The State Bar
of California

OPEN SESSION
AGENDA ITEM
SEPTEMBER 2019
REGULATION AND DISCIPLINE COMMITTEE III.C

DATE: **September 19, 2019**

TO: **Members, Regulation and Discipline Committee**

FROM: **Andrew Tuft, Supervising Attorney, Office of Professional Competence**

SUBJECT: **Ethical Duties to Retain and Release Closed-Client Files in Certain Criminal Matters – Report, Recommendations and Request to Circulate for Public Comment**

EXECUTIVE SUMMARY

On September 18, 2018, Assembly Bill 1987 was signed into law. The bill expands a defendant's right to access post-conviction discovery materials to cases where the defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more. The bill also includes an uncodified section (Section 3) requesting that the State Bar study whether the Rules of Professional Conduct are sufficiently clear regarding "an attorney's duties related to file release and retention upon finality of the case or termination of the attorney-client relationship." This item presents the report and recommendations of the Committee on Professional Responsibility and Conduct on this issue and requests that the Board of Trustees circulate, for a 60-day public comment period, proposed amendments to three Rules of Professional Conduct.

BACKGROUND

Assembly Bill 1987 was signed into law on September 18, 2018.[1] This bill amended California Penal Code section 1054.9 by expanding the right to access post-conviction discovery materials to include cases where the defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more.[2] The bill also added an obligation on trial counsel in such matters to retain a copy of a former client's files for the term of the client's imprisonment.

[1] A copy of Assembly Bill 1987 is provided as Attachment A to this memorandum.
[2] Previously, the right to access post-conviction discovery materials was available in cases in which a sentence of death or life in prison without the possibility of parole had been imposed.

Assembly Bill 1987 contains an uncodified Section 3 that requested the State Bar to "study the issue of closed-client file release and retention by defense attorneys and prosecutors in criminal cases." Section 3 further states that if such a study is undertaken, the State Bar is directed to ascertain whether the recently revised California Rules of Professional Conduct, which became effective on November 1, 2018, are sufficiently clear as to "an attorney's duties related to file release and retention upon finality of the case or termination of the attorney-client relationship." This section also provides that if the rules are found to be insufficiently clear with respect to post-conviction discovery, then the State Bar shall consider: (1) whether a clarifying advisory ethics opinion should be issued; and, (2) whether a new or amended Rule of Professional Conduct should be proposed to address the deficiency.

On February 20, 2019, the co-chairs of the Regulation and Discipline Committee (RAD) assigned to the Committee on Professional Responsibility and Conduct (COPRAC or the Committee) the tasks of studying the issue of closed-client file release and retention duties of defense attorneys and prosecutors in criminal cases and providing a recommendation regarding what action, if any, should be taken to address this issue.

DISCUSSION

ASSEMBLY BILL 1987, SECTION 3

Section 3 of Assembly Bill 1987 reads as follows:

> 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 became 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 Rules of Professional Conduct for submission to the Supreme Court of California for the Supreme Court's consideration and possible approval.

CONSIDERATION BY COPRAC

On June 7, 2019, and July 26, 2019, the Committee met to discuss the issue of closed client file release and retention by defense attorneys and prosecutors in criminal cases. At the July 26

meeting, the Committee approved a final report and recommendation, in memorandum form, which is provided as Attachment B.

The Committee considered the following three questions when studying the issue as set forth in the bill: (1) are the rules sufficiently clear on this subject matter; (2) should the Committee issue an advisory ethics opinion on this subject matter; and (3) should the State Bar propose new or amended rules of professional conduct to address this subject matter?

1. Are the Rules Sufficiently Clear on this Subject Matter?

The Committee determined that the Rules of Professional Conduct do not provide extensive practice guidance on file release and retention and none of the rules specifically address post-conviction discovery. In the attached report, the Committee highlights the Rules of Professional Conduct which may apply generally in the context of post-conviction discovery. For example, the following rules would govern an attorney's conduct in this situation, depending on the facts and circumstances: rule 1.1 (Competence); rule 1.3 (Diligence); rule 1.9 (Duties to Former Clients); and rule 1.16 (Declining or Terminating Representation).

