

4.1 Discussion of Draft Opinion 19-0004 [re Client File Release and Retention Duties] and Possible Request to Circulate for Public Comment or Possible Approval for Submission to the Board of Trustees

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

ISSUES: What are the ethical obligations of lawyers with respect to retention and destruction of client files, materials, and property in closed civil and criminal matters?

DIGEST: California Rules of Professional Conduct do not specify a fixed retention period for closed client files.¹ A lawyer's file retention duties generally turn on the lawyer's obligations as the bailee of the client's papers and property and the lawyer's duty to avoid reasonably foreseeable prejudice to a former client. If not returned to the client, original documents, property furnished to the lawyer by the client, and items of intrinsic value must be retained by the lawyer and cannot be discarded or destroyed without the client's consent. In civil matters, absent an agreement to the contrary, other client materials and property may only be destroyed after the lawyer uses reasonable means to notify the client of their intended destruction and gives the client a reasonable time to respond. If a 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 client. Items that the lawyer believes are reasonably necessary to the representation may be preserved in electronic form only, unless the lawyer believes the loss of physical copies will prejudice the rights of the client.

In closed criminal matters, absent an agreement to the contrary, client files should not be destroyed without a client's express consent while the 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). 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 a 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. 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.

¹ A lawyer may need to address the handling of closed files for both current and former clients. In this opinion, we use "client" or "former client" interchangeably in many places.

AUTHORITIES

INTERPRETED: Rules 1.4, 1.15, 1.16, and 3.8 of the Rules of Professional Conduct of the State Bar of California.²

Business and Professions Code section 6068, subdivision (e).

Penal Code section 1054.9.

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 digitize 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. The California Rules of Professional Conduct and the 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 client of their intended destruction, but they disagree on whether there should be a fixed, minimum retention period applicable to all file contents.³

² Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

³ 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 requirement for client accounting records), with Bar

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 client, unless the 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) & 475 (1994).)

Since then, there have been some new developments with respect to file retention duties in criminal matters. Effective January 1, 2019, 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, subd. (g).) 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.⁴

In June 2020, the California Supreme Court approved amendments to the Comments to rules 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.⁵ However, neither amendment specifies the retention period nor addresses disposal of client files in closed criminal matters.

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

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 specify a fixed retention period).

⁴ 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 Penal Code 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 Penal Code section 1054.9, subdivision (g) should be read in this context.

⁵ 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 the issue of closed-client release and retention by defense attorneys and prosecutors in criminal cases.” This committee studied the issue and recommended amendments to the Comments 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, effective June 1, 2020.

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.⁶

B. Contents of Closed "Client File"

A lawyer's file retention and release duties in closed matters stem from rule 1.16, 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 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 & 2007-174.) In closed matters, a client's "client file" generally includes items necessary to avoid "reasonably foreseeable prejudice" to the rights of the 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:

⁶ 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 (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, 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, 2022).

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 client or a third-party, on behalf of the client or related to the client matter.
- **Communications to and from lawyer**—communications to and from the client, opposing counsel, witnesses, or third parties, and records of those 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**⁷—research notes, notes regarding witnesses, strategy and tactics, and similar items generated in the course of the representation.
- **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 servers, mobile devices, messaging apps, or cloud platforms, and whether maintained solely in electronic/digital format or copies of physical files.⁸

(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] & 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 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

⁷ Attorney work product must be released to the client if the information is “reasonably necessary to the client’s representation.” See rule 1.16(e)(1); 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 & 1996-1. This opinion does not address whether a client is entitled to receive uncommunicated work product in circumstances where it is not “reasonably necessary to the representation” or might “result in reasonably foreseeable prejudice to the client if withheld.” See San Diego Bar Association Formal Opn. No. 1997-1; 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. For purposes of the facts presented in this opinion, it is assumed that closed client files consist only of the 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. This opinion concerns only an attorney’s ethical obligations and does not address discovery obligations in malpractice litigation.

⁸ 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 or electronic formatting if they do exist. Cal. State Bar Formal Opn. No. 2007-174.

to the client would arise from 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. 1996-1.⁹)

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, §§ 1813–1847.¹⁰) 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, digitizing 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.) Citing to California's Unclaimed Property Law, Code of Civil Procedure sections 1500 et seq., Los Angeles County Bar Association Formal Opinion No. 475 defined "intrinsically valuable" as "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 (1994).) Over time, as we continue to become less dependent on paper documents, what items are considered to be intrinsically valuable in their paper form will undoubtedly change.

Other file contents. Other materials and property that are reasonably necessary to the representation or will not otherwise prejudice the rights of the clients 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 (1994).) On the other hand, where the lawyer has reason to believe that the file contains items that will reasonably be needed by the 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 the client's need for the closed files, a

⁹ Rule 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 (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.

¹⁰ The retention period for certain estate planning documents delivered to a lawyer for safekeeping are also subject to the Probate Code sections 700 to 735, which provide, *inter alia*, that the deposit may be terminated only as permitted by Probate Code sections 731 to 735.

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 (1994).) In light of these interests, California ethics opinions have consistently concluded that absent a file retention agreement to the contrary, client files relating to all types of criminal matters must be retained *for the life of the client*, unless the client expressly authorizes the destruction of the files.¹¹ (See Cal. State Bar Formal Opn. No. 2001-157; Los Angeles County Bar Association Formal Opn. No. 420 (1983); Los Angeles County Bar Association Formal Opn. No. 475 (1994).)

