How long should you keep your closed files?

"How long do I have to keep my closed files?" is one of the most frequent questions lawyers ask practicePRO.

Certainly you don't have to keep all files permanently – this just doesn't make practical or economic sense. Nor is the solution as simple as a one-size-fits-all rule for when to destroy closed files (e.g., toss everything at 10 years). For many reasons, file retention and destruction is a complex issue. This article examines why and provides some direction on how long you should keep your closed files.

Why keep closed files?

There are a number of reasons to keep your closed files. Some benefit your client, others benefit you. One of key reasons is to defend yourself against allegations of malpractice.

A well-documented file is often the best defence, especially if it contains evidence of the work done on a matter. Sometimes there will be no other source for that information. On many malpractice claims the lawyer and client will disagree or have different recollections on what was said or done – or not said or done.

Credibility is a critical factor for defending malpractice claims and LawPRO finds claims are difficult to successfully defend if the lawyer has not made efforts to include written or electronic correspondence, notes on personal or phone conversations and other documentation in the file. Clients usually have very specific recollections of what was said or done, and lawyers frequently have little or no recollection of what happened on a specific file.

Remember that most clients are involved with few legal matters in their lifetimes and are thus more likely to remember the specifics of what happened. Most lawyers will handle hundreds or even thousands of legal matters, making it more difficult to remember the specifics of individual files. When it comes down to credibility, judges often prefer clients with specific memories over lawyers with limited or no memories. This is why the information in a closed file becomes so important and why you should not underestimate the importance of a well documented file.

For these reasons, LawPRO encourages lawyers to ensure that files are well documented and handled in accordance with appropriate file closure, retention and destruction procedures. Consider the consequences of having no file available in the event of a claim:

- A reduced ability to defend the claim, as there is no evidence to establish what work was done on the matter;
- A reputational risk to the lawyer, who may have to appear in open court to defend the claim without a file;
- The increased risk of having to pay the deductible and a claim history levy surcharge, depending on the outcome of the claim and the program options selected by the lawyer;
- Ineligibility for the part-time practice option, as a result of an indemnity payment and/or cost of repair being incurred; and
- An increased risk of exposure outside of policy coverage and above policy limits for the lawyer.

Of course, in reporting a claim matter under the program, the lawyer is obliged to co-operate with LawPRO in the investigation and defence of the matter, including production of his or her file, to the extent that it then exists. Lawyers with excess insurance are encouraged to check with their excess insurers to determine their requirements and/or applicable policy terms.

Figure 1: Age of claims reported by area of law

	Under 10 years	10-15 years	Over 15 years	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

How long do you keep closed files?

The news here is good and bad. The good news: In most cases, probably not as long as you might think. The bad news: In some cases, perhaps longer than you might think. The trick is figuring out what you can destroy after a reasonable and appropriate period of time and what you should keep for a bit longer.

A file retention policy can provide direction to firm members on what the firm's standard file retention period is and help lawyers identify the files that should be kept for a longer period of time. See page 5 for more information on file retention and destruction policies.

A good starting point for trying to answer the question on how long to keep closed files is LawPRO's data on how long claims take to surface (i.e., an allegation of malpractice is made or circumstances arise that make it appear as if a mistake might have been made).

Categorized by major areas of law, Figure 1 shows the years between the *error date* (the date the work was done) and the *reporting date* (lawyers are obliged to report real or potential errors to LawPRO as soon as they are aware of them) for 22,241 claims reported to LawPRO between 1997 and 2007.

The chart does not include data from more recent years, as many claims files opened in those years are still open and that data would not reflect a true cross-section of reported claims.

The good news appears in the first two columns: In most areas of law, the majority of claims arise in less than 15 years, and in some cases less than 10 years.

The caution column is the percentage of claims that arise beyond 15 years, in particular for real estate, family, and wills and estates claims. The bad news appears in the oldest claim column – some claims take a long time to make themselves known.

