

Succession Planning

Resources and Practice Aids

October 2010

Lawyers' Insurance Association of Nova Scotia

Phone: (902) 423-1300

Fax: (902) 421-1822

Web Site: www.lians.ca

These resources and practice aids are provided to you to assist in your practice but do not establish, report or create the standard of care for lawyers. They are not meant to be used as is. The material provided is not a complete analysis of the topic and each lawyer should complete his or her own appropriate legal research and modify documents to reflect the facts and agreement in each situation.

Lawyers' Insurance Association of Nova Scotia

1660 Hollis Street, Suite 1102

Halifax, NS B3J 1V7

Phone: (902) 423-1300

Fax: (902) 421-1822

www.lians.ca

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WRAPPING UP AND WINDING DOWN

First Published in the Society Record February 2006 and updated September 2009

In Nova Scotia, there are 497 practising lawyers who were admitted to the Bar more than twenty-five years ago. As the baby boom generation of lawyers begins to approach retirement, many private practitioners have questions on what should be considered and tasks completed prior to and upon retirement. The following checklist does not deal with the sale of a practice which involves valuation and accounting issues. It does not propose to be a comprehensive list, but rather a starting point. It is geared primarily to the sole or small firm practitioner who will be winding up his or her practice or to those assisting in an involuntary windup of a lawyer's practice.

1. Finalize as many active files as possible. Decide when you will cease to accept new files.
2. Notify clients with active files that you are retiring from practice and that a new lawyer needs to be retained. A new lawyer can be recommended but the client should be made aware that he or she can choose another lawyer to assume their file. You should inform them about time limitations and time frames important to their cases ([see sample precedent](#)), and provide applicable [authorizations for the client's signature](#).
3. Check for potential conflicts before referring and transferring client files to another lawyer. If the client chooses to self represent, have a [receipt of file](#) signed by the client. Maintain a copy of the file.
4. For cases that have pending court dates, discoveries or other appearances, discuss with the client and assuming lawyer how to proceed.
5. Where applicable, ensure that a Notice of Change of Solicitor is filed or a Notice of Intention to Act in Person (signed by the client) is filed.
6. Advise the Prothonotary of your retirement and your contact information.
7. Review closed files to determine whether they should continue to be stored, destroyed, returned to the client or, with the client's consent, transferred to another lawyer for storage. If transferred to another law firm get written confirmation that these files will be maintained and made available to LIANS or yourself if needed to respond to a claim against you. How long a file should be retained depends on the type of case, the client, and the advice given, especially where your advice is ignored. Many files or copies of files should be kept indefinitely. Without a file, it is almost impossible to defend an errors and omissions claim. For additional information, see the Practice Assistance Manual and its [Guidelines for File Closure, Retention & Destruction](#) published by the Society in 1998 (Available at the Nova Scotia Barristers' Library).
8. For Real Property Matters ensure that all foundation documents are maintained and or transferred in accordance with *Legal Profession Act* Regulations <http://www.nsbs.org/documents/general/CURRENTREGS.pdf>
- 8a. Make sure that all required Client ID documentation is maintained in accordance with the Client ID Regulations <http://www.nsbs.org/documents/general/ClientID/ClientIDPkg.pdf>



Lawyers' Insurance Association of Nova Scotia

by Deborah E. Gillis, Q.C., Risk and Practice Management Advisor

9. If you do destroy a file, keep a record of the files destroyed and the destruction date. Protect the client confidentiality by shredding. For files transferred, maintain a [record of instructions received](#) and where file was sent.

10. Maintain your old phone number for six months or a year, or arrange for a new phone number to be given out or a voice-mail activated when your old phone number is called so former clients have some way to contact you for file information. Re-direct mail.

11. Seek instructions from corporate clients for new addresses for their registered and records office and ensure that the notices are filed with the Registrar of Joint Stock Companies.

12. Make satisfactory arrangements to fulfill any outstanding undertakings. Complete reporting letters.

13. Submit the application to the Society required for Change of Category ([see application](#)).

14. Close trust accounts and file applicable audit reports.

15. Complete billings to clients.

16. Terminate lease or sublet office premises and deal with office equipment leases.

17. Give sufficient notice to staff of your pending retirement.

18. Pay any outstanding firm liabilities.

19. If applicable, leave open a general account to satisfy any outstanding obligations or for receipt of any accounts receivable after the closure of your practice.

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Contact LIANS at 423-1300 or email info@lians.ca for assistance or answers to questions.

CHECKLIST FOR CLOSING ANOTHER LAWYER'S OFFICE

The term "Affected Lawyer" refers to the lawyer whose office is being closed.

1. Contact staff. If they are available and reliable, retain them to work with you to administer the transition of open files. Having worked day to day with these files they can provide valuable information on the matter and the client that might not be apparent from reading the file.
2. Find and review the office's policies and procedures manual and contact list. When these do not exist, have staff prepare a memo on office procedures and important contact information.
3. Obtain names, addresses, phone numbers and email addresses for all staff.
4. Take possession and control of all property of the practice, including client files and records.
5. Open, review, and file all unopened correspondence and e-mails. Match any unfiled correspondence or e-mail with the appropriate file. Respond to the correspondence and e-mails.
6. Review the lawyer's calendar and active files to determine which items are urgent and/or scheduled for hearings, trials, discoveries, court appearances, etc and that may require immediate attention.
7. Immediately contact courts and the opposing lawyer(s) for files that have pending discoveries, court appearances or filing deadlines. Obtain new dates for hearings or extensions where necessary. Confirm extensions and rescheduled appearances in writing.
8. For cases before administrative bodies and courts, file a Notice of Change of Solicitor, Notice of Intention to Act in Person (if applicable) or make an application to have the Affected Lawyer removed as solicitor of record. Send copies of the filed Notices to the opposing lawyer(s).
9. Prepare a memo outlining the relevant facts, deadlines, opposing lawyer(s) and others involved in the case.
10. Contact clients who have active (but not urgent or time sensitive) files explaining verbally and in writing of the circumstances and asking for instructions from them on the ongoing carriage of the matter. Provide a date by which they should provide instructions to you.
11. If your arrangement is to represent the Affected Lawyer's clients on their pending cases, check for conflicts of interest. Where there is no conflict obtain each client's consent for your representation and for the rescheduling of hearings, court appearances and discoveries. Where there is a conflict, do not review the file. Have another lawyer who does not have a conflict immediately review the file, and advise the client of the circumstances and to receive instructions from him or her.
12. Instructions from clients regarding their matters should be confirmed, clearly and in writing. Spell out clearly what is and isn't being undertaken- continuing representation, interim

representation with nothing substantive done until the client finds another solicitor, self-representation, etc. Otherwise, some clients may think you're acting for them simply because you are there and have your hands on the file. There can be significant confusion at this time. Going into an office to close out their file can be an upsetting experience for a client. If not satisfied with the eventual outcome of their matter, a client may want to put the responsibility for that on you, recalling differently, the instructions you believe you received from them, or the advice you gave to them. There should be a clear paper record between the times of entry of the Assisting Lawyer until the time that lawyer leaves the file, on what was agreed to with the client.

13. If you will not be representing the client on a go forward basis, direct the client to either pick up a copy of his/her active file or sign an authorization for you to release a copy to the new lawyer. Have the client or new lawyer acknowledge, in writing, the receipt of the file. Keep a copy of the acknowledgment and the file. (See sample)
14. Advise clients with closed files of the contact information and process for retrieving a closed file.
15. Prior to releasing any file to a client:
 - Obtain and keep two pieces of identification from the client and check it against the information on file to confirm the file is being released to the client
 - Obtain a signed acknowledgement of receipt of file and a Notice of Intention to Act in Person, if applicable
 - Discuss any outstanding fees with the client to determine when payment can be made
16. When keeping track of disposition of files, consider dividing the list into files transferred to clients personally and those transferred to another lawyer.
17. Advise any new lawyer of outstanding third party invoices on files (re medical or expert reports, process serving, discovery services). Where appropriate, have the lawyer acknowledge the solicitor's lien on the file and the amount of the lien.
18. Report any potential claims to LIANS (www.lians.ca; 902-423-1300) immediately and ask LIANS for direction on further steps to be taken. Do not release the file without making a complete copy of it.
19. Secure trust and general account records. Contact the lawyer's accountant and/or bookkeeper.
20. Secure all computer records, backup all materials. Maintain the software required to run the programs.
21. Look for cheques or funds that have not been deposited. Determine if funds should be deposited or returned to clients. (Some of the funds may be for services already rendered.) Where records permit prepare a final billing statement, showing any outstanding fees due, and/or any money in trust.
22. If the Affected Lawyers' accounts are frozen, some legitimate outstanding cheques to clients, service providers, etc., may not be honoured. These will have to be identified and replaced.

