

# Guidance Statement No. 6 – Form of Delivery for Client Documents (Published 28 September 2016)

## 1. Introduction

### 1.1 Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

### 1.2 What are the issues?

If a law practice has an obligation to provide or return ‘client documents’ to a client at the completion or termination of the law practice’s engagement:

- In what form should those documents be provided (particularly if the documents are in electronic form)?
- Is the law practice permitted to charge for providing them?
- Is the law practice permitted to retain a copy of the documents?

### 1.3 What this Guidance Statement does not address

This Guidance Statement does not deal with these issues:

- Which documents on a client file are ‘client documents’?<sup>1</sup>
- The operation or scope of any lien over documents the law practice may have for unpaid fees.<sup>2</sup>
- When the client may be charged for document *storage* or *retrieval*.<sup>3</sup>
- The legal risks of a law practice not handing over documents when critical steps or time limits are relevant.<sup>4</sup>

### 1.4 Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society (QLS) Ethics Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the note and following the guidance it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

<sup>1</sup> Refer to *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society, June 2014, 61, Appendix C.

<sup>2</sup> Ibid 63-64.

<sup>3</sup> Ibid 65.

<sup>4</sup> Lexon insured law practices should refer to Lexon’s LastCheck Receiving and Transferring a file.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct. This Guidance Statement represents a standard of good practice and is endorsed by the Ethics Committee of the QLS.

## 2. Ethical principles

### 2.1 ASCR

Rule 14.1 provides:

#### 14. Client documents

14.1 A solicitor with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement:

14.1.1 the client or former client; or

14.1.2 another person authorised by the client or former client,

is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.

Despite the rule, it is recommended that the client's right to documents, and the law practice's right to impose any charges, be set out where possible in the costs agreement in order to help avoid disputes. A sample clause is set out at paragraph 2.6, below.

### 2.2 Physical documents

Original client documents that are held in physical form should be given to the client in the same form in which they are held (as opposed to a copy of any kind), unless the client and law practice agree otherwise. A request by a client that such documents be provided in another form, or in more than one form (such as both originals and scanned electronic copies), does not need to be complied with unless the law practice agrees (in which case a reasonable fee may be charged).

Where a law practice also holds a copy (such as a photocopy or electronic copy) of the original physical document, this does not have to be provided to the client unless, for example, it forms part of another document to which the client is otherwise entitled.

Physical documents may be held by the law practice solely in electronic form (for example, scanned copies) if otherwise agreed or permitted by legislation such as the *Electronic Transactions (Queensland) Act 2001* (Qld).<sup>5</sup> However, if the client documents in question are held by the law practice as physical documents, those must be provided to the client, unless otherwise agreed.

### 2.3 Electronic documents

Rule 14 specifies that only **copies** need be provided of electronic documents. This is because, given the intangible nature of electronic documents, it would generally not be possible to provide the actual 'original' versions.

<sup>5</sup> For example, under sections 19 & 20.

Consistent with the approach to physical documents, ‘copies’ of electronic documents should be provided, wherever possible, in the same electronic format in which they are held by the law practice. Electronic documents also contain ‘meta data’ which can have forensic value and it may not be possible to readily copy this information into the form of a printed hard copy. Reducing an electronic document to a printed copy would also deprive the client of the quality of electronic files that allows them to be electronically searched and organised. As Mummery LJ recently observed in the Court of Appeal of England and Wales when assessing the nature of a ‘document’, “*content cannot be separated from form*”.<sup>6</sup>

Therefore, electronic documents do not need to be, and generally should not be, provided in ‘hard copy’ or physical printed form, unless the client and law practice agree otherwise.

A request by a client that such documents be provided in another form, or in more than one form (such as both electronic copies and printed copies), does not need to be complied with unless the law practice agrees (in which case a reasonable fee may be charged).

Where a law practice also holds another copy (including a physical copy, such as a printed copy) of the electronic document, this does not have to be provided to the client unless, for example, it forms part of another document to which the client is otherwise entitled.

### **Format**

In choosing the appropriate electronic format, wherever possible the document should be provided in the same file format as that in which it is held by the law practice. However, the law practice should act reasonably, having regard to the circumstances of the client and the nature of the matter. For example, it would usually be acceptable to provide a Microsoft Word document in that format, even if the client may need to purchase software to make full use of it, because that format is in common use by both individuals and business. It is not the responsibility of the law practice to provide any software or hardware to enable electronic documents to be accessed.

Where a file which has been produced by the law practice (as opposed to one originally supplied by the client) is in a more sophisticated or unusual format, or is one that relates to legacy software which is no longer produced, such that a client is unlikely to be able to access it without considerable expense, then, taking into account the circumstances of the client, consideration may be given to extracting the relevant information, or converting the file to another format. This need only be done where the conversion would be a straightforward process which is capable of being performed at minimal cost to the law practice.

