

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 19-0004

ISSUES: How long is a lawyer ethically obligated to retain files in closed civil and criminal matters? What ethical obligations does a lawyer have with respect to the destruction of closed civil and criminal matters?

DIGEST: California Rules of Professional Conduct do not specify a fixed retention period for closed client files. In closed civil matters, a lawyer's file retention duties 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. If not returned to the 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 matters 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 closed criminal matters, absent an agreement to the contrary, client files should not be destroyed without the former client's express consent while the former client is alive. California Penal Code section 1054.9 requires trial counsel to retain a copy of a client's files *for the term of imprisonment* where the client is convicted of a serious or violent felony resulting in a sentence of 15 years or more. California Penal Code section 1054.9(g) (amended Stats. 2018, ch. 482; eff. Jan. 1, 2020). Section 1054.9, however, concerns a criminal defendant's access to discovery materials post-conviction in certain cases and does not address or govern a lawyer's ethical obligations with respect to closed client files. Because files relating to criminal matters may have future vitality even without conviction, and 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. At a minimum, a lawyer should not initiate the destruction of client files in closed criminal matters until the expiration of the sentence, all appeals, or any statute of limitations on actions against the lawyer, whichever is longest. The contents of the closed files in criminal matters may be retained in electronic form if every item is digitally copied and preserved, unless retention of the physical item is required by law or the item, by its nature, requires preservation in physical form, i.e., physical evidence.

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AUTHORITIES

INTERPRETED: Rules of Professional Conduct 1.4, 1.15(d), 1.16(e)(1), and 3.8(f) of the Rules of Professional Conduct of the State Bar of California.¹

Business and Professions Code section 6068(e).

Penal Code section 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 their age, 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 provide all of the boxes, without prior review, to a data management company for secure destruction.

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 but only in closed felony cases before delivering them to a data management company for secure destruction. Lawyer B believes the files in closed misdemeanor cases and matters in which the client was arrested but never charged or tried are of no value to the former clients, and therefore, plans to have them destroyed without making a copy.

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 client's file in a closed matter. They also do not provide when and how a lawyer may destroy the contents of closed client files.

Ethics opinions generally agree that, absent an agreement or other legal proscription to the contrary, certain file contents in closed civil matters may be destroyed after the lawyer makes reasonable efforts to notify the former client of their intended destruction, but they disagree on whether there should be a fixed, minimum retention period applicable to all file contents.²

¹ Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

² See Cal. State Bar Formal Opn. No. 2001-157; compare Los Angeles County Bar Association Formal Opn. No. 475 (1994) (recommending five-year retention period for closed client files by analogy to five-year retention

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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 criminal file be retained for the life of the former client, unless the former client expressly consents to their destruction. (See Cal. State Bar Formal Opn. No. 2001-157; Los Angeles County Bar Association Formal Opn. Nos. 420 (1983) and 475 (1994).)

Since then, there have been some new developments with respect to file retention duties in criminal matters. In 2018, California Penal Code section 1054.9, which concerns a criminal defendant's access to post-conviction discovery, was amended to include a file retention provision. Under the amended statute, trial counsel is now required to maintain a copy of a former client's files "for the term of that client's imprisonment" in cases where the defendant is convicted of a serious or violent felony and sentenced to 15 years or more. (Pen. Code, § 1054.9(g) (eff. Jan. 1, 2019).) This file retention requirement, however, relates to a criminal defendant's access to post-conviction discovery rather than a lawyer's ethical obligations with respect to file retention and disposal.³

In June 2020, the California Supreme Court edited comments to California Rules of Professional Conduct 1.16 [Declining or Terminating Representation] and 3.8 [Special Duties of a Prosecutor], expressly reminding defense attorneys of their file retention obligations and prosecutors of their obligations to preserve evidence, respectively.⁴ Neither amendment specifies the retention period nor addresses disposal of client files in closed criminal matters, however.

This committee last addressed a lawyer's ethical obligations relating to the retention and disposition of closed client files in its 2001 opinion, prior to the effective date of the current Rules of Professional Conduct and amended Penal Code section 1054.9. Given these changes, as well as great advances made in digital file storage since 2001, this opinion revisits a lawyer's file retention and disposal duties in

requirement for client accounting records), with Bar Association of San Francisco Formal Opn. No. 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 Formal Opn. No. 2001-157 (declining to adopt a fixed retention period).

³ The primary purpose of Penal Code section 1054.9 is to enable criminal defendants efficiently to reconstruct defense counsel's trial files that might have become lost or destroyed after trial and to access other materials to which trial counsel was legally entitled. See *In re Steele* (2004) 32 Cal.4th 682, 694 [10 Cal.Rptr.3d 536]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899–90 [114 Cal.Rptr.3d 576]. Discovery under section 1054.9 requires a showing that "good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful . . ." (Pen. Code, § 1054.9(a).) Accordingly, the California Supreme Court has noted that "[d]efendants should first seek to obtain their trial files from trial counsel," and ". . . if a defendant can show a legitimate reason for believing trial counsel's current files are incomplete . . . the defendant should be able to work with the prosecution to obtain copies of any missing discovery materials it had provided to the defense before trial." *Barnette, supra*, 50 Cal.4th at 898; see also *Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, 469 [197 Cal.Rptr.3d 891]. Trial counsel's file retention duty under subsection (g) should be read in this context.

⁴ 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.

closed or inactive civil and criminal matters where there is no existing agreement regarding the retention period and disposal of closed file contents.⁵

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

Rule of Professional Conduct 1.16(e)(1).

A “client file” is not a “static” concept, and its contents will change depending upon circumstances. (Cal. State Bar Formal Opn. Nos. 1994-134, fn. 1 and 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 rule. 1.16(d); Bar Association of San Francisco Formal Opn. No. 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:

⁵ 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 Formal Opn. No. 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 Association 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 August 3, 2021).

