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This opinion was commissioned by the New Zealand Law Society to provide guidance to New Zealand lawyers on the law and requirements relating to the ownership and retention of records on termination of retainer.

OWNERSHIP AND RETENTION OF RECORDS ON TERMINATION OF RETAINER

Introduction

1. This opinion is a revised version of an opinion prepared in 2003. Since that time there has been very little development in the relevant case law, although some matters have been clarified regarding the Privacy Act 1993 and the scope of limitation. These developments have been incorporated into the opinion, as have the new rules promulgated under the Lawyers and Conveyancers Act 2006 which impact on the retention of records.

2. The purpose of this opinion is to provide guidelines for legal practitioners as to the retention of records on the termination of a retainer, and to provide an opinion as to the legal basis underlying the guidelines.

3. The particular matters of concern are: which records must be retained; in what form records may be retained; and for how long records have to be retained. You have also requested me to consider the relevance to these issues of the Privacy Act 1993. The solicitors' lien over documents does not form part of this opinion.

4. Some of these matters were dealt with in an opinion by Robert Smellie QC dated 17 September 1979. I have not sought to replicate the work done there, but have relied on it as a starting point.

5. Since that opinion, the legal position has been clarified to some degree by the decision of the Court of Appeal of the Supreme Court of New South Wales in *Wentworth v De Montfort* (1988) 15 NSWLR 348. There have also been considerable developments in technology for the storage of records. The matter has finally been addressed by the legislature in the Electronic Transactions Act 2002.

6. Many of the authorities which have developed the principles are of venerable antiquity, and were developed in relation to quite different situations. This was acknowledged by Hope JA in *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 353. I have attempted to bear this in mind when seeking to extract the governing principles.

7. I have divided the opinion into the following sections:

7.1 Contractual obligations between solicitor and client

7.2 Categories of documents to be retained

7.3 Right to information

7.4 Dealing with documents once retainer has ended

7.5 Form in which records are to be retained

7.6 The position of barristers

8. My conclusions as to the appropriate form of guidelines are set out in an appendix.

A Contractual obligations between solicitor and client

9. The obligation to retain records is frequently considered solely as a question of ownership of documents. This is, however, no more than a default position. It is important to note that the relationship between solicitor and client is essentially a contractual one. The importance of the contract between professional and client was stressed in *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 ALL ER 483 in relation to valuers. It is also acknowledged in *Wentworth v De Montfort* (1988) 15 NSWLR 348, which concerned solicitors.

10. It is permissible for a solicitor to regulate by contract exactly which documents the client will be entitled to, and what is to happen to documents retained by the solicitor. This has become a matter or increasing importance with developments in technology and the impracticability of storing paper for long periods of time. As the law does not cater specifically for this, contractual arrangements are necessary to ensure proper protection for solicitors. As a matter of practice, the ownership of and obligations relating to documents should be discussed on establishment of the retainer in order to avoid confusion at a later date.

11. The contract between the solicitor and the client should specify which documents a client is entitled to, what documents will be retained by the solicitor for his or her own records, what will happen at the end of the retainer, and how the solicitor will deal with any documents retained after that time.

12. Solicitors may find it advisable to address the following matters in the retainer:

12.1 Whether drafts of a final document remain the property of the solicitor.

12.2 Whether the solicitor is entitled to make and retain copies of documents sent to the client, which will be the property of the solicitor.

12.3 Charges that will be made for any copies retained by the solicitor, or for documents provided to the client on request.

12.4 Whether the solicitor is obliged to retain any documents on behalf of the client, or for any period of time.

12.5 The right to retain intellectual property in any documents created by the solicitor.

13. While it may well be that some of these matters have become accepted as a consequence of the law governing general retainers between solicitors and clients (see below), it is preferable for all concerned to have clarity. To the extent that these stipulations could be regarded as a limitation of the retainer, they are required to be notified to the client (see para 12 below).

14. Rule 3.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 requires solicitors to provide clients with written details of the service to be provided. Any limitation on the retainer is required to be notified at the same time. Any provisions regarding the ownership and retention of records should be included in these terms.

15. The principles discussed below relate to the situation which has not been regulated by the terms of the retainer.

B Categories of documents to be retained

16. As noted in the Smellie opinion, documents fall to be considered in three basic categories:

16.1 Documents in existence before the retainer commences.

16.2 Documents coming into existence during the retainer.

16.3 Documents relating to joint instructions or fiduciary duties to others.

17. Rule 4.4.1 of the Conduct and Client Care Rules specifies that the client has the right to uplift all documents held on the client's behalf when changing lawyers. However, the rule does not indicate which documents are held "on the client's behalf". A further test has to be applied in order to make this decision.

Documents in existence before the retainer commences

18. There is no doubt that these belong to the client and must be returned to the client on termination of the retainer, or be disposed of as directed by the client. In terms of rule 4.4.1 of the Conduct and Client Care Rules, these documents are clearly held on the client's behalf.

