

THE SEVEN-YEAR DITCH

Closed files may be out of sight but they should not be out of mind.

The Legal Practitioners' Liability Committee (LPLC) often receives queries from practitioners about dealing with closed files. A myriad applicable issues relate to this topic and here we revisit some of the basic requirements.

Closing files

Before closing any file, there are several checks that a practitioner needs to make. The practitioner must ensure that the retainer has been finalised and the client has been informed in writing that the representation has ended and the file is closed.

Further, it is essential to check that all relevant documents have been stamped/registered, all originals have been returned to the client and no money remains in trust. For guidance, the Ethics section of the LIV website refers practitioners to the Law Society of Western Australia's "Guidelines for closing, storage and destruction of files". [See <http://bit.ly/gwMLBo>. The LIV Ethics Department is currently waiting for Victorian guidelines to be approved in the near future.]

Situations in which liens are asserted are beyond the scope of this article. Practitioners should check the relevant provisions of rls 7 and 23. For a discussion on requests for client documents by a former client's new solicitor or other parties, practitioners are encouraged to read "Delivering up documents", the LPLC column in the June 2009 *LIJ*.

Rule 7.5 defines documents to which a client is entitled as including:

- 7.5.1 – documents prepared by a practitioner for the client, or predominantly for the purposes of the client, for the purposes of the client's matter; and
- 7.5.2 – documents received by a practitioner from a third party for or on behalf of the client or intended for the use or information of the client, for the purposes of a client's matter.

The principles that are applicable when determining ownership (in the sense of being entitled to the document) turn on the question of the identity of the person for whose benefit the document was prepared.

Many practitioners already have closed files which comprise documents such as duplicates of letters and court documents in hard copy and other documents, such as emails, in electronic format.

On request, documents belonging to the client should be handed over to the client in the format in which they are held by the practitioner. Practitioners should ensure that electronic documents are stored securely and that when providing a client with documents in electronic format, any metadata reflecting confidential information of other clients is stripped out.

We were recently contacted by a practitioner who had lost a number of closed files when the practitioner's garage, in which the files were stored, was flooded. Practitioners should give careful consideration to whether their clients' hard copy files are stored in a location that is adequately secure.

Practitioners are reminded that r37 prohibits any attempt to charge a client for storage or retrieval of a client's documents unless the client has agreed otherwise.

File destruction

Practitioners are prohibited from destroying files within seven years of the conclusion of the relevant retainer. On the expiration of the seven-year period, a practitioner is permitted to destroy a file only with the authority of the client or after reasonable attempts have been made to contact the client.

Of course, many practitioners address this issue by including the necessary authority in their standard terms of engagement.

There are some files we recommend should not be routinely destroyed. They include the will instruction files and files relating to binding financial agreements under the *Family Law Act 1975* (Cth).

Finally, it is up to practitioners to make a risk assessment that takes account of their needs, such as how long it may take before a cause of action could accrue and the need to keep files to assist in the defence of a potential claim, as well as those of the client, before destroying any file. ●

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Client documents

Practitioners should be aware that client files are held on trust for the client, subject to limited types of documents that belong to the practitioner's firm (and can be removed from the file).

Rule 7 of the *Professional Conduct and Practice Rules 2005* requires practitioners to securely and confidentially retain documents to which a client is entitled until at least seven years after completion or termination of an engagement.

Those documents must be given to the client on request after the conclusion of a matter, subject to any assertion of lien for unpaid fees or applicable court order. When changing firms, a client may ask for a file to be transferred to another practitioner.

While for some documents that person is readily identifiable, other documents may be regarded as having been produced for mixed purposes (in which case the client would ordinarily be entitled to them). An important factor is whether the client was charged for the creation of the document. Each document must be considered individually.

Documents prepared for the practitioner's own benefit for which the client has not been charged belong to the firm, as do letters and other documents provided by the client (property in which was not intended to remain with the client). However, the typical position is that the client will be entitled to most documents on the file.

As many practitioners move towards a "paperless" office, client documents are increasingly being stored electronically.

This column is provided by the Legal Practitioners' Liability Committee. For further information ph 9672 3800 or visit www.lplc.com.au.