



The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 8: File Retention
and Destruction**

Serving Illinois Lawyers

Chapter 8: File Retention and Destruction

How long should a lawyer retain a client file after the matter is completed? This is an important question because a lawyer who destroys client files too quickly may be destroying their best defense to a legal malpractice claim. Unfortunately, there is no simple answer to this question. There are, however, general guidelines that private practitioners can follow in determining when to retain and when to destroy a file.

File Closing Procedures

Your file destruction procedures should begin the moment you close a client file.

1. **The file should not be officially closed until the lawyer who is primarily responsible for the matter has determined that all work on the matter has been completed**, including routine post-judgment and post-closing duties. Such clean-up work might consist of filing a UCC statement or verifying that the beneficiary on an insurance policy has been changed.
2. **The contents of the file should be carefully reviewed.** Does it contain all documentation relating to the client representation, including fee agreements, conflict waivers, client consents, drafts of contracts, research, telephone slips and the like? Nothing should be discarded except duplicate copies and drafts that involve typographical changes.
3. **The file should be reviewed to ensure that all documents or materials originally furnished by the client are returned.** If the original client papers contain substantive information, they should be copied before being returned to the client.
4. **The file is now ready to receive a file-closing date.** These dates are valuable because they allow the firm to track how long a closed file has been retained. In this manner, the firm can review its closed file list annually and destroy only those files that have been retained for the required number of years. Many firms also add color codes to closed files or write the word "CLOSED" on the file covers so they cannot be confused with active files.

When to Destroy Files

First and foremost, never destroy a file until both the statute of limitations and repose for bringing a legal malpractice action with respect to that file has expired. Currently, most legal malpractice actions accruing on or after January 1, 1991, must not only be brought within two years from the time the plaintiff knew or reasonably should have known of the injury for which damages are sought (the statute of limitations), but additionally "may not be commenced in any event more than six years after the date on which the act or omission occurred" (the statute of repose). (See exceptions discussed below.) We therefore recommend that lawyers keep their files for at least seven years, subject to the exceptions noted below. Many lawyers round off that seven-year period and keep all files for a minimum of ten years.

Exception for Wills. Lawyers should retain their wills and estate planning clients' files until at least two years after the death of the client, unless letters of office are issued or the person's will is admitted to probate within that two-year period, in which case the legal malpractice action may be commenced within the time for filing claims against the estate or a petition contesting the validity of the will, whichever is later. (Although the Civil Justice Reform Amendments of 1995 eliminated the exception in

the statute of limitations for causes of action accruing upon the death of a client, the Act was declared unconstitutional in 1998.)

Other Exceptions. The following is a list of other files that should be kept more than ten years:

- matters involving a minor or disabled individual who is still a minor or disabled at the end of ten years
- contracts or judgments to be paid off in excess of ten years
- files establishing a tax basis
- adoption files
- patent files that may have to be retained in excess of ten years according to U.S. Patent and Trademark Office rules
- corporate books and records
- some support and custody files

Label files with special retention requirements

To avoid destroying files with unique retention issues, it is recommended that firms mark these files (***“REVIEW BEFORE DESTROYING”***) so that they can be easily identified as files that should not be destroyed without further investigation.

Ethical Rules Regarding Record Retention

The [Illinois Rules of Professional Conduct](#) are silent with respect to retention of client files. They do however require practitioners to retain other client-related documents for specific time periods. In particular, the Rules set forth time limits for maintaining trust account records (seven years after the representation. [Illinois Rules of Conduct Rule 1.15\(a\)](#)). In addition, [Illinois Supreme Court Rule 769](#) requires lawyers to retain financial records relating to their practice for not less than seven years after conclusion of the representation. Finally, [Illinois Supreme Court Rule 769](#) requires lawyers to keep a record of the names and last known addresses of all past and present clients.

File Destruction Procedures

There is no direct guidance in the [Illinois Rules of Professional Conduct](#) on file destruction. The best approach is to obtain client consent regarding file destruction procedures at the beginning of the representation. We suggest including a provision in your engagement letter or contingency fee agreement that specifies when the file will be destroyed and provides the client with procedures to obtain their portion of the file prior to its destruction. For a detailed discussion of what parts of a file the client should have access to, see [ISBA Advisory Opinion 94-13](#).

- **Make sure that you destroy the files in a manner that does not compromise client confidences.** Merely placing the files in the garbage is not sufficient. Destruction should be by shredding or incineration. (Many file storage companies provide these services.)
- **Don't forget that the client file is your most valuable weapon in a legal malpractice action.** If you destroy that file prematurely, you are destroying the ability to defend yourself.

- **Consider scanning your files** to your computer, to an external hard-drive or flash drive, or to your server via a case management system as discussed below. There are many vendors you can use who will scan your files for you and will provide you with electronic copies thereof. The cost of storage of electronic files will be minimal and hard copy files can then be destroyed in a secure way such as by shredding to ensure confidentiality.
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File Retention and Destruction Do's and Don'ts

Do...

- ✓ Carefully review the contents of a file before closing it.
- ✓ Review files to ensure that all documents or materials originally furnished by the client are returned before closing.
- ✓ Review your closed file list annually and destroy only those files that have been retained for the required number of years.
- ✓ Label files with special retention requirements.
- ✓ Consider scanning your files.

Don't...

- ⊖ Don't close a file before the lawyer who is primarily responsible for it has determined that all work related to the file has been completed.
 - ⊖ Don't just put files in the garbage. Your destruction method must preserve client confidences.
 - ⊖ Don't forget that the client file is the most valuable weapon in a legal malpractice claim.
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