23. If you are authorized to do so, and resources permit, handle financial matters and pay business expenses. Deal with staffing issues. Issue ROE's and T-4's where applicable. Arrange for HST and payroll remittances to be made and reports filed.
24. Have an auto answer installed on the Affected Lawyer's e-mails setting out the current circumstances and advising clients of contact information for the lawyer who is currently handling the Affected Lawyer's files.
25. Wind down the financial affairs of affected lawyer's practice, including providing his/her clients with a final accounting and statement for services rendered, return of client funds, collection of fees owing to the affected lawyer, payment of business expenses, and closure of business accounts when appropriate.
26. If the practice is being closed and phone being disconnected arrange for the lawyer's phone number to be forwarded to a number where someone can answer the caller's questions or direct him/her for information. This will reduce the problems created when a former client calls the Affected Lawyer's phone number, gets a "disconnected" recording, and does not know how else to obtain information.
27. If your arrangement with the Affected Lawyer or estate authorizes you to do so, liquidate or sell the practice.
28. Send the name, address, and phone number of the person who will be retaining the closed files to the Nova Scotia Barristers' Society.

TO CONSIDER WHEN NEGOTIATING AN ASSISTING LAWYER AGREEMENT

- Is the Assisting Lawyer experienced in areas of law that you frequently practice in and does he/she have time available for the orderly winding down of your practice? Is he or she will to assume this responsibility?
- Are your files well documented and your practice well organized to allow for an orderly transition?
- How will the assisting lawyer be paid and at what rate?
- Do you have a policies and procedures manual that outlines your office policies. If not will you prepare one?
- How will your disability or impairment be determined; medical doctors, family?
- How do you revoke the agreement?
- Do you have employment contracts in place?

Will the assisting lawyer have the power to

- Access to your office
- Open your mail
- Be your signatory on your bank accounts on disability what will happen on death
- Access files and client material
- Notify LIANS of potential negligence claims
- Transfer files and original documents
- Pay expenses including HST and CRA remittances
- Deal with staffing/personnel issues
- Settle claims against you
- Sell furniture, books, etc.
- Provide services to your clients if there are no conflicts and clients consent
- Purchase practice, if so on what terms – fair market value as determined by an appraiser and as approved by your executor or an independent third party
- Arrange for the sale of the practice to himself or herself

CHECKLIST FOR LAWYERS PLANNING TO PROTECT CLIENTS'
INTERESTS IN THE EVENT OF THE LAWYER'S
DEATH, DISABILITY, IMPAIRMENT, OR INCAPACITY

1. Have a thorough and up-to-date office procedure manual that includes information on:
 - a. How to check for a conflict of interest;
 - b. How to use the calendaring system;
 - c. How to generate a list of active client files, including client names, addresses, and phone numbers;
 - d. The location of all law office bank account records (trust and general);
 - e. How and how frequently you back up your electronic data;
 - f. Where details on individual trust accounts are kept;
 - g. The bank name, address, account signers, and account numbers for all law office bank accounts;
 - h. Where client accounting records are kept;
 - i. How the open/active files are organized;
 - j. How the closed files are organized and assigned numbers;
 - k. Where the closed files are kept and how to access them;
 - l. The office policy on keeping original documents of clients, if applicable;
 - m. If there is one, where the safety deposit box is located and how to access it;
 - n. Current contact information for all employees.
2. Choose a lawyer who has experience in the areas of law similar to those in which you frequently work and who has the time and resources available to attend to the orderly winding down and record keeping requirements of your law practice.
3. Make sure all of your file deadlines (including follow-up deadlines) are on your calendaring system.
4. Maintain well organized and well documented files.
5. Organize emails so they are easily accessible and retrievable in the future. Maintain the technology you will need to read this electronic data.
6. Keep your time and billing records current and your trust account reconciled
7. Have a policy of file retention and destruction. Ensure clients are aware of it when your file is opened. Consider not keeping original documents of clients, such as wills and other estate planning documents.
8. Meet with the Assisting Lawyer to discuss your firm's operation, and the terms of the proposed agreement. Discuss how computer passwords and telephone access codes will be obtained. Reduce your Assisting Lawyer agreement to writing.
9. Introduce your Assisting Lawyer to your office staff and your executor (executrix) and your spouse. Make certain at least two of these people know where you keep the written agreement and how to contact the Assisting Lawyer if an emergency arises. If you practice without regular staff, make sure your Assisting Lawyer knows how to gain access to your office.

10. Review your written agreement with your assisting lawyer at least annually or sooner if there are changes in circumstances (yours or the Assisting Lawyer's) that would warrant this.
11. Make sure your office procedures manual is kept current.

FACTORS THAT MAY AFFECT THE VALUE OF YOUR PRACTICE ON SALE

- Urgency or lack thereof may affect the price – sale before death or disability likely results in a better sale price
- Your practice areas may also affect price
- Client Base – how long have you been in practice
- Office location and renewal options
- Having good systems and well organized files makes a practice more valuable
- Up to date client lists and contact information
- Engaged and experienced staff – will they be remaining
- Referral sources – will these continue to refer when you are no longer there
- Can you stay on for a period of time to assist in transition
- Will fee income be guaranteed for a period of time or will there be some other arrangement
- Furniture, equipment – often have no value other than book value
- WIP – is it well recorded
- Closed files – how many are there and what are their ongoing storage costs
- Retainer agreements – do you have one for each file
- Are your accounts receivable low and current

DOCUMENTS REQUESTED FOR BUSINESS VALUATION ENGAGEMENTS

FINANCIAL STATEMENTS

- Annual financial statements and tax returns for the last 3-5 years.
- Interim financial statements through last period.
Copies of any forecasts or projections.

OTHER DATA

- Copies of business plan.
- Schedule of compensation. Paid to staff or for services that are contracted out
- Date of hire for current employees
- Resumes of employees or a summary of the background and experience/details of staff experience
- Details of any employee benefit plans, including health, life, disability, pension plans, profit sharing plans or RRSP contributions
- Inventory on hard assets – book value and market value
- Brochures, information, website.
- Breakout of revenue mix. Practice area and percentage of income and office profit
- Details of leases both for premises and equipment
- Details of other contracts – yellow pages, phone, etc.
- Copies of partnership agreements, details of loans, details of accounts payable, details of accounts receivable; are accounts receivable pledged as security for loans or line of credit?
- Details of any litigation, including pending or threatened lawsuits.

**LETTER FROM ASSISTING LAWYER ADVISING THAT PLANNING LAWYER
IS UNABLE TO CONTINUE IN PRACTICE**
(Sample – Modify as appropriate)

Dear [Name]:

Re: [Name of Case]

Due to ill health, [Affected Lawyer] is no longer able to continue representing you on your case(s). He/she has made arrangements for me to assist in any emergency matters and in the transition of his/her client matters to new lawyers. If you wish, I, or another member of this firm would consider handling your case. As well, you have the option of selecting another lawyer to represent you; or you can choose to represent yourself in this matter.

You are receiving two copies of this letter. If you wish me/our firm to consider handling your matter, please sign the authorization (1) at the end of this letter and return one copy to me. Keep the other copy for your record.

As well please contact me by phone at _____ or by e-mail at _____ to arrange for an appointment so that we can discuss your matter with you. Until we meet and until a new retainer agreement is signed, I do not consider that either I or our firm has been hired by you to do anything further on your file.

If you wish to retain another lawyer, please sign authorization (2) at the end of this letter and return one copy to me. Upon receipt of this authorization we will contact your new lawyer who can arrange for pickup of your file.

If you wish to represent yourself in this matter please sign authorization (3) at the end of this letter and return one copy to me. When you attend at the office to pick up your file please bring 2 pieces of ID, at least one of which is a picture ID. You will have to sign a Notice of Intention to Act in Person and an acknowledgement of receipt of file when you come to pick up the file. Please give me at least one business day's notice of your intention to pick up the file.

Since time deadlines may be involved in your case, that can affect whether your case will succeed, it is important that you advise me immediately of your choice of representation.

You will shortly receive a final account relating to [Affected Lawyer's], representation of you, which will include any outstanding balance(s) you owe [him/her], and an account of any funds in your trust account.

On behalf of [Affected Lawyer], I would like to thank you for retaining him/her to represent you.

Please feel free to contact me with any question you might have.

Yours truly,
[Assisting Lawyer]

1. I want _____ or a member of the firm of [*insert law firm's name*] to consider handling my case in place of [*insert Affected Lawyer's name*].