Is 15 years a starting point?

If you want to have a file around to defend the majority of the malpractice claims you might face, a reasonable choice, based on the data in the above chart, would be 15 years. This time period also happens to be the ultimate limitation period specified by the *Limitations Act, 2002* – although it appears the ultimate limitation period may not protect you for several years. For more on this topic see "A side note on the ultimate limitation period" sidebar on page 4.

In Ontario, under the *Limitations Act, 2002*, the general limitation period is two years running from the day the claim is discovered. This basic two-year period is subject to discoverability, and there are a number of exceptions that can extend the basic two-year limitation period.

The ultimate limitation does not run if a person with a claim is incapacitated or is a minor and is not represented by a litigation guardian with respect to that claim. The ultimate limitation also does not run if the person who the claim is against conceals that claim or wilfully misleads the person with the claim. There are also exceptions in other legislation. See s. 19 of the *Limitations Act, 2002* for a list of these. Where applicable, you should also keep in mind relevant limitation periods from other provinces or under federal legislation. Note that in some cases there are no limitations on environmental claims.

Thus, based on LawPRO 's claims data, and the ultimate limitation period in the *Limitations Act, 2002*, 15 years is probably a good starting point as a general rule. But it is not a strict rule that can or should be followed in all circumstances. (And as an aside: Should it be 15 years plus six months? Remember that after a statement of claim is issued you have six months to serve

it.) Lawyers must consider a number of factors and make at least some decisions on a file-by-file basis. In many cases the 15-year general rule will apply, but in some cases files should be kept longer than 15 years.

Setting a file destruction date

When a file is closed, the primary lawyer on that file should set a file destruction date, taking into consideration that a general rule — which does ensure some consistency and direction — won't necessarily work for all files. Personal judgment by the lawyer on a file by file basis is necessary. The lawyer should consider ethical, legal and professional considerations. These tend to be strict rules and many of them are unbending. The lawyer should also consider economic and practical factors. These are really business decisions and there is more flexibility here. Ideally the lawyer can look to a formal firm file retention and destruction policy for direction.

In setting a destruction date the lawyer should consider these questions: What is the likelihood I will face a malpractice claim or a Law Society complaint on this file? Is there any other reason I might need it? The answers to these questions will vary depending on:

- the area of law: See the age of claims chart above;
- the relevant limitation periods: What are the specific limitations relevant to this type of matter?
- the type of clients (e.g., limitations can be extended if minors or incapacitated individuals are involved);
- specific client characteristics (e.g., were they difficult or demanding and thus more likely to raise an issue in the future?);
- the type of matter (e.g., very simple vs. very complex with many parties);
- how likely you are to represent the client again in the future on a related matter.

When should you keep a file for more than 15 years?

Consider the above factors, especially if your clients are under a disability or are minors. Family law matters are more likely to come up beyond 15 years, often because issues relating to post-secondary school tuition and expenses come up in this time frame, and the amount of spousal support seems to be an issue that is revisited.

As people often own a property for more than 15 years, holding your real estate files for at least this long makes sense. Original wills and will notes should be kept much longer than 15 years.

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A side note on the ultimate limitation period

When the *Limitations Act, 2002* was proclaimed in force on January 1, 2004, many lawyers hoped that s. 15 of the Act would provide immediate protection against claims arising from legal services performed more than 15 years before the claim was made.

Section 15(2) of the Act provides that "no claim shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place…"

The judgment of the Court of Appeal in *York Condominium Corp. No. 382 v. Jay-M Holdings,* 2007 ONCA 49 (http://www.canlii.org/en/on/onca/doc/2007/2007onca49/2007onca49.html) (also found at 84 O.R. (3d) 414) put an end to this hope.

The Court held that where the allegedly defective services were rendered in 1978, by virtue of s. 24 of the Act (the "transition provision"), the defective services were deemed to have been rendered on January 1, 2004. Therefore, the 15-year "ultimate limitation period" was inapplicable.

