

# CHAPTER 5

## RETAINER

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## (1) ACCEPTING INSTRUCTIONS

### 5.01 Freedom to accept instructions

**A solicitor is generally free to decide whether to accept instructions from any prospective client.**

#### **Commentary**

1. A solicitor should not refuse to accept instructions based upon the race, colour, ethnic or national origins, sex or religious or political beliefs of a prospective client.
2. In deciding whether to represent a prospective client who is accused of a crime, a solicitor should not be influenced by his own opinion of the client's guilt.
3. A solicitor who is instructed to bring an action against his prospective client's former solicitor should, provided he is competent and able, accept those instructions. However, he should not accept instructions to sue a colleague with whom or with any of whose partners or solicitors he is on friendly terms; he should instead explain the situation and advise the prospective client to seek advice elsewhere.
4. A solicitor cannot be retained by a prospective client who does not have mental capacity. There is a legal presumption of capacity unless the contrary is shown. Whether a prospective client does have capacity is a matter of law and it should be borne in mind that different levels of capacity are required for different activities. If there is doubt about a prospective client's mental capacity it may be advisable, where possible, to seek an opinion from the prospective client's medical doctor.
5. Where instructions are declined, the party giving the instructions must be promptly informed of the solicitor's decision. The solicitor should exercise his judgment whether to give reasons for his decision.
6. When considering whether to enter into a retainer, solicitors must not accept instructions where to do so will involve a breach of law or professional misconduct, e.g. those relating to anti-money laundering and instructions from recovery agents, property fraud, or security transactions with a potentially unduly influenced party. See Practice Direction P paragraphs 18 to 28 in relation to anti-money laundering and Circular 12-176 in relation to Recovery Agents.
7. In deciding whether to represent a client, a solicitor should consider his competence and time availability (see Chapter 6).
8. Save in the case of retainers in criminal matters, which must be in writing under Rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), in civil matters it is advisable for a solicitor to enter into a written retainer with his clients (see also Principle 4.01 Commentary 16).
9. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

## (2) ACTING OR CONTINUING TO ACT

### 5.02 Breach of law or professional misconduct

**A solicitor must not act or continue to act where to do so would involve him in a breach of law or in professional misconduct.**

#### *Commentary*

1. A solicitor who has accepted instructions to act is under a duty to uphold the law and to observe the rules of professional conduct; a client must accept these limitations on the performance of a retainer.
2. If a solicitor becomes aware that he will or has become involved in assisting someone to break the law he must cease to act for that person in that matter.
3. A solicitor must not act or continue to act where to do so would amount to an abuse of process.
4. A solicitor who is a party to an ORFS agreement may terminate the ORFS agreement before the conclusion of the matter to which the agreement relates if the solicitor reasonably believes that (a) the client has committed a material breach of the agreement or (b) the client has behaved, or is behaving, unreasonably (see also Principle 1.09, Principle 5.01 Commentary 9, Principle 5.03 Commentary 1, Principle 5.04 Commentary 3, Principle 5.05 Commentary 2, Principle 5.07 Commentary 3 and Principle 5.22 Commentary 13). A solicitor may consider including relevant terms and conditions in the ORFS agreement to provide for termination of ORFS agreement under other circumstances such as conflict of interest.

added on  
16/12/2022 as per  
Circular 22-827

### 5.03 Competence to act

**A solicitor must not act or continue to act in circumstances where he cannot represent the client with competence or diligence.**

#### *Commentary*

1. This obligation to refuse or to cease to act is a consequence of the professional responsibility to act competently and promptly in carrying out any retainer (see Chapter 6).
2. This would apply where a solicitor has insufficient time to devote to the matter, or insufficient experience or skill to deal with the instructions.
3. This Principle will not prevent a solicitor from acting if he is able to do so competently by, for example, instructing suitable counsel. Nevertheless he must be able to exercise sufficient care and control in the matter (see Principle 6.01).

