

DELIVERING UP DOCUMENTS

Practitioners need to be aware of a number of competing duties when asked to produce clients' files.

There are often many issues and competing interests for practitioners to consider when dealing with requests to hand over documents.

Here are a few familiar scenarios, and what to do about them.

Scenario 1

Subpoenas by non-clients to produce client's files pre-trial

The concern for practitioners when they receive a subpoena is that the file is ostensibly the client's. The practitioner owes a continuing duty of confidentiality to the client and in most cases the file will contain documents that are subject to legal professional privilege.

A subpoena is a court document and the recipient is bound to comply with it. A practitioner cannot refuse to comply with a subpoena just because they have a lien over the file.

When receiving a subpoena, the practitioner should write to the subpoenaing party confirming receipt of the subpoena, and advise that:

- the file will be delivered to the court;
- privilege is not waived; and
- the documents are not to be made available for inspection by any party (other than the client/former client) unless:
 - ordered by the court; or
 - privilege is waived by the person entitled to claim it.

The practitioner should also write to the client or former client, explaining that the subpoena has been received and that the file will be delivered to the court with a claim for privilege.

The file should be sealed and delivered to the Prothonotary's office (or the Registrar's office if a County Court subpoena) with a covering letter stating that the documents are delivered under the subpoena and that privilege is not waived.

Further, it should be made clear that objection is taken to the documents being made available to the parties for inspection and they should be kept intact and only made available to the judge until such times

as the client waives the privilege or the court so orders.

Under no circumstances should the practitioner receiving the subpoena just copy the file and send it to the subpoenaing party.

Scenario 2

Request for documents from the former client's new solicitor

In circumstances where the former client's new solicitor requests information or documents, the two issues to consider are: shared privilege and liens.

As a rule, where the client terminates the retainer and goes elsewhere, solicitors can claim a possessory or general lien over the client's documents until their costs are paid.

The situation is different if the solicitor discharges the client. In that scenario, the solicitor is required to hand over the file to the new solicitor, who then holds it subject to the previous solicitor's lien and provides reasonable security for the payment of the costs.

Subject to some exceptions, and other than to formally acknowledge receipt of that request and advise that you are seeking instructions, nothing should be conveyed to that solicitor without first informing the client of the request and obtaining instructions either from the client or, if you are no longer acting, from the former client.

The LIV *Professional Conduct and Practice Rules* 2005 r3 sets out the circumstances in which information confidential to a client can be disclosed. These include where:

- a practitioner is compelled to by law;
- the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite the client's claim for legal professional privilege and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;
- the information has lost its confidentiality; or
- the practitioner obtains the information from another person who is not bound by

A practitioner cannot refuse to comply with a subpoena just because they have a lien over the file.

In that case, the LIV *Professional Conduct and Practice Rules* 2005, rls 23.3 and 23.4 set out what is required of practitioners.

If the practitioner acted for more than one party in a matter, the privilege attaching to information or documents belongs to all parties and must be waived by the other clients before the documents can be given to one of the client's new solicitor. The practitioner must therefore seek the other client's consent before delivering the documents.

Scenario 3

Requests for documents from a non-client's solicitor

Where the source of the request is a non-client, legal professional privilege and the duty of confidentiality are the most significant issues.

the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.

Conclusion

There is a minefield of issues for practitioners to traverse as they deal with the regular and often urgent requests to produce documents.

Practitioners need to be mindful of their duties of confidentiality to clients and former clients as well as understand their duties to the court and the obligations they have in upholding legal professional privilege to avoid damage to themselves or their clients. ●

This column is provided by the LEGAL PRACTITIONERS' LIABILITY COMMITTEE. For further information ph 9670 2001 or visit the website www.lplc.com.au.