



The Law Society

File retention: records management – retention and wills, deeds and documents together with supporting data

Practice note

Legal policy

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Status of this practice note

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- 1.1. The information set out below has been developed by the Wills & Equity Committee of the Law Society in order to help practitioners identify issues that should be considered before relevant files are 'weeded' or destroyed.

Aims

- 1.2. The aims of this exercise are:
 - a) to remind the profession of the possible circumstances in which a challenge to the practice of the firm is more likely to succeed if protective measures are not put in place.
 - b) to encourage the profession to offer and maintain a high level of service to clients by adopting some of the practice management suggestions set out below.

The background to the project

- 1.3. The December 1986 guidance under Annex 12A of the Guide to the Professional Conduct of Solicitors has now been superseded by the new solicitors' Code of Conduct, which does not contain guidance published in the same format. It should be noted that Rule 5 (business management) in the new Code of Conduct – which came into force on 1 July 2007 – requires principals in a firm to make arrangements for the effective management of their firm and these arrangements must include, amongst a list of other things, the safekeeping of documents as assets entrusted to the firm.
- 1.4. Following the splitting of regulation of the profession from representation in January 2006 and after the coming into force of the new code, on 1 July 2007, there is an information gap that could and should be filled by the representative part of the Society producing advice as necessary, although the Professional Ethics helpline (0870 606 2577) of the regulatory part of the Law Society will still be able to advise practitioners on matters in this area.
- 1.5. The Wills & Equity Committee takes the view that the former 12A guidance does not contain sufficient good practice information to allow it to be used as a ready reference source by solicitors on a day to day basis, since it operates more at the level of principle rather than practicality. The Wills & Equity Committee hopes that the attached good practice information can be used as a practical source on a day to day basis.
- 1.6. It is hoped that the good practice advice and information set out below will be of practical help to solicitors: it is not, nor is intended to be definitive guidance on the possible options available to the profession.

General position in relation to storage and destruction of wills and will files

1.7. For how long should the original will be retained?

With will related material you need to bear in mind that an original will stored by you is the property of the client and after the client's death, it is the property of the estate. On this basis you should consider storage of the original until after the death of the client, or until you are able to return the original to the client.

Some firms store the will indefinitely, while others have a policy of holding the original will for fifty years from the date of its creation. There is no absolute rule, but it is suggested that solicitors should err on the side of caution, even if the firm believes or knows that a later will has been made.

At some point the firm may consider destroying the original will, after consultation with the client, if you know or have been told by the client that a new will has been made. You should consider and inform the client that occasionally the validity of the subsequent will might be challenged and then a prior will might be proved as the last will of the deceased. It is also possible that in cases where undue influence is alleged or where an Inheritance (Provision for Family & Dependants) Act 1975 claim is made an earlier revoked will may be produced as evidence of a settled or disturbed pattern of behaviour or thought by the testator. If a will is revoked you may wish to consider keeping a copy in your records.

With wills the limitation period does not start to run until the testator has died (see discussion of limitation periods in 1.26 below) and so the general six year limitation from the time the case is concluded is of little relevance.

1.8. How long should will files and supporting documentation be retained?

When framing a policy on storage and disposal of will related documentation a firm should consider a number of matters.

The file belongs to the client, subject to a limited number of documents which can be removed and which belong to the firm. Documents which come into existence during the retainer fall into four broad categories: (i) documents prepared by you for the client and which have been paid for by the client belong to the client; (ii) documents prepared for the firm's own benefit or protection for which the client has not been charged belong to the firm; (iii) documents and letters written by the client to you where property passes to you on despatch belong to the firm; (iv) documents prepared by a third party during the course of the retainer and paid for by the client belong to the client. (see *Cordery on Solicitors* for more detail).

If the client cannot be contacted or is unable to respond or make a decision, the firm will have to make a risk assessment before destruction of any such material, including consideration of whether the firm's insurer's should be consulted.

