



**The Law Society
of Manitoba**

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FILE CLOSING, RETENTION, STORAGE & DESTRUCTION

Practice Management

November 2023

Acknowledgement and Thank You

The Law Society of Manitoba acknowledges the work done by the Law Society of British Columbia in creating its Small Firm Practice Course. Those course materials assisted in the development of these Practice Management materials for Manitoba lawyers.

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A. INTRODUCTION

Once you finish the legal work on a file, you may find the client will press you for the final documents and any money owing to them. This can be a nudge to taking the final steps of properly stripping and closing your file, storing the necessary parts and recording a date for final destruction.

If, however, the client is not expecting a specific document or if the client owes you money, you might find that the client may not press you for anything on the file. The client may perceive that everything is complete or may not want to push for a final account or collection. Especially in those situations, you may find yourself putting off doing the final report and billing and properly closing a file, perhaps feeling those steps are lower priorities when you have pressing active matters to deal with for other clients who are clamouring for your time and expertise.

Without a proper system, it is easy to put off the final steps necessary before storing your file until a final destruction date.

Prompt and proper closing of a file is good risk management as a competent professional. Build in automatic procedures for yourself and your staff to follow once the main legal work is completed to help you ensure the file is ready to be closed. Create closing file checklists that remind you of the necessary steps and keep the file in your reminder system until the steps are completed.

This material deals with when to close a file, what you must retain in the closed file and what you should return to the client, how and where to store closed files and how and when you may finally destroy a closed file.

B. WHEN TO CLOSE A FILE

1. When is a Client's Matter Finished?

This seems like an obvious question. For you, the client's matter is finished when all legal work is completed, all undertakings and trust conditions have been satisfied, all trust money has been paid out and accounted for, any outstanding accounts for which the firm is responsible have been paid, a final report has been sent to the client enclosing the client's original documents and a final statement of account and any other client property have been returned to the client.

Normally you do not close a client's file until you have completed all the legal work for which you have been retained. But what about other scenarios that end a client's matter for you or your firm? Some of those situations include:

- the client who has lost interest in the file and/or won't give you instructions;
- the client who has disappeared and can't be located;
- the client who refuses to pay your accounts for services rendered although more work is still to be done;
- the client who has a hearing set before a court/tribunal and says they cannot pay for the matter any longer;
- the client who persists in instructions that call for you to do something unethical or unprofessional.

Withdrawing from the representation of a client even though the legal matter is not yet complete is a situation that also calls for closing the client file.

In some situations, you will not have completed the legal work under the retainer, but you cannot proceed to do so for good cause. Some examples of good cause for withdrawing from representation before the end of the legal matter may include:

- the client has fired you;
- the client persists in instructing you to do something unethical;
- an ethical conflict has arisen that prevents you from continuing;
- there is a loss of confidence between you.

If the client's matter is ongoing, but you have good cause to withdraw, you must ensure that you have properly withdrawn from representation before your file is ready to be closed.

See the *Code of Professional Conduct* [section 3.7](#) on Withdrawal from Representation, and related Code of Conduct Rules and Commentaries on when a lawyer may withdraw from representation of a client. You should also note the Law Society [Rule 5-128](#) enacted in December 2019 which imposes a duty to withdraw based on information obtained at the time of your retainer.

For more detail about withdrawing from representing a client, see the chapter [Withdrawal of Legal Services](#), in the Law Society Education Centre Practice Management Resources.

2. Determining Whether a File is Ready to be Closed

Before you decide that a file is ready to be closed, be sure that:

- You have complied with all undertakings you have given on the file.
- You have honoured all trust conditions that you accepted.
- The other side has complied with all undertakings given.
- The other side has met all trust conditions you imposed.
- All the legal work outlined in the original retainer as amended over the course of the file has been completed.
- You are off the record with the court/tribunal/other entity as representing the client if the matter is proceeding without your services.
- All necessary registrations, final orders, releases, etc. have been signed/filed/registered with the appropriate entities.
- You have paid any outstanding bills or accounts from third parties.
- There is no unbilled time/work or disbursements that must be billed to the client.
- You have sent the client a final statement of account.
- You have sent the client a final reporting letter outlining the legal work completed and listing any matters that are the client's responsibility or that the client should know about for the future.
- There is no balance in the client's trust account.
- The client has paid all of your accounts to date or any account owing has been referred to a collection file.
- You have made copies of original documents that you cannot easily access in the future should you need them to respond to any complaints or allegations of negligence.
- You have returned all the client's original documents and all the client's property to the client.
- You have a complete record of all communications related to the file saved in the file (not just in your email inbox, text messages in your mobile phone or scanned documents on your computer's hard drive).
- You have reported any risks of claims to the Insurer.

