



PRACTICE ADVISORY

DESTRUCTION OF CLOSED CLIENT FILES

Members of the profession frequently seek guidance from the Law Society concerning appropriate time periods for retaining closed client files before destruction, and proper procedures for disposal of old files.

WHEN CAN FILES BE DESTROYED?

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

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

The Society recognizes that practical considerations must apply when a law firm is faced with a question of whether to and when to destroy old files, as it is virtually impossible to keep every closed file indefinitely. Many firms have developed an informal "rule of thumb" as to the appropriate time period after which files will be culled and destroyed. Ultimately, a lawyer must use his or her best professional judgement when determining whether it is appropriate to destroy a file in any particular case, keeping in mind the provisions of the *Limitation of Actions Act*¹. Consideration should be given to the length of time the file has been closed, the type of legal matter and the lawyer's own opinion as to the likelihood of any complaint arising in the future concerning the quality of legal services provided. In recent years, there has been an increased incidence of wrongful conviction proceedings. In such circumstances, a member's original file may take on great importance. Where, in a lawyer's professional judgment, there is a risk of wrongful conviction proceedings being commenced, it would be prudent for members to consider maintaining such files indefinitely.

Members are reminded there are minimum requirements imposed by Revenue Canada for maintaining trust account records, and the Law Society Rules require that trust account books and records be kept for at least seven years [Rule 81.6]². However, these are minimum requirements only, and should not be interpreted as authority to automatically destroy every file after a fixed time period.



Also, the Society's Rules specify that a member who intends to withdraw from the practice of law in the Northwest Territories shall as per Rule 58³ and prior to the cessation of practice provide written notice to the Executive and shall obtain the approval of the Executive with respect to the intended disposition of all

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

PROPER PROCEDURE FOR DESTRUCTION OF FILES

When a lawyer has made a judgment that it is appropriate to destroy a closed file, it is recommended that the following procedures be adopted:

1. Every file to be destroyed should be reviewed briefly by a lawyer or articling student. It is not appropriate to delegate this task to a paralegal or secretary;
2. The file should be checked for valuable documents such as original wills, certificates of title, etc., that may have been mistakenly placed in a closed file;
3. Any other original documents or paper which are property of the client should be removed and returned to the client. Ideally, this procedure should be performed at the time the file is closed. See *Bank of Nova Scotia v. Imperial Developments* (1987) 46 DLR (4th) 190 (Man. C.A.), [1988] 2 W.W.R. 141 (1987) 49 Man. R. (2d) 53.
4. Files should be shredded or similarly destroyed before discarding in order to protect confidential information. If this task is entrusted to a professional shredding service outside the law firm, the lawyer should exercise an appropriate degree of care, control and supervision when transferring custody of the files.

For further guidance, members may wish to consult the directive from the Practice Advisor in Alberta online at www.lawsocietyalberta.com.

¹ *Limitation of Actions Act*, R.S.N.W.T., 1988 c. L-8

² 81.6. The books of account of a member must show current transactions and the transactions for the six previous years as determined by the member's fiscal year end. [Amended, R-158-98]

³ 58. (1) A member who ceases the private practice of law in the Territories shall provide written notice to the Executive before the cessation occurs and shall obtain the approval of the Executive with respect to the intended disposition of all

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



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- (2) A member who ceases the private practice of law in the Territories shall, within three months after the cessation occurs, provide a written report to the Executive advising of the disposition of the
- (a) files, documents and valuables referred to in paragraphs (1)(a),(b) and (c); and
 - (b) trust accounts and books of account referred to in paragraph (1)(d), including a statement confirming that
 - (i) all the balances have been remitted to the clients or other persons on whose behalf they were held, or have been transferred to another member at the request of the client with written instructions concerning the conditions attaching to them, and
 - (ii) the net interest earned on a pooled trust account has been remitted to the Northwest Territories Law Foundation in accordance with the provisions of the Legal Profession Act.
- (3) On the written application of the member, the Executive may extend the time for providing a report under subsection (2).