For will files and related material you need to bear in mind that the limitation period does not start to run until the testator has died (see discussions of

limitation periods in 1.26 below). The general limitation period applicable in will related cases is 6 years from the date of death of the testator.

Therefore consider:

- a) storing the file and any other supporting documentation for as long as the will is stored.
- b) editing the file and supporting documents so that the most important material is kept. You will have to decide whether to edit soon after the file is closed, or several years thereafter. An advantage of editing the file soon after the end of the transaction is that the relevant issues will be fresh in your mind. If the file is left to be edited at a later stage bear in mind that your memory of issues may have dimmed and that you may no longer be working at the firm, leaving editing to be carried out by someone unfamiliar with the matter.
- c) keeping an abstract with the original will setting out significant matters.

Editing information

In order to help you decide how to handle a will file containing material such as instructions, retainer letters, general correspondence, drafts and attendance notes, you should assess if there are any unusual circumstances or disposals (see 1.9 below) that might be questioned by for example, a disappointed beneficiary.

You may decide that it is worth keeping the whole file, or selected material recording instructions or attendance notes of advice you gave to the client warning of matters such as a possible Inheritance (Provision for Family and Dependents) Act 1975 claims, or an abstract setting out how the matter was handled.

If you retain the original will while destroying the file, you may decide keep a note of the destruction with the will, so the absence of papers can be explained at a later stage (see reference to *Larke v Nugus* immediately below) to show that the destruction was carried out in accordance with good business practice.

Even where you might know or suspect that a client has made a new will, it is still possible that the validity of a subsequent will could be challenged so you should consider making a risk assessment of whether originals should be destroyed or copies kept where the original has been sent to the client. You might also think of advising the client that all supporting papers will be destroyed unless claimed and then keep a record of this notice.

Prior to destruction of papers you should consider *Larke v Nugus* [2000] WTLR 1033 and established guidance from Professional Ethics that where there is a dispute about the circumstances in which a will was made, and where requested, a solicitor should make available a statement of evidence regarding the execution of the will and the circumstances surrounding it, to anyone who asks the solicitor for such a statement, whether or not the solicitor acted for the person making the request.

Coding your files

It may be worth the firm building subject coding into the filing system for stored wills and files to enable staff to check which clients have particular provision in their wills related to, for example taxation of trusts, this should help identify all clients with circumstances that may be affected by a subsequent change in the law.

Your retainer should set out if you have any obligation to advise a client of a legal or taxation regime change, but even where there is no obligation to advise the client you may decide to inform clients of a change so that they have the option of coming back to you for a review of their affairs.

Money laundering rules – ‘relevant business’

The Money Laundering Regulations 2003 require that for ‘relevant business’, evidence of identity is to be retained for at least five years after the business relationship ends and for details of a transaction to be kept for a five year period from the date on which all activities taking place in the course of the transaction were completed.

Note that will - writing is not treated as relevant business

Note that trust and probate work is relevant business for the purposes of money laundering rules.

Destruction of files where there have been lifetime disposals/transfers of property at an undervalue

1.9. What sort of transactions related to the work I’ve done for my will client should I think of keeping with the will or recording on the will file?

Listed below is the sort of transactions where you need to consider retaining the file regardless of the standard conveyancing or other general firm policy on limitation periods.

- (1) deeds of gift
- (2) gifts of land
- (3) transfers at an undervalue
- (4) right to buy where funds came from someone other than the purchasing tenant/s
- (5) lifetime gifts

Such transactions might be challenged in the future by someone alleging that there were, for example, capacity issues or that undue influence, fraud, negligence or, mistake was in play around the time a will was made or property disposed of. A disappointed beneficiary might ask why a hoped for share of an estate is non-existent or reduced and your files may be called for. Therefore

you should consider keeping records (see reference to *Larke v Nugus* at 1.8 above) with the will that could explain why, for example there was a conveyance at an undervalue, and recording that appropriate advice was offered to the client at the time. You should bear in mind that memories fade with time and that relevant staff may not be around at the time of a challenge who were around when the transaction happened or the will is challenged, so without adequate records you may not be able to defend the advice given by the firm.

