

OPINION

OWNERSHIP AND RETENTION OF RECORDS ON TERMINATION OF RETAINER

Introduction	1 – 7
Contractual obligations	8 – 11
Categories of documents to be retained	12
Documents in existence before retainer commences	13
Documents coming into existence during retainer	14 – 33
Documents with third party interests	34 – 36
Right to information	37 – 40
Dealing with documents once retainer has ended	41- 58
Form in which documents are to be retained	59 – 73
The position of barristers	74 – 78
Guidelines for retention of records	Appendix

Introduction

1. I have been asked to revise the guidelines for legal practitioners as to the retention of records on the termination of a retainer, and to provide an opinion as to the legal basis underlying the guidelines.
2. The particular matters of concern are: which records must be retained; in what form records may be retained; and for how long records have to be retained. You have also requested me to consider the relevance to these issues of the Privacy Act 1993. The solicitors' lien over documents does not form part of this opinion.
3. Some of these matters were dealt with in an opinion by Robert Smellie QC dated 17 September 1979. I have not sought to replicate the work done there, but have relied on it as a starting point.
4. Since that opinion, the legal position has been clarified to some degree by the decision of the Court of Appeal of the Supreme Court of New South Wales in *Wentworth v De Montfort* (1988) 15 NSWLR 348. There have also been considerable developments in technology for the storage of records. The matter has finally been addressed by the legislature in the Electronic Transactions Act 2002.
5. Many of the authorities which have developed the principles are of venerable antiquity, and were developed in relation to quite different situations. This was acknowledged by Hope JA in *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 353. I have attempted to bear this in mind when seeking to extract the governing principles.
6. I have divided the opinion into the following sections:
 - 6.1 Contractual obligations between solicitor and client
 - 6.2 Categories of documents to be retained

- 6.3 Right to information
 - 6.4 Dealing with documents once retainer has ended
 - 6.5 Form in which records are to be retained
 - 6.6 The position of barristers
7. My conclusions as to the appropriate form of guidelines are set out in an appendix.

A Contractual obligations between solicitor and client

8. The obligation to retain records is frequently considered solely as a question of ownership of documents. This is, however, no more than a default position. It is important to note that the relationship between solicitor and client is essentially a contractual one. The importance of the contract between professional and client was stressed in *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 ALL ER 483 in relation to valuers. It is also acknowledged in *Wentworth v De Montfort* (1988) 15 NSWLR 348, which concerned solicitors.
9. It is permissible for a solicitor to regulate by contract exactly which documents the client will be entitled to, and what is to happen to documents retained by the solicitor. This has become a matter of increasing importance with developments in technology and the impracticability of storing paper for long periods of time. As the law does not cater specifically for this, contractual arrangements are necessary to ensure proper protection for solicitors. As a matter of practice, the ownership of and obligations relating to documents should be discussed on establishment of the retainer in order to avoid confusion at a later date.
10. The contract between the solicitor and the client should specify which documents a client is entitled to, what documents will be retained by the solicitor for his or her own records, what will happen at the end of the retainer, and how

the solicitor will deal with any documents retained after that time. It would be advisable to stipulate that all drafts of a final document remain the property of the solicitor, and that the solicitor is entitled to make copies of all documents sent to the client, which will be the property of the solicitor. While it may well be that these matters have become accepted as a consequence of general retainers between solicitors and clients (see below), it is preferable for all concerned to have clarity.

11. The principles discussed below relate to the situation which has not been regulated by the terms of the retainer.

B Categories of documents to be retained

12. As noted in the Smellie opinion, documents fall to be considered in three basic categories:

- 12.1 Documents in existence before the retainer commences.
- 12.2 Documents coming into existence during the retainer.
- 12.3 Documents relating to joint instructions or fiduciary duties to others.

Documents in existence before the retainer commences

13. There is no doubt that these belong to the client and must be returned to the client on termination of the retainer, or be disposed of as directed by the client.

Documents coming into existence during retainer

14. In this category, the nature of the retainer undertaken by the solicitor is of critical significance. In some situations, the solicitor is simply acting as the agent of the client. Other situations will involve the provision of professional services.

