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Guide to Retention and Destruction of Closed Client Files



The Law Society of
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Barreau
du Haut-Canada

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GUIDE TO RETENTION AND DESTRUCTION OF CLOSED CLIENT FILES

This guide is not intended to replace a lawyer's professional judgment or to establish a one-size-fits-all approach to the practice of law and the retention and destruction of closed files. Subject to the guide provisions that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a decision not to follow the provisions will not, in and of itself, indicate that a lawyer has failed to provide quality service. Whether a lawyer has provided quality service will depend upon the circumstances of each case.

INTRODUCTION

One of the challenges for law firms is how to deal with the increasing volume of retained records such as closed client files and other administrative records. Records include both paper and electronic records.

The Law Society has developed this guide to assist lawyers to develop policies for the closure, retention and destruction of client files. Such policies assist lawyers to control the volume and type of records retained, manage risk and meet professional responsibilities.

Lawyers establishing such policies might also want to consider adopting policies for the retention and destruction of other administrative records generated or obtained by the firm such as business records, contracts with suppliers and other correspondence or documents.

Appendix 1 contains some sample file retention policies for law firms. No one policy can cover all situations relating to all law practices or practice areas. These sample policies are not intended to replace the lawyer's professional judgment or the views of a law firm's professional standards or other practice management committees, risk management partners or general counsel. When establishing a file retention policy a law firm should consider both the circumstances of the law firm's individual and group practices as well as the Law Society Guide on Retention and Destruction of Closed Client Files.

REASONS FOR FILE RETENTION

There are a number of reasons why lawyers retain client files for a period of time or sometimes indefinitely after completion of the client matter. Some of these reasons are for the benefit of the client, while others are for the benefit of the lawyer.

Defend Against Allegations of Malpractice

One of the key reasons lawyers retain files is to respond to negligence or other claims made against them. A well- documented file may contain the evidence necessary to successfully defend such claims. This is particularly important in situations where the evidence necessary to successfully defend a claim cannot be obtained from any other source.

Claims founded in negligence and/or breach of contract against a lawyer can be made well after the alleged negligence or breach of contract has occurred. *The Limitations Act*,

2002 establishes some deadlines for commencing such proceedings. The *Act* contains a basic limitation period of two years running from the day that the claim is discovered and an ultimate limitation period of fifteen years running from the date that the act or omission on which the claim is based took place.

Both of these limitation periods are subject to provisions in the *Act* that operate to extend the limitation periods. For example, subsection 15(4) provides that the ultimate limitation period does not run during any time that a person with a claim is a minor and is not represented by a litigation guardian in relation to the claim. This section also indicates that the ultimate limitation period does not run if the person against whom the claim is made willfully conceals certain information from the person with the claim or willfully misleads that person as to the appropriateness of a proceeding as a way of remedying the injury, loss or damage. With respect to the basic two year limitation period, section 5 of the *Act* contains a discoverability principle and provides that there is a rebuttable presumption that a claim is discovered on the day that the act or omission on which the claim is based took place. In addition, Section 19 incorporates into the *Act* specific limitation periods contained in other statutes and these limitation periods prevail over the basic two year limitation period.¹

With regard to the Law Society's professional liability insurance program, LAWPRO actively encourages lawyers to ensure that files are well documented and handled in accordance with appropriate file closure, retention and destruction procedures. However, there is no provision under the LAWPRO mandatory insurance program that requires such. Rather the consequences of having no file available in the event of a claim are as follows:

- a reduced ability to defend the claim as there is no evidence to establish what work was done on the matter;
- a reputational risk to the lawyer who may have to appear in open court to defend the claim without a file;
- a greater risk of exposure to payment of the deductible and claim history levy surcharge, depending on the outcome of the claim and the program options selected by the lawyer;
- ineligibility for the part-time practice option, as a result of an indemnity payment and/or cost of repair being incurred; and
- a greater risk of exposure outside of policy coverage and above policy limits for the lawyer.

Of course, in reporting a claim matter under the program, the lawyer is obliged to cooperate with LAWPRO in the investigation and defence of the matter, including production of his or her file, to the extent that it then exists. Lawyers with excess insurance are encouraged to check with their excess insurers to determine their requirements and/or applicable policy terms.

¹ Section 24 of *The Limitations Act, 2002* contains transition provisions. Where a claim against a lawyer in negligence and/or for breach of contract is discovered prior to the effective date of the *Limitations Act, 2002* (January 1, 2004) the former limitation period of six years under the *Limitations Act, 1990* continues to apply.

Legal Requirements

A lawyer might retain client documents in a file to assist the client to meet statutory obligations. For example, The *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), sets out certain minimum time periods in which accounting records, including supporting vouchers and cheques, must be kept.

Generally when a matter is completed the lawyer should return to the client all original documents belonging to the client unless previously provided to the client or otherwise agreed with the client. It is generally not recommended that the lawyer retain original client documents after the matter has been completed.

Comply With Regulatory Requirements

By-Law 9 made pursuant to the *Law Society Act* requires lawyers to maintain specific books or records as part of their law office accounting system. Lawyers are required to maintain trust accounting records or documents for ten years immediately preceding the lawyer's most recent fiscal year end. All other accounting records or documents are to be maintained for six years immediately preceding the lawyer's most recent fiscal year end.

Future Use

Finally the lawyer may retain the file for future use by the lawyer or may agree with the client to retain the file so that it is available for future use by the client

THE CLIENT FILE

Contents of the File

Client files will usually consist of some or all of the following:

- Paper documents contained in the paper file folder;
- Electronic documents and electronic data and information contained in the electronic document or file;²
- Documents and or property relating to the client matter but not kept in the paper or electronic file folder.

File Organization

A client file should be organized in a way that will facilitate its eventual closing.

² Electronic data and information may include email, draft versions of documents on a server or document management system, scanned/imaged documents, faxes (where there are no paper copies), voicemail, metadata and any other information or data relating to a matter saved and stored in electronic form (e.g. on servers, magnetic media, magneto-optical systems, compact discs, DVDs)

Files may contain only one copy of each document unless there is a reason for retaining additional copies of the same document.

Depending on the complexity of the file, a lawyer should consider using folders and subfolders to organize the contents of the file.

If files are maintained electronically in order to help simplify organization, file management and retrieval, the lawyer may consider naming the file with as much detail as possible. If electronic files are being retained in multiple locations such as in the lawyer's e-mail box, computer file system and the firm's practice management software, the lawyer may consider using software that creates a single point of access or using a file and folder system that is similar across all locations. For example, if the lawyer uses main folders based on a client and subfolders based on matters, the lawyer may consider implementing a similar structure wherever electronic information is stored.

CLOSING CLIENT FILES

In order to simplify the task of closing files, a lawyer should establish a file closure policy addressing when and how files should be closed.

Establishing When to Close a File

A file should be closed only after all matters relating to the file have been completed and, in particular after all undertakings have been satisfied.

Prior to closing a file the lawyer should ensure that:

- all of the work that the lawyer was retained to complete has been completed;
- the lawyer has reported to the client;
- the client has paid the final account or the firm has written off any balance owing on the final account;
- all undertakings have been satisfied; and
- the lawyer has dealt with any balances to the credit of the client in the lawyer's trust account.

Preparing the File to be closed

The following steps should be taken before closing a file.