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

2. Please make my file available to my new lawyer _____, of _____

Address _____ Phone _____ Email _____

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

3. I will represent myself in this matter. Please make my client file available for pickup.

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

**LETTER FROM ASSISTING LAWYER ADVISING THAT PLANNING LAWYER
IS UNABLE TO CONTINUE IN PRACTICE**
(Sample – Modify as appropriate)

Dear [Name]:

Re: [Name of Case]

I am very sad to report that your lawyer _____ died _____. Prior to his/her death he/she arranged for me to assist with client matters in the event of his/her death or disability. He/she has made arrangements for me to assist in any emergency matters and in the transition of his/her client matters to new lawyers. If you wish, I, or another member of this firm would consider handling your case. As well, you have the option of selecting another lawyer to represent you; or you can choose to represent yourself in this matter.

You are receiving two copies of this letter. If you wish me/our firm to consider handling your matter, please sign the authorization (1) at the end of this letter and return one copy to me. Keep the other copy for your record.

As well please contact me by phone at _____ or by e-mail at _____ to arrange for an appointment so that we can discuss your matter with you. Until we meet and until a new retainer agreement is signed, I do not consider that either I or our firm has been hired by you to do anything further on your file.

If you wish to retain another lawyer, please sign authorization (2) at the end of this letter and return one copy to me. Upon receipt of this authorization we will contact your new lawyer who can arrange for pickup of your file.

If you wish to represent yourself in this matter please sign authorization (3) at the end of this letter and return one copy to me. When you attend at the office to pick up your file please bring 2 pieces of ID, at least one of which is a picture ID. You will have to sign a Notice of Intention to Act in Person and an acknowledgement of receipt of file when you come to pick up the file. Please give me at least one business day's notice of your intention to pick up the file.

Since time deadlines may be involved in your case, that can affect whether your case will succeed, it is important that you advise me immediately of your choice of representation.

You will shortly receive a final account relating to [Deceased Lawyer's], representation of you, which will include any outstanding balance(s) you owe [him/her], and an account of any funds in your trust account.

On behalf of [Deceased Lawyer], I would like to thank you for retaining him/her to represent you.

Please feel free to contact me with any question you might have.

Yours truly,
[Assisting Lawyer]

1. I want _____ or a member of the firm of [*insert law firm's name*] to consider handling my case in place of [*insert Deceased Lawyer's name*].

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

2. Please make my file available to my new lawyer _____, of _____

Address _____ Phone _____ Email _____

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

3. I will represent myself in this matter. Please make my client file available for pickup.

[Client Signature] [Date]

Address _____

Phone _____ Cell _____

Email _____

LETTER ADVISING THAT LAWYER IS CLOSING HIS/HER OFFICE

(Sample - Modify as appropriate)

Dear [Name]

Re: [Name of Case]

As discussed, as of [date], I will be closing my law practice due to [provide reason, if possible]. I will be unable to continue representing you on your legal matters.

I have made arrangements with [insert law firm name/Lawyer's name] to assume carriage of my active files provided that you agree and provided that lawyer has no conflict in representing you. You do not have to accept [insert law firm name/Lawyer's name] to represent you. You can select any lawyer you wish to represent you. If you wish to retain another lawyer, I would also be happy to provide you with a list of other local lawyers who practice in the area of law relevant to your legal needs.

Once you have made your decision with respect to legal representation, please provide me with written authority to transfer your file to the new lawyer. A draft authorization is enclosed for your convenience. If you choose to self-represent, you will have to pick up your file at [insert address] and if applicable, sign a Notice of Intention to Act in Person.

It is imperative that you make your decision regarding a new lawyer as soon as possible so that time limitations applicable to your case will be protected and your other legal rights preserved.

[Insert limitations or other deadlines specific to this particular file]

If you or your new lawyer need a copy of a closed file, please contact me to make arrangements for this.

Within the next [fill in number] weeks, I will be providing you with a full accounting of your funds in my trust account and fees you currently owe me.

You will be able to reach me at the address and phone number listed on this letter until [date]. After that time, you or your new lawyer can reach me at the following phone number, e-mail and address:

[Name]

[Address]

[Phone]

[E-mail]

I have appreciated the opportunity of providing you with legal services. Please do not hesitate to give me a call if you have any questions or concerns.

Sincerely,

[Lawyer]

[Firm]

AUTHORIZATION FOR TRANSFER OF CLIENT FILE

I hereby authorize the law office of [*Firm/Lawyer Name*] to deliver a copy of my file to my new lawyer [*Insert lawyer name*] at the following address:

[*Client*]

[*Date*]

[*Address*]

[*Phone number - Office*]

[*Phone number - Home*]

[*Phone number - cell*]

[*E-mail address*]

ACKNOWLEDGEMENT OF RECEIPT OF FILE

Re: File Number
Client Name
Matter

I hereby acknowledge that I have received my file from *[Lawyer's name]*.

[Client]

[Date]

[Address]

[Phone number - Office]

[Phone number - Home]

[Phone number - cell]

[E-mail address]

Law Firm Inventory Checklist

Item	Ownership	Disposition
Communication Systems		
1. Phones		
2. Voicemail		
3. Fax Machines		
4. E-Mail		
5. Internet		
6. Cell Phones		
7. Personal Organizers		
8. Website / Internet		
9. Other		
Computer Systems		
1. Desktop Computers		
2. Laptop Computers		
3. Software		
4. Other		
Equipment		
1. Photocopiers		
2. Shredders		
3. Dictaphones		
Furniture		
1. Desks		
2. Computer Desks		
3. Chairs		
4. Bookshelves		
Books <i>(itemize as necessary)</i>		
Office Supplies <i>(itemize as necessary)</i>		
Offsite Storage <i>(itemize as necessary)</i>		

From the Law Society of British Columbia

http://www.lawsociety.bc.ca/practice_support/succession.html#_References

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.

These guidelines were prepared by the Nova Scotia Barristers' Society Practice Assistance Committee, and endorsed by Bar Council in May 1998.

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.

These guidelines were prepared by the Nova Scotia Barristers' Society Practice Assistance Committee, and endorsed by Bar Council in May 1998.

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.

These guidelines were prepared by the Nova Scotia Barristers' Society's Practice Assistance Committee, and endorsed by Bar Council in May 1998.



NOVA SCOTIA BARRISTERS' SOCIETY

APPLICATION FOR CHANGE OF CATEGORY

TO: **The Executive Director, Nova Scotia Barristers' Society**
1101-1645 Granville Street, Halifax, NS B3J 1X3

I, _____,
(please print)

make application to the Nova Scotia Barristers' Society to
change my membership category from that of Practising
Lawyer to:

- Non Practising Member
- Retired Member
- Life Member
- I wish to resign my membership

1. Contact Information:

Current Address	After Category Change – As Current <input type="checkbox"/> or: Address
_____	_____
_____	_____
e-mail	e-mail
_____	_____
Telephone	Telephone
_____	_____

2. Professional History

Employer prior to Category Change:

Address: _____

E-Mail: _____

Telephone: _____

3. Current Employer As in 1 above, or:

Name: _____

Address: _____

E-Mail: _____

Telephone: _____



NOVA SCOTIA BARRISTERS' SOCIETY

4. I wish to change membership category because:

Three horizontal lines for providing reasons for changing membership category.

5. For those members applying to Retire:

I confirm that, upon my retirement, I will not be earning employment income.

YES NO

_____ *Initial*

6. Client Matters:[Provide all applicable information]

I confirm that all client matters have been completed.

YES NO

_____ *Initial*

For Open Client Files

I confirm that arrangements have been made to the clients' satisfaction to have their files, documents and papers returned to them.

YES NO

_____ *Initial*

I confirm that arrangements have been made to the clients' satisfaction to have their files, documents and papers turned over to another practising lawyer.

Name of Lawyer: _____

For Real Estate Files

I confirm that for closed Real Estate files all foundation documents required to be kept in accordance with Part 8 of the regulations, together with a list of the files, are being transferred to:

_____ *(a practising lawyer)*

The written consent of _____, (the lawyer receiving the foundation documents and agreeing to maintain the documents in accordance with Regulation 8.2.3.3.2) is attached.

For Closed Client Files

All closed client files, other than Real Estate files referred to above, and documents have been

turned over to _____ or; *(a practising lawyer)*

Closed client files, other than Real Estate files, are stored

at: _____ *(address)*

These files may be accessed by contacting: _____ at _____ *(name) (telephone number)*



NOVA SCOTIA BARRISTERS' SOCIETY

7. Trust Accounts:

During the past 12 months I used **my firm's Trust Account**.

YES NO

If yes:

I confirm that all money or other property held in trust has been accounted for and either paid over to the person entitled to it, or has been transferred to _____(a practising lawyer) for the benefit of the person or persons entitled to it.

Initial

I currently do not hold money or other property in trust for any person.

Initial

During the past 12 months **I had open at a Financial Institution a Lawyer's Trust Account**.

