

MODEL PARTICIPATION RULES GUIDANCE NOTE

RETENTION OF EVIDENCE

1 INTRODUCTION

This guidance note aligns with Version 7 of the Model Participation Rules and explains:

- what evidence retention is;
- why evidence is required to be retained;
- when evidence must be retained; and
- how evidence is to be retained.

Capitalised terms have the meanings given to them in the Model Participation Rules, Model Operating Requirements or Electronic Conveyancing National Law.

This guide does not constitute legal advice nor does it replace prudent conveyancing practice. Nothing written in this guide overrides the Electronic Conveyancing National Law, Participation Rules, any other relevant legislation or Registrar's Prescribed Requirements.

2 WHAT IS EVIDENCE RETENTION?

Under the Model Participation Rules evidence supporting a Conveyancing Transaction must be kept for at least seven years from the date of Lodgment. The evidence must be legible, stored safely and securely, and accessible.

A Subscriber is required to retain evidence supporting:

- Client Authorisation;
- Verification of identity;
- Right to deal;
- Other Prescribed Requirements; and
- Any evidence required by the Duty Authority.

3 WHY IS EVIDENCE REQUIRED TO BE RETAINED?

Evidence is required to be retained in order to demonstrate that the transaction was completed in accordance with legislative and other requirements and the certifications required were accurately made. Refer to Model Participation Rules Guidance Note #3: Certifications.

Evidence may be required to be provided to the Registrar for the purpose of monitoring compliance with legislative and other requirements. Under the Electronic Conveyancing National Law, the Registrar may conduct a Compliance Examination either as a result of receiving a request or complaint from any Person or on the Registrar's own initiative. The Registrar may conduct a Compliance Examination for the purpose of ascertaining whether or not the Model Participation Rules have been complied with or investigating any suspected or alleged case of misconduct. Refer to Model Participation Rules Guidance Note #6: Compliance Examinations.

If there is a dispute that arises in relation to a Conveyancing Transaction a Subscriber may need to demonstrate in Court proceedings that the transaction was completed in accordance with legislative and other requirements. For example, evidence that reasonable steps were undertaken to verify the identity of a Client or Client Agent and the Client's right to deal may be required. Refer to Model Participation Rules Guidance Note #2: Verification of Identity and Model Participation Rules Guidance Note #4: Right to Deal.

4 WHEN MUST EVIDENCE BE RETAINED?

Evidence must be retained whenever a Conveyancing Transaction is undertaken. It must be retained for at least seven years from the date of Lodgment of the Registry Instrument or Document.

Evidence supporting the Registry Instrument is that which is required to demonstrate the validity of the Conveyancing Transaction. This will be what is required for a paper instrument, with the addition of the Client Authorisation and verification of identity evidence (if not currently kept). The evidence required is evidence which should be obtained as part of the process of undertaking the Conveyancing Transaction in accordance with prudent practice. A Subscriber is not required to seek additional supporting evidence.

There may be cases where there is little supporting evidence, for example for a discharge of mortgage Lodged by the mortgagee. In this case there may only be the mortgagor's request for a discharge.

The following evidence must be retained:

4.1 Client Authorisation

The Client Authorisation and any evidence supporting that Client Authorisation must be retained. Refer to Model Participation Rules Guidance Note #1: Client Authorisation.

Where there is a Client Authorisation and it is for a batch of Conveyancing Transactions, the Client Authorisation is required to be kept for at least seven years from the last Conveyancing Transaction Lodged with the Land Registry. Similarly, for a standing Client Authorisation it will need to be kept for at least seven years from the last Conveyancing Transaction Lodged with the Land Registry before the Standing Authority was revoked or expired.

