

Guidelines for File Closure, Retention and Destruction

Introduction

It is not the Practice Assistance Committee's intention to recommend mandatory guidelines or regulations, but rather merely to provide some advisory guidelines on the considerations to be taken into account on closure, retention, and possible destruction of files.

Clearly, the safest policy for any firm or lawyer is to retain every client file for all time. However, a thoughtful and consistent policy of stripping down, notification, retention and destruction is compatible with a professionally responsible practice. There will always be business risk associated with file destruction, but at some point the cost of keeping everything will outweigh the risk of destroying files. **It is for each practitioner/firm to develop their own policy to address the risk in a fashion that they can tolerate.**

File Closure

When a file is no longer current or the job involved has been completed, the file should be closed. The lawyer involved in the matter should review the file personally to return to or provide to the client all documents and property which belong to or were provided by the client or which relate to the final reporting to the client. The file can further be stripped down by discarding multiple copies of documents. Some practitioners view earlier drafts of final documents as disposable, whereas others wish to retain them to establish the pattern of client instructions or process of negotiations between parties. Property searches, maps, bylaws, etc., which may be useful for other files may be removed and stored centrally or indexed. **It is essential that the lawyer involved do this process by stripping down the file.** The client should be notified that the file is being closed and will eventually be destroyed. It may be useful to obtain the client's acknowledgement or even instruction that the file will be destroyed.

A file closure checklist, such as the one originally produced by the Law Society of Alberta, is recommended to be incorporated into the individual member's file closure review and is reproduced at the end of this article. It canvasses important considerations which should be addressed by the lawyer involved in deciding to close a file.

File Retention

We recommend maintaining most files for an absolute minimum of ten years. This time will be lengthened depending on the client and type of file.

Considerations affecting the period during which files should be retained include:

1. For what period would the contents of this file be useful to the lawyer/firm for this client or some other client or for general purposes?
2. During what period am I/is the firm liable to claims involving professional negligence?
 - ⇒ Representatives of the Nova Scotia Barristers' Liability Claims Fund advise that typically most non-property related claims arise within **ten years** of closing the file. However, some claims exist for services performed twenty or more years ago. They note that it is of particular importance to keep on a more or less permanent basis the notes of the limit of the scope of retainer and notes where clients have failed to follow your advice.
 - ⇒ In contract: you are liable to claims within **six years** after the cause of action arose.
 - ⇒ In tort: you are liable to claims within **six years** after the date the client ought to have discovered with the exercise of reasonable diligence, the act or omission resulting in loss or damages. *Central Trust v. Rafuse* [1986] 2 S.C.R. 147 var by [1988], 1 S.C.R. 1206. Also, s. 3(2) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 provides that in some circumstances an action may be permitted to proceed despite the limitation period. Remember that for claims involving infants, **the limitation period does not begin to run until after the infant reaches the age of majority**. For claims involving mentally incompetent adults, permanent retention of files is strongly recommended.

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3. For what period should I keep this file to defend against claims?

⇒ The Director of Discipline advises that historically, complaints have arisen usually with **five years** after a file is closed. However, complaints have been made as late as twenty years after service has been rendered.

4. For what period am I/is the firm required to keep documents under specific laws or rules, e.g. income tax considerations (six years after the later of (i) the end of a taxation year, or (ii) the filing of a late return for the taxation year, C.L.I.A. policies etc.)?

5. Is there some other source from which documents can be obtained, e.g. Registry Office, Court House? Keep in mind that the Prothonotary's Office also destroys old files.

Any retention schedule adopted by a member must address these considerations. As well, different types of files (criminal, civil, estate, family, tax, etc.) may have different considerations for file retention. The following attempts to review some of these considerations for the various file "types".

Income Tax Considerations

The *Income Tax Act* provides some specific rules concerning retention of records. Most of these deal with a person carrying on business. For example, Section 230(2.1) requires "...a person carrying on business as a lawyer...whether by means of a partnership or otherwise," to keep accounting records, including supporting vouchers and cheques. The general rule provided by Section 230(4) is that these types of records are to be kept at least six years.

