

Paralegal Guide to Retention and Destruction of Closed Client Files



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du Haut-Canada

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GUIDE TO RETENTION AND DESTRUCTION OF CLOSED CLIENT FILES

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

INTRODUCTION

One of the challenges for paralegal 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 paralegals to develop policies for the closure, retention and destruction of client files. Such policies assist paralegals to control the volume and type of records retained, manage risk and meet professional responsibilities.

Paralegals 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 a sample file retention policy for paralegal firms. No one policy can cover all situations relating to the provision of legal services or practice areas. This sample policy is not intended to replace the paralegal's professional judgment. When establishing a file retention policy a paralegal should consider both the circumstances of the paralegal's practice as well as the Law Society Guide on Retention and Destruction of Closed Files.

REASONS FOR FILE RETENTION

There are a number of reasons why paralegals 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 paralegal.

Defend Against Claims and Allegations of Misconduct

One of the key reasons paralegals 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 paralegal 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

Paralegals should check with their individual insurance provider with respect to any requirements or recommendations regarding the retention and destruction of closed client files.

Legal Requirements

Generally when a matter is completed the paralegal 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 paralegal 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 paralegals to maintain specific books or records as part of their law office accounting system. Paralegals are required to maintain trust accounting records or documents for ten years immediately preceding the paralegal's most recent fiscal year end. All other accounting records or documents are to be maintained for six years immediately preceding the paralegal's most recent fiscal year end.

Future Use

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

¹ Section 24 of *The Limitations Act, 2002* contains transition provisions. Where a claim against a paralegal 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.

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.

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 paralegal 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 paralegal may consider naming the file with as much detail as possible. If electronic files are being retained in multiple locations such as in the paralegal's e-mail box, computer file system and the firm's practice management software, the paralegal 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 paralegal uses main folders based on a client and subfolders based on matters, the paralegal may consider implementing a similar structure wherever electronic information is stored.

CLOSING CLIENT FILES

In order to simplify the task of closing files, a paralegal 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.

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)

Prior to closing a file the paralegal should ensure that:

- ❑ all of the work that the paralegal was retained to complete has been completed;
- ❑ the paralegal 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 paralegal has dealt with any balances to the credit of the client in the paralegal'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 paralegal 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 a fiduciary.³

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

³ Law Society of Upper Canada, *Paralegal Rules of Conduct*, (March 29, 2007), Rule 3.07.

Before returning documents to the client, the paralegal should determine whether to retain copies of these documents. In making this determination, the paralegal might consider such factors as any legal requirement to preserve the document, the likelihood of the paralegal 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 paralegal transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard the paralegal 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 paralegal must cooperate with the successor licensee so as to minimize expense and avoid prejudice to the client. Rule 3.08 of the *Paralegal Rules of Conduct* set out the paralegal's obligations in this regard.

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

2. Purging the File

The paralegal should ensure that the file is organized prior to closing the file. A paralegal may wish to remove from the file any unnecessary materials. While staff may assist the paralegal in this task, the paralegal primarily responsible for the file should approve the removal, deletion and destruction of materials from the file. If files are maintained electronically, paralegals 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 paralegal 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 *Paralegal Rules of 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 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 paralegals 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 paralegal should retain draft copies of documents where the draft copies document the history of the matter or confirm client instructions and where the paralegal 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 paralegal 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 paralegal should consider advising the client of the file closure, retention and destruction policy at the outset of the retainer. The paralegal 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 paralegal is not required to retain all client files permanently.

When a file is closed, the paralegal 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 paralegal should implement a system to ensure that such circumstances are identified and the destruction date is changed if necessary.

Paralegals may consider establishing a file review date preceding the destruction date. The paralegal 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 paralegal 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 paralegal adopt a single retention period for all files. Rather the paralegal 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 paralegal'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. Paralegals 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 paralegal 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 paralegal must comply with any legal or regulatory requirements.
- (ii) *Client's Need*
The paralegal should consider whether the file might support future representation of the client or other clients.
- (iii) *Defend against Claims and Allegations of Misconduct*
The paralegal should also consider the likelihood of the file being needed to defend against claims, allegations of misconduct and the applicable limitation periods for such claims. Complaints to the Law Society against the paralegal may be made after the matter has been completed or when a file has been transferred to another paralegal. 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.⁴

RETENTION OF CLIENT FILES

System for Organizing Closed Files

A paralegal 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.

⁴ *Limitations Act, 2002*, S.O. 2002, c.24, ss. 6, 7, and 15

Form or Medium of Storing Retained Files

Paralegals 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 paralegal 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, paralegals 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, paralegals 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, paralegals must ensure that confidentiality is maintained. The storage facility must be secure to maintain confidentiality and to protect the files from damage or loss. Paralegals may wish to consider whether to encrypt stored files.

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

If files are being stored electronically, the paralegal should ensure that documents, data and information in the file can be accessed during the file retention period. The paralegal 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 paralegal primarily responsible for the file or if this is not possible another paralegal 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 paralegal's obligation to maintain confidentiality survives the retainer. Paralegals must ensure that they maintain confidentiality when disposing of files. If paper documents are shredded or incinerated, the paralegal must ensure that confidentiality is maintained both during the destruction process and the disposal.

