

RETENTION, STORAGE AND DISPOSITION OF CLIENT FILES

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Overview:

Thank you to all those members who have contributed thoughts, comments and questions to this project.

It is now clear to me that there is no possible single method to deal with all the issues of file management that can apply to all firms.

Accordingly, the problem properly framed for each law firm is:

“What is the appropriate best policy applicable to this practice to deal with issues of client file retention, storage and disposition?”

What I propose to provide here is a set of considerations for you to take into account as you establish the policy that applies to your firm and to your practice.

As well, I shall give you an example of how I could have better organized my collection of closed files - had I known “then” what I know now.

Points to Consider When You Establish your Policy:

1. Who are the Stakeholders?
You, your firm, your successors, clients, client successors, regulatory authorities such as privacy and tax, your errors/omissions insurer.
2. Some Legislative Requirements - there may be others
 - Code of Professional Conduct, Chapter VIII Preservation of Clients’ property
 - Income Tax Act (Circular IC78-10R4)
 - Personal Information Protection and Electronic Documents Act, S 8(8) and Schedule 1 (Canada)
 - The Freedom of Information and Protection of Privacy Act (Sask.)
 - The Land Titles Act, S. 80, 81, 83.
3. Instruction from the clients
Am I required to keep files and records for the client? For how long?

Is this requirement explicit in a retainer letter or instruction from the client?
4. Who pays?
How is the cost of closing, retention and disposition covered in the cost recovery strategy of the firm?

5. Storage - where?

The need to have storage facilities that maintain the integrity of the material stored is implicit.

The need to identify requirements for paper file storage and electronic material storage must be kept in mind as your policy develops.

6. Disposition - how?

Where the ultimate end of the file is destruction, you must have a process that is efficient, effective and confidential.

Where the ultimate end may be permanent storage, then suitable permanent space is required.

7. Human Resources

Make the closing/retention/disposition tasks specific mandated activities on an ongoing basis - not as a fill in or pick up job.

8. All files are not equal

Different files have different needs. Assess what areas of law or the kinds of files that you have.

Assess what are the different considerations applicable to each area of law you work within.

9. Integrate your protocols

Ultimate disposition of a file should be an orderly last step in the whole continuum of file management.

10. The file management continuum

Opening: develop a set of file identification and recording steps that can serve you well when the file is active, and later when it is closed, retained and then achieves ultimate disposition.

Building: the purpose for building a file is to make a record of the instructions, track progress on the work, and record conclusion of the work. As well, your file is the record from which you justify the fees charged and trust funds handled throughout.

Make your files complete.

Keep them in order on an ongoing basis.

What medium do you use: all paper, part paper/part electronic?

Do you retain electronic data in that form or is it printed to the paper file?

If the file has two components - electronic and paper, then a parallel collection-retention disposition strategy must be developed for each medium.

Reliance on electronic file building and retention will require that you organize your system so that e-mails, drafts and other things produced electronically on a file are kept on a client specific e-file.

Closing: The purpose of having a file closing protocol is to establish that all work has been completed and that all trust and general fund considerations are at zero.

Add to your closing procedure a set of tasks that looks forward to the ultimate disposition of the file:

- complete the file record - that is, organize all the paper together, organize all the electronic information together.
- return to the clients all of their original papers, documents, wills, certificates and the like.
- return, where appropriate, third party documents to their source; for example: Crown disclosure could go back to the Crown.
- keep everything else produced by you on the file. I would suggest keeping all notes, paper, drafts etc. as a complete record for two reasons:
 1. Who can guess what questions may arise in the future.
 2. Do not spend time now picking and choosing what to save from a file that will be stored for at least 7 years anyway.
- identify the retention and disposition stream that is appropriate for this particular file. This set of choices is easier to make now than to try and do it later after the file has been stored for a number of years.

Retention: The purposes for retaining the files are to be able in the future to review their history, answer questions, make proof of facts, justify the work, as well as justify the general and trust money matters.

Disposition: The purpose of having a disposition strategy is to identify the limits of the lawyer's obligation to manage and store the file and the lawyer's obligation to incur the associated administrative costs.

11. How long?

While some guidelines across Canada argue in favour of a minimum retention period of 10 years, others consider shaving that in some instances.

All things considered, I cannot imagine a scenario where the retention period should be less than a full 7 years.

Disclaimer: This is a minimum for the most simple and straight forward kinds of files. Each lawyer and each firm must assess and be responsible for identifying a retention period that is appropriate to each particular file.

Example Application of these Considerations:

In the following example, I am pretending that I have a broad general practice with a substantial return rate for most clients, their families and their successors.

This practice includes real estate, corporate, wills/estates, civil and criminal litigation and some *pro bono* public advocacy work on issues of political and public interest.

I have made the conscious choice that my file will be a paper file even though material is received/sent and produced in the electronic medium.

Accordingly, I have built my files by printing everything to the paper file.

This allows for deletion of electronic data on an ongoing basis unless it is saved to a precedent collection for very current use.

The entire paper file is complete and is always maintained in chronological order.

NOTE: This is just the example I have chosen. *You have to decide what your file looks like.*

I have identified each file with a number according to a system that suits the nature of the practice.