4.2 Verification of Identity

Any evidence supporting that reasonable steps were taken to verify the identity of the Client or Client Agent, mortgagor, Person to whom a certificate of title was provided, Signer, Subscriber Administrator or other User (as applicable) must be retained. If the Verification of Identity Standard was used this evidence must demonstrate that the procedure for the Verification of Identity Standard was followed. If the Subscriber appoints an Identity Agent, the Subscriber must retain the written appointment, as well as the Identity Agent certification in Schedule 9 of the Model Participation Rules. If alternative reasonable steps were used to verify identity, the evidence must show what these steps were. Refer to Model Participation Rules Guidance Note #2: Verification of Identity.

4.3 Right to Deal

Any evidence supporting a Party's right to enter into the Conveyancing Transaction must be retained. Refer to Model Participation Rules Guidance Note #4: Right to Deal.

Evidence supporting a Party's right to enter into a Conveyancing Transaction may include but is not limited to originals, copies or records of: a current local government rates notice, current utility bills for the property, a current land tax assessment notice for the property, loan documentation, the mortgage granted by the mortgagor, the contract of sale for the property, the certificate of title/duplicate certificate of title for the property (if one exists) and/or a recently issued registration confirmation statement for the property.

4.4 Other Prescribed Requirements

Any evidence that demonstrates compliance with relevant legislation and other Prescribed Requirements must be retained. Prescribed Requirements detail policies, procedures and requirements of the Registrar in the respective Jurisdiction. Examples of Prescribed Requirements include but are not limited to notices to Land Registry

customers, practice manuals, practice directions and guidelines. What type of evidence is required to be retained is dependent on the type of transaction but may include statutory declarations, trust deeds, agency agreements or evidence of death.

5 HOW IS EVIDENCE TO BE RETAINED?

Evidence could be electronic or paper evidence. It could be stored electronically and/or in paper. It could be stored by the Subscriber and/or an agent on a Subscriber's behalf. However, the medium and means in which Documents supporting the Conveyancing Transaction are to be retained is to be determined by a Subscriber in light of the possible need to produce the evidence to a Court and any privacy obligations they are required to abide by. Evidence should be accessible, legible, and safely and securely stored whichever medium is used.

6 FREQUENTLY ASKED QUESTIONS

Q1: Does the evidence certification include all correspondence, emails and telephone attendance notes?

A1: Evidence should be kept which is sufficient to support the requirements and the validity of the Conveyancing Transaction.

For example, if the correspondence, emails or telephone notes support that reasonable steps were taken to verify the right to deal of the transacting Party, they should be kept.

Q2: Can evidence be retained electronically?

A2: Yes. Evidence can be stored electronically. However, the medium and means in which Documents supporting the Conveyancing Transaction are to be retained is to be determined by the Subscriber in light of the possible need to produce those Documents as evidence to a Court.

Q3: What would constitute "sufficient evidence" when the caveat is to protect a mortgagee's interest? Would a copy of the loan agreement or mortgage suffice, or would we need to retain a paper caveat on the same terms?

A3: There is no specific requirement to hold a paper Caveat on the same terms. Your obligation is to ensure that you have evidence of authorisation to represent the Client and evidence to support the transaction that is being conducted. In the case of a Caveat protecting a mortgagee's interest, a loan agreement or Mortgage may be deemed by a Registrar as being appropriate evidence of the transaction.

Q4: Can another conveyancer or lawyer act for my client in an electronic Conveyancing Transaction?

A4: A conveyancer or lawyer (Instructing Practitioner) may instruct a conveyancer or lawyer Subscriber (Subscriber) to act on its Client's behalf to undertake work in an Electronic Lodgment Network, including creating and Digitally Signing electronic Registry Instruments and other electronic Documents. In these circumstances, the Subscriber must obtain a Client Authorisation directly from the Client (not the Instructing Practitioner). The Subscriber will also need to take reasonable steps to verify the identity of the Client and the Client's right to deal, as well as comply with all other Model Participation Rules. The Subscriber will need to retain the appropriate supporting evidence.

Refer to Model Participation Rules Guidance Note #9: Instructing Practitioner Engaging a Subscriber.