

**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 client¹ files. A lawyer’s ethical obligations regarding file retention are primarily governed by (1) the duties that arise from a lawyer acting as the bailee of a client’s papers and property; and (2) the lawyer’s duty to avoid reasonably foreseeable prejudice to the client.

In closed civil matters, absent an agreement to the contrary, client files should not be destroyed unless the lawyer has used reasonable means to notify the client of the intended destruction and provided the client with a reasonable time to respond. If a client cannot be located or fails to respond to reasonable notice, the lawyer may destroy items whose retention is not otherwise required and whose destruction would not cause reasonably foreseeable prejudice to the client. Items the lawyer believes are reasonably necessary for the representation may be preserved in electronic form only, unless the loss of physical copies would prejudice the client’s rights. However, original documents, property furnished to the lawyer by the client, and items of intrinsic value must be retained and cannot be discarded or destroyed without the client’s consent.

In closed criminal matters, absent an agreement to the contrary, client files should not be destroyed without the client’s consent while the client is alive.² Because files in criminal matters may have future vitality even after judgment, sentence, and appeals, a lawyer should retain them for the life of the client, absent a contrary agreement or consent. Closed files in criminal matters may be retained electronically, unless retention of the physical item is required by law or its nature requires physical preservation (i.e., physical evidence). However, as with civil files, original documents, property furnished to the lawyer by the client, and items of intrinsic value must be retained and cannot be discarded or destroyed without the client’s consent.

¹ In this opinion, we use “client” and “former client” interchangeably.

² Cal. Penal Code, § 1054.9, as amended January 1, 2026, addresses a defendant’s post-conviction access to discovery materials and requires trial counsel to retain a copy of a client’s file for the term of imprisonment following a felony conviction resulting in incarceration. The provisions of subdivision (g) apply to “all felony convictions on or after July 1, 2026.”

AUTHORITIES

INTERPRETED: Rules 1.4, 1.15, 1.16, and 3.8 of the Rules of Professional Conduct of the State Bar of California.³

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

Penal Code section 1054.9.

STATEMENT OF FACTS

Lawyer A, a solo practitioner planning to retire in a few years, wishes to dispose of hundreds of boxes of closed client files, some dating back decades. Each box is indexed, including the client-matter information and general descriptions (e.g., pleadings, discovery, transcripts, estate planning documents). Lawyer A has no agreement governing file retention, but, given the age of the files, Lawyer A reasonably believes former clients would not be prejudiced by their destruction. Lawyer A plans to send all of the boxes, without prior review, to a data management company for secure destruction.

Lawyer B, also a solo practitioner, handles criminal matters ranging from serious felonies to misdemeanors and is transitioning to a paperless practice. For closed felony cases, Lawyer B plans to digitize the files before having them securely destroyed. For closed misdemeanor cases and matters where the client was arrested but not charged or tried, Lawyer B plans to destroy the files without making digital copies.

DISCUSSION

A. Background

Client file retention and disposal can be challenging for California lawyers due in large part to the absence of clear rules. The rules and the State Bar Act do not specify how long a lawyer must retain a client's file or how client files may be destroyed. However, ethics opinions generally agree that, absent an agreement or other legal requirement, closed civil files may be destroyed after the lawyer makes reasonable efforts to notify the client of their intended destruction.⁴

On the other hand, client files in closed criminal matters raise unique considerations, including the criminal defendant's liberty interests and the possibility of changes in the law, new grounds for appeal, and 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;

³ Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

⁴ See Los Angeles County Bar Ass'n Professional Responsibility and Ethics Committee 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 Ass'n 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).

Los Angeles County Bar Ass'n Professional Responsibility and Ethics Committee Opn. Nos. 420 (1983) & 475 (1994).)

Lawyers should also take care to comply with other applicable laws that may impose additional retention obligations. For example, recent amendments to California Penal Code section 1054.9 concern a criminal defendant's access to post-conviction discovery in cases where the defendant is convicted of a felony and incarcerated in the Department of Corrections and Rehabilitation. (Pen. Code, § 1054.9, subd. (g).) While counsel may retain an electronic copy, it is only sufficient if it is in color. (*Id.*)

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 Neither amendment, however, specifies the retention period nor addresses disposal of client files in closed criminal matters.

