

LAWPRO®

Toronto Lawyers ASSOCIATION 

Conflicts, Undertakings, and File Management:
What you need to know

November 5, 2025

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CONFLICT OF INTEREST TIPS

A conflict of interest happens when there is a substantial risk that a lawyer's duties to a client will be compromised by the lawyer's own interest or the lawyer's duties to another client, former client, or another third person.



1. DEVELOP AND FOLLOW A CONFLICT CHECKING SYSTEM

- Every new client means new potential conflicts. Implement and follow a rigorous conflicts-checking system that applies to every new client and new file. Also, make sure there are not conflicts with other lawyers at the firm, or with your own business interests. You can't always objectively judge your own conflicts, so it may be a good idea to get the opinion of someone outside the matter.



2. KNOW WHO YOUR CLIENT IS

- Ask yourself "who is my client"? Some family or business disputes find lawyers taking instructions from multiple individuals. Ensure you know which natural or corporate persons you represent in all circumstances. Send clients for ILA when appropriate. Remember that conflicts can unexpectedly arise in the middle of a matter.



3. DON'T ACT FOR FAMILY MEMBERS OR FRIENDS

- It's best not to act for family or friends. They are too close to you. It increases the risk that you may have an interest in the matter, be unable to remain objective or manage your client's expectations. We see claims where lawyers don't make proper enquiries or proper documentation because they assumed they knew their family or friends' personal circumstances or didn't treat their friend or family member's matter as they would normally. It's best not to act for them, but if you must, treat them as if they were strangers.



4. DON'T BE AFRAID TO WALK AWAY

- When a real or potential conflict of interest situation arises, it is critical that a lawyer immediately informs the client, and either withdraws, or proceeds with the client's consent where this is permitted.



5. SEEK FURTHER GUIDANCE WHERE NECESSARY

- For further guidance, consult the Law Society of Ontario's [Steps for Dealing with Conflicts of Interest Rules](#) resource, the [Canadian Bar Association Conflicts of Interest toolkit](#) and our [Managing Conflict of Interest Situations](#) booklet.

LEARN MORE ABOUT AVOIDING CONFLICTS AND MANAGING YOUR RISKS:

See the "[Malpractice Claims Fact Sheets](#)" and the practicePRO [conflicts of interest webpage](#).

A checklist for avoiding conflicts on



lateral lawyer transfers*

Lateral hiring of partners or associates occurs at firms of every size, and is becoming far more common. The other articles in this issue of *LAWPRO Magazine* address the topic of finding someone who has the right credentials and is a good fit, from both the point of view of the firm and the transferring lawyer.

However, in addition to reviewing the transferring lawyer's credentials and suitability, the transferring lawyer and firm will need to identify and deal with potential conflicts of interest that may arise with respect to clients at the transferring lawyer's previous firm, and in particular, clients for whom the transferring lawyer worked.

This critical task is not as easy as it might seem on first thought. The hiring firm must have sufficient information to complete an internal conflicts check, while at the same time making sure that no confidential client information is disclosed by either the transferring lawyer or the hiring firm.

Here are some steps you may want to take to identify potential conflicts of interest when dealing with a lateral hire:

- Ask for a current curriculum vitae so that you can review the background of the transferring lawyer. You will want to look back at least five years, or to the time of articling if this was less than five years ago.
- Check with the lawyers in your firm, or search within your conflicts system if it has the data to identify any matters on which the transferring lawyer's previous firm was on the other side.
- Ask the transferring lawyer for a list of major clients and the matters he or she worked on (but not any confidential information, including the identity of clients if that is confidential) and have your firm's conflicts person run these names through your firm's conflicts database.
- In an interview (not in writing) ask the transferring lawyer if he or she is aware of any potential conflicts due to work done while at his or her previous firm.

- Ask the transferring lawyer if he or she sat on any boards, and if so, have your firm's conflicts person run this information through your firm's conflicts database, including, ideally, the name of the entity, the directors and officers.

It is critical that both the firm and the transferring lawyer take an honest and critical look at any potential conflicts situations. Unfortunately, the serious assessment of conflicts often does not occur until the very final stages of the transfer when the lawyer and firm are committed to making the transfer happen. A strong desire to hire a transferring lawyer should not lessen the need to identify and fully assess potential conflicts, and to take appropriate steps to deal with them if necessary. This may include erecting confidentiality screens or seeking client consents. In some cases, it may mean that the transferring lawyer cannot be hired or that the hiring firm may have to send existing clients to another firm.

Informing all lawyers and staff about the transfer once the transferring lawyer starts at the new firm will help identify potential conflicts that were not identified in the pre-transfer screening, and will ensure that appropriate confidentiality screens are put in place. The CBA Conflicts of Interest Task Force's Toolkit (www.cba.org/conflicts) has an excellent model of a Lateral Hire Memorandum.

Resist any temptation to overlook or ignore any real or potential conflicts that arise when a lawyer transfers from one firm to another. A failure to deal appropriately with these conflicts only delays the inevitable. In all likelihood the firm will have to refer any clients with a conflict to another firm, and it may even face a malpractice claim as a result of a conflict. ■

* Portions of this article were adapted from the *Checklist for interviewing transferring lawyer* which appeared in the CBA Conflicts of Interest Task Force's Toolkit (www.cba.org/conflicts).

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managing

CONFLICT OF INTEREST

situations





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Managing Conflict of Interest Situations is just one of several booklets in the PracticePro library. Other resources available to lawyers include: articles and videos that highlight the profession's legal obligations and liabilities; practice aids that provide a "how to" approach to law practice; education initiatives; and promotion of the concepts of wellness and balance.