Section 230(6) of the Act requires a person who has served a Notice of Objection or filed an appeal to the Tax Court under the Act, to maintain all records, etc., pending the final resolution of the appeal.

Another concern is the limitation period for reassessment under the *Income Tax Act*. The general rule is that an individual cannot be reassessed unless the Reassessment is issued within three years of the initial Assessment for the relevant year. There are slightly different rules for corporations. Regardless, the concern is that these limitation periods can be rendered ineffective if there has been misrepresentation, fraud, etc., relating to the issues in the relevant return, and Revenue Canada can then go back an indefinite number of years. As a matter of practice, Revenue Canada generally will not go back any more than six to seven years, even if charges of tax evasion and/or filing false returns are sworn under Section 239 of the Act.

In essence, a lawyer should not recommend to a client that their records need not be retained, simply because the normal assessing period has expired. This is particularly important because often the onus of proof is on the taxpayer to discredit the Assessment that has been issued, and this becomes extremely difficult if relevant documentary evidence is not available.

Another concern relates to establishing costs of assets. For example, if a person has owned a property for many years and then disposes of the property, it may be crucial to determine that cost base of the property. This is a common problem, and quite often lawyers' files are reviewed to determine cost information. In a typical real estate transaction, obviously the Deed for the property is readily available from the Registry of Deeds; however, the cost base of the property may be dependent on verifying the initial transaction. Unfortunately, in many situations people cannot remember what they paid for the property, in addition to what amounts they may have spent on the property over the years of ownership. This, of course, is even more difficult if one or more of the owners is now deceased.

Obviously, it would be preferable for lawyers to return all relevant documents and information to clients with instructions to keep those records indefinitely, and for very crucial documents, that they be kept in a secure place, for example, a safety deposit box. However, in reality what more often happens is that the client/taxpayer does not have relevant information readily available and must search out files of the lawyer who handled a relevant transaction to determine the history of an asset.

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Civil Litigation

The considerations described in "File Retention" with respect to contract and tort apply to all civil litigation matters.

Wills and Estates

In respect of wills, it must be recognized that a client may make a will which is not probated until the client dies - perhaps 40 or 50 years later. A lawyer's file containing original will instructions could therefore be needed 40 or 50 years after the original instructions were taken. Similarly, a will containing ongoing trusts or trusts for grandchildren, even though closed at probate, may be operative for a considerable period of time after probate is closed. Again, a lawyer's file containing original will instructions may be needed many years later.

As a result, it is recommended there be permanent retention of files for wills and estates in which probate has not been closed, and which have ongoing trusts after probate has been closed.

Family

Types of family matters:

1. Divorce - no corollary issues
2. Custody and access
3. Division of assets
4. Spousal and child support
5. C.A.S. "Protection" files
6. Adoptions

What is on file?

1. **Divorce - No Corollary Issues:** petition, affidavit of service, affidavit, application, waiver of financial statements, long form marriage certificate, divorce judgment, possibly a corollary relief judgment, certificate of divorce.

Commonly, clients call many years after the conclusion of the divorce looking for certified copies of the divorce and corollary relief judgments (or Decree Nisi and Decree Absolute). As usual, only one certified copy of each of these is issued at the time they are granted and those are sent to the client. Only photocopies will be on file in any event.

Certified copies can be obtained at the offices of the various prothonotaries.

Originals of the documentation used will be on the court file.

Give consideration to retaining copies of your own notes and relevant correspondence with your client, particularly if there were assets of some kind and the client did not wish at the time to pursue a division.

2. **Custody and Access:** affidavits, custody/access assessments, other professional reports, notes and perhaps a decision and order.

If the matter is settled then there will be no decision and there may be no affidavits.

In the future, the client may need to make, or respond to, an application to vary and will need to establish or negate a change of circumstances.

If we are looking at a time frame of, say, ten years before a file will be destroyed, then in the event of an application made after that time period, in many cases the passage of time itself will produce a sufficient change of circumstances, but documents may be necessary for the conduct of the application to vary in any event.