C. TRUST ACCOUNT REQUIREMENTS

One of the important tasks to be completed when a file is ready to be closed is to comply with the trust account requirements under the Law Society Rules.

No money can remain in trust for your client's matter when you close a client file. The client's trust ledger must accurately reflect all of the financial activity on the file, and the balance must be zero to properly close the file.

The Law Society [Rule 5-44\(1\)\(m\)](#) requires that you ensure you pay out all trust money "expeditiously" once a legal matter is concluded, which means when the legal matter is concluded for you or your law firm. Those situations where you or your firm are no longer involved in the legal matter because the client has retained a new law firm or the client chooses to represent themselves would be considered situations where the Law Society Rule 5-44 (1)(m) applies.

When you close the file Law Society [Rule 5-54\(1\)\(b\)](#) requires that you place a copy of the individual client trust ledger on the client's file, either electronically in a universally readable format (usually PDF) or hard copy.

The client trust ledger is the record of the financial history of the entire file. You may need that financial history to be able to respond to future Law Society Audit inquiries, or client queries about the finances, or to defend complaints or allegations of misconduct or negligence.

Requiring you to keep a copy of the client trust ledger on the closed file ensures that you check your individual client's trust ledger before closing the file. You must do so to see if any funds are remaining in trust to the credit of that file. You must disburse all trust funds before closing the file, either by refunding them to the client or by sending the client a bill for your unbilled legal services to date and then transferring that remaining amount in trust to your general account toward the outstanding bill. Until you prepare and send or deliver the final statement of account to the client, trust monies cannot be transferred to pay your outstanding account (see [Rule 5-44\(1\)\(d\)](#)).

As part of the closing process, when you prepare the final report to the client, you should also review the client's trust ledger to make sure that it matches exactly with what happened on the file. You should correct any errors on the trust ledger before making any final payout from the trust account. If you use a manual system, a quick "add" of the client trust ledger should reveal any errors and prevent an incorrect payout which may leave behind an annoying small balance.

The trust account for the file must have a zero balance before you can properly close the file.

The Law Society's Audit Department has found that some lawyers forget to check the individual client ledger before closing the file, only to realize many months or years later that they didn't deal with the last bit of the client's remaining money. At that point, it may be very difficult to locate the client to render an account for unbilled fees or disbursements or to return that trust money to the person entitled to it.

If you have trust money in your trust account that goes unclaimed for more than three years see section 51 of *The Legal Profession Act*. If you have made all reasonable efforts to locate the person over the years, but you have failed, then you are permitted to pay the money to the Law Society and your liability to pay the money to any other person is extinguished under section 51(2).

Don't leave money in a trust account when a matter is complete or has left your office. Explanations that "The client never cashed the cheque" or "The letter with the enclosed funds was returned because the client moved" are not acceptable excuses for leaving money sitting in the trust account for a file that should be or is closed. Before you can rely on section 51 of *The Legal Profession Act*, you must have taken additional steps to locate the client or other person entitled to the trust funds.

The [Application to Pay Unclaimed Trust Money](#) to the Law Society of Manitoba is available under [Membership Services/Forms](#) on the Law Society website.

Reasonable efforts would at least include social media searches and possibly the employment of a private investigator to search for the person if the amount involved justifies such an expense on your part. The efforts you make should take into account the dollar value involved but remember that it is only when you have made all reasonable efforts to locate the person and return the funds that you can use the Rules to apply to transfer the trust funds to the Law Society and extinguish your own liability.

Once all these steps have been considered and addressed, you are ready to strip and close the file, set a closed file destruction date and send the file to storage.

D. REMOVING MATERIAL FROM THE FILE BEFORE CLOSING

Once you have decided it is appropriate to close a file and remove it from your active records, you should remove certain documents from the file before it goes to storage. It is good practice to set up a checklist to guide yourself when deciding what can be removed from the file so that you can be systematic about it and prevent errors or omissions. The sample checklist below will help you create your own checklist based on the nature of your practice.

