

## File ownership, retention & destruction guidelines

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A file usually contains hardcopy and electronic documents<sup>1</sup> which belong to either the solicitor and/or the client. Accordingly, the client matter file in its entirety does not belong to either the solicitor or the client. Each document within a client matter file must be assessed individually to determine who is entitled to that particular document prior to the document being retained, destroyed or provided to the client in the format held by the solicitor (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 these guidelines affects trust or administrative records.

Two relevant factors to be considered in relation to who is entitled to a document are:<sup>2</sup>

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

### Client's 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 solicitor wholly or primarily for the client's benefit, in relation to the client's matter.<sup>3</sup>
  - (b) Documents which the client provided to the solicitor where the client did not intend for the ownership of the documents to

pass from the client to the solicitor at the date the documents were provided.<sup>4</sup>

2. Documents *created for the client's benefit* belong to the client, and may include:<sup>5</sup>
  - a) Documents prepared by a solicitor on behalf of the client where the client was charged for the creation of the document (which includes letters and emails written by a solicitor to third parties);
  - b) Documents involving counsel which were created or received for the benefit of the client (even though it may also be for the solicitor's own benefit) e.g. counsel briefs;
  - c) Correspondence and notes of conversations between a solicitor and court officials (although a solicitor is entitled to a copy of these documents);
  - d) Documents prepared by third parties during the retainer and sent to the solicitor (including letters and emails from third parties to the solicitor, expert reports and counsel's opinions).<sup>6</sup> This does not apply to documents provided at the solicitor's expense.<sup>7</sup>

### Solicitor's Documents

3. Documents to which the solicitor is entitled may vary from case to case as a matter of law but will generally include:<sup>8</sup>
  - (a) Documents prepared by the solicitor for the solicitor's own benefit or use; and
  - (b) Documents which the client or third party provided to the solicitor where the client or third party intended for the ownership of the documents to pass from the client or third party to the solicitor at the date the documents were provided.

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<sup>1</sup> *Electronic Transactions (Victoria) Act 2000* (Vic) ss 10-11.

<sup>2</sup> *Wentworth v de Montfort* (1988) 15 NSWLR 348, *Champion v Rohrt* (2016) VSCA 215.

<sup>3</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 14.

<sup>4</sup> *Wentworth v de Montfort* (1988) 15 NSWLR 348, *Champion v Rohrt* (2016) VSCA 215.

<sup>5</sup> *Ibid.*

<sup>6</sup> Arthur Cordery, LexisNexis Butterworths, *Cordery on Solicitors* (9<sup>th</sup> ed, London, loose-leaf), E/405-E/406.

<sup>7</sup> *Wentworth v de Montfort* (1988) 15 NSWLR 348, *Champion v Rohrt* (2016) VSCA 215.

<sup>8</sup> *Ibid.*

4. Documents *created for the solicitor's own benefit and use* may include:<sup>9</sup>
- a) Correspondence including electronic documents, emails, drafts, internal photocopies, copies of letters written to the client, internal emails/memoranda, attendance notes, office journals and account book entries;
  - b) Proofs of evidence;
  - c) File notes (including diary entries, time sheets and books of account);<sup>10</sup>
  - d) 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 solicitor is obliged to retain client documents in a secure and confidential manner.

A solicitor or law practice “*may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement except where there are client instructions or legal obligations to the contrary.*”<sup>11</sup>

There is a trend for law practices (whether as part of a paperless office or otherwise) to scan client documents in physical form ('hard copies') for electronic storage ('soft copies'). It is noted that a solicitor or law practice may only destroy hard copies of client files before the expiration of 7 years if the firm has obtained client consent.

In the case of electronic documents (including emails and messages), solicitors should retain them in their original (native) format, as that format is likely to include other potentially relevant information about the document (metadata) that is not immediately apparent. So, for example, solicitors should not merely print out an email and store that hard copy, as the hard copy is a substantially inferior record of the original email, given the loss of metadata (about how and when it was delivered etc.) in the printed version. The metadata is as much a part of the electronic document (and thus potentially owned by the client) as its ordinary text. In addition, to the extent that a solicitor is obliged by law to retain an “electronic communication” (such as an email), section 11(4)

of the *Electronic Transactions Act 2000* (Vic) obliges solicitors to retain it in a manner that maintains its integrity.