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If the case "went to court" and documentation was produced, then originals will be on the court file. When the file was closed, originals of other documents should be sent to the client with a caution to preserve it for the purposes of an application to vary in the future.

If the matter was settled early in the process or was not contested, there may be very little documentation to show what was relied upon to settle and both parties may have proceeded from different perspectives in choosing to settle.

3. **Division of Assets:** correspondence, notes, statements of property, supporting documentation such as valuations.

Many agreements effect a division of assets, but in many cases values of various items of the property, while they may have been exchanged between the parties, do not appear in the agreement and one cannot tell from reading the agreement if it effects an equal or an unequal division. The recitals will probably not spell that out either.

That may also be the case when agreement has been reached without the exchange of formally sworn statements, but information may be in the correspondence and a clause to the effect that the parties have each made full disclosure may not be helpful if there is no record of values.

It may be important after division has been effected for a client to establish the nature of the division, particularly if one of the considerations for it was tied in with the specific spousal support provision.

A division of assets is considered to be a once and for all settlement, but now some divisions are being revisited as a result of the recent legislation with respect to the division of Federal Pension Benefits, and it is therefore very important to retain whatever may be on the file showing what was taken into account in arriving at the agreed upon division.

They may also be "revisited" in the context of applications to vary support.

4. **Spousal and Child Support:** correspondence, notes, sworn financial statements and supporting documentation, such as T.1s, pay stubs.

This is the area where there will most likely be applications to vary and reliance placed upon old material with respect to the onus on one party of establishing a change in circumstances.

Having said that, and again if the kind of time frame we are talking about is around the ten year mark, then the passage of time alone will go quite a ways towards meeting the test in any event.

The form of affidavit used in support of the corollary relief judgment calls for a pretty barebones statement of the gross incomes of each of the parties and if that is all there is, there may be no indication on the record of more details or of expenses.

With respect to child support, which will be based upon the payer's gross income as and from May of 1997, the new legislation may obviate the necessity of detailed financial statements unless there is a departure from the new guidelines in a given case.

With respect to spousal support, it will be important to keep detailed records including, as far as possible, the specific factors taken into account in arriving at a particular agreement.

5. **C.A.S. "Protection" Cases:** affidavits, assessments, notes, correspondence.

These files will likely provide the most detail of any family files by reason of the practice of attaching to the affidavits the recordings of the workers. These will be kept on the court file.

The other side of the case, that of your client, may not be recorded in as detailed a manner.

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If there is a consent to a disposition which involves a child being placed permanently, it will be most important to have and to retain documentation supporting instructions from the client to that effect and factors taken into consideration.

6. **Adoption:** notes, correspondence, affidavits, consent(s), certificate regarding counselling, notice of adoption, application, order.

If this was a private adoption, it will be most important to be able to establish from the perspective of both sides a valid consent in strict compliance with the Act as well as compliance with all other requirements.

The valid consent should, if you represent the parents or one of them, include documentation confirming the independent advice which you have given with respect to the consequences of an adoption order and an acknowledgement from them (him, her) of having received and understood that advice.

Property and Property-Related Files

This area of practice is the largest source of claims for professional negligence against solicitors. It is particularly important if you practise in this area for you to keep notes of a limited retainer (i.e. client does not want a full title search) and to keep notes of recommendations made by you but not followed.

Regulation 48C of the Nova Scotia Barristers' Society states:

Interpretation

(1) In this Regulation,

- (a) "firm" means two or more lawyers in partnership or associates for the practice of law;
- (b) "lawyer" means an individual practising member of the Society.

Title Information to be Available

- (2) Where a firm or a lawyer certifies title to real property either with or without qualification, the firm or lawyer shall keep available either an abstract of title which discloses the chain of title, or such title information or certificate of title on which the firm or lawyer relied which would justify the certification of title by a reasonably competent solicitor.

Accordingly, even if your file is closed and retained in accordance with your firm's policy, abstract of title must be kept indefinitely.

