LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

File Retention
Resources and Practice Aids

November 2015

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Disclaimer

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.

All of the resources and practice aids enclosed or referenced are provided to you to assist in your practice, but are not meant to be a complete analysis of the topic, or necessarily to be used as is.

You should also do your own appropriate legal research and modify documents to reflect the facts and agreement in each situation.

What to Consider When Closing Files

It is important to recognize that when deciding which files to keep, and for how long, it is the contents of the file, not its date, which should dictate the length of time a file is to be retained. For instance, where a client has not followed your advice and you have documentation supporting the advice given and not accepted, it is prudent to keep that documentation indefinitely to protect you in the event that a negligence claim or a professional responsibility complaint is made against you. In general it is best if the lawyer responsible for the file should be the one to approve what documentation is being culled before it goes to storage and to determine the ultimate destruction date for the file (in accordance with the firm's established policy).

We strongly recommend that in all files, when culling file contents you maintain all your file notes. They are frequently a very important part of the advice you gave and the instructions you received from your client.

Legal Profession Act Regulations

When closing the property files, also 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

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:

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

See also:
Regulation 4.5 (Client Identification) - requirement to retain record of the information and documentation obtained to verify identify; and

Regulation 10.4 (Maintenance of records) - requirement to preserve accounting records

CRA has their own requirements on how long accounting records should be maintained. You should check with your accountant on this.

Resources

Articles

Wrapping Up and Winding Down – By Deborah E. Gillis, Q.C., Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, Society Record, Vol 24 No 1, February 2006

You've Planned for Success Now Plan for Succession – By Deborah E. Gillis, Q.C., Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, Society Record, Vol 26 No 3, July 2008.

Planning Now for File Management – Deborah E. Gillis, Q.C., Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, Law Practice Today Webzine

Turning the Page - Moving Towards a Less Paper Dependent Office – By Deborah E. Gillis, Q.C., Risk and Practice Management Advisor, Lawyers' Insurance Association of Nova Scotia, Society Record, Vol 27 No 4, October, 2009

Closed Files - Retention and Disposition – Law Society of British Columbia, July 2015
https://www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf
[Please Note: This resource makes reference to British Columbia statutory requirements and suggested minimum retention periods for British Columbia practices. Do not rely on these for a Nova Scotia practice.]

Texts & Manuals (available from the NSBS library)

Emailing Archiving for Dummies - Bob Spurzem & Bill Tolson
Call Number: KB 56 S772 2008
(Hoboken, NJ: Wiley Publishing, 2008)

Lawyer's Guide to Records Management and Retention - George C Cunningham & John C Montana
Call Number: KB 56 C973 2006 + CD*
(Chicago: ABA, 2006)
* Ask staff for assistance in locating the CD accompanying this book.

Organize Your Office: A Small Business Survival Guide to Managing Records - Teri J Mark
Call Number: KB 267 M345 2003
(Lenexa, Kan: ARMA, 2003)

Records Management in the Legal Environment: A Handbook of Practice and Procedure - Jean Barr, Beth Chiaiese & Lee R Nemchek
Call Number: KB 56 B268 2003
(Lenexa, Kan: ARMA, 2003)

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 an then go back an indefinite number of years. As a matter of practice, Revenue Canada generally will not go back any more than six to seven years, even if charges of tax evasion and/or filing false returns are sworn under Section 239 of the Act.

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

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

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

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Civil Litigation

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

Wills and Estates

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

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

Family

Types of family matters:

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

What is on file?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. **Spousal and Child Support**: correspondence, notes, sworn financial statements and supporting documentation, such at 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

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 phase 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.

File Closure Checklist

(Updated November 2015)

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 * (Cloud service, 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://nsbs.org/regulation/client_id_regulations			
19. Comply with Legal Profession Act Regulations. http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/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?			

Law Practice Today

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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.

About the Author

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Lawyers' Insurance Association of Nova Scotia
by Deborah E. Gillis, Q.C., Risk and Practice Management Advisor

WRAPPING UP AND WINDING DOWN

First Published in the Society Record February 2006, updated November 2015

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, 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://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/currentregs.pdf

8a. Make sure that all required Client ID documentation is maintained in accordance with the Client ID Regulations http://nsbs.org/regulation/client_id_regulations

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.

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.

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

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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.

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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.

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Practice Advisory on Changes to the *Legal Profession Act* Regulations
August 25, 2009 (updated for November 2015)

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)

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

Updated regulations can be found at:
http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/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 d (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 (e)

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 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, and circulate this notice to all real estate lawyers and paralegals in your firm, as well as anyone else involved in the file.

It is recommended 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