Law Society of Ireland

CLOSE OF PRACTICE GUIDELINES

TABLE OF CONTENTS

1

Introduction

The purpose of the Run-off Fund ("ROF") is to provide run-off cover to firms that meet the necessary criteria. Firms with succeeding practices cannot avail of run-off cover through the ROF.

Firms obtaining run-off cover through the ROF will not be required to bear any additional self-insured excesses for run-off cover provided that they meet the criteria as laid out in Regulation 8(f) of the Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) Regulations 2011 [S.I. No.409 of 2011], one of which is the requirement to comply with close of practice guidelines.

Close of practice guidelines are defined in the regulations to mean "*the close of practice guidelines to be published by the PII Committee from time to time"*, and are listed in this document. These guidelines were approved by the PII Committee on 23rd January 2012.

Failure to comply with these guidelines in full may result in the imposition of additional self-insured excesses.

It should be noted that run-off cover provided by the ROF is for the minimum sum insured (currently €1,500,000). If firms require cover in excess of this amount, they will need to make their own separate arrangements.

2

Long Term Planning

2.1 Types of closure

Firms close for a variety of reasons, some involuntary and some voluntary including:

(a) Principal's illness.

(b) Principal's death.

(c) Practice is no longer viable.

(d) Regulatory action.

(e) Life events.

(f) Decision to retire.

2.2 Planning for emergencies

A sole practitioner/principal who is planning prudently for the future of his/her firm should put measures in place to deal with the closure of their firm in the event of serious illness or death or a prolonged absence from their firm due to ill health that could otherwise result in the closing of the firm. These measures should include the following:

(a) A will appointing a solicitor as one of the executors to deal with the disposal of the practice after the death of the sole practitioner/principal.

(b) Agreement for management – to be used if the solicitor is likely to return to practice.

(c) Power of attorney – to be used if the sole practitioner/principal will not, or is unlikely to, return to practice in his/her former role.

(d) Enduring power of attorney – to be used if the solicitor is not *compos mentis* and will not, or is unlikely to return to practice

(e) Insurance policies – such as an income protection insurance (known as permanent health) or 'keyman' policy.

(f) Authority to operate bank accounts.

More comprehensive information on these recommended measures can be found in Appendix 1. It is never too early for firms to prepare such measures and it is strongly recommended that such measures are prepared by firms as soon as they commence practice.

2.3 Wind-down plan

Firms should have a wind-down plan in place in readiness for a decision to voluntarily close the firm in the future. Further information on the preparation of a wind-down plan can be found in Appendix 2. Any wind-down plan put in place should be periodically reviewed and updated by the firm.

2.4 Budget for costs

All firms should budget for the costs that will be associated with a voluntary or involuntary closure in the future. These may include the following:

(a) Accountant's fees for the preparation of a closing reporting accountant's report.

(b) Staff redundancies, if applicable.

(c) Salaries of personnel to do the closure work.

(d) Destruction exercise for closed files.

(e) Where the firm has been paid to carry out certain work, but this has not been done, the firm may be responsible for the fees of any new solicitor employed by the client to do that work, including dealing with outstanding undertakings.

In a wind-up by file distribution (or where some of the files are not transferred to another firm), the following additional costs may be incurred:

(a) Circularising the current clients- secretarial, stationery and postage costs.

(b) Distribution of current files to clients, or new firms nominated by them.

(c) Distribution of clients' monies.

(d) Arrangements for storage of closed files which cannot be destroyed, which must be transferred to the control of a solicitor with a current practising certificate.

2.5 Appoint a nominee

All firms should appoint a nominee to be available to arrange that the work involved is carried out, should they, as partners or principal, become unavailable.

Ideally, a nominee should be in place from the date that a firm opens, so that if the partners or principal are not in a position to be personally involved in their firm's closure, for example because of illness, their nominee can take charge to make decisions and arrange for the work involved in closing the practice to be done.

Firms may enter into reciprocal arrangements with other firms to act as each other's nominee. However, it should be remembered that the duties being undertaken may be onerous.

Alternatively arrangements may be made with a firm to provide a professional service should the need arise with the cost of such a service budgeted for by the firm closing down.

It is important that the Law Society, a member of staff and a member of the solicitor's family should be informed of the identity of this nominee.