Documents coming into existence during retainer

19. In this category, the nature of the retainer undertaken by the solicitor is of critical significance. In some situations, the solicitor is simply acting as the agent of the client. Other situations will involve the provision of professional services, including the production of documents for the client.

20. The old case of *Ex parte Horsfall* (1827) 7 B & C 528 equated entitlement to documents with payment for them. That is, however, too crude a measure, and the decision has subsequently been glossed in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA).

Payment for something does not as a matter of course result in ownership; the intention of the parties has to be ascertained (see eg *In re Wheatcroft* (1877) 6 Ch D 97). While payment is a relevant factor to be taken into consideration, the principal distinction which has been drawn by the Courts is between those documents prepared for the benefit of the client, and those prepared for the benefit of the solicitor: *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205; *Wentworth v De Montfort* (1988) 15 NSWLR 348.

21. A factual inquiry is needed to determine whether documents can properly be described as held "on the client's behalf".

22. Bearing this in mind, documents can be divided into three broad categories:

22.1 Documents created to be sent, received or held by the solicitor as agent for the client.

22.2 Documents created for the benefit of the client.

22.3 Documents created for the benefit of the solicitor, or where property is intended to pass to the solicitor.

(a) Documents created to be sent, received, or held by the solicitor as agent for the client

23. If a solicitor is acting solely as agent on behalf of the client as principal, the ordinary rules of agency apply. Letters received by the solicitor from third parties will often fall in this category. In the nature of solicitors' business, however, a document created by the solicitor purely as an agent is rare, and will be the exception rather than the rule. In *Breen v Williams* (1996) 186 CLR 71, the High Court of Australia held that a patient had no proprietary interest in her medical records. Gaudron & McHugh JJ said (at 101):

> "Professional persons are not ordinarily agents of their clients even though they often have express, implied or ostensible authority to enter contracts on their clients' behalf. Documents prepared by an agent are ordinarily the property of the principal, but documents prepared by a

> professional person to assist him or her to do work for a client are the property of the professional person, not the lay client."

24. Documents sent or received by the solicitor purely as agent belong to the client: *Chantrey Martin v Martin*; *Wentworth v De Montfort* (1988) 15 NSWLR 348. This category includes correspondence with third parties, as well as notes of telephone calls. Copies of such documents retained for the solicitor's own file would, however, fall into category (c).

(b) Documents created for the benefit of the client

25. In the ordinary situation, where the solicitor is not acting as a simple agent, but is providing professional services, it is necessary to consider the reasons for creating a document. As noted in *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 355, the reasons will frequently be mixed. Whether a charge has been made for the particular document is a relevant factor, but is not determinative.

26. Where the retainer requires the solicitor to produce a document such as a contract or deed for the client, this will clearly be the property of the client: *Gibbon v Pease* [1905] 1 KB 810; *Breen v Williams* (1996) 186 CLR 71 at 89 per Dawson & Toohey JJ. Copies of letters written on behalf of the client and retained as evidence would likewise belong to the client: *Marshall v Macalister* [1952] NZLR 257; *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 355.

27. The position of drafts and additional copies of letters for the solicitor's file is more difficult. It has been suggested that, where the client pays for these, they belong to the client, and consequently that a solicitor should not charge for copies retained for his or her own protection. (This was the position adopted in the Smellie opinion, and is still reflected in Annex 12A of *The Guide to Professional Conduct of Solicitors* (8th ed 1999) produced by the Law Society of England and Wales.)

28. Additional copies of letters for the solicitor's file are not brought into existence for the benefit of the client; their purpose is for the benefit of the solicitor: *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 356. The fact of payment for such copies is not determinative and is, in my opinion, generally irrelevant. It should not be allowed to

obscure the principle that property in these documents is intended to vest in the solicitor. They cannot properly be described as held "on behalf of" the client.

29. In *Wentworth*, Hope JA suggested that there would have to be a "special agreement" to justify charging the client for such copies (at 356). In my opinion, that puts the matter too high; it would come as a great surprise to most solicitors to learn that they were not entitled to charge a client for copies they intended to retain. There is no reason why solicitor's charges should not be made for such copies.

30. Rule 4.5(b) of the Conduct and Client Care Rules expressly permits a practice of retaining copies of the client's documents where this has been agreed in the retainer, or where it is considered necessary for the purposes of defending a claim or complaint. If the matter has not been agreed, the rule suggests that there may be some doubt as to whether copies of all documents may be retained. In the event of a dispute, the solicitor would have to prove that retention was reasonably considered necessary to defend a possible claim or complaint. Although this threshold is unlikely to be a high one, the preferable course would be to regulate the matter by agreement.