#### 5.04 Duress or undue influence

**A solicitor must not continue to act where he suspects after reasonable enquiry that his instructions have been given by a client under duress or undue influence.**

##### *Commentary*

1. If a solicitor suspects or has reason to suspect that a client's instructions were given under duress or undue influence, he must either see the client alone in order to satisfy himself that the instructions were freely given, or refuse to act.
2. Particular care may need to be taken where clients are elderly or otherwise vulnerable to pressure from others.
3. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 1.09 and Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

#### 5.05 Unclear instructions

**A solicitor is entitled to cease to act if he cannot obtain clear instructions from a client.**

##### *Commentary*

1. In relation to the preparation of wills, especially where the client may be elderly, it is important to obtain enough information about the client's circumstances to be able properly to act for the client. When asked to prepare a will on the basis of written instructions alone, a solicitor should always consider carefully whether these are sufficient or whether the solicitor should see the client to discuss the instructions.
2. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 1.09 and Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

#### 5.06 Third party instructions

**Where instructions are received not from a client but from a third party purporting to represent that client, a solicitor should obtain written instructions from the client that he wishes him to act. In any case of doubt he should see the client or take other appropriate steps to confirm instructions.**

##### *Commentary*

1. In such circumstances a solicitor must advise the client without regard to the interests of the source from which he was introduced.

2. This Principle should particularly be borne in mind when instructions are received to commence or defend litigation; a solicitor is required by law to be properly authorised to act on behalf of a litigating client; if he is not he may become personally liable for costs if the action is struck out.

### **5.07 Conflict of interest**

**A solicitor must not act, or must decline to act further, where there is, or is a significant risk of, a conflict of interest.**

#### ***Commentary***

1. For conflict of interest between a solicitor or his firm and a client, see Chapter 7.
2. For conflict of interest between clients, see Chapter 9.
3. In relation to ORFS agreements, see Principle 1.09 and Principle 5.02 Commentary 4.

added on  
16/12/2022 as per  
Circular 22-827

### **5.08 Appointment leading to conflict**

**A solicitor must not act or continue to act where either he, his partner, employer, employee or near relative holds some office or appointment which may lead to a conflict of interest or which may give the impression to the public that the solicitor is able to make use of such appointment for the advantage of the client.**

#### ***Commentary***

1. The expression 'near relative' includes a spouse, parent, child, brother, sister, or spouse of any of them.
2. For example, a solicitor must not act or continue to act where he or his partner, employer, employee or near relative is a member of the tribunal before which the matter is to be heard. However, if he or his partner, employer, employee or near relative is merely a member of the panel from which that tribunal is selected, he is not thereby disqualified from acting.

### 5.09 Law Society investigations

**A solicitor should not accept instructions which at any stage involve an agreement whereby the Law Society is precluded from investigating the conduct of a solicitor or his employee.**

#### *Commentary*

1. It is improper for a solicitor to seek to preclude his client or former client from reporting a solicitor's conduct to the Law Society (see Principle 6.01 Commentary 9).
2. It is also improper for a solicitor acting for either party to a dispute to accept instructions to offer a settlement on similar terms.
3. As to limitation of liability for negligence, see Principle 6.01 Commentary 7.

### 5.10 Solicitor as a witness

**A solicitor must not accept instructions to act as an advocate for a client if it is clear that he or a member of his firm will be called as a witness in the case, unless his evidence is purely formal.**

#### *Commentary*

For further discussion, see Principle 10.13.

### 5.11 Where another solicitor has been retained

**A solicitor generally must not accept instructions to act in a matter where another solicitor is acting for the client in respect of the same matter unless the first solicitor consents.**

#### *Commentary*

1. Where the first retainer has been determined, another solicitor may act, and there is no duty on the second solicitor to inform the first solicitor of the fact that he has been so instructed, except in litigation where the first solicitor is on the record.
2. This Principle does not preclude a solicitor from giving a second opinion without the first solicitor's knowledge. However, a solicitor from whom a second opinion is sought must carefully consider whether he is in possession of sufficient facts to give such an opinion. In no



circumstances should the second solicitor improperly seek to influence the client to determine the first solicitor's retainer.

3. Furthermore, a solicitor is not precluded from advising another person on the subject matter of the first solicitor's advice if the other person has a separate or distinct interest.
4. Executors appointed under a will are free to choose a solicitor to act in the administration, notwithstanding that the testator may have expressed a wish in the will that a particular firm be used. There is no duty imposed on the solicitor instructed to act to notify the firm named in the will.