3

Pre-closure procedures

A firm ceasing practice should carry out the following procedures before the date of cessation.

3.1 Undertakings

A list of outstanding undertakings should be drawn up and firms should seek to ensure compliance with all outstanding undertakings given by the firm before the firm closes.

It should be noted that the partners/principals of a firm remain liable in conduct for undertakings, even after closure. If a solicitor wishes to remain in practice until all undertakings given by the firm have been complied with, they must continue to have a practising certificate and PII in place to complete such undertakings, even if they are not open for new business. In the absence of such measures, partners/principals of a firm may be directed by a court or by one of the regulatory committees of the Society to pay fees for any new firm to carry out outstanding legal work necessary to ensure compliance with any undertakings still outstanding after the firm closes.

3.2 Finalising work on files

Firms should seek to finalise as many files as possible before the firm closes.

3.3 Closing down client accounts

Firms should commence work on closing down client bank accounts before the date of cessation, with particular focus on dealing with any dormant balances. It should be noted that the firm should cease to hold, control, receive or pay client monies within 2 months of the date of cessation.

3.4 Notifying the Law Society

The firm should notify the Society in writing that they intend to cease practice and the intended date of cessation prior to the date of cessation, and any changes to this date of cessation should also be notified in writing to the Law Society.

The firm should also provide the Society with the partners'/principal's home addresses or other correspondence addresses for corresponding with the partners/principal in the future.

3.5 Notifying insurers

The firm must notify their insurer in writing that the firm intends to cease practice and the intended date of cessation prior to the date of cessation.

It should be noted that the professional indemnity insurance ("PII") cover in place at the time of cessation remains in place until the expiry date of the policy.

3.6 Notifying the Special Purpose Fund Manager

In the case of a firm ceasing practice that will require run-off cover, the firm must notify the Special Purpose Fund ("SPF") Manager that the firm intends to cease practice and the intended date of cessation by whichever is the earlier of the following:

(a) at least 60 days prior to ceasing practice; or

(b) at least 60 days prior to the expiry of the coverage period for the firm.

The firm may use the notice of closure form to notify the SPF Manager. This form is appended to the run-off rules and to these guidelines (Appendix 3). The use of this form is not compulsory and the same information provided in a different format will be acceptable.

The notification of closure must also include a copy of the firm's last proposal form and last insurance policy, together with details of any claims or notifications made during the indemnity period leading up to closure.

3.7 Additional information to be provided to SPF Manager

Within a reasonable time following the notification of closure, and before the date of cessation, the firm must provide confirmation to the SPF Manager that the firm is not aware of any other claims or circumstances which may give rise to future claims and the firm must continue to notify its insurers of any such claims or circumstances in the period until expiry of its policy.

The firm must report any matters to the SPF Manager which come to their attention with regard to claims, notifications or circumstances which may give rise to claims, following commencement of coverage of the firm by the Run-off Fund.

3.8 Terms and conditions of run-off cover

It should be noted that terms and conditions of the run-off cover as provided by the Run-off Fund will reflect the minimum terms and conditions for each subsequent indemnity period.

4

Closure procedures

A firm ceasing practice should carry out the following procedures from the date of cessation. In the case of file distribution, this may commence before the date of cessation.

4.1 Cease all legal services

(a) Files

From the date of cessation, no work may be carried out on any file, no matter how urgent. This includes answering Land Registry queries and, especially, certifying title. Once the firm has closed, even if a solicitor in the firm still has a current practising certificate, they cannot certify title in the name of the firm. A solicitor who does not have a practising certificate cannot certify title as a practising solicitor, even if the certificate is, as usual, backdated to the date of the closing of the sale, when the firm was open and the solicitor had a practising certificate.

(b) Client account

From the date of cessation the firm may not carry out any transactions on the client account, except paying clients money due to them.

4.2 Publish the fact of cessation

As an immediate measure, a notice may be put up at the firm's premises and, if the office is not being manned, a message may be put on the firm's answering machine.

The local Bar Association, local courts, town agent (if any) and any other third parties should be notified as necessary.

Alternative arrangements should be made for post and courier services.

4.3 Treatment of files

The work involved in the transfer or distribution of files must be arranged and carried out by the firm or by a nominee of the firm.

