

Technology Committee

The two key functions of the Technology Committee of the Law Society of Ireland are to monitor developments in technology which are relevant to the legal profession, and to promote the use of technology as a business resource within the profession. In addition, the Committee provides assistance and advice to individual members on a one to one basis throughout the year. This article is one of a series of articles posted on the Technology Committee section of the Law Society website



RETENTION OR DESTRUCTION OF FILES

AND OTHER PAPERS AND ELECTRONIC STORAGE

This note provides general guidance for solicitors on the retention and destruction of client files and documents. The note reviews the position concerning adequate periods of retention following the completion of a transaction on behalf of a client and the effective closing of the file.

It is suggested that the conclusion of a transaction occurs when all relevant details are completed including appropriate filing or registration requirements, payment by the client of all appropriate fees and costs and when all appropriate materials and documents have been returned to the client.

This note offers general guidance but may not be suitable for particular situations. It is always a matter for individual solicitors to make their own professional judgement with regard to ongoing retention of files and documents following the expiry of the statutory periods for retention.

Solicitors should be aware that a file belongs to the client once the solicitors costs and outlays have been paid, although there are certain limitations on what the client will be entitled to. At the start of a transaction it may be appropriate to explain to a client the retention policy that you operate for closed files. A solicitor is not expected to retain a file indefinitely.

This note relates to the retention and storage of paper files (i.e. documents, papers, correspondence and other materials which remain in the possession of a solicitor following the conclusion of a transaction) and the retention and storage of such files in

electronic format. Clearly, there is a need to retain original executed agreements, deeds and other engrossments on an ongoing basis and such agreements and deeds are not dealt with in this note.

The retention and storage of paper files pose a number of problems for solicitors. These include the cost and management of physical storage space, security and conservation issues, difficulties in identification and location of files and identification of files suitable for destruction. Accordingly, this note also provides guidance on the electronic storage of client files and documents.

GENERAL BACKGROUND

The Law Society last issued a practice note on recommended file destruction and retention policies in 1996. This note offers guidance in relation to the retention or destruction of files and other papers taking note of other changes in regulatory requirements in the interim period.

The *Guide to Professional Conduct of Solicitors in Ireland Law Society* (2nd Edition 2002) states at 9.13 "In order to protect the interests of clients who may be sued by third parties and also to protect the interests of the solicitors' firm which may be sued by former clients or by third parties, a solicitor should ensure that all files, documents and other records are retained for appropriate periods." The reference to 'appropriate periods' is to appropriate periods of limitation for the issue of proceedings.





NOTE:

Because a court may grant a renewal of a summons for one year and thereafter, in certain circumstances, for a further six months, solicitors may wish to add 18 months to the relevant retention periods.

MANDATORY PERIODS FOR RETENTION

Purpose	Category of Files or other records	Period not less than	Statutory or regulatory reference
Protection of Solicitor – period of limitation within which clients can bring proceedings relating to the solicitor/client contract. Availability of the file for the solicitor’s professional indemnity insurers	All files except as below	6 years	Statute of Limitations Act, 1957, as amended, and other relevant legislation
Protection of the client- Periods of limitation within which the client can be sued by third parties arising out of a transaction	All files except as below	6 years	Statute of Limitations Act, 1957, as amended, and other relevant legislation
Protection of solicitor and client	Conveyancing files	12 years	Statute of Limitations Act, 1957 for title matters
Protection of solicitor and client. Various periods of limitation	Files of infant	Relevant period of limitation after child has reached majority	Statute of Limitations Act, 1957, as amended, and other relevant legislation
Protection of solicitor and client	Files of mentally incapacitated persons	Indefinite	Various
Protection of solicitor, executors and beneficiaries	Probate files	12 years but where trust – see below “Trust files”	Various
Protection of solicitor, client, trustees and beneficiaries	Trust files	The lifetime of the trust plus 12 years	Various
Protection of solicitor and testator	Notes relating to drafting of will	Indefinite	Various
Law Society investigation of complaints of inadequate services or excessive fees	All files	5 years	S. 8 and S. 9 Solicitors (Amendment) Act, 1994
Compliance with accounts regulations	All files – the file forms part of accounts records	6 years	Accounts Regulations, 2001 S.I. 421 of 2001
Compliance with accounts regulations	Accounts records	6 years	Regulation 20 (2) Solicitors Accounts Regulations 2001 S.I. 421 of 2001
Compliance with anti-money laundering legislation	(1) Documentation evidencing the identity of clients (2) Original documents or admissible copies of transactions	5 years	Criminal Justice Act, 1994 and Criminal Justice Act (Section 32) Regulations 2003 S.I. 242 of 2003
Compliance with revenue and tax law	All files	6 years	Various
Compliance with VAT regulations	Files of persons with a taxable interest in land	Period of taxable interest plus 6 years	Section 16 VAT Act, 1972 as amended by Section 121 Finance Act, 2003





STATUTE OF LIMITATION REQUIREMENTS (NOT LESS THAN APPROPRIATE LIMITATION PERIOD)

It is recommended that files should be retained for at least the duration of the appropriate limitation period as set out for specific actions under the Statutes of Limitation 1957 (as amended). A list of the appropriate limitation periods is set out in each annual edition of the Law Directory.