YES NO

If yes:

I confirm that all money or other property held in trust has been accounted for and either paid over to the person entitled to it, or has been transferred to _____(a practising lawyer) for the benefit of the person or persons entitled to it.

Initial

I currently do not hold money or other property in trust for any person.

Initial

My trust account is closed, or will be closed by _____ (a date not later than 30 days later than this application).

Initial

My final Trust Account Report is attached, showing that my trust account is closed and that all trust money or property has been disbursed

YES NO

If NO: I undertake to file a final Trust Account Report form for the period from the end of my last fiscal year to the date of this application, confirming that all Trust Accounts have been closed and that all Trust obligations are complete.

Initial

The Final Trust Account Report will be filed by _____ (a date not later than 30 days from the date of this application).

Initial

8. Member's Practice:

I am not aware of any claim or complaint against me in my professional capacity or in respect of my practice which has not been reported to the Lawyers' Insurance Association of Nova Scotia.

Initial



NOVA SCOTIA BARRISTERS' SOCIETY

I acknowledge that my change in membership category is not effective until this application is approved by either the Executive Director, or the Credentials Committee. I further acknowledge that, until this application is approved, I am bound by the obligations of a practising lawyer per Regulation 4.1.2 of the Legal Profession Act, including my obligation to pay the fees associated with being a practising lawyer.

I confirm that, upon approval of this application, I will not engage in the practice of law as defined by the *Legal Profession Act*.

Signature of Member

Date

OFFICE USE ONLY:

Approved by:

Executive Director

Date

Or:

Referred to Credentials Committee on

Date

Approved by Credentials Committee

Chair of Credentials Committee

Date



NOVA SCOTIA BARRISTERS' SOCIETY

Consent to receive Foundation Documents

I _____ (*Name of Receiving Lawyer*) confirm that I am willing to accept the Foundation Documents (as defined in the Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28) from _____ (*Name of Original Lawyer*). Arrangements have been made to have these documents turned over to me by _____ (*date*).

I undertake to advise the Executive Director if the transfer of documents has been completed by that date. I undertake to maintain these documents in accordance with the Regulations.

(*signature*)

(*date*)

File Closure Checklist
(Updated September 2009)

DATE:	CHECKED BY:
FILENAME:	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. (a) Electronic data including emails and email attachments maintained with the file. (b) Which current storage media is used * (CD, tape, external hard drive etc.)			
14. Destruction date marked on file cover? (Not less than ten [10] years from file closure.)			
15. Current accounting and file records moved to closed accounting and file records?			
16. Closed file renumbered and entered in closed file index?			
17. Closed file physically removed to closed file location (including all sub-files, ancillary loose leafs, notebooks, rolls of plans, etc.)?			

* Technology will eventually become obsolete
Ensure that records are continually migrated to readable, accessible software and hardware

ITEMS	YES	NO	DONE
18. Have Client ID records been retained in accordance with Client ID Regulations. http://www.nsbs.org/documents/general/ClientID/ClientIDPkg.pdf			
19. For real property matters ensure that all foundation documents been dealt with according to the Legal Profession Act Regulations. These Regulations can be found at http://www.nsbs.org/documents/general/CURRENTREGS.pdf			
20. Have trust account and other accounting records been maintained in accordance with the Legal Profession Act, CRA requirements and generally accepted accounting principles?			

Practice Advisory on Changes to the *Legal Profession Act* Regulations August 25, 2009

Law firms and real estate practitioners should be aware of the new obligations created by amendments to the Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28 and approved by Council on April 24, 2009. Enforcement of these regulations will begin September 15, 2009.

All lawyers should be aware of the changes to Regulations

- 4.5.4 (Client ID)
- 4.7.1 (fees)
- 4.7.13 (fees)

also approved by Council on April 24, 2009, which took effect on that date.

Updated regulations can be found at

<http://www.nsbs.org/documents/general/CURRENTREGS.pdf>

For real estate lawyers the new obligations created include the obligation to maintain foundation documents, even when a lawyer leaves a firm, or a firm is dissolved. Foundation documents include more than the abstract.

The definition of foundation documents, certificate of legal effect and opinion of title are defined in Part 1 of the regulations. See:

- 1.1.1. (da)** certificate of legal effect
- 1.1.1 (ma)** definition of foundation documents
- 1.1.1. (ua)** opinion of title defined

Some of the other changes impacting law firms and real estate practitioners are noted and/or summarized below:

Part 5

Content of Application (change of category)

5.5.2 (iii)

5. 8.2 c (iii)

A practising lawyer applying to change category, must if applicable, confirm that all foundation documents required to be kept pursuant to Part 8 of the Regulations have been transferred in accordance with that part.

Part 7

Law Firms, LLP's , Law Corporations, Firm Names and Advertising

7.2.1 (a)

7.2.1 (f)

A law firm must now also have a designated practising lawyer to receive communications regarding an LRA Audit under part 13 of the *Legal Profession Act*.

A law firm must now maintain foundation documents for firm real estate practitioners, unless this obligation is transferred in accordance with Part 8 of the regulations.

Part 8 Standards

Regulation **8.2.3** has been deleted

Regulations **8.2.3.1-8.2.3.4** have been added.

These regulations deal with requirements of law firms and lawyers to keep foundation documents unless relieved of this obligation.

Part 9 Professional Responsibility

9.2.1.2

If the Executive Director receives a report from an LRA Auditor under Part 13 of these regulations which relates to the lack of co-operation of an eligible lawyer, in addition to exercising any other power provided for in this Part, the Executive Director may determine that a practicing lawyer, whose conduct is the subject of the report, is no longer "eligible" within the meaning of Part 13 of these regulations and give notice to that person of this determination.

Part 13

Real Estate Practice – Interpretation

See the following new regulations which relate to eligible lawyers and the *Land Registration Act* and the LRA Audit process.

13.1.1

13.2

13.2.1

13.2.2

13.2.3

13.3

13.3.1

13.3.2

13.3.3

13.3.4

13.3.5

13.3.6

13.3.7

13.3.8

Read the changes to all the parts of the Regulations carefully. I recommend that you also circulate this notice to all real estate lawyers and paralegals in your firm, as well as anyone else involved in the file.

I also recommend that you:

- decide now, who from the firm will be the lawyer designated to receive communication regarding a LRA Audit under Part 13 of the *Legal Profession Act*
- consider adding compliance with the Regulations to your opening and closing checklists
- consider offering an in-house education session on the Regulations, so that all who should be aware of the changes, are in fact aware of them, and complying with them by the September 15, 2009 enforcement date

If you have any questions on this, or any other risk or practice related matter, do not hesitate to contact me, Deborah E. Gillis, Q.C., Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia at 423-1300 ext. 345 or at dgillis@lians.ca

APPLICATION FOR DISPOSAL OF UNDISTRIBUTED TRUST FUNDS

Procedure and Sample Documents

The Nova Scotia Barristers' Society makes periodic applications on behalf of its members for disposal of members' undistributed or unclaimed trust funds. The *Public Trustee's Act*, Section 28(1), mandates that lawyers apply for disposal of undistributed trust funds that have been held for five years. The Society provides a facilitated process for members to dispose of such funds that have been held for at least two years and reasonable attempts have been made to dispose of the trust funds.

Funds Which Qualify

- held in trust for at least two years
- reasonable efforts have been made to identify and contact the person(s) to whom the fund funds belong without success
- amount(s) held in trust can be specifically quantified and some information provided as to source of funds, reasons funds paid into trust, etc. if known
- members can certify, if possible, that there are no conditions to which the trust funds are subject

Procedure

1. You must file an affidavit with the Society's Director of Finance and Administration which contains the following information (see sample attached):
 - (a) **For Trust Funds to Which One or More Persons are Entitled**
 - name of client(s) and last known address
 - balance of trust funds currently held
 - date funds were received
 - date funds were last dispersed, where applicable (attach as exhibit a copy of the trust account ledger)
 - a statement that the funds were or appear to have been received for provision of legal services and a brief description of the legal services which were/were to have been provided

- efforts made by you to deliver the funds to the client(s) (attach as exhibit copies of letters to client(s), newspaper advertisements, etc. if applicable)
- a statement that there are no conditions to which the funds are subject
- if the client entitled to the funds was a corporation, a statement as to whether the corporation still exists according to the official records of the government of the jurisdiction in which the corporation was incorporated or continued
- a statement that you wish the Court to authorize the transfer of funds belonging to (name of client(s)), held in trust by (name of lawyer or law firm) to the Public Trustee

(b) **For Trust Funds That Cannot Be Attributed to Any Person**

- the amount of unattributable trust funds currently held
 - the date the funds were received
 - the reason(s), if known, why the funds were credited to the trust account and why the funds cannot be attributed to any particular client or other person
 - a statement that you wish the Court to authorize the transfer of unattributable funds held in trust by (name of lawyer or law firm) to the Public Trustee
2. You must enclose with your affidavit a \$25.00 administration fee *payable to the Nova Scotia Barristers' Society*.
 3. The Society will prepare the necessary documentation for a Chambers application and will include your application documents in the next application for disposal of undistributed trust funds.
 4. Once the Society has received the Order granting payment of the undistributed trust funds to the Public Trustee, the Director of Finance and Administration will provide you with a copy of the Order and request that you send a trust cheque in respect of the funds contained in your application to the Society, *payable to the Public Trustee*.
 5. The Director of Finance and Administration will then provide the Public Trustee with an original Order and enclose members' trust cheques.