With respect to closed-client file release and retention duties of a prosecutor, rule 3.8 (Special Responsibilities of a Prosecutor) governs the ethical obligations of a prosecutor. Paragraph (f) of this rule states that prosecutors have 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." However, this rule does not have a provision addressing a prosecutor's duty with respect to closed-client file release and retention.

The Committee concluded that the current rules do not provide specific guidance with respect to file release or retention duties in the context of criminal matters. Moreover, the rules do not contain any reference to an attorney's duty in the context of post-conviction discovery.

2. Should the Committee Issue an Advisory Ethics Opinion on this Subject Matter?

In 2001, COPRAC published California State Bar Formal Opinion 2001-157 which addresses an attorney's ethical obligations regarding the retention of a former client's files. This opinion analyzes an attorney's duty concerning file preservation in both criminal and civil matters. With respect to criminal matters, this opinion is clear:

> Recent adoption of measures such as California's "Three Strikes" law (Proposition 184 of 1994, codified as Penal Code section 1170.12) could make a client file in a matter resulting a prior conviction more important than ever. The Committee concludes that client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive.

(Cal. Formal Ethics Opn. 2001-157, p. 5.)

This opinion, and another like it,[3] provides helpful guidance to attorneys concerning their duties to retain client files in criminal matters. However, these opinions do not expressly address the obligations owed by a prosecutor and the general topic has not been addressed in an ethics opinion in 18 years. As a result, the Committee has determined that an updated and expanded ethics opinion on this would be appropriate, including the obligations of a prosecutor. The opinion would not be limited to the specific context set forth in Penal Code section 1054.9, but would attempt to address an attorney's obligations with respect to closed-client file release and retention in both criminal and civil matters. The Committee will begin the development of an updated and expanded ethics opinion on this topic. However, final publication of this opinion will likely follow any Supreme Court action concerning the proposed amendments to the Rules of Professional Conduct as the ethics opinion is expected to cite to those rules as authority for the Committee's analysis.

3. Should the State Bar Propose New or Amended Rules of Professional Conduct to Address this Subject Matter?

As noted above, there is no Rule of Professional Conduct that directly addresses a defense attorney's or a prosecutor's obligation with respect to post-conviction discovery. Most of the rules that do exist apply more directly to the conduct of a defense attorney, which include duties to former clients, and obligations owed at the time of termination of the representation. Other than the duty of competence, these rules do not appear to apply to a prosecutor.

On the other hand, the Penal Code does impose specific preservation duties upon prosecutors in certain circumstances. For example, Penal Code sections 1417.1-1417.8 address trial exhibits. The statutory preservation period is short, but the defendant is entitled to at least 15 days' notice prior to the destruction of certain exhibits, and is offered an opportunity to make a copy of the exhibit at his or her own expense. Penal Code section 1417.9 addresses biological evidence, which requires "the appropriate governmental entity" to retain such objects or materials for the term of the defendant's incarceration. Earlier destruction is permitted following notice to the defendant under certain circumstances.

In addition to these statutes, prosecutors are obligated to comply with post-conviction orders to preserve evidence subject to protection under Penal Code section 1054.9. For example, in *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, the California Supreme Court considered whether the superior court had jurisdiction to grant a motion to preserve evidence in anticipation of a future post-conviction discovery hearing under Penal Code section 1054.9. In this case, the Court stated that the superior court, which has jurisdiction under section 1054.9 "to grant condemned inmates' motions for postconviction discovery, [has] the inherent

[3] See also, Los Angeles County Bar Association Professional Responsibility and Ethics Committee Formal Opinion No. 420 (1983) ("Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. The Committee concludes, therefore, that it is incumbent on the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative.")

power to protect that jurisdiction by entertaining motions for preservation of evidence that will ultimately be subject to discovery under that statute when the movant is appointed habeas corpus counsel." (*Id*. at p. 533.) As a result, "because the superior court has jurisdiction under Penal Code section 1054.9 to grant postconviction discovery to the extent consistent with the statute, the court has the inherent power under Code of Civil Procedure section 187 to order preservation of evidence that would potentially be subject to such discovery." (*Id*. at p. 534.)

