

## When seven years isn't long enough

How long should you keep your file after a matter has concluded?

Some practitioners routinely destroy files seven years after closure with client authorisation. In some instances, experience tells us you should keep files for longer, especially where a cause of action can accrue more than six years after the retainer has ended. Retaining files is now relatively convenient and inexpensive given electronic storage options.

In one claim, a practitioner prepared a pre-nuptial agreement for the husband-to-be. The agreement, which made no provision for children from the marriage, was signed by the husband and a certificate of legal advice was signed by the practitioner four days before the wedding. The wife signed the agreement shortly after the wedding when she consulted her own lawyer.

After 15 years of marriage and children the couple decided to divorce. In the family court proceedings, the wife sought property orders without regard to the agreement and the husband argued the agreement ousted the jurisdiction of the court. The parties ultimately settled.

Subsequently, the husband alleged against the practitioner that he was not given adequate advice about the agreement, whether it was prudent to enter into it and that the agreement's lack of provision regarding children made it vulnerable to being set aside. As a result, his ex-wife received over \$2 million more than he thought she was going to receive under the agreement.

The practitioner's file was destroyed seven years after the expiration of the retainer. Well and truly before the marriage disintegrated. This significantly hampered his ability to refute allegations he failed to give adequate advice and failed to take instructions about whether the parties intended to have children.

This example indicates that you should maintain copies of family law financial agreement files in excess of the seven-year standard as they may be needed well after that time.

Similarly, will instruction files should also be kept indefinitely. One practitioner told us he initially marks all will instruction files 'not to be destroyed'. When he acts on a deceased estate involving a will he prepared, he consolidates the will instruction file with the estate file. He then destroys both files with client consent seven years after the estate file is closed.

You should also consider the need to keep files longer than seven years where you have acted in connection with:

- a mortgage where the term exceeds seven years
- a lease, especially one with an option to renew

- any matter where the period for ratification of an instrument by an infant exceeds seven years
- a power of attorney or deed.

Before destroying any file, it is up to you to make a risk assessment considering the time it could take for a cause of action to accrue and the need to keep the file to assist in the defence of a potential claim.