



# ISBA Professional Conduct Advisory Opinion

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**Opinion No. 12-06**  
**January 2012**

**Subject:** Client Files; Law Firms

**Digest:** A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period for most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information.

**References:** Illinois Rules of Professional Conduct 1.4, 1.6, 1.15, and 1.16;

ISBA Professional Conduct Advisory Opinion 94-13;

Illinois Supreme Court Rule 769;

735 ILCS 5/13-214.3(c);

*Restatement Third, The Law Governing Lawyers* § 46 (2000);

Arizona Ethics Opinion 08-02 (December 2008);

West Virginia Ethics Opinion 2002-01 (March 2002).

## **FACTS**

The inquiring legal services program has been existence for more than 35 years. Its staff and volunteer lawyers provide low or no-cost legal services to low-income persons in 65 Illinois counties. The program's annual case load averages more than 20,000.

The program retains case files and "conflict cards" for a period of five years after case closing. It permanently or indefinitely retains original documents (deeds, wills); documents in pending guardianship files; files which are or may be the subject of a pending or anticipated complaint, lawsuit or investigation; case-related materials which may have value as a part of the program's archives; money on deposit in the program's office or client trust accounts; and materials relating to open, active cases that are related to another case of a client's matter currently pending in the office.

The program routinely offers to return all materials furnished by clients to the program prior to the destruction of case files. If no materials were furnished, no offer is made. Storage costs are a major expense to the program. It believes that it can dispose of routine case file materials not described above five years after case closing without any adverse affect to the program's clients.

### **QUESTIONS**

1. May the program routinely destroy "conflict cards" five years after case closing?
2. May the program routinely destroy case files five years after case closing?

### **OPINION**

Although it is clear that a lawyer is required to preserve and protect the funds and other property of clients or third persons in the lawyer's possession, and there are explicit directives regarding the maintenance and preservation of financial records regarding a lawyer's practice, there is little guidance with respect to a lawyer's duty to preserve those portions of a lawyer's file that are neither client property nor financial records.

The Illinois Rules of Professional Conduct and the Illinois Supreme Court Rules provide specific guidance regarding preservation of client property and certain lawyer records. With respect to client funds and other property, Illinois Rule 1.15(a) requires:

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend- bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third party. ... Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Rule 1.15(a)(1) through (8) lists specific requirements for the maintenance of “complete records” of trust accounts, including the retention of: receipt and disbursement journals, account ledgers, checkbook registers and bank statements, client retainer and compensation agreements, and copies of all bills and rendered to clients for legal fees and expenses.

Illinois Rule 1.16(d) further provides:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as ... surrendering papers and property to the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Supreme Court Rule 769 defines two categories of lawyer records that must be kept as originals, copies, or computer-generated images. Paragraph (1) requires a lawyer to maintain records that identify the name and last known address of each client and reflect whether the representation of the client is ongoing or concluded. In contrast to Rule 1.15(a) and paragraph (2) of Supreme Court Rule 769, discussed below, paragraph (1) makes no reference to any period of time. It therefore appears that the client information described in paragraph (1) should be preserved indefinitely.

Paragraph (2) of Supreme Court Rule 769 requires that all financial records related to a lawyer’s practice be maintained for a period of not less than seven years. Financial records are defined to include bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.

The Committee Comment to Supreme Court Rule 769 notes that the 2003 amendment to the rule gives lawyers the option of maintaining records in forms that save space and reduce cost without increasing the risk of premature destruction. The comment also advises on appropriate types of electronic storage media: “For example, CDs and DVDs have a normal life exceeding seven years, so an attorney might use them to maintain financial records. At present, however, floppy disks, tapes, hard drives, zip drives, and other magnetic media have insufficient normal life to meet the requirements of this rule.”

Aside from the rules discussed above, there appear to be no other Illinois professional conduct or court rules regarding the preservation of lawyer files or records. The *Restatement Third, The Law Governing Lawyers* § 46(1) (2000) provides that a lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client. Comment *b* to § 46 notes that a law firm need not preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence.

ISBA Opinion 94-13 (January 1995) reviewed in detail a lawyer's duty to return to clients or to provide access by clients or former clients to various categories of materials normally maintained in a lawyer's file. Because there are various types of materials (like lawyer notes, drafts, research memoranda, and internal administrative documents) that a lawyer need not provide either copies or access to the client, there appears to be no reason to require retention of such materials after the materials are no longer of use to the representation.

Applying these rules and principles to the questions presented by the inquiring legal services program, the program should not routinely destroy the "conflict cards" five years after case closing because those records appear to reflect client information covered by Supreme Court Rule 769(1) that must be retained indefinitely. However, if the information required by Rule 769(1) is collected and preserved in some other acceptable form, then there is no reason to retain the actual "conflict cards" beyond five years after a matter is closed.

With respect to case files, given that the program retains original deeds, wills, and other documents with intrinsic value indefinitely and offers to return any materials furnished by clients, the program need not retain the rest of the case files more than five years after closing if those materials are no longer useful to the clients' representation. Designation by the Supreme Court of seven years as the minimum retention period for specific materials, including a detailed list of materials to be maintained with regard to client trust funds and other property held by a lawyer and the financial records of a law practice, suggests that a shorter period should be sufficient for routine materials. Thus, if the program has kept clients reasonably informed about the status of their matters in compliance with Rule 1.4(a), then the rest of the case files generally may be discarded after five years after closing.

There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia Opinion 2002-01 (March 2002).

Although disposal of routine case file materials not covered by Rule 1.15(a) or Supreme Court Rule 769 five years after conclusion of a matter is generally permissible, other considerations suggest that a longer period might be advisable. One consideration is cost. For many lawyers, separating the records that must be maintained for at least seven years from those that may be discarded after five years would require additional administrative effort and expense that could exceed any saving in storage costs. Another consideration is the availability of a lawyer's file in the event of a claim against the lawyer. Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim.

Finally, disposal of any part of a lawyer's file must be done in a manner that protects the confidentiality of all information relating to the client's representation, consistent with the lawyer's duty under Illinois Rule 1.6. Comment [16] to Rule 1.6 observes that a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or others participating in the representation of the client or who are subject to the lawyer's supervision. Hence, the program must assure that its method of disposing of case files preserves the confidentiality of its clients' information.

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