31. Drafts prepared by solicitors have been the subject of little in the way of judicial decision since *Horsfall*, in which they were held to be the property of the client who had paid for them. In *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA), however, the Court of Appeal had no difficulty in concluding that drafts prepared by chartered accountants were not the property of the client.

32. The position taken in *Cordery on Solicitors* (8th ed 1988) at 90 is that, where solicitors base their charges on an expense rate which includes a proportion of overheads, the client is entitled to all drafts and copies. (This is the last bound edition of the work; the looseleaf version is unhelpful.) *The Guide to Professional Conduct of Solicitors* also considers drafts to belong to the client because they have been indirectly paid for (Annex 12A para 1).

33. In my opinion, this approach is flawed, and cannot be reconciled with the reasoning in *Chantrey Martin*. Ownership is determined not by the basis on which expenses are charged, but by the intention of the parties. The position cannot be stated in a general

way to cover all cases, which is why clarification of the basis of retainer is recommended. Normally, however, a solicitor would consider that he or she is entitled to discard drafts without reference to the client; it is – subject to specific instructions to the contrary – the final version of the document for which the client has contracted.

34. In *Wentworth v De Montfort* (1988) 15 NSWLR 348, Hope JA discussed a number of categories of documents. He considered that counsel's brief, correspondence with counsel, and notes of telephone attendances or conferences with counsel all belong to the client (360-361). In respect of correspondence and notes in general, he held that the question is one to be determined on the facts, depending on for whose benefit the document was created.

35. An additional difficulty has arisen with electronic communications, such as email messages. If some of these are in fact the property of the client, the solicitor would have a duty to retain them, and solicitors should take this into account before deleting messages from the system (see below on methods of storage). Once again, the matter is best regulated by contract. It may, however, be advisable to have a system whereby any significant electronic document is either copied or stored in a designated file.

36. Many email communications are ephemeral in nature, and retention would serve no obvious purpose. In such cases, it could be argued that there is no duty to retain them. To avoid dispute, this issue should be addressed in the retainer.

37. A matter that has received little attention in cases is the right to the intellectual property in documents created by the solicitor. The fact that a particular document has been created for a client does not automatically mean that the client is free to modify that document or use it for purposes other than the one for which it was prepared. Where there is significant intellectual property in a document, it would be advisable for this matter to be addressed by agreement.

(c) Documents created for the benefit of the solicitor

38. It is now generally recognised that, in the conduct of professional practice, many documents will be generated which are in essence for the benefit of the solicitor, and which are properly to be regarded as belonging to the solicitor.

39. This was first accepted in *London School Board v Northcroft* (1889) Hudson's BC (4th ed vol 2) 147. That decision was adopted and applied by the Court of Appeal in *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 All ER 483, a case relating to valuers. MacKinnon LJ held that the notes and memoranda made by valuers in preparation for a report belonged to the valuer, unless otherwise provided by contract (at 486-487). A similar approach was adopted in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286 (CA) in relation to audit working papers, notes and draft accounts prepared by chartered accountants. In the course of that judgment, the Court stated that similar considerations should apply to solicitors.

40. It appears that the only recent case which has considered the position of solicitors directly is the decision of the Court of Appeal of New South Wales in *Wentworth v De Montfort* (1988) 15 NSWLR 348. In that case, Hope JA applied the authorities mentioned above, noting that the client would be entitled to a copy of such documents (for which a charge could be made) but that they remain the property of the solicitor.

41. The decision of Hope JA is helpful in that the Court considered various specific classes of documents. The following were held to be the property of the solicitors: cheque requisition forms; financial records and computer printouts of financial records; internal firm records and memoranda as to work done or to be done; photocopy requisitions; attempted financial reconciliation of documents; bank account statements relating to money held for the client. The Authority and Instruction Forms required to be retained under s 164C of the Land Transfer Act 1952 would also fall into this category: they are for the protection of the solicitor. Transaction and verification records required by ss 29 and 30 of the Financial Transactions Reporting Act 1996 would be treated similarly. They are produced pursuant to a statutory duty resting on the solicitor in order to facilitate the detection of money laundering.

42. In some situations, it may not be immediately obvious whether the document was prepared for the client's or solicitor's benefit. In such cases, it may be necessary to resort to a predominant purpose test (*Wentworth* at 359).

43. As noted above (see para 30), rule 4.5(b) of the Conduct and Client Care Rules suggests that there may be a restriction on the type of document that a solicitor may copy for his or her own purposes. A solicitor should therefore be able to provide a justification for the creation of a document intended to benefit the solicitor.

Documents relating to joint instructions or third party interests

44. Where the client does not have the sole proprietary interest in the documents, it is obvious that different considerations must apply. There is virtually no authority on this question, and what there is is far from recent. In *Janson v Davison* (1837) 1 Jur 352, it was held that the wishes of the majority of clients should prevail. Should there be no clear majority view, an application may be made to the Court to exercise its inherent summary jurisdiction over solicitors as officers of the Court (see the authorities cited in the Smellie opinion in relation to s 141 of the Legal Practitioners Act 1982, which has not been carried through to the Lawyers and Conveyancers Act 2006).

