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## **FORBES ROTH BASQUE**

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November 2, 2010

College of Psychologists of New Brunswick  
238, St-George St., Suite 5  
Moncton, (NB) E1C 1V9

Attention Ms. Cécile Mallais, Registrar

Ms. Mallais,

**RE: Destruction of Files**

You have asked for an opinion with regard to the destruction of files. You would like a uniform rule applicable to all psychologist, whether they are in private practice, work in industry, are employed in a government institution or are in a non-government agency.

We place client files in two groups: 1) those where the relationship is ongoing, and 2) those where the relationship is ended. The first does not require our attention here. We assume it is clear those types of files should never be destroyed. For the second group, we see four (4) reasons to keep client files:

1. There is a chance the relationship will revive;
2. Protection from an action in negligence;
3. Protection from a complaint to the College; and
4. Protection from a criminal complaint.

Over and above ethical considerations, this issue is also informed by two (2) pieces of legislation: the *Personal Health Information Privacy and Access Act* (“PHIPA”), and the *Limitations of Actions Act* (“LAA”). You can access both at <http://www.gnb.ca/0062/acts/acts-e.asp#GlossP>. For your convenience, I am appending an electronic copy of both to this opinion.

Materials canvassed from numerous sources invariably suggest that the safest policy for any professional is to retain every client file. However, an effective and consistent policy of stripping down a file, notifying and providing the client with their documents, retaining the remainder for various time periods and ultimately destroying a file, is entirely compatible with professional responsibility. There will always be a business risk associated with file destruction but it is recognized that the cost of keeping everything will at some point outweigh the risk of destroying a

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file. A policy to address this known risk in a fashion that can be tolerated by the psychologist or the employer can be developed. The College can prepare guidelines and checklist for file closure, retention and destruction for the purpose of providing assistance to psychologists in their practice.

The Canadian Code of Ethics for Psychologists, Third Edition, provides that in adhering to the Principle of Respect for the Dignity of Persons, psychologists :

*1.41 Collect, store, handle, and transfer all private information, whether written or unwritten (e.g., communication during service provision, written records, e-mail or fax communication, computer files, video-tapes), in a way that attends to the needs for privacy and security.*

PHIPA provides that:

*55(1)A custodian shall establish and comply with a written policy for the retention, archival storage, access and secure destruction of personal health information that*

*(a)meets any requirements prescribed by regulation or any requirements contained in any Act of the Legislature,*

*(b)protects the privacy of the individual to whom the information relates,*

...

The definitions in PHIPA bring your members into the definition of “custodian.”

It is a principle of privacy legislation that personal information should not be retained longer than it is needed. And not all files look alike.

On May 1, 2010, the new LAA came into force. It does two things for the professions:

1. It establishes a two-year limitation period that runs from the day of discovery of the error by the client; and
2. It establishes an ultimate limitation period of 15 years from the day on which the act or omission on which the claim is based occurred.

This means that a psychologist cannot be sued two years after the client discovers what s/he believes to be alleged negligence, and ultimately 15 years after the last day when services occurred, no matter when the alleged negligence occurred. However, for claims involving infants, the limitation period does not begin to run until after the infant reaches the age of majority.

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We suggest you develop not a bylaw, but a policy recommending minimum file retention standards. The matters that need to be addressed include the following:

1. **File closure:** When a client is no longer current or the mandate has been completed, the file should be closed. The psychologist involved in the matter should review the file personally and return to or provide to the client all documents and property which belong to or were provided by the client. The file can further be stripped down by discarding multiple copies of documents, unless there is a reason to keep earlier drafts. It is essential that the psychologist be involved in the process of stripping down the file. The client should be notified well in advance that the file is being closed and will eventually be destroyed. A file closure checklist should be incorporated into the individual psychologist's file closure review. A diary date should be set, 15 years hence.
2. **File retention:** Files should be maintained for fifteen (15) years from the day when the last service was rendered, being the ultimate period the psychologist is liable to claims involving professional negligence. Typically most claims arise within ten years of closing the file. It is unlikely that a complaint that is over 15-years old could be prosecuted. It is of particular importance to keep permanent notes of the scope of engagement and notes where clients failed to follow your advice.
3. **Infants and persons suffering a mental disability:** Due to the fact that for claims involving infants, the limitation period does not begin to run until after the infant reaches the age of majority, the 15-years should be calculated from the infant's 19<sup>th</sup> birthday. For claims involving mentally incompetent adults, permanent retention of files is strongly recommended.