For more information on how you can put PracticePro to work for your practice, contact LPIC at 1-800-410-1013 or (416) 598-5899, or visit our website at www.lpic.ca.

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conflicts of interest are everywhere

Conflicts of interest can arise in any context – financial, political, social, moral or religious. Conflicts of interest can be potential or actual, obvious or hidden, anticipated or unexpected, direct or imputed. Conflicts of interest can surface before the lawyer is retained or sometime during the retainer. And they are becoming more and more prevalent in legal practice, irrespective of the size or practice specialty of a lawyer or his or her firm. In fact, conflicts which arise from acting for more than one party in a matter represent the second most frequent cause of claims against Ontario lawyers.

many factors contribute to this phenomenon

External factors that contribute to an increase in conflict claims include: Increased competition between lawyers and other professionals; increased consumerism; broadening definitions of legal duties; the movement of lawyers from firm to firm; the large size of some firms; and the development of more intricate inter-relationships of corporate clients as a result of mergers and globalization.

As well, internal factors, such as the nature of a lawyer's practice, involvement by fellow lawyers and staff in other legal matters, board memberships and lawyers' business investments affect this trend.

This booklet has several purposes:

- to inform you of the costly consequences of acting with a conflict of interest;
- to help you identify, check for and manage conflict of interest situations; and
- to offer some guidance on what to do if you find yourself in the thick of a conflict of interest mess.

identifying a conflict of interest situation

what is a conflict of interest?

A conflict of interest is a **compromising** influence that is likely to negatively affect the advice which a lawyer would otherwise give to a particular client.

A conflict of interest situation is a set of circumstances that is likely to affect adversely:

- the lawyer's **judgment** concerning a client or prospective client,
or
- the lawyer's **loyalty** in respect of a client or prospective client,
or
- the lawyer's **safeguarding** of interests of a client or prospective client.

Conflicts: The lawyer's Achilles Heel

What is it about a conflict of interest that is so bad? The answer is quite simple. Loyalty and independence of judgment are essential to the effective representation of a client. In fact, they are fundamental to the health of the lawyer/client relationship. Yet a conflict of interest may make it impossible to exercise the essentials of loyalty and judgment.

Therefore, identifying and checking for a conflict of interest situation need to be routine steps in every lawyer's practice. In fact, every time you have a new client or a new matter for an existing client, you should address the issue of the existence of or potential for a conflict of interest situation.

how to spot a conflict

The most claims-prone conflicts arise when:

- acting for more than one person on a single matter,
or
- acting for a client on a matter where the lawyer has a personal interest other than reasonable professional fees.

Acting for more than one person

It is not always readily apparent that a representation involves more than one person as a client. Some conflict situations are hidden, for example when dealing with members of a family or partners or shareholders in a business.

Appendix 1 – Checklist to Identify Conflicts Involving Multiple Interests lists questions you should be asking to help identify such a situation and whether or not it presents a conflict or potential conflict. You will also find a list of classic situations where representation of multiple parties should be avoided.

Acting when the lawyer has a personal interest

In very few instances is it safe for a lawyer to represent the interests of a client when the lawyer's own interest, financial or otherwise, is involved (other than the expectation of a reasonable fee).

Appendix 2 – Checklist to Identify Conflicts Involving Lawyer's Personal Interest lists questions you should be asking to help identify such a situation and whether it presents a conflict or potential conflict. You will also find a list of classic situations where representation of a client in the face of a personal interest should be avoided.

Other typical conflict situations

In addition to the situations listed earlier, typical conflict situations include:

- acting for one client against another client,
or
- acting for one client against a former client.

Either of these scenarios is usually best identified through a conflicts checking system, be it manual or computerized. Conflict checking systems are discussed in the next section: *Checking Systems for Conflicts of Interest*.

Some special cases

DECLINED REPRESENTATION

A conflict can also arise when a lawyer has declined to act for a party. It may be that after interviewing a potential client, you decide that you will not represent them. While you are deciding about your representation, you should take care that you do not receive any confidential information. Receiving confidential information can create obligations of confidentiality even if no lawyer/client relationship ultimately ensues; which in turn can prevent you from acting either for a new client or even for a current client at some point in the future.

Another problem situation occurs when someone connected with your client believes that you are acting for them too. When they later discover that you have not protected their interests, they complain.

Whichever the situation, documentation is critical. A non-engagement letter, also called a non-representation letter, should

be prepared either when you decline the opportunity to act for a prospective client or when you need to clarify that you are not representing someone who may be connected to your client.

Appendix 3 – Checklist for Non-Engagement/Non-Representation Letter contains a checklist of the key information which should be included in a non-engagement or non-representation letter.

IMPUTED CONFLICTS

A conflict of interest can be imputed to you although you may not have any direct involvement in the conflict or the representation.

Appendix 4 – Checklist to Screen Imputed Conflicts provides a brief overview of imputed conflicts and the use of “screens” or “walls” to manage such conflicts.

why a conflict matters

The consequences of a conflict of interest situation for the lawyer can be severe and costly.

For example, acting with a conflict of interest can result in civil liability for professional malpractice as well as disciplinary action by the Law Society for breach of Rule 5 and related Rules.

Some very serious consequences also flow from a proven claim in contract, tort or equity, including:

- disqualification from representation of one or more clients;
- forfeiture of fees charged; the inability to charge for work in progress and other time invested;



- a damage claim which may include punitive damages;
- embarrassment, inconvenience and aggravation of defending a malpractice claim or investigation; and
- lost time spent on defending a malpractice claim or investigation.

Some of these exposures are inevitable even if the claim is not successful.

To fully appreciate the consequences of conflict, and to understand what all of the information generated by conflicts of interest checking systems means, it is critical that lawyers are aware of the current legal standards regarding conflicts of interest.