In determining the appropriate retention period to specify in the file retention agreement, a lawyer should consider the potential consequences and material risks to the client arising from the disposal of the file contents. See, Cal. State Bar Formal Opn. No. 1996-1 (file retention period to be determined by factors relevant to determining whether prejudice to the client would arise by the destruction of the file contents). Additionally, a lawyer needs to consider whether the retention period comports with the lawyer’s duty of competence. For example, a lawyer may violate the duty of competence if a file retention agreement 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. In criminal matters, the issue of retention period raises some unique concerns. A client’s need for the file may change due to the possibility of post-conviction review, changes in the law, and other circumstances that may impact the client’s liberty and other interests well after the file retention period specified in the agreement. See, section D.1, *infra*.

- **Original client papers and property**—original materials furnished to the lawyer by the former client and on behalf of the client
- **Communications to and from lawyer**—communications 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, and verbatim transcripts of the proceedings.
- **Investigation and research reports**—investigation and research reports (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, and similar items generated in the course of the representation and communicated to the client.⁶
- **Electronic files and digital data**—intangible data concerning the matter in the form of electronic files and digital data, including emails, text messages, other SMS messages, whether stored on hard drives, local or remote server, mobile devices, or messaging apps or cloud platforms, and whether maintained solely in electronic/digital format or copies of physical files.⁷

(See rule 1.16(e)(1); Cal. State Bar Formal Opn. Nos. 1994-134, fn. 1 [listing items considered contents of the client file in other ethics opinions] and 2007-174 [discussing a lawyer’s ethical obligation to release electronic items].)

C. File Retention Duties in Closed Civil Matters

⁶ Attorney work product may be **would be considered**? KEN – I agree with would be but I think this is something the whole Committee should chime in on] 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 Association Formal Opn. No. 1997-1 (lawyer may not withhold work product “reasonably necessary” to client’s representation); Bar Association of San Francisco Formal Opn. Nos. 1990-1 and 1996-1; Los Angeles County Bar Association Formal Opn. Nos. 330 (1972) (work product for which client can be billed belongs to client); San Diego Bar Association Formal Opn. No. 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 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 Formal Opn. No. 2001-157; cf. *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 855 (client file, “absent uncommunicated attorney work product,” must be surrendered to client upon termination of representation; see also *Rose v. State Bar* (1989) 49 Cal.3d 646, 655 (“Whether an attorney has a duty to surrender uncommunicated work product to a client for the client’s use in a malpractice action against the attorney appears to be an open question.”)). How this “open question” should or will be decided is beyond the scope of this opinion. [OCBA: Wants note that regardless of whether lawyer concludes that attorney work product need not be returned to the client, the lawyer may still have an obligation to retain it.] 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.

⁷ 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 Formal Opn. No. 2007-174.

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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 Formal Opn. No. 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 Formal Opn. No. 1996-1.) These obligations cannot be measured by a fixed retention period. (Cal. State Bar Formal Opn. No. 2001-157; Bar Association of San Francisco Formal Opn. No. 1996-1.⁸)

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. (See Rule 1.15; Cal. State Bar Formal Opn. No. 2001-157; Civ. Code, §§ 1813-1847.⁹) 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 Formal Opn. No. 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, 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 client's consent. (Cal. State Bar Formal Opn. No. 2001-157.) "Intrinsically valuable materials are those materials, such as money orders, traveler's checks, stocks, bonds, wills, original deeds, original notes, judgments and the like, which have value, or may have value, in and of themselves, or which themselves create or extinguish legal rights or obligations." (Los Angeles County Bar Association Formal Opn. No. 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 and retrieve the contents, and of their intended destruction. (Cal. State Bar Formal Opn. No. 2001-157; Los Angeles County Bar Association Formal Opn. No. 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 Formal Opn. No. 2001-157.) In evaluating

⁸ 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* (9th Cir. BAP 1995) 183 B.R. 583, 587 fn. 3.) Ethics opinions disagree on whether rule 1.15 is intended to address retention duties with respect to client *files*. Los Angeles County Bar Association Formal Opn. No. 475 (1994) (recommending five-year retention period for client files "by analogy" to former rule 4-100(B)(3) (now rule 1.15(d)(5))); Cal. State Bar Formal Opn. No. 2001-157 (5-year retention rule not intended to address client file retention obligation); Bar Association of San Francisco Formal Opn. No. 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 the 5-year retention requirement under rule 1.15 does not apply to client files.

⁹ 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 sections 731 to 735.

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the client's need for the closed files, a lawyer should consider whether the materials 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 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 Formal Opn. No. 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

Client files in criminal matters "warrant especially cautious treatment" due to unique considerations pertaining to the former client's liberty interest" and "the possibility of review of criminal convictions by appeal or writ (even many years after conviction)" (Los Angeles County Bar Association Formal Opn. No. 475), among others. In light of these interests, California ethics opinions have consistently concluded that, absent a file retention agreement to the contrary, client files relating to criminal matters must be retained *for the life of the client*, unless the client expressly authorizes the destruction of the files. (See, Cal. State Bar Formal Opn. No. 2001-157; Los Angeles County Bar Association Formal Opn. No. 420; Los Angeles County Bar Association Formal Opn. No. 475.)

As noted in Section A, *supra*, the amended Penal Code section 1054.9 provides a different measure of retention period. Under this section, in cases in which "a defendant is or has ever been convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more," trial counsel must retain a copy of the former client's files for "the term of [that former] client's imprisonment." (Pen. Code, §§ 1054.9(g).¹⁰) During this retention period, counsel may maintain the file in electronic form but "only if every item in the file is digitally copied and preserved." *Id.* (emphasis added).