As noted in Section A, *supra*, amended Penal Code section 1054.9 provides a different measure for the 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 client’s files for “the term of [that former] client’s imprisonment.” (Pen. Code, § 1054.9, subd. (g).¹²) 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

¹¹ The committee recognizes that, in many circumstances, the “life of the client” may be longer than the life of the lawyer or law firm who represented the client. While no specific California rule requires that a California lawyer adopt a succession plan, existing rules, including the duties of competence and diligence, can be interpreted as imposing a duty on lawyers to take reasonable steps to protect the clients’ interests during the course of the representation, including in the event of a lawyer’s sudden inability to continue to practice law. Because a failure to properly plan or prepare for both anticipated and unexpected departures from a lawyer’s practice may expose clients to significant damage or prejudice, lawyers should consider their file retention duties in light of the possibility that the lawyer may or may not outlive their client.

¹² 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.

access to discovery materials in certain post-conviction proceedings. (See footnote 4, *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 and other interests in the future.¹³ 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 (1983).)

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.¹⁴

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, subs. (a) and (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, 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* (2006) 140 Cal.App.4th 310, 318 [44 Cal.Rptr.3d 320] [Even "after a conviction the prosecutor . . . is

¹³ 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 the 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.

¹⁴ As representatives of "The People of the State of California," the files kept by prosecutors are not true "client" files. Rather, these files would more aptly be called "case files." This portion of the opinion discusses the ethical duties of prosecutors with respect to their case files.

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 portion of the prosecutor’s case file, however.

Effective June 1, 2020, rule 3.8 was 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.”¹⁵ 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.¹⁶

E. Duties Relating to Disposal of Closed Client Files

The 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.

¹⁵ 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.

¹⁶ 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)).

Before disposing of any item in a closed civil file, absent an agreement to the contrary, a lawyer must make 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.¹⁷ (Cal. State Bar Formal Opn. No. 2001-157. See also rule 1.4; Los Angeles County Bar Association Formal Opn. No. 491 (1998).) 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, original notes, original deeds, judgments), 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 commonsense judgment. (Los Angeles County Bar Association Formal Opn. No. 475 (1994); 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 should consider whether to examine the file to determine whether there are any items that must be retained (as described above) or might result in reasonably foreseeable prejudice to the client if destroyed.¹⁸ In order to make a determination about whether a particular document is permitted to be destroyed, the 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. In closed civil matters, if the lawyer has a question about whether the destruction of a document may cause the client prejudice, the lawyer should err on the side of caution and consider whether it can be preserved electronically.

In closed criminal matters, absent an express written consent from the former client, a lawyer should not destroy the client's file as long as they reasonably believe the client is still alive. (Los Angeles County Bar Association Formal Opn. No. 420 (1983); 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

¹⁷ In the event a former client requests release of the closed file, a lawyer should take reasonable steps to remove any confidential information about the lawyer's other clients. Cal. State Bar Formal Opn. Nos. 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. 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)).

¹⁸ 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.

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, subd. (g).) The file may be maintained in electronic form “only if every item in the file is digitally copied and preserved.” (*Id.*¹⁹)

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 (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 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.) Discarding 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 (1998).)

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 clients 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 until they are returned to the client and has no right to destroy them without the client’s consent.

With respect to other client materials and property, 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; Los Angeles County Bar Association Formal Opn. No. 491 (1998).) 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 if the lawyer reasonably believes its destruction will not result in prejudice to the rights of the client. Since Lawyer A is without personal knowledge of the contents of the boxes in storage, Lawyer A should, at a minimum, review the contents of the files to determine whether any of the materials or property are permitted to be destroyed.

¹⁹ For lawyers wishing to go paperless, in light of this requirement, it would be prudent to have a clear digitization plan and follow it, for example, scanning all incoming documents and returning originals to the client immediately (unless the original is needed for representation).

Because Lawyer B may not be able to foresee the future utility of the information contained in any of their closed criminal files, Lawyer B must retain the closed files of all current and former clients for the life of the client unless the client authorizes the destruction of the file, and this is only permitted in some circumstances. For example, under Penal Code section 1054.9, Lawyer B would be required to retain a copy of a 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. As such, in addition to violating the statute, a lawyer's failure to maintain a copy of that client's file for this minimum period of time would result in "reasonably foreseeable prejudice to the rights of the client." (See rule 1.16(d).) 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.

For both Lawyer A and Lawyer B, when destroying the contents of any client file (with the client's express authorization and only when permitted by law), they should do so in a manner consistent with the lawyer's ongoing duty of confidentiality to these clients.

CONCLUSION

Understanding a lawyer's ethical obligations with respect to client file retention and disposal can be challenging. In determining the appropriate file retention period and disposal of closed client files, a lawyer should be guided by the overriding considerations of what is reasonably necessary to the client's representation, the lawyer's duty to avoid reasonably foreseeable prejudice to the client, and duties of competence and confidentiality. In the absence of an agreement to the contrary, a lawyer's obligations as to original papers and property received from a client in closed matters are generally determined by the law of bailments or the law of deposit. A lawyer may not destroy materials of intrinsic value without the former client's consent unless those items can be electronically maintained without prejudice to the rights of the client. With respect to closed client files in criminal matters, an especially cautious approach is required to ensure that no portion of the file is destroyed prematurely or improperly, and the file should be retained, in some form, throughout the life of the former client. 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.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	Alternate Defenders, Inc.
Name	Mary Stearns
City	San Rafael
State	California
Email address	marystearns@marin-adi.org
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.