(a) General

The firm must divest itself of all files, current and closed, in all locations.

The firm may divest itself of the files by:

(i) selling or transferring the files to another firm; or

(ii) carrying out a wind-up exercise by way of file distribution; or

(iii) some files may be transferred to another firm and a wind up exercise carried out on the remainder of the files.

(b) Sale or transfer of files

Arrangements may be made to transfer all, or some, current files to another firm or firms.

The new firm should enter into any such agreement having checked on the insurance implications for their own firm and having carried out a proper due diligence exercise on all the files being taken, to assess the risk.

Where files are transferred, it will be necessary for the new firm to obtain confirmation of instructions from each client before proceeding to act on their behalf. If a client does not wish the new firm to act on their behalf, the file should be transferred to a solicitor nominated by the client, or to the client themselves in the absence of a nominated solicitor.

The Society must be informed in writing of the firms to which all, or batches of, files have been transferred.

(c) Winding-up: File distribution exercise

In the case of a wind-up, a file distribution exercise must be carried out as follows:

(i) All current clients must be contacted, by circular or otherwise, advising them to nominate a new firm to take their files and documents.

(ii) Where there are no undertakings on the file, the clients themselves can be given their files.

(iii) Records must be kept of the destination of all files.

(iv) It should be taken into account that clients may be very slow about taking up their files. Follow-up reminders/phone calls should be made to clients.

(d) Closed files

A destruction exercise can be carried out in accordance with the recommended criteria in the Society's practice note ("Retention or Destruction of Files and Other Papers and Electronic Storage" – Gazette, April 2005), which is appended to these guidelines (Appendix 4).

(e) Completing the file distribution exercise

After a reasonable period has elapsed (not longer than six months) arrangements must be made for the partners/principal to divest themselves of the remainder of the files, whether current or closed, deeds, wills and all practice documents, whether held manually or electronically.

This can be done by transferring the files to another firm on a "storage only" basis. The new firm will then be in control of the files but only on a storage basis. If clients seek their files, the new firm will locate their file for them. The new firm must be informed that decisions to be made in the future relating to those files will be for the new firm alone to make.

On completion of the file distribution exercise, the firm should certify to the Society that the file distribution exercise has been completed in accordance with these guidelines, and that the partners/principal has ceased to hold or control any practice documents.

(f) Access to files

Access may be needed to files in future, for example, the partners/principal may need to deal with Revenue or PII matters. It should be ensured when transferring files, whether all or some files, individually or on a "storage only" basis, that arrangements are made for the retiring partners/principal to have access to these files in the future.

If this is not done, it may be necessary in the future for the partners/principal affected to proceed for an Order of Discovery against the firm or individual who holds the relevant file in the event that that solicitor is sued on foot of a claim in relation to legal services provided.

4.4 Wills

Client may take up their wills individually. If this does not occur, it is good practice in appropriate local scenarios to transfer all the wills to one local firm and circularise the local firms to inform them that this has been done.

4.5 Undertakings

The firm's undertaking register, or all individual files, must be reviewed to identify all outstanding undertakings. It should be noted that the partners/principal of a firm remain liable in conduct for undertakings and may be directed by a court or by one of the regulatory committees of the Law Society to pay fees to any new firm to carry out outstanding legal work necessary to ensure compliance with the undertaking.

If the files of clients on whose behalf undertakings have been given, which are still outstanding, are transferred to another firm, the recipient of the undertaking must be notified of the closure and informed of the identity of the client's new firm. The new firm will not be responsible for the undertaking but can make new arrangements with the lender or other recipient. The partners/principal of the ceasing firm may be required by the SPF Manager to present an estimate from the client's new solicitor, as selected by the client, and show evidence that these funds will be available to be paid by the partners/principal of the ceasing firm on completion of the work. In due course, if the file is not taken up, the recipient should also be informed.

In both cases, if the recipient of the undertaking is a lender, the lender can be sent the deeds, even if there is work outstanding. Alternatively, the lender has the opportunity of calling for the deeds on foot of the equitable interest arising because of the giving of the undertaking.

A list of all outstanding undertakings must be retained. In the interests of the recipients of the undertakings, and in the interests of the partners/principal themselves, these undertakings must be reviewed on an ongoing basis, until letters of release have been received in all cases. This may not be achieved until a new firm has done any necessary outstanding work to allow compliance with the undertaking.

