The file? What's that?

Richard Harrison looks at modern ways of storing and accessing client information

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It used to be so simple. You had a client. Who had a "matter". For each particular matter, there was a cardboard "file", labelled with the name of the client and the description of the matter.

There were various methods of organisation but generally you had a clip for "correspondence": (letters in letters out, attendance notes, instructions to counsel), which would generally be in ascending chronological order. Then there was a flap for loose drafts and documents and possibly a separate folder for important documents such as contracts or pleadings.

Original court documents could be identified as such because they were sewn up with green tape. This practice gradually declined among progressive practitioners, to be superseded by the branded folded corner.

If the matter was complex or long-running, you would have several such folders or would transfer everything into nicely labelled lever-arch files.

To understand what had happened in the case previously, and its current status and future intentions, you looked at "the file". If the client wanted it for a new firm of solicitors, it was generally transferred physically (subject to any issues of lien for unpaid fees). There was, and to some extent remains, the misconceived notion that the file "belonged" to the client.

Incidentally, for detailed assessment, the court used to want to see the entire collection of paperwork and make sure that the documents said to have been copied for counsel had indeed been so copied. And that counsel's instructions were properly indorsed with a squiggle confirming the work done and the outcome of any hearing.

The modern "electronic file"

Now, apart from possibly printing out bundles for court hearings, or general convenience, we do not need paper and our "client files" are wholly electronic.

> *"The age of the electronic file certainly requires long-held assumptions to be rigorously tested"*

Each matter has its own spot on the server divided into appropriate virtual folders. The system can be trained to place e-mails in the appropriate folder automatically and all we have to call a file is a collection of electronic information, albeit searchable and sorted into date order.

Separately there is an accounts system upon which time is recorded and on which the narratives attributed to time entries can be used to fulfil the old function of "attendance notes": recording what was discussed in meetings and telephone calls and containing matters of substance to the case.

These can be printed as a single document to complement the main file of electronic information but, fundamentally, all we have is a series of "computerised records", in two separate locations.

This system has great advantages in terms of space, accessibility and organisation. It has drawbacks for anyone reviewing a case or coming new to it: while known documents can be found, there is always the possibility that important attachments to e-mails may not have been separately saved or properly indexed.

The process of working out what actually is there, what is relevant and putting material into historical context is undeniably problematic. That is why I, at least, tend to retain, for my own purposes, working bundles with printouts of relevant material.

How does this fit into the Law Society's client care requirements?

The latest practice note on client care information dated 5 September 2016 states: "If you intend only to store documents in an electronic format, you should consider whether the absence of paper documents will be detrimental to the client's interests before you agree to such storage methods with your client."

Who owns the file?

What we have in relation to any particular matter is essentially structured information. Unless a client has sent us original documents, or photocopies which it is clear should be returned, there is very little that in reality "belongs" to the client.

Since we do not have physical "files", some thought would be necessary if we were asked to transfer the information for any purpose, whether to a new solicitor or to a client direct.

In my experience, most such situations are dealt with amicably and co-operatively. However, it is possible to envisage circumstances where there is a potential dispute and a demand for "my file" needs to be responded to with considerable care.

Equally, you may act for a client who needs to get documents and information from a former solicitor for the purpose of advancing a case or advising on potential claims. You will need to press the right buttons.

There is some guidance from the Law Society which used to appear in old editions of the Guide to the Professional Conduct of Solicitors and which is generally treated as the *locus classicus* on this topic. Unfortunately it now has little relevance.

The note identifies "four broad categories".

Documents which belong to the client

- Documents prepared for the benefit of the client and which have been paid for by the client, either, directly or indirectly. *Examples*: instructions and briefs; most attendance notes; drafts; copies made for the client's benefit of letters received by you; copies of letters written by you to third parties if contained in the client's case file and used for the purposes of the client's business. There would appear to be a distinction between copies of letters written to the client (which may be retained by you) and copies of letters written to third parties.
- Documents prepared by a third party during the course of the retainer and sent to you (other than at your expense). *Examples*: receipts and vouchers for disbursements made by you on behalf of the client; medical and witness reports; counsel's advice and opinion; letters received by you from third parties

Documents which belong to the solicitor

- Documents prepared by you for your own benefit or protection, the preparation of which is not regarded as an item chargeable against the client. *Examples*: copies of letters written to the client; copies made for your own benefit of letters received by you; copies of letters written by you to third parties if contained only in a filing system of all letters written in your office; tape recordings of conversations; inter-office memoranda; entries in diaries; time sheets; *computerised records* [author's emphasis]; office journals; books of account.
- Documents sent to you by the client during the retainer, the property in which was intended at the date of despatch to pass from the client to you. *Examples*: letters, authorities and instructions written or given to you by the client.

