Closed File Retention, Storage and Disposal

File retention, storage and disposal raise important regulatory, professional and statutory obligations. You may also need to use the contents of a closed file to respond to a complaint or negligence claim.

The objectives of the Closed File Retention, Storage and Disposal Module are:

- To clarify which parts of the file the client owns and which parts of the file you own;
- To explain what you need to keep and should keep on a closed file, why and for how long; and
- To review acceptable methods of file 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. Best practice is to provide original documents and other important materials to the client. The remaining file contents may belong either to the client or the lawyer. The lists below provide more specific guidance on this.

File ownership is also an important issue when a file is transferred 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 which are created during the retainer belong to the client if the client has paid, or is liable to pay, for their preparation or if they are 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, including drafts of pleadings and written submissions;
- 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 and exhibits
- letters received by the lawyer from third parties;
- copies of vouchers and receipts for disbursements made by the lawyer on the client's behalf;
- expert reports; and
- questioning (both for discovery and cross-examination) and trial transcripts.

Except in limited circumstances, the client owns and should be provided the paper and electronic file. The digital file materials, including drafts of work in progress, form part of the work product for which the client has paid or is liable to pay and should be provided to the client or their new lawyer. New counsel should not be expected, for example, to retype an entire agreement or pleading because 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 client's benefit; and
- the client is not liable to pay for them.

The retainer letter should address what documents the lawyer owns and should consider in as much detail as possible what the client is and is not liable to pay for.

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 the 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; and
- notes and other documents prepared for the lawyer's benefit or protection and at the lawyer's expense.

What Must Lawyers Keep and for How Long?

Regulatory provisions govern record retention by lawyers. Rule 119.35(1) of the Rules of the Law Society of Alberta (the Law Society Rules) provides that certain financial records, trust ledger accounts and file contents that support the financial records must be retained for a minimum of ten full years. Paper copies are not required, but the records must be stored in a format that is retrievable on demand.

Law firms must comply with two rules about its prescribed financial records. Rule 119.34(4)(b)(ii) stipulates that the trust ledger and accounts receivables ledger for every client matter must be kept for a minimum of ten full years. Rule 119.51(3)(b) requires the firm to retain the client's identification information and verification documents for at least six years following completion of the work for which the lawyer was retained. This obligation must be balanced with relevant privacy legislation which stipulates that records should not be kept longer than required.

Statutory provisions also govern record retention. As discussed above, original documents should be returned to the client. Because clients might resist having records returned to them, it may be effective to send a letter advising clients of statutory provisions which require the return. If the client has provided instructions to retain records until the statutory requirements are fulfilled, best practice would require the lawyer to confirm that agreement in writing and address issues such as the cost of retaining and storing the file.

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 that *Act*. These requirements should not be confused with lawyers' file retention obligations under the Law Society Rules.

Some of the more common Rules and statutory file retention periods are:

Statute or Rule	Documents to Retain on File	Period
Law Society Rule 119.34(4)(b)(ii))	Copy of the client trust ledger **and** accounts receivable ledger	Minimum of ten full years
Law Society Rule 119.51(3)(b)	Record of the client identification information obtained and copies of all verification documents	At least six years following completion of the work for which the lawyer was retained
Business Corporations Act RSA. 2000, c. B-9, s. 226	Entire record book	Six years from dissolution
Canada Business Corporations Act RSC 1985, c. 44, s. 20(2.1)	Entire Record book	Six years from dissolution
Income Tax Act RSC. 1985 (5th Supp); IT Reg. 58—and Info Circular No. 78-1OR4	Records and books of anyone carrying on business, or who pays or collects tax	Six years after the end of the last taxation year to which they relate, or from the date the return is filed, whichever is longer

The Code of Conduct

In addition to the Law Society Rules and statutory references above, Code of Conduct provisions are relevant to file closing and storage. These include:

- **Preserving confidentiality:** This duty continues after the professional relationship ends (Code of Conduct, Rule 3.3-1).
- **Preserving client property:** Client property including funds, wills, minute books, and all other papers and files. Lawyers are required to care for client property as a careful

prudent owner would and must observe all relevant rules and law. Original testamentary documents (e.g., wills, powers of attorney, personal directives) should not be destroyed unless and until the lawyer knows the client is deceased, probate has been sought, and any applicable limitation period has run. Best practice is to ensure original testamentary documents are given to the client at the time of signing. The lawyer must then store their file for the same period that they would have stored those originals, but can do so electronically (Code of Conduct, Rule 3.5-1).

