File Retention and Document Management

File storage and retention is of concern to practicing lawyers, particularly due to the cost of storing original file materials and the attractive alternatives offered by technology. The cost of storing paper files often seems to outweigh the utility of doing so.

The Practice Advisors receive many inquiries from lawyers about document management and retention. The most common questions include:

1. Who owns the file?
2. What must I keep, and for how long?
3. What should I keep, and for how long?
4. What are best practices in file management, storage and destruction?

Who owns the file?

Before closing a file, a firm must consider which parts of the file will be returned to the client. Lawyers typically provide original documents and other materials of importance to the client. The balance of the documents remaining on the stored file may belong to both the client and the lawyer.

File ownership is an important issue when considering file transfers to new counsel. File transfers may be subject to solicitors' liens, which is a separate topic. If the client has paid all outstanding accounts, certain parts of the file belong to the client, subject to the following comments.

The Client's Documents

Documents created before the retainer generally belong to the client. Such documents are often sent by the client or third parties to the lawyer during the retainer. Documents which are created during the retainer belong to the client if:

- the documents were a necessary part of the business transacted, and
- the client has paid, or is liable to pay, for their preparation.

The client therefore owns documents:

- prepared by the lawyer for the benefit of the client and for which the client has paid, or is liable to pay; or
- prepared by third parties and sent to the lawyer, other than at the lawyer's expense.

All of the following are owned by the client and should be provided to the client without further copying charges (with the possible exception of letters sent by the client to the lawyer):

- client documents brought to the firm by the client;

- originals of all documents prepared for the client;
- copies of all documents prepared by the lawyer for which the client has paid, including draft copies of documents;
- copies of letters received by the lawyer, some of which may be paid for by the client;
- copies of letters of instruction from the client to the lawyer;
- copies of letters from the lawyer to third parties kept in the client file;
- originals of letters from the lawyer to the client, though these would be sent to the client in the normal course;
- copies of case law;
- notes of telephone calls, meetings or interviews;
- briefs and memoranda of law where preparation was paid by the client;
- documents created in preparation for a hearing or trial, such as briefs, trial books and books of documents;
- letters received by the lawyer from third parties;
- copies of vouchers and receipts for disbursements made by the lawyer on behalf of the client;
- expert reports;
- discovery and trial transcripts

More recently, some lawyers have questioned whether the former firm is obliged to provide electronic copies of emails and drafts of documents to the client or new counsel, along with the client's paper file. In the Practice Advisors' collective opinion, the digital file materials form part of the work product for which the client has already paid and should be provided. New counsel should not be expected, for example, to retype an entire agreement when the former firm has refused to provide an electronic version for editing.

The Lawyer's Documents

Documents created during the retainer belong to the lawyer if:

- the lawyer was under no duty to prepare them;
- the documents were not prepared for the benefit of the client;
- the client cannot be regarded as liable to pay for them.

Documents properly belonging to the lawyer include:

- documents sent to the lawyer in circumstances where ownership was intended to pass to the lawyer;
- original letters sent by client;
- copies of all original correspondence;
- copies of original documents or correspondence belonging to the client, and copied at the lawyer's expense;
- working notes or summaries, lawyer's notes regarding submissions to court;
- inter-office memos;
- time entries;
- accounting records;
- original receipts and disbursement vouchers;
- notes and other documents prepared for the lawyer's benefit or protection and at the lawyer's expense.

What must you keep?

The Rules of the Law Society

Lawyers' obligations to maintain records are addressed in the Rules of the Law Society of Alberta, as follows:

> **119.37 (1)** Except as otherwise authorized by the Executive Director, a law firm shall:
>
> (a) maintain its financial records in a safe and secure location;
>
> (b) maintain its most recent 2 years of financial records at its principal place of practice in Alberta;
>
> (c) upon completion and closing of a client file, place a copy of the client trust ledger card on the client file;
>
> (d) retain its trust ledger accounts referred to in rule 119.36(4)(b) and (c) for at least the 10-year period following the fiscal year of the law firm in which the trust ledger account was closed;
>
> (e) retain all other financial records referred to in rule 119.36, for at least the 10-year period following the fiscal year of the law firm in which the records came into existence;
>
> (f) **retain such parts of the files of the law firm, relating to the affairs of clients or former clients of the law firm, as are necessary to support the prescribed financial records for at least the 10-year period following the fiscal year of the law firm in which the file was closed**. [*emphasis added*]
>
> **(2)** A law firm must not give up possession of any financial records and client files of the law firm relating to the affairs of clients or former clients of the law firm to a person other than a lawyer, unless the law firm retains or makes a copy of such parts of the file as are necessary to support the prescribed financial records, which copy must be deemed to be an original for the purposes of the Act and the Rules.