To bring these important legal obligations to the attention of attorneys in California, the Committee recommends amending the Comments to three existing Rules of Professional Conduct. The Comments are the appropriate part of the rules for clarifying existing duties and for cross-referencing relevant statutory requirements. A new standalone rule is not recommended, in part because this attorney conduct issue is fact dependent and the legal obligations are subject to court control as courts retain the authority to issue orders in a particular matter regarding post-conviction discovery file release and retention obligations. In addition, there is the potential for future statutory changes.

PROPOSED RECOMMENDATIONS

In order to address these important ethical and legal obligations in the California Rules of Professional Conduct, the Committee recommends the following amendments to the existing rules (the full text of the rules and comments are provided in Attachments C, D, and E):

1. Amend Comment [5] to rule 1.16 (Declining or Terminating Representation) as reflected below in bold underline. The Committee believes Comment [5] to rule 1.16 is appropriate for such a modification because this rule deals with the issue of an attorney's duties at the end of the legal representation. Comment [5] currently references other Penal Code provisions that may prohibit a lawyer from releasing client materials in certain circumstances:

   "[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) **A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)**"

2. Amend Comment [7] to rule 3.8 (Special Responsibilities of a Prosecutor) as reflected below in bold underline. The Committee believes Comment [7] to rule 3.8 is appropriate for such a modification because this rule addresses the responsibilities of a prosecutor. Comment [7] currently addresses a prosecutor's obligation to disclose certain evidence that creates a reasonable likelihood that a person convicted of a crime did not commit that crime. Citing to Penal Code statutes that require a prosecutor to preserve certain types of evidence, as well as case law requiring a prosecutor to comply with file preservation orders, will help ensure prosecutors are aware of these important obligations that serve a similar purpose:

"[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) **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].)**

3. Amend Comment [3] to rule 1.4 (Communication with Clients) as reflected below in bold underline. Rule 1.4(a)(3) requires a lawyer to promptly comply with a current client's reasonable request for copies of significant documents when necessary to keep the client informed about significant developments relating to the representation. However, rule 1.4(c) permits the lawyer to delay transmission of information to a client if the lawyer believes the client would react in a way that may cause harm to the client or third persons. Comment [3] emphasizes that the ability to delay transmission only applies during the representation and does not change the obligations a lawyer owes at the time of termination under rule 1.16(e)(1). The Committee recommends amending this Comment by adding a cross-reference to Comment [5] of rule 1.16 which currently addresses the obligation of criminal lawyers to refrain from releasing certain information in certain circumstances (see, Pen. Code §§ 1054.2 and 1054.10) and, with the amendment suggested above, will also address an attorney's obligation to retain a copy of a former client's file in certain circumstances. This recommendation is made in order to help ensure lawyers are aware of these duties:

   "[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1)**; see also, Comment [5] to rule 1.16**.)"

4. The Committee also believes developing an updated and expanded ethics opinion on this subject is appropriate. The Committee notes that the prior opinion is now 18 years

old and only addresses the duties of criminal defense attorneys. In fact, at its meeting on July 26, 2019, the Committee agreed to begin the process of developing a comprehensive opinion on the topic of client file release and retention duties.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Rules of Professional Conduct, Comment [5] to rule 1.16 (Declining or Terminating Representation); Comment [7] to rule 3.8 (Special Responsibilities of a Prosecutor); and Comment [3] to rule 1.4 (Communication with Clients).