- **Accounting for client property:** A lawyer must account for client property in their custody and, where appropriate, return it to the client (Code of Conduct, Rules 3.5-2 and 3.5-5).
- **Successor lawyer:** A lawyer must provide client files to successor counsel, subject to a lawyer's right of lien (Code of Conduct, Rule 3.7-7(b)).
- **Explaining costs:** A lawyer should explain fees or disbursements a client might not anticipate, such as file storage and retrieval costs (Code of Conduct, Rule 3.6-1 and Commentary para 4).

What Lawyers Should Keep and for How Long

The Rules **do not require** lawyers to keep a complete copy of the entire client file. However, it is **a strongly recommended practice**, in the event you need to defend a professional negligence claim or respond to a complaint. While no time limitations apply to complaints to the Law Society, civil litigation claims are subject to limitations legislation. Most firms store client files for a minimum of 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* and in coordination with Part 5 of the Rules. It is recommended that lawyers should consider maintaining files for the duration of the 10 year outside limitation period, plus one year to serve a statement of claim, plus the three-month renewal period provided by the Rules of Court.

There will be situations where files should be maintained for longer periods. For example, lawyers should identify files where a client was a minor and the limitation period does not commence until they reach the age of majority, and files where discoverability issues may apply and consider whether they should keep the file longer. Also, original wills, powers of attorney and personal directives **must** be kept for ten years after probate is granted. Lawyers will need to consider the contents of each file to determine how long they must retain it. This is discussed in greater detail below.

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.

It further 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.

The *Limitations Act* contains additional qualifications on the limitation periods noted above. 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. Other special provisions govern claims by minors.

In reality, 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 their potential liability. If a lawyer is unsure when to destroy a file, they should set a date on which to review and reassess it in the future. Sound business judgment should be applied when deciding to destroy files. A lawyer should be particularly cautious when minors or clients with capacity concerns are involved. Lawyers are encouraged to contact the Practice Advisors before destroying files which may have issues of liability or potential ongoing limitation periods.

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 until many 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. Like the testamentary documents themselves, the lawyer's file should be retained until after probate is sought as it will be evidence if the matter is litigated. This is discussed in greater detail below.

When closing client files, lawyers should consider retaining the following (in addition to the mandatory documents outlined above)

- copies of notes of all telephone calls, meetings or interviews;
- copies of all documents and correspondence prepared by the lawyer for which the client has paid, including draft copies of documents;
- copies of letters received by the lawyer;
- copies of letters/emails of instruction from the client to the lawyer;
- copies of email communications;
- 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 the lawyer's opinion or recommendation;

- lawyers' opinions, personal notes and file memos;
- copies of statements of account;
- copies of briefs and memoranda of law (and possibly drafts);
- copies of documents which may not be easily obtained from other sources after the file is closed; and
- copies of documents created in preparation for a hearing or trial, such as briefs, trial books and books of documents.

"Copies" may be hardcopies or electronic versions.

Wills and Other Original Documents

Original wills and other testamentary documents should not be destroyed. The will preparation file should be kept for at least ten years past the date on which probate is completed. Disappointed beneficiaries can pursue litigation against lawyers for negligence in drafting testamentary documents. In the case of wills, the limitation period for such claims may only arise after the testator has passed away and the beneficiaries become aware of the will's terms.

To mitigate the risks associated with indefinite storage obligations, it is recommended that lawyers return original wills and related documents to clients. A lawyer who decides to store wills must use a safe and secure means of storage, such as a vault or fireproof cabinet. It is also important to be aware of the Ethical Considerations Regarding Requests for Wills.

Lawyers should similarly approach storage of clients' originally executed documents or agreements falling into other categories. Lawyers should make a note on the file when they have stored the client's original documents and approach destruction of the file with caution. The Practice Advisors can assist lawyers in addressing this issue.

Best Practices in File Management, Storage and Destruction of Client Files

Typically, lawyers handle a file from start to finish and will then retain and store the majority of the file materials. Throughout the file, lawyers will likely provide the client with copies of significant documents and correspondence.