1. Dealing with Client Property

A lawyer has an ethical obligation to care for a client's property as a careful and prudent owner would when dealing with like property and must observe all relevant rules and law about the preservation of a client's property entrusted to the lawyer.³

³ Law Society of Upper Canada, *Rules of Professional Conduct*, (November 1, 2000), Rule 2.07.

The documents that must or should be handed over to a client upon the termination of a retainer is a matter of law. The following cases and materials have dealt with the issue of document ownership and may be of assistance to lawyers in determining issues relating to document ownership:

Aggio v. Rosenberg, 24 C.P.C. 7, 1981

Alexandra Marks, ed., *Cordery on Solicitors*, 9th ed. (London: Lexis Nexis Butterworths, 1995) at 4/661.

McInerney v. Macdonald, [1992] 2 S.C.R. 138

Unless previously provided to the client or otherwise agreed with the client, prior to closing the file, lawyers should return to the client all property that the client provided to the law firm during the course of the matter together with all documents or other property that the lawyer was retained to produce in connection with the matter. Generally it is not recommended that the lawyer retain documents belonging to the client after termination of the retainer. In the event that the lawyer and client agree that the lawyer will retain such documents, it would be prudent for the lawyer to clarify in writing with the client the nature of the lawyer's responsibilities and who is responsible for storage and retrieval costs.

Before returning documents to the client, the lawyer should determine whether to retain copies of these documents. In making this determination, the lawyer might consider such factors as any legal requirement to preserve the document, the likelihood of the lawyer requiring the document in the future, the provisions of the retainer agreement, whether the client has its own records retention policy, and if so, the length of time that a document is preserved under that policy and the client's wishes.

When a lawyer transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, subject to the lawyer's right to a lien, the lawyer must deliver to or to the order of the client all papers and property to which the client is entitled and must give the client all information that may be required in connection with the case or matter. In addition the lawyer must cooperate with the successor lawyer or paralegal so as to minimize expense and avoid prejudice to the client. Rule 2.09 of the Rules of Professional Conduct sets out the lawyer's obligations in this regard.

Appendix 2 contains a summary of some of the documents contained in a file and how a lawyer should deal with these documents.

2. Purging the File

Prior to closing a file, a lawyer should ensure that the file is organized. A lawyer may wish to remove from the file any unnecessary materials. While staff may assist the lawyer in this task, the lawyer primarily responsible for the file should approve the removal, deletion and destruction of materials from the file. If files are maintained electronically, lawyers should use care not to purge electronic information contained in

the file that may be required in the future such as information required for conflicts checking.

Copies of documents that can be used as precedents or in handling other matters, such as copies of legal memoranda, may be removed from the file or copied and stored in a central repository for future use. The lawyer should ensure that such copies are stripped of all personal information within the meaning of *The Personal Information Protection and Electronic Documents Act* (PIPEDA) and that client confidentiality, in accordance with the *Rules of Professional Conduct*, is maintained with respect to any other information that identifies the client.

Copies of documents (electronic and paper) or documents that are available from another source such as documents that are permanent records of the court, registry office or government office may be removed from the file and destroyed when the file is closed unless there is any legal or other reason for retaining the document. In determining whether to remove and destroy such documents lawyers may wish to consider the likelihood of the document being required in the future and the expense of retrieving it and whether the entity retaining the document has a document destruction policy in place which may result in the document not being available at a future date. A lawyer should retain draft copies of documents where the draft copies document the history of the matter or confirm client instructions and where the lawyer reasonably believes that these factors might become an issue in the future.

Appendix 3 contains suggestions and recommendations for dealing with the contents of a file when preparing to close the file.

Depending upon the complexity or nature of the matter, the lawyer may wish to maintain a list of the documents removed from the file together with the date of their removal and the method of disposal (e.g. destruction, return to the client).

3. Communicating with the Client

A lawyer should consider advising the client of the file closure, retention and destruction policy at the outset of the retainer. The lawyer should consider advising the client how documents will be handled and maintained during the course of the retainer and after completion of the matter. A summary of the file retention and destruction policy may be included in the written retainer agreement or in the final report to the client.

Appendix 4 contains a sample clause that may be included in the retainer agreement and a sample letter to the client upon termination of the retainer.

4. Determining the File Destruction Date

A lawyer is not required to retain all client files permanently.

When a file is closed, the lawyer primarily responsible for the file should review the file and establish a file destruction date.

Circumstances may arise during the file retention period that would postpone the destruction of the file. The lawyer or law firm should implement a system to ensure that such circumstances are identified and the destruction date is changed if necessary.

Lawyers may consider establishing a file review date preceding the destruction date. The lawyer or law firm could then check to determine whether circumstances have changed and the file destruction date should be changed.

Both the file destruction date and the file review date should be entered into the firm's tickler or file tracking system.

A lawyer should be guided by ethical, legal and professional considerations as well as economic and practical factors when determining how long to retain a file. It is not recommended that a lawyer adopt a single retention period for all files. Rather the lawyer should consider each file individually and determine the file destruction date in light of the nature and circumstances of the matter, the client's needs, the applicable limitation period, the lawyer's file retention policy and any other issue that might be relevant.

Generally based on the provisions of the *The Limitations Act, 2002*, an appropriate retention period for client files is 15 years after the file is closed. This guide is not a rule and this suggested time period may not be appropriate for all client files. Lawyers should use their own judgment when establishing destruction dates for client files based on the circumstances of the individual client matter and their own needs and the needs of their firm and clients. For example, factors such as the nature and complexity of the matter may require a longer retention period than the suggested 15 years.

The following are some of the factors that a lawyer must or should consider when determining the length of time to retain a file.

- (i) *Legal and Regulatory Requirements*
In establishing a destruction date, the lawyer must comply with any legal or regulatory requirements.
- (ii) *Client's Need*
In certain areas of practice, the lawyer should consider whether the file might support future representation of the client or other clients.
- (iii) *Defend against Allegations of Malpractice or Misconduct*
The lawyer should also consider the likelihood of the file being needed to defend against allegations of malpractice, misconduct or for an assessment of an account and the applicable limitation periods for such claims. Complaints to the Law Society against the lawyer may be made after the matter has been completed or when a file has been transferred to another lawyer. Each file should be considered independently in order to assess the risk of future complaints.

- (iv) *Nature of the Matter*
Depending upon the nature of the matter, different considerations might apply when establishing a destruction date.

- (v) *Clients under a Disability: Minors and Incapable Persons*
The client's age and competency might be a relevant factor in determining the length of time that a file is retained. The *Limitations Act, 2002* contains special provisions for minors and the mentally incapable. For example, under the *Limitations Act, 2002* no limitation period runs during any time that the claimant is either an unrepresented minor or is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition and is not represented by a litigation guardian in relation to the claim.⁵

RETENTION OF CLIENT FILES

System for Organizing Closed Files

A lawyer should have a system for organizing and retrieving closed files. When a file is closed, the file should be classified as closed. The law firm's data base should contain a list of all closed files, the file name, the original file number and the closed file number if different, the location of the stored file including where applicable, the box or carton number and the file destruction date.

Form or Medium of Storing Retained Files

Lawyers may store files electronically and/or in paper form. In some instances, it may be advantageous to store documents electronically rather than in paper files. In making such decisions, the lawyer must ensure compliance with all legal and regulatory obligations. By-law 9 made pursuant to the *Law Society Act* provides that if records are entered and posted by mechanical or electronic means, lawyers must ensure that a paper copy of the record may be produced promptly on the Society's request. Other legislation such as the *Income Tax Act* may have different requirements.