In the committee's view, the file retention period specified in Penal Code section 1054.9 is distinct from a lawyer's ethical obligations with respect to client files in closed criminal matters. Section 1054.9 is a post-conviction discovery statute, the purpose of which is to ensure a criminal defendant's reasonable access to discovery materials in certain post-conviction proceedings. See, footnote 2, *supra*. Accordingly, the statutory file retention requirement for trial counsel serves this particular purpose 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. To that end, a lawyer must consider the former client's need for the contents of the closed file, which may be difficult to do due to the possibility of post-conviction review (even long after the representation ends), as well as changes in criminal law that may impact the former client's liberty

¹⁰ Trial counsel in these cases, thus, must not destroy the file contents for the duration of the former client's imprisonment, regardless of the file retention period specified in any agreement with the client/former client.

and other interests in the future.¹¹ Because a lawyer “cannot foresee the future utility of information contained in the file” after the representation ends, a lawyer should not undertake the destruction of the files absent “specific written instruction from the client authorizing the destruction of the file.” (Los Angeles County Bar Association Formal Opn. No. 420.)

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. (See rule. 3.8.) 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 provides 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.” (Penal Code, § 1054.9(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* (2006) 140 Cal.App.4th 310, 318 [44 Cal.Rptr.3d 320] (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 obligations to retain any portions of the prosecutor’s case file, however.

¹¹ The following examples illustrate this point.

- In November 2014, California voters passed Proposition 47, which changed certain low-level crimes from potential felonies to misdemeanors, unless the defendant has prior conviction for certain serious or violent crimes. Because the law is retroactive, it also requires anyone currently serving a sentence for a felony of the included offenses (without prior serious or violent offenses) to be resentenced to a misdemeanor. A former client may need the contents of the closed file pertaining to the included offense. Since California employers may inquire into a job applicant’s conviction record after a conditional offer of employment, including the nature and severity of the offense, this law has implications beyond the former client’s liberty interest.
- A former client may need the contents of the closed file in connection with a petition for a certificate of factual innocence. Under California Penal Code section 851.8, a person can seek a petition for factual innocence where they have been detained by police but not arrested for a crime; has been arrested but not formally charged; was formally charged for a crime but the charges were later dismissed; or was formally charged for a crime and tried for that crime but there was no criminal conviction. Where the petition is granted, the police agencies must seal and destroy all records of the arrest. Because person bringing the petition bears the burden of showing factual innocence, a former client seeking a finding of factual innocence may need the contents of a closed file.

Effective June 1, 2020, California Rule of Professional 3.8 was 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.”¹² 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.¹³

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, absent an agreement to the contrary, 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.¹⁴ (Cal. State Bar Formal

¹² 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.

¹³ These obligations include the duty to preserve materially exculpatory evidence in the government’s possession, which must be disclosed to the defense (*Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194]) and the duty to preserve and promptly return a crime victim’s property to the victim when it is no longer needed as evidence. (Cal. Const., art. I, § 28, subd. (b), par. (14).)

¹⁴ 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 Formal Opn. Nos. 2010-179 and 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

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Opn. No. 2001-157; see also rule 1.4 and Los Angeles County Bar Association Formal Opn. No. 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” (e.g., money orders, traveler’s checks, stocks, bonds, wills, original notes, original deeds, judgments), Los Angeles County Bar Association Formal Opn. No. 475, unless the lawyer has a reason to believe that a file contains items required by law to be retained (e.g., original client papers, including wills) 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 Formal 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.¹⁵

In closed criminal matters, absent an express written consent from the former client, a lawyer should not destroy the file contents. (Los Angeles County Bar Association Formal Opn. No. 420; Cal. State Bar Formal Opn. 2001-157.)

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 in such cases cannot be destroyed under any circumstances—even if authorized by the former client—during the client’s imprisonment. (Pen. Code, § 1054.9(g). The file may be maintained in electronic form “only if every item in the file is digitally copied and preserved.” *Id.*¹⁶

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(e), 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

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. (Los Angeles County Bar Association Formal Opn. No. 491 (1998).) A lawyer may charge the client (or the client’s legal representative, heirs, etc.) for copying the file if the fee agreement so provides, but the lawyer cannot condition delivery of the file on the client’s payment of copying expenses. (Rule 1.16, Cmt. [6]; see also Cal. State Bar Formal Opn. No. 2007-174, fn. 3 (interpreting former rule 3-700(D).)

¹⁵ 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 Formal Opn. No. 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.

¹⁶ 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 example, scanning all incoming documents and returning originals to the client immediately (unless the original is needed for representation).

themselves, to preserve and protect the confidential information of the client. See generally, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal. 4th 811, 821 [124 Cal.Rptr.3d 256] (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 Formal Opn. No. 2001-157, fn. 9.) Throwing the client files into the garbage, for example, would not protect client confidentiality, and therefore, would not be appropriate. On the other hand, “shredding, incinerating or employing a commercial service that guarantees confidential disposal of documents would be sufficient.” (D.C. Bar Formal Opn. 283, fn. 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 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 Formal Opn. No. 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 unless returned to the client 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. (Cal. State Bar Formal Opn. No. 2001-157; see also rule 1.4 and Los Angeles County Bar Association Formal Opn. No. 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” (e.g., money orders, traveler’s checks, stocks, bonds, wills, original notes, original deeds, judgments), Los Angeles County Bar Association Formal Opn. No. 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 Formal Opn. No. 2001-157; see also ABA Informal Opn. No. 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 not destroy the client files of a living client in closed criminal matters without the former clients’ express authorization. Thus, 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. Lawyer B may retain the files 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 (with the former client’s express authorization), Lawyer B should do so in a manner consistent with the lawyer’s ongoing duty of confidentiality owed to the former clients.