It is highly desirable for a solicitor to ensure that client retainers include provisions enabling destruction of appropriate documents and to explain that if requested, the client documents will be provided in a specified form (electronic or hard copy)<sup>12</sup>.

A suggested form of words to include in client engagement letters is:

Subject to any instructions by you to the contrary, you authorise us to destroy, at any time and without consulting you, any documents we hold in hard copy form regarding your matter that by law are regarded as belonging to you, (except any wills, deeds, leases and agreements). If we destroy any hard copy document before the date 7 years after the completion or termination of our engagement for your matter, then we will create an electronic copy before destroying it.

Where we hold documents in electronic form regarding your matter and you are entitled to a copy of them (including electronic copies created as above), we will retain them for at least 7 years after the completion or termination of our engagement for your matter. (If you request these documents they will be provided to you in electronic form, not hard copy.) After that period we may, unless you instruct us otherwise, destroy them without further notice to you.

Where litigation may be delayed beyond the applicable statute of limitations period, longer retention periods may also be necessary.

As reflected in the above suggested engagement letter wording, original documents (and associated files) that may be the subject of litigation, such as wills, deeds, leases and agreements including 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.

Solicitors should always maintain a common-sense approach and consider the prospect of litigation in determining which documents to retain or destroy.

It is good practice for firms to ensure there are adequate protocols, procedures and training for the scanning of hard copy documents so as to ensure nothing is missed and that original documents, that should not be destroyed are not inadvertently

<sup>9</sup> Ibid.

<sup>10</sup> But see *Alexiou v Alexandra White and ors t/as HWL Ebsworth Lawyers* [2021] NSWSC 485.

<sup>11</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 14.2.

<sup>12</sup> Note the provisions in rule 16 of the *Australian Solicitors' Conduct Rules 2015*. In particular that a solicitor must not charge for storage or retrieval of documents unless the client has agreed in writing to such charge.

caught up in the file and subsequently destroyed. 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 solicitor's ability to defend claims. Solicitors are reminded of their obligations under the *Crimes Act 1958* (Vic) not to knowingly destroy documents which will be used or are reasonably likely to be used as evidence.

### Document Delivery

Where a client requests the file, then a solicitor 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).<sup>13</sup>

If the client collects the file in person from the solicitor, no charge should be made to the client. Any expense incurred by making any other form of delivery may be charged to the client.<sup>14</sup>

A solicitor 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 solicitor's own record, but the solicitor is not entitled to charge the client for this copy.

### Photocopying

If a solicitor 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 solicitor 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.

### Paperless offices

Client matter files may be stored entirely electronically with the consent of the client, and client engagement letters should seek client consent and also specify the means by which the client documents will be provided to the client at the completion of the matter (i.e. either in electronic form or in hardcopy.)

Solicitors should refer to [Going Digital: Record-keeping guidance](#) published by the Victorian legal

Services Board & Commissioner's Office when seeking to store files digitally.

### Multiple clients

Where multiple clients are jointly entitled to documents, the solicitor should hold the original documents on file and provide copies to all of the clients when requested. A solicitor 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 & Practitioner Support Department's website](#).

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and any other applicable rules or legislation.

To discuss concerns about document retention, destruction & delivery, contact the Ethics & Practitioner Support Department on (03) 9607 9336.

*Approved by the President of the Law Institute of Victoria on 12 October 2022, under the Instrument of Delegation authorised by a resolution of the LIV Board passed on 19 June 2019.*

<sup>13</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 16.

<sup>14</sup> Gordon Lewis, Emiliios Kyrou & Nuwan Dias, *Lewis & Kyrou's Handy Hints on Legal Practice* (LawBook Co, 3<sup>rd</sup> ed 2004) 106.