Consideration may also need to be given to providing emails in a generic or commonly used format, where this can readily be done and is reasonable having regard to the circumstances of the client in question. Whether any potentially significant ‘meta data’ could be lost may also be a consideration in deciding whether it is appropriate to provide documents in a substantially different file format.

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<sup>6</sup> *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 866, [54].

If the engagement did not include the provision of documents that the client would be able to subsequently edit themselves, it may be appropriate to convert the documents to a 'read-only' format in order to help protect the law practice's intellectual property.

### ***Method of delivery***

It may be reasonable to use file sharing services to facilitate delivery to the client, rather than providing them on physical media (such as on a USB drive or DVD). Where there are a large number of files, however, the client may incur data charges in downloading them. As accessing data in this way is commonplace, and there are steps clients can take to mitigate those charges, the law practice should not be liable for them. However, it may be reasonable to take data charges into account when choosing the means by which files are to be provided to certain clients or, at least, to warn those clients that higher charges may be incurred. Again, mention of this in the costs agreement is recommended.

## **2.4 Is the law practice permitted to retain a copy of the documents?**

A practitioner is not prohibited from taking copies of the documents prior to their delivery to the client, in order to maintain a complete file for the practitioner's own record, but the practitioner is not entitled to charge the client for this. It is recommended that law practices make express provision in the costs agreement for the right to take copies of the documents prior to the delivery. It is also recommended that law practices make and retain a complete copy of the client file.

## **2.5 Is the law practice permitted to charge for providing the documents?**

The law practice must not charge for the provision of a client document, unless the client has provided an earlier authority in writing to such a charge.<sup>7</sup> If a legal practitioner wishes to impose such a charge, that should be provided for in the costs agreement.

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<sup>7</sup> Legal Services Commission, *Regulatory Guide 1 – Charging Outlays and Disbursements* (version 2) (20 May 2013).

## 2.6 Sample clause

The following is a suggested clause on the topic of client documents, for inclusion in costs agreements. The topics addressed, and the benefits of including them in a costs agreement, rather than the specific choice of words, is what practitioners should focus on in considering the suggested clause. Please note that this sample clause also attempts to deal with some related issues broader than the scope of this Guidance Statement. Practitioners should of course satisfy themselves as to the suitability of the clause for their own circumstances.

- “1. Your client documents
- 1.1 The law says that not all documents on our file will be your client documents, including some file notes, working papers, accounts or internal emails, which will belong to us.
  - 1.2 Where permitted by law, we may elect to hold some or all of your client documents solely in electronic form. We will keep your client documents, relating to the legal work we perform for you, for seven (7) years after the engagement has ended or has been terminated. After this time, we may destroy them without contacting you again.
  - 1.3 At the conclusion of the legal work which we perform for you, or where our engagement is terminated, you may request your client documents from us at no charge. If you do make such a request, they will be provided to you within a reasonable timeframe. This will end our obligation to keep your client documents.
  - 1.4 You agree that we may also retain copies of your client documents, for our own regulatory, insurance and other reasonable internal purposes.
  - 1.5 Where your client documents are held by us in electronic form, only electronic copies of them will be provided to you. Those copies will be provided in a reasonable electronic format, usually the same format in which we hold them.
  - 1.6 No software or equipment will be provided to you to enable you to view or access your electronic client documents. Electronic documents may be provided to you solely in a ‘read only’ format, unless it was part of our engagement that they be provided in a form which permits editing or modification by you. While we take reasonable measures against malware, viruses or other harmful code, to the extent the law permits, no warranty is given that the electronic documents will be free from these. We recommend that you use a reputable security program at all times.
  - 1.7 We may choose to make your electronic documents available to you for a limited time via a file sharing platform so that you can download them, if we consider this to be reasonable. While this would be at no charge to you, please be aware that you may incur data charges associated with the download for which we will not be liable. We accept no liability for any loss you may suffer as a result of your use of that service.”

Changes in technology may affect the appropriateness of aspects of the sample clause in the future. If the law practice wishes to impose fees, such as for document retention and storage, or other services, these matters should also be included in the clause.

Other issues you may wish to consider here include the storage of documents using third parties, including 'cloud' services for electronic documents, and any intellectual property rights in the documents.

### **3. More Information**

Solicitors are referred to:

- *The Australian Solicitors Conduct Rules 2012 in Practice: a Commentary for Australian Legal Practitioners*, Queensland Law Society, June 2014, 61-62.

For further assistance please contact an Ethics Solicitor in the QLS Ethics Centre on **07 3842 5843** or email at **ethics@qls.com.au**.