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FOR LAWYERS**

# File Retention and Destruction



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# File Retention and Destruction

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Many Illinois lawyers are surprised to learn that there are few legal or ethical requirements that a lawyer keep a client file for any defined period post resolution of the matter. Under most circumstances, the client file could be destroyed immediately upon the conclusion of an engagement. Nonetheless, prudence dictates that lawyers maintain client files for a defined period following the conclusion of the engagement. This resource is designed to aid Illinois lawyers in determining what documents must be kept, how, and for how long following the end of a representation.

## Illinois Legal and Ethical Rules Regarding File Retention

The requirements for the retention of a lawyer's or law firm's client files are contained in [Illinois Supreme Court Rule 769](#), Rule 1.15(a) of the Illinois Rules of Professional Conduct (a "Rule" or the "Rules") (Safekeeping of Property) and Rule 796 (Proof of MCLE Compliance).

Illinois Supreme Court Rule 769 (Maintenance of Records) requires lawyers to maintain "originals, copies or computer-generated images" of two types of records:

1. records identifying the name and last known address of the lawyer's clients and whether the representation is ongoing or concluded; and
2. "all financial records relating to the lawyer's practice."

Records identifying the name and last known address of the lawyer's clients and whether the representation is ongoing or concluded must be kept indefinitely. Financial records must be kept for no less than seven years after the representation has concluded. Financial records subject to Illinois Supreme Court Rule 769 are generally considered to include bills and invoices, checks, check stubs, receipts, expense reports, account ledgers, bank statements, time-entry and billing records, tax returns and reports and financial audit records. Illinois Rule of Professional Conduct Rule 1.15(a), much like Illinois Supreme Court Rule 769, requires that all records of trust accounts or other property held in trust be kept for a period of seven years after the end of the engagement.

For all client-file contents other than those addressed above, there are no state-specific rules that specifically address how long a lawyer must keep records contained within their files (unless a lawyer had been disciplined in which case Illinois Supreme Court Rule 764 applies).

As discussed below, although there may be no ethical requirement that a lawyer maintain file contents other than those discussed above, there are compelling reasons to preserve the entirety of all client files for at least seven years after the conclusion of the engagement. Also, lawyers possessing original wills, trust instruments, deeds and tax records should take care to maintain or dispose of such records appropriately. Under most circumstances, if the lawyer is unable to return such documents to their client, they should either keep the document indefinitely or, in the case of a will, make arrangements to submit the will to the Illinois Secretary of State's "will deposit" in accord with Illinois Compiled Statutes [15 ILCS 305/5.15](#).

## Establishing and Implementing a Record Retention, Destruction and Return Plan

As a risk management tool and to ensure compliance with ethical obligations, it is essential for every law firm and sole practitioner to have an established **written** record-retention policy. A [sample File Closing Procedures Checklist](#) can be found in the Addenda [Sample Letters and Forms](#) portion of this document. Every retention plan should include detailed procedures for the retention, destruction, and return of client files, including the following:

- A written statement as to where each file is kept (i.e., identify the storage facility at which hard copies are kept, include instructions as to how to access electronic file documents saved in the cloud, identify where other electronic media is kept, such as an external hard drive);
- Policies regarding the maintenance, destruction and return of different sorts of files, such as litigation files, trusts and estates files, tax files, real estate files; and
- A plan for regular and systematic review as to compliance with the record retention procedures.

The retention plan should take into consideration the following:

### ***Closing the file and returning file contents to the client***

Upon conclusion of the representation, lawyers have an obligation pursuant to Illinois Supreme Court Rules 1.15(d) and 1.16(d) to return to their clients all property and papers to which the clients are “entitled.” Including a [File Closing Form](#) can be included with every closed file to ensure completeness of files. Depending on the circumstances, clients will be entitled to different components of the legal file. If the client is involved in an ongoing legal matter, a lawyer may be obligated to deliver the majority of the file to the client to avoid prejudicing the client’s rights. This is subject to the lawyer possessing and appropriately enforcing a retaining lien, in some circumstances. If the client requests the file following the conclusion of the engagement, the client is entitled to certain portions of the file, including any documents and materials “furnished by the client.” See, e.g., [ISBA Advisory Opinion on Professional Conduct No. 94-13](#). A [File Closing Checklist](#) can be found in the [Sample Letters and Forms](#) of this guide.