### (3) DUTIES OWED DURING A RETAINER

#### 5.12 Diligence, care and skill

**A solicitor who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill.**

#### *Commentary*

1. If a solicitor cannot act competently or efficiently he should cease representing the client (see Principle 6.01 Commentary 3 in particular).
2. A solicitor must act within his client's express or implied authority. It is therefore essential at the outset for a solicitor to agree clearly with his client the scope of his retainer and subsequently wherever possible to refer any matter of doubt to his client (see also Principle 6.01 Commentary 8).
3. A client should be told in simple language at the outset of a matter or as soon as possible thereafter the issues raised and how they will be dealt with and, in particular, the immediate steps to be taken. The client should also be informed about costs (see Chapter 4). The solicitor should consider whether it is appropriate to confirm in writing the advice given and the instructions received.
4. A solicitor should explain to his client the effect of any important and relevant document.
5. A solicitor should keep his client informed of the progress of the matter, any significant development in the matter and of the reason for any serious delay which occurs. This may often be assisted by sending his client copies of letters. Requests for information should be answered promptly.

6. A solicitor in carrying out his retainer has implied and ostensible authority to bind his client in certain circumstances; however, as a matter of good practice, it would not be appropriate for a solicitor to rely upon such implied or ostensible authority other than for routine matters or in exceptional circumstances, for example, where it was impossible to obtain express authority (see also Principle 10.17 Commentary 1).
7. It is good practice for a solicitor to obtain confirmation of the scope of the retainer in writing from his client at the outset in order to prevent or resolve quickly any dispute over the scope of responsibilities taken up by the solicitor (see also Principle 5.01 Commentary 8).

### **5.13 Confidentiality (see Chapter 8)**

**A solicitor must observe the duty of confidentiality (see Chapter 8).**

### **5.14 Rules of professional conduct to be observed**

**It is an implied term of a retainer that a solicitor is under a duty, at all times, to observe the rules of professional conduct.**

#### ***Commentary***

1. This means that there will be limitations upon the freedom of a solicitor to do what his client wants him to do. A solicitor must not breach the principles of professional conduct in order to benefit his client.
2. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

### **5.15 No exploitation**

**A solicitor must not take advantage of the age, inexperience, ill health, lack of education or business experience of his client.**

### **5.16 Fiduciary duty (see Chapter 7)**

**A solicitor owes a fiduciary duty to his client (see Chapter 7).**

### 5.17 Communication with client

**A solicitor is under a duty to keep his client properly informed and to comply with reasonable requests from the client for information concerning his affairs.**

#### *Commentary*

1. A client should be told the name and the status of the person responsible for the conduct of the matter on a day-to-day basis and the partner responsible for the overall supervision of the matter.
2. If the responsibility for the conduct or the overall supervision of the whole or part of a client's matter is transferred to another person in the firm the client should be informed.
3. A solicitor should advise his client when it is appropriate to instruct a barrister and obtain the client's authority before doing so. Whenever a client is to attend a hearing at which he is to be represented, he should be told the name of the solicitor or barrister who it is intended will represent him (see Principle 12.03 Commentary 1).
4. This duty extends to keeping a client informed about recent changes of the law where those changes affect the subject matter of his retainer.
5. The extent and frequency of the information supplied and the degree of consultation will depend on the circumstances and on the type and urgency of the matter and of the experience or otherwise of the client in that type of matter.
6. There may be exceptional circumstances in which a solicitor would be justified in withholding information from a client. See for example, Principle 8.03 Commentary 4.

### 5.18 Honest, candid and objective advice

**A solicitor must be both honest and candid when advising a client and give objective advice.**

#### *Commentary*

1. A solicitor's duty to a client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, and adequate consideration of the applicable law and the solicitor's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the solicitor honestly thinks about the merits and probable results.

2. A solicitor should explain as well as advise, so that his client is informed of the true position and is fairly and objectively advised about the real issues or questions involved.
3. A solicitor should clearly indicate the facts, circumstances and assumptions upon which his opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless a client instructs otherwise, a solicitor should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.
4. A solicitor should avoid making bold and confident assurances to a client.
5. In addition to advice on legal questions, a solicitor may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course a client should choose. In many instances the solicitor's experience will be such that his views on non-legal matters will be of real benefit to the client. A solicitor who advises on such matters should, where and to the extent necessary, point out his lack of experience or other qualification in the particular field and should clearly distinguish legal advice from such other advice.