4.6 Client monies and bank accounts

If the practice is being sold and a balance remains on the client account, this amount should be transferred to the purchasing firm. The purchasing firm should ensure that the amount agrees with the cash position in the client account. The purchasing firm should also be given the relevant ledger cards to enable the ownership of the clients' funds to be identified. The purchasing firm will then be responsible for accounting to the clients and to the Law Society for the clients' monies.

When a firm ceases practice, the firm must take immediate action to close the client account or accounts and office account or accounts of the practice. Monies held in the client account should be paid back to the clients concerned or to the firms appointed by clients to act on their behalf. Ideally, these monies should be paid out close to or on the date the firm ceases practice. The firm or its partners or principal should cease to receive, hold, control and pay client monies within two months of the date of cessation.

The firm must take all necessary and reasonable steps to trace the clients, including advertising if appropriate.

4.7 Closing reporting accountants' report

In accordance with the provisions of Regulation 26(2) of the Solicitors Accounts Regulations, 2001 (S.I. No.421 of 2001), where a practice is being wound up, the partners/principal are required to file a closing reporting accountant's report from the date of the last annual reporting accountant's report for the practice, to the date at which the practice ceased to receive, hold, control and pay client monies (i.e. – the date at which the balances in the client bank accounts go to zero as per the bank statements).

This report must be filed within two months of the date of cessation of the practice.

The accounting period covered by the closing report must not exceed a 12 month period. The partners/principal must file any annual reporting accountant's reports for financial periods ending before the date of cessation of the practice.

Any application to combine the annual and closing reporting accountant's reports must be made in writing to the Society before the date of cessation, and written permission granted by the Society.

Closing reports which show balances remaining in the client bank accounts will not be accepted by the Society.

Appendix 1: Practice note - Planning for emergencies in a sole practitioner's/principal's firm

A sole practitioner / principal who is planning prudently for the future of his / her firm needs to make a will and also to execute three deeds, as set out below.

- Agreement for Management;
- Power of Attorney;
- Enduring Power of Attorney.

The will obviously will cover the situation where the solicitor dies in practice. The three deeds are needed to cover eventualities during the solicitor's life that might prohibit him / her from practising.

Will
It goes without saying that all sole practitioners / principals should make a will appointing a solicitor as one of their executors to deal with the disposal of the practice after their death.

Solicitors should be aware that, with regard to the period between a solicitor's death and the issue of the grant, the Solicitors Acts provide that a solicitor may be appointed to the practice with the consent of the Law Society, on a temporary basis, pending the issue of a Grant of Probate or Administration. However, non-legal family members might not have the experience or expertise to recruit a suitable solicitor without the assistance of a solicitor executor.

Suggested clauses for a solicitor's will, were published in the October, 2005 Gazette, p29, available at www.lawsociety.ie/Gazette/oct05.pdf.

Agreement for Management – to be used if the Solicitor is likely to return to practise

In this scenario the practitioner / principal continues to hold a current practising certificate and continues to be responsible for all matters relating to the firm.

A precedent is offered below. As with any precedent it can be amended freely to suit individual circumstances. At a minimum, it will operate as a useful checklist for matters that may need attention.

The agreement is a simple agreement for management services. Under this agreement, there is no question of the manager having power to sell or wind up the practice. The agreement would cover temporary absences from the office, where the solicitor is likely to return to the practice and resume as sole practitioner / principal.

This Agreement would cover illnesses, both physical and mental - for instance long stays in a general hospital, or long stays in a mental hospital recovering from, for example, depression, alcoholism, and so on. It would not cover a situation where the solicitor had permanently lost mental capacity. It would also cover unexplained absences or abandonment. However, solicitors are reminded that reckless abandonment may have serious repercussions in terms of regulatory action being taken by the Law Society against the solicitor or negligence actions being taken by clients who suffer a loss.

The agreement, suitably amended, could also be used by sole practitioners / principals who are going on maternity leave. For instance, the manager might be an assistant solicitor in the firm who is asked to take charge during the maternity leave period.

In most circumstances it will not be difficult to trigger the commencement of the agreement. However, it is recognised that there are some situations where it would be difficult to do so.