When the file is concluded, lawyers should ensure the client has originals or copies of all documents of importance or interest and should keep a record of the documents the client received. One way to do this is to provide a final reporting letter to the client which lists the documents that are returned and provided, and to retain a copy of this letter on the closed file. The client should also be advised when the file is scheduled for destruction and of any file retrieval fees which may be applicable in case the client may 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 closed-file retrieval 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 their 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 unless the full file has already been provided to the client. If the client cannot be located, the destruction proceeds as scheduled.

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

On transferring the file, it is an unreasonable trust condition to expect the successor lawyer to keep the file in the same order and state, or to provide the transferring lawyer with the file at a later date if they are sued or the subject of a complaint. The file belongs to the client and it is inappropriate to put restrictions on its future use and transfer. This is another reason why lawyers should maintain a copy of the file themselves.

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.

Note that the Rules **require** the lawyer to copy the client file materials if the client is taking the file, rather than new counsel (Rule 119.34(6)). This Rule is focused on the file materials which support the trust accounting records, rather than the entire client file.

If the lawyer has routinely informed the client of the file's progress by providing copies of all incoming and outgoing correspondence and documents, the client may already have a significant portion of the materials to which they are entitled. While the lawyer does not have to recopy what has already been provided, the client may 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 requested by the client or new counsel.

File Storage and Retention

At all stages of practice, lawyers should keep storage issues in mind. What happens when a firm dissolves, or a lawyer quits practice or dies? 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 sole and small firm practitioners. Who will want to take responsibility for client files when a lawyer retires? Who will pay for storage? From the day a lawyer begins practice, they should try to reduce the file materials they retain and set file destruction dates for closed files.

The lawyer will have 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 confirm the agreement and receipt of the files.

In addition, lawyers should 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, lawyers must carefully address issues of privilege and confidentiality. Client confidentiality must be preserved indefinitely and does not end with the retainer or die with the client. Ideally, lawyers should get a release from their client or the client's estate or successors before releasing any confidential or privileged information. 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 Files

When a file is ready to be closed and stored, the following considerations may be helpful and referenced as a checklist.

Lawyers should:

- ☐ Develop and adhere to policies that govern what will be retained in a hard copy file, and what electronic records will be maintained, both during the life of the file and at its conclusion. While the Rules of the Law Society previously required retention of hard copies of some elements of the trust accounting, those rules have changed. The information must be retrievable rather than stored on site. See Rule 119.35(1).
- ☐ Develop a system to organize and save emails and attachments.
- ☐ 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.
- ☐ Return valuable and/or original records to the client.
- ☐ List the records returned to the client in a final reporting letter.
- ☐ Advise clients of the file destruction date.
- ☐ Remove all duplicates from the file.
- ☐ Keep case law separate so it can be easily discarded when closing the file. However, it may be helpful to keep a list of research sources for the file.
- ☐ Consider keeping research memos or pleadings as precedents for future use and remove any identifying information and clean metadata.
- ☐ Keep anything on a file which allows the lawyer to answer a potential claim – advice given, instructions received, decisions, drafts of documents which evidence instructions received to amend them.
- ☐ Consider the cost of file storage and retrieval and advise the client throughout.
- ☐ Make the final decisions about what file materials to remove or destroy.
- ☐ 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.
- ☐ Where your client has lost interest in their matter, advise them clearly and in writing that you are withdrawing from representation (formally if required), the file is being closed, and clearly set out any upcoming deadlines.
- ☐ Check for funds in trust.
- ☐ Check for outstanding undertakings and trust conditions.
- ☐ Choose a date for destruction and note this when you close the file.
- ☐ Schedule a review date if you are unsure when to destroy a file.
- ☐ Confirm the firm's intentions with your closed files if you are leaving a firm.
- ☐ Retain records identifying the files that are closed and destroyed.
- ☐ Develop a policy regarding who will have access to closed files.
- ☐ Confirm the security and confidentiality of files if storing them off-site or digitally.
- ☐ Consider whether you need insurance for stored files.

Digital File Storage

Electronic storage is now more secure and more reliable than maintaining hard copies of files. Electronic storage also enables lawyers to practice with little to no disruption in instances where they cannot go into their office (e.g., a fire or flood).