### 5.19 Unbiased advice

**A solicitor's advice must be unbiased and not be influenced by whether his employment or other work may depend upon advising in a particular way (see rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Chapter 3).**

#### ***Commentary***

For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

### 5.20 Costs

**A solicitor should keep his client informed on an appropriately regular basis of the costs incurred to date (see Principle 4.06).**

### 5.21 Advice about legal aid or duty lawyer

**A solicitor is under a duty, both at the commencement of a retainer and during the retainer, where circumstances so indicate, to consider and advise a client on the availability of legal aid or the Duty Lawyer Service.**

#### *Commentary*

1. Failure to advise a client promptly of the availability of legal aid and the Duty Lawyer Service can amount to professional misconduct.
2. See also Principle 4.01 and its Commentaries.

## (4) TERMINATION OF RETAINER

### 5.22 Constraints on termination

**Unless otherwise provided in a written retainer, a solicitor must not terminate his retainer with his client except for good reason and upon reasonable notice, or with the client's consent.**

#### *Commentary*

1. A written retainer may be terminated in accordance with the terms of the retainer.
2. Where the entire contract rule applies, the contract may be terminated by a solicitor for good reasons and by reasonable notice.
3. Examples of good reason include where a solicitor cannot continue to act without being in breach of the law or rules of professional conduct, where a solicitor is unable to obtain clear instructions from a client, where there is a serious breakdown in the confidence between them or where a conflict of interest arises.
4. A solicitor has good reason to terminate a retainer if a client does not pay disbursements when required. If a client agreed at the inception of or during the retainer to pay on account of profit costs and anticipated disbursements ('fees') and he fails to pay, then that also may justify termination by the solicitor if the terms of the agreement to pay support the solicitor's action. If there is no such agreement the solicitor cannot justifiably terminate for failure to pay fees during the retainer (see Principle 4.08).
5. When funds run out during a trial, every assistance should be given to the client to make an immediate application for legal aid. Unless there are exceptional circumstances, the solicitor should continue to act at legal aid rates if he is on the Legal Aid Panel and if he is assigned to

act by the Director of Legal Aid (see also Principle 10.05 Commentary 3).

6. As to a solicitor's obligations, when he is the solicitor on record in criminal trial proceedings and he intends to terminate his retainer, see Principle 10.05 Commentaries 2 & 4.
7. A retainer may be determined by operation of law, for example, because of a client's or a solicitor's bankruptcy or mental incapacity or death. Where a client suffers mental incapacity the solicitor should take reasonable steps to ensure that the client's interests are protected. This may involve contact with the relatives. The solicitor may also contact the Official Solicitor. See also the *Mental Health Ordinance* (Cap. 136) and the *Official Solicitor Ordinance* (Cap. 416).
8. If a sole practitioner decides to cease to practise, he must inform his clients of that fact so that they may instruct other solicitors. Failure to inform his clients could amount not only to an act of negligence but also could lead to disciplinary action.
9. Where a new firm takes over from a firm which has ceased to practise or an existing firm is dissolved and the partners divide into two or more entities, the clients have the right to choose which solicitor or firm to instruct. It would not be proper for the new firm to take over the clients' business, including papers or money previously held, without the clients being notified promptly. Notification promptly by circular letter is therefore essential as is an agreement between the solicitors concerned as to the contents of such a letter.
10. Where the partners disagree about the arrangements for notifying clients of the dissolution of the firm, one or more partners may separately circularise all the clients of the firm. This circularisation should be a short factual statement informing the clients of the change as a result of a dissolution and may give the new practising addresses of each partner. There must be a statement that the client is free to instruct a solicitor of his choice.
11. The same Principles apply where a firm amalgamates with another firm.
12. Whatever the reasons for termination by a solicitor, it is prudent that reasonable notice or confirmation in writing, with the reasons, be given to the client.
13. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

### 5.23 Lien

**On termination a solicitor should, subject to any lien, promptly deliver to the client or his new solicitor all papers and property to which the client is entitled or hold them to his order and account for all funds of the client then held by the solicitor (see Circular 12-475).**