The State should provide funds to attorneys who are appointed by the court to represent indigent clients for the purpose of scanning/copying their files so that they can be stored electronically - including preserving all evidence into an electronic form. It is ridiculous that attorneys who work for less money and represent indigent clients should pay for this themselves and/or pay for storage of old VCR's, boxes of discovery etc.

Furthermore, the Opinion ignores one reality for criminal defense attorneys - they cannot return a complete file to a criminal client because there are addresses and contact information of witnesses. This puts criminal defense attorneys in an untenable position of maintaining (?) documents no matter what. I do not have a solution to this.

Finally, what happens when an attorney dies? Perhaps for appointed attorneys, the State can have a catalogue/storage facility.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	retired
Name	Cynthia Andrews
City	laguna woods
State	California
Email address	ayysandiego@gmail.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.

I moved to CA from Dallas 6 years ago. I heard everybody tell me the State Bar of CA is such a corrupted organization, they are in-bed with crook attorneys, Nobody in CA can get justice from the State Bar. After filing complain with State Bar of CA., I know it is true.

The State Bar of California has failed to effectively discipline corrupt attorneys, allowing lawyers to repeatedly violate professional standards and harm members of the public

I am so happy that the Lawsuit against State Bar of California spurs calls for a new lawyer discipline model. California bar bungled attorney misconduct cases, new audit finds

You asked a lot of shit questions on the survey; the point is not those questions. The point is attorneys who work for State Bar have no ethics, no decency, they are in-bed with attorneys we complained about. They are all on the attorney's side and turn down every complaint.

If you continue like this, you will hit a hard rock someday. You bully the public, cus you think you cannot do anything to sue you.

Fuck you all !!

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Anonymous
City	Los Angeles
State	California
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.	<p>Keeping files costs money, space, time and worry. The requirement that attorneys keep files for the life of the client is absurd and, in fact, evil. Here's why:</p> <p>Attorneys, among other professionals, have a very real burden. That burden is handling someone else's problems. To be brief, an attorney has to support themselves and handle their own responsibilities and possibly the responsibilities over children and/or elderly parents. In a complex world, this is already a difficult burden. Many choose not to work because of the stress. When a professional takes over another person's problems, they must navigate a extreme host of issues over which they have limited control. There is documented research that shows professionals endure secondary trauma from handling the affairs of others. There are additional burdens like carrying insurance and being exposed to danger and hostile participants in and out of court. No business promises to keep records forever but, at least, corporations have an unlimited life span. When a person final retires (most attorneys I have seen die in the practice broken down from stress or diabetes, both related), don't they have</p>

the right to move on? The government is in a better position to keep files forever. Just mark them confidential and have the Court keep them. Why not? That is because no one and no government wants to pay for the responsibility of keeping files forever. It is a sickening and expensive burden.

One last note...I think as a group, women are probably better attorneys than men overall. But, it is sad to see them many years later all dried up from the profession. Women have less collagen than men. The practice of law drains the collagen and life out of a person. Instead ...

...of supporting attorneys for all that they do, now you want to make every case last for the life of an attorney? There must be reform on this. This is evil.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization

No

Name

Anonymous

City

Santa Ana

State

California

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 do have some concerns about a mandate to retain criminal files for the lifetime of the client barring a separate, express agreement. In my experience as criminal defense attorney not in private practice, public defender's offices could adapt to the new proposed rule without being unduly burdened. Public Defenders have well developed systems for retaining client files for prolonged periods as well as access to governmental funding that can cover additional costs arising from the new rule. My concern would be for private practitioners, especially solo or small firm practitioners, who do not have the experience, institutional longevity, and access to funds to make the realization of the new rule easily practicable. Some may solve the dilemma through a standard clause in their contracts with clients authorizing much earlier destruction of files. This presumably would not realize any of the purported goals of the new rule. Others may be discouraged from accepting clients or be burdened by an ongoing logistical problem. My hope is that the Bar would consider the financial and logistical burden of its proposed rule as well as potential perverse incentives that may be

created if the rule is implemented (discouraging small practitioners in the area of criminal law, accelerating the destruction of files belonging to criminal defendants rather than encouraging their retention in anticipation of future litigation or changes in law, etc.) Perhaps the Bar could ameliorate these effects if it developed strong retention protocols and services that would be available at moderate cost and/or providing real financial and logistical support to non-institutional actors in the criminal defense space.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	ADI, CAPLA, CCAP, FDAP, SDAP
Name	Lynelle Hee
City	San Diego
State	California
Email address	ikh@adi-sandiego.com

From the choices below, we ask that you indicate your position. (This is a required field.)

Support

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.