Purchase Transaction - A lawyer should consider all of the following when deciding to retain the file:

1. The certificate of title to the client is a matter of contract law and the lawyer is responsible to the client regarding the title to the property until the client has sold the property. Therefore, the title search is a critical component of the file.
2. The *Marketable Titles Act* provides that the title is "marketable" if there is a clear chain of title for forty years plus one day. This factor should be considered when retaining the title search.
3. A legal undertaking is one that is intended to be a personal undertaking. All undertakings must be completed according to the terms of the undertaking and within a reasonable time. The file should be reviewed for any undertakings for their content and impact on the title of the property.
4. The *Registry Act* does not require that documents relating to title be recorded. Therefore, any unrecorded documents retained in the file should be reviewed to determine their importance to the title of the property.
5. The statement of adjustments are often the only written form of accounting left after the closing. Banks and Municipalities tend to destroy their records within a ten year period. Situations may arise where the purchaser or

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vender has misplaced the documents and requests that a copy be sent to him/her. The client may require copies for income tax purposes in the future. These factors should be considered when reviewing the file for retention.

6. Although mortgages are recorded at the Registry of Deeds, mortgage instructions and Statements of Disclosure should be reviewed for any special clauses which may affect the terms of the mortgage.
7. Zoning letters from the Municipality are important to confirm that the use of the property conforms with the zoning. If the zoning changes after closing, this type of letter can prove that the use at closing was conforming and may protect the lawyer from a negligence claim. This type of letter is important for the file. Similarly, occupancy permits are equally important.
8. Surveying information may be relevant to the boundaries of the property. Although it is common for surveyors to retain records, any original survey should be retained unless verification has been made that it is recorded at the Registry of Deeds. The lending institution returns the survey/location certificate to the owner or lawyer when the mortgage is paid off. If the lawyer has received the location certificate from the lending institution, it is possible that the client does not have a copy and therefore should be sent to the client indicating so or retained in the lawyer's file.
9. The Real Estate Standards adopted by the Nova Scotia Barristers' Society provide assistance and direction to the lawyer when making decisions about file retention.

Property Sale Transactions - As follows:

1. Similar to 3 above, undertakings given on closing should be reviewed to ensure they were completed. Evidence of completion of the undertaking may take certain forms such as letter paying out a mortgage, recording of documents, etc.
2. Similar to 4 above, any unrecorded documents in the file should be reviewed to determine their effect on the title and the impact on any undertakings which may have been given.
3. Similar to 5 above, the Statement of Adjustments serve as an important record of the disbursement of trust funds including Mortgage Payouts.
4. Mortgage Payout Statements provide information about the exact balance due on the closing date. It should be reviewed to determine if it may be relevant for the file after closing. Consideration should be given to whether the release of mortgage had been recorded and whether all undertakings had been performed.

Corporate Law

Some corporate work, such as debentures, chattels, etc., could well be considered to overlap with property law. In this context, if one is acting for a lender and the documentation is on file at the Registry of Deeds, you could allow for file copy documentation to be destroyed if the release acknowledgement is maintained in the file. Trust Ledgers and banking information should be retained as long as you are in practice. However, once the certificate conditions are voided through repayment of the debt, the lawyer should be able to consider destroying the documentation.

With regard to incorporation and other corporate records, they should be maintained until a company goes through a legal dissolution, when once again, documents may be destroyed; the dissolution order should be maintained for future records.

In any transaction where you act for the Vender or Purchaser of a business, all documentation should be maintained for the practising life of the solicitor, subject to dissolution of the company as noted above.

Labour and Employment Law

Litigation Services - Litigation services involve appearances before the courts as well as administrative/quasi judicial tribunals, including Labour Relations Boards, Human Rights Tribunals, Arbitration Boards, professional discipline tribunals, etc.

