

Fact Sheet 14 - File Ownership and Handling

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Most documents in a file belong to the client, but some belong to the lawyer. Ownership generally depends on *when* a document came into existence, and *why*.

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 cause, 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 experts' 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 rules which govern the conduct of lawyers say that if a client has left a file with a lawyer, the lawyer must return documents to which the client is entitled or keep them safely for seven years.

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 seven 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 period.

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

The lawyer should return the original file to the client, but might wish to keep a copy for his or her own protection or records. If so, the client cannot be charged for the photocopying expenses.

The cost of returning a file to a client should generally be considered as part of the lawyer's office expenses. If a lawyer has to retrieve a file from storage at the client's request, the lawyer may charge for any costs associated with obtaining the file — provided those costs were disclosed to the client. These costs may include a component for file storage as well as retrieval. The reasonableness of the charge depends on the circumstances in each matter. The charge should not contain an element of profit.

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. Further information can be found on the OLSC Fact Sheet **Liens**.

What happens if my file is lost or misplaced?

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

The Office of the NSW Legal Services Commissioner takes the view that lawyers should make every effort to reconstruct files for clients if the files cannot be found. We cannot compel lawyers to obtain new documents from other lawyers or government authorities but we can certainly try to negotiate a suitable solution and often an apology.

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