The Solicitors Acts provide that the High Court may appoint another solicitor to carry on a practice in the event of the incapacity or bankruptcy of a sole practitioner or the abandonment by a sole practitioner of his / her practice. However, this is an expensive and cumbersome alternative to having a detailed management agreement in place, which has been agreed by both the solicitor and the manager and which reflects the wishes of both.

Power of Attorney – to be used if the solicitor will not, or is unlikely to return to practice in his / her former role

The Power of Attorney will be used only if the practice is to be sold, to give the Attorney the necessary powers to do this. A standard deed can be used.

Without a Power of Attorney the practice cannot be sold by another solicitor. The power could be exercised where the solicitor is compos mentis but too ill to attend to, or does not wish to attend to, business affairs. In this scenario, the sole practitioner / principal might or might not hold a current practising certificate.

Again, the sole practitioner / principal will continue to be responsible for all matters relating to the practice.

It is recommended that the powers given in this deed are limited to matters relating to the sale of the practice. While the named attorney might also be the named manager in an agreement for management, the management arrangement is best dealt with separately in the detailed Agreement for Management.

Enduring Power of Attorney – to be used if the solicitor is not compos mentis and will not, or is unlikely to return, to practise

In this scenario, the presumption would be that the solicitor is no longer in practice and no longer compos mentis. The Enduring Power of Attorney would be used to sell the practice and to do any acts necessary to facilitate this.

The standard Law Society precedent can be used. This can be accessed on the members' area of the Law Society website www.lawsociety.ie

Who should be selected to be the Executor / Manager / Attorney?

Many solicitors may decide to have a reciprocal arrangement with another sole practitioner and this may be appropriate for them. However, it should be remembered that the duties being undertaken may be onerous. In some situations, a better alternative would be to make an arrangement with a medium to large firm to give a professional service should the need arise. The cost of doing this would have to be taken into account.

The solicitor selected should have sufficient experience and time to manage the practice, as well as continuing with his / her existing commitments.

Remuneration for Manager

The precedent Agreement for Management below sets out a formula for remuneration which is to be an average hourly rate that an assistant solicitor of ten year's standing would be paid. Solicitors might wish to negotiate a different formula. However, this formula is suggested in the context of a reciprocal arrangement being made between two solicitor friends / colleagues.

Budgeting for the New Situation

It is clear that if a sole practitioner cannot attend at his / her offices, there may be additional expenses incurred. Solicitors should be aware that not only do they need to plan for the emergencies, but they also need to budget for them. For instance, if there is a decision to wind up the practice, rather than sell it, this can be a very expensive exercise. It is labour intensive, and significant costs may have to be paid. Files that can be destroyed may have to be destroyed professionally. Another solicitor's firm may have to be paid to take all the files not distributed to clients.

In situations where a locum solicitor will be employed, this too is an additional cost. Locum solicitors are expensive to employ and are unlikely to bring in the level of fees that the solicitor himself / herself would have brought in, so that there will be less money than usual available to pay for overheads.

Insurance Policies

Solicitors could consult with their brokers to check out whether an income protection insurance (known as permanent health) policy or Keyman insurance policy should be put in place as part of the emergency plan. Some premiums may be tax deductible.

Inform the Law Society, a member of staff and a member of the family

It is important that the Law Society, a member of staff and a member of the solicitor's family should be informed of the arrangements that a solicitor has made for emergencies.

As all solicitors know, making a will and not telling anyone about it can prove to have been a futile exercise, if the will is never found after a person's death. Likewise, if no-one is aware of the arrangements that have been put in place for emergencies, there will be needless upset and inconvenience to all concerned if an emergency does occur.

Objectives

The objective of having a plan for emergencies is to minimise the disruption to clients' affairs. The position of staff will also be secured. It is also to ensure that the practice can continue, if this is what the solicitor and/or his family wish. However, if the wish is that the practice be sold, then the powers are in place to do so.

In the event that there is a vacuum, then it is likely that the Law Society will have to become involved and the only option may be for the Society to require that the firm cease trading. It would then be closed and the clients asked to nominate new solicitors. This might not be in accordance with what the solicitor would have wished, particularly if the likelihood is that he/she will return to practice. In addition, it is likely that all expenses incurred by the Society in the exercise of its statutory duty, including the salaries of personnel involved in carrying out the function, will be charged to the solicitor or his estate.

