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CLOSED FILES: Why Do We Have to Keep Them?

When faced with the storage costs associated with closed files, lawyers ask the question, "why do we have to retain inactive files?" The question becomes even more pressing when the cost to store surpasses the fees associated with the original account. Rising storage costs aside, retention of closed files is necessary to meet legal, ethical, and practical needs.

Rules and Regulations:

The requirements governing the retention of client files are outlined in Rules 3-68 of the Law Society Rules. Specifically, Rules 3-60 to 3-62 state that trust and non-trust books, records and accounts must be retained for at least 10 years, the first three years of which must be at the lawyer's chief place of practice.

A Practical Approach:

Before handing over closed files to clients or another lawyer, many lawyers retain copies of files for the practical reason of defending themselves against future negligence cases. In such events, the collateral work product is essential in the defense of a negligence suit.

The retention of collateral documents which include initial retainer letters, notes of instructions and conversations, telephone records, copies of important papers, correspondence and drafts becomes as important as the retention of the primary documents.

Negligence actions can be brought long after the alleged negligence has occurred. Section 3(5) of the Limitation Act, R.S.B.C. 1996, c. 266 governs professional negligence actions and allows that an action may be brought within six years of the date when the right to bring the action arose.

The limitation period can be extended by the postponement of the running of time when the plaintiff is not aware of the factual basis of a claim.

However, in most cases an extension of the limitation period will not trump the ultimate limitation period which is 30 years after the claim arose. Therefore, some lawyers choose to retain files for up to 30 years.

We are on our own

Closed Files: Retention and Disposition, a paper issued by the Law Society of British Columbia, states that "The Law Society does not act as a repository for closed files for members or their estates. In very limited circumstances an exception may be made to this practice (for example, where a lawyer has died and the spouse cannot continue to provide storage)."

Off-Site Storage for Closed Files

The high cost of office leasing makes in-house storage of closed files prohibitively expensive and off-site storage becomes a cost-effective option. However, cost is not the sole criteria for assessing off-site storage. Other considerations may factor into selecting a storage facility:

- *Security*—are facilities alarmed, monitored and patrolled?
- *Confidentiality*—is physical access to files limited, controlled and logged?
- *Factors of nature*—are premises alarmed against fire, rodent free & climate controlled to protect against paper degradation?
- *Insurance*—is extra coverage needed? what are the policy limitations?
- *Retrieval*—can files be retrieved quickly and easily? at what cost?
- *Weight*—is the facility structurally strong enough to safely contain the weight of the files avoiding loss and potential damages?
- *Bad Neighbors*—is the environment in and around a self-storage facility safe when you store and retrieve records?

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Retention Guidelines

In managing retained files, the following guidelines apply in British Columbia:

Corporate Matters:	6 years after the matter is closed
Commercial Matters:	6 year after the matter is closed
Criminal:	6 years after sentencing
Tort Claim:	6 years after final judgment
Contract Claim:	6 years after last court activity
Family Litigation:	6 years after final judgment
Separation Agreements:	10 years after agreement
Real Estate:	10 years after closing
Wills:	Permanent retention or, if a will is probated then 10 years after final distribution of estate
Estate Files:	10 year after all trust are fully administered.

Beyond the Guidelines

Lawyers must consider factors outside the guidelines to protect themselves and their firms against the ramifications of document retention errors.

In matters involving minors, the clock starts to tick after the minor has reached the age of majority. However, because the age of majority varies from jurisdiction to jurisdiction, the period to retain documentation may vary.

In instances of alleged negligence where the plaintiff is not aware of the factual basis of a claim, postponement of the limitation period may occur, posing additional risks when documents have only been retained according to accepted guidelines. Most onerous is the 30 year ultimate limitation period under s. 8 of the Limitation Act, R.S.B.C. 1996, which may supersede guidelines adhered to under normal document retention practices.

In Summary

Lawyers need to find alternatives to paper for retention of closed files. Realistic and practical alternatives should address the availability of files for the protection of the lawyer in defending against accusations of negligence. In addition, alternatives should address the non-recoverable costs of storage over decades. Further, for sole practitioners or small firms, alternatives should consider the burden of storage costs upon partners, spouses or other survivors.

Services that incorporate storage costs up front and eliminate ongoing fees offer relief from the burdens born by those responsible for retention and for those inheriting that responsibility. Services must also support easy management and no cost retrieval for both primary documents and collateral documents. Storage of paper documents is a sub-optimal form of long-term retention. Paper can satisfy retention guidelines but has significant drawbacks in time, expense and effort.

About the Author

Jag Gillan, Esq. BA, MBA, LLB

Mr. Gillan is Chief Executive Officer of Datawitness Online Ltd., an online document authentication and archiving service. Mr. Gillan is a member in good standing with the Law Society of British Columbia and formerly practiced law in the area of mergers and acquisitions.