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: None - core business operations

RECOMMENDATIONS

It is recommended that the Regulation and Discipline Committee approve the following resolution:

RESOLVED, that the Regulation and Discipline Committee receive and file the report and recommendation submitted by the Committee on Professional Responsibility and Conduct as set forth in Attachment B; and it is

FURTHER RESOLVED, that staff is authorized to make available, for a public comment period of 60-days, amendments to Comment [5] of rule 1.16, Comment [7] of rule 3.8, and Comment [3] of rule 1.4 of the Rules of Professional Conduct of the State Bar of California as set forth in Attachments C, D, and E; and it is

FURTHER RESOLVED, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of any proposed amended Rule of Professional Conduct.

ATTACHMENT(S) LIST

A. Assembly Bill 1987

B. Report and Recommendation in Response to Assembly Bill 1987, Section 3

C. Proposed Revisions to Rule 1.16 (clean and redline)

D. Proposed Revisions to Rule 3.8 (clean and redline)

E. Proposed Revisions to Rule 1.4 (clean and redline)

ATTACHMENT A

Assembly Bill No. 1987

CHAPTER 482

An act to amend Section 1054.9 of the Penal Code, relating to discovery.

[Approved by Governor September 18, 2018. Filed with
Secretary of State September 18, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1987, Lackey. Discovery: postconviction.

(1) Existing law requires, in a case in which a sentence of death or life in prison without the possibility of parole has been imposed, a court to order that a defendant be provided reasonable access to discovery materials upon prosecution of a postconviction writ of habeas corpus or a motion to vacate judgment and a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful. Existing law defines "discovery materials" for these purposes as materials in the possession of the prosecuting and law enforcement authorities to which the defendant would have been entitled at time of trial.

This bill would expand this right of access to discovery materials to any case in which a defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more. By authorizing the court to require local agencies to provide access to physical evidence under certain circumstances, this bill would impose a state-mandated local program.

The bill would, in a case in which a sentence other than death or life in prison without the possibility of parole has been imposed, if a court has entered a previous order granting discovery pursuant to the above provision, authorize a subsequent order granting discovery to be made in the court's discretion. The bill would require a subsequent request for discovery to include a statement by the person requesting discovery as to whether he or she has previously been granted an order for discovery.

This bill would, in cases involving a conviction resulting in a sentence of 15 years or more for a serious or violent felony, require trial counsel to retain a copy of his or her client's files for the term of his or her imprisonment.

The bill would also request the State Bar to study the issue of closed-client file release and retention by defense attorneys and prosecutors in criminal cases, as specified.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that post-conviction discovery promotes the fair administration of justice in seeking to assure that innocent persons do not remain unjustly incarcerated and that the availability and integrity of a client's file in such cases are necessary to the accomplishment of this important public protection objective.

SEC. 2. Section 1054.9 of the Penal Code is amended to read:

1054.9. (a) In a case involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (b) or (d), order that the defendant be provided reasonable access to any of the materials described in subdivision (c).

(b) Notwithstanding subdivision (a), in a case in which a sentence other than death or life in prison without the possibility of parole has been imposed, if a court has entered a previous order granting discovery pursuant to this section, a subsequent order granting discovery pursuant to subdivision (a) may be made in the court's discretion. A request for discovery subject to this subdivision shall include a statement by the person requesting discovery as to whether he or she has previously been granted an order for discovery pursuant to this section.

(c) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.

(d) In response to a writ or motion satisfying the conditions in subdivision (a), the court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical

evidence for purposes of postconviction DNA testing are provided in Section 1405, and this section does not provide an alternative means of access to physical evidence for those purposes.

(e) The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant.

(f) This section does not require the retention of any discovery materials not otherwise required by law or court order.

(g) In criminal matters involving a conviction for a serious or a violent felony resulting in a sentence of 15 years or more, trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment. An electronic copy is sufficient only if every item in the file is digitally copied and preserved.

(h) As used in this section, a "serious felony" is a conviction of a felony enumerated in subdivision (c) of Section 1192.7.

(i) As used in this section, a "violent felony" is a conviction of a felony enumerated in subdivision (c) of Section 667.5.

