CLOSE X
Loading Image...
CLOSE X
Loading Image...

Law firms need document retention policies too

Tech Support

Written by Jason Leung
Posted Date: October 1, 2012

This article will discuss document retention and destruction practices that Canadian law firms are using today. If your law firm doesn't already have a document retention and destruction policy for both paper and electronic files, it should implement one as soon as possible.

Why does my firm need to retain documents from closed client files?

There are legal and regulatory requirements regarding document retention. The Ontario Limitations Act 2002 mandates a basic limitation period of two years for actions against lawyers for negligence and actions for the recovery of purely financial loss caused by professional negligence. There is also an "ultimate" 15-year limitation prescribed in the act, which runs for 15 years after the date of the occurrence giving rise to the claim, even if the material facts have not been discovered. Furthermore, no limitation period exists for criminal conduct or misconduct.

The Law Society of Upper Canada bylaws, for instance, require all records other than trust account records be kept for at least six years. Trust account records must be retained for at least 10 years. Whether the files are stored electronically or otherwise, documents must be "readily accessible" within a 30-day time frame.

The Income Tax Act requires all records and books of account be retained for six years from the end of the taxation year of such records. The Income Tax Act allows for such records to be stored electronically as long as they are "electronically readable."

An important reason for retaining documents from closed client files is they may be material to defending future allegations of malpractice or assessments of account. A negligence claim can be made long after the alleged incident has occurred.

Also, lawyers should retain records to help them maintain an effective and efficient practice. Valuable precedents and legal research memoranda often have their genesis in ongoing client matters. Once a client matter is completed, the lawyer should consider whether file material can be put to such beneficial uses. However, delete or block out client information so it is not inadvertently disclosed when the document is used as a precedent.

Closing a file

A file's closing date is generally the date on which the responsible lawyer has determined the matter has

been completed and, in some cases, a file destruction date has been set. Most lawyers consider a file closed when all matters set out in the retainer have been dealt with and accounting issues have been settled.

A firm's policy for closing files may include specific requirements for some practice areas. For example, Stephen Mullings, a partner at the insurance litigation firm Dutton Brock LLP, says when an insurance litigation case arrives at a settlement, his firm specifically requires the following prior to closing the file: (i) original executed full and final releases; (ii) a dismissal order with respect to all claims and crossclaims, on a without-costs basis (in some cases a notice of discontinuance may suffice); (iii) settlement funds have been issued to the plaintiff; and (iv) all accounts in the matter have been satisfied.

Joseph Neuberger, the managing partner at criminal defence firm Neuberger Rose LLP, says files remain open at his firm until: (i) the case is concluded, such as where a trial has been completed and the appeal period has passed; (ii) the final account has been settled; and (iii) if necessary, the Crown disclosure has been returned.

John Gillies, the director of practice support at Cassels Brock LLP, says his firm's practice includes stripping the paper file of documents already stored in the firm's document management or e-mail systems. At Ridout & Maybee LLP, if any documents can be retrieved or reproduced from another source, including documents available on a public registry, we strip these documents from the file.

Eugene Cipparone, the director of professional support at Goodmans LLP, says his firm conducts an annual review of files that show no recent activity and have no work in progress, trust funds, or accounts receivable. When such a file is identified, the responsible lawyer is told the file will be closed unless he or she requests that it remain open.

It is important to ensure the file is marked as being closed and maintain a record to identify all closed files. This record should include the file closing date and, if applicable, the file destruction date.

Document storage

Many Canadian law firms store closed paper files in a secure offsite location to maintain client confidentiality and be protected against damage or loss. However, the files must also be retrievable within 30 days. One of the disadvantages of storing paper files is the cost associated with shipping the paper files to and renting space in a storage facility. Storage facilities generally charge about 25 cents per box per year, and these costs can add up significantly.

Electronic storage is generally more economical and this is one of the reasons many firms, including my own, have been moving towards maintaining only electronic files. If you intend to use electronic storage, it is important to make sure all relevant paper documents have been scanned and saved prior to closing the file. As with paper storage, electronic storage must be done in a manner that maintains client confidentiality and is readily accessible.

Mullings says once a file is closed, his firm removes any electronic documents (Word, pdf, etc.) from the server and saves backup copies to CD-ROM.

Document destruction

In accordance with LSUC bylaws, some Ontario firms set an earliest file destruction date of six years after the file closing date. Neuberger says his firm's retainer agreement includes a clause that sets an

earliest file destruction date of six years unless the client requests otherwise. Other firms have taken a more cautious approach and have set the date at 15 years, in view of the “ultimate” limitation period under the Ontario Limitations Act.

Regardless of whether it’s six or 15 years, there are exceptions to this rule. File destruction should generally be delayed in cases where the client is a minor or mentally incapacitated. In my firm’s intellectual property practice, for patent prosecution files in which a patent issues, the file destruction date is set to be at least two years after the patent expires or lapses.

Of course, the file destruction date should be suspended in situations such as an actual or potential errors or omissions claim made against the firm, complaints made to the law society, audits, government investigations, and so on.

Some firms have been even more cautious and not adopted a formal document destruction practice for client matters. Cipparone says while Goodmans has destroyed most of its non-client files in offsite storage, it has yet to destroy any for client matters, including files from the firm’s earliest years.

Goodmans has closed paper files dating back to the 1960s in an offsite storage facility. Cipparone mentions his firm is considering destroying some of them after Jan. 1, 2019 which is 15 years after the Ontario Limitations Act came into force.

One downtown Toronto law firm told me it had previously hired full-time staff to co-ordinate the pulling of paper files that were closed for more than 15 years from offsite storage and bring these paper files to the responsible lawyer who could then authorize their destruction. However, they found that in the short term, it was more economically feasible to keep the paper files in storage. The cost of pulling a box of paper files from storage was about $7 to $8 per box and did not include having to pay staff to co-ordinate it all. As such, this practice was suspended.

Our firm maintains a record of destroyed files including the name and address of the client, the file number, a brief description of the matter, the file closing date, the file destruction date, and the name of the responsible lawyer.

Jason Leung (jleung@ridoutmaybee.comjleung@ridoutmaybee.com) practises intellectual property law and is the director of knowledge management at Ridout & Maybee LLP in Toronto.

Add comment

Name (required)

E-mail (required, but will not display)

Title (required)

1000 symbols left

Notify me of follow-up comments

Type the text

Privacy & Terms

Send

JComments