How do these distinctions fit present practice?

The reality now is that solicitors are not simply "preparing documents" for which the client pays. The client is paying for information marshalled and presented. "Drafts" are ongoing things. If we print them out, we keep them for our own benefit. The client gets the end result, usually e-mailed or downloaded in electronic form. The client will already have received electronic copies of communications with third parties: and they will rarely be "letters".

Nobody has a separate "filing system of all letters written in your office" (although I am old enough to remember the days of "the second carbon"—a practice which presumably the Guidance intended to encompass).

And notably according to the Guidance, "computerised records" do *not* belong to the client. Well, of course, everything is now a "computerised record". And many "attendance notes" are contained in the "books of account".

The client may be entitled to certain pieces of information held by the solicitor. But he is not entitled simply to take a dump of the entire electronic record and, even on the old authority, he is not entitled to the correspondence passing between them.

Of course the information may be relevant and required to be produced for regulatory purposes. And it may regrettably need to be printed and organised in the old-fashioned way for the archaic process of costs assessment.

But what obligations do you have to provide an ex-client, who may have ulterior motive and is engaged in a "fishing expedition" with information about a case?

In the vast majority of modern legal transactions, clients will have been sent copies of everything. How they choose to preserve and order it is a matter for them but there is no reasonable basis for expecting performance of those obligations a second time without being paid.

Guidance for modern conditions

What does the modern Code of Conduct with its vague focus on "principles", "outcomes" and "indicative behaviours" provide? There is in fact nothing specific.

The SRA advisory service has suggested in an informal discussion that, subject to any lien, a solicitor should "hand over the client file promptly on request, failure to do so could give rise to the client making a successful complaint to the Ombudsman for poor standard of service contrary to principle 5 [you must provide a proper standard of service to your *clients* which may include former clients] and outcome 1.5: [the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances]".

The adviser does make the point that ownership of documents is a matter of law. But on my view of the law, it seems that the assumption that a client "owns" a modern electronic file is wrong.

Rights to information: agency & inherent jurisdiction

A solicitor's electronic file consists of information only. I suggest that the client is not entitled to that information on any sort of proprietorial basis.

In which case, any reference to a "lien" is quite simply irrelevant: a lien can only be exercised against documents actually belonging to the client, *not* information to which he may have a right of access.

The right of access probably derives partly from an analogy with the law of agency under which the principal is entitled to documents and electronic records concerning his affairs prepared by the principal. The case of *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886, [2013] All ER (D) 239 (Jul) confirms that this extends to electronic communications. However, the documents to which the client is entitled under the law of agency do not include internal drafts and working papers generated for the purposes where the relationship is that of professional person and client.

The client may also have a right of access through the inherent jurisdiction of the court: a solicitor may be ordered to produce all documents in his custody, possession or power, relating to an action, and to allow the client to inspect and make notes of them, and to supply the client with such copies as he desires: this was described by Clauson J as "the plain right of a client against his solicitor": *Re Crocker* [1936] Ch 696, [1936] 2 All ER 899.

For the purpose of modern conditions, the *Crocker* assertion cannot be absolute. It is certainly evident that the old analysis of "client's papers" and "lien" is now rather outdated.

A way forward

It might be suggested that provided a client is prepared to pay or secure a reasonable fee for the exercise, the client is entitled to a reasonably comprehensive account of the matter during the time in the hands of the solicitor, subject to the solicitor's ability to select what is provided on the principles set out above.

The "proper fee" can be the subject of negotiation, assessment or escrow arrangements but only complete failure to engage in the process should be treated as a failure to provide a proper standard of service. The exercise of the court's discretion will depend on the reasonableness of the stances taken.

The age of the electronic file certainly requires long-held assumptions to be rigorously tested. NLJ

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