



# LAW SOCIETY

OF THE NORTHWEST TERRITORIES

## PRACTICE ADVISORY

### Destruction of Closed Client Files

Members frequently contact the Law Society with questions concerning appropriate time periods for retaining closed client files before destruction, and proper procedures for disposal of old files.

### WHEN CAN FILES BE DESTROYED?

A client can sue his or her former solicitor in contract and tort when alleging the solicitor has provided inadequate or negligent legal services (*Central Trust v. Rafuse* [1986] S.C.J. No. 52 [1986] 2 S.C.R. 147, (1986) 31 DLR (4th) 481). The limitation date may not expire until six years after the date of the error or, with leave of the court, within one year of the date on which the applicant first knew, or in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based (*Limitations of Actions Act* R.S.M. 1987, c.L150, Sec. 14(1), *Rarie v. Maxwell* [1998] M.M. No. 588, (1988) 168 DLR (4th) 579 [1999] 6 W.W.R. 142 and (1998) 131 Man. R (2d) 184.)

Thus, lawyers are faced with the dilemma of never knowing with absolute certainty whether one can safely destroy an old file. The destruction of a file could in itself be a negligent act if important documents are inadvertently destroyed, or might eliminate the best evidence the lawyer has to defend against an allegation of negligence.

Practical considerations must apply when a lawyer or law firm is faced with a question of whether to and when to destroy old files, as it is virtually impossible to keep every closed file indefinitely. Many lawyer and firms have developed an informal "rule of thumb" as to the appropriate time period after which files will be culled and destroyed. Ultimately, a lawyer must use their best professional judgement when determining whether it is appropriate to destroy a file in any particular case, keeping in mind the provisions of the *Limitation of Actions Act*. Consideration should be given to the length of time the file has been closed, the type of legal matter and the lawyer's own opinion as to the likelihood of any complaint arising in the future concerning the quality of legal services provided.

In recent years, there has been an increased incidence of wrongful conviction proceedings. In such circumstances, a member's original file may take on great importance. Where, in a lawyer's professional judgment, there is a risk of wrongful conviction proceedings being commenced, it would be prudent for members to consider maintaining such files indefinitely.

The Law Society Rules specify minimum periods for retention of certain documents. Rule 134.9 requires that client identification and verification documents be kept for at least six years following the completion of the work on a file, or longer if the lawyer and client continue to have a relationship. Rule 108(1) requires that client financial records be kept for ten years following the fiscal year when the file was closed, and the lawyers' financial records be kept for a period of ten years following the end of the fiscal year that the records apply to.

Also, there are minimum requirements imposed by Revenue Canada for maintaining trust account records. However, these are **minimum requirements only**, and should not be interpreted as authority to automatically destroy every file after a fixed time period.

Also, Rule 62 requires that a lawyer who intends to cease the practice of law in the NWT, or cease being an active member must, at least 14 days prior to the cessation, seek the approval of the Executive of a cessation of practice plan which includes the intended disposition of

- (a) open and closed files,
- (b) wills, titles and other important or valuable documents,
- (c) non-documentary valuables, and
- (d) trust moneys, trust accounts and books of account, that relate to the practice of the member in the Territories and are within the control of the member.

## **PROPER PROCEDURE FOR DESTRUCTION OF FILES**

Here are some recommendations around both closing and destroying files:

- Develop and adhere to a policy that governs what you will retain in a paper file or how you will maintain electronic records, during the life of the file and upon its conclusion. Remember to organize emails too. Good file management will make it easier to cull the file when it is time to close it.
- Determine whether file materials should be stored, destroyed, returned to client, delivered to a third party, or transferred to another lawyer who will be assuming the obligation to store them. Remember to consider the electronic records as well;

- Valuable and/or original documents on the file should be returned to the client – it is preferable to do this when closing the file, but certainly prior to destruction;
- When returning documents to the client, list them in the covering letter;
- Advise your client of the file destruction date;
- Remove all duplicates.
- Keep case law separate so you can easily discard it when closing the file. You may wish, however, to keep a list of your research sources for your file.
- Consider whether to keep research memos or pleadings as precedents, for future use within the firm. If doing so, remember to delete any information which might identify the client, to ensure that client confidentiality is preserved;
- Keep anything on a file which allows you to answer a potential claim – advice given, instructions received, decisions, etc. You may want to keep drafts of documents to evidence your instructions to amend them.
- A lawyer should make the final decisions about what file materials to remove or destroy;

You may consider destroying documents which can be obtained from public records, such as documents filed at the land titles office, or pleadings filed with the court. Keep in mind, however, that it is expensive to obtain copies from court files, and with old files, there is no guarantee that court files will always be accessible.

- If you are closing a file because your client has lost interest in your matter, advise that you are closing the file and that you no longer act. If the client has disappeared, document your efforts to find him or her. Get off the file. Tell the client about critical dates and deadlines and make it clear it's the client's responsibility to ensure they are met;
- Before closing a file, check for funds in trust as well as for outstanding undertakings and trust conditions;
- When deciding on a destruction date, consider other requirements, like tax legislation and limitations law. Also consider the likelihood of potential negligence claims or complaints. Even criminal lawyers may have to consider the likelihood of wrongful conviction proceedings in the future;
- Assess your client's needs – will your client need access to these file

materials in the future? If, for example, they relate to a long term lease on property which your client is likely to own or lease for a substantial period of time, you may wish to keep the file for decades;

- Even family law files may have to be kept for longer periods, depending on when enforcement or interpretation issues may arise. For example, when does the pension become payable?
- If you are unsure when to destroy a file, set a date on which to review it and reassess in the future;
- If you are leaving a firm and your closed files are remaining behind, confirm the firm's intentions, particularly if you have a file on which a claim or complaint may arise;
- Files should be shredded by a trusted professional shredding service or by the firm. Cross-hatch shredding is the most secure. If hiring an outside company, exercise due diligence to ensure confidentiality;
- Retain records identifying the files you have closed and destroyed. These records should also help you identify the location of all stored files, should you ever need to retrieve any. By keeping a record of all files destroyed in accordance with a file destruction policy, you will be able to refute any allegation that you may have destroyed a file indiscriminately.
- Assign new sequential numbers to closed files, and store files closed in the same year together.
- Develop a policy regarding who will have access to closed files. Consider not only firm staff, but also employees of any off-site storage facility who may be accessing your documents;
- If storing off-site, ensure there is proper security during both the storage and destruction phases. Confidentiality is a concern, but also damage from fire, flooding, temperature and humidity. Storage conditions may be different for paper, as opposed to other electronic media. You may want to insure the files, as standard professional negligence insurance will not cover the loss and possible cost of restoration of valuable documents.
- For further guidance, see [this information](#) from the Law Society of Alberta.