This committee last addressed a lawyer's ethical obligations regarding file retention and disposal in its 2001 opinion, prior to the effective date of the current rules and amended Penal Code section 1054.9. Given these changes, as well as great advances made in digital file storage since 2001, this opinion revisits a lawyer's file retention and disposal duties where there is no existing agreement regarding retention and disposal.⁶

⁵ These amendments resulted from the legislature's request, in connection with its enactment of the amendment to Pen. Code, § 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.

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 Ass'n Professional Responsibility and Ethics Committee Opn. No. 475 (1994) (file retention recommendations stated in the opinion apply unless there is a contrary agreement with the client). Sample fee agreement provisions concerning file retention and disposal are provided on the State Bar website. (See Sample Fee Agreements forms and instructions, available at: <https://www.calbar.ca.gov/form/mandatory-fee-arbitration> (last visited May 4, 2026).

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 Bar Ass'n of San Francisco 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*.)

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, experts’ reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not[.]

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.) A client file generally includes items necessary to avoid “reasonably foreseeable prejudice” to the rights of the client. (See rule 1.16(d); Bar Ass’n 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:

- **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.

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 County Bar Ass’n Formal Opn. No. 1997-1 (lawyer may not withhold work product “reasonably necessary” to client’s representation); Bar Ass’n 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 County Bar Ass’n Formal Opn. No. 1997-1;

- **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 to the client would arise from destruction of the items. (*Id.*; see also Bar Ass’n of San Francisco Formal Opn. No. 1996-1.) These obligations cannot be measured by a fixed retention period. (Cal. State Bar Formal Opn. No. 2001-157; Bar Ass’n 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 and may not 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

Cal. State Bar Formal Opn. No. 2001-157; cf. *In re Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 855 (a 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, italics added.)

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. (*In re Ramirez* (Bankr. 9th Cir. 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 Ass’n Professional Responsibility and Ethics Committee Opn. No. 475 (1994) (recommending five-year retention period for client files “by analogy” to former rule 4-100(B)(3) (now rule 1.15(d)(5)); Cal. State Bar Formal Opn. No. 2001-157 (5-year retention rule not intended to address client file retention obligation); Bar Ass’n of San Francisco Formal Opn. No. 1996-1 (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 Prob. Code, §§ 700–735, which provide, *inter alia*, that the deposit may be terminated only as permitted by Prob. Code, §§ 731–735.

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 Civ. Proc., §§ 1500 et seq., Los Angeles County Bar Ass’n Professional Responsibility and Ethics Committee Opn. No. 475 (1994) 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.” 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 Ass’n Professional Responsibility and Ethics Committee 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 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 prejudice the former client, the item should be electronically preserved 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

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 Ass’n Professional Responsibility and Ethics Committee Opn. No. 475 (1994).) In light of these interests, California ethics opinions have consistently concluded that absent an agreement to the contrary, client files relating to criminal matters must be retained *for the life of the client*.¹¹ (See e.g., Cal. State Bar Formal Opn. No.

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

2001-157; Los Angeles County Bar Ass'n Professional Responsibility and Ethics Committee Opn. No. 420 (1983); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Committee Opn. No. 475 (1994).) This committee agrees with these opinions. Because a lawyer "cannot foresee the future utility of information contained in the file" after the representation ends, a lawyer should not destroy a file relating to a criminal matter without the client's consent.

This is consistent with Penal Code section 1054.9, which addresses a defendant's post-conviction discovery rights, and provides that in cases involving a felony conviction resulting in incarceration in Department of Corrections and Rehabilitation, trial counsel must retain a copy of the client's files for "the term of that 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 in color and preserved." (*Id.*, italics added.)¹³

The committee is aware of no specific Rule of Professional Conduct or ethics opinion directly addressing a prosecutor's duty to preserve their files or other relevant evidence. However, prosecutors have a responsibility to see that justice is done and owe certain constitutional and statutory duties with respect to evidence in criminal proceedings. (See rule 3.8.)¹⁴

For example, 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 that the same defendant would have been entitled at time of trial or materials that tend to negate guilt, mitigate the offense, mitigate

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.