15. The old case of *Ex parte Horsfall* (1827) 7 B & C 528 equated entitlement to documents with payment for them. That is, however, too crude a measure, and the decision has subsequently been glossed in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA). Payment for something does not as a matter of course result in ownership; the intention of the parties has to be ascertained (see eg *In re Wheatcroft* (1877) 6 Ch D 97). While payment is a relevant factor to be taken into consideration, the principal distinction which has been drawn by the Courts is between those documents prepared for the benefit of the client, and those prepared for the benefit of the solicitor: *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205; *Wentworth v De Montfort* (1988) 15 NSWLR 348.
16. Bearing this in mind, documents can be divided into three broad categories:
 - 16.1 Documents created to be sent, received or held by the solicitor as agent for the client.
 - 16.2 Documents created for the benefit of the client.
 - 16.3 Documents created for the benefit of the solicitor, or where property is intended to pass to the solicitor.

(a) Documents created to be sent, received, or held by the solicitor as agent for the client

17. If a solicitor is acting solely as agent on behalf the client as principal, the ordinary rules of agency apply. Letters received by the solicitor from third parties will often fall in this category. In the nature of solicitors' business, however, a document created by the solicitor purely as an agent is rare, and will be the exception rather than the rule. In *Breen v Williams* (1996) 186 CLR 71, the High Court of Australia held that a patient had no proprietary interest in her medical records. Gaudron & McHugh JJ said (at 101):

“Professional persons are not ordinarily agents of their clients even though they often have express, implied or ostensible authority to enter contracts on their clients’ behalf. Documents prepared by an agent are ordinarily the property of the principal, but documents prepared by a professional person to assist him or her to do work for a client are the property of the professional person, not the lay client.”

18. Documents sent or received by the solicitor purely as agent belong to the client: *Chantrey Martin v Martin; Wentworth v De Montfort* (1988) 15 NSWLR 348. This category includes correspondence with third parties, as well as notes of telephone calls. Copies of such documents retained for the solicitor’s own file would, however, fall into category (c).

(b) Documents created for the benefit of the client

19. In the ordinary situation, where the solicitor is not acting as a simple agent, but is providing professional services, it is necessary to consider the reasons for creating a document. As noted in *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 355, the reasons will frequently be mixed. Whether a charge has been made for the particular document is a relevant factor, but is not determinative.
20. Where the retainer requires the solicitor to produce a document such as a contract or deed for the client, this will clearly be the property of the client: *Gibbon v Pease* [1905] 1 KB 810; *Breen v Williams* (1996) 186 CLR 71 at 89 per Dawson & Toohey JJ. Copies of letters written on behalf of the client and retained as evidence would likewise belong to the client: *Marshall v Macalister* [1952] NZLR 257; *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 355.
21. The position of drafts and additional copies of letters for the solicitor’s file is more difficult. It has been suggested that, where the client pays for these, they belong to the client, and consequently that a solicitor should not charge for copies retained for his or her own protection. (This was the position adopted in the Smellie opinion, and is still reflected in Annex 12A of *The Guide to Professional Conduct of Solicitors*.)

22. Additional copies of letters for the solicitor's file are not brought into existence for the benefit of the client; their purpose is for the benefit of the solicitor: *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356. The fact of payment for such copies is not determinative and is, in my opinion, generally irrelevant. It should not be allowed to obscure the principle that property in these documents is intended to vest in the solicitor.
23. In *Wentworth*, Hope JA suggested that there would have to be a "special agreement" to justify charging the client for such copies (at 356). In my opinion, that puts the matter too high; it would come as a great surprise to most solicitors to learn that they were not entitled to charge a client for copies they intended to retain. There is no reason why solicitor's charges should not be made for such copies.
24. Drafts prepared by solicitors have been the subject of little in the way of judicial decision since *Horsfall*, in which they were held to be the property of the client who had paid for them. In *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA), however, the Court of Appeal had no difficulty in concluding that drafts prepared by chartered accountants were not the property of the client.
25. The position taken in *Cordery on Solicitors* (8th ed 1988) at 90 is that, where solicitors base their charges on an expense rate which includes a proportion of overheads, the client is entitled to all drafts and copies. (This is the last bound edition of the work; the looseleaf version is unhelpful.) *The Guide to Professional Conduct of Solicitors* (8th ed 1999) produced by the Law Society of England and Wales also considers drafts to belong to the client because they have been indirectly paid for (Annex 12A para 1).
26. In my opinion, this approach is flawed, and cannot be reconciled with the reasoning in *Chantrey Martin*. Ownership is determined not by the basis on which expenses are charged, but by the intention of the parties. The position cannot be stated in a general way to cover all cases, which is why clarification of the basis of retainer is recommended. Normally, however, a solicitor would

consider that he or she is entitled to discard drafts without reference to the client; it is – subject to specific instructions to the contrary – the final version of the document for which the client has contracted.