If the record or document is to serve as documentary evidence, lawyers should ensure that proper steps are taken to comply with any evidentiary rules governing the admissibility of such documents. To qualify as evidence, imaging and microfilm including microfiche reproductions may have to be produced, controlled and maintained according to certain specifications.

Documents should remain trustworthy, readable, and accessible for the applicable retention periods. In order to ensure the accessibility and readability of documents, the appropriate hardware and software should be maintained during the retention period.

Storage of Retained Files

Closed files should be stored either on site or in an off site location. Regardless of the location, lawyers must ensure that confidentiality is maintained. The storage facility must

⁵ *Limitations Act, 2002*, S.O. 2002, c.24, ss. 6, 7, and 15

be secure to maintain confidentiality and to protect the files from damage or loss. If files are stored electronically, lawyers may wish to consider whether to encrypt stored files.

When storing files electronically lawyers should consider both the physical location and the medium (e.g. backup tape, cd/optical disk) on which they are stored. Lawyers should have a system for backing up closed files.

In addition, the lawyer should ensure that documents, data and information in the file can be accessed during the file retention period. The lawyer should be prepared to convert older electronic formats to new formats so that they continue to be accessible. In addition it may be useful to include on any list of electronic files, the file format in which the documents are saved so as to facilitate conversion of the document at a future date

Review Status of Closed File

As part of the file closing procedure, the lawyer primarily responsible for the file or if this is not possible another lawyer in the firm, should consider reviewing the file again prior to destruction to ensure that circumstances have not changed since the establishment of the destruction date and that the file destruction should proceed. Alternatively the firm might implement a system to ensure that where there is a change in circumstances prior to the destruction date, the file is reviewed and the destruction date is changed if necessary.

Files that are to be retained indefinitely may be reviewed periodically, perhaps 10 or 20 year intervals, to determine whether there has been any change in circumstances that would now allow for the destruction of the file.

DESTRUCTION OF CLIENT FILES

Maintaining Confidentiality

A lawyer's obligation to maintain confidentiality survives the retainer. Lawyers must ensure that they maintain confidentiality when disposing of files. If paper documents are shredded or incinerated, the lawyer must ensure that confidentiality is maintained both during the destruction process and the disposal.

Destruction of Documents and Information

When destroying a file a lawyer should ensure that all of the contents of the file are destroyed. This includes both paper and electronic documents and electronic information contained in the electronic document such as metadata.

Maintaining a Record of Destruction

The lawyer should keep a record of all files destroyed or returned to the client in accordance with the lawyer's file destruction policy. The record at a minimum should contain the client's name, address, file number, a brief description of the nature of the matter, the file closure date, the file destruction date or date that the file was delivered to the client, and the name of the lawyer who authorized the destruction or delivery. This will assist a lawyer to counter allegations that a file was destroyed indiscriminately.

Appendix 5 contains suggested steps for closing, retaining and destroying a file.

SAMPLE FILE RETENTION POLICY

This file retention policy is a sample policy only to assist lawyers in preparing a file retention policy. This sample policy should be adapted to suit the individual law practice. No one policy can cover all situations relating to all law practices. This policy is not intended to replace the lawyer's professional judgment. When establishing a file retention policy the lawyer should consider both the circumstances of the lawyer's practice as well as the Law Society Guide on File Retention.

1. Purpose

The purpose of this policy is to provide procedures for the closing, retention and disposition of client files.

2. Definitions

“disposition of client files” means the final action taken with the contents of client files and includes destruction, transfer to the firm's precedent bank and permanent retention.

“ client file ” means the physical paper folder containing the physical documents related to the matter and/or the electronic folder or directory containing the electronic files, documents , data or information related to the matter (hereinafter referred to as “file”).⁶

“file destruction date” is the date on or after which a file may be destroyed.

“lawyer” is the lawyer who has carriage of the file or another lawyer in the firm who has been assigned responsibility for the file.

3. Closing the File

3.1 When a matter has been completed, the lawyer shall review the file to determine if the file may be closed.

3.2 No file shall be closed unless:

⁶ Electronic data and information may include email, draft versions of documents on a server or document management system, scanned/imaged documents, faxes (where there are no paper copies), voicemail, metadata and any other information or data relating to a matter saved and stored in electronic form (e.g. on servers, magnetic media, magneto-optical systems, compact discs, DVDs)

- ❑ the retainer has been completed;
 - ❑ a final account, if any, has been forwarded to the client;
 - ❑ all accounts have been paid or forgiven;
 - ❑ there is a final distribution and accounting of all trust balances relating to the file;
 - ❑ client property has been returned to the client;
 - ❑ there are no outstanding undertakings.
- 3.3 Prior to closing the file, unless otherwise agreed, client documents shall be returned to the client.
- 3.4 At the lawyer's discretion, copies of client documents may be retained in the file.
- 3.5 At the lawyer's discretion prior to closing the file, the file shall be stripped of the following:
- ❑ duplicate copies of documents;
 - ❑ draft copies of documents unless the history of creation of the document might be an issue in the future;
 - ❑ any documents that can be reproduced from another source such as pleadings, copies of registered deeds or mortgages.
- 3.6 Prior to closing the file, at the lawyer's discretion copies shall be made of any documents that may be used as precedents and placed in the firm's precedent bank for future use. The lawyer will ensure that such precedent documents are stripped of all personal information within the meaning of *The Personal Information and Electronic Documents Act* (PIPEDA) and that client confidentiality, in accordance with the *Rules of Professional Conduct*, is maintained with respect to any other information that identifies the client
- 3.7 No file shall be closed unless the lawyer reviews the file and determines whether the file is appropriate for destruction at a future date or whether the file should be retained permanently.
- 3.8 If the file is appropriate for destruction, the lawyer shall establish a date for the destruction of the file ("file destruction date").
- 3.9 No file shall be closed unless a letter has been forwarded to the client by ordinary mail or delivered to the client advising the client that:
- ❑ the matter has been completed;

- ❑ all documents and property belonging to the client have been returned to the client or alternatively confirming any arrangement between the lawyer and the client regarding the storage of the client's property;
 - ❑ the law firm may store the file off-site and if the client requires copies of documents from a file stored off-site, an administrative fee will be charged to retrieve the file;
 - ❑ in accordance with the law firm's policy, a file destruction date has been established and the file will be destroyed on or after the file destruction date without further notice to the client.
- 3.10 If documents from the file are returned to the client, copies shall be made of all documents that cannot be readily obtained from other sources or that in the lawyer's judgment the firm may require in the future.
- 3.11 When the file is closed, the file shall be moved from an active status to an inactive status.
- 3.12 The firm shall maintain a list of closed files including the date that the file was closed.

4. Establishing the File Destruction Date

- 4.1 If the lawyer determines that the file is appropriate for destruction at a future date, the lawyer shall establish:
- ❑ a file destruction date no earlier than fifteen years after the date that the file is closed; and
 - ❑ a date for the review of the file no earlier than 90 days prior to the file destruction date ("file review date").
- 4.2 If the lawyer determines that the file is to be retained permanently, the lawyer shall establish periodic review dates in order that the lawyer may review the file to determine whether circumstances have changed and whether the file is appropriate for destruction.
- 4.3 The lawyer will exercise professional judgment in determining whether a file is appropriate for destruction and in establishing a file destruction date. In making these decisions, the lawyer shall consider:
- ❑ the length of time that the lawyer is required to retain documents pursuant to specific laws or regulatory provisions;
 - ❑ the client's age and competency;

- the likelihood that the lawyer or law firm will require the file for the future representation of the client;
 - the length of time that the lawyer or law firm may be liable for claims involving professional negligence; and
 - the likelihood that the lawyer or law firm will require the file because of the nature of the matter, the outcome of the matter or the fact that the file involved a difficult client.
- 4.4 All file destruction dates and file review dates shall be entered into the firm's tickler system.