There are however other considerations, depending on the type of file:

4. **Income Tax Considerations:** The *Income Tax Act* provides some specific rules concerning retention of records. Most of these deal with a person carrying on business and require one to keep accounting records, including supporting vouchers and cheques at least six years. These limitation periods can be rendered ineffective if there has been misrepresentation, fraud, etc., relating to the issues in the relevant return, and Canada Revenue Agency can then go back an indefinite number of years.
5. **Custody and Access matters:** In the future, the client may need to make, or respond to, an application to vary and will need to establish or negate a change of circumstances. Documents may be necessary for the conduct of the application to vary. A parent can now be obliged to support a child through more than one university degree.

6. **Child Protection Cases:** It will be most important to have and to retain documentation, supporting instructions and the factors taken into consideration for your recommendation.
7. **Adoption:** It will be most important to be able to establish from the perspective of all sides valid consent and adequate investigation
8. **Advice and reports :** While you may want to destroy the underlying documents, you should not destroy opinion letters and reports.
9. **Sexual assault:** There is no “Statute of Limitations” in the Criminal Code of Canada, nor is there one in the *College of psychologists Act* with regard to the sexual assault provisions. The 15-year limitation period in the LLA does not apply to criminal matters, only civil matters. Alleged victims of sexual assault can make complaints years after the “events” they say occurred. If the psychologist has any doubt that the former client could some day make an allegation of sexual impropriety, the psychologist should keep the file forever.

### **File Destruction**

PHIPA provides that:

*55(1)A custodian shall establish and comply with a written policy for the retention, archival storage, access and secure destruction of personal health information that*

...

*(c)requires that a custodian who destroys personal health information to keep a record of the individual whose personal health information is destroyed, a summary of the contents of the record, the time period to which the information relates, the method of destruction and the name of the person responsible for supervising the secure destruction.*

When your reminder system brings forward on your chosen monthly, quarterly or semi-annual basis the names/numbers of files scheduled for destruction, a second review should take place. Again, this review should be made by the psychologist involved (and if this in impossible, then by another psychologist familiar with the matter or type of file). At this stage there are really three routes to follows:

1. Retain the file for a longer period if something has happened during the retention period to justify this, i.e. the client has returned;

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2. Some psychologists will favour contacting the client again about the possibility of destroying the file. This would be more likely if no contact had been made at the time of file closure. However, contact may be difficult to make with the client due to passage of time (death, relocation, etc.).
3. Destroy the file. When destruction takes place, confidentiality of the material should be maintained, e.g. shredding file contents. At a minimum, a permanent record must be kept of all files destroyed Information which should be maintained includes:
  - a. client's name and address, file number and brief description of subject matter;
  - b. notices to client of file closure and destruction;
  - c. date file was closed and psychologist who authorized closure;
  - d. date file destroyed and psychologist who authorized destruction; and
  - e. location and nature of records retained.

This is an outline of what is required. I hasten to add that there are many other obligations imposed on your members by PHIPA, such as regarding collection, use and retention of information, and what they must do should the information be challenged. I have restricted my opinion to answering your question. Should anything further be required, please advise.

Yours truly,

FORBES ROTH BASQUE

A handwritten signature in blue ink, appearing to read 'G. Robert Basque', written in a cursive style.

G. Robert Basque, Q.C.