27. In *Wentworth v De Montfort* (1988) 15 NSWLR 348, Hope JA discussed a number of categories of documents. He considered that counsel's brief, correspondence with counsel, and notes of telephone attendances or conferences with counsel all belong to the client (360-361). In respect of correspondence and notes in general, he held that the question is one to be determined on the facts, depending on for whose benefit the document was created.
28. An additional difficulty has arisen with electronic communications, such as email messages. If some of these are in fact the property of the client, the solicitor would have a duty to retain them, and solicitors should take this into account before deleting messages from the system (see below on methods of storage). Once again, the matter is best regulated by contract. It may, however, be advisable to have a system whereby any significant electronic document is either copied or stored in a designated file.

(c) Documents created for the benefit of the solicitor

29. It is now generally recognised that, in the conduct of professional practice, many documents will be generated which are in essence for the benefit of the solicitor, and which are properly to be regarded as belonging to the solicitor.
30. This was first accepted in *London School Board v Northcroft* (1889) Hudson's BC (4th ed vol 2) 147. That decision was adopted and applied by the Court of Appeal in *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 All ER 483, a case relating to valuers. MacKinnon LJ held that the notes and memoranda made by valuers in preparation for a report belonged to the valuer, unless otherwise provided by contract (at 486-487). A similar approach was adopted in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA) in relation to audit working papers, notes and draft accounts prepared by

chartered accountants. In the course of that judgment, the Court stated that similar considerations should apply to solicitors.

31. It appears that the only recent case which has considered the position of solicitors directly is the decision of the Court of Appeal of New South Wales in *Wentworth v De Montfort* (1988) 15 NSWLR 348. In that case, Hope JA applied the authorities mentioned above, noting that the client would be entitled to a copy of such documents (for which a charge could be made) but that they remain the property of the solicitor.
32. The decision of Hope JA is helpful in that the Court considered various specific classes of documents. The following were held to be the property of the solicitors: cheque requisition forms; financial records and computer printouts of financial records; internal firm records and memoranda as to work done or to be done; photocopy requisitions; attempted financial reconciliation of documents; bank account statements relating to money held for the client. The Authority and Instruction Forms required to be retained under s 164C of the Land Transfer Act 1952 would also fall into this category: they are for the protection of the solicitor. Transaction and verification records required by ss 29 and 30 of the Financial Transactions Reporting Act 1996 would be treated similarly. They are produced pursuant to a statutory duty resting on the solicitor in order to facilitate the detection of money laundering.
33. In some situations, it may not be immediately obvious whether the document was prepared for the client's or solicitor's benefit. In such cases, it may be necessary to resort to a predominant purpose test (*Wentworth* at 359).

Documents relating to joint instructions or third party interests

34. Where the client does not have the sole proprietary interest in the documents, it is obvious that different considerations must apply. There is virtually no authority on this question, and what there is is far from recent. In *Janson v Davison* (1837) 1 Jur 352, it was held that the wishes of the majority of clients

should prevail. Should there be no clear majority view, an application may be made to the Court to exercise its inherent summary jurisdiction over solicitors as officers of the Court, or the various powers under s 141 of the Legal Practitioners Act 1982 (see the authorities cited in the Smellie opinion).

35. A third party who claims an interest in documents held by a solicitor cannot rely on an application under the inherent jurisdiction; this is reserved to clients: *Ex parte Campbell, Re Hancock* [1969] 91 WN NSW 61. The question could, however be resolved in the course of an application by a client. It would have to be refused if it were established that third parties had interests in the documents.
36. Similarly, an application under s 141 of the Law Practitioners Act 1982 may only be brought by a person for whom the solicitor has performed some services. A third party seeking to enforce a right to documents would have to institute proceedings in conversion or detinue.