GENERAL MATTERS (NOT LESS THAN 6 YEARS)

Subject to any other legislative or regulatory requirements all other files need only be retained for 6 years. If a solicitor continues to act on behalf of a client for a period longer than 6 years, some solicitors like to retain all the files of that client.

CONVEYANCING FILES (NOT LESS THAN 12 YEARS)

Most solicitors retain conveyancing files for 12 years, taking the view that adverse possession would sort out any difficulties which might necessitate reference to the sale or purchase file at a later date. However, it is also valid to argue that a vendor's file need not be retained for this period, because the purchaser's solicitor would have had the opportunity of full investigation of title and will be precluded from raising queries post completion, except in cases of fraud or misrepresentation.

INFANT CASES (AS APPROPRIATE)

As time does not begin to run against infants until their majority, infant files must be identified and retained for the appropriate period.

MENTALLY INCAPACITATED PERSONS (INDEFINITE)

A solicitor cannot accept instructions from a mentally incapacitated person. However, occasionally, following the completion of cases there may be a suggestion by third parties that instructions should not have been accepted. In any such case, the file should be retained indefinitely.

PROBATE FILES

Prior wills should be kept in the probate file and destroyed when the file itself is being destroyed.

DRAFTING OF WILLS (INDEFINITE)

When a solicitor drafts a will for a client the solicitor should consider whether the file should be retained with the original will and then be retained indefinitely.

INVESTIGATION OF COMPLAINTS (NOT LESS THAN 5 YEARS)

The Solicitors (Amendment) Act, 1994 provides that the Law Society may not investigate complaints of inadequate services or excessive fees which relate to matters arising more than five years previously. Files must be retained for this period.

SOLICITORS ACCOUNTS REGULATIONS (NOT LESS THAN 6 YEARS)

Regulation 20 of the Solicitors Accounts Regulations 2001 (SI 421/2001) sets out the minimum accounting records which a solicitor must maintain and keep in connection with his or her practice. In addition, the regulation requires that a solicitor must retain these records for at least six years. The regulations also require that the original of each paid cheque drawn on each client account must be retained (ie as opposed to a copy cheque). The regulations would indicate that the original of each paid cheque together with the corresponding cheque stubs or requisition dockets are to be retained. This requirement would appear to preclude the storage of these items in electronic format at present.

ANTI-MONEY LAUNDERING REQUIREMENTS (NOT LESS THAN 5 YEARS)

The provisions of the Criminal Justice Act 1994 (Section 32) Regulations 2003 (SI 242/2003) extend certain anti-money laundering requirements to solicitors. Solicitors are now designated bodies, for the purposes of Section 32 of the Criminal Justice Act 1994 and are required to satisfy themselves as to the identity of any new client. Under the requirements of the legislation, records evidencing the identity of a client should be retained for a period of five years after the relationship of the client has ended. In addition, the original documents, or admissible copies, relating to the relevant transaction should be retained for a period of at least five years following completion of the transaction. Section 32(9) of the 1994 Act states:-

“Where a designated body identifies a person for the purposes of this section, it shall retain the following for use as evidence in any investigation into money laundering or any other offence,

- (a) in the case of the identification of a customer or proposed customer, a copy of all materials used to identify the person concerned for a period of at least 5 years after the relationship with the person has ended,
- (b) in the case of transactions, the original documents or copies admissible in legal proceedings relating to the relevant transaction for a period of at least 5 years following the execution of the transaction.”





REVENUE AND TAX REQUIREMENTS (NOT LESS THAN 6 YEARS)

A general obligation to keep certain records for tax purposes is imposed by Section 886 of the Taxes Consolidation Act, 1997. The section requires that sufficient records must be kept as will enable full tax returns to be made and does not qualify the period for which they must be kept. While the definition of records is specifically related to accounts and books of accounts etc, certain other supporting documents must be retained by the person obliged to keep the records for six years after the completion of the transaction to which they relate. It appears that linking documents and returns do not have to be retained where an Inspector notifies the person concerned that retention is not required.

Section 886 of the Taxes Consolidation Act allows for the records to be kept in any electronic, photographic or other process approved of by the Revenue Commissioners.

VAT LEGISLATION

Section 16 of the VAT Act, 1972, as amended by Section 121 of the Finance Act, 2003 requires records appropriate to VAT payments to be kept for a period of six years from the date of the latest transaction to which the records, or any of the other documents specified, relate. Accordingly where solicitors act for a client in the acquisition of an interest in leasehold or freehold property that is subject to VAT, files relating to the acquisition or re-development of the property and the treatment of VAT should be retained as necessary.