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 Pen. Code, § 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.

the sentence, or otherwise are favorable or exculpatory to the defendant. “Discovery materials” includes all materials that the convicted person would be entitled to if they were being tried today, irrespective of whether the materials were discoverable at the time of the convicted person’s original trial. “Discovery materials” includes the prosecution’s jury selection notes.” (Penal Code, § 1054.9, subds. (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).)

E. Duties Relating to Disposal of Closed Client Files

The rules and the State Bar Act are also silent on the destruction of closed client files. Regardless, before disposing of any item in a closed client file, a lawyer must take certain precautions to prevent any reasonably foreseeable prejudice to the former client.

Before disposing of any item in a closed civil file, absent an agreement to the contrary, a lawyer must make 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.¹⁵ (Cal. State Bar Formal Opn. No. 2001-157; see also rule 1.4 and Los Angeles County Bar Ass’n Professional Responsibility and Ethics Committee Opn. No. 491 (1997).) 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. (See Los Angeles County Bar Ass’n Professional Responsibility and Ethics Committee Opn. No. 475 (1994); Cal. State Bar Formal Opn. No. 2001-157; see also ABA Informal Opn. No. 1384 (1977).)

If the lawyer is without personal knowledge of the contents of the file, the lawyer should consider examining the file to determine whether it includes any items that must be retained (as described above) or might result in reasonably foreseeable prejudice to the client if destroyed.¹⁶ In order to make a determination about whether a particular document may be destroyed, the lawyer should consider,

¹⁵ 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 Ass’n Professional Responsibility and Ethics Committee Opn. No. 491 (1997).) 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. (See rule 1.16, Cmt. [6]; see Cal. State Bar Formal Opn. No. 2007-174, fn. 3 (interpreting former rule 3-700(D).)

¹⁶ 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 (italics 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.

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 Ass'n Professional Responsibility and Ethics Committee Opn. No. 420 (1983); Cal. State Bar Formal Opn. No. 2001-157.)

As discussed above, in criminal matters involving a conviction for a felony that results in incarceration in the Department of Corrections and Rehabilitation, trial counsel must retain a copy of the former client's files for the term of the former client's imprisonment. Thus, the files in such cases cannot be destroyed under any circumstances—even if authorized by the former client—during the client's imprisonment. (Pen. Code, § 1054.9, subd. (g).) The file may be maintained in electronic form “only if every item in the file is digitally copied in color and preserved.”¹⁷ (*Id.*)

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, other jurisdictions have concluded that “shredding, incinerating or employing a commercial service that guarantees confidential disposal of documents would be sufficient.” (See D.C. Bar Formal Opn. No. 283 (1998), fn. 14.)

F. Analysis of Facts

Lawyer A should not dispose of the closed client files without reviewing the contents. The facts indicate that, as a solo practitioner, 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 clients would be prejudiced by the destruction of the files, 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 (2001); Civ. Code, §§ 1813–1847.) Unless the deposit is terminated as permitted by the governing statute, the lawyer remains responsible for the

¹⁷ In light of this requirement, for lawyers wishing to go paperless, 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).

safekeeping of the items at all times until they are returned to the client. Thus, Lawyer A may not destroy original papers and property 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 and Los Angeles County Bar Ass'n Professional Responsibility and Ethics Committee Opn. No. 491 (1997).) 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.

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 felony and sentenced to time in Department of Corrections and Rehabilitation. 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, in color, 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

In determining a lawyer's obligations with respect to retaining or disposing of a client file, the lawyer should be guided by what is reasonably necessary to the client's representation, and the duty to avoid reasonably foreseeable prejudice to the client. Absent a contrary agreement, obligations as to original papers and property are generally determined by the law of bailments or deposit, and materials of intrinsic value may not be destroyed without the client's consent unless those items can be electronically maintained without prejudicing the client.

Criminal matter files require special caution to ensure that no portion of the file is destroyed prematurely or improperly, and the file should be retained, in some form, for the life of the client. These files, however, may be electronically retained unless otherwise required by law or the nature of the item (i.e., physical evidence).