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CONCLUSION

380 Understanding a lawyer's ethical obligations with respect to client file retention and disposal can be
381 challenging. In determining the appropriate file retention period and disposal of closed client files, a
382 lawyer should be guided by the overriding considerations of the lawyer's duty to avoid reasonably
383 foreseeable prejudice to the client and duties of competence and confidentiality. In the absence of an
384 agreement to the contrary, a lawyer's obligations as to original papers and property received from a
385 client in closed civil matters are generally determined by the law of bailments or the law of deposit.
386 With respect to closed client files in criminal matters, an especially cautious approach is required to
387 ensure that no portion of the file is destroyed prematurely or improperly. In any type of matter, a
388 lawyer may not destroy materials of intrinsic value without the former client's consent.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Jennifer Mouzis
City	Sacramento
State	California
Email address	jm@jennifermouzislaw.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I have been a practicing criminal defense attorney since 2007. I have handled countless cases where my client faced life. In a handful of cases, my client received a life sentence. I have yet to have a former client, or an attorney on his or her behalf, request a file more than five years old. I always cooperate with successor counsel, so that is not the issue. Unless it is a death penalty case, there simply is very little reason to need a trial file later. In a direct appeal, the record is all that can be used by appellate counsel. In the rare habeas, the attorney will be asking within five years, or be pursuing a matter outside the trial file.

To require counsel to retain all files for a client's life gives no real guidance to the attorney. We have no idea when our client's die. Is it then the rule that we must ask our heirs to keep our client's files, in the event our clients may outlive us? If so, what is the enforcement method as to the deceased attorneys? Requiring express consent provides another insurmountable barrier. Once our clients cease being represented by us, they often move and cannot be found. There is no way to obtain express consent in the majority of cases post representation. However, we can send letters to the last known address with a directive to call or write if they object to the destruction of the file, and consent to destroy the file will be inferred if an objection is not made.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Dan Eaton
City	San Diego
State	California
Email address	eaton@scmv.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>This opinion provides very thoughtful guidance to the practitioner. I just have a few nits:</p> <p>* Footnote 6 on page 5: The sentence that begins "Whether uncommunicated" should read: "A lawyer's obligation to release to the former client attorney work product not previously communicated to the client remains an open question."</p> <p>* Footnote 7, page 5: It is not clear what the word "application" means in that sentence. If it means "electronic formatting," it should say that.</p> <p>* Page 10, last line: "therefore, not appropriate" should read "therefore, would not be appropriate."</p> <p>* Page 11, last line: "With respect to closed client files in criminal matter" should read "With respect to closed client files in criminal matters."</p> <p>Very well done.</p>

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Philip Heithecker
City	Chico
State	California
Email address	ph@pheithecker.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Under cost/fiscal impact the proposed opinion states none. With a criminal file this is not the reality, What is the cost to keep (store) these files for the life of the client, or even to convert the file to a digital format and store the file digitally?

Public Comment - Proposed Opinion 19-0004

Name	Susan Lea
City	Studio City
State	California
Email address	suelea5@yahoo.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>Comments concerning 19-0004:</p> <ol style="list-style-type: none">1. Attorneys should have the right to return all originals to the client so long as there is no severe harm to the client in doing so. Attorneys should have a written record of this, or a receipt signed by the client or client's legal representative.2. Attorneys should keep physical copies or digital copies of important papers for the shorter of ten (10) years or until two (2) years after a matter is fully discharged or dismissed or finalized, so long as the originals or accurate copies/digital files of any relevant documents have been returned to the client.3. Attorneys should have a plan in the event of their deaths before either ## 1 or 2 above are fulfilled, and the State Bar should have a committee of volunteers who are willing to go through an attorney's records to ensure return of files/evidence/records or other writings have been returned to clients as required by this rule.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Frances J Bourn
City	Visalia
State	California
Email address	jeanbourn@ymail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	In criminal cases it would create a huge burden on counsel. It also conflicts with other requirements and law. I practice juvenile law and the law requires files be destroyed in many cases. My experience has been that counties due not keep all their files that long.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	John Karayan
City	Palmdale
State	California
Email address	jekarayan@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	The proposal would be enhanced were there a general "sunset" rule for paper files, such as 75 years.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association Ethics Committee
Name	Alison Buchanan
City	San Jose
State	California
Email address	alison.buchanan@hogequenton.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	CLA_ethics_committee_COPRAC_Interim_Op._19-0004_-_client_file_release_and_retention_duties.pdf (202 KB)

October 28, 2021

Justin Fields, Chair
Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim No. 19-0004 (Client File Release and Retention Duties)

Dear Mr. Fields and members of COPRAC:

On behalf of the California Lawyers Association Ethics Committee, in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Formal Opinion Interim No. 19-0004 and appreciate the opportunity to comment on the proposed opinion.

In general, we approve of the opinion and believe that it provides helpful guidance. However, we offer suggestions for revision with the intent of improving the opinion.

1. For clarity, we would insert the word "criminal" between "closed" and "file" in the third line of the first paragraph on page 3.
2. On page 3, the opinion states that the Supreme Court made "operative amendments" to Rules 1.16 and 3.8 "expressly reminding defense attorneys of their file retention obligations and prosecutors of their obligations to preserve evidence, respectively." It would be helpful to specifically identify these changes, which we understand include adding a reference to Penal Code section 1054.9 in Rule 1.16, comment [5]; and similar edits to Rule 3.8, comment [7]. We also suggest finding another way to describe these changes, since "operative amendments" is not a term of art, and (as far as we understand) these are simply edits to comments (which the Supreme Court has made clear do not have the effect of actual rules). One suggestion would be to say instead that the "Supreme Court edited comments to" the rules and state what those changes were.
3. In the list of materials "typically considered part of the client file" and provided to the client, the opinion lists "text messages [and] other SMS messages." While

some lawyers may routinely include text messages in a client file, we are not aware of any authority that they must include text messages in a client file regardless of content. We therefore question the basis for the statement that it is “typical[]”. Perhaps a better formulation would be that these kinds of communications “may be considered part of the client file, depending upon their content.”