The rule requires retention of financial records for 'ten plus' years. This rule does not, however, create an obligation to maintain the entirety of the client's file. The rule is focused on maintenance of trust accounting records. It is, however, strongly recommended that lawyers do not destroy files until a minimum of ten years after a matter is complete.

Also note that the client identification rules require information related to the identification and verification of clients to be stored for six years following the completion of the work for which the lawyer was retained (see Rule 118.7(1) of the Rules of the Law Society of Alberta, available at

(Rules of the Law Society of Alberta).

The *Income Tax Act* requires financial records to be maintained for six years from the last taxation year for which the record may be required for a determination under the *Act*. These

requirements should not be confused with lawyers' file retention obligations under the Rules of the Law Society.

The Code of Conduct

The current Code of Conduct, in force February 3, 2017, provides for:

- Preservation of confidentiality – Rule 3.3-1
- Preservation of client property, including funds, wills, minute books, and all other papers and files. You are to care for client property as a careful prudent owner would, and must observe all relevant rules and law – Rule 3.5-1
- You must account for client property in your custody and, where appropriate, return it to the client – Rules 3.5-4 and 3.5-5
- When withdrawing from a representation, you must provide client files to successor counsel, subject to a lawyer's right of lien – Rule 3.7-7
- You should explain fees or disbursements a client might not anticipate – Rule 3.6-1. This would apply to file storage or retrieval costs.

What should you keep?

The Practical Realities of File Storage

The rules **do not require** you to keep a complete copy of the entire client file – it is, however, **a strongly recommended practice**, in the event you are required to defend yourself in a professional negligence claim or respond to a complaint. While there are, of course, no time limitations applicable to complaints to the Law Society, civil litigation claims are subject to limitations legislation. It is standard practice for most firms to store client files for ten years following the end of the fiscal year in which the file was closed, in consideration of sections 3 and 11 of the *Limitations Act*.

The *Limitations Act* provides:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or
>
> (b) 10 years after the claim arose,

> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Section 11 provides:

> 11 If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

There are further qualifications on the limitation periods set forth in the Act. For example, section 4(1) states that the operation of the ten-year limitation period is suspended while a defendant fraudulently conceals an injury. The operation of a limitation applicable to an individual under disability is also suspended during the time the claimant is disabled. There are other special provisions governing claims by minors.

In reality, however, most claims and complaints are brought in the early stages. Any file that may give rise to a potential claim that is not statute-barred should be retained indefinitely, until the lawyer is able to make an assessment of his or her potential liability. If you are unsure when to destroy a file, set a date on which to review and reassess it in the future. Sound business judgment should be applied when deciding to destroy files, whether at or after the ten year period. You may wish to be particularly cautious when minors or mentally incompetent clients are involved.

The nature of the work performed, or the "working life" of the document, must also be considered when deciding how long to store client files. Wills are an obvious example, as they may not be subject to probate for a number of years after their execution. Other examples of documents with an extended "working life" include mortgages, long term leases, and matrimonial agreements. In many of these examples, the client may return to the lawyer for assistance with the interpretation, enforcement or variation of an agreement. In the case of a will, the interpretation of the will and the testator's intentions may be the issue of future litigation.

When closing client files, consider retaining the following documents:

- All correspondence, including non-engagement letters;
- Documentation evidencing client instructions or changes to instructions;
- Lawyers' opinions;
- Copies of drafts or other documents which substantiate a change in client instructions;
- Documents confirming a client's refusal to follow a lawyer's advice;
- Copies of all offers to settle and the client's acceptance or rejection of any offers;
- Copies of expert reports or other documents that provide the basis of a lawyer's opinion or recommendation;
- Clients' written authorizations and directions;
- Written retainers;
- Memos of telephone conferences or meetings;
- Time sheet entries;
- Lawyers' personal notes and file memos;
- Copies of bills; and
- Copies of documents which may not be easily obtained from other sources after the file is closed.