1. A Sample Checklist: What to Keep/What to Remove

a) To Keep in the Closed File

What to Keep:

- Your original signed retainer agreement – and all amendments to it.
- Any signed written instructions given during the course of the file.
- All emailed or texted instructions from your client.
- All your interview or phone notes, and your memos to the file – keep the original notes relating to wills instructions or testator competency but the other material may be scanned and kept electronically.
- Copies of all communications with the client and other persons – include emails and texts.
- Drafts of agreements/contracts that might be necessary as evidence of client instructions if disputed in future.
- Copy of any original documents you will give to the client that you cannot easily obtain in future from a public source. Before removing documents that you can get from public offices in future (i.e., the court, the Corporations Branch) check on the public office's own retention periods and consider the cost and timeline associated with obtaining replacement documents in future should you need them.
- Client trust ledger showing the financial history of the file and a zero balance. You are required by Law Society [Rule 5-54\(1\)](#) to keep or electronically maintain in a universally readable format the copy of the individual client trust ledger with the closed file.

b) What to Send to Your Client

What to Send to Your Client:

- All original documents provided to you by the client or on behalf of the client (i.e., tax returns).
- Any product you created for the client as part of your legal services to the client (i.e., written legal opinions, original contracts, original wills).
- All original expert reports (i.e., doctor's reports, expert opinions).
- Original documents from the other side (i.e., financial statements).

When you return original documents to your client, consider whether you should keep a copy for your records in the closed file, if not easily obtained in future from another source.

Consider whether you should ask the client for a written acknowledgement of receipt of the original documents. At a minimum, include a letter to the client that clearly:

- confirms the file is being closed;
- identifies the documents being returned;
- reminds the client the documents are the originals for safekeeping by the client; and
- states the date that the balance of the file will be destroyed.

If there are statutory reasons that require your client to keep any original documents, advise your client, in writing, of the statutory requirements.

Before accepting any instructions from your client to retain documents until the statutory requirements are fulfilled, discuss and address all issues such as the cost of retaining the file documents and confirm your agreement in writing.

c) What to Remove and File Elsewhere for Re-Use

Consider if any documents are useful as precedents for you or your law firm. If so, scan and file them electronically so that others can access them.

File Elsewhere for Re-Use:

- Legal research memos – index by subject.
- Novel or excellently drafted pleadings.
- Special or standardized clauses in agreements – consider.

d) What to Discard

To Discard:

- Extra copies of documents. If you decide that you must keep a copy of a document on your closed file, you only need one copy of it.
- Paper copies of documents, if you have already scanned and saved them electronically. Remember to keep your original notes of instructions for a will and keep all your original notes related to your assessment of the competence of a client.
- Copies of case decisions (you can keep a list if you think it is necessary).

2. Who Owns the Closed File?

In Manitoba, direction on closed files comes from the decision in [Bank of Nova Scotia v. Imperial Developments \(Canada\) Ltd.](#), 1987 CanLII 5358 (MBCA) that concludes that once the file has been properly closed, the file that is retained by the solicitors *belongs* to the solicitors.

[9] In Manitoba, once a file has been closed and a reporting letter sent out, the file that is retained by the solicitors has always been regarded as belonging to the solicitors. Any client's documents, such as a will, held by the solicitor is always kept separate from the closed file; the documents remain available to the client on call at any time. I question the propriety of closing a file which contains documents mixed together, some the solicitor's property and some the client's property. It is common practice in this province for solicitors to destroy their files after an appropriate period of time has elapsed. No solicitor dreams of asking his former clients for permission to destroy the closed files. This is because the clients have no proprietary interest in the solicitors' files once they are properly closed.

There is an important caveat: Do not close the file while it still contains the client's original documents or any materials the client might eventually require (such as copies of orders, original judgments, contracts, agreements, etc.). Only once a lawyer has taken the time to fully report and to send the original documents to the client and pay out all trust funds, can the file be properly closed and the client's proprietary interest extinguished.

E. WHY RETAIN CLOSED FILES?

1. Law Society Rules

Rule 5-54(1) requires that you keep financial records for at least ten years, and on the completion and closing of a client's file, you must maintain a copy of the individual client trust ledger on the file. If it is an electronic file, the client trust ledger must be in a "universally readable format" on the electronic file (usually in a PDF format).

Rule 5-126 requires you to retain a copy of every document used to verify a client's identity for the duration of the lawyer/client relationship and for at least 6 years after the completion of the work for which you were retained. The documents may be kept in an electronic form provided they are in a universally readable format, and may be kept in a machine-readable or electronic format so long as a paper copy may be readily obtained.

2. Negligence Claims

A negligence claim can be brought against you long after the alleged negligence occurred. You may need material from the closed file to defend the claim.

When deciding what to keep on a closed file, be mindful of the limitation dates set out in *The Limitations Act* of Manitoba that might apply to the work you have done on the file. For example, under sections 13 and 14 the time during which a person is a minor or is under a disability is not included in calculating the time within which the action is required to be brought.

