

Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society's Professional Indemnity Scheme who do not receive the Law Society Bulletin.

File Closure – Removal From Storage & Destruction

By Gianna Di Stefano, PII Risk Manager

Law Claims has received a number of enquiries relating to the storage and retention of clients' files. We have also received notifications of potential claims against practitioners arising out of the inadvertent destruction of files which should have been kept indefinitely e.g. wills and estate files, capacity issues, negligence and PI claims settlements to name a few.

Policies for closing and destruction of files by law practices can have serious consequences for a law practice from a risk management perspective unless fundamental matters are included in the practice policy and adhered to by all staff.

The Law Society of South Australia has published a "Best Practice Guidelines for Closing, Storage and Destruction of Files" which is reproduced below. We encourage practitioners to review firm policies currently in place or implement one if you do not currently have such a protective measure in place. It is anticipated that the Guidelines below will be of practical help to practitioners, however, it is not intended to be a definitive guidance on the possible options available to the profession.



1. Terms of Engagement

The standard terms of engagement or retainer agreement between a law practice and its client should include a written and signed authority from the client to destroy the client's file in accordance with the firm's usual practice.

2. Closing Files

Before a file is closed, a partner or senior lawyer should review the file to ensure that:

- 2.1 any loose unfiled paperwork is sorted and placed securely in the file;*
- 2.2 draft workings, records of telephone calls, messages, research materials should not be culled and destroyed except where multiple copies are present. One exact copy only of any given document need be retained but destruction of amended drafts could hinder the capacity of a law practice to defend itself in relation to negligence, taxation of costs or disciplinary matters.*
- 2.3 all work required to be done has been completed:*

for example:

- 2.3.1 *have all documents been stamped or registered?*
 - 2.3.2 *has the court order/judgment been delivered and disclosed to the client or served on other parties?*
 - 2.3.3 *has counsel's brief been returned with any original or copy documents?*
 - 2.3.4 *have all exhibits tendered in court been retrieved?*
 - 2.3.5 *have all original documents been returned to the client?*
 - 2.3.6 *has a final account been rendered and have all outstanding disbursements been paid?*
 - 2.3.7 *is any money still standing to the client's credit in the trust ledger for this matter?*
 - 2.3.8 *has a final trust account statement been delivered to the client?*
- 2.4 *e-mails and documents sent or received by e-mail:*
- *have been printed in hard copy and stored with the file: or*
 - *saved on to disk or CD for storage with the hard copy file*
- 2.5 *Copies of the trust ledger cards and trust account records must be printed in hard copy and placed securely in the file to comply with the trust account regulation (Reg 23) which requires trust records to be retained for 7 years from the date of the last entry.*
- 2.6 *If the file is to be stored electronically, the entire file should be scanned and the client advised of the date on which the hard copy file will be destroyed. The client may wish to collect the hard copy file.*
- 2.7 *A letter should be sent to the client to advise:*
- 2.7.1 *that the retainer or representation is concluded and*
 - 2.7.2 *the file has been closed and*
 - 2.7.3 *of any relevant arrangements for storage and retrieval of file or of any remaining duties or obligations of the client,*
- for example:*
- *the date for renewal of a licence*
 - *the date upon which an option needs to be exercised*
 - *if the retainer was for advice only, the date on which any time limitation may expire*

3. Recommended Retention Period

*In normal circumstances the recommended **MINIMUM** retention period is 6 years (see R 7.2.1, Rules of Professional Conduct & Practice). However trust records and files to which trust transactions relate are required to be retained for 7 years from the date of the last entry.*

The firm may consider that commonly high risk matters such as commercial transactions, conveyancing and mortgage transaction files should be retained for longer than the minimum period. No file should be destroyed without giving consideration to the statutes which may have an impact on the subject matter of the file. It is not possible for these guidelines to contain an exhaustive list, but some pertinent examples are:

3.1 Income Tax Assessment Act 1936

*Records must be retained for **5 years** from the date on which the document was prepared or obtained, or from the date of the relevant transaction, whichever is the later.*

3.2 **Legal Practitioners Act 1981 and Regulations 2009**

Trust ledger account records **7years** and all other trust records and supporting documentation (including client files) **7 years**.

3.3 **Corporations Act 2001**

Financial records must be retained for **7 years** after the completion of the transaction. Incorporation records should be returned to the client corporation for safe custody.

3.4 **Limitations of Actions Act**

Most actions under contract and tort must be commenced within 6 years but consideration should be given to the provisions relating to extensions of time.

Records should be kept for a **MINIMUM** of 7 years – i.e. 6 years plus 1 year for service of any proceedings.

The period of retention of 6 years may need to be much longer depending on the circumstances.

4. **When is a longer period necessary?**

Examples are:

- **Wills and Estate Planning**

Claims may arise for lengthy periods after the testator's death and the file, not just the will could contain evidence of the testator's intent.

- **Leases**

Where a lease with an option to renew is recorded, a claim could arise up to 6 years from the last renewal date

- **Mortgages**

The term of a mortgage may well exceed 6 years

- **Adoptions**

Consideration should be given to whether these files should ever be destroyed.

- **Financial Agreements**

Consideration should be given as to whether financial agreements under Part 5A of the Family Law Act 1997 or Part VIIIA of the Family Law Act 1975 should ever be destroyed.

Clients under a Disability

- **Infants**

When an infant is involved in litigation or in a deceased estate, the file should be retained until the period has expired within which the infant has to ratify the contract.

- **Persons Under A Guardianship Order**

Consideration should be given to retaining these files indefinitely.

- **Other Matters**

Matters which generally may not determine by a known date, such as trusts/superannuation deed, partnership agreements, unregistered easements, unregistered unrevoked Powers of Attorney.

5. **Client's Request to Collect file**

If a client requests the collection of a file at the time that the file is closed or during the file's designated retention period, the firm should consider copying and retaining either all or the relevant portions of the file until the designated date for destruction.

The cost of copying the file is the law practice's responsibility.

However, if a cost is paid to retrieve a file from an external storage company, this is a disbursement which may be charged to the client.

If a charge is to be made, the client should be informed of the charge in advance and it would be appropriate to include such matters in the retainer agreement or terms of engagement.

It should be standard practice management to obtain a signed receipt for a file when collected by a client and that receipt should be retained with the copy of the file.

6. Destruction of documents

Each file should again be reviewed and if the decision to destroy is made, all necessary steps should be taken to ensure that original documents have been returned to the client when the file was archived and all relevant time periods have expired.

A permanent record should be made of the date and method of destruction and upon whose authority it was destroyed.

Hard copy files should be professionally shredded and CDs destroyed in a manner that ensures that no breach of client confidentiality can occur.

Other queries that have been raised with us include the issue of electronic storage. The same issues in principle arise with electronic data as with other material i.e. there will be a need to consider limitation period, ownership, confidentiality and an adequate risk assessment of the individual file is recommended prior to destruction. In addition, electronic data needs to be the subject of further safeguard. Systems need to be in place to safeguard the authenticity, reliability, accessibility and security of all electronic material as it is much easier to corrupt electronic data (whether by accident or not) as opposed to paper.

Access to files operates as a prime risk management tool. We trust this article has been of some assistance in raising your awareness of the risks of disposing of files after 7 years when the reality is many claims or relevant issues can arise much later. In particular, storage of files can help practitioners avoid 'no negligence but cannot prove it' types of claims. Where files are available the documents can assist rebut allegations.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.

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