

File Requests Guidance

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There is a misconception that the client is entitled to every document that its solicitor holds on the file, whether paper or electronic. However, that isn't strictly true.

Some documents will belong to the solicitor and so the client won't usually be entitled to those. The question is one of ownership of the documents – which documents belong to the client and which documents belong to the solicitor.

Documents which come into existence during the retainer can be in either one of two categories:

- (a) where the solicitor is acting as professional adviser; and
- (b) where the solicitor is an agent of the client.

Ownership of documents in the first category will depend on the purpose of the retainer, and whether the document was created in furtherance of that purpose.

Documents in the second category will normally belong to the client. The client will therefore be entitled to them upon request. The main example of material that falls into this category is correspondence with third parties where the solicitor is sending or receiving correspondence on behalf of the client.

Categories of documents

The Law Society makes the following suggestions as to which category documentation should fall into. These suggestions apply to both paper and electronic documents.

Documents belonging to the client:

- Original documents sent to the firm by the client (unless title was intended to pass to the firm).
- Documents sent to or received by the firm as agents for the client e.g. correspondence with counsel, experts, or a counterparty.
- Final versions of documents which go to the object of the retainer e.g. agreements or written representations.
- Final versions of documents prepared by a third party and paid for by the client e.g. counsel's advice or expert reports.

Documents belonging to the firm:

- Documents prepared for the firm's own benefit or protection e.g. file copies of letters written to the client, notes regarding time taken or made for protective purposes regarding advice to the client.
- Drafts and working papers.
- Internal emails and correspondence.
- Emails and correspondence written by the client to the firm.
- Accounting records including disbursement vouchers and timesheets.



The question of attendance notes

Attendance notes are not specifically addressed in the guidance by the Law Society. These are usually prepared for the solicitor's benefit (i.e. confirmation of the advice given to the client, to protect their position should the situation ever be challenged) and they typically aren't charged for in any event.

On that logic, attendance notes would fall into the category of documents belonging to the solicitor. But it isn't quite that simple. If the production of the note has been agreed by the client e.g. a note of a conference with counsel prepared for the benefit of all parties (solicitor, counsel and client), that note is likely to be charged for and will therefore belong to the client. So it is likely to be a case of looking closely at attendance notes and taking a view as to whose benefit the note was produced for.

More than one client?

Where you have more than one client on a particular transaction, special care will need to be taken when complying with a file request. Each client will have its own interests in the file, and it may be a breach of confidentiality to disclose to one client aspects of the file that belong to another. This might typically arise in conveyancing transactions involving a lender.

Contractual arrangements

All that has been said above assumes that the terms of the retainer with the client do not prescribe different arrangements. It is, of course, possible for you to make express provision in your terms and conditions of business as to which documents belong to the client and which to the firm.

Your terms and conditions could also set out the circumstances in which the firm will destroy documents or when a charge may be made for search, retrieval and provision of documentation to the client.

Can I exercise a lien?

This is a question we are frequently asked; can I hold onto a client's documentation pending settlement of my fee? The simple answer is yes; you may exercise a lien where your fees remain unpaid. However, care should be taken here, as any exercise of a lien may serve only to inflame a situation and make a subsequent claim against you more likely. So we would recommend that caution be adopted in this scenario, especially where the file shows that excellent service was provided. A firm that has nothing to hide is in a good place to recover its fees by alternative means than through the pressure of a lien.

A tactical advantage?

Following on from the above, consider any tactical advantages that may be gained by handing over documents upon request rather than withholding them. There is little to be gained in holding on to a document that shows your firm in a positive light; whereas failing to disclose it could arouse suspicion that you are hiding something, and a claim may then follow that might otherwise have been prevented.

Send a copy not the original!

This may seem obvious, but please don't send your client the original of your file. Always send copies of documents and retain the original yourself in case of future need. If a claim ultimately comes in against you and you don't have your file to defend yourself, you are immediately at a disadvantage. And asking for a copy from the client is both embarrassing and risks you receiving an incomplete version.

A subject access request?

Everything we have said above is relevant to a situation where a client (or, frequently, its new solicitor) asks for a copy of your file. Things change slightly if the request for information comes in the form of a 'Data Subject Access Request' under the Data Protection Act or the General Data Protection Regulation (GDPR). If you receive one of these requests, there are very detailed and prescriptive rules that need to be complied with, ranging from what needs to be provided, in what format and within what timeframes. Those rules are beyond the scope of this note, but we can provide some further guidance on this upon request.

Summary

- If a client or its new solicitor asks you for your file, you don't need to send everything.
- In fact, you shouldn't send everything.
- Make a copy of your file (don't send the original!) and remove any documents that you don't need to send.
- Keep a record of those documents you decide not to send, so that you know exactly what the client has and does not have.
- If a document that you are proposing to withhold shows you in a positive light (and could make the difference between a complaint coming in or not), consider sending it rather than withholding it. You stand to gain little by keeping hold of a helpful document.
- If you receive a subject access request under Data Protection legislation, you need to act quickly to comply – call us for more information.