Although under most circumstances lawyers will not be required to return file contents to their clients at the end of the representation, there are good reasons to do so anyway. As noted above, if the lawyer possesses documents with legal significance, such as original wills, trust documents, stock certificates, deeds, tax documents or other documents prepared for the client’s use, it may be prudent to return such documents to the client promptly upon the conclusion of the representation. Otherwise, the lawyer may have an obligation to keep such documents indefinitely to avoid prejudice to the client. For instance, a lawyer retained to draft a trust instrument on behalf of a client may have an obligation to preserve the original instrument following the conclusion of the representation, but this duty can be discharged by delivering the document to the client.

Even if the client will not be prejudiced by the destruction or loss of an original document, it is recommended that lawyers return all original documents to their clients at the conclusion of the representation. Doing so will avoid any arguable obligation to preserve the original documents.

Whenever a lawyer turns over file contents to a client, the transaction should be appropriately memorialized in a writing identifying with particularity the item(s) transmitted, the method of

doing so, the date of transmission and the identity of the recipient of the item(s). The lawyer should obtain the recipient's signed acknowledgment of receipt of the file contents. If the file contents are given to someone other than the client, such as the client's family member or new lawyer, the client's authorization to make the transfer should also be memorialized in writing and signed by the client.

Although clients may be entitled to the return of some portions of the client file and the lawyer may choose to return other portions of the file to the client, the lawyer should, under all circumstances, keep copies of all file contents. Below, we address how and for how long such documents should be kept.

### ***Options for storing a closed file***

An accumulation of closed legal files can quickly overwhelm even a large law office and off-site storage costs can mount rapidly. Although it is appropriate to maintain hard copies of client files, it is often more cost-effective to store closed files in electronic format and to destroy the hard copies (see below for a further discussion of the destruction of client-file contents).

#### **Hard Copies**

For lawyers and law firms that choose to keep hard copies of client files, the files should be maintained in a manner such that client confidentiality will be protected. It is recommended that when physical files are sent to offsite storage a detailed description of the contents of each file be generated and kept in the office to allow for easy identification and retrieval of the client file.

#### **Electronic Format**

Many lawyers and law firms choose to store closed files in electronic format. Other than documents of legal significance – original wills, deeds, etc. – most documents can be scanned, and the hard copies destroyed. The electronic documents can be saved to cloud-based storage, the firm's local server or other electronic media, such as an external hard drive. We recommend keeping at least two copies of all electronically stored documents in the event that one version is lost, destroyed or corrupted. Keeping an extra copy also provides a modicum of insurance if a cyber attacker is able to access documents and hold them hostage.

The maintenance of electronic versions of closed files, just like open files, must be done in a manner that reasonably protects client confidences. Illinois Supreme Court Rule 1.6I provides that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Depending on the circumstances, this may mean encrypting electronically stored data.

Note also that, in addressing certain documents that a lawyer is required to maintain, Illinois Supreme Court Committee Comment to Rule 769 approves the use of digital media like CDs and DVDs but notes that, as of 2003, “certain other storage media, such as floppy disks, tapes, hard drives, zip drives, and other magnetic media are not sufficient to meet the requirements of [Rule 769](#) because they have normal life spans of less than seven years.” Electronic data storage methods have advanced considerably since 2003, but it is important to remember that a decision as to how to maintain records in an electronic format should take into consideration the issues addressed in the aforementioned committee comment.

## ***How long should a file be kept?***

One-size does not fit all when addressing file-retention. When determining how long to maintain a client file, lawyers should exercise prudent judgment in light of the particular circumstances. For instance, a lawyer suing for unpaid lawyer fees may require the complete file to establish the basis for the fee-claim or, as noted above, a lawyer may be responsible for maintaining original documents such as wills, deeds, trust instruments and some tax records. Under such circumstances, there may be a need to maintain the client file longer than would otherwise be prudent.