The initial retainer letter, notes of instructions and conversations, telephone records, copies of correspondence, drafts of documents, and final documents can be particularly important in defending a negligence claim against you. Keep that material in your closed file if there is potential for a negligence claim and report the potential to the Insurance department of the Law Society for direction and help.

Similarly, if you are asked or required to turn over a file to a subsequent lawyer or to the client before the matter is completed or for a subsequent related matter, it is in your best interest to keep the file materials that belong to you and that need not be provided to your client, and to keep a copy (made at your own expense) of the file contents that belong to the client before you send the file out of the office.

3. Defending Against Complaints

Another reason to retain your closed files is to enable you to defend against complaints that might arise. A complaint to the Law Society may be made against you during your active work on the file, or when your client decides to change lawyers, and even after you have closed your file. The retention rules help prevent the destruction of material that you might need from the closed file.

F. HOW LONG MUST YOU KEEP THE CLOSED FILE?

Lawyers often call the Law Society to ask how long they are required to keep a closed client file before destroying it. Canada Revenue Agency imposes minimum requirements for maintaining trust account records. Law Society [Rule 5-54](#) requires that you keep the law firm's financial records for at least ten years, and the most recent three years of financial records must be stored in your chief place of practice in Manitoba unless otherwise authorized. The Professional Liability Claims Fund files are kept for a minimum of ten years from the date the files are closed, after which they are again reviewed and a decision made on whether or not they can then be destroyed.

Keep in mind when storing electronic files that the format of storage must be capable of being accessed for the whole length of the retention period, so you might have to set reminders to convert older electronic formats to new formats as those formats evolve.

1. What to Consider

To decide on a file retention policy, you may want to consider:

- requirements and recommendations under the [Code of Conduct](#), the [Act](#) or the [Rules](#);
- statutory requirements other than the Code of Conduct, the Act or the Rules;
- the area of law;
- the applicable limitation period for a negligence claim against you (generally, 2 years after the day the claim is discovered); and
- the potential future needs of you and/or your client to access the closed file material.

2. Limitation Dates

When deciding how long to retain and store a closed file, be mindful of *The Limitations Act* limitation dates and whether your notes in your file might be needed in future.

Remember that the Act permits a professional liability claim to be brought against a lawyer up to 2 years after the day the claim is discovered.

Under *The Limitations Act*, a claim is discovered on the day the claimant first knew or ought to have known all of the following:

- that injury, loss or damage has occurred;
- that the injury, loss or damage was caused by or contributed to by an act or omission;
- that the act or omission was that of a person against whom the claim is or may be made;
- that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

You may want to store a closed file for a longer time if the legal matter was complex or if there is a possibility of an extended limitation period.

3. Nature of the File

In general, consider 10 years as a suggested minimum length of time to store a closed file. Of course, it depends on the nature of the file.

a) Wills Files

As mentioned earlier, original notes related to drafting a will should be kept at least until after the will is probated and the estate distributed and limitation dates for civil suits against the estate have expired. Lawyers practicing in wills and estates may decide that they need to keep some files for an indefinite period, sometimes "permanently" because they fear that the end of the client's life may only be the beginning of potential problems related to the drafting of the will.

You will be unlikely to need your wills file to assist you to address any questions about the capacity of the client beyond 60 years after the date that your client signs the will, although some suggest such files should be kept for 100 years. As long as you are not keeping the original will, it is not unreasonable to set a destruction date for the file for 60 years after the date your client executes the will.

b) Civil Litigation Files

For those practising in civil litigation, generally your files must be retained for at least six years after final disposition of the matter by judgment (including appeals), dismissal, or settlement.

Of course, a claim can always be brought – meritoriously or otherwise - long after the file giving rise to the claim has been closed. And it's always the insurer's preference to have the lawyer's original file (or an accurately scanned version of it) to defend a lawyer against allegations of negligence. When determining whether it's appropriate to destroy a file after ten years, use your discretion and professional judgment. It may depend on the type of legal matter and your judgment as to the likelihood of an eventual complaint about the quality of services provided.