45. A third party who claims an interest in documents held by a solicitor cannot rely on an application under the inherent jurisdiction; this is reserved to clients: *Ex parte Campbell, Re Hancock* [1969] 91 WN NSW 61. The question could, however be resolved in the course of an application by a client. It would have to be refused if it were established that third parties had interests in the documents.

46. A third party seeking to enforce a right to documents would have to institute proceedings in conversion or detinue. Certain powers to seize documents may be exercised by a Standards Committee under s 169 of the Lawyers and Conveyancers Act 2006, but these are not of general application.

C Right to information

47. The fact that a document is the property of the solicitor does not mean that the client is not entitled to know what is in the document. Where a document concerns the affairs of a client, the client may be entitled at common law to a copy of the document, for which the solicitor may charge a fee: *Wentworth v De Montfort* (1988) 15 NSWLR 348. In *Wentworth*, Hope JA held that the client was entitled to copies of computer printouts of financial records, and to details of information held in other financial records (358, 361). In *Foley's Transport Ltd v Weddell NZ Ltd (in rec & Liq)* (1996) 9 PRNZ 392, Greig J considered that a client would be entitled to copies of documents recording advice given or having a bearing on the future conduct of a case.

48. The right of a client to information material to his or her interests held by the solicitor was affirmed in *McKaskell v Benseman* [1989] 3 NZLR 75. (See also Chapter 7 of the *Conduct and Client Care Rules*). It appears that this is based on the fiduciary relationship between solicitor and client, because there is no corresponding right to inspect medical records: *Breen v Williams* (1996) 186 CLR 71 (HCA). It is clear from *Breen*, as well as *Wentworth* that there is nevertheless some information which is purely the concern of the solicitor, and to which the client has no right. Examples of this would be personal notes or work schedules made by the solicitor.

49. The common law has been supplemented to a large extent by the Privacy Act 1993. Where a solicitor holds "personal information" about a client, the client is entitled to have access to it, subject to the exceptions allowed for in the Act. Personal information includes any information about an identifiable individual (s 2(1)). That would appear to include financial records such as those considered by Hope JA in *Wentworth v De Montfort* (1988) 15 NSWLR 348.

50. The Human Rights Review Tribunal has adopted a broad concept of personal information, and this has generally been endorsed by the High Court as well. In In *Sievwrights v Apostolakis* (2008) 8 NZBLC 102,200 (para 10), the Court held that a letter sent by the solicitors for Ms Apostolakis to her mortgagee contained information relating to personal finances, which was personal information. In *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580, a barrister's client was held to be entitled

to copies of the barrister's diary entries where the relevant attendances on him had been recorded.

51. In *Geary v NZ Psychologists Board* [2012] 2 NZLR 414, the High Court concluded that a list of a psychologist's clients was not personal information, but the decision is contrary to the general trend of authority. Leave to appeal to the Court of Appeal was granted (see [2012] NZHC 2403), but the case was settled before the appeal was heard. The preferable view is that anything related to a person or a person's affairs is to be considered personal information to which the person is entitled under the Privacy Act.

52. Access to the information may be provided by way of a copy, reasonable opportunity to inspect the document, an excerpt or summary of the contents, or oral information about the contents (s 42). The Act permits a charge for the provision of information (s 35). The charge must be reasonable, and regard may be had to the cost of labour and materials involved in making the information available.

53. Where documents have been archived, there may be additional costs involved in retrieving information. Under the Privacy Act, it is legitimate to take these costs into account in setting the charge for providing the information. Where the request is made based on a common law right, the solicitor also has a right to charge for providing the information: *Wentworth v De Montfort* (1988) 15 NSWLR 348. A fee can legitimately include the costs involved in retrieving documents from storage because it is reasonable to expect to pay for a solicitor's time. As with other matters of potential dispute, this could profitably be included in documents establishing the retainer.

54. The fact that the client may be entitled to copies of documents does not mean that any intellectual property in the documents belongs to the client. This is a matter that will depend on the terms of the retainer.

D Dealing with documents once retainer has ended

Documents belonging to the solicitor

55. Once the retainer has come to an end, the solicitor is obliged to retain trust account records by virtue of r 11 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. Authority and Instruction Forms must be retained by virtue of the Land Transfer Regulations 2002, and transaction and verification records by virtue of ss 29 and 30 of the Financial Transactions Reporting Act 1996. Otherwise, there is nothing to prohibit destruction of the documents which belong to the solicitor. In most cases the solicitor would wish to retain at least some of these documents for protection in the event of a negligence suit. The appropriate period of retention is problematic, and depends on the proper approach to limitation periods.