A complete file is often necessary to effectively defend against allegations of legal malpractice or an ethical violation. Any file-retention policy should take this consideration to heart. Although an ethical complaint may be brought at any time, legal malpractice claims must be brought within the applicable statutes of limitations and repose. In Illinois, the statute of limitations for legal malpractice is two years from the time the person bringing the action knew or reasonably should have known of the injury (keeping in mind that the statute of limitations could be extended if the client is a minor or incompetent) and the statute of repose is six years from the last act of representation with regard to the act or omission upon which the malpractice claim is founded, per Illinois Compiled Statutes [735 ILCS 5/13-214.3](#).

Under most circumstances, the statute of repose will expire no later than six years following the conclusion of the engagement. However, if the lawyer is sued for malpractice on the eve of the expiration of the statute of repose, the lawyer may not be served promptly and, thus, may not learn of the lawsuit for many months thereafter. Although Illinois Supreme Court Rule 103(b) requires diligence in effecting service of a complaint, courts will often afford a plaintiff six months or more following the expiration of the statute of limitations (or repose) to obtain service. As such, a lawyer sued for legal malpractice may not be aware of the lawsuit until well over six years after the engagement concluded.

By seven years after the representation ends, a lawyer will very likely know if they have been sued for legal malpractice. For this reason, we recommend that lawyers and law firms maintain complete client files (or copies thereof) for no less than seven years after the conclusion of the engagement.

In some cases, lawyers should maintain client files for longer than seven years. For example:

- If the client was a minor or if the engagement involved the interests of a minor, a legal malpractice claim may still be timely years after the minor turns eighteen. Files should be kept for at least three years after the minor reaches the age of majority.
- In the case of wills, trusts and other estate-planning work, the statute of limitations will not expire until two years after the client's death. Files should be kept for a minimum of three years after the client dies or the estate is settled.
- If the client was under a legal disability or becomes under a legal disability, the time within which a malpractice claim must be filed could be tolled. If the disability is known to the lawyer, when determining for how long to preserve the file consideration should be given to the tolling of the statute of limitations. In any event, files relating to the foregoing should be kept for no less than seven years following the conclusion of the representation.

Lawyers should carefully consider all relevant issues when determining for how long to maintain each and every client file. In addition to issues relating to original client documents, pending or contemplated fee claims, and the running and tolling of statutes of limitations and repose, lawyers may want to consider other factors, such as the quality of the relationship between lawyer and client. A poor lawyer-client relationship is more likely to lead to a legal or ethical complaint, in which case it would be prudent to hold on to the client file.

## Destroying Client Files

At some point, either the entire client file or a portion thereof will need to be disposed of properly. Whether destroying physical files that have been scanned and saved to electronic media or disposing of files in accord with a record retention and destruction policy, lawyers should be mindful that file destruction must be performed in compliance with the applicable ethical requirements. Appropriate precautions should be taken to minimize the risk of inadvertent disclosure of client confidential information. The lawyer or law firm should formulate a file-destruction procedure including detailed record-keeping as to the identification of destroyed files and the date of destruction. The [File Destruction Authorization Form](#) found in [Sample Letters and Forms](#) can be used to ensure all the details are included in the record.

## Additional Considerations

Strong file retention, return and destruction policies and procedures will take into account the particular characteristics of each and every client matter and will be tailored thereto. If your engagement letter calls for specific treatment of client files upon the conclusion of an engagement, your policies and procedures should be adjusted accordingly for such matters. Likewise, future engagement letters should contemplate your current policies. In this resource, we discuss the Illinois legal and ethical rules, but it is possible that federal rules or other states' rules could be relevant, too.

An effective procedure also calls for reevaluation of a previously set file-destruction date. For instance, though it may be appropriate to set a seven-year destruction date when the engagement concludes, if the client later threatens to make a civil or ethical complaint, it would be prudent to maintain the file indefinitely.

Formulating a comprehensive yet tailored set of policies and procedures relative to file retention, destruction and return is essential to a smoothly running practice and an effective risk-management program; however, policies and procedures are only effective if they are regularly revisited and followed. There is no substitute for good judgment and diligence.