[Project_Comment_-_FINAL.pdf \(63 KB\)](#)

To: State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC)

From: Appellate Defenders, Inc., California Appellate Project – Los Angeles, Central California Appellate Program, First District Appellate Project, Sixth District Appellate Program

Date: September 28, 2022

Re: Proposed Formal Opinion Interim No. 19-0004 – Public Comment

The five Appellate Project Offices jointly submit this public comment to the Proposed Formal Opinion Interim No. 19-0004 (Client File Release and Retention Duties). The projects administer the appointment of counsel for the six appellate districts. We select counsel for indigents on appeal in criminal cases, juvenile delinquency and dependency cases, and civil commitments (e.g., mentally disordered offenders, sexually violent predators, etc.). Each project is responsible for appointment of counsel within their designated district(s), and each project manages a panel of attorneys appointed to represent indigent clients on appeal. The combined panel lists include approximately 700 attorneys; the majority have chosen to dedicate their practice solely to court-appointed appeals. Over the last five years, the statewide average was approximately 7,500 appointments per year. All counsel in the court-appointed defense counsel program has a stake in the release and retention responsibilities of an attorney.

The appellate projects support the proposed formal opinion, clarifying that an attorney can preserve client file *in electronic form only*, so long as the document or item does not fall within specified exceptions. The current rules do not specify a fixed retention period for closed client files. In civil cases, counsel must retain “original documents, property furnished to the lawyer by the client, and items of intrinsic value.” Other items can be destroyed only after the lawyer uses reasonable means to notify the client of intent to destroy and gives the client a reasonable amount of time to respond. In criminal matters, absent express consent, counsel must retain client files, materials, and property for the life of the client. Electronic storage is a viable option for the vast majority of the client file,

and a rule expressly providing for this alternative will help counsel comply with their ethical obligations.

For the statewide panel, the cost of retaining and storing client files is considered overhead and not compensable on the compensation claim. Panel attorneys receive compensation upon submission of their compensation claim to the project. The project office recommends payments based upon state guidelines, and transmits the claim to the Judicial Council of California (JCC) for payment. Claims are subject to quarterly audits by the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC). Compensation is based upon services performed on the particular case and does not include overhead or future costs incurred in storing and retaining a client file. Naturally, this overhead increases as counsel's volume and complexity of cases increases. Thus, an attorney choosing to accept court-appointed appellate appointments must incur these costs for the lifetime of a client, regardless of an attorney's decision to retire from the practice.

Retention and storage costs for the original file are significant. As an example, Corodata is a records management facility operating throughout California. The *minimum* storage billing is \$52.50 per month. Customers are charged different monthly rates (depending on the type of carton) ranging from \$.28 (record storage carton) to \$1.80 (3 cube carton). Additional services are available, including retrieval (\$2.65 per carton), copying (\$1.10 per page), pick-up and delivery (\$1.25 to \$2.80 per carton), and destruction (\$6.90 per carton). Corodata currently adds a 5% energy charge per account.

In appellate practice, the bulk of the client file consists of the appellate record. Record page counts range from the hundreds to the thousands, depending on the particulars of the case and often the seriousness or complexity. As a result, attorneys who practice court-appointed appellate work for years end up with significant storage costs (well in excess of the minimum \$52.50 per month) when they are unable to return these materials to the client. Upon retirement, panel attorneys, many of whom are solo practitioners, must continue to store the physical files and incur the fees.

The proposed opinion gives counsel the necessary guidance on when an electronic copy is not sufficient to protect the interests of the client. For example, in civil cases, electronic storage will be permitted *unless* the lawyer believes the loss of physical copies will prejudice the rights of the client. In criminal cases, the

contents may be retained in electronic form provided that (1) every item is digitally copied and (2) retention of the physical item is not required by law, or its nature does not require preservation. These exceptions protect counsel and the client in the rare case that a document or item must be preserved in its original form. Even with the exceptions, appellate counsel will be able to reduce storage costs tremendously by electronically storing most transcripts and other documents that do not fall within the narrow exceptions.

We appreciate the opportunity to comment and thank COPRAC for considering these thoughts.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name James A. Bach

City San Francisco

State California

Email address jbach@immilaw.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.

I oppose the mandate in the Opinion that "other client materials [that is, those in civil cases that are not original documents and do not have intrinsic value] and property may only be destroyed after the lawyer uses reasonable means to notify the client of their intended destruction and gives the client a reasonable time to respond."

This requirement far exceeds the obligation imposed by the CRPC. It is burdensome and expensive for attorneys in civil matters, and any benefit to the clients does not justify that burden and expense. After time has passed (e.g., 10 years) it may be difficult to locate the former clients, expensive to send them letters or emails, and the reality is that the clients rarely want their files at that point. If they did, they would have asked for them sooner. The attorney must then save the letters or emails forever to prove compliance.

On balance, I believe the burden imposed by this Opinion (regarding old civil files with no intrinsic value) does not significantly enhance the integrity

or reputation of the profession, and should not be imposed. At a minimum there should be a safe harbor after a designated number of years.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Keith bowman
City	Los angeles
State	California
Email address	kmarshallbowman@yahoo.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.