Authority to Operate Bank Account

There are some situations where the full emergency plan would not need to be triggered, but the emergency might be met by having an authority in place simply to operate the firm's bank accounts.

Click on the link below for a copy of the AGREEMENT PROVIDING FOR THE TEMPORARY MANAGEMENT OF A SOLICITOR'S FIRM DURING THE INCAPACITY OF A SOLE PRACTITIONER/PRINCIPAL

- PDF Version
- Word Version

Appendix 2: Wind-down plan

Firms are recommended to have a written wind-down plan in place in the event that the decision is made to voluntarily close the firm in the future. Anne Neary Consultants and Outsource assisted the Law Society in the preparation of this wind-down plan.

Any wind-down plan put in place should be periodically reviewed and updated by the firm. The wind-down plan should be in accordance with the Society's close of practice guidelines and should also contain the following elements:

1. Nominee of the firm

The name and full contact details of an appointed nominee of the firm should be included in the wind-down plan. The nominee appointed by the firm is to be available to arrange that the work involved in winding down, selling or transfer of the firm will be carried out should the partners/principal of the firm be unable, for whatever reason, to carry out this work. Details of the arrangement with the nominee, including payment if required, should also be included.

2. File procedures

Procedures in relation to the sale, transfer, storage or disposal of files following cessation of the firm should be set out in writing in accordance with the Society's close of practice guidelines.

3. Funding plans

Plans to fund the wind-down should be prepared to include paying for:

(a) Closing reporting accountant's report.

(b) Staff redundancies, if applicable.

(c) Salaries of personnel to do the closure work.

(d) Destruction exercise for closed files.

(e) Where the firm has been paid to carry out certain work, but this has not been done, the firm may be responsible for the fees of any new solicitor employed by the client to do that work, including dealing with outstanding undertakings.

In a wind-up by file distribution (or where some of the files are not transferred to another firm), the following additional costs may be incurred and should be including in the funding plans:

(a) Circularising the current clients- secretarial, stationery and postage costs.

(b) Distribution of current files to clients, or new firms nominated by them.

(c) Distribution of clients' monies.

(d) Arrangements for storage of closed files which cannot be destroyed, which must be transferred to the control of a solicitor with a current practising certificate.

4. Financial information

The following documentation should be included in the wind-down plan and updated as necessary:

(a) Copies of audited accounts for the last 3 years.

(b) Details of all office overdrafts, term loans, leasing agreements and any other financial data.

(c) Copy of the most recent Law Society investigating accountant's report.

(d) A statement confirming tax affairs are up to date, including PAYE, PRSI, VAT, corporation tax (if applicable) and copies of final tax returns.

(e) Banking protocols, including a statement of how bank accounts are to be managed.

(f) A list of all bank accounts including client accounts, office account, savings accounts and deposit accounts.

(g) Information on the location and contents of office safe deposit boxes.

(h) Procedures to manage funds held for uncontactable clients

(i) Procedures to cancel subscriptions and direct debits.

5. Premises disposal/terminating leases

Plans in relation to the disposal of the firm's premises should include:

(a) Details with regard to the disposal of office premises and office equipment.

(b) Plans with regard to keys to the premises, interior locked file cabinets, offices and safes.

(c) Plans with regard to branch offices.

(d) Payment to date of closure of rates or disposal of the premises, insurance, waste and water charges.

6. IT, computers and digital information

Details in relation to the management and disposal of computing equipment, including the management and disposal of confidential information stored in a digital format should include the following:

(a) An inventory of all electronic equipment used with regard to the practice.

(b) Evidence of compliance with data protection legislation if relevant

(c) Plan for dealing with client confidential information on all computers, servers, laptops, scanners, photocopiers, memory keys and cloud servers.

(d) Plan to transfer digital information to any successor firm with regard to files being transferred.

(e) Plan to remove information from computers.

(f) Plan with regard to client information contained on all mobile phones, including staff mobiles.

(g) Plan for dismantling website.

(h) Plan in relation to back-up discs and tapes.

(i) Disposal arrangements in relation to computers and equipment.

(j) Plan in relation to managing computer passwords.

