



The Law Society

Guidance – ownership, storage and destruction of documents

1. 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 (see also *Cordery on Solicitors*):

(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. Who owns the file where there has been a joint retainer?

In the Society's opinion the documents which fall into category (a) above belong to both or all of the clients jointly. Such documents can only be disclosed to third parties with the consent of both or all of the clients and the original papers can only be given to one client with the authority of the other(s). Each client is entitled to a copy of the relevant documents at their own expense. (See also **16.01** note 5, p.324 in the Guide.)

3. Who owns the file where there is a single file but two separate retainers?

This is usually the case where you have acted for the buyer/borrower and for the lender on a contemporaneous purchase and mortgage, or for the borrower and for the new lender on a re-mortgage. You will need to sort through the file to determine the ownership of the various papers (see question 1, above). There may, however, be documents which belong to the borrower but which the lender is nevertheless

entitled to see as they relate to that part of your work where the lender and borrower can be said to have a common interest, such as the deduction of title, the acquisition of a good title to the property and ancillary legal issues such as the use of the property. See also **16.02** note 9 (p.326) in the Guide, and Annex 16C (p.341) in the Guide on the ownership of conveyancing documents.

4. How long should I retain old files?

The Society cannot specify how long individual files should be retained. It may be advisable to retain all files for a minimum of six years from when the subject matter was wholly completed. At the end of the six-year period, you should review the files again according to the nature of the particular transactions, and the likelihood of any claims arising. In cases where a party was under a disability at the time of the action or where judgement for provisional damages has been obtained, files should be retained for a minimum period of six years from the date on which the client would have a cause of action, or final judgement has been obtained.

The relevant statutory provisions should also be taken into account and some examples are given:

- (a) Under Schedule 11, paragraph 6(3) of the Value Added Tax Act 1994, records and papers relevant to VAT liability have to be kept for six years; this obligation could cover all the papers in a solicitor's file and, subject to Customs and Excise agreeing the contrary in any particular case, the whole file should therefore be kept for this period. This obligation may be discharged by keeping the papers on microfilm or microfiche, but Customs and Excise's detailed requirements should first be checked with the local VAT office.
- (b) Section 14A of the Limitation Act 1980 provides a special time limit for negligence actions where facts relevant to the cause of action are not known at the date of accrual. It prevents the bringing of such actions after six years from the date on which the cause of action accrued or three years from the date on which the plaintiff knew or ought to have known the facts, whichever is later. Section 14B provides an overriding time limit of 15 years from the defendant's breach of duty.

5. Can I destroy documents once I have held them for the relevant period?

Before deciding to destroy a file it is essential to consider who owns which documents (see question 1, above). No documents should be destroyed without the prior consent of the owner (but see question 6 below in respect of microfilming). You may always invite clients to take possession of their own papers, balancing the potential saving of space and expense against a possible loss of goodwill.

6. Can I store documents photographically or electronically, and destroy the originals?

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 stored, for example, on a CD ROM, computer system or microfilm and then destroyed after a reasonable time. 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. When seeking owners' permission to microfilm or store data electronically and destroy documents, you may wish to reserve the right to make a reasonable charge for preparing copies

if they are later requested. See question 4(a) above for the requirements of Customs and Excise.

7. What is the evidential value of a photographically or electronically stored document where the original has been destroyed?

There is a dearth of judicial authority on this topic and, until the law and practice on the subject of microfilmed or electronically stored documents are clarified, it is only possible to provide general guidelines. The Society has been advised that:

- (a) A microfilm of any document in a solicitor's file will be admissible evidence to the same extent, no more and no less, as the document itself, *provided that* there is admissible evidence of the destruction of the document and identification of the copy.
- (b) Written evidence of the destruction of the original and of identification of the copy will enable the microfilm to be adduced in subsequent civil proceedings (under the Civil Evidence Act 1968) and in criminal proceedings (under the Police and Criminal Evidence Act 1984).

8. What procedures would the Society recommend where an original document is stored electronically or photographically and then the original is destroyed?

- (a) Written evidence of the destruction of the original and of identification of the copy must always be preserved in case oral evidence is no longer available when needed (see question 7(b) above).
- (b) There should be a proper system for:
 - (i) identifying each file or document destroyed;
 - (ii) recording that the complete file or document, as the case may be, has been photographed;
 - (iii) recording identification by the camera operator of the negatives as copies of the documents photographed; and
 - (iv) preserving and indexing the negatives.
- (c) If a microfilm, electronically or photographically stored data is required to be produced in evidence, a partner or senior member of staff should be able to certify that:
 - (i) the document has been destroyed;
 - (ii) the microfilm, electronically or photographically stored data is a true record of that document; and
 - (iii) the enlargement is an enlargement of the microfilm, electronically or photographically stored data.
- (d) Microfilm copies of some documents (e.g. coloured plans) can be unsatisfactory, in which case the originals should be preserved.

9. Will I be covered by the Solicitors' Indemnity Fund if I lose a client's file or destroy it without the client's consent?

If you incur liability either to a client or to a third party by the loss or destruction of documents, cover will normally be provided by the Solicitors' Indemnity Fund.

10. What happens if I lose a file relating to a claim against my firm?

If the handling or settlement of a claim has been prejudiced by non-compliance with any provision of the indemnity rules, Solicitors Indemnity Fund Limited (SIF) is entitled to recover from the firm (or from you personally) the difference between the sum payable by the Fund in respect of the claim and the sum that would have been payable but for the non-compliance (Annex 29A at p.793 in the Guide). This could happen if documents were destroyed after a claim had been made or after the firm had knowledge of circumstances likely to give rise to a claim. In such a case, the firm would be in breach of its obligation to allow SIF to take over and to conduct the defence or settlement of the claim. Extra care should, therefore, be taken of any papers that relate to a claim or possible claim.

11. Would the client have grounds for making a complaint if I lost a file, or destroyed it without the client's consent?

The Standards and Guidance Committee's view was that the storing of deeds and other legal documents for clients is a professional service. The loss or destruction of such documents could, therefore, give rise to an investigation by the Office for the Supervision of Solicitors on the basis of inadequate professional services.

12. What if I am holding documents which may be of historical or archival value?

Contact the county archivist to arrange a confidential inspection of the documents. If it is necessary to preserve the confidentiality of archival material due, for example, to the true ownership being in doubt, arrangements should be made with the county archivist for it to be deposited on that basis, so that if the ownership is later established, it can be returned. For further details contact the British Records Association, Records Preservation Section, c/o London Metropolitan Archives, 40 Northampton Road, London EC1R 0HB (0171 833 0428 or 020 7833 0428).

13. How can I ensure client confidentiality when destroying old files?

The best way to ensure confidentiality is to arrange for the old files to be shredded in the office sufficiently finely to avoid any risk. If that is not possible, while this responsibility remains with the solicitor, it should be possible to contract either with the local council or a member firm of the British Recovered Paper Association for their confidential destruction in sealed bags. The Association's address is Paper Makers House, Rivenhall Road, Swindon SN5 7BD (01793 889624).

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