4. Footnote 6: The second sentence has a typo; it appears that the word “uncommunicated” should be removed.
5. On page 11, in the analysis section, the opinion says that materials in a closed civil matter may be destroyed, except for certain circumstances including “unless the lawyer has a reason to believe that a file contains items required by law (e.g., estate planning documents.)” This statement is not very clear, unless what is referred to is the same point made in the prior paragraph: that certain original testamentary documents must be handled in accordance with statutory requirements. We suggest that this be clarified.
6. It may be worth adding to the discussion of the lawyer’s destruction of the civil file the option of retaining electronic copies of files before destroying hard copy files, as a practical consideration clearly allowed by the rules.

Thank you for the opportunity to comment on this draft opinion.

Sincerely,



Alison Buchanan, Chair
California Lawyers Association Ethics
Committee



LOS ANGELES COUNTY BAR ASSOCIATION

200 South Spring Street | Los Angeles, CA 90012
Telephone: 213.627.2727 | www.lacba.org

November 9, 2021

State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed COPRAC Formal Opinion Interim No. 19-0004

Dear State Bar of California:

On behalf of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, and in response to the State Bar of California's request for public comment, we respectfully submit this letter commenting on Proposed COPRAC Formal Opinion Interim No. 19-0004.

While we find that the proposed opinion for the most part is accurate, we think its discussion on retention of client documents in civil matters has been covered by other ethics opinions and question whether it is necessary. We offer the following comments if COPRAC nevertheless decides to issue this proposed opinion.

Our most significant concern about the civil portion of the opinion is footnote 6 on page 5. The opinion is on file retention, but this footnote discusses a different issue that is important both for disciplinary and civil reasons. That issue is whether the phrase "client materials and property" in rule 1.16(e)(1) obligates a lawyer to make available to a former client the tangible (or electronic) results of the lawyer's efforts on the former client's behalf if the lawyer has not previously provided them to the client. The draft footnote says that it is not certain whether a lawyer has this obligation. We do not believe there is a tenable argument that a lawyer can withhold any such material that is reasonably necessary for the former client's representation. We see this as the meaning of the rule's mandate that the lawyer release to the client any "items reasonably necessary to the client's representation, whether the client has paid for them or not" We cannot conceive of a situation in which rule 1.16(e)(1) would permit a lawyer to withhold any material the lawyer created as part of the lawyer's representation of the client simply because the lawyer had not previously shared the material with the client. We believe this reading of rule 1.16 is consistent with the lawyer's full disclosure obligation under rule 1.4, but we view the rule 1.16 obligation as broader.

Here are four examples:

First, assume a lawyer has spent considerable time researching and drafting *in limine* motions, and the client replaces the lawyer before the lawyer has shared this material with the client. Whether or not the lawyer has charged the client for this work or, if so, the client has paid the charges, withholding the work would not protect the lawyer's legitimate interests.

Second, assume a lawyer is convinced that a witness' s deposition actions demonstrate that particular deposition testimony was false, and the lawyer makes a file note about how to effectively examine that witness at trial. We reach the same conclusion with this example.

Third, assume a lawyer has file memos that evidence a client's competence when executing estate planning instruments. We reach the same conclusion with this example.

Fourth, assume a lawyer's uncommunicated notes or intrafirm communications show the firm's failure to interview a key witness in a civil or criminal defense matter because of internal confusion over who would do the work; the failure to disclose this information in addition would violate the disclosure standard stated in *Neel v. Magana*, 6 Cal.3d 176, 188-89 (1971) and the later *Beal Bank, SSB v. Arter & Hadden, LLP*, 42 Cal.4th 503, 514 (2007).

We also think the discussion of the rule 1.16(e)(1) issue would be clearer if it were to avoid use of the term "work product." That phrase relates to limits on discovery from a litigation adversary under C.C.P. § 2018.020 and, in the Federal system, under case law based on Rules 26 and 34 of the Federal Rules of Civil Procedure. We believe a reader's focus and perspective should be on a client's right, which is the right to the entire client file, rather than on a lawyer's right to keep certain materials secret from others.

We urge COPRAC to change the opinion to make clear that all such information should be made available to the former client. We think this is the most important aspect of the proposed opinion and further urge COPRAC to place this discussion in the body of the opinion and in its Issues and Digest.

We have the following additional comments on the civil portion:

- 1) The Issues section speaks of a former client, but the body of the draft opinion uses "closed or inactive." A "closed or inactive" file is not necessarily the file of a former client. The draft therefore equates "closed file" with former clients. We think the opinion should recognize the distinction and either exclude a "closed or inactive" file of a current client or address it separately.
- 2) The Digest speaks of "civil cases." This could be read as limited to litigation. We recommend speaking of "civil matters."

- 3) About three-quarters of the way down the first Digest paragraph there is a sentence that begins "If the former client cannot be located" and then says file destruction is permitted with two exceptions. This omits contractual limitations although it is recognized in the first paragraph of the Statement of Facts. We believe it should be included in the Digest.
- 4) On page 5, we recommend that the Committee expand the description of "original client papers and property." Original papers can also be received from third parties, such as securities or letters patent that come into the lawyer's possession.
- 5) On page 6, the sentence including the phrase, "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" should be expanded to also include a reference to rule 1.15. It addresses ethical duties concerning client property.
- 6) Also on page 6, the first sentence of Other File Contents states a "would need" standard. We believe this is materially different from the "foreseeable prejudice" standard of rule 1.16(d) and urge the use of the exact rule language. The end of that paragraph restates the standard as "would injure," and we again urge the use of the exact rule language.