Wills and Other Original Documents

Do not destroy original wills, and keep the will preparation file for at least ten years past the date on which you know probate has been completed. Disappointed beneficiaries are able to pursue litigation against lawyers who negligently draft wills for testators, and the limitation period for such claims may only arise when the testator has passed away and the beneficiaries become aware of the terms of the will.

We recommend that lawyers return original wills and related documents to clients, to avoid indefinite storage obligations for wills. If you have decided to store wills, you must use a safe and secure means of storage, such as a vault or fireproof cabinet.

The same considerations apply to the retention of clients' originally executed documents or agreements falling into other categories. You should make a note on the file when you have stored the clients' original documents.

Best Practices in File Management, Storage and Destruction

Dealing with Client Files

In the normal life of a file, you will handle it from start to finish, and will retain and store the majority of the file materials. Throughout the file, you likely will have provided the client with copies of significant documents and correspondence. When the file is concluded, you should ensure the client has originals or copies of all other documents of importance or interest. Keep a record of the documents the client has received, perhaps by keeping a copy of the final letter to the client in which the documents were listed. The client should also be advised when the file is scheduled for destruction and of any file retrieval fees which may be applicable, should the client wish to obtain a copy of any file materials in the future. Even if this has already been contemplated in the original retainer, it is a good idea to remind clients of the potential cost associated with retrieval of closed files so that they can request additional copies of any file materials before they are stored off-site.

Some firms also contact clients 60 or 90 days prior to file destruction, to advise that the file will be destroyed unless the client wishes to retain it in his or her possession. In that case, the entire file may be sent to the client. Any copying of file contents is at the cost of the firm. If the client cannot be located, the destruction will proceed.

If you are required to transfer the file to new counsel before the matter is concluded, and if you wish to make copies before transferring the file, this must be done at the lawyer's cost. You are entitled to a copy, even if the client objects to you making one.

You cannot expect the successor lawyer to accept a trust condition to provide you with the file at a later date if you are sued or the subject of a complaint in the future. The file belongs to the client and it is inappropriate to put restrictions on its future use and transfer.

A lawyer must not give property held under trust conditions to the client or a new lawyer, unless new terms are negotiated with those parties to whom the lawyer owes obligations.

If you have kept the client informed of your progress on the file by providing copies of all incoming and outgoing correspondence and documents, the client may already have a significant portion of the materials to which he or she is entitled. You do not have to recopy what they already have. The client may, however, be entitled to other parts of the file (original documents, memos of calls and meetings, etc.). In practice, it may be difficult, time-consuming and impractical to try to distinguish what belongs to the client and what the client has already received; lawyers may ultimately find it more efficient to simply duplicate the entire file when the contents are demanded by the client or new counsel.

Note that the Rules of the Law Society require you to copy the client file materials if the client is taking the file, rather than new counsel. These rules, however, are focussed on the file materials which support the trust accounting records.

File Storage and Retention

It is important for lawyers at all stages of practice to be thinking about file storage issues. What happens when a firm dissolves, or a lawyer dies or quits practice? Lawyers retiring from larger firms may have fewer concerns, as the remaining firm members continue to arrange for file storage. File retention and destruction issues are very important planning issues for solos and small firm practitioners. Who will wish to take responsibility for your files when you retire? Who will pay for storage? From the day you start practice, you should try to reduce the file materials you retain and set file destruction dates for closed files.

When Alberta lawyers leave practice, they are required to submit Form 2-20 to our membership department: Form 2-20. The form requires lawyers to identify where closed files will be stored. If the retiring or inactive lawyer's files are to be held by or transferred to another lawyer, the receiving lawyer must also sign the form to indicate confirm the agreement and receipt of the files.

Consider preserving appropriate firm records as archives. This involves identifying records which are of long-term legal or historical value, and then transferring these records for preservation, under appropriate conditions. When considering whether to transfer file contents to an archive, make sure you carefully address issues of privilege and confidentiality. Client confidentiality must be preserved indefinitely, and does not die with the client. You should get a release from the client or the client's estate or successors before releasing any information of a confidential or privileged nature. The Legal Archives Society of Alberta may be contacted for more information: telephone (403) 244-5510 or by email at lasa@legalarchives.ca.

Procedures for 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.
- Consider the cost of file storage and retrieval and, if it is your policy to charge a retrieval fee, you should advise your client at the time of opening and closing the file;
- 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. In addition, in recent years the courts' files were contaminated by mold and not accessible. Will court files 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 the 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.