(j) The changes made to this section by the act that added this subdivision are intended to only apply prospectively.

SEC. 3. 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.

SEC. 4. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

The State Bar
of California

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

Date: July 26, 2019

To: State Bar Board of Trustees

From: Committee on Professional Responsibility and Conduct

Subject: Report and Recommendation in Response to Assembly Bill 1987, Section 3; Ethical Duties to Retain and Release Closed-Client Files in Certain Criminal Matters

BACKGROUND

Assembly Bill 1987 was signed into law on September 18, 2018. This bill amended section 1054.9 of the California Penal Code by expanding the right to access post-conviction discovery materials in cases where the defendant is convicted of a serious or violent felony resulting in a sentence of 15 years or more. It also imposed a file retention obligation on trial counsel in such matters.

Section 3 of the law directs the State Bar of California to ascertain whether the recently revised California Rules of Professional Conduct, which became effective November 1, 2018, are sufficiently clear as to "an attorney's duties related to file release and retention upon finality of the case or termination of the attorney-client relationship." This Section also provides that if the rules are found to be insufficiently clear on this subject, then the State Bar is directed to consider: (1) whether a clarifying advisory ethics opinion should be issued and (2) whether new or amended rules should be proposed to address the deficiency.

On Wednesday, February 20, 2019, the Co-Chairs of the State Bar of California's Regulation and Discipline Committee assigned to the Committee on Professional Responsibility and Conduct (COPRAC) the task of studying the issue of closed-client file release and retention by defense attorneys and prosecutors in criminal cases and providing a recommendation regarding what action should be taken to address this issue.

SUMMARY OF RECOMMENDATIONS

- Because the rules contain no specific directive with respect to how long client files in criminal matters must be retained, we propose that rule 1.16 (Declining or Terminating Representation) be amended by adding a sentence to Comment [5] directing defense

attorneys to be aware of the file retention duties contained in Penal Code section 1054.9.

- With respect to prosecutors, the rules do not refer to any special duties of file preservation. We recommend adding a Comment to rule 3.8 (Special Duties of a Prosecutor) referencing the existing statutory obligations with regards to the disposition of evidence in criminal cases as well as the prosecutor's duty to comply with preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions.

- Although our committee opined in an ethics opinion published in 2001 (Cal. Formal Ethics Opn. No. 2001-157) that criminal defense files, absent client consent, must be retained throughout the client's life, we believe an updated and expanded opinion would be useful for both civil and criminal defense matters.

ASSEMBLY BILL 1987

The preamble to this bill reads:

> The Legislature finds and declares that post-conviction discovery promotes the fair administration of justice in seeking to assure that innocent persons do not remain unjustly incarcerated and that the availability and integrity of a client's file in such cases are necessary to the accomplishment of this important public protection objective.

Assembly Bill 1987, Chapter 482.

The new law, codified at Penal Code section 1054.9, provides, pertinent to our discussion:

- Courts shall issue orders allowing defendants who have been convicted of a serious or violent felony resulting in a sentence of 15 years or more reasonable access to "discovery materials" to assist in postconviction habeas corpus proceedings or motions to vacate the judgment. "Discovery materials" is defined as materials in the possession of the prosecution and law enforcement authorities to which the defendant would have been entitled at the time of trial. Pen. Code § 1054.9(a) and (c). However, this section "does not require the retention of any discovery materials not otherwise required by law or court order." Pen. Code § 1054.9(f).

- Where such sentences have been imposed "trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment." Pen. Code § 1054.9(g). The specific directive to the State Bar, found in Section 3 of Assembly Bill 1987, reads:

> "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."

CONSIDERATION BY THE COMMITTEE

1. ARE THE RULES SUFFICIENTLY CLEAR ON THIS SUBJECT MATTER?

The rules do not have extensive provisions relating to file retention or release obligations, and none of them are directly on point. The following provisions in the rules are of some relevance:

- Rules 1.1, "Competence," and 1.3, "Diligence": These rules state the general duty of competence and diligence but, literally, they apply only during the time the lawyer represents the client.