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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...***

- ⊗ Close a file before the lawyer who is primarily responsible for it has determined that all work related to the file has been completed.
- ⊗ Just put files in the garbage. Your destruction method must preserve client confidences.
- ⊗ Forget that the client file is the most valuable weapon in a legal malpractice claim.

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To download our entire guide, ***The Fundamentals of Loss Prevention for Lawyers*** or to access Sample Letters & Forms, visit our website [www.isbamutual.com](http://www.isbamutual.com).

# Addenda: Sample Letters and Forms

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NOTE: This material is intended as only an example, which you may use in developing your own letters and forms. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

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## **File Retention & Destruction: File Closing Procedures Checklist – Internal Document (Form ER02)**

- \_\_\_\_\_ Complete original documents concluding matter (Release executed, Dismissal Entry filed, etc.)
- \_\_\_\_\_ Confirm final invoice if paid in full. Be sure to check on all court costs and other expenses.
- \_\_\_\_\_ Return original documents and papers to the client. Note: You may not charge the client for copying any documents you wish to retain for your files.
- \_\_\_\_\_ Copy useful forms for office form file. Do not charge client for copies of file.
- \_\_\_\_\_ Remove duplicates and “clean out” file for storage.
- \_\_\_\_\_ Copy all stored electronic data – including all e-mails – related to client matter to DVD disk to be included with file.
- \_\_\_\_\_ Send closing letter to client.
- \_\_\_\_\_ Calendar future docket dates such as Uniform Commercial Code and judgment renewals.
- \_\_\_\_\_ Send client survey to client.
- \_\_\_\_\_ Enter case into closed file database for future conflicts checks.
- \_\_\_\_\_ Assign date for review/destruction of file. Ask client if s/he prefers to have the file returned or destroyed after the assigned date.

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## File Retention & Destruction: Checklist

Client: \_\_\_\_\_

Matter Name: \_\_\_\_\_

Matter No.: \_\_\_\_\_

Responsible Lawyer: \_\_\_\_\_

Date: \_\_\_\_\_

CHECK ONE	AREA OF LAW	RETENTION PERIOD	DESTRUCTION DATE (IF CHECKED)
<input type="checkbox"/>	Antitrust	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Banking	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Commercial Finance	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Bankruptcy	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Collections	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Commercial Litigation	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Commodities	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Contract Actions	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Corporate	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Criminal	Review annually and destroy 10 years after client's release from incarceration	
<input type="checkbox"/>	Employee Benefits	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Estate Litigation	Conclusion of engagement plus 7 years	
<input type="checkbox"/>	Estate Planning and Administration	Indefinite	
<input type="checkbox"/>	Family Law - Adoption	Until adopted child reaches age of majority plus 7 years.	
<input type="checkbox"/>	Family Law - Dissolution of Marriage	If no minors or disabled individuals involved, conclusion of engagement plus 7 years.	

CHECK ONE	AREA OF LAW	RETENTION PERIOD	DESTRUCTION DATE (IF CHECKED)
		If minor(s) and/or disabled individuals involved, until the latest of the youngest child reaching the age of majority plus 7 years OR the removal of the disability plus 7 years.	
<input type="checkbox"/>	Family Law - Prenuptial	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Government Regulations or Legislation	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Health Care	If minor(s) and/or legally disabled individuals involved, until the latest of the youngest child reaches the age of majority plus 7 years OR the removal of the disability plus 7 years. Otherwise, conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Intellectual Property	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Joint Ventures	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Juvenile	Until minor reaches age of majority plus 7 years.	
<input type="checkbox"/>	Labor	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Litigation - General	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Litigation - Appellate	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Merger and Acquisition	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Municipal	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Personal Injury - Adults	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Personal Injury - Minors or Legally Disabled Individual	If minor(s) and/or disabled individual(s) involved, until the later of the youngest child reaches the age of majority plus 7 years OR the removal of the disability plus 7 years.	
<input type="checkbox"/>	Products Liability	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Real Estate Transaction	Conclusion of engagement plus 7 years.	
<input type="checkbox"/>	Regulatory	Conclusion of engagement plus 7 years.	

CHECK ONE	AREA OF LAW	RETENTION PERIOD	DESTRUCTION DATE (IF CHECKED)
<input type="checkbox"/>	Securities	Conclusion of engagement plus 7 years.	

