

**ALASKA BAR ASSOCIATION  
ETHICS OPINION 2023-1**

**ISSUE PRESENTED**

What ethical duties does a lawyer have regarding the retention of former clients' files in criminal matters?

**SHORT ANSWER**

Files relating to criminal matters may have future vitality even after judgment, sentence, and statutory appeals have concluded. In criminal matters, lawyers cannot always foresee the future utility of information contained in the file. New technology, newly discovered evidence, and changes to the law can make post-judgment relief appropriate, and a complete copy of the client file may be critical to obtaining that relief.

The Committee concludes that lawyers and legal agencies involved in criminal defense should formulate and adopt client file closing and retention policies that are reasonably related to the likelihood that the file will be relevant in future years. Lawyers should retain a copy of client files in criminal matters for an amount of time commensurate with the potential future need for the file, which in some situations could be indefinitely, and in many situations may be for a substantial period of years. The Alaska Rules of Professional Conduct, however, do not create a hard and fast rule regarding criminal file retention covering all possible scenarios.

**ANALYSIS**

Lawyers have a number of ethical and legal obligations related to client files and property. The applicable Rules of Professional Conduct include:

- Rule 1.1: A lawyer shall provide competent representation.
- Rule 1.3: A lawyer shall act with reasonable diligence and promptness.
- Rule 1.4: A lawyer shall communicate with a client and comply promptly with all of a client’s reasonable requests for information.
- Rule 1.6: A lawyer shall keep a client’s confidences.
- Rule 1.15: A lawyer shall safeguard the property of the client.
- Rule 1.16(d): A lawyer shall, upon termination of representation, take reasonable steps to protect a client’s interests including surrendering all papers and property to which the client is entitled.<sup>1</sup>

The Rules of Professional Conduct do not prescribe a minimum period of time for the retention of client files, nor is a lawyer required to permanently preserve all files of current or former clients.<sup>2</sup> In civil matters, the Committee is advised that Alaska lawyers generally retain client files for seven to ten years—

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<sup>1</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) §46 (“(1) A lawyer must take reasonable steps to safeguard documents in the lawyer’s possession relating to the representation of a client or former client. (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.”). The Committee notes that in addition to obligations under the Rules of Professional Conduct, a lawyer may have file retention obligations arising from contractual obligations, malpractice insurance requirements, or agency policies and practices, among other sources.

<sup>2</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1384 (1977) (applying former Code of Prof’l Responsibility) (“[a] lawyer does not have a general duty to preserve all of [the lawyer’s] files permanently . . . . But clients (and former clients) reasonably expect from their lawyers that valuable and useful information in the lawyers’ files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed, to the client’s detriment. We cannot say there is a specific time during which a lawyer must preserve all files and beyond which [the lawyer] is free to destroy all files.”).

essentially, until the chances for a reopening of the matter have dwindled to a minimum.

Criminal files are different in that they can be the subject of post-conviction relief litigation many years after the matter has been closed. “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.”<sup>3</sup> An application for post-conviction relief, even if resulting in the filing of a certificate of no merit, requires a thorough investigation by the attorney into the applicant’s claims.<sup>4</sup> The court reviewing a post-conviction relief petition needs an adequate record to determine whether the applicant was adequately advised and represented.<sup>5</sup>

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<sup>3</sup> California Bar Formal Ethics Op. No. 2001-157 (2001), quoting Los Angeles Co. Bar Ass’n Committee on Legal Ethics Formal Op. No. 420 (1983). Based on these concerns, the California Bar concluded that “client files in criminal matters should not be destroyed without the former client’s express consent while the former client is alive.” Op. No. 2001-157 at 5.

<sup>4</sup> Criminal Rule 35.1(d)(4) and (f)(2); *see also Belluomini v. State*, 2020 WL 2551859 (Alaska App. May 20, 2020) (“Under Rule 35.1(e)(3), a certificate of no merit must include a full description of the claims the attorney considered, the materials the attorney reviewed, the investigations the attorney conducted, and the reasons why the attorney has concluded that all of the applicant’s potential claims have no arguable merit. With regard to this final requirement, the attorney ‘must provide the court with a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous.’” (quoting *Griffin v. State*, 18 P.3d 71, 74 (Alaska App. 2001))).