C Right to information

37. The fact that a document is the property of the solicitor does not mean that the client is not entitled to know what is in the document. Where a document concerns the affairs of a client, the client may be entitled at common law to a copy of the document, for which the solicitor may charge a fee: *Wentworth v De Montfort* (1988) 15 NSWLR 348. In *Wentworth*, Hope JA held that the client was entitled to copies of computer printouts of financial records, and to details of information held in other financial records (358, 361). In *Foley's Transport Ltd v Weddell NZ Ltd (in rec & Liq)* (1996) 9 PRNZ 392, Greig J considered that a client would be entitled to copies of documents recording advice given or having a bearing on the future conduct of a case.
38. The right of a client to information material to his or her interests held by the solicitor was affirmed in *McKaskell v Benseman* [1989] 3 NZLR 75. It appears

that this is based on the fiduciary relationship between solicitor and client, because there is no corresponding right to inspect medical records: *Breen v Williams* (1996) 186 CLR 71 (HCA). It is clear from *Breen*, as well as *Wentworth* that there is nevertheless some information which is purely the concern of the solicitor, and to which the client has no right. Examples of this would be personal notes or work schedules made by the solicitor.

39. The common law has been supplemented to a large extent by the Privacy Act 1993. Where a solicitor holds “personal information” about a client, the client is entitled to have access to it, subject to the exceptions allowed for in the Act. Personal information includes any information about an identifiable individual (s 2(1)). That would appear to include financial records such as those considered by Hope JA in *Wentworth v De Montfort* (1988) 15 NSWLR 348.
40. Access to the information may be provided by way of a copy, reasonable opportunity to inspect the document, an excerpt or summary of the contents, or oral information about the contents (s 42). The Act permits a charge for the provision of information (s 35).

D Dealing with documents once retainer has ended

Documents belonging to the solicitor

41. Once the retainer has come to an end, the solicitor is obliged to retain trust account records by virtue of r 4 of the Solicitors Trust Account Rules 1996. Authority and Instruction Forms must be retained by virtue of the Land Transfer Regulations 2002, and transaction and verification records by virtue of ss 29 and 30 of the Financial Transactions Reporting Act 1996. Otherwise, there is nothing to prohibit destruction of the documents which belong to the solicitor. In most cases the solicitor would wish to retain at least some of these documents for

protection in the event of a negligence suit. The appropriate period of retention is problematic, and depends on the proper approach to limitation periods.

42. The transaction and verification records required by ss 29 and 30 of the Financial Transactions Reporting Act 1996 must be retained for a minimum of 5 years. Trust account records must be retained for at least 6 years after the date of the last entry (Solicitors Trust Account Rules 1996, r 4(6)). Authority and Instruction Forms relating to eDealing transactions are required to be retained for a period of at least 10 years from the date on which the instrument is lodged for registration (Land Transfer Regulations 2002, reg 14; NZLS Guidelines for the use of *Landonline* for an electronic transaction, guideline N).
43. At common law, professional negligence proceedings are subject to a limitation period of 6 years from the date on which the cause of action accrued.
44. In cases of negligence by builders, the Court of Appeal has held that the cause of action only accrues when damage is reasonably discoverable: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (upheld on appeal [1996] 1 NZLR 513 (PC)). This principle also applies in cases of personal injury: *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA). Based on *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA), however, it has been suggested that this approach may not apply to professional advice (see NZ Law Commission Preliminary Paper No 39 *Limitation of Civil Actions* paras 36-38; Report 61 *Tidying the Limitation Act* (2000) para 10). This was regarded as the correct approach by the High Court in *Saunders v Bank of New Zealand* [2002] 2 NZLR 270, para 39. That conclusion was obiter, and was not the subject of any detailed reasoning.
45. In my opinion, it would be unwise to set store on the limited approach. The damage in *Gilbert v Shanahan* was reasonably discoverable at the time the contract was signed, and it was not argued otherwise. The reasoning of the Court of Appeal in the *G D Searle* case was based on taking a consistent approach to all claims (see Todd *Law of Torts in New Zealand* 3rd ed 26.5.9). It is quite likely that, should the issue arise for decision, the Court of Appeal would apply a

reasonable discoverability test across the board. This in fact appears to have been accepted by the Court in *All Seasons Properties Ltd v Smith* 28/5/97, CA151/96.