Rules of Professional Conduct

Rule 5 of the Law Society's Rules of Professional Conduct states:

The lawyer must **not** advise or represent both sides of a dispute **and, save after** adequate disclosure to and with the consent of the client or prospective client concerned, **should not** act or continue to act in a matter when there is or there is likely to be a conflicting interest. *(emphasis added)*

Although the rule and its commentaries and related rules on confidentiality and disclosure seem simple enough, the number of conflicts-based claims and complaints against lawyers indicate that lawyers have difficulty applying the rules in practice because they either fail to recognize the situation or choose to ignore it.

Standard of care at common law

Usually, the standard of care imposed on lawyers in contract and tort is to act as a reasonably competent and diligent lawyer. In a professional liability claim, the allegation of a conflict of interest casts a very onerous burden of proof onto the lawyer to show that the client who now complains received the best possible advice which could have been obtained from a truly independent lawyer.

Fiduciary duty in equity

The fiduciary duty imposed on a lawyer, breach of which gives rise to very broad equitable relief, includes the obligations to provide full disclosure, to act with undivided loyalty and exclusivity, and to maintain the client's affairs in confidence. A lawyer's ability to meet these obligations is challenged when that lawyer is confronted with a conflict of interest situation; failure to manage the conflict likely will result in allegations that the fiduciary duty was breached, paving the way for a broadly based damage award.

checking systems for conflicts of interest

types of conflict checking systems

For the small office that does not have a complex client mix, a manual system based on index cards may still be adequate.

However, for most practitioners the better option is a computerized system that includes a relational database and strong management capabilities for changes and back up. A relational database can store and manage a large amount of information about individuals and their relationships to each other, including clients, lawyers and staff or third parties, predecessor firms, lateral hires, contract lawyers or branch offices.

when to use a conflict checking system

Certain points in time trigger the need for a conflicts check and additional input of data. Most data input and conflict checking occurs pre-engagement, on the first call or visit and before opening a file. Another trigger point is during the engagement when there has been some change in the matter, often unanticipated, such as when a new party becomes involved in the matter. The new data should be immediately inputted in the system and followed by a check.

essential elements of a conflict checking system

Appendix 5 – Checklist of Essentials of Conflict Checking Systems describes the key elements of a conflict checking system. Note that an effective system is more than a collection of index cards or a piece of computer software. Key to its success – and to the success of your firm – is a commitment to use the conflict checking system by every member of your firm.

managing a conflict of interest situation

Just because a name is identified in the conflict checking system does not mean a conflict exists. It does mean that the lawyer should fully evaluate the situation. There are a few common and key issues which should be addressed in any conflict of interest situation.

step one: the need for legal analysis

First and foremost, the lawyer must bring to the discussion with the client his or her own judgment about the propriety of acting in the face of the conflict. Clients cannot consent to certain conflicts of interest. The first branch of Rule 5 of the Rules of Professional Conduct describes a non-consentable conflict: "The lawyer must not advise or represent both sides of a dispute." The rationale for the prohibition is that the matter is contentious and the interests are clearly adverse.

In some situations you may need to decline the representation, even though your client could consent to having you act for more than one interest, simply because you cannot exercise your judgment independently with respect to the client's interests. Even a perception that your judgment will be influenced is reason enough to decline the representation.

The conflicts test, simply stated, is as follows:

- You cannot proceed to seek a consent to waive from the client, former client or third party and then represent them unless you believe that the representation of one client will not adversely affect the interest of the other client.
- You cannot act for a client where your own interest is involved unless you believe that the presence of your interest will not adversely affect the interest of that client. If you are in doubt, consult with a colleague or make a confidential inquiry of the Law Society's Practice Advisory Service.

step two: the need for adequate disclosure

If you believe that it is appropriate to seek your client's consent to waive the conflict, the next step is adequate disclosure to all of the parties who are affected by the conflict.

Components of adequate disclosure include

- a review and discussion of the nature and circumstances of the conflict;
- an explanation of the potential competing interests;
- a review of the reasonably foreseeable negative implications, including what will happen vis-à-vis future representation of one or all of the clients if a conflict arises; and
- the possible need for independent counsel. You need to anticipate misunderstandings by your clients and address them proactively.

As part of this discussion, you should also review the positive aspects of proceeding with the representation despite the existence of a potential conflict. A commentary on Rule 5 of the Rules of Professional Conduct directs the lawyer to consider the availability of the requisite experience and expertise in another lawyer and the extra cost, delay and inconvenience involved in engaging another lawyer who will not be familiar with the client and the client's affairs.

step three: the need for informed consent

Consent must be informed

Once adequate disclosure has been made, the affected parties or clients must decide if they are prepared to accept the lawyer's representation despite the burden of the conflict. This is also sometimes referred to as an informed waiver. The consent is informed only if it is given voluntarily and knowingly. Consent given by a client without these features is void and of no effect. If an informed consent is not forthcoming from the affected parties, then the representation is prohibited. Rule 5 of the Rules of Professional Conduct refers to the saving provisions of adequate disclosure and informed consent.

Consent must be put in writing

It is essential that the consent be in writing and executed by the client/s. In fact, the disclosure made by the lawyer, and on which the consent is based, should also be put in writing.

Remember, all clients or parties affected by the existence of the conflict must have adequate disclosure. The paper documenting the client/s' waiver of conflict must be tailored to each representation. No single format will do.

Recommend ILA

A further precaution is to encourage the client/s to seek independent legal advice with respect to the consent/waiver which they are giving. This approach may not prevent claims by angry clients, but does reduce their validity to a non-starter.