TIPS FROM THE RISK & PRACTICE MANAGEMENT ADVISOR

BY DEBORAH E. GILLIS, Q.C.
 Risk and Practice Management Advisor

You've Planned for Success. Now Plan for Succession.

Well-developed and well-implemented records management systems and file retention policies should be part of your succession planning.

When you open a file, and as the matter progresses, you should put thought into how you manage and document the file and consideration into what information should be retained when the file will be closed. Having well-organized and well-managed records increases your profitability, reduces your risk and makes your practice more attractive to a potential purchaser.

A well-documented file plays a significant role in managing your risk and defending against a negligence claim. Documentation confirming advice given and instructions received, as well as notes of conversations and meetings, and copies of other relevant documentation and correspondence, should be maintained in your closed files.

When developing a succession plan, a lawyer or law firm should decide what criteria will be followed in determining what is retained in a closed file, as well as when, if ever, the file should be destroyed. As well, the lawyer and/or law firm should address what happens to a lawyer's closed files if a lawyer dies, leaves the firm or the firm dissolves.

Consider the following when addressing these issues:

- What will be maintained in a closed file?
- Where will closed files be stored and for how long?
- Who will pay for storage?
- How will these files be accessed?
- Will there be a destruction date set for each file as it is closed? If so, who sets it and what criteria is used?
- If a lawyer leaves a firm, what happens to the files he or she was responsible for? Will the firm continue to store the files indefinitely; will the departing lawyer take responsibility for the ongoing storage of the files?
- If the firm retains the file, will the firm give the responsible lawyer advance notice of an intended destruction and give that lawyer the option of storing closed files himself/herself, instead of the firm destroying it?
- If closed files still exist on the death of the lawyer, who will assume responsibility for the ongoing storage of these files?

Lawyers frequently ask how long they must keep a closed file. There is no magic or easy answer to this question. It is ultimately a professional judgment that the lawyer and law firm have to make after considering the type of file at hand, the particular matter, and the particular client – especially when that client has ignored your advice, or when the client has limited the scope of your retainer.

Without a file, it is almost impossible to defend against a negligence claim. Property, family, commercial, and wills and estates files may be needed long after the file is closed. LIANS has seen negligence claims in family and real estate matters made more than 20 years after representation has ended. Having access to the lawyer's well-documented closed files was critical in the successful defense of these claims.

In an article entitled *Wrapping Up and Winding Down* and posted to the LIANS website at www.lians.ca/lossprevention/wrap_up.htm, I provide suggestions on what should be considered, and what tasks completed, prior to and upon retirement. That article includes the following link to *Guidelines on File Retention and Destruction* published by the Society in 1998.

Two other excellent resources to assist you in developing records management and file retention policies are:

[The Lawyer's Guide to Records Management and Retention](#), George C. Cunningham and John C. Montana, American Bar Association, Law Practice Management Division, 2006

[Records Management in the Legal Environment](#), Jean Barr, CRM; Beth Chiaiese, CRM; and Lee R. Nemchek, CRM, ARMA, 2003

The first is available at the Nova Scotia Barristers' Library and can also be purchased from the American Bar Association. The second is on order and should soon be available at the Barristers' Library.

While many files should be kept indefinitely, it does not mean that everything in the file has to be kept when the file is closed. Spend time culling a file as the matter progresses, and when it is being closed. Duplicate or unnecessary information can be removed from the file before it is sent to storage. Return client records to the client. Do not keep a client's original documentation. If retaining your files in digital form, be mindful of the need for backup and of the possibility that future changes in technology might render this data inaccessible. Maintain a copy of whatever technology you will need to be able to read this data and/or have it reformatted as technology changes.

Time spent planning now will reap many future rewards, including reduced storage costs.

Deborah E. Gillis, Q.C., is the Risk and Practice Management Advisor for LIANS. She may be reached at 423-1300 ext. 345 or at dgillis@lians.ca

Taking Care of Business



Carol's husband, Brian, was a senior lawyer operating a sole practice when he suddenly and unexpectedly died of a heart attack. Carol and Brian had been happily married for over 35 years. Not only did Carol have to cope with the grief of losing her life partner, she also had to deal with her husband's legal practice.

Unfortunately, like so many lawyers, Brian had made no succession plans for his practice. That is, he had made no arrangements for another lawyer to handle the closure of his office, the transition of his files and the realization of the value of the practice.

The task facing Carol was a daunting one. There were active files, some of them urgent, that needed to be transferred to new lawyers. There were thousands of closed files. A plan had to be developed for staff during the transition. The office landlord, equipment lessees and suppliers needed to be dealt with. If things were not handled quickly, the value of the practice would quickly erode as clients drifted away.

When news of Brian's death spread, chaos quickly followed at the office. Clients were calling for their files and staff were looking to their own future employment prospects. Files were unbilled. There were accounts receivable to collect and trust funds to deal with.

In addition to the tremendous stress these practice issues visited on Carol, clients are likewise stressed. Many of them develop a personal relationship with their lawyer over the years, are saddened by his death, but are also confused as to their proper course of action.

Sometimes the lawyer's spouse or other family members are employed

in the office. This can provide helpful continuity for the lawyer taking over the practice, but undoubtedly brings an additional level of stress to the family member.

John Rafferty, Q.C.
Burchell MacDougall

In a larger law firm, transitioning is usually not a serious problem. The firm has other lawyers who can take on the work of the deceased partner. Sometimes, other lawyers have already been working on the files. Even if not, they are prepared to work longer hours for the good of the firm and of the clients. Chaos is controlled, clients are serviced, file value is maintained, and the deceased's family is protected from additional stress. With proper planning, sole practitioners can achieve the same result.

It is not just death that creates the need for a succession plan. Disability, suspension, incompetency or other factors may also result in the need for one. If a proper succession plan is not in place, the Society may appoint a custodian or receiver to manage the practice and protect the public interest, may assist with transitioning the practice to another lawyer, or may work with the estate to ensure client interests are protected. Immediately after appointment, the custodian will secure the lawyer's files and records and become the signing authority on the trust and general accounts.

Whether the successor lawyer is appointed by the Bar Society or the estate, the deceased lawyer's calendar will be checked for upcoming hearing dates and meetings. Files will be reviewed to identify urgent matters and impending limitation dates. Clients and opposing



counsel will be contacted on the urgent matters first and, eventually, on all active files.

One of the most significant tasks facing a custodian or successor is disposition of the lawyer's trust funds. On active files, this is usually relatively straightforward, with a replacement lawyer obtaining authorization from the client and committing to honour the undertakings of the former lawyer.

However, many client trust balances are quite stale. There may be sums retained to record releases that have never been obtained. This may sometimes occur due to difficulty with the mortgagee or as a result of a failure to vigorously follow up requests for releases. When the release is eventually obtained, the recording fee may have changed so that the available funds are now inadequate.

In some cases, trust funds should go back to the client. With stale transactions, the client may be difficult or impossible to find and a court application may become necessary.

There is often money in trust for the lawyer's retainer or from which the lawyer's account can be paid. If the money has been there for a long time, it may be difficult to create a proper bill or to fend off client arguments or complaints because time records or retainer agreements may not be available. Value will be lost to the family.

All of us have a tendency to ignore difficult or tedious tasks and push them to the back of our desks. Unfortunately, the longer they sit, the more difficult they are to resurrect and resolve. When the task falls to a successor lawyer or custodian, valuable time will be spent in getting up

to speed on the file and doggedly pursuing the resolution. Again, this expense subtracts from the value of the practice to the lawyer's family.

Studies indicate that lawyers are remaining in practice longer now than in the past. This may be the result of better health, longer life span, a desire to remain employed, an inability to sell the practice, an inadequate requirement plan or a combination of these factors. Because of this, we can expect an increase in the number of lawyers ceasing practice because of death, disability or incompetency rather than planned retirement.