The lawyer-client relationship can be created without a written retainer. It is always a question of fact. "The court set out a number of indicia which could be used to determine whether a solicitor-client relationship existed. They include a number of factors, some of which are obvious such as a retainer, the opening of a file, the rendering of a bill, giving of instructions and/or legal advice." *Zimak v. 4244354 Manitoba Ltd. et al.*, 2015 MBCA 58 (CanLII).

c) Criminal Law Files

Criminal law files generally must be kept for six years after completion of sentencing, including appeal proceedings if you are acting as defence counsel, but if there is a possibility of a wrongful conviction claim being advanced in future, you might decide it is wise to retain the file for a longer time.

d) Other Files

Use your judgment when deciding how long to keep other files, depending on their nature. For example, similar to a wills file, it may be good practice to retain a prenuptial, spousal or cohabitation agreement file indefinitely, as a potential claim may not be discovered until many years later, perhaps upon separation or death.

e) Lawyer's Personal Records

Diaries and time records should be kept at least as long as the files to which they refer are kept.

4. LawPRO® Chart

LawPRO® has published the [following chart](#) based on practice areas that may be of assistance to lawyers when setting a file destruction date for client files. The chart shows the years between the error date (the date that the work was done) and the reporting date (the date the error was reported to LawPRO®) for claims reported to LawPRO® between 1997 and 2009 sorted by practice area. While most claims against lawyers tend to arise within 15 years of the date that the work was completed, some claims do arise later.

	Under 10	10 to 15	Over 15	Oldest Claim
Real Estate	90.2	5.7	4.1	42 years
Plaintiff Litigation	98.3	1.3	0.4	31 years
Corporate	96.3	2.5	1.2	41 years
Family	92.5	4.8	2.7	26 years
Defence Litigation	98.5	1.1	0.4	24 years
Wills	91.0	5.5	3.5	39 years
Labour	98.8	1.2	0.0	14 years
IP	98.6	0.9	0.5	18 years
Tax	95.9	3.4	0.7	24 years
Criminal	96.0	1.6	2.5	24 years
Securities	98.7	1.3	0.0	13 years
Bankruptcy	96.2	3.8	0.0	14 years

5. Law Society of BC Chart

The chart below sets out examples of suggested minimum file retention periods linked to areas of practice, including some information from an original chart created by LSBC for their Small Firm Practice Management course.

Item	Suggested Minimum Retention Period
* In cases involving minors or persons under a disability, limitation periods commence after the child reaches the age of majority, so adjust accordingly.	
LAWYER'S PERSONAL RECORDS	
Diaries and time records	Keep at least as long as the files to which they refer are kept
Trust and general accounting records	10 years (Law Society of Manitoba Rule 5-54)
CORPORATE & COMMERCIAL	
Securities	Six years after financing is complete
Sale of assets and shares	Six years after sale is completed
Private shares issue	Six years after issuance is completed
Share restructuring	Six years after transaction is completed
Amalgamations	Six years after amalgamation is completed
Bankruptcy	Six years after bankruptcy proceedings are completed, or payment
Ordinary commercial agreements	Six years after the transaction or franchise is completed
Receivership	Six years after receiver is discharged or payment, unless receiver has entered into another agreement
Indemnity agreement	Six years after end of term or agreement or termination
Partnership	Six years after partnership agreement is executed
Joint venture/Syndication	Six years after end of term or early termination

CRIMINAL	
Prosecution	Six years after completion of sentence
Defence	Six years after completion of sentencing and appeal proceedings (unless strong possibility client has been wrongfully convicted)
LABOUR	
Collective bargaining	Six years after agreement made
Hearings (labour relations board and arbitration)	Six years after final decision
GENERAL CIVIL LITIGATION (not Family)	
Court action	Six years after dismissal or payment of judgment or settlement, or six years after last court activity if matters do not proceed, except in cases involving minors*
* In cases involving minors or persons under a disability, limitation periods commence after the child reaches the age of majority, so adjust accordingly.	
FAMILY LAW	
Litigation	Six years after final judgment or settlement, except when any minor or pension is involved*
Agreements	Six years after pension payments begin; otherwise 10 years after agreement, except where minors are involved* (Manitoba note: You may wish to retain separation agreement files longer, due to the possibility of variations. You may also wish to retain prenuptial, spousal and cohabitation files indefinitely as claims may not arise until death or separation).
* In cases involving minors or persons under a disability, limitation periods commence after the child reaches the age of majority, so adjust accordingly.	
REAL PROPERTY	
Residential conveyance	10 years after status of title certificate received
Commercial conveyance	10 years after closing (there may be transactions of such complexity that a longer retention period is advisable)