If related transactions are undertaken by a separate department such as the Property department there is a risk that the relevant records will be kept in property files and that the Property department may have a policy of file destruction after a shorter period of time (i.e 6-12 years). You should consider how you can best ensure that all relevant documents, advice and information about the affairs of a will client are preserved in an accessible form (also see 1.15 – 1.21 discussing storage of electronic data).

Remember that a standard 6 year limitation period may not protect you in will related cases where, for example, undue influence is alleged and note that in *Humphreys v Humphreys* [2005] 1 F.C.R. 712 (Ch D) there was a successful challenge thirteen years after the transaction.

1.10. How should retention of general files and related property transactions be dealt with?

Your firm may have different policies on the appropriate time for storing property transactions and wills files. Where a transfer of land has been made which could have a bearing on the dispositions in a will you should try to ensure that the link is noted and that a record is kept on the will file (which may be retained for longer than the property file) particularly if advice about the effect and consequences of the transfer has been given by other colleagues in the firm (the information could concern the sale of shares in a family company or business or agricultural property).

You may also keep a general file recording contact with a particular client which is not related to any major transaction, but which contains pertinent information about, for example, family dynamics or the intentions of the client. You should not overlook such files when assessing what should be retained with the will (see also the discussion in 1.8 and 1.9 above).

Practical problems - on the terms of the retainer, storage, production of documents, charges and client consent to destruction

1.11 How soon can I destroy information and documents on the file at the end of a will transaction?

Your retainer may have set out what will happen to papers, however bear in mind that the original will and certain other papers are not your property and should not be destroyed without written permission from the client.

If nothing has been agreed at the outset in your retainer, you should seek to

contact your client and return any papers that you do not intend to retain.

If you cannot contact your client for some reason then you should document your efforts to trace the client and then carry out a review before deciding whether to retain or destroy material. You may wish to consider passing very old documents to a local authority archive as an alternative to destruction, but note the position regarding client confidentiality or legal privilege if the client may still be alive or recently dead (see 1.13 -1.14). The National Archives recommends that where personal data needs to be stored for the life of the relevant individual and the date of death is not known it should be held until that individual would have reached 100 years.

You may also wish to take note of the appropriate limitation period (see question 1.26) before deciding when to destroy the file and what if anything from the file you should retain, whether as an original or a copy. Consider that certain papers such as attendance notes and copy e-mails may later help to explain why certain actions were taken. You may wish to refer to the facts of *Larke v Nugus* (1.8 above) and *Humphreys v Humphreys* [2005] 1 F.C.R. 712 (Ch D).

You may need your client's permission if you wish to put records of documents they own on microfilm, and so it may be worth dealing with such questions in your retainer letter as a matter of routine.

The requirement under schedule 11, paragraph 6(3) of the Value Added Tax Act 1994 should also be taken into account. This says that records and papers relevant to VAT liability have to be kept for six years.

Also note the anti-money laundering requirements set out in 1.8 above.

1.12 Can I charge my client for storage, copying or production of old records and documents?

Your retainer should set out charges for storage, if any, and charges for copying the file or producing a document from storage. You might consider reminding the client that there is a cost to your business for storage and retrieval of documents from deep storage, particularly where the material is kept off site.

Confidentiality and legal professional privilege

1.13 Are family members or beneficiaries entitled to disclosure of family papers?

Confidentiality - After the client's death, the right to confidentiality will pass to the client's executors and it can only be waived by them. If the family members are personal representatives, it will be their decision whether to disclose information to beneficiaries.

There is an exception in cases where the validity of the will is in dispute. In such a case, the solicitor who prepared the will should make available a statement of his or her evidence regarding the execution of the will, and the circumstances surrounding it, regardless of whether or not the solicitor is

acting for those named as executors in the will. The statement should be available to anyone who is a party to probate proceedings or whom the solicitor believes has a reasonable claim under the will (*Larke v Nugus* – 1.8 above).

