period for closed client files. A lawyer's file retention duties in closed civil matters generally turn on the lawyer's obligations as the bailee of the former client's papers and property and the lawyer's duty to avoid reasonably foreseeable prejudice to the former client. Original documents and property furnished to the lawyer by the former client and items of intrinsic value must be retained by the lawyer and cannot be discarded or destroyed without the former client's consent. Other client materials and property in civil cases may be destroyed, absent a contrary agreement, after the lawyer uses reasonable means to notify the former client of their intended destruction and gives the former client a reasonable time to respond. If the former client cannot be located or fails to respond to reasonable notice of intended destruction of the file, the lawyer may destroy items whose retention is not required by law and is not necessary to avoid reasonably foreseeable prejudice to the former client. Items that the lawyer believes are necessary to avoid reasonably foreseeable prejudice to the former client may be preserved in electronic form only, unless the lawyer believes the loss of physical copies will injure the former client.

In criminal matters involving a conviction for a serious or violent felony resulting in a sentence of 15 years or more, trial counsel is statutorily required to retain a copy of the former client's files for the term of his or her imprisonment. Cal. Pen. C. § 1054.9(g) (amended Stats. 2018, Ch. 482; eff. Jan. 1, 2019). The files may be retained in electronic form only "if every item in the file is digitally copied and preserved." *Id.* (emphasis added). These statutory file retention obligations relate to post-conviction discovery in certain criminal matters and do not govern a lawyer's ethical obligations as to client files in closed criminal matters. Because files relating to criminal matters may have future vitality even after judgment, sentence and appeals, absent a contrary agreement or client consent, a lawyer should retain the files for the life of the client whenever feasible. At a minimum, a lawyer should not undertake the destruction of client files on the lawyer's initiative until the expiration of the sentence, all appeals, or any statute of limitations on actions against the lawyer, whichever is longest. During this recommended retention period, the files may be retained in electronic form if every item is digitally copied and preserved, unless retention of the physical item is required by law.

**AUTHORITIES
INTERPRETED**

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

STATEMENT OF FACTS

Lawyer A, a solo practitioner in general practice, plans to retire in the next few years. Lawyer A would like to dispose of the hundreds of boxes of closed client files in storage, some of which date back decades, with minimal time, effort and expense. Lawyer A has not reviewed the files in storage in years, but each box is indexed for content, including the client/matter information and general descriptions (e.g., pleadings, discovery, transcripts, estate planning documents). There is no express file retention agreement as to these old files, but given the age of the files, Lawyer A believes there is very little chance that any of the lawyer's former clients would have a need for the contents of the files. Lawyer A therefore plans to have all of the boxes picked up by a data management company for secure destruction without review.

Lawyer B handles a wide range of criminal matters, from serious felony to misdemeanor cases. Lawyer B is in the process of going paperless and disposing of closed client files. Lawyer B plans to digitalize the contents of the files in closed felony cases before delivering them to a data management company for secure destruction; files in closed misdemeanor cases will not be digitalized before destruction.

DISCUSSION**A. Background**

Client file retention and disposal can be challenging for California lawyers, due in no small part to the absence of a clear rule on the topic. California Rules of Professional Conduct and State Bar Act do not specify how long a lawyer must retain a former client's file in a closed or inactive matter, or expressly address ethical obligations with respect to the destruction of closed client files.

With respect to closed civil matters, ethics opinions generally agree that, absent an agreement or other legal proscription to the contrary, certain file contents may be destroyed after the lawyer makes reasonable efforts to notify the former client of their intended destruction, but disagree on whether there should be a fixed, minimum retention period applicable to all file contents. Cal. State Bar Form. Opn. 2001-157; *compare* Los Angeles Cty. Bar Ass'n Form. Opn. 475 (1994) (recommending 5-year retention period for closed client files by analogy to 5-year retention requirement for client accounting records), *with* Bar Ass'n of San Francisco Form. Opn. 1996-1 (declining to suggest a bright-line rule relating to the retention of client files and concluding that a lawyer may dispose of any writing in the client file, except to the extent necessary to avoid reasonably foreseeable prejudice to the client's legal rights) and Cal. State Bar Form. Opn. 2001-157 (declining the adopt a fixed retention period).

