

Rentention of documents

Retaining documents can be an expensive and onerous business, incurring storage charges and involving deliberations over what to keep and what to destroy. In addition to ensuring they are in compliance with GDPR (gov.uk/government/publications/hmrc-records-management-and-retention-and-disposal-policy/records-management-and-retention-and-disposal-policy), Members and affiliates need to consider which documents to retain and for how long.

It is understood that any drawings, papers and other documents belonging to a client or another party, which are in the possession of a Member or affiliate, should never be destroyed without the owner's consent. If the project is at an end and/or if they are no longer required and if written permission has not been given to destroy them, they should be returned to the rightful owner. For a Member's or affiliate's own documents or those of their practice, it is necessary to consider a number of different obligations including what needs to be kept to ensure the most effective measures to be taken whilst in the period of liability, where there could be litigation relating to the subject matter of the documents and where there is not.

Litigation

It is hoped that most Members and affiliates will never become involved in litigation over their projects. Where they are unfortunate enough to do so, the golden rule is to preserve everything, which is, or may, become relevant to the issues in the case. Once the Member or affiliate knows litigation is possible, they should err on the side of caution and keep everything, even if there is only a tenuous link to the litigation, and ensure that colleagues within their practice do likewise. The issues in litigation evolve throughout a case and something which does not start out as a crucial issue may become one.

Disclosure obligations under the Civil Procedure Rules require parties to proceedings to disclose documents on which they rely and documents which adversely affect their own case or another party's case or which support another party's case. 'Documents' means anything in which information of any description is recorded.

This includes paper and electronic documents (i.e. computer files, databases, software, hard drives) as well as emails, text messages, audio and visual recordings and photographs. Deliberately destroying disclosable documentation in the face of litigation is unacceptable and a direct route not only to losing the litigation, but potentially ending up behind bars!

The Court rules require disclosure of documents to be accompanied by a disclosure statement certifying the extent of the search that has been made to locate disclosable documents; the understanding of the duty to disclose documents and that, to the best of your knowledge, you have carried out that duty. Documents that are not disclosed when they should be may not be relied upon at a trial and a false disclosure statement may give rise to proceedings for contempt of Court. These obligations underline the need to preserve documentation relevant to litigation, and that task is made far less onerous where a practice has an orderly filing/document management process in place as a matter of normal day-to-day practice.

No litigation

What is the position where litigation has not been contemplated? There are two categories of documents; project documents and corporate governance documents. This information relates purely to project documents. If a Member or affiliate has any concerns in relation to taxation or company documents, they should take specific advice. In the absence of litigation, the main considerations governing document retention are the limitation periods for bringing claims.

The starting point is that whenever project files are due to be archived, any Appointment Agreements or Collateral Warranties should be checked for details of any limitation periods. If the limitation period is stated e.g. twelve years from the date of practical completion of the project, it is advisable not to destroy project files until that limitation period has expired. It would be prudent to add on a further four months after the expiry of the limitation period as Claimants have four months from the date of issuing proceedings to serve them. Even if a limitation period is not stated, there are statutory limitation periods which provide a guide. In the case of a deed, a retention period of twelve years (plus four months) is a prudent approach.

In most other cases, the primary limitation period is six years for claims in contract and tort, but the date from which the six year period starts to run varies according to whether you are being sued in contract or tort.

A prudent approach (absent any deeds) would be to retain project files for a period of six years (plus four months) from the date on which you close your file at the end of a project. There are mechanisms whereby the primary limitation period can be extended beyond six years up to a 'long stop' of fifteen years and longer still if there has been fraud or deliberate concealment which raises the question, do documents have to be retained forever?

After the primary limitation period of six years, and in the absence of any deeds, a Member or affiliate should probably balance the reasons and cost of keeping the documents against the reducing risk that the documents may become important again in the future. If a Member, affiliate or their practice is incurring storage charges and wishes to destroy documents, a good policy would be to destroy the oldest documents first and to maintain all documents for at least the minimum period of six years plus four months and longer for deeds. Outside of the limitation periods, it is always worth considering whether a piece of work has any historical or similar value in which case, it may be worth keeping your papers indefinitely. GDPR rules have to be observed whilst considering this decision.

In relation to outgoing Members, affiliates or directors leaving a practice, it would be wise for them to ensure that the ongoing practice agrees to maintain a rational document retention policy.

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