

File Ownership and Handling



Who owns documents in a client file?

This fact sheet provides information for complainants and lawyers about ownership and management of clients' files.

Does a file belong to the client or the lawyer?

Most documents in a file belong to the client, but some belong to the lawyer. Ownership generally depends on the nature of the document, the purpose for which it was created and/or the circumstances under which it came into the lawyer's possession.

Documents generally belong to the client in the following circumstances:

- The document existed before the client employed the lawyer and the client sent the document to the lawyer.
- The lawyer prepared the document for the benefit of the client. Examples include the lawyer's notes of conversations with third parties for the purpose of advancing the client's matter, records of attendances at court, briefs to Counsel and notes of conferences and telephone conversations with Counsel.
- The document was prepared by a third party and the client paid for it. Examples include expert reports.

Documents generally belong to the lawyer in the following circumstances:

- The client gave the document to the lawyer for the lawyer's own use and benefit.

- The lawyer prepared the document for his or her own benefit, protection or records, and the client is not expected to pay for them. Examples include notes of attendances on the client, notes of work done and notes of matters requiring attention.

In some cases, a document may have been created for the benefit of both the client and the lawyer. It will then be necessary to look at the main purpose of the creation of the document.

How long does a lawyer have to keep a file safe?

The *Legal Profession (Solicitors' Conduct) Rules 2020* (the Rules)¹ provides that a lawyer (or the law practice) may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

Common practice among lawyers is to keep files for a longer period taking into account factors such as the age of the client, the type of matter or the type of documents contained in the file, possible taxation implications and any statutory limitation period that might be relevant. Where a minor is concerned, lawyers generally keep the file until 7 years after the minor has reached 18 years of age.

Many lawyers enter into a written agreement with their clients which, among other things, authorises the lawyer to destroy the file after a specified period². Good practice by the lawyer would be to include an acknowledgement in standard client agreements that the file will be destroyed after seven years if no other written agreement to the

¹ Rule 18(2) (Note: These Rules commenced 1 October 2020)

² If so Rule 18(2) will not apply.

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contrary is entered into between the lawyer and client.

For certainty, lawyers should adopt a commonsense approach of not destroying a client or former client's documents without the client's consent, preferably in writing.

Can the client be charged for storing and copying a file?

The Rules provide that when requested by a client (or former client) to be given client documents, the lawyer responsible for a client's matter must ensure that, upon completion or termination of the law practice's engagement, the client (or another person authorised by the client) is given those documents as soon as reasonably possible. If the documents are electronic documents copies of those documents are to be given³. This rule applies unless there is an effective lien (see below – *Can my lawyer keep my file?*).

The lawyer must return the original file to the client but might wish to keep a copy and/or a copy of electronic records for his or her own protection or records. If that happens, the client should not be charged for the photocopying expenses.

The Rules also provide that a lawyer must not charge for either storage of documents, files or other property on behalf of clients (or former clients) of the lawyer or law practice (or predecessors in practice), or for retrieval from storage of those documents, files or other property UNLESS the client has agreed in writing to charge(s) being made⁴.

Some lawyers outsource the storage of files, but as stated, the client must have agreed in writing for any storage charges to be passed on to the client.

For clarity, a standard client/cost agreement document signed by the client may contain clauses related to consent to a file being destroyed after 7 years, charges for storing and/or retrieving files.

Can my lawyer keep my file?

Lawyers have the right to keep a client's file if their costs have not been paid by the client but they cannot exercise a lien over wills or certificate of titles owned by a person who is not the client. This is called a *lien* and is similar to the action taken by car mechanics or dry cleaners when their costs are not met by customers who have had work done for them.

There are a number of rules which apply to liens and some instances when liens can be waived or the court can order the handing over of a client's file. For further information, see the Fact Sheet on [Liens](#).

³ Rule 18 (1)

⁴ Rule 20

What happens if my file is lost or misplaced?

Unfortunately, administrative errors do occur and files and documents can be lost.

We cannot compel lawyers to obtain new documents from other lawyers or government authorities.

If the loss of a file or other paperwork has more serious implications for your matter you should seek legal advice.

The loss of a file or other paperwork may be indicative of a conduct issue. You should contact the Legal Profession Board of Tasmania to discuss your concerns.

The information contained in this fact sheet does not constitute legal advice.

The information contained in this fact sheet has been adapted with permission from the NSW Office of the Legal Services Commissioner, 'File Ownership and Handling' Fact Sheet 14.



Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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