I have ensured that the file identification number on the folder is the same as the identification number used in my PC Law accounting system. To accomplish this, I had to override the sequential number system in the PC Law program in favour of the number system I developed for my practice.

All files are filed in correct numerical order when active and after having been closed.

I use an alphabetical name list cross referenced to the file number list. This cross reference list is begun at file opening and is maintained throughout.

In this pretend example, I have applied the policy considerations above when I made the following choices:

- I have reviewed the kinds of files my practice produces and I see that there are different kinds of files requiring different kinds of policy.
- I have established three possible disposition streams and each file must be put into one of these streams at closing:

1. Retain the file for a full 7 years, then shred.

I will use this stream for simple files when there is no comeback outside the limitation periods and the tax considerations.

I am thinking of simple real estate files and simple files related to criminal prosecution and defence work.

2. Retain the file for a full 10 years, then shred.

I will use this stream for the great majority of files.

3. Retain the file in a permanent collection.

I will use this stream where the consequences of the work are long lasting both for the client and for me.

For example, I retain will instructions and estate files where there are ongoing trust implications in this stream.

I also have some files of historical interest to me in this stream.

- To allow for a full 7 or 10 year retention period, I have chosen December 31st in any year as the annual anniversary date. For example, a file closed in July of 2007 and streamed to the 7 year retention group will be available for shredding at December 31, 2014.

I made this choice taking into consideration the number of files that will come up each year.

If old files are disposed once a year, then I can justify a commercial shredder.

- So I will need to make a record of forward diary dates for file disposition (a sample of such a record can be seen below).
- I had to decide how I would store the closed files during the retention period.

Two obvious choices were to either:

1. Store the files in bunches related to the shred date. That is, all files available for shredding at December 31, 2014 go into one place in numerical order.

In my example practice, this would cause me to keep many, many little groups in my file storage space.

2. Store all retained files in existing numerical order, and then on December 31st of each year, retrieve all files diarized for shredding.

Again, this requires that my files record includes the forward dates for disposition of each file.

In my pretend practice I have chosen No. 2 above because it fits best with the number of files I have and the amount of space I have.

- I have applied my file closing protocol to each file. Thereafter, once each file is properly closed, they can be retained in one of the 3 streams.

One of the most common stress points in practices I have assessed is that the lawyer is overwhelmed by piles of files that have not been properly closed.

A further stress point is that if files are not closed according to the closing protocol recommended, lawyers often think that they have to then sit and review each retained file at some later date to decide about disposition.

The fundamental value of the recommendations here are to do all the work when it is fresh and you can be efficient, rather than go back over the same territory later. This is mostly why people do not do it - going back after a number of years is often ugly work!

And so, based on this example of my pretend practice, following is what my ongoing file record could look like:

[These are selections from the pretend record only - the real complete record would have all the files in appropriate order.]

Ongoing open files will only show the opening date until they are closed. Then the disposition information will be added.

File	Open	Closed	Medium (electronic or paper)	Retain to	Why	Disposition	Done
1066-0	May 20/2007	Oct. 10/2007	/ X	Dec. 31/2014	Standard Real Estate	Shred Dec. 31/2014	
1092-1	April 3/2007	Oct. 14/2007	/ X	Dec. 31/2017	Real Estate with Controversy	Shred Dec. 31/2017	
2112-2	Jan. 4/2006	Oct. 2/08	/ X	Permanent Collection	Estate Trusts	Permanent Collection	
4024-1	Feb. 9/2005	April 4/08	/ X	Dec. 31/2018	Precedent	Shred Dec. 31/2018	
6026-0	Feb. 18/1999	Oct. 12/08	/ X	Permanent Collection	Historical value	Permanent Collection	

And here is why I made these sample choices for each file:

1066-0: Will be maintained in its entirety as a paper file until December 31, 2014 - then it will be shredded.

This is the bare minimum, but it was a simple straight forward deal with no issues.

1092-1: Again, a complete paper file as they all are.

The shred date here is the 10 year anniversary because there were some controversial issues and so I am adding a three year buffer.

2112-2: This estate file has trusts that will extend for the full 21 years. It goes into the permanent collection.

At some future time, a review of the permanent collection will have to be made to decide whether or not to continue retention.

4024-1: This complex commercial finance file could be a valuable precedent and so it has been put to December 31, 2018, the tenth year. By this time, these precedents will be stale anyway.

6026-0: This file contains material of historical value both to the client and to the firm, as

it dealt with litigation and advocacy regarding issues that were, at the time, of significant public interest.

So it stays in the permanent collection. Again, this collection will have to be reviewed at some time in the future.

Conclusions

The key concept I suggest you should carry away after reading this article is that the goal should be to create a file management policy that works as a continuum from opening to ultimate disposition.

To accomplish this outcome, you will need to apply all of the considerations above to your individual circumstances.

Suggested Reading Materials:

- *Practice Advisory: File Retention & Destruction*. Law Society of New Brunswick, May 27, 2005
- *The Lawyers Guide to Records Management and Retention*. American Bar Association, Law Practice Management Section, 2006
- *Guidelines for File Closure, Retention and Destruction*, Nova Scotia Barristers' Society Practice Assistance Committee, May 1998