Client files in closed criminal matters raise unique considerations due to the criminal defendant's liberty interests and the possibility of post-conviction review long after the representation ends. Accordingly, prior ethics opinions have uniformly recommended that the contents of a closed file be retained for the life of the former client, unless the former client expressly consents to their destruction. *See* Cal. State Bar Form. Opn. 2001-157; Los Angeles Cty. Bar Ass'n Form. Opns. 420 (1983) & 475 (1994). Since then, there have been new developments with respect to file retention duties in criminal matters. First, in 2018, the legislature signed into law amendments to California Penal Code section 1054.9 to expand criminal defendants' right to access post-conviction discovery materials to include cases where the defendant is convicted of a serious or violent felony and sentenced to 15 years or more. The amended section 1054.9 now requires trial counsel in such cases to maintain a copy of a former client's files "for the term of his or her imprisonment." Cal. Pen. Code § 1054.9(g). Second, as discussed in greater to

detail below, in June 2020, the California Supreme Court approved amendments to California Rule of Professional Conduct 1.16 [Declining or Terminating Representation] and Rule 3.8 [Special Duties of a Prosecutor], expressly reminding defense attorneys of their file retention obligations and prosecutors of their obligations to preserve evidence.¹

Notwithstanding these developments, there is still no clear rule, statute, or case law that define file retention duties in criminal cases that fall outside the scope of section 1054.9 (e.g., misdemeanor cases, felony cases resulting in less than 15-year sentence).

This Committee last addressed a lawyer's ethical obligations relating to the retention and disposition of former clients' closed files in its 2001 opinion, prior to the effective date of the current Rules of Professional Conduct and amended Penal Code section 1050.9. Given these changes, as well as the great advances made in digital file storage since 2001, this opinion revisits a lawyer's file retention and disposal duties in closed or inactive civil and criminal matters where there is no existing agreement regarding the retention period and disposal of closed file contents.²

B. Contents of Closed "Client File"

A lawyer's file retention and release duties in closed matters stem from Rule 1.16 of the California Rules of Professional Conduct, which provides that upon the termination of a representation for any reason:

Subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, expert's reports and other writing, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items

¹ These amendments resulted from the legislature's request, in connection with its enactment of the amendment to Penal Code section 1054.9, that the State Bar "study and issue of closed-client release and retention by defense attorneys and prosecutors in criminal cases." This Committee studied the issue and recommended the amendments to Rules 1.16 and 3.8, which were approved by the Board of Trustees and approved by the California Supreme Court on April 23, 2020.

² There is no rule expressly permitting (or prohibiting) a file retention agreement, but ethics opinions have consistently recognized that a lawyer's file retention and disposal duties may be defined by an agreement with the client. *See, e.g.*, Cal. State Bar Form. Opn. 2001-157 (a file retention provision in a fee agreement specifying the duration of time for preserving closed client files may be appropriate in certain circumstances); Los Angeles County Bar Ass'n Formal Opn. No. 475 (1994) (file retention recommendations stated in the opinion apply unless there is a contrary agreement with the client). Sample fee agreement provisions concerning file retention and disposal are provided on the State Bar website. *See* Attorney Forms, Sample Fee Agreements forms and instructions, available at <http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Forms-Resources> (last visited July 15, 2020). In determining the appropriate retention period to specify in the file retention agreement, a lawyer should consider whether the retention period comports with the lawyer's duty of competence. For example, a file retention agreement that permits disposal of client files that may be useful in the assertion or defense of the client's position in a matter for which the statute of limitations has not expired, including in a potential action against the lawyer, may violate the duty of competence owed to the client.

reasonably necessary to the client's representation, whether the client has paid for them or not[.]

Cal. R. Prof. Cond. 1.16(e)(1).

A "client file" is not a "static" concept, and its contents will change depending upon circumstances. Cal. State Bar Form. Opns. 1994-134, fn. 1 & 2007-174. In closed matters, a former client's "client file" generally includes items necessary to preclude "reasonably foreseeable prejudice" to the rights of the former client. See Cal. R. Prof. Cond. 1.16(d); Bar Ass'n of San Francisco Form. Opn. 1996-1 (key to retention of client papers in a closed matter is the need to retain those papers that are necessary to preclude reasonably foreseeable prejudice to the client).