To protect yourself and your family, every lawyer should have a succession plan. Trust accounts should be kept up-to-date by rendering accounts promptly, by returning money to clients quickly and by regularly following up on outstanding documents such as mortgage releases. Files should be culled to their essentials to reduce storage needs both now and in the future. Ensure that original documents are given to the client with a notation or receipt in the file. Keep an up-to-date file list and store files numerically or alphabetically for easy retrieval. Keep clear records of time or billing arrangements so that appropriate fees can be charged and justified.

One of the lawyer's biggest assets is the value of his practice - both on an ongoing basis and in the work invested in existing files. Be sure not to deprive your family of this asset by sloppy record keeping, poor file administration, or the lack of a succession plan. ♣

John Rafferty, Q.C., a lawyer with the Truro firm of Burchell MacDougall, also works for the Society as a practice receiver and custodian.

A man in a grey suit and white shirt is diving horizontally through the air, reaching out with his left hand to catch a baseball. He is wearing a dark baseball glove. The background shows a baseball field with a crowd of spectators in the stands under a blue sky with white clouds. In the bottom right corner, there is a logo consisting of the letters 'CA' in a large, white, sans-serif font, with a small square icon to its right.

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And the file goes to...

Your ethical obligations in disposing of files upon the conclusion of your practice



We frequently receive calls here at the Professional Responsibility Department from members asking “What do I do with my client files when ____?” The “blank” can be any number of situations, including retirement, wind up of a practice, dissolution of a firm, colleagues transferring to another practice, and the list goes on.

When a member dies suddenly, with no succession plan in place, we also receive calls from surviving family members and colleagues asking the same question: “What do I do with the files?”

Contrary to what many members believe, it is not the responsibility of the Society to take care of client files upon the death of a member of the Bar. That being said, the *Legal Profession Act* does contain provisions under which the Society may appoint a custodian or receiver to manage the practice and protect the public interest, by assisting with the transition of the practice to another lawyer, or working with the estate to ensure client interests are protected.

First and foremost however, it is the responsibility of the member to ensure that client files are dealt with appropriately. Upon death, and in the absence of a succession plan, that responsibility will transfer to the member’s estate.

The *Legal Ethics Handbook* outlines members’ ethical obligations with respect to client files.

Chapter 5 of the *Handbook* requires members to “hold in strict confidence” all client information acquired during a retainer, except where disclosure is authorized by the client, required by law, or permitted by the *Handbook*. Commentary 5.3 states that every client is owed a “continuing duty of secrecy” by the member and that this duty survives the professional relationship.

Chapter 9 of the *Handbook* requires members to protect and safeguard clients’ property, which includes client files, and to return client property at the end of a retainer.

Failing to adopt a succession plan which deals with your client files could result in persons reviewing the contents of client files without client authorization, in order to determine the status of a file and its

ownership, thus breaching the continuing duty of secrecy owed to your clients. Lack of a succession plan could also result in client files not being returned to clients or not being properly transferred because your successor or estate is unaware of the file’s existence or its location.

Heather Totton
NSBS Professional Responsibility Counsel

To ensure client files are handled appropriately, consider the following when preparing a succession plan:

1. Create and maintain an up-to date office procedure manual providing detailed directions with respect to client files, including:
 - a. How to generate a list of active client files, including client names, addresses, and phone numbers;
 - b. Where client ledgers are kept
 - c. How the open/active/closed files are organized, assigned numbers and where they are kept
 - d. Where original client documents are kept
2. Ensure that you are able to generate complete client and file open lists with up-to date contact information.
3. Record all deadlines on every file in a central calendar system which is easily accessible.
4. Thoroughly document all files sufficiently to allow the conduct of file to be assumed without delay and expense to clients.
5. Purge and close files regularly and avoid keeping clients’ property or original documents (see File Retention Policy).
6. Store all critical information regarding client matters, trust accounts, and financial information in a location easily and efficiently accessed by your estate, staff, colleagues or successor.
7. Draft detailed written letters of instructions/guidelines for your estate, staff, colleagues, or successor. Review and update these instructions from time to time, and advise the same as to location of instructions.

(Adapted Checklist – Practice and Planning Considerations from the article “Succession Planning,” by the Law Society of British Columbia)

A proper succession plan dealing with your client files will ensure your clients are protected and your ethical obligations pursuant to the *Handbook* are met. ☞



INSURANCE NEWS

BY DEBORAH ROZEE

Director, Lawyers' Insurance Association of Nova Scotia

CLIA EXCESS INSURANCE PROGRAM – New coverage available for retiring lawyers

The Canadian Lawyers Insurance Association (CLIA) policy renewal period for the mandatory insurance program and the excess insurance is July 1st. In an ongoing effort to be responsive to members' needs, CLIA will be offering a new excess coverage this year. **Effective July 1st retiring sole practitioners and lawyers retiring from a firm may purchase their own excess coverage, renewable each year.** Traditionally, excess insurance policies are purchased by a firm basis and not by the individual members of a firm. When a lawyer retires from a firm, the lawyer is dependant on the firm maintaining excess coverage in order to have excess insurance for the work of the lawyer while the lawyer was with the firm. If the law firm no longer exists or does not continue to purchase excess insurance, and a claim is subsequently brought against the lawyer, there will not be any excess insurance available to respond to the claim. Previously, sole practitioners could only purchase excess insurance coverage for two years after retirement.

The CLIA information bulletin on this new insurance coverage states:

Lawyers retired from private practice in the CLIA provinces can be left without protection above their primary program limits in situations where they were a sole proprietor or have left a firm which no longer exists. This is typically a concern where the firm has dissolved and not purchased an extended reporting period, but can also occur where a firm no longer purchases excess limits...

Coverage will be limited to CLIA provinces only for professional services rendered prior to their retirement. Coverage must have been maintained continuously and each account will be individually underwritten. Vicarious liability will be excluded so that this policy will not respond to the acts of other individuals in the firm.

Watch for further information about this new insurance protection.

CLIA EXCESS INSURANCE PROGRAM – PROTECTION AGAINST LATE REPORTING

CLIA's excess insurance program offers another significant benefit to members. Reporting of a claim under the mandatory \$1 million policy also serves as reporting for the purposes of a CLIA excess insurance policy in force at the time. Reporting to LIANS is not reporting to the excess insurer when the excess insurance is purchased from an insurance company other than CLIA.

Often the full magnitude of a claim is not known at the time of reporting to LIANS. When the initial report of the claim is made, the lawyer or firm may not report the claim to their excess carrier. If the subsequent report to the excess carrier is not in the same policy term as the initial report to LIANS, the excess insurer will likely review their obligation to provide coverage and may deny coverage for the claim. This exposure does not exist when the excess insurance policy is with CLIA.

Under the CLIA excess program, a claim report to LIANS is also notice under the CLIA excess insurance policy.

RETURN OF SURPLUS TO PARTICIPATING MEMBERS

Lastly, the CLIA excess insurance program is non-profit. Surplus not required for future claims is returned to insureds who have participated in the program for a full underwriting period of 5 years.

For more information on CLIA's excess insurance program contact Christine Ward cward@lians.ca or Deborah Rozee drozee@lians.ca.

Deborah Rozee is the Director of LIANS. She may be reached at 423-1300 or at drozee@lians.ca.

TIPS FROM THE RISK & PRACTICE MANAGEMENT ADVISOR

BY DEBORAH E. GILLIS, Q.C.

Risk and Practice Management Advisor

The Importance of Securing Your Electronic Data

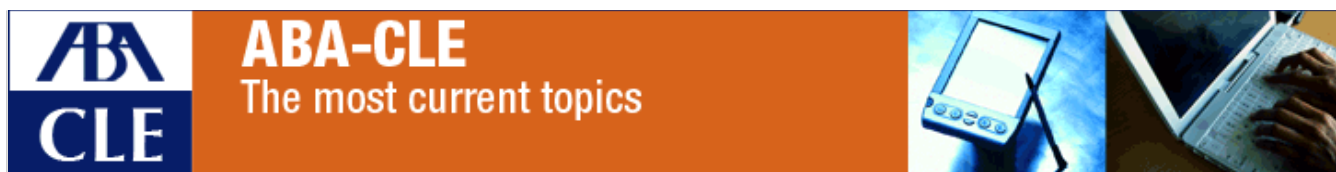
The theft, loss, or destruction of practice-related data is disruptive, stressful, and financially draining to you. If that data belongs to, or impacts your client, this breach of confidentiality might result in a negligence claim against you, an investigation and fine under PIPEDA (*Personal Information Protection and Electronic Documents Act*), and/or a legal ethics and professional responsibility complaint.

Therefore, it is important that you take steps to safeguard your own and your client's information. Implement a security policy for your office that covers your electronic data as well as your paper files.