I believe the current rule is impractical. I have been practicing for over 29 years doing criminal law. To require us to keep files for the life of the client is expensive as well. If you are an attorney who is 50 years old and the current client is 18 and he lives until he or she is 60 that means the attorney would be 92 years of age. Furthermore, where would the state bar propose these files be kept. Anyone who has storage understands that a 5 x 10 storage facility which is 50 square feet runs about \$ 120 a month and will no doubt go up. Who is going to reimburse the attorney. If they believe the attorney should keep for that period of time the state bar should provide storage at the state bar. As part of our attorney fees the bar should provide personnel from the state bar who can come and scan and archive our files at the end of the year and keep at the state bar so if an attorney dies or closes his practice those files can be found. If someone worked at a business for example a CPA there would be no way a CPA could keep the files of a client he or she had 30 years ago which is what you are asking the Attorney to do.

Public Comment - Proposed Opinion 19-0004

Reference #	16062274
Status	Complete
Commenting on behalf of an organization	No
Name	Gordon S. Brownell
City	St. Helena
State	California
Email address	gsbrownell@aol.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.	What happens to the files after the lawyer dies? May surviving family members shred them?
Last Update	2022-09-22 16:33:40
Start Time	2022-09-22 16:29:11
Finish Time	2022-09-22 16:33:40
IP	Anonymous
Browser	Other
Device	Other
Referrer	N/A

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name Steven A Chase

City South San Francisco

State California

Email address stevenchase1066@gmail.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.

I have been an attorney for over 50 years. It is very expensive to store files from the past. I have had some files digitized, but who knows how long the digital media will last. I am a member of the San Mateo County. I've handled countless misdemeanor cases for minor violations, such as 14601 VC, 484 PC, 602 PC, etc. These files are not worth saving. Cases where people have long prison sentences should be saved due to changing laws and other writs, etc. However, it is crazy to keep misdemeanor cases. Even DUI cases don't need to be kept as issues on pleas or immigration consequences don't require the physical file. Please rethink this rule.

Steven A. Chase, State Bar No. 50274.

Public Comment - Proposed Opinion 19-0004

Name	Anthony Dell'Anno Sr
City	Visalia
State	California
Email address	dellanno31@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.	If the client asks for a his file be returned to him/ her/them and the attorney complies, the attorney shall keep a record by way of a signed release. This absolves the attorney of the duty to keep the file until the death of the client.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name Douglas S. Feinberg

City Clovis

State California

Email address dougfeinberg@yahoo.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.

It seems like imposing a lifetime requirement for holding onto files is a bit onerous particularly in misdemeanor cases. What about infractions? The requirement of holding onto a file for the lifetime of someone else is extremely challenging. What must the attorney do in order to satisfy the attorney that the client is dead? May the attorney assume that a client has not lived to age 100? There appears to be a great deal of research involved in determining that the client is dead. The rules regarding the retention of files in criminal cases are wildly ignored because they are impractical. This seems to be just one more ridiculous rule that will be unlikely to be enforced often because attorneys will simply find compliance too onerous. When the attorney becomes too ill to manage files or dies, who is going to keep them for the life of the client (which may last 50 years or more after the death of the attorney)? Who is going to pay for that?



HABEAS CORPUS RESOURCE CENTER

303 Second Street, Suite 400 South
San Francisco, CA 94107
Tel 415-348-3800 • Fax 415-348-3873
www.hcrc.ca.gov

MICHAEL J. HERSEK, Executive Director

E. ANNE HAWKINS, Assistant Director

JOHN A. LARSON, Assistant Director

The Habeas Corpus Resource Center (“HCRC”) is an entity of the Judicial Branch of the State of California. HCRC provides legal representation for indigent petitioners under a sentence of death in habeas corpus proceedings in state and federal courts, provides training, and serves as a resource to private attorneys appointed to represent petitioners in capital cases. *See* Cal. Gov’t Code § 68661. HCRC has been appointed to represent people under a sentence of death in over 100 state and federal habeas corpus proceedings.

We urge the State Bar of California to adopt Proposed Formal Opinion Interim No. 19-0004. American Bar Association Guidelines require counsel representing capitally charged clients to conduct a wide-ranging investigation of their client’s background, including obtaining all records related to prior convictions that might be used as evidence in aggravation by the prosecution. (Am. Bar Ass’n, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.15 (2003 ed.); *Rompilla v. Beard* (2005) 545 U.S. 374, 377 [holding that trial counsel must obtain prior conviction files to discover any mitigating evidence and to anticipate the aggravating evidence].)

In the event trial counsel has not collected attorney files related to a client’s prior convictions, state habeas corpus counsel must try to obtain them as part of their investigation of potential habeas claims. (ABA Guidelines (2003), Guideline 10.15.1 (Commentary).) Because of the lengthy delay in appointing habeas corpus counsel in death penalty cases in California, attorney files relating to prior convictions have usually been destroyed by the time habeas corpus counsel is appointed. The destruction of these files means that habeas counsel are prevented from fully investigating clients’ prior conduct and raise allegations regarding the circumstances of those priors.

Because the unavailability of prior counsel’s files may deprive people charged with a capital crime of information critical to their defense, requiring counsel in criminal cases to retain files for the life of the client would improve trial and post-conviction counsel’s ability to provide adequate representation in the most serious criminal cases and would further the interests of justice. We therefore support Proposed Formal Opinion Interim No. 19-0004.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Melissa Hill
City	Nashville
State	Tennessee
Email address	hill71218@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.