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Typically, at the conclusion of the Tribunal hearing, you should review the file and destroy only extra copies of exhibits, cases submitted, etc. That is simply to lessen the storage load. The next review is conducted after the appeal period passes, which vary depending upon the nature of the tribunal. A statutory arbitrator is subject to certiorari (six month appeal period), and a consensual arbitrator is subject to an application under the *Arbitration Act* with sixty day appeal periods respectively. It should be noted that some tribunals have internal appeal mechanisms such as the Nova Scotia Labour Relations Board which allows for an application for recommendation which may be made upon leave within one year of the decision or order of the Board. Certainly before an appeal period passes, you should maintain your personal notes created at the hearing, copies of cases or submissions made by the parties, copies of all exhibits tendered, copy of the tribunal's decision, etc.

Following the passing of the appeal period, you may decide to destroy notes made at the hearing, copies of cases submitted by the parties, etc. However, it is a good idea to retain a copy of the decision rendered, all briefs submitted, etc.

Seven years after the file is "closed", you may wish to review the materials again with a view to further reducing the materials in the file.

Advice - Due to ongoing relationships which you maintain with clients, you should not destroy opinion letters. Often an issue will arise again and you will be called upon to reflect on earlier advice; from a client service perspective, it is a good idea to maintain opinions forever. You may wish to have all opinions indexed and stored on a computer system, which all members of your firm can access, in order to reduce duplication of research efforts.

Collective Bargaining - Due to the nature of collective bargaining, issues arise in grievances and arbitrations about the meaning and interpretation of a particular phrase in a collective agreement. Sometimes arbitrators are called upon to review negotiating history as a guide to interpretation. Therefore, it is a good idea to maintain collective bargaining notes, proposals, counter-proposals, etc., forever.

File Destruction

When your reminder system brings forward on a monthly, quarterly or semi-annual basis the names/numbers of files scheduled for destruction, a second review should take place. Again, this review should take place by the lawyer involved (and if this is impossible, then by another lawyer familiar with the matter or type of file).

At this stage there are really three routes to follow:

1. Retain the file for a longer period if something has happened during the retention period to justify this, i.e. the matter has been revived.
2. Send the file to the client. Some practitioners will favour contacting the client again about the possibility of destroying the file. This would be more likely if no contact had been made at the time of file closure. However, contact may be difficult to make with the client due to passage of time (death, relocation, etc.). If a client wishes to retain the file, and the alternative is to destroy it, you may wish to give it to the client.
3. Destroy the file. When destruction takes place, confidentiality of the material should be maintained, e.g. shredding file contents.

At a minimum, a permanent record should be kept of all files destroyed or returned to the client. Information which should be maintained includes:

- ⇒ client's name and address, file number and brief description of subject matter;
- ⇒ notices to client of file closure and destruction;
- ⇒ date file was closed and lawyer who authorized closure;
- ⇒ date file destroyed and lawyer who authorized destruction; and
- ⇒ if applicable, authorization given by client to file closure for destruction.

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File Closure Checklist

DATE:	CHECKED BY:
FILE NAME:	APPROVED BY:
FILE #:	CLOSED FILE #:
DESTRUCTION DATE:	

ITEMS	YES	NO	DONE
1. Reporting letters done?			
2. All trust conditions met, all undertakings completed?			
3. File reviewed for loose ends? Noted for action?			
4. Unnecessary limitation dates removed from Limitation Diary?			
5. No balances in accounts: (a) Unbilled time (b) Unbilled disbursements (c) Unpaid accounts			
6. All accounts on file paid?			
7. Does client owe overdue bills on other files?			
8. Anything on file which should be sent to clients or others (e.g. executed documents, borrowed documents)?			
9. Anything on file useful for other files?			
10. Any notes or copies of briefs, opinions, memos of law, etc., to be preserved?			
11. Anything else to take off file (e.g. drafts of documents: bulky, repetitive, useless items, including those stored elsewhere, not including correspondence or notes or messages)?			
12. (a) Client notified regarding closure and eventual destruction?			
(b) Client acknowledgement or instructions received?			
13. Destruction date marked on file cover? (Not less than ten [10] years from file closure.)			
14. Current accounting and file records moved to closed accounting and file records?			
15. Closed file renumbered and entered in closed file index?			
16. Closed file physically removed to closed file location (including all sub-files, ancillary loose leafs, notebooks, rolls of plans, etc.)?			

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