56. The transaction and verification records required by ss 29 and 30 of the Financial Transactions Reporting Act 1996 must be retained for a minimum of 5 years. Trust account records must be retained for at least 6 years after the date of the last entry (Lawyers and Conveyancers Act (Trust Account) Regulations 2008 r 11(5)). Authority and Instruction Forms relating to eDealing transactions are required to be retained for a period of at least 10 years from the date on which the instrument is lodged for registration (Land Transfer Regulations 2002, reg 14; NZLS Guidelines for the use of Land*online* for an electronic transaction, guideline N).

57. Limitation in negligence claims is regulated by the Limitation Act 1950 for acts or omissions prior to 1 January 2011, and otherwise by the Limitation Act 2010. The 2010 Act has significantly altered the rules governing limitation to allow for longer limitation periods.

58. Under the Limitation Act 1950, professional negligence proceedings were subject to a limitation period of 6 years from the date on which the cause of action accrued.

59. In cases of negligence by builders and personal injury, the Courts interpreted the law so that the limitation period only began when damage was reasonably discoverable: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (upheld on appeal [1996] 1 NZLR 513 (PC)); *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA). There was some doubt as to whether this approach extended to professional negligence: *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA); *Saunders v Bank of New Zealand* [2002] 2 NZLR 270, para 39. In

Murray v Morel & Co Ltd [2007] 3 NZLR 721 (SC), the Supreme Court held that there was no general doctrine of reasonably discoverability, and it now appears unlikely that the doctrine would be extended to professional negligence claims.

60. Under the Limitation Act 2010 (which applies to acts or omissions occurring on or after 1 January 2011), money claims are subject to a limitation period of 6 years from the date of the act or omission on which the claim was based. The Act expressly provides for an extension of the limitation period in certain cases where the plaintiff was not aware of all aspects of the claim. A period of three years following discovery of the relevant facts (s 11(3)). There is however a longstop limitation period of 15 years following the act or omission relied on.

61. For services provided from January 2011 onwards, there is potentially a very long gestation period for negligence claims. Documents cannot be confidently destroyed once six years have passed since the professional services were provided. It appears to be generally accepted, however, that this is the minimum period for which documents should be retained (see below). One way of reducing the burden of lengthy storage periods is by using electronic storage. This is discussed below.

62. Principle 9 of the Privacy Act 1993 provides that personal information should not be kept for longer than is required for the purposes for which it can be lawfully used. As the objective of retention of documents is to provide protection in the event of a legal claim, it would seem that there is no conflict between this and the Privacy Act. Just as with other aspects of record retention, this is a matter which could satisfactorily be addressed contractually.

63. As noted above, difficulties may arise with the preservation of electronic data, such as email messages. Where these are of significance, it will be important to ensure that a hard copy is retained, or that appropriate storage systems are put in place. When making hard copies, it is also important to copy each message so as to avoid any issues of hearsay arising. The Electronic Transactions Act requires that the record must be able to identify the origin and destination of the communication, as well as the time it

was sent and received (s 27(a)). In addition care must be taken to ensure software and hardware does not become obsolete.

Documents belonging to client

64. The more important question concerns documents belonging to the client. These must either be returned to the client or dealt with as instructed by the client. Where a solicitor retains such documents, the solicitor is in the position of a gratuitous bailee. As such, he or she would be required to hand over the documents on request by the client: *North Western Railway Co v Sharp* (1854) 10 Ex 451. Destruction of the documents without the client's consent would technically amount to conversion.

65. Client documents can be divided into two basic categories: those documents which evidence legal obligations, such as contracts, wills and deeds; and those which are produced in the course of a retainer, such as correspondence and notes of telephone conversations. The reasons for retaining documents can also be divided into three broad categories: it may be to ensure the safekeeping of an important document which may be required in the future; it may be to satisfy some statutory requirement; or it may simply be to preserve the records of transactions in the event of potential disputes.

66. Documents evidencing legal obligations will generally be entrusted to the solicitor for safekeeping, and clearly cannot be destroyed after any set period of time. The period of retention will depend on the particular document, and such documents should not be destroyed without the client's or owner's consent. *The Guide to Professional Conduct of Solicitors* recommends that the written permission of the client be obtained (Annex 12A para 6). Some documents simply cannot be destroyed: see *Re Crawford* [2014] NZHC 609, discussed below.

67. Other documents will normally become redundant after a period of time; the relevant period will depend on the reason for retaining the document. There is no general power to destroy documents belonging to a client; this is a matter which is best regulated by contract. In agreeing to retain records on behalf of a client, a solicitor

could therefore stipulate that they would be destroyed after a number of years unless earlier uplifted by the client.