With regard to the retention of criminal files, the opinion largely is directed to California Penal Code section 1054.9(g) as amended in 2018. This statute does not state an ethics standard but only concerns a criminal defendant's access to discovery materials. The opinion itself points this out, and we believe that discussion could be relegated to a single brief footnote.

Alternatively, the entire "Duties of prosecutor" section could be removed, because it conflates the **prosecutor's files** with a **client's files**, and only the latter is germane to the opinion, per the "Issues" section:

"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?"

As another alternative, the opinion could replace the entire "Duties of prosecutor" section with a footnote stating, "While prosecutors do not retain client files, they are prohibited from destroying exculpatory evidence in their files with knowledge that it is relevant and material to a case. (See Pen. Code, § 141, subd. (c).)"

We also recommend that several sections of the discussion of criminal files be revised if the opinion's criminal portion is retained:

In the Digest, the sentence starting with "At a minimum, a lawyer should not initiate the destruction of client files in closed criminal matters until the expiration of the sentence, all appeals, or any statute of limitations on actions against the lawyer," is at risk of being misread and/or misapplied in light of the much broader requirement announced at the beginning of the digest that "client files should not be destroyed without the former client's express consent while the former client is alive."

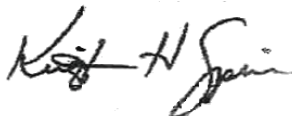
The final discussion on page 11 regarding Lawyer B should be expanded somewhat to continue to differentiate between files from serious felony cases and misdemeanor cases and matters in which the client was never charged. The discussion of Lawyer B's options should reference the primary rule that Lawyer B must retain the files for the life of the client.

We also believe that reorganizing the discussion on confidentiality would be beneficial to readers of the Opinion. On page 10, in the paragraph starting with "Any decision regarding the disposal of close client files..." we recommend that the shift from the prior paragraph be more smoothly transitioned. Also in this same paragraph and the following, Business and Professions Code section 6068 is twice discussed in similar language, and the second reference could be deleted or truncated.

Also on page 10, the proposed opinion cites a Los Angeles County Bar Op. and Cal. State Bar Formal Op. 2001-157 for the proposition that a lawyer should not destroy a closed criminal file without client consent. See L.A. County Bar Op. 475, which limits this to while the former client is alive. The final sentence to the Op. 2001-157 Digest advised of the same standard.

Thank you for the opportunity to comment on COPRAC Formal Opinion Interim No. 19-0004.

Sincerely,

A handwritten signature in black ink, appearing to read "Kirsten H. Spira". The signature is fluid and cursive, with the first name "Kirsten" and last name "Spira" clearly distinguishable.

Kirsten H. Spira
Chair

Professional Responsibility and Ethics Committee



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THURGOOD MARSHALL BAR ASSOC.

November 10, 2021

Angela Marlaud

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, California 94105-1639

Via Email: angela.marlaud@calbar.co.gov

Re: Proposed Formal Opinion No. 19-0004

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion No. 19-0004.

Founded over 100 Years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors is made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the Professionalism and Ethics Committee.

We appreciate that COPRAC has taken the time to provide guidance regarding the retention and destruction of client files. Overall, we agree with the analysis and offer the following comments.

In the “Analysis of Facts” section of the opinion, the paragraph discussing Lawyer B’s duties does not mention the criminal lawyer’s ethical duty to retain client files *for the life of the client*. This section of the opinion should at least remind the reader of this important point.

With respect to the issue of retaining files for the life of the client, we believe there must be alternatives available to a lawyer, at least under some circumstances. After all, a lawyer will not always outlive the client. What provisions must the lawyer make in the event the lawyer is unable to retain client files for the life of the client? And which, if any, of those alternatives are available to a lawyer who is able to continue retaining the files, but is no longer willing to do so?

On Page 2, we believe the last sentence of the first paragraph regarding Lawyer A could use some rewording to provide more clarity. We recommend: “Lawyer A therefore plans to provide all of the boxes, without prior review, to a data management company for secure destruction.”

On Page 3, footnote 4, the quote in the first sentence appears to be missing a word. It states that amendments resulted from the legislature's request "that the State Bar 'study and issue of closed-client release and retention by defense attorneys'" This sentence needs to be revised.

Page 5, footnote 6 embarks from the issue of whether work product may be destroyed or must be retained to discuss the "open question" of whether a lawyer must *return* work product to a client. Footnote 6 should clarify that even if a lawyer concludes attorney work product need not be *returned* to the client, the lawyer may still have an obligation to *retain* the work product.

Also in footnote 6, the second sentence that begins with "[w]hether uncommunicated a lawyer ..." the word "uncommunicated" should be deleted.

The discussion of "Original papers and property" on page 6 discusses the law of bailments, but does not refer to Rule of Professional Conduct 1.15 (Safekeeping Funds and Property of Clients and Other Persons), which also addresses obligations to maintain client property. We believe Rule 1.15 should be discussed or at least mentioned and that the statement in footnote 8 be clarified to add the underlined language (or something similar) "The committee sees no reason to deviate from its previous conclusion that the 5-year retention requirement under rule 1.15 does not apply to client files."