Retention of criminal appellate files over a life time appellate career has become very costly and burdensome. I am a solo practitioner. I only worked on court-appointed criminal appeal and habeas cases. When it became prohibitively costly to pay for storage for files, I moved files to my home storage in a garage. they covered three walls of an oversized garage. A few years ago, I spent months personally scanning all pages of retained paper files in advance of selling my home and downsizing to a much smaller house in a different state, in hopes of retiring. Having professional scanning done would have been prohibitively costly for court-appointed case files. For counsel doing court-appointed appeals in serious felonies and death penalty cases, the files can be quite large. If retention for the client's lifetime is to be required, the court-appointed counsel system should provide payment to counsel at the end of the case to have paper files professionally scanned. Alternatively, the state could provide facilities for storage of court appointed counsel criminal appeal files in perpetuity so clients can request files as long as they are alive, even if their lawyers are not.

Also, how are we to know if a client has died?
Once the client can no longer be located in
prison, a lawyer may have no idea where the
client is and whether he or she is alive.

I am still licensed in California but finishing up
work on several cases from a new home in
Nashville, Tennessee.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name David H. Hofheimer, Esq.

City Benicia

State California

Email address DrHofheimer_DC_Esq@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.

I feel that for cases involving civil matters especially as to personal injury cases and civil cases other than probate cases, there should be a maximum retention time of four (4) years starting from the date that the given case is closed. This is because the statute of limitations times for written contracts and attorney malpractice are four (4) years and one (1) year, respectively. At the end of four (4) years after the closing of a case, all documents in both in written paper form and electronic form should be able to be destroyed without having to attempt to reach a former client.

Thank you,

David H. Hofheimer, Esq.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	martin homec
City	davis
State	California
Email address	martinhomec@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 importance of litigation documents means that the documents and other physical evidence should be preserved by the State government not by individual attorneys. The attorneys possessing physical and documentary evidence may not be available when the need for the evidence arises so the administrative agency or court hearing the case should be responsible for keeping all the evidence not the attorney.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization

No

Name

Kyle Joseph Humphrey

City

Bakersfield

State

California

Email address

kyle@kylejhumphrey.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.

this rule places an expensive and harsh burden on attorneys. Clients are entitled to copies or actual files and should be responsible for maintaining them. This type of rule is typical of people who hear about an extreme case of what would have happened if a file was saved and ignore that there should be a balance in place instead of an extreme rule. How about misdemeanors? Probation is 1 year, and most cases are going to end up being sealed. Should we keep those forever? Is the State Bar going to quit spending our dues on bloated salaries for its staff and hire someone to search who dies and let us know? This is another case of the Bar creating a solution for a problem that rarely exists when they could just make a new rule going forward that we have a duty to retain misdemeanors for 3 years post probation, all non life felonies 10 years post sentencing, and all life terms 15 years post sentencing with the option that the client can consent to destruction of their file if so provided in retainer agreements. Your new rule as is creates a problem looking for a solution.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Joseph Katz
City	Hanford
State	California
Email address	josephkatzlaw@yahoo.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.

It should not be incumbent upon an attorney, particularly in private practice, to shoulder the expense of storing a client's file for life (whether the attorney's life or the client's). Hopefully, savvy attorneys were, and now ALL attorneys will, draft retainer agreements to reflect an agreed-upon period for the destruction of files that would include specific provisions for the copying of a client's file for delivery to the client. There must be some burden on a client to seek out the materials. It is not reasonable to contact an attorney twenty years, or even a decade, after the case resolved and start demanding discovery. Particularly, as is almost always the case, when the client was previously provided discovery, but lost it, and then lied about ever receiving it, of course.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	Los Angeles County Professional Responsibility and Ethics Committee
Name	Rachelle Cohen
City	Los Angeles
State	California
Email address	rcohen@ksccllegal.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTS You 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.	PREC_Ltr_Re_COPRAC_Formal_Opinion_Interim_No._19-0004_Final.pdf (152 KB)

**LOS ANGELES COUNTY BAR ASSOCIATION**

200 South Spring Street | Los Angeles, CA 90012

Telephone: 213.627.2727 | www.lacba.org

State Bar of California

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

Dear State Bar of California,

This letter is written on behalf of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, with respect to the latest revision of COPRAC's Proposed Formal Op. Interim No. 19-0004.

We appreciate the changes and improvements to this proposed opinion. However, we continue to have several recommendations and offer the following suggestions for your consideration.

In the first paragraph of the Digest, in the sentence beginning with, "If a client cannot be located," we recommend that for consistency with the prior sentence, "a" client should be changed to "the" client. At the end of the first paragraph of the Digest, we recommend that the phrase "the lawyer believes" should be changed to "the lawyer reasonably believes."

In the first paragraph of the Discussion on page 2, addressing the absence of a California rule on file retention, it would be helpful to add that this is true "Because a lawyer's file retention obligations depend on a variety of facts and circumstances, the issue is addressed in advisory ethics opinions, rather than in a rule."

At the top of page 4, the opinion references "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." We recognize that there is a distinction between closed and inactive matters. However, the proposed opinion does not delve into the significance. For consistency and to avoid confusion, we recommend that you consider deleting "inactive" from this sentence.

At the top of page 5, in the description of client materials and property, "communications" is narrowed at the end of the sentence to "conversations." We recommend that use of the broader term "communications" would be more appropriate here.