5. Retention of Closed Files

- 5.1 Closed files shall be stored in facilities that are physically secure so as to maintain client confidentiality and to protect against damage or loss.

6. File Destruction

- 6.1 The lawyer shall review the file on or after the file review date and prior to the file destruction date to determine whether circumstances have changed since the establishment of the file destruction date and whether the destruction should proceed.
- 6.2 All destruction of files shall be conducted in a manner that ensures the maintenance of client confidentiality.
- 6.3 A list or database of destroyed files shall be maintained.
- 6.5 A record of destruction or disposal shall be maintained. The record shall include the following information: the name and address of the client, the file number, a brief description of the matter, the file closure date, the file disposition date, and the name of the lawyer who authorized the file disposition.

SAMPLE FILE RETENTION POLICY FOR MEDIUM AND LARGE LAW FIRMS

The Law Society acknowledges the assistance and input by various representatives of large law firms in the preparation of this sample policy.

Note: No one policy can cover all situations relating to all law practices or practice areas. This sample policy should be adapted to suit the particular circumstances of each law firm and is not intended to replace the lawyer's professional judgment or the views of a law firm's professional standards or other practice management committees, risk management partners or general counsel. When establishing a file retention policy, the law firm should consider both the circumstances of the law firm's individual and group practices as well as the Law Society Guide to Retention and Destruction of Closed Client Files.

Background

This sample file retention policy addresses a number of file retention issues that may be unique to medium and large law firms, most notably:

- (a) the large number of lawyers who may be working on any given matter or for any given client;
- (b) the large number of practice areas within a medium or large law firm;
- (c) the use of document management systems to electronically store draft and final versions of documents created for the client;
- (d) the use of email management systems to electronically store or transmit correspondence and documents among lawyers, the client and third parties; and
- (e) other resources which a medium or large law firm may deploy for the purposes of file and records management and document retention and destruction (for example, records management personnel, document production personnel, scanning technologies, automated records retention systems, errors and omissions partners/committees and practice management and professional standards committees).

In most instances, the nature of the retainer is such that the law firm is being retained for legal advice and to create documents for the benefit of the client which are "owned" by the client (for example, contents of minute books, share certificates, transaction documents, litigation pleadings, legal opinions, documents to be filed or registered with a governmental authority, wills, deeds and conveyancing documents, etc.). In the normal course of a matter, the law firm will have provided the client with copies of all relevant documents relating to the matter at all stages of their production, including draft documents for their review, copies of correspondence to or from third parties and of

course final versions of transaction record books, litigation pleadings, contracts, wills or other final work product contemplated by the retainer.

Law firms should communicate their file retention policy to the client at the time of retainer and include a copy or a summary explanation of it with the initial or early correspondence to the client. Law firms may wish to post their file retention policy on their website and direct their clients' attention to it. Law firms may also wish to communicate their file retention policy to the client when the file is closed along with any final reporting or disengagement correspondence.

In practice, both the client and the law firm operate on the understanding that, upon the closing of the matter, the client will want to receive from the law firm: (a) all of its property that it may have provided to the law firm during the course of the retainer or matter, and (b) all documents created for the client by the law firm as contemplated by its retainer. The client may further understand that the remainder of the law firm's files will be available to it for some period of time after the matter has closed (for reference, due diligence, liability and other reasons).

For medium and large law firms, the time to return to the client documents not already returned and the time to determine the retention period for the remainder of the law firm's file is at the time the matter is closed.

1. Purpose

- 1.1 The purpose of this policy is to provide procedures for the closing, retention and destruction of client files maintained by the law firm.

2. Definitions

- 2.1 In this policy, the following terms have the following meanings:

"client's property" has the meaning given to it in Section 3.2(e).

"file" means the aggregate of all paper and electronic documents and any non-documentary items relating to a particular client matter.

"file closing date" means the date on which the matter-responsible lawyer has determined that the matter has been completed and from which the file destruction date is determined.

"file destruction date" means the date on or after which a file may be destroyed.

"matter-responsible lawyer" means the law firm lawyer who has been assigned primary responsibility for the matter.

3. Reviewing and Closing the File

- 3.1 When a matter has been completed, the matter-responsible lawyer shall determine the file closing date and the file destruction date.

3.2 The matter shall not be closed unless:

- (a) the retainer has been completed, including the sending of a reporting letter or disengagement letter where appropriate;¹
- (b) a final account, if any, has been forwarded to the client;
- (c) all accounts have been paid or written off;
- (d) there is a final distribution and accounting of all trust balances relating to the matter;
- (e) the law firm has returned or delivered to the client all property that the client provided to the law firm during the course of the matter together with all documents or other property that the law firm was retained to produce in connection with the matter (collectively, the “client’s property”), other than any property belonging to the client that the client has instructed the law firm to retain on its behalf after the matter has been completed; and
- (f) there are no outstanding undertakings.

3.3 At the end of each matter, each lawyer or other professional who has been involved in the matter shall review his or her portion of the file to determine whether there is any remaining client’s property that should be returned to the client.² As contemplated by Section 3.2(e), the remainder of the file in the possession of the law firm will not contain any client’s property other than client’s property that the client expressly instructed the law firm to retain and store on its behalf after the matter has been completed (e.g. seals, minute books, share certificates, wills, etc.).

3.4 At the end of each matter, unless the matter has been subject to a confidentiality or other information screen, each lawyer or other professional who has been involved in the matter shall review his or her portion of the file to determine whether there are any documents that should be used as precedents and placed in the firm’s electronic precedent repository for future use.

¹ ANNOTATION: It is considered best practice to send the client a reporting letter or disengagement letter which formally indicates to the client that the retainer is at an end, that no further documents will be provided to the client unless requested and that any remaining documents in the file will be destroyed in accordance with the law firm’s document retention policies and procedures.

² ANNOTATION: The law firm may wish to make appropriate copies of all client’s property being returned to the client before doing so, unless copies of such client’s property may be readily obtained from other sources (including the law firm’s electronic document repository). To help avoid any possible confusion or disputes at a later date, the law firm may also choose to keep a record of the client’s property that was returned to the client.

- 3.5 Before closing the file and sending any physical documents or other property from the file to offsite storage, each law firm professional who has been involved in the matter should arrange to have the file stripped of:
- (a) hard copies of documents that have been imaged or otherwise saved in the firm's electronic document repository; and
 - (b) any documents that can be retrieved or reproduced from another source (such as documents filed in a public registry, copies of cases, etc.).

The law firm may also delete duplicate copies of electronic versions of documents that have been saved in the firm's electronic document repository.³

- 3.6 When the file is closed, the law firm shall note in its records that the file is a closed file.
- 3.7 The law firm shall maintain records that identify its closed files, including the file closing date and, if applicable, the file destruction date.

4. Retention of Closed Files

- 4.1 Closed files shall be stored in facilities that are physically secure so as to maintain client confidentiality and protected against damage or loss.