While not exhaustive, the following items are typically considered part of the former client's "client materials and property" for purposes of release to the client at termination of representation:

- **Original client papers and property** – original materials furnished to the lawyer by the former client and in behalf of the client
- **Communications to and from lawyer** - letters or emails to and from the client, opposing counsel, witnesses or third parties, and notes of telephone or in-person conversations
- **Filed documents, discovery materials and transcripts** - pleadings and other documents filed with the court, court orders and opinions, discovery, verbatim transcripts of the proceedings
- **Investigation and research reports** – investigation and research reports prepared at the lawyer's direction (both legal and factual) prepared by the lawyer or at the lawyer's direction
- **Attorney work product communicated to the client in the course of the representation** - research notes, notes regarding witnesses, strategy and tactics, similar items generated in the course of the representation and communicated to the client³

³ Attorney work product may be part of the former client's "client file" if the information is necessary to avoid "reasonably foreseeable prejudice to the client." See San Diego Bar Ass'n Form. Opn. 1997-1 (lawyer may not withhold work product "reasonably necessary" to client's representation); Bar Ass'n of San Francisco Form. Opns. 1990-1 & 1996-1; Los Angeles Cty. Bar Ass'n Form. Opns. 330 (1972) (work product for which client can be billed belongs to client); San Diego Bar Ass'n Form. Opn. 1984-3 (although client not entitled to attorney's absolute work product, "such disclosure is recommended as a matter of professional ethics and courtesy"). Whether uncommunicated a lawyer is obligated to release to the former client attorney work product not previously communicated to the client remains an open question. See Cal. State Bar Form. Opn. 2001-157; cf. *Matter of Regan*, 4 Cal. State Bar Ct. Rptr. 844, 855 (Rev. Dept. 2005) (client file, "absent uncommunicated attorney work product," must be surrendered to client upon termination of representation). How this "open question" should or will be decided is beyond the scope of this opinion. For purposes of the facts presented in this opinion, it is assumed that closed client files consist 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.

- **Electronic files and digital data** – intangible data in the form of electronic files and digital data, whether stored on hard drives, local or remote server, or cloud platforms, and whether maintained solely in electronic/digital format or copies of physical files⁴

See Cal. R. Prof. Cond. 1.16(e)(1); Cal. State Bar Form. Opns. 1994-134, fn. 1 (listing items considered contents of the client file in other ethics opinions) & 2007-174 (discussing a lawyer's ethical obligation to release electronic items).

C. File Retention Duties In Closed Civil Matters

Absent an agreement to the contrary, there is no blanket retention period applicable to the entire contents of a client file in a closed civil matter. Cal. State Bar Form. Opn. 2001-157. Instead, the length of time that a lawyer must retain the file contents depends on the nature of the items, the nature of the services rendered to the client, and any other factors relevant to determining whether prejudice to the client would arise by destruction of the items. *Id.*; see also Cal. State Bar Form. Opn. 1996-1. These obligations cannot be measured by a fixed retention period. Cal. State Bar Form. Opn. 2001-157; Bar Ass'n of San Francisco Form. Opn. 1996-1.⁵

Original papers and property. In the absence of 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, or law of deposit. Cal. State Bar Form. Opn. 2001-157; Cal. Civ. Code. §§ 1813-1847.⁶ Unless the deposit is terminated as permitted by the governing statute, the lawyer remains responsible for the safekeeping of the items at all times and has no right to destroy them without the client's consent. 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. See Cal. Prob. Code §§ 730-735. Thus, if a lawyer is in possession of an original will, digitalizing it and purging the original would be prohibited.

Intrinsically valuable items. A lawyer may not destroy materials of intrinsic value without the former client's consent. Cal. State Bar Form. Opn. 2001-157. Intrinsically valuable materials are those that have

⁴ A lawyer's ethical obligation to release electronic items does not require the lawyer to *create* such items if they do not exist or to change the application if they do exist. Cal. State Bar Form. Opn. 2007-174.