#### **Commentary**

1. Where a lien arises over a client's papers and documents delivered to a solicitor in his professional capacity for costs due and work done, they can be retained until those costs are paid. The lien is passive in nature and does not entitle a solicitor to sell or dispose of a client's property.
2. Despite the lien referred to above, the Law Society has certain powers to take possession of a solicitor's documents and assets under the *Legal Practitioners Ordinance* (Cap. 159), section 26C and Schedule 2.
3. Further, the court has power to order a solicitor to deliver up a client's papers notwithstanding the existence of the solicitor's lien. See *Rules of the High Court* (Cap. 4 sub. leg. A), Order 106 rule 3 and section 65 of the *Legal Practitioners Ordinance* (Cap. 159).
4. Where a solicitor is properly exercising a lien in respect of his unpaid costs the solicitor's papers should normally be released to the successor solicitor subject to a satisfactory undertaking as to the outstanding costs being given by the successor solicitor in lieu of the lien. There is however no duty on the original solicitor to accept an undertaking.
5. Where a client is legally aided, a solicitor's costs are secured by the Legal Aid Certificate and it follows that it would be inappropriate to call for a professional undertaking by the successor solicitor save for the costs not covered by the Certificate.
6. When a client changes solicitors the first solicitor should not charge for removing files from storage for collection by the former client, but he may charge a reasonable amount for the cost of delivering such files to the client or other solicitor. A reasonable charge may be made for retrieving documents from a client's file at the request of the client as this is fee earner's work for which a charge is normally made.

## APPENDIX

### PRINCIPLE 5.23

CIRCULAR 12-475

25 June 2012

#### LAW SOCIETY GUIDANCE NOTE

#### Storage and Destruction of Old Files Revised June 2012

##### 1. Ownership of Papers

The first task which should take place upon the conclusion of the retainer is a thorough review of the file to determine the ownership of the papers. Members should review the following extracts on 'Ownership, Storage and Destruction of documents' from *Cordery on Solicitors*:-

'Is the client entitled to the whole file once the retainer is terminated?'

Not necessarily. Most files will contain some documents which belong to you, some which belong to the client and possibly others belonging to a third party. Documents in existence before the retainer, held by you as agent for and on behalf of the client or a third party, must be dealt with in accordance with the instructions of the client or third party (subject to your lien). Documents coming into existence during the retainer fall into four broad categories.

- (a) Documents prepared by you for the benefit of the client and which have been paid for by the client, either directly or indirectly, belong to the client.

Examples: instructions and briefs; most attendance notes; drafts; copies made for the client's benefit of letters received by you; copies of letters written by you to third parties if contained in the client's case file and used for the purpose of the client's business. There would appear to be a distinction between copies of letters written to the client (which may be retained by you) and copies of letters written to third parties.

- (b) Documents prepared by you for your own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to you.

Examples: copies of letters written to the client; copies made for your own benefit of letters received by you; copies of letters written by you to third parties if contained only in a filing system of all letters written in your office; tape recordings of conversations; inter-



office memoranda; entries in diaries; time sheets; computerised records; office journals; books of account.

- (c) Documents sent to you by the client during the retainer, the property in which was intended at the date of despatch to pass from the client to you, belong to you.

Examples: letters, authorities and instructions written or given to you by the client.

- (d) Documents prepared by a third party during the course of the retainer and sent to you (other than at your expense) belong to the client.

Examples: receipts and vouchers for disbursements made by you on behalf of the client; medical and witness reports; counsel's advice and opinion; letters received by you from third parties.'

## 2. Retention of Old Files

The following are guidelines on the minimum retention period of old files:-

Conveyancing	*15 years
Tenancy	**7 years from expiration of the tenancy agreement
General files	**7 years
Criminal cases	3 years from the expiration of any appeal period

### \*Title Deeds and other original documents

Members should clarify the scope of the retainer in relation to the retention of title deeds. If the retainer does not extend to the safe custody of these documents, members should write to the client and seek instructions on returning these documents. If the client fails to provide instructions, members should write to the client to advise that a 'storage charge' fee will be charged for the safe custody of these documents. The level of any fee will be a matter for the practitioner to decide and is obviously a contractual matter with the client. Members should note however that it is not good conveyancing practice to hold original documents with the file.

\*See paragraphs 5(B)(a) and 8 below

\*\*See sections 51C and 51D of the *Inland Revenue Ordinance* (Cap. 112)

## 3. Storage of Old Physical Files in Hong Kong

Law Society's Practice Direction D7 (June 2012)

All old physical files must be stored in Hong Kong in order to ensure *inter alia* the preservation of confidentiality and easy retrieval.