At page 6-7, the proposed opinion provides that "the lawyer nevertheless fears that loss of the item may injure the former client..." In our view, the use of "fears" in this context conveys a subjective standard that is not helpful to the reader. We suggest this be revised to use the word "believes" if a subjective standard is intended, or that perhaps the use of "has reason to believe" would be more appropriate.

At the top of page 7, in the first full paragraph, the first sentence references “estate planning documents” in the parenthetical, but does not support that reference. We suggest that COPRAC consider adding reference to COPRAC’s Formal Op. 2007-173 and perhaps to the governing Probate Code provisions relevant to this example.

At the top of page 10, the draft opinion provides that closed client files in a civil matter may be destroyed where a “lawyer cannot locate the client or obtain clear instructions from the client...” The implication is that if a former client gives ambiguous instructions concerning the disposition of the file, the lawyer can destroy the file. We disagree with this, and recommend that this be revised to provide that any ambiguous instructions be clarified with the former client.

Also, at the top of page 10, the opinion first speaks to the lawyer making “reasonable efforts” then switches to reference “diligent efforts” to notify the former client. For consistency, we recommend that the second reference be changed to “reasonable efforts” throughout.

In footnote 11, the opinion addresses the need for a “succession plan,” in the discussion of handling criminal files. This is a significant point, and we recommend that it be broadened, and moved out of the criminal section, perhaps to the summary.

As ABA Formal Ethics Opinion 1384 (1977) noted: ‘A lawyer does not have a general duty to preserve all of his [or her] files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services.’ It is the opinion of this committee that lawyers have no ethical duty to preserve documents in stale and long-closed matters that have no inherent or current value.

We appreciate the work of the Committee and the opportunity to comment on proposed Opinion 19-0004.

Sincerely,



Rachelle Cohen
Chair
Professional Responsibility and Ethics Committee

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name Lori G. London

City South Lake Tahoe

State California

Email address attorneylondon@yahoo.com

From the choices below, we ask that you indicate your position. (This is a required field.) Oppose

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. [Comments.pdf \(21 KB\)](#)

RE: Comments Regarding Attorney Retention of Client Files

The proposal that in criminal matters an attorney be obligated to keep client files for the life of the client is incredibly onerous especially for court appointed counsel. Below are reasons in opposition to that proposal:

-How is the attorney to know if the client is alive or dead? After representation we have virtually no contact with the client.

-What purpose is served by keeping the file for the lifetime of the client?

-In court appointed cases attorneys are not given money to retain client files. The proposal envisions that unless the attorney puts all existing closed files and new files in digital format then the attorney must pay for retention (storage) of the client file for some unknown period of time. The time and ability of an attorney to put all files in a digital form is onerous in and of itself. Client files often are hundreds of pages. Some are years old (although closed). Not everyone has the ability, staffing, etc to scan and save all files in digital form.

-In court appointed cases there is no retainer agreement in which a provision for destruction of the client file can be addressed. As such those who provide services under contract will be mandated to keep all client files for an indefinite period of time.

-The proposal does not reflect a "real life" proposal that balances the needs of the client and the attorney.

An appropriate amount of time to keep a client file in my opinion is two to three years at best. There really should be no set time line to keep a client file. All court records are accessible to the public for many years. The actual law enforcement reports as well as motions, communications, etc are usually provided to the client so they can assist the attorney in preparation and resolution of a case. The client should hold responsibility for retaining those records if they so desire.

Thank you for your attention to this matter.

Very truly yours,

Lori G. London
Attorney at Law
Conflict Public Defender-El Dorado County

Contract Public Defender- Alpine County

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	Yes
Professional Affiliation	Senior Deputy Public Defender - Ventura County
Name	Michael C McMahon
City	Carpinteria
State	California
Email address	nvrglty@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.

Proposed Formal Opinion Interim No. 19-0004
(Client File Release and Retention Duties)
The Public Defender of Ventura County will
Support only if Modified

The Public Defender of Ventura County will not support the proposed opinion unless it is modified to specify a file retention term of eight years after disposition of nonfelony cases and a longer, determinate retention term for felony cases. The proposed metric of “the life of the client” is a metric unknown and inherently unknowable to Public Defender offices.

The proposed opinion operates as both a mandatory injunction and an unfunded mandate. As the Committee acknowledges, we are not writing on a blank slate. However, the proposed opinion ignores at least one controlling statute. “Notwithstanding any other provision of law relating to the destruction of attorney-client information or county records, at the request of the public defender, the board of supervisors may authorize the destruction of nonfelony public

defender records eight years after final disposition of a case.” (Gov. Code, § 26205.8.) In Ventura and many other counties, the board did just that. The proposed opinion should be modified to reflect that it does not require retention of nonfelony public defender records beyond the eight years provided in the code. The use of the phrase “Notwithstanding any other provision of law” indicates the Legislature intended to preempt any current or future conflicting mandates.

In enacting section 26205.8, the Legislature recognized that retaining files for the life of the client may...

... impose an unreasonable duty and burden on county government. Because the Public Defender handles a vast number of cases and clients, there is no practical method to learn of the death of former clients. A “life of the client” duty to retain essentially operates as a duty to maintain files of former clients permanently. There are good reasons why California has refrained from specifying an indefinite duty to retain such files.