⁵ California Rule of Professional Conduct 1.15(d)(5) contains a five-year retention requirement for client *accounting records*. One California bankruptcy case has applied this five-year rule to client files but without analysis. *Ramirez v. Fuselier*, 183 BR 583, 587 fn. 3 (9th Cir. BAP 1995). Ethics opinions disagree on whether Rule 1.15 is intended to address retention duties with respect to client *files*. Los Angeles Bar Ass'n Form. Opn. 475 (1994) (recommending 5-year retention period for client files "by analogy" to former rule 4-100(B)(3) (now rule 1.15(d)(5))); Cal. State Bar Form. Opn. 2001-157 (5-year retention rule not intended to address client file retention obligation); Bar Ass'n of San Francisco Form. Opn. 1996-1 (same; unless attorney and client otherwise agree, attorney may dispose of any writing except when needed to avoid reasonably foreseeable prejudice to client's rights under former rule). The Committee sees no reason to deviate from its previous conclusion that Rule 1.15 does not apply to client files.

⁶ The retention period for certain estate planning documents delivered to a lawyer for safekeeping are also subject to the Probate Code sections 700-735, which provide, *inter alia*, that the deposit may be terminated only as permitted by Probate Code section 731 to 735.

value, or may have value, in and of themselves (e.g., money orders, travelers checks, stocks, bonds, original deeds, original notes, judgments, etc.). Los Angeles Cty. Form. Opn. 475.

Other file contents. Items that a lawyer has no reason to believe the former client would need may be destroyed after the lawyer has used reasonable means to locate the client and notify the client of the existence of the file, of the client's right to examine the retrieve the contents, of their intended destruction. Cal. State Bar Form. Opn. 2001-157; Los Angeles Cty. Form. Opn. 475. On the other hand, where the lawyer has reason to believe that the file contains items that will reasonably be needed by the former client or items required by law to be retained, the lawyer should inspect the file for such items and retain those items for the period required by law or according to the client's reasonably foreseeable needs. Cal. State Bar Form. Opn. 2001-157. In evaluating the client's need for the closed files, a lawyer should consider whether the information to be destroyed 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, including in any potential actions against the lawyer. The remaining items in the file may then be destroyed. *Id.* Where an item has no intrinsic value but the lawyer nevertheless fears that loss of the item may injure the former client, the item should be preserved electronically/digitally, unless retention of the physical item is required by law.

As with certain original client documents (e.g., estate planning documents), 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 (discussing law regulating employment records, tax and corporate records, records relating to environmental matters). The Committee recommends that lawyers verify that the disposal will not violate any state or federal document retention requirement.

D. File Retention Duties In Closed Criminal Matters

1. Duties of defense counsel

As mentioned in Section A, *supra*, 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). Counsel may maintain the file in electronic form but "only if every item in the file is digitally copied and preserved." *Id.* (emphasis added).

Existing ethics opinions, all of which predate the above amendment to Penal Code section 1054.9, had concluded that client documents related to criminal matters must be retained until the client dies or expressly consents to their destruction. Cal. State Bar Form. Opn. 2001-157; LACBA Form. Opn. 420 (1983) (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 file."); 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."). Although Penal Code section 1054.9(g) imposes a shorter retention period (for the term of the former client's imprisonment) even in the most serious criminal cases than what had previously been recommended in all criminal cases (for the life of the former client) in the ethics opinions, the purpose of section 1054.9 differs from that of ethics opinions. Section 1054.9 relates to post-conviction discovery only and is not tied to a lawyer's ethical obligations, which are governed by the need to protect the interests of the

former client and are thus arguably be broader in scope. Nevertheless, given the wide range of closed criminal files, including those pertaining to minor infractions, misdemeanors, and cases in which the client was never convicted, the Committee believes its previous recommendation for retention period warrants modification. Accordingly, in closed criminal matters resulting in conviction or guilty plea for any crime, absent the former client's express consent to the contrary, the closed files should be retained until the expiration of the sentence, all appeals, the former client's incarceration, or any statute of limitations on actions against the lawyer, whichever is longest. During this recommended retention period, the files may be retained in electronic form, provided that every item is digitally copied and preserved unless retention of the physical item is required by law.