46. Consequently, it cannot be said with any confidence that documents can be destroyed once six years have passed since the professional services were provided. It appears to be generally accepted, however, that this is the minimum period for which documents should be retained (see below). One way of reducing the burden of lengthy storage periods is by resorting to electronic storage. This is discussed below.
47. Principle 9 of the Privacy Act 1993 provides that personal information should not be kept for longer than is required for the purposes for which it can be lawfully used. As the objective of retention of documents is to provide protection in the event of legal claim, it would seem that there is no conflict between this and the Privacy Act. Just as with other aspects of record retention, this is a matter which could satisfactorily be addressed contractually.
48. As noted above, difficulties may arise with the preservation of electronic data, such as email messages. Where these are of significance, it will be important to ensure that a hard copy is retained, or that appropriate storage systems are put in place. When making hard copies, it is also important to copy each message so as to avoid any issues of hearsay arising. The Electronic Transactions Act requires that the record must be able to identify the origin and destination of the communication, as well as the time sent and received (s 27(a)).

Documents belonging to client

49. The more important question concerns documents belonging to the client. These must either be returned to the client or dealt with as instructed by the client. Where a solicitor retains such documents, the solicitor is in the position of a gratuitous bailee. As such, he or she would be required to hand over the documents on request by the client: *North Western Railway Co v Sharp* (1854)

10 Ex 451. Destruction of the documents without the client's consent would technically amount to conversion.

50. Client documents can be divided into two basic categories: those documents which evidence legal obligations, such as contracts, wills and deeds; and those which are produced in the course of a retainer, such as correspondence and notes of telephone conversations. The reasons for retaining documents can also be divided into three broad categories: it may be to ensure the safekeeping of an important document which may be required in the future; it may be to satisfy some statutory requirement; or it may simply be to preserve the records of transactions in the event of potential disputes.
51. Documents evidencing legal obligations will generally be entrusted to the solicitor for safekeeping, and clearly cannot be destroyed after any set period of time. The period of retention will depend on the particular document, and such documents should not be destroyed without the client's or owner's consent. *The Guide to Professional Conduct of Solicitors* recommends that the written permission of the client be obtained (Annex 12A para 6).
52. Other documents will normally become redundant after a period of time; the relevant period will depend on the reason for retaining the document. There is no general power to destroy documents belonging to a client; this is a matter which is best regulated by contract. In agreeing to retain records on behalf of a client, a solicitor could therefore stipulate that they would be destroyed after a number of years unless earlier uplifted by the client.
53. There are a number of statutory periods relevant to the length of the retention period. Among the most significant of these are the Inland Revenue Acts and the Companies legislation. Under the Tax Administration Act 1994, business records must be ordinarily be retained for 7 years after the end of the income year to which they relate (s 22(2)). Other taxing statutes (such as the Goods and Services Tax Act 1985 and the Child Support Act 1991) generally adopt the 7 year period as well. Where records relate to debt forgiveness or distributions by

trustees, they must be retained as long as the trust exists (s 22B). Company records as detailed in the Companies Act are also required to be retained for 7 years (s 189 Companies Act 1993).

54. If the object of retention is to protect the client against possible legal action, the limitation period would be relevant. While the appropriate period might generally be regarded as 6 years from when the cause of action arose, the difficulty lies in establishing that start date. As outlined above, in tort claims, the start date will often be when damage is reasonably discoverable. In contract cases, the relevant date will be the date of breach. Neither of these facts will be readily ascertainable by the solicitor who is doing no more than holding records. There is accordingly no neat way to draw a line after a certain time period and know that records will no longer be required.
55. The Australian model rules of professional conduct require records to be retained for at least 6 years after the end of the retainer, unless the Court orders otherwise or the client provides contrary instructions (Dal Pont *Lawyers' Professional Responsibility* (2nd ed 2001) 68). *The Guide to Professional Conduct of Solicitors* also recommends a minimum period of 6 years, but cautions that relevant statutory periods have to be taken into account (Annex 12A para 4).
56. The Solicitors Trust Account Rules 1996 require that trust account records must be retained for a period of at least 6 years from the date of the last transaction recorded in them (r 4(6)).
57. Six years is probably not long enough to provide reasonable protection for the client. The Building Act 1991 contains a long stop limitation period of 10 years, and a similar long stop period was recommended by the Law Commission in its recent report *Tidying the Limitation Act* (2000). After 6 years it may, however, be appropriate to review the file to determine whether there is any need for further retention.