- Rule 1.9, "Duties to Former Clients": This rule is generally intended to protect against subsequent conflicts of interest and the use or disclosure of confidential material adverse to the client's interests but there are no specific file preservation duties stated here. Comment [1] does, however provide that the lawyer has a continuing duty not to do anything that will be injurious to the former client in any matter in which the lawyer represented that client. Logically, failing to retain the relevant portions of the criminal defendant's file in these circumstances would be injurious to the client's interests; but, again, the rule is generalized and not specific to file preservation obligations.

- Rule 1.16, "Declining or Terminating Representation": Subsection (e)(1) of this rule requires the attorney, upon termination of representation, to promptly release "client materials and property" at the request of the client. But it imposes no file preservation duty. It contains no specific directive as to how long client files must be retained if the client has neither requested them nor given permission for them to be destroyed.

  This subsection defines "client materials and property" to "include correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not…."

Further, as to the attorney's duty to release files to present or former clients:

- Rule 1.1, "Competence": An attorney who refuses to turn over pertinent and useful file documents to an existing client probably has violated the basic duty of competence. However, again, this rule only applies to existing clients.

- Rule 1.9, "Duties to Former Clients": Comment [1] makes it clear that an attorney owes a duty to the former client not to do anything that will injuriously affect the client in any matter in which the attorney represented the former client. Without question refusing to turn over needed parts of the criminal file injures the former client.

- Rule 1.16, "Declining or Terminating Representation": As discussed above, this rule states a clear obligation to turn over client property and materials. In addition, this rule states that a lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. Failing to preserve a criminal file, or ensure its careful transfer to successor counsel could result in a lawyer violating this duty.

There is one relatively broad rule dealing with certain ethical duties specifically related to prosecutors. Rule 3.8(f) states prosecutors have 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." However, the rule has no provisions specifically mandating that any portions of the file be retained.

Standing alone, these general rules do not provide specific guidance as to file retention or preservation specifically in the context of criminal matters and therefore are not sufficiently clear with regards to the specific context of post-conviction discovery.

2. SHOULD THE STATE BAR ISSUE AN ADVISORY ETHICS OPINION ON THIS SUBJECT MATTER?

Eighteen years ago, our committee published Formal Opinion No. 2001-157, which does deal with file preservation duties in both criminal and civil matters. This opinion states a clear obligation with respect to criminal matters:

> "Recent adoption of measures such as California's "Three Strikes" law (Proposition 184 of 1994, codified as Penal Code section 1170.12) could make a client file in a matter resulting a prior conviction more important than ever. The Committee concludes that client files in criminal matters should not be destroyed without the former client's express consent while the former client is alive." (Page 5).

This opinion cited an opinion from the Los Angeles County Bar Association's ethics committee to the same effect, which read in part:

> "Files relating to criminal matters may well have future vitality even after judgment, sentence and statutory appeals have concluded. In criminal matters, the attorney cannot foresee the future utility of information contained in the file. The Committee concludes, therefore, that it is incumbent on the attorney in a criminal matter to obtain some specific written instruction from the client authorizing the destruction of the file. Absent such written instruction, the attorney should not undertake the destruction of client files on the attorney's initiative."

Formal Opinion No. 420 (1983) of the Los Angeles County Bar Association Committee on Legal Ethics.

Existing ethics opinions provide useful guidance regarding a criminal defense attorney's obligation to retain client files in criminal matters. However, that discussion is limited to the obligations owed by criminal defense attorneys and the topic has not been addressed in 18 years. Accordingly, an updated and more comprehensive advisory ethics opinion is probably warranted.

3. SHOULD THE STATE BAR PROPOSE NEW OR AMENDED RULES ADDRESSING THIS SUBJECT MATTER?

As noted, there is no Rule of Professional Conduct or existing ethics opinion that directly addresses a prosecutor's duty to preserve their own files or other relevant evidence. Most of the rules relevant to the conduct of a defense attorney including those relating to former clients and termination of representation—have no application to a prosecutor's office.