Privilege – ‘Legal advice privilege’ protects a client’s communications to and from his lawyer made for the purpose of seeking legal advice or assistance. Legal privilege belongs to the client, and only he/she can waive it. Privilege of the client passes to the personal representatives on death.

- 1.14 Does confidentiality or legal privilege prevent me from providing information about the circumstances in which a trust was established, to beneficiaries under that trust?

Confidentiality – Yes. The information will be confidential to the settlor during his lifetime. On his death the duty to keep matters confidential will pass to his/her personal representatives. An executor’s powers derive from the will, whereas an administrator’s powers derive from the grant of representation. Accordingly, if the client died intestate, the administrator’s authority to waive confidentiality will date from the issue of the grant.

Privilege - Privilege prevents any information being given to the beneficiaries during the settlor’s lifetime unless the settlor waives privilege. On death of the settlor the right to assert privilege passes to the settlor’s successors in title (the personal representatives - see 1.11 above).

Data protection and electronic storage

This information highlights some of the basic issues concerning data protection. More extensive information on all aspects of data protection is available from the Information Commissioner at:

<http://www.ico.gov.uk/>

- 1.15 Do I treat electronic data the same as paper based information?

The same issues of principle arise with electronic data as with other material, so you always need to consider limitation periods, ownership, confidentiality, privilege and make an adequate risk assessment etc, prior to destruction. However electronic data is subject to further regulatory safe guards as set out in the Data Protection Act 1998.

- 1.16 Does the Data Protection Act 1998 require me to destroy personal data on beneficiaries and family members shortly after the will has been made?

The Data Protection Act 1998 allows you to retain personal data stored in an office the information on file without breaching the Act for as long as necessary for one or more specified lawful purposes (see further information).

1.17 Are my paper files subject to the Data Protection Act 1998?

Personal data contained within files in paper format are subject to the Act only if they are held in a relevant filing system (*Durant v FSA* 2003).

1.18 How does the Data Protection Act 1998 affect electronically stored information?

See 1.15 -1.16 above. All personal data which are held in electronic format, including scanned documents which were formerly held in hard copy form, are subject to the Act.

1.19 Is electronic storage of all file material safe, or could the material be corrupted?

It is much easier to corrupt electronic data, whether by accident or design, than paper. Systems need to be in place to safeguard the authenticity, reliability, accessibility and security of all electronic material.

1.20 Is storing relevant e-mails containing relevant advice and discussion of cross-departmental issues on one matter safe?

E-mail is both unreliable and an insecure medium. If necessary, encryption should be used to safeguard the confidentiality of information transmitted via e-mail. E-mail should not be relied upon as a storage medium. Information should be stored in a system, whether paper or electronic, which manages it according to its function and content, not its format.

1.21 The firm is upgrading its IT systems in a few weeks. What issues should I keep in mind when thinking of how to transfer electronically stored data.

It is a mistake to treat all data as though it were of equal value. Only business critical data or data of clear reference value should be migrated to new systems; the remainder should be destroyed according to an agreed retention and disposal policy prior to any migration occurring. This is particularly important where personal data is concerned, since migration is a form of processing and should therefore not be undertaken if there is no longer any need to retain the data.

Migration of large quantities of data is additionally a costly process and can also result in loss or corruption of data elements. Before data transfer to a new system, the firm should consider to whether or not data is likely to be corrupted by the migration process.

Storage issues in relation to file transfer within firms, use of external storage facilities, firm merger and office relocation

1.22 Our firm has moved to new offices where there is no longer as much storage room for old files. My partners have asked me to rationalise the private

clients departments' files and to dispose of a target of 50% to reduce the cost of paying for external storage. The other partners think that there are few issues involved in disposing of files beyond the usual 6 year limitation period. What should I tell my partners?

You should refer your partners to the sections of this good practice advice on limitation periods (1.26 and 1.8 which looks at ownership of papers), so that they are aware of the risks of disposing of will related files where a claim could well be brought far beyond the normal six year period.

- 1.23 Our firm has just merged and some of our old will files have gone astray. What are the issues I should consider?