The Law Society of Alberta does not have an express policy regarding cloud usage or electronic storage. For more information about exercising due diligence to meet your obligation of confidentiality, please review The Basics of Cloud Computing and the Law Society of British Columbia's Cloud Computing Checklist.

For lawyers who are considering maintaining only electronic copies of file materials, keep the following in mind:

- Lawyers have an obligation to ensure they maintain confidentiality over their clients' records throughout the file and after it has ended.
- Lawyers must exercise due diligence when choosing any service provider to store confidential client information.
- Lawyers should inform their clients about cloud storage and obtain their consent if it is being stored outside Canada.
- Consider the format and future readability of the documents.
- Confirm that the stored records are accessible.
- Confirm who can access the stored records. For example, if the records are on servers in the United States, whether they can be subpoenaed under American legislation despite solicitor-client privilege.
- Consider whether outside service providers are likely to continue in business and what happens to firm documents if they do not.
- Carefully read the service agreement.
- Consider transitioning to a more "paperless" policy on a go forward basis.
- Confirm that digital data is appropriately removed from all discarded firm computers and devices.

Finally, it is also important to consider evidentiary issues regarding the admission of electronic records into evidence. A lawyer seeking to introduce parts of their electronic file into evidence must be able to prove the authenticity of that file. The relevant provisions of the *Alberta Evidence Act* in relation to the admissibility of electronic records are:

> **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 a firm policy which addresses the specific needs of a particular firm's clients and 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 closing reporting letter done notifying client of file closure and eventual destruction?			
2. Anything that should be sent to clients included in the closing reporting letter (e.g., originals, executed documents, borrowed documents)?			
3. Consider whether formal Withdrawal is necessary and serve on client?			
4. Anything else to take off file? (e.g., unneeded drafts of documents; bulky, repetitive, useless items, including those stored elsewhere and caselaw, but not including correspondence, notes, messages or drafts made in response to client feedback)?			
5. All trust conditions met and all undertakings completed?			
6. Unnecessary limitation dates removed from limitation diary?			
7. No balances in accounts: (a) Trust (b) Unbilled time (c) Unbilled disbursements (d) Unpaid accounts			
8. Retain copies of client trust ledger and client's accounts receivable ledger on the closed file (Rule 119.34(4)(b)).			

9. Retain copies of client trust ledger and client's accounts receivable ledger in a central file maintained for closed ledgers (Rule 119.34(4)(a).			
10. Retain client identification and verification documents for a period of at least six years following completion of work for which lawyer was retained (Rule 119.51(3)(b)).			
11. All amounts payable to third parties paid?			
12. Any notes or copies of briefs, opinions, memos of law, etc., to be preserved?			
13. Destruction date marked on file cover or in digital file? (not less than ten years from file closure)			
14. File closed in practice management/accounting software?			
15. File removed from Master File List?			
16. File and date of destruction added to the closed file list?			
17. Closed file moved to closed file location or saved digitally? (including emails, sub-files, binders etc.)			

Destroying Files

Lawyers require a process to bring those files in need of destruction to their attention. Possible methods include maintaining them in a diary system or a process whereby the closed file listed is reviewed at regular intervals to identify those that are ready for disposal.

When the day comes for the file to be destroyed, additional processes will be necessary. The most common method of destruction of paper or hard copy files is shredding. A professional shredding service, a student or assistant can do this, or a lawyer can shred the files themselves. The most important consideration with this process is exercising due diligence to protect confidentiality throughout the shredding process. It is best if the shredded paper is then recycled in a secure manner and that no portion of the file remains intact and thrown in the trash, dumpster or public recycling bin. In some rural areas and with due care and attention, burning paper files may also be an option.

Firms that store closed files digitally on hard drives, USB sticks or in the cloud, will need to create a process for the complete deletion or destruction of the file. Hard drives and USB sticks cannot simply be dumped into the trash, donated or sold. Because programs exist to reformat hard drives, extra care and attention must be taken. If files are deleted from the cloud, attention must be paid to ensure they have not been backed up to another server. If they have, the back-up must also be deleted.

Numerous considerations are at play during the life of a file and, as is evident above, closed files also require numerous considerations. Lawyers can meet their obligations and make it easier and more cost effective for their future selves with the creation and maintenance of thoughtful closed file retention, storage and disposal processes.