On page 11 in "Analysis of Facts," after the words "safekeeping of the items at all times" the phrase "until returned to the client" should be added. It may seem obvious that a client always has the *right* to retrieve client files. However, adding this phrase preserves a question that is not explicitly addressed by this opinion but perhaps should be: may a lawyer return files for closed matters to the client when the client will not consent to destruction, but also does not want to take possession? It may be worthwhile to address whether a lawyer may, at least in a civil matter, unilaterally decide to deliver client files to a client.

Finally, the opinion refers several times to the need to get client consent in order to destroy certain portions of the client file, but is silent as to whether this consent can be obtained in advance, such as in the engagement agreement or otherwise. Because this is a natural question that comes to mind, we encourage COPRAC to address whether advance consent is appropriate and, if so, the extent to which it must be informed.

Thank you for your consideration of our comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Larisa M. Dinsmoor". The signature is fluid and cursive, with a large initial "L" and a stylized "D".

Larisa M. Dinsmoor
2021 President
Orange County Bar Association

2021 Board of Directors

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State Bar of California
180 Howard Street
San Francisco, CA 94105

Via Online Public Comment Form

November 10, 2021

Re: COPRAC Proposed Formal Opinion Interim 19-0004 (Client File Release and Retention Duties)

On behalf of the San Diego County Bar Association, we thank you for the opportunity to comment on Proposed Formal Opinion Interim No. 19-0004 (the “Proposed Opinion”). As an initial matter, we support the opinion, and commend the Committee for its thorough and thoughtful work.

Based on input from our Legal Ethics Committee, we also have a number of comments for your consideration.

First, the Proposed Opinion states that “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.” (See Proposed Opinion, at p. 6, citing Cal. State Bar Formal Opn. No. 2001-157; Civ. Code §§ 1813–1847.) While true, the Rules of Professional Conduct also apply. Specifically, Rule 1.15(d) creates rules regarding “securities” and “other property” of a client, including notification requirements regarding receipt of such property (see Rule 1.15(d)(1)); identification, labelling, and storage of such securities and properties (see Rule 1.15(d)(2)); maintaining records of such securities and other property (see Rule 1.15(d)(3)); accounting in writing for such property (see Rule 1.15(d)(4)); preservation of records of such property (see Rule 1.15(d)(5)); complying with State Bar audits related to such records (see Rule 1.15(d)(6); and promptly distributing such property upon the client’s request (see Rule 1.15(d)(7)). We suggest including a citation to Rule 1.15 along with the citation to the Formal Opinion No. 2001-157 and the provisions of the Civil Code.

Second, the Proposed Opinion states that a civil lawyer may destroy documents after using reasonable means to obtain permission from the client, if the lawyer “has no reason to believe the former client would need” such documents. (Proposed Opinion, at p. 6.) Conversely, the lawyer should retain those “items that will reasonably be needed by the former client . . .” (*Ibid.*) Similarly, the Proposed Opinion advises attorneys 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.” (*Id.*, at p. 10.)

We believe that practitioners would benefit from further guidance in the form of illustrative examples, as well as a non-exhaustive listing of factors to be considered. For example, a lawyer ordinarily will have no reason to believe that purely ministerial communications—regarding scheduling and logistics—would be needed by a client after a matter’s closure. On the opposite end of the hypothetical spectrum, a lawyer should ordinarily expect that documents that memorialize ongoing legal rights and obligations (judgments, contracts, agreements, liens, wills, etc.) would be needed by a client. The bulk of items in a client file, however, are likely to be less

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obvious, and a list of factors would thus be helpful. In non-obvious cases, lawyer should consider, among other things: (i) the age of a document; (ii) whether the document has any ongoing effect; (iii) whether subsequent developments render a document outdated or superseded; (iv) whether limitations periods affect the ongoing effectiveness of a document; (v) whether related disputes are known to be ongoing; and/or (vi) whether related future disputes are anticipated. It should also be noted that in determining whether a file should be retained, the reviewing attorney should consider not only disputes between the client and other parties, but also any potential disputes between the client and the attorney, including malpractice actions.

Third, the Proposed Opinion states that “absent a file retention agreement to the contrary, client files relating to criminal matters must be retained for the life of the client . . .” (Proposed Opinion, at p. 7.) We agree with this statement of the rule, but respectfully suggest that practitioners need additional guidance, because it is commonplace for criminal defense attorneys to lose touch with their clients over time. Indeed, this is ordinarily the norm, and it is only in exceptional cases where a criminal defense attorney has clear knowledge that a client is deceased. Because of this ambiguity and the frequency with which defense attorneys experience such uncertainty, we recommend addressing the issue directly. We believe that an appropriate framing of the rule is that a criminal defense attorney’s retention obligations expire when such lawyer has a *reasonable belief* that a client is deceased, and that *suspicion or uncertainty* alone is not sufficient to relieve an attorney of their retention obligations.

Fourth, difficult retention problems may arise from the death or disability of the attorney, especially in the case of a solo practitioner. Although this may be beyond the scope of the Opinion, the Committee might consider a footnote addressing whether an attorney has an obligation to plan for disposition of files in the event of death or disability.

Fifth, there may be occasions where the death of a former client does not relieve an attorney of retention obligations. For example, if a criminal defendant also has a parallel civil action challenging police excessive force in conjunction with an arrest, the civil action may survive the death of the plaintiff, with the plaintiff’s successors stepping into the shoes of the deceased plaintiff. Although such instances are likely rare, we suggest providing a footnote on page 7 to clarify that retention of documents for life, while ordinarily necessary, may not always be sufficient.