(k) Plan in relation to managing calendars including the firm's shared diary and personal calendars.

7. Staff

The plan to manage staff in a wind-down situation should deal with the following:

(a) Staff redundancies.

(b) Transfer of trainees.

(c) Pensions.

(d) Contracts of employment.

8. Insurance policies

Details in relation to the management of all insurance policies should be included and deal with the following:

(a) PII.

(b) Employer's liability.

(c) Premises insurance.

(d) Life and disability.

(e) Employees' health insurance.

9. Correspondence arrangements

Arrangements in relation to the management of correspondence following the winding down of the firm should include collection and forwarding arrangements for post, emails, faxes and couriers.

10. Client notification procedures

Procedures relating to contacting and notifying clients in the circumstances of a wind-down should include the following:

(a) Preparation of a current client list with contact details.

(b) Draft notification letter to clients.

(c) Plan to obtain client consents to file transfers, if required.

(d) Plan to deal with files where clients cannot be contacted.

11. Wills procedures

Procedures in relation to managing wills including a wills register.

12. Deeds procedures

Procedures in relation to managing deeds should including the following:

(a) A copy of the deeds register.

(b) Plan to return deeds to clients.

(c) Plan to transfer deeds to another firm of solicitors.

(d) Where clients cannot be contacted, a plan to transfer deeds to another solicitor on a storage-only basis.

13. Solicitors accounts regulations compliance procedures

Plan to produce the following in the event of a wind-down:

(a) Up to date bank account reconciliations.

(b) Up to date client balancing statements.

(c) Client account closing procedures including reducing client account balances to zero.

(d) Client tracing procedures for distributing client balances.

(e) Plan for preparation of closing reporting accountant's report.

(f) Contact details of firm's accountant.

14. Collection of costs and outlay procedure

Procedure with regard to billing and collecting costs and outlays in the event of a wind-down of the firm.

15. Undertakings procedures

Plan to deal with undertakings, including discharge of all outstanding undertakings, in accordance with the Society's close of practice guidelines.

16. Critical dates procedure

Procedures with regard to the management of critical dates should including the following:

(a) Critical dates register.

(b) Procedures in relation to clients whose files have critical dates.

(c) Plan to deal with critical dates in letters of disengagement.

(d) Plan to ensure all statutory deadlines are complied with.

17. Complaints procedures

Procedures to deal with any outstanding complaints currently before the Society's regulatory committees, the Disciplinary Tribunal or the High Court.

18. PII and ongoing claims procedures

Procedures to resolve any outstanding claims at the date of cessation to include:

(a) Commitment to cooperate with PI insurers, the SPF Manager and the Society until all outstanding claims and notifications have been resolved.

(b) Copy of the most recent claims history for the last 10 years.

19. Minimum common risk management standard

Plans to meet the provisions of the minimum common risk management standard.

Appendix 3: Notice of closure form

Dear Sirs

Pursuant to Regulation 8(a) of the Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) Regulations 2011 (the "**Regulations**") , we hereby give notice of our intention to cease practice on [*insert date*].

We hereby confirm that this notice is given at least 60 days prior to the earliest to occur of the following:

(a) the cessation of the firm's practice; or

(b) the expiry of the policy of professional indemnity insurance or ARP coverage held by the firm.

We further confirm that no person who is a principal of the firm at the time it ceases practice shall carry on a practice which is largely similar to the practice of the firm or which has succeeded the practice of the firm such that it could be treated as a phoenix firm pursuant to Regulation 3(m) of the Regulations.

We enclose with this notice the firm's most recently completed proposal form for professional indemnity insurance and most recent policy of professional indemnity insurance.

Yours faithfully

Appendix 4 : Practice note - Retention or Destruction of Files and Other Papers and Electronic Storage

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

Law Society of Ireland

FROM THE TECHNOLOGY COMMITTEE
OF THE LAW SOCIETY OF IRELAND

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 THAN12 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."

Law Society of Ireland

FROM THE TECHNOLOGY COMMITTEE
OF THE LAW SOCIETY OF IRELAND

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.**

DISCLAIMER

The views expressed above are personal to the Writer who is not an IT professional. These points are developed borne of the Writer's own personal experience. When purchasing any software the advice of an appropriate IT professional should be sought.