68. There are a number of statutory periods relevant to the length of the retention period. Among the most significant of these are the Inland Revenue Acts and the Companies legislation. Under the Tax Administration Act 1994, business records must ordinarily be retained for 7 years after the end of the income year to which they relate (s 22(2)). Other taxing statutes (such as the Goods and Services Tax Act 1985 and the Child Support Act 1991) generally adopt the 7 year period as well. Where records relate to debt forgiveness or distributions by trustees, they must be retained as long as the trust exists (s 22B). Company records as detailed in the Companies Act are also required to be retained for 7 years (s 189 Companies Act 1993).

69. If the object of retention is to protect the client against possible legal action, the limitation period would be relevant. As noted above, there are difficulties in determining when legal action is no longer possible. There is accordingly no neat way to draw a line after a certain time period and know that records will no longer be required.

70. The professional rules in most jurisdictions require records to be retained for at least 6 or 7 years after the end of the retainer, unless the Court orders otherwise or the client provides contrary instructions (Dal Pont *Lawyers' Professional Responsibility* (5th ed 2013) para 3.225). *The Guide to Professional Conduct of Solicitors* also recommends a minimum period of 6 years, but cautions that relevant statutory periods have to be taken into account (Annex 12A para 4).

71. The Lawyers and Conveyancers Act (Trust Account) Regulations 2008 require that trust account records must be retained for a period of at least 6 years from the date of the last transaction recorded in them (r 11(5)).

72. Six years is probably not long enough to provide reasonable protection for the client. The Building Act 1991 contains a long stop limitation period of 10 years, and a 15 year long stop limitation period is provided in the Limitation Act 2010. After 6 years it may,

however, be appropriate to review the file to determine whether there is any need for further retention.

73. If a single period of time is to be selected as a guideline for the retention of documents, that period would have to be 10 years. This period may be able to be reduced in individual cases, based on a judgment exercised at the six year review point. Bearing in mind the 15 year longstop period in the Limitation Act 2010, there will be some cases where prudence requires retention for this period of time.

E Form in which records are to be retained

74. Continual technological innovations mean that many records are never created in a paper form, and that it is much easier to store information in electronic forms rather than as physical documents. From the solicitor's point of view, the question arises as to whether such records will be sufficient to satisfy any obligations which might arise. This will depend on the reason for retaining the record.

75. The Lawyers and Conveyancers Act (Trust Account) Regulations 2008 permit electronic storage of trust account records where the records have been computer generated by the solicitor. In other cases, storage in the form of "microfilm, imaging, or other similar technology" is permitted after the first 3 years (r 11(5)).

76. Apart from this, statutory provisions generally do not specify any particular form in which records are to be retained, although there is frequently a requirement that they be in English. The Inland Revenue Acts only require "sufficient" records to enable tax to be calculated. The Companies Act requires that records be "convertible into written form" and also that adequate measures exist to prevent falsification (s 190).

77. In order to protect the interests of clients in such cases, it would appear that there is no barrier to adopting any form of electronic storage, provided that the records are readily retrievable and that systems are in place to record what has been done, and to prevent and detect falsification of the records stored. *The Guide to Professional Conduct of Solicitors* sees no barrier to electronic or photographic storage provided

that a basis has been laid for later admissibility in court proceedings (Annex 12A paras 7, 8).

78. Any system put in place should be able to:

78.1 Identify each document stored electronically.

78.2 Record that the complete document has been stored.

78.3 Identify the operator who stored the document in the system.

78.4 Record the fact of destruction of the paper document.

79. The Electronic Transactions Act 2002 reinforces this approach. The Act is designed to ensure general equivalence for electronic forms of data storage, and contains general provisions permitting storage of information electronically (ss 25-27). The preconditions are that it must provide a reliable means of assuring the "maintenance of the integrity" of the information, and that the information is readily accessible. In the case of wills, however, the paper copy may be essential: see *Re Crawford* [2014] NZHC 609.

80. Where the reason for retaining documents is for use in evidence, the objective must be to ensure that they are admissible. There is no restriction on the type of evidence a party may bring to prove its case, but there may well be issues as to reliability. The definition of "document" in the Evidence Act 2006 is wide enough to encompass any form of electronic storage. Document is defined as:

> (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes—
>
> (i) a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached:
>
> (ii) a book, map, plan, graph, or drawing:

(iii) a photograph, film, or negative; and

(b) information electronically recorded or stored, and information derived from that information.

81. The same definition is found in r 1.3 of the High Court Rules. It is unlikely that the Courts would adopt a restrictive approach (see Gahtan *Electronic Evidence* (Carswell 1999) at 9.2). In any event, the admissibility provisions of the Evidence Act would cover many situations where evidence of this nature would be important. A statement made in a document is admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and the maker of the statement is unavailable as a witness; or the Court considers that undue expense or delay would be caused if the maker of the statement were required to be a witness (s 18 Evidence Act 2006). If the document is a business record (as defined in the Act), wider admissibility provisions apply (s 19), but this would not generally cover client documents.