By reason of this judgment, it appears that claims based on legal services rendered on or before January 1, 2004, will be barred only as of January 2, 2019. As we move through 2019, legal services provided throughout 2004 will begin to be shielded from claims by s. 15. Claims for services rendered throughout 2005 will come under s. 15's purview through 2020, and so on into the future. In the meantime, s. 15 appears to be of little practical importance.

What is a file retention policy

and why should your firm have one?

A file retention policy is a document that provides a step-by-step outline of the processes and procedures on how firm files should be closed, retained and destroyed. Having a formal policy means clear rules with which all must comply are in place, including a general file retention period for the firm and any exceptions. What gets written gets done. It should give direction on dealing with both the paper and electronic parts of a file.

The Law Society's new *Guide to Retention and Destruction of Closed Client Files* (http://rc.lsuc.on.ca/pdf/practiceGuides/retentionDestructionGuide.pdf) has a Sample File Retention Policy for law firms in Appendix 1.

Although the retention and destruction of client files is a critical issue, best practices would see a firm have a retention and destruction policy for other critical firm documents and records – in particular financial and business records, HR records, important contracts (suppliers, leases), and insurance policies.

And as a reminder, remember that Bylaw 9 provides that trust account documents and records must be kept for the 10 years immediately preceding the lawyer's more recent fiscal year end, and other accounting records and documents for six years immediately preceding the lawyer's more recent fiscal year end.

Tell your clients about your file retention policy

You should tell your clients about your file retention and destruction policy. The best practice would be to tell the client at the time you are retained and to include it in your retainer or initial correspondence.

Providing this information at the start of your relationship sets and controls the client's expectations as to what is to happen with the contents of the file while the matter is progressing and after the file is closed. Appendix 4 of the Law Society's file retention guide has a sample text you can include in a retainer. In your final reporting letter to the client, you should reiterate what was agreed with respect to file retention; do so again when you are returning the client's documents and other property.

Firms that work in a paperless office environment and maintain an electronic file have an opportunity to be very progressive and proactive on file management. Their retainers will provide that most original documents (e.g., correspondence from the other side) will be scanned and forwarded to clients as they arrive at the office, and that the firm will keep only an electronic record of that document. Doing this makes file management and the handling, closing and storage of closed files far easier.

Managing the file destruction process

The best practice is to have a calendar or tickler system that tracks destruction dates and provides a file destruction review reminder when the relevant destruction date arrives.

Setting a destruction date and blindly pulling the trigger when that date arrives is not appropriate. There should be a process whereby the primary lawyer or other appropriate individual reviews the file before destruction to make sure circumstances haven't changed. There also should be a process to postpone an already established file destruction date if there is a change in circumstances. Files that are to be kept indefinitely should be reviewed periodically (e.g., every 10 years) to see if circumstances have changed so they can be destroyed.

Recordkeeping after you destroy the file

In the event you must defend a malpractice claim, showing up with nothing more than a vague memory of having represented the client won't look very good. For this reason, you should retain some basic information about files that are destroyed including:

- The client's name: This is critical for conflicts searches. Consider keeping the names of the other parties to the matter;
- The client's address, the file number and a brief matter description;
- The date of file closure;
- The date of file destruction (or date file was returned to client or transferred out of the firm) and name of person that authorized this; and
- some record or details of what was destroyed.

The above comments provide some direction on the proper procedures to follow with respect to file retention and destruction. See the Law Society's *Guide to Retention and Destruction of Closed Client Files* for more detailed instructions and checklists.

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By reason of this judgment, it appears that undiscovered claims based on legal services rendered on or before January 1, 2004, will be barred by s. 5.15 only as of January 2, 2019. As we move through 2019, legal services provided throughout 2004 will begin to be shielded from claims by s. 15. Claims for services rendered throughout 2005 will come under s. 15's purview through 2020, and so on into the future. In the meantime, s. 15 appears to be of little practical importance.