In closed criminal matters that did not result in conviction or guilty plea, the Committee believes the lawyer should be permitted to dispose of the contents of the closed file, provided that the lawyer first consider all factors relevant to determining whether prejudice to the client would arise by destruction of the items. Even if no prejudice would result, before destroying any item, a lawyer should use reasonable means to 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 thereof.

2. Duties of prosecutor

In light of their responsibility to see that justice is done, prosecutors owe certain ethical, constitutional and statutory duties with respect to evidence in criminal proceedings. However, there is no specific Rule of Professional Conduct or ethics opinion directly addressing prosecutors' duty to preserve their 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. Rule 3.8 is silent on obligation to retain any portions of the prosecutor's case file, however.

Effective June 1, 2020, California Rule of Professional 3.8 has been amended to add the following two new sentences to Comment [7]:

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].)

This amendment resulted from Assembly Bill 1987 amending Penal Code section 1054.9, by which the legislature requested that the State Bar “study the issue of closed-client file release and retention by defense attorneys and prosecutors in criminal cases.”⁷ While the amended Comment does not create new file preservation duties, the added sentences highlight prosecutors’ existing obligations regarding the disposition of evidence in criminal matters and compliance with file preservation orders.

E. Duties Relating to Disposal of Closed Client Files

California Rules of Professional Conduct and the State Bar Act are also silent on 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.

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.⁸ 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,

⁷ Uncodified section 3 of Assembly Bill 1987 provides in full:

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.

⁸ 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).

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.⁹

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.*¹⁰

Any decision regarding the disposal of closed client files must also reflect due consideration of the duty of confidentiality mandated by Business and Professions Code section 6068, subdivision (2), which requires a lawyer “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

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.

F. Analysis of Facts

Lawyer A should not dispose of the closed client files without first determining their contents. The facts indicate that, as a solo practitioner in general practice, Lawyer A handled various civil matters, including estate planning matters. Notwithstanding Lawyer A's belief that there is very little chance that any of the lawyer's former client would have a need for the contents of the files, and therefore, will not be

⁹ 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 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.

¹⁰ 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).

prejudiced by their destructions, Lawyer A's file retention duties with respect to client's original papers and property, including testamentary documents, are governed by the law of bailments/deposit. Cal. State Bar Form. Opn. 2001-157; Cal. Civ. Code. §§ 1813-1847. Unless the deposit is terminated as permitted by the governing statute, the lawyer remains responsible for the safekeeping of the items at all times and has no right to destroy them without the client's consent.

Lawyer A must make reasonable efforts to locate and notify the former clients of the existence of the file, of the client's right to examine and retrieve the file, and of the intended destruction.¹¹ 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 (e.g., estate planning documents). Cal. State Bar Form. Opn. 2001-157; *see also* ABA Informal Opn. 1384 (1977). Since Lawyer A is without personal knowledge of the contents of the boxes in storage, Lawyer A should, at a minimum, review the file indices for general descriptions of their contents and determine whether any of the files contains original or intrinsically valuable items, and whether there is reason to believe that any former client will foreseeably have a need for any item(s) in the closed files.

Lawyer B may destroy the client files in closed criminal matters that did not result in conviction or guilty plea, provided that the destruction of such materials will not cause prejudice to the client. Even if no prejudice would result, before destroying any item, Lawyer B should use reasonable means to 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 thereof. Client files in closed criminal matters that resulted in the client's conviction or guilty plea for any crime, whether a felony or a misdemeanor, absent the former client's express consent to the contrary, the closed files should be retained until the expiration of the sentence, all appeals, the former client's incarceration, or any statute of limitations on actions against the lawyer, whichever is longest. During this recommended retention period, the files may be retained in electronic form, provided that every item is digitally copied and preserved unless retention of the physical item is required by law. In destroying the file contents, Lawyer B should do so in a manner consistent with the lawyer's ongoing duty of confidentiality owed to the former clients.

¹¹ 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).