Lease/Sub-lease /Licence to occupy	Six years after lease has expired, including any renewal
Foreclosure	Six years after order absolute, property sold, judgment satisfied or instruction received from client to stop proceedings
Receivership	Six years after receiver is discharged or payment unless receiver has entered into another agreement
Option to purchase/ Right of first refusal	Six years after the options expire or are exercised
Easement/ Right-of-way/ Restrictive covenant	10 years after registration
Review of title and opinion	Six years from giving an opinion, unless opinion leads to an action
Mortgage/ Debenture	Six years after expiry of mortgage term
Building contract	Six years after substantial completion
Encroachment settlement	Six years after settlement
WILLS & ESTATES	
Original wills and all wills files	Recommended that original wills be given to the client for safekeeping. Otherwise, permanent retention of an original, or until a will of the client has been probated, then 10 years after final distribution of the estate
Estate files	10 years after all trusts are fully administered
Committeeships	Six years after committeeship has ended

G. STORAGE OF CLOSED FILES

1. Where to Store Closed Files

a) Financial Records

The three most recent years of financial records must be in the place of business of the lawyer or law firm (*Rule 5-54*). Records older than three years can be stored off-site.

b) Closed Files

Closed files may be stored anywhere provided the files are secure from theft, fire or flood, the client's right to confidentiality is preserved by the storage and you can access the closed file promptly if necessary.

2. Permitted Formats for Storage

a) Financial Records

Financial records may be stored as paper records or as an electronic copy in a universally readable format (usually PDF).

b) Closed Files

Closed file records – original notes related to wills should be stored in the original format, other closed file documents may be stored either as paper records or in a universally readable format (usually PDF).

c) Electronic Files

Keep in mind when storing electronic files that the format of storage must be capable of being accessed for the whole length of the retention period, so you might have to set reminders to convert older electronic formats to new formats as those formats evolve.

While being retained, the material in the closed file should have encryption protection for the information.

d) Digital Data Storage

Of particular concern is the digital data that you must retain into the future when the technology may be different. Take care to ensure that the data is stored in a form that will be accessible over the life of the chosen retention period.

e) **Cloud Storage**

Cloud storage is a way to store your digital data on off-site servers maintained by a third-party provider in a secure way. Your data will be accessible to you via the internet.

To learn more about the benefits and concerns of cloud computing, privacy and security, see the article **“Cloud Computing” by Tana Christianson** in the **Appendix**, and the Law Society of Ontario’s Technology Resource Center on [Cloud Computing](#).

f) **Email**

You will also need to decide how to retain e-mail communication, which in some instances may form a crucial part of your file. Some practitioners are in the habit of creating a hard copy of all e-mails; others create e-folders for individual clients.

g) **Summary**

Whatever system you choose, ensure that your staff are aware of what system you are using so that they can check and include all forms of communication at the time of file closing. Make sure the naming and filing of the e-material are meticulous and consistent.

3. **A Guide from the Law Society of Ontario**

Storage of Retained Files

Closed files should be stored either on-site or in an off-site location. Regardless of the location, lawyers must ensure that confidentiality is maintained. The storage facility must be secure to maintain confidentiality and to protect the files from damage or loss. If files are stored electronically, lawyers may wish to consider whether to encrypt stored files.

When storing files electronically lawyers should consider both the physical location and the medium (e.g. backup tape, disk, or external drive) on which they are stored. Lawyers should have a system for backing up closed files.

In addition, the lawyer should ensure that documents, data and information in the file can be accessed during the file retention period. The lawyer should be prepared to convert older electronic formats to new formats so that they continue to be accessible. In addition, it may be useful to include on any list of electronic files, the file format in which the documents are saved so as to facilitate conversion of the document at a future date.

4. Organize Closed Files in Storage

You should establish a method of numbering and organizing the closed files so that you can locate a closed file in storage accurately and quickly. The information should be maintained in a database, or in a hard copy file closing book that lists sequentially the file name, original file number, closed file number, storage box number, storage location and file destruction date. The complexity of your cataloguing system will depend on the number of files to be closed and the type of storage facilities you use. The system should be detailed in your law firm manual so that regardless of when the file is closed, there is consistency in the application of the system.

Keep in mind that a subsequent issue may arise that will require you to pull the closed file from storage urgently. If your cataloguing system fails to accurately describe where the file is located, this may be difficult.

H. WHEN TO DESTROY CLOSED FILE RECORDS

In some cases, you may have a difficult time setting a firm file destruction date at the time a closed file is put into storage. You will need a system for calling up these files for reconsideration of the destruction date.

1. A Guide from the Law Society of Ontario

Determining the File Destruction Date

A lawyer is not required to retain all client files permanently.

When a file is closed, the lawyer primarily responsible for the file should review the file and establish a file destruction date. Circumstances may arise during the file retention period that would postpone the destruction of the file. The lawyer or law firm should implement a system to ensure that such circumstances are identified and the destruction date is changed if necessary.