Digital File Storage

We receive regular inquiries about whether lawyers are allowed to maintain digital file records, on local servers or other electronic media, or in the cloud. If you are considering maintaining only electronic copies of your file materials, keep these issues in mind:

- There are no LSA rules endorsing or prohibiting the retention of client file materials exclusively in a digital format. It is cheaper to store documents digitally in the long term;
- Lawyers have a fundamental obligation to ensure that they maintain confidentiality over their clients' records, whether those records are stored in hard copy or in digital form. Lawyers must exercise due diligence when choosing any service provider that might be engaged in the storing of confidential client information. In the case of digital storage, the onus is on lawyers to understand the technology they are using and to exercise appropriate levels of care when converting or storing client information in digital formats.
- Clients should be fully informed, and their consent confirmed, before their data is stored in the cloud.
- The Law Society of Alberta currently has no express policy regarding cloud storage. The legislation in other jurisdictions, like the U.S.A., could authorize a breach of privilege or confidentiality. The Law Society of British Columbia has studied the issue and generated some useful reports and checklists. For more information, see the report from the Cloud Computing Working Group and the Cloud Computing Checklist on the website of the Law Society of British Columbia: http://www.lawsociety.bc.ca/docs/publications/reports/CloudComputing_2012.pdf and http://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf .
- If storing electronic media, consider the storage environment and ensure humidity and temperatures are appropriate;
- Consider the potential for corruption and future readability of document images. You may have to maintain certain programs in the future to ensure you can access stored records;
- If using an outside service provider, consider whether it is likely to continue in business and what happens to your documents if it disappears. Read the service agreement closely;

- Implement a document scanning or 'paperless' policy on a 'go forward' basis – the cost of scanning existing paper files may be more prohibitive than storing them;
- Ensure digital data is appropriately removed from all discarded firm computers and devices.

Consider evidentiary issues regarding the admission of electronic records into evidence. You must be able to prove the authenticity of your file. The relevant provisions of the *Alberta Evidence Act* with regard to the admissibility of electronic records are as follows:

> **Authentication**
>
> **41.3** A person seeking to introduce an electronic record as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.
>
> **Application of the best evidence rule**
>
> **41.4(1)** Subject to subsection (3), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic records system.
>
> **(2)** The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system by or in which the information was recorded or stored, or by evidence that reliable encryption techniques were used to support the integrity of the electronic record.
>
> **(3)** An electronic record in the form of a printout that has been manifestly or consistently acted on, relied on or used as the record of the information recorded or stored on the printout is the record for the purposes of the best evidence rule.
>
> **Presumption of integrity**
>
> **41.5** For the purposes of section 41.4(1), in the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is proved
>
> (a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system,
>
> (b) if it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it, or
>
> (c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce it.

Standards

41.6 For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

Sample Closed File Checklist

As with any checklist or guideline, the following is merely a starting point. It is not a substitute for implementing your own firm policy which addresses the specific needs of your clients and the nature of your practice.

DATE:	**SUPERVISING LAWYER:**
FILE NAME:	**ADMINISTRATIVE ASSISTANT:**
OPEN FILE #:	**CLOSED FILE #:**
REASON FOR CLOSING:	**DESTRUCTION/REVIEW DATE:**
CLIENT NAME(S):	**LAST KNOWN ADDRESS AND PHONE NUMBERS:**

ITEMS	**YES**	**NO**	**DONE**
1. Final reporting letters done?			
2. All trust conditions met, all undertakings completed?			
3. File reviewed for any loose ends? Noted for action or follow up? Is further diary entry required?			
4. Unnecessary limitation dates removed from limitation diary?			
5. No balances in accounts: (a) Trust (b) Unbilled time (c) Unbilled disbursements (d) Unpaid accounts			

6. All amounts payable to third parties paid?			
7. Does client owe overdue bills on other files?			
8. Anything on file which should be sent to clients or others? (e.g. originals, executed documents, borrowed documents)? Is there a list of these documents, in correspondence or a memo?			
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 re closure and eventual destruction? (b) Client acknowledgment or instructions received?			
13. Destruction date marked on file cover? (not less than ten years from file closure)			
14. Current accounting and file records moved to closed accounting and file records?			
15. Closed file renumbered and entered in closed file index?			
16. Closed file physically removed to closed file location? (including all sub-files, ancillary loose leafs, notebooks, rolls of plans, etc.)			