82. Various issues have arisen concerning the use of electronically generated evidence as to whether a record produced from electronically stored data is an original or a copy, but the courts have tended to avoid dealing with the technical status of the document, and to concentrate on its authenticity: *R v McMullen* (1978) 42 CCC (2d) 67, affirmed (1979) 47 CCC (2d) 499; *R v Bell* (1982) 35 OR (2d) 164, affirmed [1985] 2 SCR 287 (SCC). The Evidence Act 2006 allows both the information and the record produced from it as admissible evidence. The Electronic Transactions Act provides general authority to retain information in electronic form, and technical evidentiary problems should disappear once it takes full effect.

83. A second issue concerns the reliability of the machinery used to store the information. As with other forms of technology, the courts have tended to assume reliability in the absence of evidence to the contrary: see Gahtan *Electronic Evidence* 161-164. This was the approach adopted in *Marac Financial Services Ltd v Stewart* [1993] 1 NZLR 86 at 92-93. In *Paul Finance Ltd v CIR* [1995] 3 NZLR 521 (CA) a question arose as to the meaning of a computer generated assessment. The Court indicated that evidence may be necessary as to the particular software and operation of the system, but appeared to accept without question the reliability of the hardware.

84. As a general proposition, therefore, it does not seem that there is any evidential barrier to relying on data stored in electronic form. The question remains as to whether it is permissible to destroy paper documents once an electronic copy has been made.

85. There is no general right to destroy a client's documents, and the matter should properly be regulated by agreement. It is of some interest to note, however, that the Electronic Transactions Act contemplates that the electronic form of a document may replace the original (s 32).

86. In the absence of any agreement between the parties, the matter will depend on the nature of the document. If it is only a copy, there is no reason why it should not be retained in electronic form; the obligation to the client is only to retain "a copy".

87. If it is an original document, the solicitor could technically be liable in conversion for destroying the document without the client's permission (see Smellie opinion). The legal position in this respect has been altered to some extent by the Electronic Transactions Act: s 25 provides specifically that a paper copy need not be retained if the information is properly stored in electronic form. Leaving this to one side, the principal concern is the risk that the electronic copy will not be regarded by the Courts as sufficient proof. In the vast majority of cases, however, this risk would be negligible if the solicitor has a proper system in place and the original has been destroyed. In that situation, the electronic copy is the best evidence available.

88. Regardless of the right to destroy a document, destruction of the original of certain documents can only be undertaken with caution. It has to be borne in mind that the original might contain the only evidence of forgery or alteration. If that is a real possibility, the original should obviously be retained. The case of *Re Crawford* [2014] NZHC 609 serves as a salutary reminder that some originals must be preserved. In that case, an original will was destroyed when it was believed that probate would not be required. The Court held that the Registrar of the High Court was not required to accept the scanned copy, and that an application had to be made for probate of a lost (or destroyed) will.

F The position of barristers

89. Where the barrister assumes the conventional role of a barrister sole, it is the solicitor who is the immediate client. The vast bulk of the file will be documents provided by the solicitor, and will be returned to the solicitor on completion of the brief as a matter of course. There may, however, be items of correspondence with third parties which the barrister has received as agent of the solicitor. As discussed above, these belong to the solicitor, and possibly ultimately to the client. Counsel's brief belongs to the client: *Wentworth v De Montfort* (1988) 15 NSWLR 348. Correspondence between solicitor and counsel and counsel's own notes would, on the principles discussed above, remain the property of counsel.

90. Where a barrister acts as a de facto solicitor, it is likely that his or her file will contain correspondence and other documentary material. This will have to be treated in the same way as documents held by a solicitor: some items will belong to the barrister and some will belong to the client.

91. As far as retention of records is concerned, the chief concern will be the barrister's own protection in the event of a claim of breach of professional duty. Following the Privy Council decision in *Harley v McDonald* [2002] 1 NZLR 1 (PC), it is clear that there is scope for personal liability of barristers. Documents on counsel's file may be required to refute this.

92. Following the decision of the Supreme Court in *Lai v Chamberlains* [2007] 2 NZLR 7 (SC), there is no longer immunity for barristers in respect of work done in connection with litigation. Barristers should therefore retain records which may have a value in defeating such a claim. This will generally mean at least keeping a copy of opinions provided. Any method of storage available to solicitors would be acceptable (see section E).

93. As in the case of solicitors, there is uncertainty regarding the precise determination of the limitation period (see paras 55-63). For most purposes, it should be sufficient for records to be retained for 10 years after return of the brief. At six years, the file should be reviewed to determine whether there is any point in further retention. In cases

where there is some doubt as to whether a negligence claim might come to light after a significant period, records would need to be retained for 15 years to ensure complete protection.

March 2014

Andrew Beck, Barrister.