<sup>5</sup> *Tazruk v. State*, 67 P.3d 687, 690 (Alaska App. 2003) (“Even if a zealous and competent attorney could not have done anything more to advance Tazruk’s claims, without an actual record indicating that the attorney investigated the claims, ‘sought to adduce support for them through discovery,’ or attempted to ‘reformulate them so that they might survive a motion to dismiss,’ we were unable to perform our constitutional duty in ensuring that Tazruk received zealous and competent representation.”); *Beshaw v. State*, 2012 WL 1368146, at \*6 (Alaska App. Apr. 18, 2012) (noting that without the record of the materials reviewed, the

Relevant evidence may consist of lawyer notes, the presence or absence of discovery materials provided by the prosecution, and evidence related to the lawyer's investigation and thoroughness in preparing the defense.

Post-conviction relief litigation can also be based on evidence related to issues of innocence and guilt. Technological advances and newly discovered evidence or testimony may make the evidence in the client's file material to post-judgment relief years after conviction.<sup>6</sup> The criminal client has the legitimate expectation that counsel will safeguard that information. Alaska has many forms of mandatory minimum and presumptive sentencing schemes, making client files in criminal matters resulting in conviction extremely important to future sentencing exposure, or even the level of charging for future criminal allegations.<sup>7</sup> In addition, time limits for seeking post-conviction relief are long and difficult to determine, which complicates setting a fixed period for file retention.<sup>8</sup>

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court has no basis to meaningfully assess whether the attorney zealously represented the applicant as required by *Griffin*, 18 P.3d at 75-77, and Criminal Rule 35.1(e)(2)).

<sup>6</sup> *Tazruk*, 67 P.3d at 689 n.2 (“[W]hen a defendant seeks post-conviction relief based on newly discovered evidence, . . . the defendant must show that the evidence was not known at the time of the defendant's trial or plea despite the defense team's diligent efforts, and that this new evidence (if presented) probably would have led to the defendant's acquittal.” (citing *Lewis v. State*, 901 P.2d 448, 450 (Alaska App. 1995) and *Gonzales v. State*, 691 P.2d 285, 286-87 (Alaska App. 1984)).

<sup>7</sup> For example, sentences of imprisonment for felonies are premised upon the presumptive sentencing structure set forth at AS 12.55.125. Similarly, in the arena of crimes against the person, the Alaska Legislature has determined that a history of prior misdemeanor assaults can turn what is otherwise future misdemeanor conduct into a felony offense. See AS 11.41.220(a)(5).

<sup>8</sup> The Committee is advised by public defense counsel that a direct appeal to the Court of Appeals can take anywhere from two to six years to be resolved, which can be followed by a petition for review to the Supreme Court, which can

Bar Ethics Committees in other jurisdictions have highlighted that criminal case files “should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer, or the administration of justice.”<sup>9</sup> Alaska’s public criminal defense agencies maintain their felony client files for up to 35 years.<sup>10</sup> The Alaska Department of Law keeps most felony criminal case files and records either for 50 years past the case closing date or permanently,<sup>11</sup> and the

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take an additional six months to several years to resolve. The post-conviction relief deadline is presumptively one year following the end of the direct appeal, but this time limit is subject to legal justifications for tolling or extending the deadline. Post-conviction relief appeals can take as long as direct appeals and may be followed by habeas corpus litigation, or by an ineffective assistance of counsel claim relating to the post-conviction relief or habeas proceeding.

<sup>9</sup> Alabama Bar Ethics Op. 2010-2, “Retention, Storage, Ownership, Production and Destruction of Client Files,” at 7; *see also* California Bar Formal Ethics Op. No. 2001-157 (2001), *supra* note 3 (criminal files should be maintained until the client’s death); Ohio Bd. of Prof’l Conduct, Ohio Ethics Guide Client File Retention (2016) at 3 (“For example, files related to . . . criminal law . . . should be retained until the files no longer serve a useful purpose to the current or former client.”).

<sup>10</sup> State of Alaska Records Retention and Disposition Schedule, Public Defender Agency, at 2 (“If original paper records are scanned, they can be disposed of once the electronic copies have been certified as being a ‘true and correct’ copy of the original. Justification for ‘C+35’ year retention: Cases are often re-opened years after a conviction is entered and the case file is closed. If a felony conviction is appealed, a new appeal case file is opened, but original felony case file must be available. Appeals often take up to 2 years, and sometimes 3-5 years. After an appeal, per the AK Rules of Criminal Procedure, a defendant has up to a year to apply for post-conviction relief. These can be lengthy proceedings, sometimes taking 2 years or more. PDA also needs to retain felony/appeals files if probation and parole revocations proceedings take place - often after a defendant serves a lengthy sentence. Defendants sometimes reoffend and are subject to enhanced sentences based on the original conviction. In all these cases effective representation requires the original case file.”).