Appendix 6 – Checklist for Eliciting Consent to Waive Conflict provides a checklist for eliciting the consent of the client/s.

step four: the need for ongoing assessment

Lawyers need to be aware that conflicts can develop during the engagement, and that they need to assess situations for conflicts throughout the representation. Because these conflicts are outside the initial screening process, they often appear unexpected. Some, however, are foreseeable at the outset of the retainer.

Conflicts that arise subsequent to the retainer

UNEXPECTED CONFLICTS

Subsequent conflicts typically arise unexpectedly. Usual triggers are the addition of a new party to a transaction or lawsuit or the addition of a lateral hire who is personally disqualified from a matter in which the firm is engaged.

They can also arise in the case of a business transaction between lawyer and client who are business partners. Because of a pre-existing lawyer/client relationship (unknown to the lawyer), the client expects the lawyer to also act as a lawyer rather than solely as a business partner. These types of conflicts should be managed in the same way as suggested for initial conflicts.

PREVIOUSLY FORESEEABLE CONFLICTS

In some instances, subsequent conflicts were foreseeable. Typically, this type of conflict was identified prior to the engagement but did not involve a contentious matter; the conflict was managed with documented disclosure to the clients and their written waiver based on informed consent. Later, the conflict materializes and requires further management. The typical scenario is where previously aligned interests diverge, such as the individual interests of partners in a partnership.

Depending on just how contentious the matter has become, continued representation of some or all of the clients affected may or may not be possible.

Appendix 7 – Checklist for Managing a Subsequent Conflict reviews the steps to follow for management of the previously foreseeable conflict.

managing the conflicts mess

Occasionally a lawyer may miss all of the conflict signals and only come to appreciate the lurking harm when the situation is a veritable mess.

Appendix 8 – Action Plan to Contain a Conflicts Mess outlines a simple three-step action plan for managing this type of situation.

At a time when our profession is already facing the pressures of a changing practice climate, it is more important than ever for all lawyers to improve their relationships with clients. Conflicts of interest, however, present numerous challenges to effecting better client relations. What is at issue with respect to a conflict is the ability to give valuable legal advice and representation in circumstances where another interest compromises the loyalty and independent judgment which a lawyer is duty-bound to give to each client.

And so, it should not be surprising that the consequences of lawyers not identifying or not avoiding or not managing a conflict of interest situation are severe. And far-reaching too, since they affect not only the lawyers within the profession but also the public's confidence and perception of the legal system itself.

When all is said and done, the secrets to successful management of conflicts are quite basic: Be aware of your obligations; exercise good judgment; and communicate and document effectively.

As part of its commitment to provide Ontario lawyers with a responsive liability insurance program, LPIC seeks to ensure that lawyers understand both the risks of conflict of interest situations and the basics of conflict management. Our goal is to help lawyers better recognize conflict situations, follow the rules, and avoid the costly consequences which conflicts present.

checklist to identify conflicts involving multiple interests

Many situations involving multiple representation involve interests which are either divergent from the get go or will become so very early on in the matter. Whether or not the proceeding or matter is contentious, the fact that the interests are divergent means that you will not be able to align your loyalty and judgment in favour of each of the interests as is required of you. The reality is that it may be difficult to show that each client received the best possible advice that he or she would have received if the lawyer was acting for one party alone and did not have any responsibility to the client with the opposing interest. In the end, one or both of the clients may complain.

Therefore, you should not act! If in doubt, consult with a colleague or the Law Society's Practice Advisory Service at (416) 947-3369 or 1-800-668-7380.

Questions to help identify a multiple interest conflict

- What are all of the interests that must be considered during the representation?
- Is there anyone else who has anything to do with the subject matter of the representation? If so, what is their interest?
- Is more than one person relying on your advice? If so, for what advice?

checklist to identify conflicts involving multiple interests

- If someone attends with a relative or friend, does that relative or friend believe that you are representing their interests as well?
- Is someone other than the person affected by the subject matter of the representation paying for your fees?
- Where people are contributing to create a business, are their contributions different? Are their rights and obligations different?
- Where people have a common interest, are their bargaining positions unequal?
- To maximize the interest of one of the persons involved will the interests of another person be compromised or negatively affected?
- Will you have to keep secret any information from one of the participants that is material to your representation in the matter?
- Is there real potential for the parties to have a falling out in the future?

checklist to identify conflicts involving multiple interests

Examples of multiple interest situations to avoid at all costs

INTERESTS BETWEEN SPOUSES REGARDING

- family law matters e.g. marriage contracts, separation agreements, divorce, custody, property disputes, assets and obligations
- financial obligations e.g. loan or line of credit guarantees, mortgage for other than a joint benefit
- wills and estate planning matters e.g. imbalance in asset holdings or both are very wealthy or previous marriage and family relationships.

INTERESTS AMONG FAMILY MEMBERS REGARDING

- financial obligations e.g. loans, guarantees, security interests
- motor vehicle accidents e.g. involving a combination of negligent driver, owner and passenger
- estate and administrator
- guardian and ward
- trustee and beneficiary
- shareholders of a closely held company
- partners in a partnership.

checklist to identify conflicts involving multiple interests

Examples of multiple interest situations to avoid at all costs (cont'd)

COMMERCIAL INTERESTS REGARDING

- trustee and beneficiary
- landlord and tenant
- general partner and limited partner
- bond issuer and underwriter
- debtor and creditor e.g. mortgagor/mortgagee; assignor/assignee
- buyer and seller
- parties attempting to collect from one fund
- shareholders of a closely held corporation
- partners in a partnership
- the partnership and one or more partners

checklist to identify conflicts involving multiple interests

COMMERCIAL INTERESTS REGARDING (CONT'D)

- corporation and one or more individuals with an interest in the corporation
- individuals involved in a joint venture
- client and a competitor
- corporate legal counsel and as an officer and director of same company.

checklist to identify conflicts involving lawyer's personal interest

Lawyers who act for one or more clients in the face of a personal interest, financial or otherwise, are really fooling themselves. The exposure to a malpractice claim is inevitable if the client becomes unhappy about any aspect of the transaction. Even with a written waiver from the client in hand, the burden of proof regarding adequacy of disclosure and demonstrating exercise of good judgment will be most challenging.