Lawyers may consider establishing a file review date preceding the destruction date. The lawyer or law firm could then check to determine whether circumstances have changed and the file destruction date should be changed.

Both the file destruction date and the file review date should be entered into the firm's tickler or file tracking system.

A lawyer should be guided by ethical, legal and professional considerations as well as economic and practical factors when determining how long to retain a file. It is not recommended that a lawyer adopt a single retention period for all files. Rather, the lawyer should consider each file individually and determine the file destruction date in light of the nature and circumstances of the matter, the client's needs, the applicable limitation period, the lawyer's file retention policy and any other issue that might be relevant.

Review Status of Closed File

As part of the file closing procedure, the lawyer primarily responsible for the file or if this is not possible another lawyer in the firm should consider reviewing the file again prior to destruction to ensure that circumstances have not changed since the establishment of the destruction date and that the file destruction should proceed. Alternatively, the firm might implement a system to ensure that where there is a change in circumstances prior to the destruction date, the file is reviewed and the destruction date is changed if necessary.

Files that are to be retained indefinitely may be reviewed periodically, perhaps 10 or 20 year intervals, to determine whether there has been any change in circumstances that would now allow for the destruction of the file.

2. Client Confidentiality

Confidentiality should be a major concern when you finally decide to dispose of a file. In the *Code of Conduct Chapter 3.3 Confidentiality* explains that the duty is broader than the evidentiary rule of lawyer-client privilege and it survives the professional relationship between the lawyer and client. It must be considered when you decide how you will dispose of closed file records once the retention period has expired.

In practice, you regularly dispose of confidential material within the office. As part of your general firm policy from time to time, all lawyers and staff within your firm should be reminded of the obligation to safeguard client information. You should periodically review your firm's policies and remind any outside shredding or recycling suppliers of the firm's policies for safeguarding client information.

Destruction of the closed file records should be handled the same way you dispose of confidential material within the office.

3. Methods of File Destruction

a) Paper Files

The predominant destruction method is paper shredding. You may decide to purchase or lease a paper shredder. Cross-cut shredders are the preferred type. Alternatively, you may hire a paper shredding company, but if you do, someone in the firm should monitor the work and ensure the documents are destroyed. Many companies provide certificates of destruction. In some rural areas, burning may be an option.

It is never acceptable for you or your staff to throw any file documents into the trash, a dumpster, a recycling bin, or a public landfill.

b) Electronic Files

While being retained, the material in the closed file should have encryption protection for the information. Once you have determined that the closed file should be destroyed, be mindful of the method you choose when deleting and destroying computer files and computer hard drives. Computer hard drives should never be dumped into public trash receptacles, donated, or sold.

Even if documents appear to be deleted on a hard drive, the information that resides on it may be able to be reconstructed. There are programs available for reformatting hard drives, but you need to take care that the job has been done successfully.

Because technology is always changing, please contact the Law Society's Practice Management Advisor if you need some advice about what programs to use to ensure that your hard drive will be properly wiped clean of all client confidential information.

4. Degaussing

Simply overwriting magnetic media does not completely erase data. Degaussing is the process of reducing or eliminating an unwanted magnetic field (or data) stored on tape and disk media such as computer and laptop hard drives, diskettes, reels, cassettes and cartridge tapes.

Degaussing magnetic media leaves the domains in random patterns with no preference for orientation, thereby rendering previous data unrecoverable. A degausser is used to completely erase all audio, video and data signals from magnetic storage media.

This process is effective in a range of industries including video, audio, computer, broadcast and data security.

I. KEEP RECORDS OF DESTRUCTION

As recommended by the Law Society of Ontario:

The lawyer should keep a record of all files destroyed or returned to the client in accordance with the lawyer's file destruction policy. The record at a minimum should contain the client's name, address, file number, a brief description of the nature of the matter, the file closure date, the file destruction date or date that the file was delivered to the client, and the name of the lawyer who authorized the destruction or delivery. This will assist a lawyer to counter allegations that a file was destroyed indiscriminately.

J. CONCLUSION

This material has been designed to help you as you develop or review your law firm policy for dealing with completed client file matters. The suggestions set out here can easily be adapted by you for dealing with the retention, storage and destruction of the administrative records you generate in the operation of your law practice. The ultimate goal is to keep only that which is necessary, securely and in an accessible format, and to keep it only as long as necessary.

