

# How Long Should You Retain Client Files?

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**H**ow long should an attorney retain a client file after the matter is completed? This is an important question because an attorney who destroys client files too quickly may be destroying his or her best defense to a legal malpractice claim. Unfortunately, there's no simple answer. There are, however, general guidelines private practitioners can follow to help determine when to retain and when to destroy a file. [For more on this, see ISBA Advisory Opinion 94-19 on page 658 of this issue.]

## File closing procedures

Your file destruction procedures should begin the moment you close a client file. First, the file should not be officially closed until the attorney primarily responsible for the matter has determined that all work 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.

Second, the contents of the file should be carefully reviewed. Does it contain all documentation relating to the representation, including fee agreements, conflict waivers, drafts of contracts, research, telephone slips, and the like? Nothing except duplicate copies and drafts that involve immaterial changes should be discarded.

Finally, the file should be reviewed to insure that any documents or other material originally furnished by the client are returned. If the original client papers contain substantive information, they should be copied for the firm's file before being returned.

The file is now ready to receive a file-closing date. These dates are valu-



***There's no magic formula, but here are some useful rules of thumb for client file retention.***

able because they allow the firm to track how long a particular 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 a specified 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

As a general rule, attorneys should retain closed files for at least 10 years. While this sounds simple enough, there are a few important and complex exceptions to this rule: *First and foremost, never destroy a file until the statute of limitations period for bringing a legal malpractice action for that particular file has expired.*

This is where things get tricky. You can't assume that the maximum peri-

od is always six years based upon the 1991 statute of limitations changes. Remember that the 1991 rules apply to all causes of action for legal malpractice "accruing" on or after January 1, 1991. It is conceivable that a legal malpractice action could be deemed to have "accrued" many, many years ago when the legal error occurred. In short, you must carefully determine for each file the statute of limitations that would apply if you were sued for malpractice based on that file.

In calculating whether the statute of limitations has run, keep the following factors in mind.

**Estate planning.** 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, attorneys who draft wills cannot rest easy. For one thing, the tort reform amendments contain an escape clause of sorts. If a cause of action would be barred or have less than two years remaining as a result of the tort reform amendments, the plaintiff has two years from the effective date of the amendments to bring the action. Also, an effort is under way to repeal this amendment. It is therefore strongly recommended that estate planners not destroy their client files until at least two years after the client's death.

**Matters involving minors or disabled individuals.** Don't forget that the statute of limitations for legal malpractice claims is tolled in the case of a minor or disabled claimant until the claimant reaches majority or is no longer disabled. You should not, therefore, automatically destroy these files after 10 years.

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***Contracts and judgments to be paid out over many years.*** Generally, you should not destroy a file even after 10 years if it pertains to a contract not fully paid or performed at the end of the 10-year period, or a judgment that must be renewed. For example, retain records pertaining to contracts, promissory notes, child support, or damage awards with lengthy payout periods.

***Federal and state recordkeeping requirements.*** Finally, there may be federal and state rules requiring you to retain particular records for a longer period. For example, if you practice in the federal tax area, check the IRS rules governing retention of tax records.

***Label files with special retention requirements.*** To avoid destroying files with unique retention issues, color-code or otherwise mark them so that they can be easily identified as files not to be destroyed without further investigation.

### **Ethical rules regarding record retention**

The Illinois Rules of Professional Conduct are silent on retention of client files. The Rules do, however, require practitioners to retain other client-related documents for specific periods. In particular, the Rules set forth time limits for maintaining trust account records (seven years, Rule 1.15(a)) and advertisements and “communications concerning the lawyer’s services” (three years, Rule 7.2(a)(1)). In addition, the Illinois Supreme Court Rules require lawyers to retain financial records relating to their practice for not less than seven years (Rule 769).

### **File destruction procedures**

Before destroying any files, mail a letter to the client’s last known address noting that the file will be destroyed on a particular date unless the client indicates to the firm that he or she would like the file returned.

The file is, after all, the client’s property. If the client wants the file, you must then decide whether to copy the file at your own expense for your protection.

Some firms obtain client consents for file destruction at the beginning of the representation. The agreement should set forth a specific period for file destruction, such as 10 years after the matter is closed, and should describe steps that the client can take to claim the file prior to its destruction.

Lastly, 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 — they should be shredded or incinerated. Many file storage companies provide these services.