Therefore, you should not act! If in doubt, consult with a colleague or the Law Society's Practice Advisory Service (416) 947-3369 or 1-800-668-7380.

Questions to help identify a personal interest conflict

- What is the client's interest?
- What is the lawyer's interest?
- Will maximizing the lawyer's interest negatively affect the client's interest? If so, you should not act.
- Will the lawyer always be able to place the interests of the client first? If not, you should not act.
- Is there potential for a falling out between the client and the lawyer in connection with the matter? If so, you should not act.

checklist to identify conflicts involving lawyer's personal interest

Examples of personal interest situations to avoid at all costs

- participating in a business transaction with a client
- having a personal or business relationship with another party interested in the representation or transaction
- acquiring an ownership or other interest in a matter adverse to a client
- purchasing real estate from a client
- taking a financial interest in a client matter other than reasonable fees
- creating a legal document wherein the lawyer is entitled to a beneficial interest e.g. being a beneficiary under a client's will which you have drafted
- having a personal, social or political interest in a client matter
- borrowing money from a client at the same time as providing legal advice and drafting documentation evidencing the loan and security therefrom.

checklist for non-engagement or non-representation letter

Purpose

The point of sending a non-engagement or non-representation letter is three-fold:

- to document that you are not representing a particular person;
- to advise the party to seek independent representation; and
- to confirm that you have not received any confidential information regarding his or her interests in the matter.

Without such a letter, the person can later allege that he or she relied on you for legal representation even though you provided none, or that you received confidential information which could prevent you from acting against the interests of that person in the future.

Contents of non-representation letter

Your letter should be clearly worded and address the following issues:

- Clearly confirm that the representation is declined and that there's no lawyer/client relationship; you need not set out your reasons for your decision.
- Return any documentation or other property obtained during the consultation.

checklist for non-engagement or non-representation letter

- Refer to the fact that statutes of limitations may apply to bar recovery if steps are not taken promptly to pursue rights or remedies. If a specific statute of limitations poses as an immediate problem, specific reference should be made to a need for the person to take urgent action.
- Advise the person to seek other legal counsel as soon as possible to pursue his/her rights.
- Take care not to express an opinion on the merits of the claim unless careful research has been conducted to support the position.

Once the letter has been sent, confirm and document that the person to whom the non-engagement letter was sent has in fact received your letter.

checklist to screen imputed conflicts

Imputed conflicts

Typically, imputed conflicts occur because you are in partnership or association with one or more other lawyers who have a direct conflict. The principle behind imputed conflicts is the imputation of information concerning a client or matter among all lawyers and staff in a firm. The merger of law firms or the lateral hiring of new partners and lawyers often create imputed conflicts which then need to be addressed. In certain circumstances, imputation of a conflict can also pertain to lawyers in work-sharing or space-sharing arrangements.

Screens/walls

In response to the court's imputation of conflicts, lawyers, particularly those in large firms, try to use physical procedural barriers called "screens" or "walls" to prevent one or more lawyers or staff from being exposed to information relating to a matter currently or formerly handled by other lawyers/staff.

Attempts to screen disqualified lawyers sometimes work to prevent the firm's disqualification. Imputation creates a rebuttable presumption of shared knowledge among lawyers and, accordingly, our courts tend to carefully scrutinize how the firm has implemented a particular screen when the issue is before them.

checklist to screen imputed conflicts

IS THE SCREEN/WALL EFFECTIVE?

Key factors in assessing whether the screen will be effective are:

- The size of the firm: The larger the firm, the less likelihood of contact by screened lawyers with non-screened lawyers.
- The physical layout of the office and proximity of lawyers and staff working on the matter to the screened lawyers.
- The file storage system, including the location of files relative to the location of screened lawyers, the ability to access files by screened lawyers, and various security measures in place to prohibit access.
- Timeliness of implementation of screen to ensure confidentiality of information.

Before attempting to use a screen to avoid disqualification, a review of and compliance with the guidelines developed by the Canadian Bar Association in its *Task Force Report – Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* is recommended. They have been reproduced here with the permission of the Canadian Bar Association.

checklist to screen imputed conflicts

CBA Guidelines

1. The screened lawyer should have no involvement in the current representation.
2. a) The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new firm.
b) No member of the new firm should discuss the current matter or the prior representation with the screened lawyer.
3. The current client matter should be discussed only within the limited group who are working on the matter.
4. a) The files of the current client, including computer files, should be physically segregated from the regular filing system, specifically identified, and accessible only to those lawyers and support personnel in the firm who are working on the matter (or require access for other specifically identified and approved reasons).
b) No member of the firm should show the disqualified lawyer any documents relating to the case.
5. The measures taken by the firm to screen the lawyer should be stated in a written policy explained to all lawyers and support personnel within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

checklist to screen imputed conflicts

6. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.
7. a) former client should be informed that the screened lawyer is now with the firm representing the current client.
b) The former client must be advised of the measures adopted by the firm to assure there will be no misuse of the confidential information.
8. It may prove helpful if the screened lawyer does not participate in the fees generated by the current client matter.
9. The lawyer's office should be located away from the offices of those working on the matter.
10. The screened lawyer should use associates and support personnel different from those working on the current client matter.
11. Every effort should be made to obtain the former client's consent to the new firm's representation. If that consent is given, it must be on the basis of a fully informed appreciation of the situation and only after receiving independent legal advice.