There are many issues to consider when developing your policy, including the use of wireless connectivity without first ensuring that all possible security features are in place. Without these features in place, serious problems can result. This was seen in Edmonton recently, when an unprotected computer server in a downtown law firm allowed an employee in a neighbouring building to access hundreds of client files that included personal information. The lawyer had set up a wireless system himself and thought it was secured by encrypted password. It was not. Alberta's Privacy Commissioner ordered an investigation into this security breach.

Links to resources and articles on data protection, security, and encryption can be found on the LIANS website at www.LIANS.ca under Loss Prevention Resources [Data Protection].

Deborah E. Gillis, Q.C., is the Risk and Practice Management Advisor for LIANS. She may be reached at 423-1300 ext. 345 or at dgillis@lians.ca



Law Practice Today



Law Practice TODAY

Technology

Planning Now for File Management

By Deborah E. Gillis

January 2009

In planning for the future it is important that you devote sufficient time and money now to developing a to a file management process .In doing so you will save both time and money in the future in dealing with your files.

Before even opening a file you should have a plan in place for what will be done with that file when it is closed. This is frequently referred to as a file retention policy.

What to Consider

Consider the following when developing your file retention policy:

- What will be maintained in a closed file?
- Where will closed files be stored and for how long?
- Who will pay for storage?
- How will these files be accessed?
- Will there be a destruction date set for each file as it is closed? If so, who sets it and what criteria is used?
- If a lawyer leaves a firm, what happens to the files he or she was responsible for? Will the firm continue to store the files indefinitely; will the departing lawyer take responsibility for the ongoing storage of the files?
- If the firm retains the file, will the firm give the responsible lawyer advance notice of an intended destruction and give that lawyer the option of storing closed files himself/herself, instead of the firm destroying it?
- If closed files still exist on the death of the lawyer, who will assume responsibility for the ongoing storage of these files?

Lawyers frequently ask how long they must keep a closed file. There is no magic or easy answer to this question. It is ultimately a professional judgment that the lawyer and law firm has to make after considering the type of file at hand, the particular matter and the particular client especially, when that client has ignored your advice, or when the client has limited the scope of your retainer.

Without a file, it is almost impossible to defend against a negligence (malpractice) claim. Property, family, commercial, and wills and estates files may be needed long after the file is closed. Having access to well-documented closed files is critical in the successful defense of these claims.

While many files should be kept indefinitely, it does not mean that everything in the file has to be kept when the file is closed. Spend time culling a file as the matter progresses, and when it is being closed. Duplicate or unnecessary information can be removed from the file before it is sent to storage. Return client records to the client. Do not keep a client's original documentation. If retaining your files in digital form, be mindful of the need for backup and of the possibility that future changes in technology might render this data inaccessible. Maintain a copy of whatever technology you will need to be able to read this data and/or have it reformatted as technology changes.

Once you have determined the criteria for when and what you will destroy in a file, reference these file destruction policies in your retainer agreement so that your client knows and acknowledges what will happen to the file and its contents when the matter is concluded.

When closing files consider marking on the outside of those you want to keep indefinitely, together with the reason why – eg. advice ignored by client; as well consider keeping files of this nature together, so that you are not reviewing these closed files unnecessarily.

When Destroying Files

Don't destroy a file without reviewing its contents carefully, as there could be important materials in those files that should be returned to the client. In addition, a review of the file might lead to a conclusion that the file should be maintained for a longer period. Sometimes an original document or deed belonging to another client might be misfiled in a file that is destined for destruction. The contents of the file and the circumstances of the case are often more relevant than the age of the file.

Ideally the file review should be done by the lawyer responsible for the file, or by a lawyer who understands the significance of the file contents and has a clear understanding of the firm's criteria for document/file destruction.

Before any files are destroyed make a record of what files are being destroyed, the date of destruction, together with the client(s) name, and last known address and other contact information as well as the matter description (e.g. family, property purchase, property sale) and file number. Protect the client's confidentiality by shredding.

Never close a file for which:

- there are any unfulfilled undertakings.
- you continue to trust funds.
- there are outstanding fees

Two excellent resources to assist you in developing records management and file retention policies are:

The Lawyer's Guide to Records Management and Retention, George C. Cunningham and John C. Montana, American Bar Association, Law Practice Management Division, 2006

Records Management in the Legal Environment, Jean Barr, CRM; Beth Chiaiese, CRM; and Lee R. Nemchek, CRM, ARMA, 2003

In planning for the future it is important that you devote sufficient time and money now to developing a to a file management process .In doing so you will save both time and money in the future in dealing with your files.

Bookmark This: 

About the Author

Deborah E. Gillis, Q.C., is the Risk and Practice Management Advisor for the Lawyers' Insurance Association of Nova Scotia. She writes and speaks regularly on various risk and practice management topics She is also a member of the LPM section of the ABA and of Practice Management Advisors of North America. She can be reached at DGILLIS@ians.ca.

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TIPS FROM THE RISK & PRACTICE MANAGEMENT ADVISOR

BY DEBORAH E. GILLIS, QC
Risk and Practice Management Advisor

Turning the Page – moving towards a less paper dependent office

Increasingly, lawyers - from the sole practitioner to those practicing in large firms - are interested in moving to an environment where they work with a minimum amount of paper. It is unlikely that any law office will be paper-free, but it can be less paper dependent or paperless.

The benefits of a paperless office include:

- Reduced environmental impact
- Productivity gains – as you and your staff spend less time looking for a document, file or precedent
- Cost savings – in both space, paper and printing costs
- Reduced storage costs
- Remote access with proper security
- Easier disaster recovery planning – electronic data can be easily backed up, archived and stored off site making for easier restoration in times of disaster, such as fire or flood.

As the price of high end computers, good-sized monitors and servers with sufficient hard drive capacity for a paperless office comes within the reach of most law firms, technology is no longer a huge issue in going paperless. Organization and the discipline necessary to set up and maintain a paperless system is the issue.

Be prepared to commit time, training, and resources to a paperless system. Significant time may be required to organize the data and files you have, to develop policies and procedures relating to your system, and to train lawyers and staff on them. Until you do this, do not spend money upgrading your equipment solely for the purpose of a paperless office.

Involve your staff in the process and in the implementation of the systems necessary to go paperless. This encourages “buy in” to the project from all involved and will play a huge role in whether or not your new system is a success. If you don't already have one in place, develop good document naming structures and storage conventions to be used consistently

throughout the firm. Insist on compliance by everyone. Organization and consistency is critical in a paperless office. Without it, finding what you have will be difficult and counterproductive. Staff will become discouraged and your paperless plan will likely not succeed.

In developing your naming structures, look at what you already have in place. If present procedures and naming conventions are working, continue using these. If not, you may consider using a date first naming protocol, e.g., 2008 08 15 0945, so that documents appear in chronological order (time included for fax and e-mails) in the same way as your paper file. This is but one suggestion. Develop what works for you and your practice, but be consistent and disciplined in following what you have developed. As part of your procedures, also consider what will be scanned, when and by whom. Include what you have developed in your policy and training manuals.

While some offices scan their closed files, many find this very expensive and choose to proceed on a go forward basis only.

Whether you choose to go paperless or not, always remember to back up your electronic data faithfully. Do this at least daily and check regularly that the backup is, in fact, working. Keep the backup in a safe place, preferably off site. Also, if retaining your files in digital form, be mindful of the possibility that future changes in technology might render this data inaccessible. Maintain a copy of whatever technology you will need to be able to read this data and/or have it reformatted as technology changes.

Deborah E. Gillis, QC, is the Risk and Practice Management Advisor for LIANS. She may be reached at 423-1300 ext. 345 or at dgillis@lians.ca

TIPS FROM THE RISK & PRACTICE MANAGEMENT ADVISOR

BY DEBORAH E. GILLIS QC
Risk and Practice Management Advisor

Succession planning for sole and small firm practitioners



At the Nova Scotia Barristers' Society's 2009 Annual Meeting, *The Business of Law During Times of Uncertainty*, a number of sole practitioners participated in the program Succession Planning for Sole & Small Practitioners offered by myself and Stephen P. Gallagher. One of our goals for the program was to provide a forum that might help program participants to continue this important process of putting a succession plan in place.

Early in our program, we asked our participants to think about some very difficult questions. What would happen (both professionally and personally) in the event of your incapacity, your long-term disability or your death? What would happen to your practice and your livelihood?

Our group seemed to agree that planning for such contingencies was an important process, but not an easy one. We suggested that lawyers need to begin their succession planning in terms of a series of developmental steps taken over a period of time.

Why

Succession planning is important not only for retirement and death but also for disability. What would happen to your clients and your practice if, tomorrow, you were struck with an illness that resulted in your being away from the office for an extended period of time? Would you have a practice to return to, upon your recovery?