Destruction of Documents and Information

When destroying a file a paralegal 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 paralegal should keep a record of all files destroyed or returned to the client in accordance with the paralegal'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 paralegal who authorized the destruction or delivery. This will assist a paralegal 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 paralegals in preparing a file retention policy. This sample policy should be adapted to suit the individual practice. No one policy can cover all situations relating to all paralegal practices. This policy is not intended to replace the paralegal's professional judgment. When establishing a file retention policy the paralegal should consider both the circumstances of the paralegal'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”).⁵

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

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

3. Closing the File

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

3.2 No file shall be closed unless:

⁵ 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 paralegal's discretion, copies of client documents may be retained in the file.
- 3.5 At the paralegal'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 paralegal'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 paralegal will ensure that such precedent documents 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 *Paralegal Rules of Conduct*, is maintained with respect to any other information that identifies the client
- 3.7 No file shall be closed unless the paralegal 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 paralegal 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 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 paralegal and the client regarding the storage of the client's property;
 - ❑ the paralegal 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 paralegal 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 paralegal'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 paralegal determines that the file is appropriate for destruction at a future date, the paralegal 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 paralegal determines that the file is to be retained permanently, the paralegal shall establish periodic review dates in order that the paralegal may review the file to determine whether circumstances have changed and whether the file is appropriate for destruction.
- 4.3 The paralegal 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 paralegal shall consider:
- ❑ the length of time that the paralegal is required to retain documents pursuant to specific laws or regulatory provisions;
 - ❑ the client's age and competency;

- the likelihood that the paralegal will require the file for the future representation of the client;
 - the length of time that the paralegal may be liable for claims involving professional negligence; and
 - the likelihood that the paralegal 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 paralegal 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 paralegal who authorized the file disposition.

FILE DOCUMENTS

The following cases and materials have dealt with the issue of document ownership and may be of assistance to paralegals 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 paralegal should deal with these documents⁶

Client's Documents

A client is entitled to:

- ❑ Documents existing before the paralegal was retained;
- ❑ Originals of documents prepared by the paralegal for the client pursuant to the retainer;
- ❑ Personal property of the client.

Other Documents

A paralegal 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 paralegal to third parties;
- ❑ Pleadings;
- ❑ Cases;
- ❑ Briefs;
- ❑ Memoranda of law;
- ❑ Draft documents prepared by the paralegal for the client;
- ❑ Vouchers and receipts for disbursements made on behalf of the client;
- ❑ Experts' reports.

Paralegal's Documents

The paralegal is entitled to the following documents:

- ❑ Original correspondence from the client including instructions from the client;

⁶ When a paralegal transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, the paralegal 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 paralegal must cooperate with the successor paralegal or lawyer so as to minimize expense and avoid prejudice to the client. Rule 3.08 of the *Paralegal Rules of Conduct* sets out the paralegal's obligations in this regard.

- ❑ 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 paralegal's own benefit or protection and at the paralegal's own expense.

APPENDIX 3

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.⁷

Document	Client	Paralegal
<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	Paralegal to determine whether to keep a copy in accordance with the paralegal firm's file retention policy.
<ul style="list-style-type: none"> ❑ Documents Prepared by the Paralegal for the Client [e.g. letter, affidavit]. 	Return	Paralegal should keep a copy unless the document can be retrieved from another source. Even where the document can be obtained from another source, the paralegal may wish to retain a copy. It is likely that the document will be required in the future.
<ul style="list-style-type: none"> ❑ Court Documents such as pleadings, etc 	Provide the client with these documents or access to these documents in accordance with the caselaw	Paralegal should determine whether to keep a copy in accordance with the paralegal firm's File Retention Policy

⁷ When a paralegal transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, the paralegal 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 paralegal must cooperate with the successor paralegal or lawyer so as to minimize expense and avoid prejudice to the client. Rule 3.08 of the Paralegal Rules of Conduct sets out the paralegal's obligations in this regard.

Document	Client	Paralegal
<input type="checkbox"/> Drafts of Documents	Provide the client with these documents or access to these documents in accordance with law	Paralegal should keep a copy if the document confirms client instructions and if the paralegal reasonably believes that this might be an issue in the future.
<input type="checkbox"/> Documents of the Opposing Party [Pleadings, etc.]	Provide the client with these documents or access to these documents in accordance with law	Paralegal should determine whether to keep a copy in accordance with the law firm's file retention policy.
<input type="checkbox"/> Letters from Third Parties	Provide the client with these documents or access to these documents in accordance with law	Paralegal should keep a copy.
<input type="checkbox"/> Letters to Third Parties	Provide the client with these documents or access to these documents in accordance with law	Paralegal should keep a copy.
<input type="checkbox"/> Caselaw	Provide the client with these documents or access to these documents in accordance with law	Paralegal should keep a list of the cases
<input type="checkbox"/> Transcripts	Provide the client with these documents or access to these documents in accordance with law	Paralegal should determine whether to keep a copy in accordance with the law firm's file retention policy.

Document	Client	Paralegal
<ul style="list-style-type: none"> ❑ Experts' Reports 	Provide the client with these documents or access to these documents in accordance with law	Paralegal should determine whether to keep a copy in accordance with the law firm's file retention policy
<ul style="list-style-type: none"> ❑ Client's Property 	Return	Paralegal should retain records as required by By-law 9.
<ul style="list-style-type: none"> ❑ Notes to the File, Inter-office Memoranda, Tape-recordings of conversations other than with witnesses or notes of conversations 		The paralegal should keep these if they document client instructions.
<ul style="list-style-type: none"> ❑ Time Entries/Dockets 		Keep
<ul style="list-style-type: none"> ❑ Paralegal 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 references to the client?
- 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 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 paralegal/client confidentiality?

Establish a Record of Destruction or Disposition

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

Paralegal Guide to Retention and Destruction of Closed Client Files

Visit www.lsuc.on.ca
or phone 416-947-3315 or
1-800-668-7380 ext 3315.



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