checklist of essentials of conflict checking systems

The underlying structure of a conflict checking system

A successful conflict checking system is an integral part of the law practice, and has the following criteria:

- It is integrated with other office systems.
- It is supported by a conflicts avoidance policy – e.g. no file is opened nor is work started on a file until a conflict check has been made and returns have been cleared.
- All members of the firm, lawyers and staff participate, with zero tolerance for opting out of the conflict checking system.
- Lawyers communicate within the firm regarding clients and potential clients.
- Client intake procedures exist for analysis of and decisions about new clients and new matters e.g. management must approve all new clients and matters before work begins.
- Education and training about conflicts and the firm’s procedures are ongoing. As responsibilities for lawyers and staff differ greatly, separate training must be developed.

checklist of essentials of conflict checking systems

Information needs of a conflict checking system

Key to a successful conflict checking system is the information input process. Information entered into the system must be complete, consistent and comprehensive and should include data on:

- new, current and former clients
- family members and allies of clients
- one-time consultations
- people who have been denied representation
- the subject matter of representation
- all parties involved or connected with the matter, including their counsel, their relationship with the client and their role in the matter
- adverse parties in a litigation or transaction
- board memberships and organization directorships
- parent or controlling shareholder of the corporate client
- directors of the corporate client
- subsidiaries or affiliations of the corporate client
- trade names of the client
- partners of partnership client
- all lawyers and staff in the firm, including family members
- lawyers' significant investments in the client/s' business.

checklist of essentials of conflict checking systems

Using a conflict checking system

Even the most comprehensive conflict checking system can be ineffective if it is not used properly.

When checking for conflicts, you need to:

- Create procedures to require conflict checking and provide for easy access to data for everyone in office.
- Conduct a conflict check at key trigger points:
 - when the first request for services is received;
 - after the first meeting where more information about who is involved in the matter is obtained; and
 - during the engagement if a change occurs concerning the parties.

Note that other checks may be necessary depending on the practice specialty.

- Include a check of various alternative spelling options.
- Circulate an inquiry among lawyers and staff about a new prospective client or matter and ask if they know of the existence of any conflict.
- Assign responsibility for checking to someone and develop a method for recording that a check was done.

checklist of essentials of conflict checking systems

Follow-up procedures for a conflict checking system

To maintain an effective conflict checking system, the following follow-up procedures should be in place:

- Circulate a list of new files opened to all lawyers and staff as a further check or back up to the conflict checking process.
- Put a written record of the conflict check in the file:
Documentation is key.
- Assign a lawyer or committee to advise on conflict matters.
- Obtain management approval of board appointments whether or not a company is a client.
- Establish a procedure for retaining outside counsel – for both yourself and your clients – when difficult issues surface.
- Regularly review policies and procedures on conflicts, and check whether all lawyers and staff are implementing procedures.

checklist for eliciting consent to waive conflict

The need for informed consent

To elicit an informed consent to waive a conflict of interest, you are obliged to explain in plain language the circumstances of the conflict.

The explanation should include the following:

- a description of the subject matter of the service to be performed
- the nature of the conflict
- the clients or other parties affected by the conflict
- who you will represent and not represent
- the factors that create the conflict
- the implications of the representation on each of the clients
- the positive aspects to proceeding with the representation
- the things you will do and not do
- the potential, if any, for the interests to diverge in the future
- that the information received by each client cannot be held in confidence against the other
- if a screen mechanism is used explain the intended process and its intended protections of information.

checklist for eliciting consent to waive conflict

Document the consent to waive in writing

The written consent should take the form of a clearly worded letter and should include the oral disclosure suggested above. This approach leaves little room for argument later about the ambit of disclosure.

The letter should also include the following:

- an acknowledgment by the clients or parties affected that even though the representation may be potentially adverse, they are prepared to proceed with the representation for now;
- an outline of the process to be followed if the interests cannot be represented together in the future. Include whether your representation will continue for at least one of the parties in the future as well as your entitlement to retain fees in the event that one of the clients has to seek alternative representation;
- a statement that the clients have been asked to obtain independent legal advice with respect to the waiver being signed. If obtained, include a copy of the certificate; if not obtained, reference the client's election to proceed without independent legal advice.

Maintain file copies of the consent

Copies of the signed consent to waive should be kept by the person in the firm responsible for monitoring conflicts and in the file.

checklist for managing a subsequent conflict

The approach suggested for managing conflicts identified before the representation begins is equally appropriate for conflicts which arise unexpectedly and subsequent to the commencement of an engagement. Some additional questions, however, need to be considered when managing a previously foreseeable conflict; these are outlined below.

Previously foreseeable conflict of interest situations

- Review the disclosure document and written consent which was prepared in light of the acknowledged potential for conflict; it may be that you determined a plan of action back then that you will now implement.
- Consider whether the matter has become contentious, making representation impossible at least for some of the parties affected.
- Discuss with all clients and parties affected that the conflict previously warned about has now materialized; review the nature, extent and implications of this conflict.
- If it is still appropriate to continue the representation, prepare a new consent in writing which outlines your disclosure and have it executed by all affected parties.

checklist for managing a subsequent conflict

- If representation becomes limited to only one or two of the parties, prepare non-representation letters for those who are no longer being represented and direct them to obtain independent representation for the remaining portion of the matter.
- Suggest that the parties obtain independent legal advice with respect to the consent being executed.
- Be alert to future signs that the representation of one or all of the parties is no longer appropriate.
- Re-examine conflicts policies and procedures and incorporate any changes that might have become apparent as being necessary to avoid subsequent conflicts.

action plan to contain a conflicts mess

The failure to identify and manage a conflict when it arises whether initially, prior to the start of the engagement, or subsequently can result in a veritable mess.

