File Ownership, Retention & Destruction Guidelines

A client file usually contains hardcopy and electronic documents which belong to either the practitioner or the client. Accordingly, the client matter file in its entirety does not belong to either the practitioner or the client. Each document with a client matter file must be assessed individually to determine who is entitled to that particular document prior to the documents being retained, destroyed or provided to the client in the format held by the practitioner (e.g. electronic documents may be provided in electronic format). In these guidelines reference to documents includes electronic documents (and references to letters include emails). Nothing in this Guideline affects trust or administrative records.

The two relevant factors to be considered in relation to who is entitled to a document include[1]:

1. Whether the client was charged for the creation of the document; and
2. Whether the practitioner created the document primarily for the client's benefit or for the practitioner's own benefit and use.

Client Documents:

1. Documents to which the client is entitled may vary from case to case as a matter of law, but will generally include:
   (a) Documents prepared by a practitioner wholly or primarily for the client's benefit, in relation to the client's matter.[2]
   (b) Documents which the client provided to the practitioner where the client did not intend for the ownership of the documents to pass from the client to the practitioner at the date the documents were provided.[3]

2. Documents *created for the client's benefit* belong to the client, and may include:[4]
   - Documents prepared by a practitioner on behalf of the client where the client was charged for the creation of the document (which includes letters and emails written by a practitioner to third parties);
   - Documents involving counsel which were created or received for the benefit of the client (even though it may also be for the practitioner's own benefit) e.g. counsel briefs;
   - Correspondence and notes of conversations between a practitioner and court officials (although a practitioner is entitled to a copy of these documents);
   - Documents prepared by third parties during the retainer and sent to the practitioner (including letters and emails from third parties to the practitioner, expert reports and counsel's opinions).[5] This does not apply to documents provided at the practitioner's expense.[6]

Practitioner's Documents:

3. Documents to which the practitioner is entitled may vary from case to case as a matter of law but will generally include:[7]
   (a) Documents prepared by the practitioner for the practitioner's own benefit or use; and
   (b) Documents which the client or third party provided to the practitioner where the client or third party intended for the ownership of the documents to pass from the client or third party to the practitioner at the date the documents were provided.

4. Documents *created for the practitioner's own benefit and use* may include:[8]
   - Correspondence including electronic documents, emails, drafts, internal photocopies, copies of letters written to the

[1] *Wentworth v de Montfort* (1988) 15 NSWLR 348
[2] Rule 7.5.1 *Professional Conduct & Practice Rules* 2005
[3] *Wentworth v de Montfort* (1988) 15 NSWLR 355 D
[4] *Wentworth v de Montfort* (1988) 15 NSWLR 348
[5] *Cordery on Solicitors* (9th ed, Butterworths LexisNexis, London, loose-leaf), pp E/405-E/406
[6] *Wentworth v de Montfort* (1988) 15 NSWLR 348
[7] *Wentworth v de Montfort* (1988) 15 NSWLR 348
[8] *Wentworth v de Montfort* (1988) 15 NSWLR 348

client, internal emails/memoranda, attendance notes, office journals and account book entries;
- Proofs of evidence;
- File notes (including diary entries, time sheets and books of account);
- Financial records (i.e. cheque requisition forms, internal financial reconciliation documents and trust account bank statements), although the client is entitled to information about their financial affairs on the records and are entitled to inspect and copy such documents where appropriate.

Document Retention & Destruction:

A practitioner is obliged to retain client documents in a secure and confidential manner for at least seven years after the completion of the matter,[9] unless the client provides instructions to the contrary. Subject to what follows, a practitioner may destroy documents held after seven years provided they have made reasonable efforts (e.g. a letter to the client's last known address may suffice depending on the circumstances) to obtain instructions from the client first.[10] Where litigation may be delayed beyond the applicable statute of limitations period, longer retention periods may also be necessary. Practitioners should always maintain a common-sense approach in determining which documents should be retained indefinitely.

If written communication to the client's last known address is not practicable, it is suggested that practitioners publish advertisements in appropriate newspapers, requesting clients to provide instructions on the destruction or retrieval of their file within 60 days.[11]

It is highly desirable for a practitioner to ensure that client retainers include provisions enabling destruction of appropriate documents.

Original documents (and associated files) that may be the subject of litigation, such as wills, deeds, leases and binding financial agreements, may need to be retained for longer periods or indefinitely having regard to the applicable statute of limitations period, which may not commence until the date of the cause of action and may be extended in some cases. Practitioners should always maintain a common-sense approach and consider the prospect of litigation in determining which documents to retain or destroy.

Firms should be mindful that their policy with respect to closing and destroying files could have serious ramifications from a risk management perspective and might affect a practitioner's ability to defend claims. Practitioners are reminded of their obligations under the Crimes Act 1958 (Vic) not to knowingly destroy documents which will be used as evidence.

Document Delivery:

Where a client requests the file before the end of seven years, then a practitioner must promptly make available that client's documents, without charge to the client, unless the client has provided an earlier authority in writing to such a charge being made (subject to an enforceable lien).[12]

If the client collects the file in person from the practitioner, no charge should be made to the client. Any expense incurred by making any other form of delivery may be charged to the client.[13]

A practitioner is not prohibited from copying a file prior to the file being delivered to the client in order to maintain a complete file for the practitioner's own record, but the practitioner is not entitled to charge the client for this copy.

Photocopying:

If a practitioner has previously supplied the client with copies of documents to which the client is entitled and the client subsequently requests further copies of those documents to be supplied, the practitioner is entitled to charge a reasonable fee for the copying of those documents. Where there are multiple clients and only one client requests photocopying of documents within the joint file, then the costs of the copying shall be borne by the requesting client.

Multiple clients:

Where multiple clients are jointly entitled to documents, the practitioner should hold the original documents on file and provide copies to all of the clients when requested. A practitioner must have the consent of all clients prior to the release of original documents to one of the clients.

How can we help you?

Visit the Ethics Department's website at: www.liv.asn.au/Practising-in-Victoria/Ethics.

These are guidelines only and do not have the force of law. A practitioner must comply with the Professional Conduct & Practice Rules 2005 and Legal Profession Act 2004.

To discuss concerns about document retention, destruction & delivery, contact the Law Institute's Ethics Department on 9607 9336.

Adopted by the Council of the Law Institute of Victoria on 18 August 2011.

[9] Rule 7 *Professional Conduct & Practice Rules* 2005
[10] Section 7.2.16 *Legal Profession Act* 2004 (Vic).
[11] Ethics Committee Ruling R3893 – Legal practice Management - File Storage/retention – Full destruction (2003)

[12] Rule 37 *Professional Conduct & Practice Rules* 2005.
[13] Lewis, G E; Kyrou, E J & Dinelli, AM, *'Lewis & Kyrou's Handy Hints on Legal Practice,'* Third Edition, LAWBOOK CO 2004, p 106.