

# New Zealand Law Society

## GUIDELINES FOR THE RETENTION OF RECORDS ON TERMINATION OF RETAINER

*These guidelines update those published in LawTalk 400 (6.9.93). They draw on an opinion by Andrew Beck separately listed on this website.*

### **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

*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

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\* 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.

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.

## **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, sections 29 & 30, transaction and verification records must be retained for a minimum of five 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.