58. If a single period of time is to be selected as a guideline for the retention of documents, that period would have to be 10 years. This period may be able to be reduced in individual cases, based on a judgment exercised at the six year review point.

E Form in which records are to be retained

59. Continual technological innovations mean that many records are never created in a paper form, and that it is much easier to store information in electronic forms rather than as physical documents. From the solicitor's point of view, the question arises as to whether such records will be sufficient to satisfy any obligations which might arise. This will depend on the reason for retaining the record.
60. The Solicitors Trust Account Rules 1996 permit electronic storage of trust account records after the first 12 months where the records have been computer generated by the solicitor. In other cases, storage in the form of "microfilm, imaging, or other similar technology" is permitted after the first 3 years (r 4(6)).
61. Apart from this, statutory provisions generally do not specify any particular form in which records are to be retained, although there is frequently a requirement that they be in English. The Inland Revenue Acts only require "sufficient" records to enable tax to be calculated. The Companies Act requires that records be "convertible into written form" and also that adequate measures exist to prevent falsification (s 190).
62. In order to protect the interests of clients in such cases, it would appear that there is no barrier to adopting any form of electronic storage, provided that the records are readily retrievable and that systems are in place to record what has been done, and to prevent and detect falsification of the records stored. *The Guide to Professional Conduct of Solicitors* sees no barrier to electronic or photographic

storage provided that a basis has been laid for later admissibility in court proceedings (Annex 12A paras 7, 8).

63. Any system put in place should be able to:
 - 63.1 Identify each document stored electronically.
 - 63.2 Record that the complete document has been stored.
 - 63.3 Identify the operator who stored the document in the system.
 - 63.4 Record the fact of destruction of the paper document.
64. The Electronic Transactions Act 2002 reinforces this approach. The Act will only be brought into force by order in council, but the principles it contains are clearly going to apply in the near future. The Act is designed to ensure general equivalence for electronic forms of data storage, and contains general provisions permitting storage of information electronically (ss 25-27). The preconditions are that it must provide a reliable means of assuring the “maintenance of the integrity” of the information, and that the information is readily accessible.
65. Where the reason for retaining documents is for use in evidence, the objective must be to ensure that they are admissible. There is no restriction on the type of evidence a party may bring to prove its case, but there may well be issues as to reliability. The definition of “document” in the Evidence Amendment Act (No 2) 1980 is wide enough to encompass any form of electronic storage. It includes:

“Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored.”
66. Although the definition is only for the purposes of the part of the Act which deals with documentary hearsay, a similar definition is found in r 3 of the High Court Rules. The expanded definition is widely accepted, and it is unlikely that the Courts would adopt a restrictive approach (see Gahtan *Electronic Evidence* (Carswell 1999) at 9.2). In any event, the admissibility provisions of the

Evidence Amendment Act (No 2) 1980 would cover many situations where evidence of this nature would be important. A statement made in a document is admissible if the maker had personal knowledge of its contents and is unavailable or, in civil matters, undue delay or expense would be caused by obtaining the evidence from the witness (s 3). If the document is a business record (as defined in the Act), wider admissibility provisions apply, but this would not generally cover client documents.

67. Various issues have arisen concerning the use of electronically generated evidence as to whether a record produced from electronically stored data is an original or a copy, but the courts have tended to avoid dealing with the technical status of the document, and to concentrate on its authenticity: *R v McMullen* (1978) 42 CCC (2d) 67, affirmed (1979) 47 CCC (2d) 499; *R v Bell* (1982) 35 OR (2d) 164, affirmed [1985] 2 SCR 287 (SCC). The Evidence Amendment Act (No 2) 1980 regards both the information and the record produced from it as admissible evidence. The Electronic Transactions Act provides general authority to retain information in electronic form, and technical evidentiary problems should disappear once it takes full effect.
68. A second issue concerns the reliability of the machinery used to store the information. As with other forms of technology, the courts have tended to assume reliability in the absence of evidence to the contrary: see Gahtan *Electronic Evidence* 161-164. This was the approach adopted in *Marac Financial Services Ltd v Stewart* [1993] 1 NZLR 86 at 92-93. In *Paul Finance Ltd v CIR* [1995] 3 NZLR 521 (CA) a question arose as to the meaning of a computer generated assessment. The Court indicated that evidence may be necessary as to the particular software and operation of the system, but appeared to accept without question the reliability of the hardware.
69. As a general proposition, therefore, it does not seem that there is any evidential barrier to relying on data stored in electronic form. The question remains as to

whether it is permissible to destroy paper documents once an electronic copy has been made.