Defining a conflicts mess

Just what is meant by a conflicts mess? Any situation where all of the following apply:

- you find yourself representing more than one interest;
- at least some of the interests have become adverse and contentious;
- at least one of the clients' interests is being preferred or perceived by another of the clients as being preferred.

Perhaps one or more of the clients are not aware of these circumstances. It may be too late to manage the conflict through the disclosure and consent approach. You feel boxed in and are not sure what to do. Your reaction may be to try to fix it yourself or alternatively to simply ignore the problem. Stop there. Consider, instead, the Three Step Plan.

action plan to contain a conflicts mess

The Three Step Plan

● Action #1 – Recognize It's Not Too Late

First, recognize that although adverse effects may already be in play, you may be able to minimize them. The earlier you react to have the situation addressed, the better.

● Action #2 – Consult With Someone

Next, recognize that the objectivity of another lawyer will be helpful. Review the situation with a colleague, your firm management or outside counsel. Or consult the Law Society's Practice Advisory Service on a confidential basis free of charge (416) 947-3369 or 1-800-668-7380.

● Action #3 – Do Not Continue To Act

Finally, recognize that you cannot continue to act. It is a huge mistake to try to deal with the conflict yourself. No matter how good your intentions or how objective you think you are, you will be challenged by the competing interests inherent in the conflict in what is, by now, a contentious and possibly acrimonious situation.

It is almost a certainty that at least one of the clients will blame his or her loss on your conflict of interest and connected failure to safeguard their interest. You should inform all of the affected clients of the conflict, that it may affect your ability to act in their interests, and that they each should seek their own independent counsel. In that way, you have done something to contain the damage.

About the Author:

This material was prepared for the Lawyers' Professional Indemnity Company (LPIC) by **Karen K.H. Bell**, Risk Management Counsel.

Ms. Bell is widely regarded as an expert in the areas of law practice management, dispute resolution and loss prevention. She has chaired the CBAO's Law Practice Management section, has taught practice management and professional responsibility in the Law Society of Upper Canada's Bar Admission program, and, as a commercial litigator and defence counsel for insurers, has developed an appreciation for the application and benefits of risk management to law practice and business. Formerly a litigation partner at a large Toronto law firm, Ms. Bell has established her own specialty practice as Risk Management Counsel.

Undertakings - A Checklist

LAWPRO has received numerous inquiries from lawyers who, after giving undertakings, were either left holding funds for longer than anticipated or while the parties were in an unexpected dispute or later realized they cannot deliver what they agreed to.

The following is a list of suggestions and considerations when drafting undertakings to avoid potential issues.

1. Language:

- Ensure that the undertaking or agreement is in writing
- Use clear, plain language that is specific

2. Basic information:

- Is the undertaking revocable or irrevocable?
- Is the undertaking that of the lawyer personally or on behalf of a client without personal liability of the lawyer? (if the later, state it)
- Is the undertaking given on a “best efforts” basis only?
- Who is it addressed to?
 - Specific person or firm/institution
 - General
- How long will the funds be held?

Ensure compliance with Law Society of Ontario rules:

- Trust funds related to legal services¹ must not be held in trust beyond a minimally reasonable time after the legal services have been performed²
- Misuse of trust funds may be subject to discipline

3. Conditions:

- Specify the reason(s) for holding funds in trust
- Lawyers should only undertake matters that are entirely in their control to fulfil e.g., obtaining a discharge of a mortgage after obtaining a discharge statement and having the funds to satisfy the amount to pay off the obligation, or agreeing to deliver something as part of discoveries. Lawyers are reminded that there is no LAWPRO coverage ([Part III, Exclusion f](#)) for any matter that the lawyer undertakes that is beyond their control to fulfil

¹ See r. 3.2-7.3 of the [Rules of Professional Conduct](#); r. 3.02(6) of the [Paralegal Rules of Conduct](#); s.8(2) para. 3 of the [By-Law 9](#).

² See s. 8.1 of [By-Law 9](#).

(Rule 7.2-11 of the Rules of Professions Conduct) i.e., payment of monies if they do not have sufficient client funds in trust or delivery by a third-party.

- Confirm if funds will be held in an interest-bearing trust account
- Set out clear objective criteria for when funds are to be paid out:
 - Lawyers often report being unsure if the conditions have been met as the parties cannot agree, so it is wise to include objective conditions or those based on a third party's action or confirmation
- Clearly outline requirements for release of funds
 - Does the client or anyone else need to be informed in advance?
 - Is signed consent required by the client or a third party?
- Specify who receives the funds and method of delivery
- Consider making the undertaking to hold funds conditional on receiving the funds contemplated
- Is there any due diligence required to confirm how to satisfy the undertaking prior to giving the undertaking? (e.g. interest or other costs that might be added to the payout that were not anticipated and for which the amount held may not be sufficient, or are the actions contemplated confirmed or subject to change?)