Loss of a file may amount to inadequate professional service or negligence where deeds are lost, so you may need to contact your insurer to record the loss and you should consider contacting your client to discuss what remedial action can be taken, if any, if original papers such as wills have been lost. If a claim arises in relation to lost papers the courts will weigh the available evidence to assess your part in the matter.

Family solicitors and advice where you feel you have a particular understanding of the needs of the client

- 1.24 I have been advising the family for years and feel I understand what they all want. I do not think the lifetime transfers I have been involved with will be challenged. Do I need to make/keep records of why the transfer/will was made?

A solicitor should always keep a proper note of the advice that was given to the client together with details of the execution of the will/transfer if the solicitor was involved regardless of whether or not the solicitor believes that there may be a subsequent challenge.

In cases where you have a good relationship with a number of members of a family, you might think that you understand how they will react. However even in these circumstances you should consider that you may not have the complete picture of family dynamics and finances. Where there is an unusual disposal such as a gift at an undervalue, or where the will, leaves unequal shares to children, it would be prudent to keep detailed records of the instructions and your advice in case in definitely in case of a later challenge. Challenges could come after a breakdown in family relations long after you made the will or as a result of changing fortunes of family members. It is impossible to predict when such situations will arise so it is important to be prepared for such possibilities.

- 1.25 Should storage of powers of attorney or living wills be linked to storage of will related material?

Powers of attorney

The original power of attorney belongs to the client and so the power of attorney should not be destroyed without the client's prior consent or until you

are satisfied that actual revocation has taken place or that the client is dead. Where a later power of attorney is made it cannot automatically be assumed that revocation of an earlier power of attorney has taken place. See *Re E [2000] 1FLR 882*.

Alternatively the power could be given to the client and you will have to make a risk assessment if you then consider destroying the file and copies of the power.

Even where a new power has been created bear in mind that the validity of the later document could be challenged so the earlier power may be required. In addition you should note that the different types of power of attorney can run concurrently. An ordinary power of attorney is not automatically revoked by the creation (applicable until October 2007) or existence of an unregistered enduring power of attorney or from October 2007 the creation of a registered lasting power of attorney, where capacity of the donor has not yet been lost.

Bearing this in mind you must be cautious about destroying both original powers of attorney and related files. You must also consider if you wish to store documents, files or abstracts linked to the creation of a power of attorney with will related material so that your firm holds a complete picture of the client's affairs and wishes during life.

Living wills

If the client chooses to store a living will with your firm rather than with a doctor, you may wish to consider keeping the living will with the will, power of attorney and other such papers since the terms may have some bearing on the client's general wishes during life. However note that the living will must be readily accessible since production may be required at very short notice.

Limitation periods

1.26 Which limitation periods need to be applied when destroying old files?

The limitation period may vary depending on the type of work

Wills files

When considering whether a file should be destroyed you should note that in wills cases successful claims can be brought well after the usual contractual period of 6 years from the end of the retainer or time the work was completed/ applicable in many other matters. In wills cases the limitation period does not start to run until the client dies and the will comes into effect.

Trusts

For breach of trust the normal limitation period under the Limitation Act 1980, s21 is six years from the date of the breach or the time the breach is discovered (subject to special provisions for fraud and for a trustee in possession of trust property).

Personal representatives

For claims against personal representatives the limitation period is twelve years from the date on which the right to receive the property accrues (Limitation Act 1980, s22 (a)) or from the date the right to receive the share

accrued which may be from the end of the executors' year rather than the date of death.

Discoverability

Under s32 of the Limitation Act 1980 the limitation period does not start to run until the claimant discovers the mistake, fraud or concealment or could have discovered it with reasonable diligence.

Disability/undue influence

Note that the limitation period, whichever applies, may not start to run until a claimant, deemed to have been under a disability (for example a minor child, a person with capacity problems, or someone suffering undue influence) has become free of that disability. So, for example, where a cause of action is apparent, a minor child will have 6 years from the date of attaining 18 years to take action.