Click [here](#) for a copy of Law Society's Practice Direction D7

4. Storage of Electronic Documents / Files (June 2012)

(a) Storage of Electronic documents (June 2011)

Members can elect to store all their old files electronically, provided that:

- (i) clients' rights are preserved in respect of confidentiality and otherwise; and
- (ii) appropriate access to copies in Hong Kong be maintained.

(b) Back-up Copies

Members should consider maintaining a duplicate set of disks with client information in a suitably secure and off-site location.

5. Destruction of Original Documents

A. Generally

Original documents, such as deeds, guarantees or certificates, which are not your own property, should not be destroyed without the express written permission of the owner. Where the work has been completed and the bill paid, other documents, including your file, may be scanned and then destroyed. In cases of doubt the owner's written permission should always be sought. If it is not possible to obtain such permission you will have to form a view and evaluate the risk.

B. Original Documents which should not be destroyed - *Electronic Transactions Ordinance* (Cap. 553)('ETO')

(a) Schedule 1 of the ETO

The Schedule identifies 13 types of documents which must be kept as originals:-

1. The creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document.
2. The creation, execution, variation or revocation of a trust (other than resulting, implied or constructive trusts).
3. The creation, execution, variation or revocation of a power of attorney.
4. The making, execution or making and execution of any instrument which is required to be stamped or endorsed under the *Stamp Duty Ordinance* (Cap. 117) other than a contract note to which an agreement under section 5A of that Ordinance relates.
5. Government conditions of grant and Government leases.

6. Any deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the *Land Registration Ordinance* (Cap. 128) by which any parcels of ground tenements or premises in Hong Kong may be affected.
7. Any assignment, mortgage or legal charge within the meaning of the *Conveyancing and Property Ordinance* (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property.
8. A document effecting a floating charge referred to in section 2A of the *Land Registration Ordinance* (Cap. 128).
9. Oaths and affidavits.
10. Statutory declarations.
11. Judgments (in addition to those referred to in section 6) or orders of court.
12. A warrant issued by a court or a magistrate.
13. Negotiable instruments.'

(b) Business Records in Electronic Format

The Inland Revenue Department (IRD) has advised that retention of business records in electronic, format should meet the requirements set out in sections 7 and 8 of the ETO.

Click [here](#) to view the IRD's letter dated 10 December 2001 and Law Society circular 01-371.

6. Admissibility of Electronic Documents before the Courts

Members should review the provisions of sections 46, 53 and 54 of the *Evidence Ordinance* (Cap. 8) (EO) which deals with admissibility of documents in court proceedings.

(a) Civil Proceedings

The broad and general definitions of 'copy' and 'document' in the EO will allow for the admission of business records stored electronically.

(b) Criminal Proceedings

Documents produced by computer are admissible under sections 22A and 22B of the EO.

7. Duty of Confidentiality

Members should review Principle 8 on the Duty of Confidentiality in *The Hong Kong Solicitors' Guide to Professional Conduct* and ensure

destruction of the file does not jeopardise the confidentiality of its contents.

#### 8. Destruction of Old Files

The responsibility for the decision to destroy a file remains with individual practitioners.

The Law Society recommends that once the retainer is terminated all documents, which belong to the client, should be returned to the client. The failure to do so may cause future difficulties as original documents, such as deeds, guarantees or certificates which belong to the client should not be destroyed without the express written permission of the owner.

Upon expiration of the appropriate retention period for closed files, members should ensure the files are destroyed in a secure manner by engaging a suitable commercial provider.

#### 9. Commercial Providers of Record Management/Scanning Services

(a) Members who wish to engage commercial providers should ensure the confidentiality of the file is maintained.

(b) Commercial Providers should provide an appropriate affidavit on the scanning services provided in compliance with the requirements of the *Evidence Ordinance* (Cap. 8):

- Identification of the document(s) scanned
- Date of scanning
- Identity of employee responsible for the scanning
- Type of machine used
- Whether the 'hard copies' have been destroyed

Circular 02-385 has been superseded (June 2012)

#### 10. Retrieval Charges

Members should arrange to return all of the clients' documents upon termination of the retainer. However, if the client wishes the firm to retain his personal documents, the firm should enter into a written agreement with the client that the firm will provide such service upon payment of appropriate storage and retrieval charges.

#### 11. Circular 02-384 has been superseded

Members should note the contents of paragraph 3 of this circular are mandatory.