At the same time, there are valid reasons for retaining files in which the case resulted in a felony conviction for additional years. The Legislature acknowledged this when it enacted Penal Code section 1054.9. 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. Using a “term of imprisonment” is a far more accessible metric than the “life of the client.”

Public Defender Offices are unique and require

special policies, procedures, and laws as demonstrated by Government Code, section 26205.8, and scores of other statutes that apply solely to Public Defender Offices. The assertion that the proposed opinion will have no fiscal/ personnel impact is demonstrably false regarding Public Defender Offices. Such impacts were the very reason why the Legislature enacted section 26205.8 as Urgency Legislation.

CONCLUSION: Public Defenders are a creature of statute. (See, Gov. Code, § 27700.) Regulation of Public Defenders on matters such as file retention should be codified by legislators...

... from large counties and those from fiscally challenged smaller counties. In any event, “the life of the client” is an unfeasible metric for Public Defender Offices. Thank you for considering our comments.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Joseph A. Pertel
City	Santa Monica
State	California
Email address	jpertel@yahoo.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.

I have practiced criminal law for 27 years, as both a public defender (San Diego & Los Angeles) and now serve as a senior attorney handling post-conviction matters for the LA County Bar's Independent Defender Program. For the past year, I have handled a large number of post-conviction cases pursuant to Penal Code section 1172.6 (former section 1170.95). On two occasions, I reached-out to the trial counsel to request a copy of the file, but was informed that they had destroyed their case file even though their clients were still serving life sentences! I cannot emphasize how strongly I feel about an attorney's responsibility to maintain their files for criminal defendants sentenced to lengthy state prison sentences. In one of the cases, the client suffered actual prejudice since a critical piece of defense evidence had been discarded by the court clerk after so many years and the DA claimed that they did not have a copy of it either. In my view, an attorney who fails to maintain their files under these circumstances should face discipline.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization

No

Name

Patricia J Ulibarri

City

SAN DIEGO

State

California

Email address

pjulibbarri1esq@cox.net

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.

As it concerns appellate work, with some exceptions such as a habeas petition being pursued, the client file consists of client correspondence, routine court filings such as extension or augment requests, miscellaneous orders, etc., that a client doesn't need I have had a client ask me once in my 30+ year career for copies of his correspondence. I send discovery to the client if I have reviewed it along with client records. It is unreasonable to force attorneys to hold on to files for the lifetime of the client when there is nothing material like discovery being stored. As it stands, storage is costly and appellate attorneys that work for the Projects are dismally paid anyway -- not to mention a variety of other administrative matters we don't get paid for. Now, I guess we are expected to download electronic files so that paper copies can be sent to the client, then we get to lug these records to the shipper (which can sometimes weigh over 30 pounds). Utterly ridiculous proposal and not grounded on the real life concerns of appellate counsel. Just what are we expected to do, periodically check the prison locator website to see if the client has passed after representation

has been terminated 10 or 20 years before? This is unrealistic in the extreme. There should be a 10 year cut off particularly since it is my understanding that Courts of Appeal hang on to client briefing for 20 years and both the DA and AG offices also have files in storage that those offices pay for; none of which takes up valued time storing much less comes out of the salaries of AGs or DAs.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization No

Name David Vasquez

City Marysville

State California

Email address dwvasquez@aol.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.

A set period of time would be better or the requirement that that the client takes his or her file with them after the case is over. But to require the lawyer to maintain the files for ever or a substantial period of time is unworkable.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Julie R. Woods
City	Walnut Creek
State	California
Email address	jwoods@lacourt.org
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.

There should be an additional carve-out for original estate planning documents in closed civil matters. I am a certified specialist in estate planning, probate, and trust law, a former member of PMHAC, and I have been a probate research attorney at two courts in different parts of the State. There are many cases in which I have seen attorneys who draft wills or trusts and retain the original copies retire or die, and clients have only obtained a copy of the Will or trust, if anything, which is otherwise lost or destroyed by the prior attorney. It causes undue hardship for the clients to have an all-too-common situation where they cannot find their original estate plan which the attorney had retained, for which they must seek judicial remedy. There should be a carve-out for the retention or return of such documents in the rule/statute for closed civil matters. Please feel free to reach out to me for further discussion or information. Thank you.

Public Comment - Proposed Opinion 19-0004

Commenting on behalf of an organization	No
Name	Jacob Zamora
State	California
Email address	jdz@jdzlaw.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.	<p>The claim there is no financial impact is incorrect.</p> <p>Who bears the financial burden of maintaining criminal records for the life of the defendant.</p> <p>What if you are an older attorney with a younger client.</p> <p>When the older attorney passes, who is responsible for maintaining the file.</p> <p>Moreover, is the new, (younger), attorney to bear the cost where they did not receive compensation.</p> <p>Where are the files to be stored.</p> <p>Can they be stored electronically.</p> <p>The simple fact is, in the criminal context, ALL criminal files can be recreated from outside sources, such as probation, the district attorney's office, the court reporter or the court file since the court is required to maintain their files for fifty years.</p> <p>Adding another financial burden on the attorney</p>

and a possible successor attorney is unacceptable.

In dependency cases a system is in place allowing attorneys to upload a client's file to the state's JCATS system. Thus, preserving the file for the life of the client.

A system must be set up to allow attorneys to upload files to a state owned system for long term preservation.