DATA PROTECTION

Section 2(1)(c) of the Data Protection Act, 1998, as amended by the Data Protection (Amendment) Act, 2003 provides that 'personal data' must only have been obtained for one or more specified, explicit and legitimate purposes. It also provides that personal data shall not be kept for longer than is necessary for that purpose or those purposes. A client file will probably contain 'personal data' within the meaning of the 1988 Act (i.e. personal data in processible form). Under the provisions of the legislation, it would appear that if the data is being retained for a "legitimate purpose" (for example to comply with a regulatory, statutory or some other valid requirement) then a solicitor may retain data beyond the closing of the client file.

COMPANIES ACTS REQUIREMENTS

There are a number of requirements imposed under the Companies Acts 1963 – 2003 relating to the retention of company books and records. These requirements (for example S.203 of the Companies Act, 1990) are imposed on the company itself and are not considered directly relevant to this guidance note.

DESTRUCTION OF FILES

When the relevant statutory or regulatory periods for retention or periods of limitation have elapsed and where the solicitor is satisfied that there is no further purpose in retaining a client file or documentation, he or she may wish to destroy the contents of a file. The decision as to whether or not to destroy the contents of a file is a matter of judgement for each individual solicitor. The decision should be taken with particular reference to the nature of the transactions conducted in the file and with due regard to the possibility of any further need to access or reproduce material from the file.

CONFIDENTIALITY

In arranging for the destruction of a file (whether in paper or electronic format) solicitors are reminded of the need to preserve client confidentiality. Old paper files should be shredded in a manner which will completely obliterate their content. Any such destruction should take place under the supervision of the solicitor. A number of commercial firms provide destruction services. Care should also be taken to dispose of electronically stored material in a manner which preserves client confidentiality.

ELECTRONIC STORAGE STORAGE IN ELECTRONIC FORMAT

In all situations where documentation is being retained or stored in electronic storage format it should be retained at a minimum for the same period(s) as would apply to the paper version. Where documentation is properly stored in an electronic format (and subject to any specific statutory or regulatory limitations on storage or retention in electronic format), the paper version (if one existed) need not be retained.

The three key issues affecting electronic storage are:

- permanency or durability of the format;
- accessibility of the format;
- security of the format.

The most likely electronic storage medium that will be considered for archival storage is on CD ROM. The issues regarding durability, accessibility and security will also apply to other electronic storage media.

The advice of systems providers should be taken on the ongoing durability of the particular CD ROM writer and recording system being used. Solicitors should consult with their suppliers on both the guaranteed and proven maximum period of storage applicable to CD ROM (or other electronic storage medium). The electronic storage medium must be capable of storing the documentation in a durable, accessible manner for as long as the statutory or regulatory periods require.

Solicitors should confirm with their suppliers that





it will be possible to export or reproduce onto paper the content of any electronically stored material.

Solicitors are also advised to consult with their insurers on the acceptability of electronic storage of client files and documents in the event of a claim against the solicitor.

Where material is being stored electronically it should be in an open format so that its future availability and accessibility will not be compromised. For example a standard open format would be *Adobe Acrobat pdf*. Similarly, where material generated is in a text processing package (ie Word or Wordperfect) consideration should be given to a backup of the material in RTF or another standard open format. This will prevent any difficulties in accessing the material with future versions of a proprietary text processing package. In all situations, solicitors should consult with their suppliers to ensure that material is being stored in an open and accessible format or that it can be converted to such for future accessibility.

Material in electronic storage format should also be secured and safeguarded against destruction or theft in the same way as materials stored in paper format. This is particularly relevant to the storage of materials on CD ROM. Material in an electronic storage format including CD ROM should be stored in a secure physical environment to ensure protection against fire, theft, destruction, etc. CD ROMs should be secured to avoid any accidental erasure or destruction. It is recommended that a backup copy be taken of any material stored on CD ROM.

Where material is stored electronically it should be numbered and indexed in such a way as to be as easily accessible as any similar paper formatted material. For example, it may be prudent to allocate individual folders to specific files when recording

onto a CD ROM or similar device.

EVIDENTIARY ISSUES AND ELECTRONIC MATERIALS

Certain provisions of the Electronic Commerce Act, 2000 remove evidentiary distinctions between paper and electronic records. For example, Section 12 provides (subject to other statutory provisions) that a person who is required or permitted to give information in writing may give the information in electronic form, whether as an electronic communication or otherwise. Section 9 of the Act specifically provides that information is not to be denied legal effect or enforceability solely on the grounds that it is wholly or partly in electronic form whether as an electronic communication or otherwise. Sections 17 and 18 of the Act provide that if a person is required or permitted to present or retain or record information in its original form then, subject to certain provisions, the information may also be presented etc. as the case may be, in electronic form. The conditions relate to the integrity and intelligibility of the material retained in electronic form.

Further note should be taken of Section 5 of the Criminal Evidence Act, 1992 regarding the admissibility of evidence in criminal proceedings. Section 5 (1) (c) provides that computerised information can be reproduced in permanent legible form and admitted in evidence

*Technology Committee
Guidance and Ethics Committee*

*** This practice note can also be downloaded from the members' area of the Law Society website at www.lawsociety.ie.**

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