**Notes:**

A legal matter may fall into more than one of the categories set forth above. If so, use the longest retention period.

There are many exceptions to the general guidelines set forth above. For instance, if you or your client have entered into an agreement to maintain certain materials, this should be taken into consideration. Or, if you or your client know or have reason to know that file contents would be material to a potential civil action, the documents should be kept for the purpose of avoiding a spoliation claim or presumption. Moreover, if another law applies, such as the Uniform Preservation of Private Business Records Act., 805 ILCS 410/1, *et seq.*, or the Illinois State Records Act of 1957, 5 ILCS 160/1, *et seq.*, and requires preservation of records for a longer period of time, the longer period should control.

Documents of independent legal significance, such as original wills, trusts or deeds, if not returned to the client should be retained indefinitely.

Before a file is destroyed, the lawyer responsible for the engagement or another responsible lawyer with the firm should review the basis for establishing a file-destruction date, as circumstances may have changed which should necessitate a re-evaluation of the file-destruction date. For instance, if it is known that the client or an intended third-party beneficiary of the engagement became legally disabled after the engagement concluded, the file should be preserved until 7 years after the disability is removed.

**DISCLAIMER: This checklist is intended to be an example that may be useful in developing your own policies and procedures and in creating your own file retention and destruction policy. Determining what documents may be destroyed and when, if at all, the documents may be destroyed will turn on the particular nature of each engagement. This is not intended to be legal advice and should not be relied upon as such.**

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## File Retention & Destruction: File Closing Form – Internal Process

Client Name: \_\_\_\_\_ File No.: \_\_\_\_\_

File Title: \_\_\_\_\_ Matter Code: \_\_\_\_\_

Responsible Attorney(s): \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ Closing Date: \_\_\_\_\_

Attorney Responsible for Final File Closing Review: \_\_\_\_\_

<u>Materials Returned to Client</u>	<u>Date</u>	<u>/</u>	<u>Means of Return</u>
_____	_____	/	_____
_____	_____	/	_____

### Materials to be Retained

\_\_\_\_\_  
\_\_\_\_\_

### Materials to be Destroyed

\_\_\_\_\_  
\_\_\_\_\_

Date File Closing Letter Sent to Client: \_\_\_\_\_

Date Signed Acknowledgement Letter Re Returned Materials Received from Client:

\_\_\_\_\_

Comments/Notes:

\_\_\_\_\_  
\_\_\_\_\_

NOTE: This material is intended as only an example, which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

## File Retention & Destruction: File Destruction Authorization Form

RE: [File Name and Close File No]

I, \_\_\_\_\_, the responsible attorney on this case, have reviewed this file and found:

\_\_\_\_\_ It has been over ten (10) years since the file was closed.

\_\_\_\_\_ I have examined the file and have found no client property in it or have returned any  
and all client property found.

\_\_\_\_\_ I have examined the file and found no reason to retaining it.

\_\_\_\_\_ The pending destruction letter has been sent to the client and the client has either consented or there has been no response from the client.

This file may, therefore, be purged from the closed file archive and destroyed.

[Firm Name]

---

[Attorney Name]

---

Date

**[Date]**

**A & C, Ltd. 111 Main Street  
Chicago, IL 60000**

RE: **Smith v. Jones**

Dear **Ms. A:**

- We choose to have **A & C, Ltd.** continue to handle the above-referenced file in the future.
- We choose to discharge **A & C, Ltd.** and transfer the above-referenced file to **B & Associates.**
- We choose to transfer our file to the law firm of **[new law firm]**, thereby discharging the firm of **A B & C, Ltd.**

With respect to any files which we have decided to transfer to **[new law firm]**, please make arrangements to transfer those files promptly in an orderly manner. We recognize that **A B & C, Ltd.** has a compensation claim for services rendered and expenses advanced on our behalf to date.

---

Signature

---

Print Name

---

Date

# Disclaimer

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This booklet includes loss prevention techniques designed to reduce the likelihood of being sued for legal malpractice. It is not the intent of these materials to suggest or establish practice standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of these materials is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practice in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

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