The Adviser

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DISPOSAL OF FILES AND RECORDS

The Practice Advisory Service and other Law Society Departments receive frequent calls concerning file destruction or disposal of law office records.

With reference to accounting records, members should refer to Regulation 15(2)(b) pursuant to the Law Society Act which, in summary, requires that general account records be maintained for six years and that trust account records be preserved for at least ten years. These Regulations are subject to the requirements of the Income Tax Act, and that Statute should be reviewed before destroying financial records.

The Law Society has not adopted any official guidelines for the destruction of files and has left it for individual practitioners to make their own decisions in this regard.

Essentially, members must examine the probability of the file being required for some later reference. Matters to be considered will include the following:-

(a) If the file is destroyed, what other sources are available to obtain information that may be required -e. g. Registry Office records, Court records, etc.

(b) The lawyer's liability for Errors and Omissions, and the applicable limitation periods - e.g. if a lawyer acted on a real estate purchase many years ago and, to the best of his knowledge, the clients still own the property, the lawyer may still have a responsibility for the title and should keep the file.

Some examples might be of assistance, keeping in mind that for some clients or situations these may not be the best or safest approach.

In estate matters, where there has been a spousal roll-over or distribution of assets to beneficiaries in specie, file information may be needed to establish acquisition cost when there is a disposition of the asset or assets. If there was no spousal roll-over, distribution had been made to beneficiaries in cash, and there are no continuing trusts, the file might be destroyed after a reasonable number of years (6 years is suggested). This assumes that all income tax returns had been filed, clearance certificates obtained and any other requirements of the Income Tax Act have been met. However, don't overlook the fact that inheritances are taken into account in the complex division of property calculations under The Family Law Act, 1986. This suggests that it might be prudent to retain, from estate files, records of moneys paid or assets transferred to beneficiaries.

In real estate transactions, if you have actual knowledge that the clients for whom you acted on a purchase had sold the property, you might destroy the file after six years following the sale. In this regard don't rely on hearsay or a change of address as evidence that the property had been sold, or may have been sold. In other words, in destroying real estate purchase files, you probably would have acted as solicitor in the subsequent sale of the property. In any event, be sure that you comply with Professional Conduct Rule 2, Commentary 6(1) which requires that you keep notes on the search of title (we suggest that this include copies of title requisition correspondence). These notes can be pulled from the file and re-indexed in a central repository for title search records.

The recent case of Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd., (1985) 51 O.R. (2d), 385, (C.A.) indicates that limitation periods applicable in cases involving professional negligence will commence as in tort rather than in contract, that is from the time the client became aware or ought reasonably to have been aware of an act or omission resulting in loss or damages. Consequently, for evidentiary purposes in Errors & Omissions claims, it may be necessary for solicitors to keep many client files almost indefinitely.

Some solicitors make a practice of turning closed files over to the clients. We question this practice because it leaves the solicitor with no records in the event of a negligence claim or some other dispute or question concerning the file. There is also the possibility of a file containing material, such as a personal notation by the solicitor, that could stimulate controversy.

It is the responsibility of the individual lawyer or firm to determine what records can be destroyed. Permission of the Law Society is not a prerequisite. Members should establish their own guidelines on this subject. We suggest that, where feasible, the lawyer who was responsible for the file should make the decision as to whether or not it can be safely destroyed. Keep in mind that client files frequently contain documents that properly belong to the client. For examination what constitutes client's property and solicitor's property see Aggio v. Rosenberg 24 C.P.C., 7. Before destruction, check the file for documents, and other client property, that should be removed and, if possible, delivered to the client.

When destroying files or records they should be shredded or incinerated in a manner to insure that confidential client information is protected. This standard should also apply to daily office waste that might contain confidential information (e.g. draft correspondence, draft pages for Wills, or other client documents or notes). It could be embarrassing to you or your client if such material goes astray in the disposal process and reaches the hands of someone who can use it prejudicially against the client, or who wants to make an issue of what appears to be careless disposal. In recent years there have been situations where newspaper reporters have made an issue of what they considered to be careless disposal by doctors of patient medical records. We know of at least one situation involving a reporter who claimed to find in a public place draft pages of a confidential document that a lawyer had placed in a waste basket.

We recommend that, when closing a file and transferring it to storage, you program your calendar or reminder system to review the file for possible destruction at some later date.

Microfilming might be a reasonable alternative to file-storage problems, at least for important files, documents or correspondence that could be needed for future reference.

ERRORS AND OMISSIONS CONCERNS

Missed Limitations: These have again become a major source of claims on the E. & O. Fund. The use of a centralized calendar or reminder system, with a notation on the lawyer's desk diary, is the most effective way of avoiding limitation problems. In fact, proper programming of files through a calendar or reminder system can increase your effectiveness and reduce much of the worry and stress of file management. Professional Conduct Rule 2, Commentary 6(m) requires members to maintain, at least, a limitation or tickler system to ensure an effective follow-up procedure with respect to files. If you don't have such a system, you are reminded that it is mandatory and must be used. Take the time to establish your system and review each of your files to see that all limitation dates, advance warning dates, and other key dates are recorded. When you take over a file from another solicitor, whether from within your firm or from outside, be sure to examine the file for limitations and record them immediately. Don't rely on someone else's notes of limitation dates. Some of our problems relate to file transfers between solicitors shortly before a limitation expiry date or reliance on the erroneous limitation notes of a previous solicitor. The transferee is responsible. If the Advisory Service can assist in establishing such a system, or reviewing your present system, call either Connie Hood or Edward Burlew of our office (Tel. 416-947-3369).

Status Hearings: There is concern that some plaintiff's solicitors are not appearing at Status Hearings pursuant to Rule 48.14 of the Rules of Civil Procedure. The Rule places an onus on the plaintiff's solicitor to set an action down for trial within one year of the filing of a Statement of Defence. If not set down within the one year period it is placed on the Status Hearing List. Notice is sent to the plaintiff's solicitor, who must give reason at the Hearing as to why the action should not be dismissed. Actions are being dismissed when the plaintiff's solicitor does not appear at the Status Hearing, and this clearly invites a negligence claim against the solicitor. We expect to have more on this subject in a later Adviser, but in the meantime;

(a) if you have been on the record as plaintiff's solicitor and there has been a change of solicitors, be sure that the Notice of Change has been properly filed in the Court Office. Don't leave it to the new solicitor. Otherwise, you may receive the Notice of Status Hearing and be faced with the attendant responsibilities to the client; or

(b) if you can't locate your client for instructions (which we suspect is a major contributor to these problems), you may need to notify the client of the risks involved, by registered letter to the client's last address, and consider moving to get off the record before the matter is placed on the Status Hearing List, or

(c) if the client does not want to proceed, obtain written instructions to file a Notice of Discontinuance.

In any event, don't simply ignore the Status Hearing.