On the other hand, prosecutors must abide by their duty of competence. It appears that the working assumption has been that in cases where post-conviction litigation can be anticipated the prosecutor's competence-based obligation to their public client provides sufficient assurance that the prosecutor will preserve files and records, both to defend those proceedings effectively and to be able to conduct a new trial if one is granted.

The Penal Code does impose certain direct preservation obligations that prosecutors must honor. Penal Code sections 1417.1-1417.8 deal with trial exhibits. The statutory preservation is short, but a defendant is entitled to notice and to copy exhibits before they are destroyed. Penal Code section 1417.9 deals with biological evidence, requiring its preservation for the length of the term of the imprisonment. Earlier destruction is permitted on notice to the defendant, under certain circumstances.

These provisions do not cover non-biological materials that were not introduced at trial—though those materials would appear to be at the center of many post trial inquiries.

Retention policies for many of these records are set locally pursuant to guidelines promulgated under Government Code section 12236. Under Penal Code section 1054.9, those materials are subject to post conviction discovery if the matter concerns a serious or violent felony with a sentence of 15 years or more. But the prosecutors appear to have no general legal obligation to preserve such materials, other than pursuant to the local record-keeping policy, unless a lawyer

for a convicted defendant files a request for a preservation order pending the defendant's appeal and the possible commencement of a habeas proceeding. *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 209.

From a defendant or public regarding point of view, the potential holes in this system are: (1) the preservation of court records and biological materials may depend on the effectiveness of notice and the ability of defendants to respond; (2) with respect to 15 year violent felonies, the preservation of non-biological materials not introduced at trial depends on whether the defendant has the knowledge and resources to seek a preservation order with respect thereto; and (3) with respect to less serious felonies and misdemeanors, there is no statewide uniform obligation to retain non-biological materials not introduced at trial. The Committee is aware that many post-conviction attorneys believe that these gaps are both substantial and harmful. The Committee does not, however, have sufficient information to form a definitive view on the matter.

RECOMMENDATIONS

Assembly Bill 1987 stated a strong public policy supporting preservation of attorney legal files in certain criminal matters. The new Penal Code section 1054.9 imposes a legal duty on at least defense attorneys to preserve and make available criminal files to their clients in such matters. In our previous opinion we clearly stated that criminal attorneys have long-term ethical duty to preserve criminal files.

None of these important ethical and legal obligations are clearly stated in the new rules. We believe this can be accomplished by a slight change to rule 1.16, which would be the appropriate locus of such a modification because it deals with the question of attorney duties at end of the legal representation. This site selection makes even more sense because this rule in its Comment presently has a call-out to attorneys to be aware of other provisions of the Penal Code.

We propose therefore to amend rule 1.16, which addresses "Declining or Terminating Representation," to add one sentence to Comment [5], as shown in bold underlined:

> [5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) **A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See Pen. Code, § 1054.9.)**

We also recommend adding a cross-reference to rule 1.16, Comment [5] in Comment [3] to rule 1.4 which addresses "Communication with Clients." Rule 1.4(a)(3) requires an attorney to comply promptly with a *current* client's reasonable request for copies of significant documents necessary to keep the client informed. However, rule 1.4(c) allows an attorney to delay transmission of information if he or she reasonably believes the client would react in a way that may cause harm. Comment [3] underscores that this ability to delay only applies to current representations and does not alter the obligations under rule 1.16(e)(1) to release all client materials and property at the termination of representation. Because an attorney is likely to

consult the communication rule when determining his or her obligation to provide copies of the file to a current client, and because rule 1.4, Comment [3] already references an attorney's obligations with respect to releasing a client's file upon termination of the representation, we recommend amending Comment [3] to rule 1.4, as shown in bold underlined, in order to help ensure attorneys are aware of their obligation to refrain from releasing certain information in certain circumstances (Pen. Code §§ 1054.2 and 1054.10) and to retain a copy of a former client's file in certain circumstances even after it has been released (Pen. Code § 1054.9):