70. There is no general right to destroy a client's documents, and the matter should properly be regulated by agreement. It is of some interest to note, however, that the Electronic Transactions Act contemplates that the electronic form of a document may replace the original (s 32).
71. In the absence of any agreement between the parties, the matter will depend on the nature of the document. If it is only a copy, there is no reason why it should not be retained in electronic form; the obligation to the client is only to retain "a copy".
72. If it is an original document, the solicitor could technically be liable in conversion for destroying the document without the client's permission (see Smellie opinion). The legal position in this respect has been altered to some extent by the Electronic Transactions Act: s 25 provides specifically that a paper copy need not be retained if the information is properly stored in electronic form. Leaving this to one side, the principal concern is the risk that the electronic copy will not be regarded by the Courts as sufficient proof. In the vast majority of cases, however, this risk would be negligible if the solicitor has a proper system in place and the original has been destroyed. In that situation, the electronic copy is the best evidence available.
73. Regardless of the right to destroy a document, destruction of any original can only be undertaken with caution. It has to be borne in mind that the original might contain the only evidence of forgery or alteration. If that is a real possibility, the original should obviously be retained.

F The position of barristers

74. Where the barrister assumes the conventional role of a barrister sole, it is the solicitor who is the immediate client. The vast bulk of the file will be documents provided by the solicitor, and will be returned to the solicitor on completion of the brief as a matter of course. There may, however, be items of correspondence with third parties which the barrister has received as agent of the solicitor. As discussed above, these belong to the solicitor, and possibly ultimately to the client. Counsel's brief belongs to the client: *Wentworth v De Montfort* (1988) 15 NSWLR 348. Correspondence between solicitor and counsel and counsel's own notes would, on the principles discussed above, remain the property of counsel.
75. Where a barrister acts as a de facto solicitor, it is likely that his or her file will contain correspondence and other documentary material. This will have to be treated in the same way as documents held by a solicitor: some items will belong to the barrister and some will belong to the client.
76. As far as retention of records is concerned, the chief concern will be the barrister's own protection in the event of a claim of breach of professional duty. Following the Privy Council decision in *Harley v McDonald* [2002] 1 NZLR 1 (PC), it is clear that there is scope for personal liability of barristers. Documents on counsel's file may be required to refute this.
77. More importantly, the decision of the House of Lords in *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543 (HL), demonstrates that the traditional immunity of barristers from negligence can no longer be relied on as providing absolute protection: see Webb "Dismantling Advocates' Immunity" [2000] NZLJ 327. While the position will become clearer after the Court of Appeal hears the appeal from *Lai v Chamberlains* 19/12/02, Laurenson & Salmon JJ, HC Auckland CP607-SD01, the possibility of professional negligence claims is a reality, and barristers should retain records which may have a value in defeating such a claim. This will generally mean at least keeping a copy of opinions

provided. Any method of storage available to solicitors would be acceptable (see section E).

78. As in the case of solicitors, there is uncertainty regarding the commencement of the limitation period (see paras 45-46). For complete protection, records should be retained for 10 years after return of the brief. At six years, the file should be reviewed to determine whether there is any point in further retention.

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Andrew Beck

Guidelines for the Retention of Records

Contractual regulation

The contract between the solicitor and the client should regulate the solicitor's responsibility with regard to documents relating to the client. It should specify:

- (a) Which documents will be the property of the client;
- (b) What documents will be retained by the solicitor for his or her own purposes;
- (c) The client's rights to information held by the solicitor;
- (d) What is to happen to documents on the termination of the retainer;
- (e) How the solicitor will deal with any documents retained after termination of the retainer.

Entitlement to documents

Where the matter is not regulated by contract, the question of ownership of documents is determined by the following principles.

