

Colo.RPC 1.15 Safekeeping Property

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) - (c) [No Change]

Required Bank Accounts

(d) - (e) [No Change]

Trust Account Requirements and Management; COLTAF Accounts

(f) - (i) [No Change]

Required Accounting Records; Retention of Records; Availability of Records

(j)(1) - (j)(5) [No Change]

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all canceled checks; ~~and,~~

~~(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.~~

(k) [No Change]

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the law firm shall make any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with ~~by one of them or by a successor firm of the records specified in~~ subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(m) [No Change]

Source: [No Change]

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. “Property” generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] - [8] [No Change]

ANNOTATION

[No Change]

Colo.RPC 3.8 Special Responsibilities of a Prosecutor

(a) - (f) [No Change]

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

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

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside 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, ~~and~~ that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action. ~~Precisely how far the prosecutor is required to go in this direction~~ is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which ~~in turn~~ are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] and [3] [No Change]

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] - [6] [No Change]

[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 (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes “within a reasonable time” will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (see C.R.S. §18-1-601 et seq. and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may 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.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor’s reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor’s reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

ANNOTATION

[No Change]

Colo.RPC 1.16A. Client File Retention

Except as provided in a written agreement signed by a client, the lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of representation in the matter, unless the lawyer previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless (1) after such termination, the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. At any time following the expiration of a period of ten years following the termination of representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

COMMENT

[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them. Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally,

lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed by a legal services organization or government agency to represent third parties under circumstances where the third party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] The two-year period under Rule 1.16A begins upon termination of a representation in a matter, even if the lawyer continues to represent the client in other matters. The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year and ten-year periods in the Rule. For example, in a matter resulting in a felony criminal conviction, a lawyer may retain a client's file for longer than the two-year and ten-year periods because of Crim.P. 35(c) considerations. The Rule does not supersede obligations imposed by other law, court order or rules of a tribunal. A lawyer may not destroy a file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year retention period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given. The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule 1.16A. Third, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, or if the lawyer has agreed otherwise. If these three preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.