Guidelines for the Retention of Records

Contractual regulation

The contract between the solicitor and the client should regulate the solicitor's responsibility with regard to documents relating to the client. The contract forms part of the client care information that must be provided to clients prior to commencing work under a retainer under rule 3.4 of the Conduct and Client Care Rules. It should specify:

(a) Which documents will be the property of the client;

(b) What documents will be retained by the solicitor for his or her own purposes;

(c) The client's rights to information held by the solicitor;

(d) What is to happen to documents on the termination of the retainer;

(e) How the solicitor will deal with any documents retained after termination of the retainer.

Entitlement to documents

Where the matter is not regulated by contract, the question of ownership of documents is determined by the following principles.

Documents in existence before the retainer commences

The solicitor holds these documents as agent for the client or third party. On termination of the retainer, the solicitor must dispose of them as the client or third party directs.

Documents created during the currency of the retainer

These can be divided into three broad categories

(a) Documents created to be sent, received or held by the solicitor as agent for the client

Where the solicitor acts purely as an agent, the documents belong to the client. Preparing documents purely as an agent is unusual, as the solicitor will generally be providing professional services of some kind. There is accordingly some overlap between this category and the next.

Examples

(i) Letters received from third parties

(ii) Vouchers for disbursements paid on behalf of clients

(iii) Correspondence conducted as agent of clients

(iv) Memoranda of telephone conversations with third parties

(b) Documents created for the benefit of the client

These documents also belong to the client. In cases where the purpose is mixed, the dominant purpose should be taken into account. Where the dominant purpose is to benefit the solicitor, the client would nevertheless be entitled (on payment) to a copy on any request under the Privacy Act 1993.

Examples

(i) Letters written and received in the course of providing professional services for the client

(ii) Documents produced for the client in terms of the retainer

(iii) Instructions and briefs to counsel

(c) Documents created for the benefit of the solicitor or where property is intended to pass to solicitor

Where the purpose of creating a document is to assist or protect the solicitor, or relates to the management of the solicitor's business, it will belong to the solicitor.

Examples

(i) Notes of authorities researched

(ii) Copies of cases or extracts from text books

(iii) Notes of submissions or addresses to courts or tribunals

(iv) Drafts and outlines of final documents[*]

(v) Entries of attendance in diary or time costing system

(vi) Tape recordings of conversations with clients

(vii) Copies of letters retained on file[*]

(viii) Letters written to the solicitor by the client

(ix) Inter-office memoranda

(x) Authority and Instruction Forms relating to eDealing transactions

(xi) Transaction and verification records under the Financial Transactions Reporting Act.

Documents relating to joint instructions or in respect of which a third party has an interest

Ownership of these documents depends on the facts of the case. In the case of joint clients, the wishes of the majority prevail. In the absence of agreement between all parties claiming an interest in the documents, the only safe course is to make application to the Court.

Inspection of documents

Regardless of questions of ownership, the client has a right to information held by the solicitor which is material to the client, or which concerns his or her affairs. This includes financial information in the solicitor's records. Where the information is personal information, there will be additional obligations under the Privacy Act 1993.

If a copy of documents is provided to the client, the solicitor is entitled to make a charge for this. There is some guidance about charges on the website of the Privacy Commissioner.

[*] It should be noted that these items are considered by some to fall into a grey area: see Opinion paras 21-26. Practitioners who wish to avoid any possibility of a dispute may choose to give the client the benefit of the doubt.

Retention of records

Documents belonging to the solicitor

Solicitors are required to retain trust account records for a period of at least 6 years after the date of the last transaction recorded in them. Authority and Instruction Forms relating to eDealing transactions must be retained for at least 10 years after the date of lodgment for registration. Under the Financial Transactions Reporting Act 1996, ss 29 and 30, transaction and verification records must be retained for a minimum of 5 years. No other period is laid down, but it is recommended that all records be retained for 10 years after the retainer has ended. The position should be reviewed after six years in the light of likely future obligations.

Documents belonging to the client

Solicitors are not obliged to retain clients' files. If they do so, they will be in the position of gratuitous bailees. There is no legal right to destroy documents belonging to the client without the client's permission. A solicitor who destroys a client's documents could technically be held liable in conversion.

One way of dealing with the problem of storage is to store documents in electronic or photographic form. It is recommended, as in the case of documents belonging to the solicitor, that records be retained for a period of ten years after termination of the retainer. Retained files should be reviewed after six years to determine whether there is any point in further retention.

Form in which documents are stored

Evidential rules generally treat electronic or photographic records as documents, and it is therefore permissible to store copies of documents in this way, provided that there are systems to ensure that the information is accurate and accessible Original documents should not be converted into electronic or photographic forms without the agreement of the client.

A system should be in place to record that the original has been destroyed, and where and how the copies have been stored.

Barristers

Barristers in the position of solicitors should follow the above guidelines. In other cases, documents belonging to the solicitor or client should be returned on completion of the brief. Counsel's own records (copies of correspondence and opinions provided) should be retained as suggested above to provide protection in the event of a negligence claim.