Sixth, the Proposed Opinion states that a lawyer should “at a minimum, review the *file indices* for general descriptions of their contents and determine whether any of the files contain 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.” (Proposed Opinion, at p. 11 [emphasis supplied].) In our view, it is rare that review of an index would suffice. Even the best kept files often include indices that are highly general, and that will not provide the reviewing attorney with sufficient information to determine whether any items therein should be retained. To that end, we would recommend revising this section to indicate that the lawyer’s obligation is to conduct a review of the file that is sufficiently granular to enable the attorney to determine, for each item therein, whether retention is warranted. Indices can be helpful in this exercise, and can help identify categories of information that should or should not be retained. For example, an attorney may elect to retain wholesale all documents in a folder labeled “contracts,” without further review. But a review of an index, alone, will rarely give a

reviewing attorney sufficient information to ensure compliance with his or her ethical obligations associated with destruction of documents.

Seventh, the Proposed Opinion, in its “Analysis of the Facts” with respect to Lawyer B, does not address the presumptive requirement of retention for life. There are two ways in which this may impact the ultimate analysis. First, the initial sentence of the analysis—“Lawyer B may not destroy the client files in closed criminal matters without the former clients’ express authorization”—could be made more precise by rephrasing it as follows: “Lawyer B may not destroy the client files of a *living* client in closed criminal matters without the former clients’ express authorization.” Second, the second sentence states that “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.” We recommend clarifying that notice alone is not enough; if the lawyer’s attempt to contact the client is unsuccessful, or if the client otherwise withholds consent to destroy the records, then the attorney is not relieved of the retention obligation.

We have one additional concern to share with the committee. Although we agree with the analysis in the Proposed Opinion (subject to the clarifications noted above), it is noteworthy that retention obligations can impose significant costs and burdens. This is especially true for criminal defense attorneys (who face life-time retention obligations), and even more so for criminal defense solo practitioners with limited resources. As the criminal defense bar is largely comprised of solo practitioners, the burdens of document retention are a cause for serious concern. Although this is likely not a matter to address in this Opinion, it is a topic that warrants continued attention and exploration in future efforts by state and local bar associations.

* * *

Thank you for the opportunity to provide input on this proposed opinion.

Sincerely,

San Diego County Bar Association

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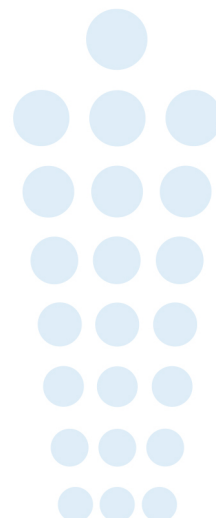
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Dear Angela:

I hope you and Andrew are well.

I realize this is a bit late, but since the next COPRAC meeting is still upcoming, I am hoping COPRAC will consider my comment. I make these comments on my own behalf and not on behalf of my firm.

I am concerned about the following statement in the draft opinion:

A "client file" is not a "static" concept, and its contents will change depending upon circumstances. (Cal. State Bar Formal Opn. Nos. 1994-134, fn. 1 and 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 rule. 1.16(d); Bar Association of San Francisco Formal Opn. No. 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].) (Emphasis added.)

The highlighted sentence is an unwarranted expansion of the definition of a former client file, which conflates a lawyer's duty prior to termination of employment in rule 1.16(d) and the definition of a client file in rule 1.16(e).

Rule 1.16(e) states in relevant part, "'Client materials and property' includes 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...***" (Emphasis added.) The rule is clear that a client file includes matters reasonably necessary to the client's representation.

Rule 1.16(d) states a lawyer's duties prior to terminating a representation. It states in relevant part: **"A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as ... complying with paragraph (e)."** (Emphasis added.) Prior to terminating a representation, a lawyer must avoid reasonably foreseeable prejudice, which includes compliance with rule 1.16(e), but may require a lawyer to provide more than what rule 1.16(e) requires.

The opinion conflates the meaning of a former client's "materials and property" (aka, a former client's file) with a lawyer's duty prior to terminating a lawyer-client relationship. In so doing, the draft opinion extends duties in rule 1.16(d) beyond the limited circumstance where 1.16(d) applies.

The two State Bar Formal Opinions the draft opinion cites just prior to the former client file definition do not support the former client file definition the draft opinion asserts. In Formal Opn. No. 2007-174, COPRAC correctly stated, "An item is 'reasonably necessary to the client's representation' if it is 'generated during the representation' for continuing use therein." Formal Opn. 1994-134 concerned an attorney's ethical obligations to prevent prejudice to the client after the attorney's employment in a litigation matter has been terminated, but before a substitution of counsel form has been filed. In that context, in footnote 1, COPRAC stated, "the Committee notes that the attorney's ethical responsibilities do not turn on the physical contents of the client's 'case file,' but rather on the ethical obligation on withdrawal to act reasonably to avoid reasonably foreseeable prejudice to his or her former client."

In support of the former client file definition, the draft opinion only cites rule 1.16(d) (which does not define what constitutes a client file) and BASF 1996-1. BASF 1996-1 does not clearly address the meaning of a former client file and does not ground its statements in the rule. To the extent the opinion defines a former client file to mean any material necessary to avoid reasonably foreseeable prejudice to a former client, there is no basis in rule 1.16 for that conclusion.

It is one thing to say that in deciding whether to destroy a former client file, lawyers must consider avoiding reasonably foreseeable prejudice to the former client, which the draft opinion correctly states. It is another to say that the former client file includes items that are beyond material generated during the representation for use therein, which incorrectly states the rule.

The draft opinion should be revised to state the following:

A "client file" is not a "static" concept, and its contents will change depending upon circumstances. (Cal. State Bar Formal Opn. Nos. 1994-134, fn. 1 and 2007-174.) In closed matters, a former client's "client file" generally includes material generated during the representation for use therein. (Cal. State Bar Formal Opn. No. 2007-174.)

Thank you for your consideration of this comment.

Regards,

Stanley W. Lamport



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