4. **Default:**

- Include a default provision if conditions are not met or time expires
 - Suggested clause: "In the event that the condition(s) for the release of the funds is(are) not realized or the time for holding the funds has expired, and/or if anyone of the parties and/or a third party objects to the lawyer paying out the funds in accordance with the lawyer's understanding of the undertaking/agreement, the parties agree that the lawyer holding the funds may apply to the court to pay the money into court, which upon payment of the funds into court the liability of the lawyer in respect of the funds is extinguished, and that the expense of the motion to do so be paid out of the funds held in trust as part of the disbursement of the funds into the court."
- Consider including a provision to permit the use of the funds in trust to cover the cost of responding to any claim made against the lawyer for the release of the funds, pertaining to the funds, or to provide any information about the funds over and above a set periodic status statement, including the lawyers time where the lawyer is not negligent or involved in wrongdoing

5. **Fees:**

- State your fee for additional accounting, if any
- State when such fee, if any, starts accumulating (i.e., after XX days)
 - An additional fee could encourage clients to resolve their issues before they start incurring fees for the funds to continue to be held in trust

6. Amendments:

- Include a clause on how the undertaking may be amended or revoked (typically in writing)
- Specify who must consent and how changes are to be documented

7. Acknowledgment:

- Ensure the client reviews the agreement or undertaking in advance
- Is ILA required or is a waiver of ILA to be included?
- Have the parties acknowledge in writing that they understand the intent and terms of the undertaking and that they agree to the terms and conditions of the undertaking

8. Recordkeeping and Time Tracking:

- Enter any deadlines or conditions of the undertaking into your tracking and recording system
- Ensure other appropriate individuals in your firm are aware of relevant terms, conditions and timelines contained in the undertaking
- Track when the undertaking is fulfilled

The Law Society of Ontario states that “Lawyers and paralegals must fulfil³ every undertaking and honour every trust condition once accepted. This duty applies to any professional or practice-related promises the licensee may give.”

Lawyers should consider reporting a claim to LAWPRO if they are sued or threatened with a claim over funds held in trust and avoid taking steps on their own.

A clearly written and objective agreement or undertaking will avoid uncertainty and issues in the future.

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NOTE & DISCLAIMER: This checklist may not be complete and should be carefully reviewed and adapted to your specific circumstances. Its suitability will depend upon a number of factors, such as the specific needs and preferences of your client. It is provided by LAWPRO for your consideration and use when you draft your own documents. It may need to be modified to correspond to current law and practice. This checklist does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

September 9, 2025

³ See r. 7.2-11 of the *Rules of Professional Conduct* ("Rules"); rr. 2.02(1) and (4) of the *Paralegal Rules of Conduct* ("Paralegal Rules")





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.

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.

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

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.

Dan Pinnington is director of practicePRO, LAWPRO's risk and practice management program. He can be reached at dan.pinnington@lawpro.ca.

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 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.

Revised (2015):

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 **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.

Resources and CPD for Lawyers

LAWPRO's Practice Management Resources	
Staying Out of the Conflict Zone – Recognizing and Reacting to Conflicts of Interest in Real Estate Transactions	This article states real examples of conflicts of interest and risk management and action steps to take.
Consider threshold questions before accepting joint retainers in wills	This articles explores conflicts you should consider at the time of accepting the retainer, drafting, and post completion of the file.
Real estate undertakings	Explore FAQs regarding real estate undertakings and exclusions in the Policy.
Review Your Files – The Ultimate Limitation Period is Arriving Soon	This article discusses the 15-year Ultimate Limitation Period and issues to consider in relation to its application.
Additional Resources	
LSO: Guide to closing, retaining, and destroying client files	Guidance on how to close, retain and destroy client files including a link to a checklist.
LSO: File retention policies including sample file retention policy	Best practices for file retention including a link to a sample file retention policy.
LSO: Retainer agreement or engagement letter	Understanding best practices for retainer letters, and a link to a checklist.
LSO: Undertakings and trust conditions	Guidance on best practices when giving or accepting an undertaking or promise.

SPEAKER BIOS

Ian Sinke



Ian is a lawyer at Antoniou Law, a litigation boutique firm in Oakville, Ontario. Before being called to the Ontario bar in 2020, Ian completed his articles at LAWPRO, and has been involved in the field of lawyer liability and professional negligence as Preferred Counsel to LAWPRO ever since.

Before becoming a lawyer, Ian graduated from the University of Toronto Faculty of Law in 2019, after obtaining his B.Eng. in Electrical and Biomedical Engineering from McMaster University in 2016.

Currently, Ian has a busy litigation practice focusing on the defence of lawyers and the repair of lawyers' errors and omissions. He is experienced in defending lawyers in many areas of practice, including litigation, real estate, wills and estates, and others. Ian also acts on many title insurance matters for TitlePLUS, including title repairs, disputes, and subrogation matters. Ian takes a thorough, analytical approach to every file, while always being mindful of his clients' ultimate goals and needs.

Ian grew up in the Hamilton area and now lives in Burlington with his wife, who is also a lawyer. In their spare time, they enjoy travelling, both throughout Canada and around the world.

Christine Stojanov



Christine is a skilled litigator turned in-house counsel, serving and managing the defence of Ontario lawyers facing negligence claims. With a knack for simplifying complex matters, Christine proactively drives all manners of complex primary and excess claims toward early resolution.

Christine is uniquely positioned to address client needs in a wide variety of claims. In addition to over 10 years of experience in private practice, Christine has gained valuable insight into the needs, goals, and challenges of clients in her role as Claims Counsel for LAWPRO. As a member of LAWPRO's Specialty unit, Christine directs the investigation and defence of professional negligence claims in all areas of law, including those involving intricate coverage issues and

fraud. She is also the primary contact for cybercrime claims, an emerging and ever-increasing area of risk for big and small organizations alike.

As a litigator, Christine enjoyed a broad but intense practice with extensive experience in claims involving contractual disputes, property damage, product liability, professional negligence, and personal injury. Christine has also litigated commercial, life and disability, and subrogated claims, and has advised insurers on coverage matters for over a decade.

Leanne Fasciano



Leanne graduated from Windsor Law and practiced litigation at McLean & Kerr LLP and Dentons before moving to Cadillac Fairview as a Director in Legal Services. She then joined LAWPRO as Claims Counsel and is now Communications Counsel.