K. APPENDIX

1. **Cloud Computing**

Tana Christianson (Communiqué Article - January 2022)

[Document follows on next page]

CLOUD COMPUTING

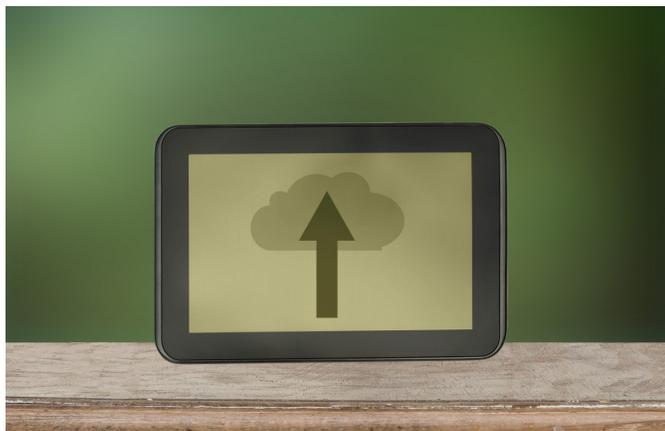
TANA CHRISTIANSON, Director - Professional Liability Claims Fund

Lawyers used to ask the Law Society whether they could store their data back-ups 'in the cloud'. Lately, they make inquiries as they plan to invest in a document management system, specialized programs or even 'cloud productivity' systems like Microsoft 365 or Office 365. In many of these systems, the user agreement says that data will be stored with the provider, not with the lawyer and possibly somewhere other than Canada, and the lawyers are concerned.

Ethical Obligations

The Law Society cannot endorse any particular commercial product or service. Lawyers should pick the product that is right for them, but should not forget about their ethical obligations.

The *Code of Professional Conduct* (the *Code*) says lawyers must be competent in the delivery of their legal services (Rule 3.1-2). Knowing the substantive law relating to a client's file is one thing. Knowing about regulatory requirements and legislative provisions that may impact the management of your law practice is another. For example, when collecting, using and disclosing clients' personal information, lawyers must understand and comply with the requirements of applicable privacy legislation such as the [Personal Information and Protection Electronic Documents Act \(PIPEDA\)](#). If lawyers have clients who are living in the European Union and their services are subject to the [General Data Protection Regulation 2016/679](#), they must ensure they are complying with its requirements.



Technologically Competent

In December 2019, Rule 3.1-2 of the *Code* was amended to add specific commentaries requiring lawyers to be "technologically competent" in their law practices. Here are those commentaries:

4[A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

4[B] The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

- (a) the lawyer's or law firm's practice areas;*
- (b) the geographic locations of the lawyer's or firm's practice; and*
- (c) the requirements of clients.*

Lawyers are not expected to become "tech experts." They are expected, however, to keep abreast of changing technologies and use technology appropriately. Lawyers should understand the benefits as well as the risks associated with the use of technology. And lawyers should understand how technology impacts their professional ethical obligations.

Confidentiality and Technology

A critical part of the *Code* is the obligation of confidentiality. Rule 3.3-1 sets out that, subject to certain conditions: *"A lawyer at all times must hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship..."* Lawyers must retain control and ownership of data and safeguard information obtained from clients. When considering prospective service providers, regardless of storage location, assess whether you retain control and ownership of data. Will you still be able to produce records on demand? Will your clients' information be released to others, including law enforcement, without your knowledge or consent? What is the provider's cyber safety experience? Can the provider you select be trusted? Carefully consider the terms of any proposed user agreement with cloud storage providers and also consider whether the cyber insurance you purchase as part of your office insurance or excess insurance will respond if something goes wrong at your cloud storage provider.



Storage Outside Canada

PIPEDA does not prohibit outsourcing storage of personal information (client or otherwise) inside or outside Canada, but see [PIPEDA Report of Findings #2020-001](#) for an interesting analysis of how to do so appropriately.

If you decide to use a cloud service provider to store personal information that will be transferred or stored outside of Canada, think about whether the cloud is private, public or some combination. You will want to know whether your client's information is more likely to be caught in foreign law enforcement access requests. Privacy best practice is to provide notification to clients of the use of a foreign service provider. In Alberta, such notification is actually required. It has been suggested that, at a minimum, disclosure of a firm's practices should be set out in its privacy policy.

Resources

There are some excellent resources on due diligence on cloud computing. See:

- [Cloud Computing Checklist v.3.0 \(updated April 2020\)](#)
- [Cloud Computing Guide, Law Society of Saskatchewan \(November 2018\)](#)

The Guide was updated in [November 2023](#).