5. File Destruction

- 5.1 When the matter-responsible lawyer closes the file in accordance with Section 3, and if the file is appropriate for destruction (see Section 5.2 below), the file destruction date shall be determined based on the firm standard as defined in Section 5.2 unless the matter-responsible lawyer has determined that a different file destruction date would be more appropriate for the file.
- 5.2 The law firm retains closed client matter files primarily to satisfy risk management concerns. Accordingly, it is prudent to retain the closed matter file for a time period based on the limitation period during which claims might be advanced against the law firm.⁴ If in doubt, the matter-responsible lawyer should designate the longest applicable retention period and file destruction date. The file destruction date for most files shall be **[fifteen (15)]** years after the file closing

³ ANNOTATION: The latest versions of certain email management and document management systems either prevent the saving of duplicate documents under different author names or they have the capability of purging duplicate documents after a matter has closed. This is mainly to save server space but it also accomplishes the same function as stripping the duplicate copies of hard copies of documents in the paper file.

⁴ ANNOTATION: Because original documents (such as trade-mark registrations) or client property (such as wills) are required for other purposes, they should not be kept with the archived or offsite closed matter file.

date set by the matter-responsible lawyer.⁵ A different file destruction date should be set by the matter-responsible lawyer depending on the circumstances of the file or in situations where the *Limitations Act, 2002* (Ontario) sets a different time period for potential claims made against the law firm. For example, the matter-responsible lawyer shall consider a different file destruction date if any of the following circumstances apply:⁶

- (a) files involving a client who is a minor: set the file destruction date to be **[fifteen (15)]** years after the client reaches the age of majority;
- (b) files involving a client who is mentally incapacitated: indefinite retention period, subject to review after **[fifteen (15)]** years;
- (c) files involving the drafting of wills or trusts: indefinite retention period, with a recall period based on the client's individual circumstances;⁷ and
- (d) files involving family law arrangements: indefinite retention period, subject to review after **[fifteen (15)]** years.

5.3 The file destruction date shall be suspended in the event of any of the following that relate, directly or indirectly, to the matter: (a) an actual or potential errors and omissions claim made against the law firm, (b) a discovery request relating

⁵ ANNOTATION: When determining an appropriate file destruction period, consider the various factors set out in the Law Society Guide to Retention and Destruction of Closed Client Files under the heading "Determining the File Destruction Date". Generally, based on the provisions of *The Limitations Act, 2002* (Ontario), an appropriate retention period for client files is fifteen (15) years after the file is closed. This time period is not a rule and it may not be appropriate for all client files. Lawyers should use their own judgment when establishing destruction dates for client files based on the circumstances of the individual client matter, the client's needs and the needs of the law firm. Remember as well that other jurisdictions (provincial, federal and international) will have different limitation periods and law firms operating or doing work in multiple jurisdictions will have to consider such other limitation periods when establishing their firm-wide file destruction periods. Shorter file destruction periods may be appropriate for some law firms in some practice areas based on a risk management assessment of the nature of their matters and the content of their files. Note also the judgment of the Ontario Court of Appeal in *York Condominium Corp No 382 v Jay-M Holdings Ltd* (2007), 84 OR (3d) 414 (CA). By reason of this judgment, it appears that it is only as of January 2, 2019 that claims discovered after January 1, 2004 based on legal services rendered on or before January 1, 2004 will be barred by section 15 of *The Limitations Act, 2002* (Ontario).

⁶ ANNOTATION: For the circumstances listed in Section 5.2, it is recommended that such files be periodically reviewed to determine if there is a change in circumstances that may justify the setting of a new or different file destruction date. Consider setting a file review date at the time the file is closed. In addition, while the circumstances listed in Section 5.2 have been broadly defined, law firms may wish to further refine them to the specific nature of the potential claim that has or might have a limitation period exceeding fifteen (15) years.

⁷ ANNOTATION: For example, the file of an 85 year old client should perhaps be re-evaluated after fifteen (15) years, whereas for a younger client, the dormancy period may be longer. Retention of the file should be re-evaluated when an event occurs that may affect the length of time for which the file should be kept: for example, if the client requests that his or her will and file be transferred to another law firm, or when the client dies.

to the client or the law firm, (c) disputes concerning the law firm's professional fees, (d) complaints made to the Law Society, (e) audits, and (f) governmental investigations. This may be ordered by any one of the matter-responsible lawyer, the errors and omissions partner/committee or a member of a practice management or professional standards committee.

- 5.4 The file destruction date may be postponed at any time if otherwise appropriate (for example, in the event that all or part of the original matter becomes active again or is relevant to a new matter).
- 5.5 This policy shall be applied in a manner so as to ensure that client confidentiality is maintained and that there is compliance with all applicable federal and provincial privacy legislation.
- 5.6 The law firm shall maintain a record of destroyed files which shall include the name and address of the client, the file number, a brief description of the matter, the file closing date, the file destruction date and the name of the matter-responsible lawyer.

FILE DOCUMENTS

The following cases and materials have dealt with the issue of document ownership and may be of assistance to lawyers in determining who owns the documents in the file:

Aggio v. Rosenberg, 24 C.P.C. 7, 1981

Alexandra Marks, ed., *Cordery on Solicitors*, 9th ed. (London: Lexis Nexis Butterworths, 1995) at 4/661.

McInerney v. Macdonald, [1992] 2 S.C.R. 138

In *Aggio v. Rosenberg* the plaintiff changed lawyers prior to trial. A direction was sent to the former lawyers requesting that they deliver the contents of their file to the new lawyer. The former lawyers did not claim a solicitor's lien, but took the position that the plaintiff was not entitled to correspondence to or from the law firm, memoranda of law and copies of cases in the file. The court dealt with the issue of who has authority over documents upon the termination of a retainer, Master Sandler states at page 4:

"As to what the law in Ontario is, I adopt the law as set out in *Cordery* [*Cordery, Law Relating to Solicitors* (6th ed.)] as follows:

Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent for and on behalf of the client or third party, and on termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs) as the client or third party may direct.

Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:

- (i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for the client, belong to the client.
- (ii) Documents prepared by the solicitor for his own benefit as protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
- (iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of dispatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.

- (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g. letters belong to the client.

The Supreme Court of Canada in *McInerney v. Macdonald* in dealing with the ownership of medical records in a physician's file, takes another approach. In *McInerney v. Macdonald*, a patient requested copies of the contents of her medical file from her doctor. The doctor delivered copies of the records that she had prepared herself, but refused to produce copies of reports and records that she had received from other doctors who had treated the patient. She took the position that those records were the property of those other doctors.

The court held that the relationship between the doctor and patient is a fiduciary relationship. Information revealed to the doctor in his or her professional capacity is held in a manner somewhat similar to a trust. While the doctor owns the actual medical records, the information is to be used by the doctor for the benefit of the patient. Generally a patient is entitled to reasonable access to examine and copy all information in the patient's medical file which the doctor considered in administering advice or treatment provided that the patient pays a legitimate fee for the preparation and reproduction of the information.

La Forest J. in delivering the judgment of the Supreme Court of Canada states at page 9:

"The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue.

In addition at page 13. he states:

"In the absence of regulatory regulation, the patient is entitled, upon request, to inspect and copy all information in the patient's medical file which the physician considered in administering advice or treatment. Considering the equitable base of the patient's entitlement, this general rule of access is subject to the superintending jurisdiction of the court. The onus is on the physician to justify a denial of access".