> [3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1)**; see also, Comment [5] to rule 1.16.)**

For similar reasons as those stated above, we recommend that the following sentence be added at the end of Comment [7] to rule 3.8, which addresses "Special Responsibilities of a Prosecutor," as shown in bold underlined:

> [7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) **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].)**

We also believe, given the importance of the subject matter, that an updated and expanded ethics opinion on this subject would be useful. The prior opinion is now 18 years old and addresses only the duties of criminal defense attorneys. There also has been ongoing debate over the extent to which attorney work product comes within the definition of "client property materials" and our committee would consider whether to address this subject as well. The opinion would address the duties not only in the specific context of Penal Code section 1054.9 but in all criminal defense and civil matters.

ALTERNATIVES CONSIDERED AND PRO'S AND CON'S

We considered alternatives to the above proposal. They included: (1) introducing no clarification to the rules and no new ethics opinion; and (2) a more comprehensive amendment to the rules.

Arguments in favor of a direct but limited change to the Comments to the Rules of Professional Conduct, include: it is simple, expedient, and should cause no controversy. The message will be clear as it calls direct attention to the new law. It is also consistent with the existing structure of rule 1.16 which makes references to other provisions of the Penal Code and subject matter of rule 3.8 dealing with a prosecutor's duties to disclose evidence pertaining to possible wrongful convictions.

The desirability of a new advisory ethics opinion addressing file preservation and release duties of attorneys seems clear.

Adding a comprehensive amendment to the text of the rules spelling out file preservation obligations in criminal matters is a possible option that was considered. The argument in favor of placing preservation obligations in the text of the rules themselves is that such obligations are a natural extension of the duties already imposed by the rules, particularly those imposed on prosecutors by rule 3.8. The argument against, starts with the proposition that the legislature has already taken significant steps in this area, and that many of the changes that might be taken to improve matters would require changes to existing legislation.

CONCLUSION

For the reasons stated above, we recommend amending Comment [5] to rule 1.16, Comment [3] to rule 1.4, Comment [7] to rule 3.8, and issuing an updated ethics opinion.

ATTACHMENT C

Rule 1.16 Declining or Terminating Representation
(Proposed Rule – Clean Version)

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;*

(2) the lawyer knows* or reasonably should know* that the representation will result in violation of these rules or of the State Bar Act;

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*

(3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*

(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(6) the client knowingly* and freely assents to termination of the representation;

(7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or

(10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(e) Upon the termination of a representation for any reason:

(1) 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; and

(2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's* order. (See Bus. & Prof. Code, §§ 6068, subd. (b) and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)

Rule 1.16 Declining or Terminating Representation
(Proposed Rule – Redline Version to Current Rule)

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;*

(2) the lawyer knows* or reasonably should know* that the representation will result in violation of these rules or of the State Bar Act;

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*

(3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*

(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(6) the client knowingly* and freely assents to termination of the representation;

(7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or

(10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(e) Upon the termination of a representation for any reason:

(1) 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; and

(2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Comment

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or

involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's* order. (See Bus. & Prof. Code, §§ 6068, subd. (b) and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)

ATTACHMENT D

Rule 3.8 Special Responsibilities of a Prosecutor
(Proposed Rule – Clean Version)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and

(e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires

the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) 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].)

[8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Rule 3.8 Special Responsibilities of a Prosecutor
(Proposed Rule – Redline Version to Current Rule)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and

(e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires

the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) 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].)

[8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

ATTACHMENT E

Rule 1.4 Communication with Clients
(Proposed Rule – Clean Version)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1); see also, Comment [5] to rule 1.16.)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

Rule 1.4 Communication with Clients
(Proposed Rule – Redline Version to Current Rule)

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1); see also, Comment [5] to rule 1.16.)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.