<sup>11</sup> State of Alaska Records Retention and Disposition Schedule, Department of Law – Criminal Division (adopted Jan. 16, 2013), <https://archives.alaska.gov/documents/rims/schedules/law/03-679-2.pdf> .

Alaska Court System similarly maintains many criminal case files and records permanently.<sup>12</sup> Advances in electronic record-keeping and electronic file security have greatly lessened the cost and inconvenience for a lawyer to maintain records for long periods of time, although precautions must be taken to assure that the files are secure and kept confidential.<sup>13</sup>

The length of time to retain a file is a matter of sound discretion for the lawyers involved.<sup>14</sup> The Committee recommends that a lawyer consider the severity of the crime, possible consequences to the client from the conviction, the complexity of the matter, the likelihood that post-conviction relief will be sought, and whether the file contains information or evidence that cannot be readily obtained from other sources. The lawyer should consider the cost and means of long-term storage, security of the information, and how retrieval of the information will be possible in the future.<sup>15</sup> The Committee recommends that the

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<sup>12</sup> See Administrative Order No. 25, Appendix B (retention schedule for felony case files), <https://courts.alaska.gov/adbulls/docs/ab25.pdf>; see also AS 40.21.010 et seq. (“Management and Preservation of Public Records”).

<sup>13</sup> The Committee believes that retaining electronic copies is sufficient to meet the lawyer’s obligations, so long as reasonable precautions are taken to assure that the complete file is preserved, that it is secure, and that it can be accessed if necessary. See, e.g., Alabama Bar Ethics Op. 2010-2, *supra* note 9, at 13 (“[D]ocuments that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file.”); Alaska Ethics Op. 2008-1; AS 09.80.090(a).

<sup>14</sup> Alaska Ethics Op. 84-9 at 1 (opining, under now-superseded Disciplinary Rules, that file retention considerations “should be based on a case by case review of files and documents”).

<sup>15</sup> Cf. Nevada State Bar Formal Opinion No. 33 (Feb. 9, 2006) (“[A]n attorney may use an outside agency to store confidential client information in electronic

lawyer notify the client of the lawyer's plan for retaining and destroying the file, offer to provide the client with the file at the time it is closed, and notify the client and afford the client a reasonable period of time to request the file prior to destruction if the lawyer is not keeping the file indefinitely.<sup>16</sup> A lawyer retiring from the practice of law should take appropriate steps to assure that criminal client files are not lost or destroyed after their retirement.

In sum, criminal files are unique in that they are more likely to require future inspection and more likely to be relevant for a longer period of time. Lawyers handling criminal matters therefore must act with special care in thinking through file retention practices. While the Rules of Professional Conduct do not contemplate a specific minimum period of time that all such files must be kept, a lawyer's ethical duties to the client dictate that the lawyer carefully consider criminal file retention issues. The Committee recommends that lawyers

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forms, and on hardware located outside the attorney's direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent.”).

<sup>16</sup> Transfer of closed files to clients is particularly plausible given technological advances allowing lawyers to separately scan and retain closed files in secure electronic settings. We note, however, that there are certain materials defense attorneys are prohibited from transferring or delivering to their client. *See, e.g.*, AS 12.61.120(a) (prohibiting disclosure of certain personal information to the defendant); Criminal Rule 16(b)(9) (setting forth restrictions on availability of certain material), and see, Alaska Bar Ethics Op. 2003-3 (“Documents to be Included in File Returned to Client on Termination of Services”) and 2011-1 (“Must a Lawyer Provide the Original File to a Former Client on Request, Rather Than a Copy?”).

and legal agencies handling criminal defense matters take all reasonable precautions to preserve and protect their client files for an appropriate length of time, based on the considerations described in this Opinion, after the matter is completed and the file is closed.

Approved by the Alaska Bar Association Ethics Committee on December 1, 2022.

Adopted by the Board of Governors on February 3, 2023.