The following are some examples of documents in a client file and how a lawyer should deal with these documents⁸

Client's Documents

Subject to the right of the lawyer in appropriate circumstances to claim a solicitor's lien, a client is entitled to:

- ❑ Documents existing before the lawyer was retained;
- ❑ Originals of documents prepared by the lawyer for the client pursuant to the retainer such as a last will and testament, power of attorney, agreement, transfer and charge;
- ❑ Personal property of the client such as corporate seals.

Other Documents

Subject to the right of the lawyer in appropriate circumstances to claim a solicitor's lien, a lawyer in accordance with the law should either return the following documents to the client or give the client reasonable access to these documents:

- ❑ Copies of letters received from third parties;
- ❑ Copy of letters sent by the lawyer to third parties;
- ❑ Pleadings;
- ❑ Cases;
- ❑ Briefs;
- ❑ Memoranda of law;
- ❑ Pretrial Memoranda;
- ❑ Draft documents prepared by the lawyer for the client;
- ❑ Document books;
- ❑ Vouchers and receipts for disbursements made on behalf of the client;
- ❑ Experts' reports.

⁸ When a lawyer transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, subject to the lawyer's right to a lien, the lawyer must deliver to or to the order of the client all papers and property to which the client is entitled and must give the client all information that may be required in connection with the case or matter. In addition the lawyer must cooperate with the successor lawyer or paralegal so as to minimize expense and avoid prejudice to the client. Rule 2.09 of the Rules of Professional Conduct sets out the lawyer's obligations in this regard.

- ❑ Discovery and trial transcripts.

Lawyer's Documents

The lawyer is entitled to the following documents:

- ❑ Original correspondence from the client including instructions from the client;
- ❑ Copies of correspondence sent to the client;
- ❑ Working notes, summaries or evidence and submissions to the court;
- ❑ Tape recordings of conversations other than with witnesses;
- ❑ Inter-office memoranda;
- ❑ Time entries or dockets;
- ❑ Accounting records and parts thereof that relate to the client matter;
- ❑ Notes and other documents prepared for the lawyer's own benefit or protection and at the lawyer's own expense.

DEALING WITH FILE CONTENTS WHEN CLOSING THE FILE

The following are some suggestions with respect to dealing with the contents of the file when preparing a file for closing.⁹

Document	Client	Lawyer
<ul style="list-style-type: none"> ❑ Retainer Documents [Retainer Agreement, Client Instructions, Conflict of Interest, Acknowledgments, Initial Letter to the Client] 	Previously given to the client	Keep
<ul style="list-style-type: none"> ❑ Client Documents Existing Prior to the Retainer 	Return	Lawyer to determine whether to keep a copy in accordance with the law firm's File Retention Policy.
<ul style="list-style-type: none"> ❑ Documents Prepared by the Lawyer for the Client [e.g. agreements, leases, charges, transfers, etc.] 	Return	Lawyer should keep a copy unless the document can be retrieved from another source. Even where the document can be obtained from another source, the lawyer may wish to retain a copy if it is likely that the document will be required in the future.
<ul style="list-style-type: none"> ❑ Court Documents such as pleadings, briefs, legal memoranda, pretrial notes, document books etc 	Provide the client with these documents or access to these documents in accordance with the caselaw	Lawyer should determine whether to keep a copy in accordance with the law firm's File Retention Policy

⁹ When a lawyer transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, subject to the lawyer's right to a lien, the lawyer must deliver to or to the order of the client all papers and property to which the client is entitled and must give the client all information that may be required in connection with the case or matter. In addition the lawyer must cooperate with the successor lawyer or paralegal so as to minimize expense and avoid prejudice to the client. Rule 2.09 of the Rules of Professional Conduct sets out the lawyer's obligations in this regard.

Document	Client	Lawyer
<ul style="list-style-type: none"> ❑ Drafts of Documents 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should keep a copy if the document confirms client instructions and if the lawyer reasonably believes that this might be an issue in the future.
<ul style="list-style-type: none"> ❑ Documents of the Opposing Party [Pleadings, briefs, document books etc.] 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should determine whether to keep a copy in accordance with the law firm's File Retention Policy.
<ul style="list-style-type: none"> ❑ Letters from Third Parties 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should keep a copy.
<ul style="list-style-type: none"> ❑ Letters to Third Parties 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should keep a copy.
<ul style="list-style-type: none"> ❑ Caselaw 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should keep a list of the cases
<ul style="list-style-type: none"> ❑ Discovery and Trial Transcripts 	Provide the client with these documents or access to these documents in accordance with law	Lawyer should determine whether to keep a copy in accordance with the law firm's File Retention Policy.

Document	Client	Lawyer
<input type="checkbox"/> Experts' Reports	Provide the client with these documents or access to these documents in accordance with law	Lawyer should determine whether to keep a copy in accordance with the law firm's File Retention Policy
<input type="checkbox"/> Client's Property [e.g. jewellery, artwork, securities]	Return	Lawyer should retain records as required by By-law 9.
<input type="checkbox"/> Corporate Minute Books and Seal	Return unless otherwise agreed with the client	Lawyer should determine whether to keep a copy in accordance with the law firm's File Retention Policy
<input type="checkbox"/> Last Wills and Testaments	Return unless otherwise agreed with the client	Lawyer should keep a copy of the original will. The lawyer should consider keeping copies of drafts of the will and previous wills as evidence of the client's instructions.
<input type="checkbox"/> Powers of Attorney	Return unless otherwise agreed with the client	Lawyer should keep a copy of the original Power of Attorney. The lawyer should consider keeping as evidence of client instructions drafts of documents and previous powers of attorney.
<input type="checkbox"/> Notes to the File, Inter-office Memoranda, Tape-recordings or notes of conversations		The lawyer should keep these if they document client instructions.
<input type="checkbox"/> Time Entries/Dockets		Keep
<input type="checkbox"/> Law Firm's Accounting Records Relating to Client Matter		Keep

SAMPLE PROVISIONS

Sample Retainer Agreement Provision

These paragraphs may be included in the retainer agreement.

When your matter has been completed, you will be entitled to receive copies of any documents relating to the legal services performed by us for you not previously provided to you, excluding our internal accounting records and other documents belonging to us. We have the right to retain copies of any documents or papers provided to you.

In addition when the matter has been completed, we will close your file and notify you. At that time if you wish to have any documents from your file, please advise us. Otherwise we will deal with your file in accordance with our file retention policy.

In this regard, some documents will be removed from the file and destroyed, while others will be stored in an off-site location for a period of time and then destroyed. If you require copies of documents once the file has been moved to the off-site location, an administrative fee may be charged to retrieve the file from storage.

Sample Letter to the Client – Closing the File

The contents of this letter may be incorporated into a final report to the client.

We have recently completed the matter for which we were retained and we are now in the process of closing the file in accordance with our file retention policy.

We enclose the following documents:

[Documents belonging to the client and which have not been previously sent to the client e.g. original documents]

In accordance with our file retention policy attached and previously provided in the retainer letter and as part of the closing procedure, some documents will be removed from the file and destroyed when the file is closed, while others will be stored in an off-site location for a period of time and then destroyed. If you require copies of documents once the file has been moved to the off-site location, an administrative fee may be charged to retrieve the file from storage.

SUGGESTED STEPS FOR CLOSING, RETAINING AND DESTROYING FILES

Determine whether you may close the file

The following are some factors that you may wish to consider in determining whether a file has been completed and should be closed.

