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Records Maintenance: How Long is Long Enough?

A March 2017 ISBA Professional Conduct Advisory Opinion provides a good review of the various time requirements for maintaining client files and attorney records. ISBA Opinion 17-02 (March 2017), at https://www.isba.org/sites/default/files/ethicsopinions/17-02.pdf. The request for the opinion came from a law firm that used an engagement letter that included a notice to clients that it would destroy its files "within a reasonable time after the termination of the engagement." ISBA Opinion 17-02, at p. 2. The firm inquired whether it could destroy files after ten years without any further notice to its clients. *Id.*

The Opinion begins by identifying the applicable rules. Illinois Rule of Professional Conduct 1.15(a) requires that trust account records "and other property" be kept for seven years after the representation ends. The records include records of deposits, withdrawals and disbursements, checks, check registers and bank statements, as well as copies of retainer and compensation agreements and copies of all bills submitted to clients for legal fees and expenses. *See* Ill. R. of Prof'l Conduct 1.15(a)(1)-(8).

In addition to the requirements of Rule 1.15(a), Illinois Supreme Court Rule 769 also identifies records that a lawyer must maintain as follows:

> It shall be the duty of every attorney to maintain originals, copies or computer-generated images of the following:
> 1. records which identify the name and last known address of each of the attorney's clients and which reflect whether the representation of the client is ongoing or concluded; and
> 2. all financial records related to the attorney's practice, for a period of not less than seven years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports.

The Opinion reviewed numerous sources, including ISBA Opinion 12-06 (January 2012), at https://www.isba.org/sites/default/files/ethicsopinions/12-06%20pdf.pdf. In Opinion 12-06, a legal services organization wanted to know if its five-year retention policy for closed case files and its "conflicts cards" was appropriate under the rules. *Id.*, at p. 2. The Opinion advised that records required by Illinois Supreme Court Rule 769(1), must be kept indefinitely, but suggested that the actual "conflicts cards" could be destroyed as long as the required information is kept in another acceptable form. *Id.* at pp. 3-4.

The financial and trust records covered by Illinois Supreme Court Rule 769(2) and Illinois Rule of Professional Conduct 1.15(a) must be kept for seven years. With respect to closed case files, Opinion 12-06 noted that there is no specific rule regarding retention of closed case file materials. It concluded that a five-year retention period was "generally permissible," but suggested that a longer period (seven years) "might be advisable." *Id.* at p. 4.

After its review of Opinion 12-06, Opinion 17-06 observed that the American Bar Association has advised that lawyers do not have a duty to maintain file materials permanently, ABA Informal Opinion 1384 (March 1977), and that Comment b to § 46 of the Restatement (Third) of The Law Governing Lawyers, § 46(1) (2000), provides that a law firm may destroy documents that are "outdated or no longer of consequence." Opinion 17-96, at pp. 3-4.

Opinion 17-96 also looked to rules of other states for guidance. The Missouri Supreme Court amended its rules in 2016 to lower the mandatory file retention requirement from ten years to six years. *Id.*, at p. 4. The Ohio Supreme Court issued a client file retention guide in 2016 to provide that file retention decisions are within the professional judgment of lawyers. Ohio requires trust account records to be kept for seven years and the guide suggests that a minimum file retention policy of seven years would be appropriate. *Id.* Tennessee, Arizona, and West Virginia recommend a five-year retention period for client files. *Id.* Iowa recommends that files be kept for six years if the policy is in writing and ten years if there is no written policy. *Id.*

Based upon the review of these various authorities, Opinion 17-06 concludes that the requesting firm's ten-year retention period was "clearly reasonable" and seven years, as a "general default" retention period, would also be reasonable for closed file materials. *Id.*, at p. 5. A seven-year period, according to the Opinion, "could also prove advantageous in the event of a lawyer liability claim, given that the Illinois statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years." *Id.*

The Opinion further noted that as long as lawyers comply with Illinois Rule of Professional Conduct 1.15(a) and Illinois Supreme Court Rule 769, they and their clients, after informed consent, may agree on a "mutually acceptable retention period for closed client files." *Id.*

The second part of the firm's request for an opinion concerned whether a lawyer must give notice to clients before destroying files. *Id.* The applicable rules do not require notice prior to destruction of the records. *Id.* The Opinion concluded that where clients were given notice of the firm's retention policy in the initial engagement letter, no additional notice was required. *Id.*, at p. 6. Finally, the Opinion appeared to agree with the conclusions of the Missouri Supreme Court and the West Virginia Lawyer Disciplinary Board that clients who have not requested their file materials for five or six years should be considered to have abandoned or lost interest in the files.

Practice Takeaways

In light of Opinion 17-06, a review of your existing practices might include the following:

1. Examine your document retention policies to ensure compliance with the applicable rules including whether the document retention policies are in writing.
2. Check the status of your "conflicts cards."
3. Examine your electronic storage media and be aware of the April 1, 2003 Committee Comments to Illinois Supreme Court Rule 769 that gives attorneys the option of maintaining records in forms that save space and reduce cost without increasing the risk of premature destruction, such as CDs and DVDs for financial records, which have a normal life exceeding seven years. The Comment notes that floppy disks, tapes, hard drives, zip drives, and other magnetic media have insufficient normal life to meet the requirements of Rule 769.
4. Keep in mind that the "physical life span" of electronic media, may exceed its "technological life span."
5. Review your engagement letter and consider revising it if it fails to of you or your firm's closed file retention policy.

6. Closing reports present an additional opportunity to address case file retention and destruction.
7. Evaluate if it is economical to have different retention periods based on the nature of each case file; however, it may be easier and more efficient to adopt a seven-year period as your general policy.

To ensure continued responsible ethical practices, IDC members' practices should include a periodic review of file maintenance policies, procedures, applicable rules, and technological changes.

About the Author

R. Howard Jump of *Jump & Associates, P.C.* practices in all areas of insurance defense and coverage at the trial and appellate levels. He is a past president of the Illinois Association of Defense Trial Counsel. He is a long time member of the IDC's Insurance Law Committee and served as its Board Liaison. He has been a contributing author of articles on insurance coverage issues for the *IDC Quarterly* and newsletters for the Insurance Law Committee. He received the IDC's Distinguished Member Award in 2008. Mr. Jump is also a member of the American, Illinois and Chicago Bar Associations, the Defense Research Institute and the Association of Defense Trial Attorneys.

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