Documents in existence before the retainer commences

The solicitor holds these documents as agent for the client or third party. On termination of the retainer, the solicitor must dispose of them as the client or third party directs.

Documents created during the currency of the retainer

These can be divided into three broad categories

- (a) *Documents created to be sent, received or held by the solicitor as agent for the client*

Where the solicitor acts purely as an agent, the documents belong to the client. Preparing documents purely as an agent is unusual, as the solicitor will generally be providing professional services of some kind. There is accordingly some overlap between this category and the next.

Examples

- (i) Letters received from third parties
- (ii) Vouchers for disbursements paid on behalf of clients
- (iii) Correspondence conducted as agent of clients
- (iv) Memoranda of telephone conversations with third parties

(b) Documents created for the benefit of the client

These documents also belong to the client. In cases where the purpose is mixed, the dominant purpose should be taken into account. Where the dominant purpose is to benefit the solicitor, the client would nevertheless be entitled (on payment) to a copy.

Examples

- (i) Letters written and received in the course of providing professional services for the client
- (ii) Documents produced for the client in terms of the retainer
- (iii) Instructions and briefs to counsel

(c) Documents created for the benefit of the solicitor or where property is intended to pass to solicitor

Where the purpose of creating a document is to assist or protect the solicitor, or relates to the management of the solicitor's business, it will belong to the solicitor.

Examples

- (i) Notes of authorities researched
- (ii) Copies of cases or extracts from text books

- (iii) Notes of submissions or addresses to courts or tribunals
- (iv) Drafts and outlines of final documents^{*}
- (v) Entries of attendance in diary or time costing system
- (vi) Tape recordings of conversations with clients
- (vii) Copies of letters retained on file^{*}
- (viii) Letters written to the solicitor by the client
- (ix) Inter-office memoranda
- (x) Authority and Instruction Forms relating to eDealing transactions
- (xi) Transaction and verification records under the Financial Transactions Reporting Act.

Documents relating to joint instructions or in respect of which a third party has an interest

Ownership of these documents depends on the facts of the case. In the case of joint clients, the wishes of the majority prevail. In the absence of agreement between all parties claiming an interest in the documents, the only safe course is to make application to the Court.

Inspection of documents

Regardless of questions of ownership, the client has a right to information held by the solicitor which is material to the client, or which concerns his or her affairs. This includes financial information in the solicitor's records. Where the information is personal information, there will be additional obligations under the Privacy Act 1993.

If a copy of documents is provided to the client, the solicitor is entitled to make a charge for this.

^{*} It should be noted that these items are considered by some to fall into a grey area: see Opinion paras 21-26. Practitioners who wish to avoid any possibility of a dispute may choose to give the client the benefit of the doubt.

Retention of records

Documents belonging to the solicitor

Solicitors are required to retain trust account records for a period of at least 6 years after the date of the last transaction recorded in them. Authority and Instruction Forms relating to eDealing transactions must be retained for at least 10 years after the date of lodgment for registration. Under the Financial Transactions Reporting Act 1996, ss 29 and 30, transaction and verification records must be retained for a minimum of 5 years. No other period is laid down, but it is recommended that all records be retained for 10 years after the retainer has ended. The position should be reviewed after six years in the light of likely future obligations.

Documents belonging to the client

Solicitors are not obliged to retain clients' files. If they do so, they will be in the position of gratuitous bailees. There is no legal right to destroy documents belonging to the client without the client's permission. A solicitor who destroys a client's documents could technically be held liable in conversion.

One way of dealing with the problem of storage is to store documents in electronic or photographic form. It is recommended, as in the case of documents belonging to the solicitor, that records be retained for a period of ten years after termination of the retainer. Retained files should be reviewed after six years to determine whether there is any point in further retention.

Form in which documents are stored

Evidential rules generally treat electronic or photographic records as documents, and it is therefore permissible to store copies of documents in this way, provided that there are systems to ensure that the information is accurate and accessible. Original documents should not be converted into electronic or photographic forms without the agreement of the client.

A system should be in place to record that the original has been destroyed, and where and how the copies have been stored.

Barristers

Barristers in the position of solicitors should follow the above guidelines. In other cases, documents belonging to the solicitor or client should be returned on completion of the brief. Counsel's own records (copies of correspondence and opinions provided) should be retained as suggested above to provide protection in the event of a negligence claim.