- Have you completed all work that you were retained to complete?
- Have you reported to the client?
- Have you forwarded an account to the client?
- Has the account been paid or has the firm written off any balance owing on the final account?
- Have all undertakings been satisfied?
- Have you dealt with any balance in the trust account?

Strip the File

- Have you removed unnecessary duplicate copies?
- Have you removed or copied material for precedent or future use?
- If so, have you stripped the precedent material of all personal information within the meaning of PIPEDA?
- Have you returned documents belonging to the client or third parties?
- Have you determined copies of which documents you will retain?

Communicate with the Client

- Have you advised the client that the file is being closed and will be destroyed after a certain date? This advice may be contained in the retainer agreement.

Establish a Destruction Date

- Have you established a file destruction date?
- Have you established a file review date to review the file prior to destruction or alternatively, do you have a system in place to ensure that the file destruction date is postponed where there are changes in circumstances during the file retention period that necessitate a postponement of the date?
- Have you entered these date(s) into your tickler system?

Classify File as Closed

- Have you classified the file as closed?

- Have you entered this data into your office system?

Determine the Method of Storage

Have you determined the method(s) of storage?

- Paper

- Electronic

If documents are going to be stored electronically, consider:

- Do you have a legal or ethical obligation to store the file in paper form?

- Do you have the necessary hardware and software to retrieve these documents during the retention period?

- Do you have a procedure in place for ensuring that you have the hardware and software to retrieve these documents during the retention period?

- If the documents are likely to be used as documentary evidence, have you complied with any evidentiary rules governing admissibility of electronic copies?

- Do you have a backup system for the materials stored electronically?

- Have you considered whether documents, data or information should be encrypted?

Place the File In Storage

- Is the storage location secure?

- Have you ensured that you can meet confidentiality obligations?

- Do you have adequate insurance to cover loss or damage?

Review the File Prior Destruction

- Have you reviewed the file before destruction to determine if the destruction date should be changed?

Destruction of the File

- Have you ensured that the file will be destroyed in a way that will maintain lawyer/client confidentiality?

Establish a Record of Destruction or Disposition

- Have you established a record of the destruction in accordance with your retention policy?

AREA OF PRACTICE SPECIFIC GUIDANCE ON FILE RETENTION AND DESTRUCTION

One of the factors that lawyers should consider when setting a file destruction date for a client file is the nature of the matter and the likelihood of the file being required to defend against allegations of malpractice.

The following best practices and recommendations based on specific practice areas may be of assistance to lawyers in determining the appropriate file destruction date. With the exception of those requirements contained in the Law Society *Rules of Professional Conduct* or By-laws, these recommendations and best practices are not intended to replace the lawyer's own personal judgment or establish a rigid approach to the retention and destruction of closed client files. When setting a file destruction date, lawyers should consider the individual circumstances of the file, their own needs and the needs of their clients and deviate from these recommendations where appropriate.

LAWPRO has recently published the following chart based on practice areas which may be of assistance to lawyers when setting a file destruction date for client files. The chart shows by practice area the years between the error date (the date that the work was done) and the reporting date (the date the error was reported to LAWPRO) for 24,221 claims reported to LAWPRO between 1997 and 2009. While most claims against lawyers tend to arise within 15 years of the date that the work was completed, some claims do arise later.

**Years From Error Date To Claim Reporting Date
By Area Of Law (Claim count by %)**

	Under 10	10 to 15	Over 15	Oldest Claim
Real Estate	90.2	5.7	4.1	42 years
Plaintiff litigation	98.3	1.3	0.4	31 years
Corporate	96.3	2.5	1.2	41 years
Family	92.5	4.8	2.7	26 years
Defence litigation	98.5	1.1	0.4	24 years
Wills	91.0	5.5	3.5	39 years
Labour	98.8	1.2	0.0	14 years
IP	98.6	0.9	0.5	18 years
Tax	95.9	3.4	0.7	24 years
Criminal	96.0	1.6	2.5	24 years
Securities	98.7	1.3	0.0	13 years
Bankruptcy	96.2	3.8	0.0	14 years

Based on 24,221 LAWPRO claims reported from 1997 through 2009.

Estates and Trusts

How long should a lawyer retain a file involving an estate or trust matter?

A will does not take effect until the testator dies and a will file may contain evidence of testamentary capacity or intention and may be required more than 15 years after the date that the file is closed. Similarly a trust may be operative for more than 15 years after the lawyer's file is closed. For these reasons it is recommended that a lawyer retain a file involving the administration of an estate or trust for a period of at least 15 years after the date that the estate has been finally distributed or the trust fully administered. Files containing a copy of a signed will, power of attorney document or trust document where final distribution of the estate has not occurred or where the trust has not been fully administered should be retained indefinitely.

In addition when setting a file destruction date, the lawyer should consider the individual circumstances of the file and in this regard may wish to consider the deadline for bringing a claim in negligence and/or contract against the lawyer.¹

Should lawyers retain original estate and trust documents such as wills?

Generally, it is recommended that when acting for a client in respect of estate litigation, planning, or trust matters, a full discussion should be undertaken with the client to determine whether or not original documents, notarial copies or copies of the following documents should be retained by the lawyer or the client:

- a) wills;
- b) trusts;
- c) powers of attorney;
- d) beneficiary designations;
- e) holograph wills;
- f) passing of accounts vouchers;
- g) precatory memoranda and directions to executors;
- h) family agreements or contracts;
- i) mutual will contracts;
- j) court orders;
- k) Certificates of Appointment of Estate Trustee; and
- l) other relevant documents

¹ There are some provisions in the *Limitations Act, 2002* that operate to extend the basic limitation period of two years and the ultimate limitation period of 15 years. For example, section 15(4) of the Act provides that the ultimate limitation period does not run if the person with a claim is a minor or is incapable and is not represented by a litigation guardian in relation to that claim. In addition as a result of the judgment of the Court of Appeal in *York Condominium Corp. No.382 v. Jay-M Holdings*, 2007 ONCA 49 (<http://www.canlii.org/eliisa/highlight.do?text=Jay-M&language=en&searchTitle=Ontario+-+Court+of+Appeal+for+Ontario&path=/en/on/onca/doc/2007/2007onca49/2007onca49.html>) also found at 84 O.R. (3d) 414, it appears that undiscovered claims based on legal services rendered on or before January 1, 2004 will be barred only as of January 2, 2019.

There are three important questions for a lawyer to consider with respect to the retention of these documents:

1. Should the lawyer keep the originals?
2. If so, how long should the originals be kept?
3. If the lawyer is not keeping the originals, what steps should the lawyer take to ensure that the originals are returned to the client?

A longstanding debate exists within the Ontario bar of whether or not a lawyer should retain custody of original documents such as wills and trusts. Retaining custody of original documents can impose onerous obligations on a lawyer with respect to the safe storage and retention of these documents. If a lawyer undertakes to retain custody of these documents, the lawyer may wish to consider the length of time that the documents will be stored and how best to maintain contact with the client in the event that the lawyer requires instructions from the client at a future date. Furthermore, it is recommended that lawyers and law firms undertake a careful risk management analysis when considering the issue of whether the lawyer or law firm will store original client documents.