To avoid the chaos, the added expense and the tremendous stress that result when no plan is in place for any of these happenings, it is important that you begin now to put a succession plan in place.

Developing an action plan

Program participants were asked to try to get started on their own action plan. We tried to identify specific projects for individuals to get their succession planning started and encouraged them to set specific goals for themselves. It is important to keep in mind that a succession planning initiative itself is intended to:

- protect your client's interests;
- minimize financial risk and emotional upset to your family; and
- maximize the value of your practice.

Specific goals to consider when planning for succession

When developing your succession plan, I recommend that you start with the following specific goals:

1. Identify and come to an agreement with an assisting lawyer—one who will step in and deal with your practice either on an emergency or a long-term basis in the event of your death or disability;
2. Organize your practice and your files to allow for an orderly transition of your practice;
3. Review trust account balances—determine why funds are still being held in trust and disburse where possible. Make any necessary application to dispose of undistributed trust funds;
4. Develop file retention and destruction policies and review your files to determine
 - what can be culled from files;
 - what must be maintained; and
 - who will keep your closed files when you retire or on your death;
5. Remember to consider Client ID Regulations [see Regulation 4.5] and other *Legal Profession Act* Regulations, including those relating to the maintenance of real property foundation documents. [See Part 13 of the *Legal Profession Act* Regulations - www.nsbs.org/documents/general/CURRENTREGS.pdf];
6. Insurance needs—look at all the insurance coverage you have, errors and omissions (including excess insurance), as well as personal life, disability and business expense coverage, to determine if what you have is adequate and how your retirement might impact this coverage.

Resources

To assist you in this planning, I have prepared a comprehensive package of succession planning resources including articles, checklists, forms and sample precedents. This package is available through my office.

As well, in the coming weeks, Stephen Gallagher and I intend to facilitate a telephone conference call with sole or small firm practitioners who are interested in hearing from other lawyers on their own succession plans, and to hear any other tips and suggestions that participants might have to offer. If you are interested in participating in this call please contact me, Deborah E. Gillis, QC, at dgillis@lians.ca or 902.423.1300 (ext. 345).

10.2 Maintenance of Records

10.2.1 Every practising lawyer or law firm shall maintain, so as to be clearly distinguishable from the record of money received and disbursed in the practising lawyer or law firm's general account, books, records and accounts to record all trust money and trust property received and disbursed in connection with the practising lawyer or law firm's practice, and as a minimum requirement every practising lawyer or law firm shall maintain

- (a) a book of original entry or data source showing the date of receipt and source of trust money for each client and identifying the client on whose behalf the trust money is received,
- (b) a book of original entry or data source showing all disbursements out of trust money for each client and showing each cheque number, the date of each disbursement, the name of each recipient, and identifying the client on whose behalf each disbursement is made out of trust money,
- (c) a clients' trust ledger showing separately for each person on whose behalf trust money has been received all such money received and disbursed and any unexpended balance,
- (d) a record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made,
- (e) a book of original entry or data source showing the date of receipt and source of all money received other than trust money,
- (f) a book of original entry or data source showing all disbursements of money other than trust money and showing each cheque or voucher number, the date of each disbursement and the name of each recipient,
- (g) a book, data source or chronological file of copies of billings showing all fees charged and other billings to clients, the dates such charges are made and identifying the clients so charged,
- (h) a record showing a comparison made monthly of the total of balances held in all trust accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the books and records together with the reasons for any differences between the totals and supported by
 - (i) a detailed listing made monthly showing the amount of trust money held for each client and identifying each client for whom trust money is held, and
 - (ii) a detailed reconciliation made monthly of each trust account in a financial institution, and such detailed listings and reconciliations shall be retained as records supporting the monthly trust comparisons,
- (i) a record showing all trust property held in trust from time to time for all clients, and identifying the client on whose behalf the property is held, and
- (j) bank statements or pass books, cashed cheques and detailed deposit slips for all trust and general accounts.

10.2.1.1 For the purpose of subregulation 10.2.1 (j) "cashed cheques" may include the original cheque or a digital image provided by the lawyer's or law firm's financial institution provided both the front and the back of the cheque can be read in their entirety and are capable of being printed.

Posting of Books, Records and Accounts

10.2.2 The entries in the books, records, data sources and accounts required to comply with subregulation **10.2.1**

(a) shall be entered and posted forthwith, and the trust comparison required by subregulation 10.2.1(h) shall be made monthly within thirty days from the effective date of each comparison,

(b) shall be entered and posted in ink or a duplication thereof, or electronically, and shall be preserved for at least seven years from the most recent fiscal year end of the practising lawyer or law firm. [Reg. 47B(3) amended]

Resources

Articles

[Succession planning for sole and small firm practitioners](#) - By Deborah E. Gillis QC, Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, *Society Record*, Vol 27, No 4, October 2009

[Wrapping Up and Winding Down](#) – By Deborah E. Gillis QC, Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia

[You've Planned for Success Now Plan for Succession](#) – By Deborah E. Gillis QC, Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, *Society Record*, Vol 26 No 3, July 2008

[Rethinking Retirement: Understanding the War for Legal Talent in the Changing Marketplace](#)
Stephen Gallagher, *Law Practice Magazine*, Volume 33 Number 8, December 2007

Websites

[Law Society of British Columbia - Succession Planning](#)

Includes articles, checklists, sample forms, consent to close office, sample will provisions, sample engagement letters etc. from The Law Society of Upper Canada, Oregon State Bar Professional Liability Fund, New York State Bar and The Law Society of British Columbia

M&A Canada Inc. – Articles on Selling your Business <http://www.mandacanada.com/>

Texts & Manuals

[The Lawyer's Guide to Records Management and Retention](#), George C. Cunningham and John C. Montana, American Bar Association, Law Practice Management Division, 2006
(available at the Nova Scotia Barrister's Society Library)

[Records Management in the Legal Environment](#), Jean Barr, CRM; Beth Chiaiese, CRM; and Lee R. Nemchek, CRM, ARMA, 2003 (available at the Nova Scotia Barrister's Society Library)

[Transitions: Making Sense of Life's Changes](#), William Bridges, Da Capo Press, Revised 2nd Edition, 2004

[Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups](#), Second Edition, Robert W. Hillman, Aspen Law and Business, 2000
(available at the Nova Scotia Barrister's Society Library)

[The Lawyer's Guide to Buying, Selling, Merging and Closing a Law Practice](#), Editors, Sarina A. Butler and Richard G. Paszkiet, American Bar Association, 2008
(available at the Nova Scotia Barrister's Society Library)

[Law Office Policy & Procedures Manual](#), Robert C. Wert and Howard I. Hatoff, 5th Edition, American Bar Association, Law Practice Management Division, 2006

Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events, Lloyd D. Cohen, Debra Hart Cohen, American Bar Association, 2008 (available at the Nova Scotia Barristers' Society Library)

[Client Identification and Verification Regulations](#) (see regulation 4.5 Client Identification)

[Nova Scotia *Legal Profession Act* Regulations](#)

(see p.60 for **PART 5: MEMBERSHIP CATEGORIES, CHANGES OF CATEGORY, OBLIGATIONS, SUSPENSIONS**)

Trust Account Regulations and Manual

(Maintenance of Records - See Regulation 10.2 of the *Legal Profession Act* Regulations (Trust Accounts) <http://www.nsbs.org/documents/general/CURRENTREGS.pdf>)

Application for Unclaimed Trust Funds

http://www.nsbs.org/documents/general/UTF_Procedures.pdf

Other Resources

Lawyers' Insurance Association of Nova Scotia www.lians.ca

1660 Hollis St. Suite 1102

Halifax NS B3J 1V7

Ph: (902) 423-1300

Melanie McGrath – Director, LIANS

mmcgrath@lians.ca (902)423-1300 ext 327

Geraldine O'Shea - Claims Counsel, LIANS – Claims

goshea@lians.ca (902) 423-1300 ext 330

Patricia Neild - Claims Counsel, LIANS – Claims

pneild@lians.ca (902) 423-1300 ext 328

Nova Scotia Barristers' Society www.nsbs.org

1645 Granville St. Suite 1101

Halifax NS B3J 1X3

Ph: (902) 421-1491

Pierre Benoit – Officer, Database Administration

pierrebenoit@nsbs.org (902) 422-1491 ext. 324

Barbara Campbell – Director, Library and Information Services

bcampbell@nsbs.org (902) 425-2665

Glen Greencorn – Director, Finance and Administration - Trust Account Inquiries

ggreencorn@nsbs.org (902) 421-1491 ext 314

Karen Trites – Admissions and Professional Development Department – Officer, Admissions
Changes in Membership Categories inquiries

ktrites@nsbs.org (902) 421-1491 ext. 339