If a lawyer retains such original documents, the lawyer should store these documents in a safe, fire proof and locked facility. Secondly, the lawyer should maintain an accurate and current record of the property stored for the client.²

Where the lawyer delivers the original document to the client for safekeeping, it is recommended that the lawyer send to the client a clear and concise reporting letter when the file is closed identifying the original document being returned. A lawyer should consider obtaining a receipt from the client acknowledging the client's receipt of these original documents. The lawyer may also wish to keep copies of documents returned to a client for future reference.

What should lawyers do with original wills/powers of attorney in their custody upon retirement or closing down their practice?

If the lawyer is able to locate the client or former client, the lawyer should advise the client in writing that the practice is closing down and seek instructions from the client as to whether the will/power of attorney should be transferred to another lawyer or delivered to the client.

If the lawyer is unable to obtain instructions from the client such as in situations where the client cannot be located, the lawyer may, subject to any legal requirement to the contrary, transfer the documents to another lawyer who must preserve the documents in accordance with Rule 2.07 or the lawyer may retain custody of the clients' documents in compliance with Rule 2.07.³ In addition, the lawyer should notify the Law Society in writing as to the location of the documents and send a letter to the client's last known

² Rule 2.07(1) of the *Rules of Professional Conduct* provides that lawyers are required to care for a client's property as a careful and prudent owner would when dealing with like property and to observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

³ Ibid.

address advising the client where their documents are to be located in light of the practice closing down.

In certain situations, original wills may be deposited for safekeeping with the Superior Court of Justice. For example this option may be available to:

- a lawyer who has custody of a will or codicil at the time of retirement from practice;
- a lawyer's estate trustee if the lawyer had custody of the will or codicil at the time of the lawyer's death; or
- a person who is authorized by the testator in writing to deposit the will or codicil.⁴

Lawyers should plan for death or disability. In this regard, they may consider having a will that appoints a lawyer as a special executor/estate trustee with a will to deal with the law practice in the event of the lawyer's death and a power of attorney granting a successor lawyer the ability to access the lawyer's trust and general accounts and continue with the practice in the event of the lawyer's disability. Upon ceasing practice, lawyers should advise their estate trustees/special executors of the location of their file list and files and should also advise the Law Society of the location of client property such as wills and powers of attorney. Furthermore they should consider any wills under which they have been named estate trustee. If a lawyer is acting as an estate trustee when the lawyer ceases to practice, the lawyer should review the will to determine if a replacement should be appointed. Similarly where an appointment has been made in the will, but the testator is still alive, it may be necessary to contact the client to discuss a Codicil changing the appointment, especially if no alternative is named.

Real Estate

How long should a lawyer retain a file involving a real estate matter?

The majority of claims against lawyers involving real estate matters tend to arise within a period of fifteen years after the lawyer has completed the work. Based on this, it is recommended that lawyers retain most real estate files for a period of fifteen years after the date that the file is closed.

In setting a file destruction date for a real estate file, lawyers should consider the individual circumstances of the file. For example, where a lawyer has acted for a client with respect to both the purchase and the sale of a property, the likelihood of the lawyer requiring the file more than 15 years after the sale of the property is minimal. By

⁴ Section 2 of the *Estates Act*, R.S.O.1990, Chapter E.21 and Rule 74.02(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg.194. Lawyers should be mindful of the duty of confidentiality which survives death and is set out in Rule 2.03 of the Rules of Professional Conduct. Consideration should be given to including in the lawyer's initial reporting letter the necessary authorization to address the issue of the duty of confidentiality in respect of the release of the client's information "before death and after death".

contrast, if the client is a continuous client of the lawyer or law firm and the file is likely to be required for the representation of the client at a future date more than 15 years after the file is closed, the lawyer may wish to retain the file for a longer period.

When establishing a file destruction date, lawyers may also wish to consider the deadline for bringing claims against the lawyer. As a result of the judgment of the Ontario Court of Appeal in *York Condominium Corp. No.382 v. Jay-M Holdings*, 2007 ONCA 49 Canlii, it appears that undiscovered claims based on legal services rendered on or before January 1, 2004 will be barred only as of January 2, 2019.

What documents should the lawyer retain in the file when a real estate file is closed?

Prior to closing the file and to facilitate the eventual destruction of the file, it is recommended that lawyers deliver to the client all original documents belonging to the client such as the survey of the property. Lawyers should keep copies of these documents having regard to the considerations set out in the *Law Society Guide to Retention and Destruction of Closed Client Files*. When lawyers deliver original documents to their clients, it is recommended that they confirm in writing with the client the documents being delivered. They may also wish to alert the client that the documents should be maintained in a safe place as the lawyer's file will eventually be destroyed in accordance with the lawyer's file retention and destruction policy and copies of documents will no longer be available thereafter.

Lawyers should consider retaining in their closed files the following documents as these documents are of particular assistance to lawyers when defending themselves against allegations of malpractice:

- title search including notes and off-title searches;
- the lender's instructions;
- a copy of the survey;
- the requisition letter and answer including any exchange of correspondence on a contentious issue;
- the title insurance policy;
- reporting letters;
- documents confirming the client's instructions such as the lawyer's contemporaneous notes to the file regarding discussions with the client or staff and decisions made on issues and letters to the client confirming instructions;
- documents in support of compliance with law statements made by the lawyer;
- copies of clients' identification;
- certificates of independent legal advice if any; and
- the client's authorization (e.g acknowledgment and direction) to the lawyer to submit documents for electronic registration and to release the authorization to the Director of Land Registration if requested by the Director in the event of an investigation regarding suspected fraudulent or unlawful activity.⁵

⁵ The Electronic Land Registration Agreement that lawyers who are account holders are required to enter into with the Ontario government for authorization to submit documents for registration in

Given the fact that real estate files tend to be paper intensive and costly to store in paper form, real estate lawyers may wish to consider implementing procedures within their firms to store newly closed files electronically.

Prior to closing a real estate file, lawyers should ensure that all undertakings given by lawyers in the matter have been satisfied.

What are some of the considerations for real estate lawyers regarding closed files when closing down their practices or upon retirement?

Lawyers in determining whether to destroy closed files upon retirement or closing down one's practice should be guided by the same considerations as for real estate files closed during the course of the practice. Generally a period of fifteen years after the date that the file was closed will be an appropriate retention period. However in setting a destruction date for such files, lawyers should consider the individual circumstances of the file and the likelihood of the lawyer requiring the file at a future date. Claims against the lawyer may arise after the lawyer has retired or left private practice. (e.g. become employed in government, education or as in-house counsel)

Depending on the nature of the lawyer's practice and the types of matters handled by the lawyer, lawyers upon retirement or leaving private practice may wish to consider purchasing increased run-off liability insurance coverage protection. The standard LAWPRO Run-Off Insurance Coverage in the amount of \$250,000 per claim/in the aggregate limit provides some limited protection, but it may not adequately protect the lawyer for any claims that may arise after the lawyer has retired or left private practice . Once the \$250,000 limit is used up, the lawyer is personally liable for any additional costs. See the LAWPRO website for more information on Run-off coverage (www.lawpro.ca).

the electronic land registration system provides that prior to submitting a Transfer, Charge, Discharge or Power of Attorney for electronic registration, the account holder must ensure that users under the account have obtained evidence of proper authorization from the owner of the land or holder of an interest in the land that has directed the registration. In addition they must be in a position to provide evidence of that person's explicit consent to release their authorization for the registration to the Director of Land Registration upon request by the Director in the event of an investigation regarding suspected fraudulent or unlawful activity or registration.