Practice Resource

Law Society of British Columbia

Ownership of Documents in a Client's File

July 2017

DM809335

This article was authored in June 2015 by Barbara Buchanan, Practice Advisor, and Chris Canning, Summer Law Student, relying in part on Jacqueline Morris, Felicia Folk, and John Vamplew's article "Whose File is it Anyway?," published in The Advocate 87 (Vol 52 Part 1 January 1994).

This article has been updated to July 2017.

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Ownership of Documents in a Client's File

Who owns the documents in a client's file? The client? The lawyer? The ownership of documents arising out of a lawyer-client relationship is a matter of law, not a subject determined by the Law Society; however, the Law Society Rules and the BC Code include professional responsibility requirements for lawyers in relation to a client's file documents and property. Document ownership has not received much attention in Canadian jurisprudence but is something that lawyers deal with regularly. For example, ownership is relevant to the distribution of documents and property when closing a file, transferring a file to a successor lawyer, undergoing discovery of documents, asserting a lien, and other situations. Some of the issues around ownership of documents are as commonplace as whether it is proper to charge clients for photocopying.

While this article provides guidance to assist lawyers, lawyers will ultimately have to do their own research to determine document ownership and to ensure that they meet their professional responsibilities. Note that this article does not deal with copyright. Lawyers (or their firm) generally have copyright in their work product. An exception is where the retainer agreement provides that copyright in the work product goes to the client. Lawyers are allowed to use documents they have prepared for an earlier client as precedents or templates as long as the earlier client's confidential information is not disclosed.[1]

If you are asked to produce your file in a situation where you think that a client or former client might make a claim against you, you should consult the Lawyers Insurance Fund for guidance as to what you should disclose.

Professional responsibility rules

Who owns a client's file documents is a matter of substantive law; however, the Code sets out ethical guidelines for lawyers to take into consideration as well. For example, rule 3.5-6 provides that lawyers must account for clients' property that is in the lawyer's custody and deliver it upon request or, if appropriate, at the conclusion of the retainer. When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer (rule 3.7-8). Code rule 3.7-9 requires that, on discharge or withdrawal, a lawyer must, subject to the lawyer's right to a lien, deliver all papers and property to which the client is entitled. Law Society Rule 3-54(1) requires a lawyer to account in writing to a client for all funds and valuables (as defined in Rule 1) received on behalf of the client.

When closing or transferring a file, lawyers should be aware that they have an ethical duty, upon request, to make reasonable efforts to provide a client with electronic copies of documents in the same form in which the lawyer holds them at the time of the request.

If a client requests copies of documents that the lawyer has previously provided to the client, the client is generally entitled to receive the same copies again, however, a lawyer is entitled to bill a fair and reasonable amount for the time and cost of providing the documents a second time. In the case of electronic documents, a lawyer may bill a reasonable amount for providing the documents and for the cost of materials (e.g. a memory stick or disk). For more information on electronic documents and billing for their production and billing for photocopies see *Ethical considerations when a lawyer moves on* in the Summer 2017 Benchers' Bulletin.

If documents are delivered to the client on file closing, it is important for the lawyer to retain copies, made at his or her expense, of all relevant documents in order to defend against negligence claims or complaints. See *Closed Files: Retention and Disposition* for more information, as well as for information regarding other ethical requirements, e.g. in relation to retention, disposition, confidentiality and security. For information on solicitors' retaining liens, see the practice resource, *Solicitors' Liens and Charging Orders – Your Fees and Your Clients*, July 2013.

The law

Neither the Code nor the Law Society Rules outline how to determine what documents are the client's property. The remainder of this article provides guidance to determine ownership of client file documents. The primary position of Canadian courts at the time of writing this article has been to follow the English authorities and *Cordery's Law Relating to Solicitors*.[2] Document ownership is determined by legal principles, not by ethics.[3] There are two broad categories to consider:

- documents created before the retainer;
- documents created during the retainer.

Documents created before the retainer

Documents created before the retainer generally belong to the client or a third party. These might include documents from a previous lawyer-client relationship or documents sent to the lawyer by a third party. As outlined in *Cordery*, such documents are held by the lawyer as agent for either the client or third party, and as such the lawyer does not own them.[4] At the conclusion of the retainer these documents should, as directed by the client, be returned or disposed of.

Documents created during the retainer

Documents created during the retainer make up the primary area of contention. As noted above, the courts have generally chosen to adopt the approach in *Cordery* in determining document ownership. In *Cordery*, the basis for a determination lies in payment: if a client pays for a document, then it belongs to the client. *Cordery* classifies documents created during the retainer into four broad categories:

- Documents prepared by the lawyer for the client's benefit or protection and paid for by the client, belong to the client.
- Documents prepared by the lawyer for the lawyer's benefit or protection, at the lawyer's expense, belong to the lawyer.
- Documents sent by the client to the lawyer, the property in which was intended to pass from the client to the lawyer, belong to the lawyer.
- Documents prepared by a third party and sent to the lawyer (other than at the lawyer's expense), belong to the client.[5]

Documents prepared for the client's benefit and paid for by the client

The client generally owns documents created by the lawyer for the client and paid for by the client. Examples of documents in this category include:

- memoranda of law;
- documents created for use in court;
- witness statements;
- notes on attendances for the client's benefit.

Generally, as long as the primary purpose underlying the creation of a document is to benefit the client, it falls under this category. Such documents are necessary for the client's case and would be expected to be transferred to a successor lawyer if the client switched firms.

Documents prepared for the lawyer's benefit at the lawyer's expense

The lawyer generally owns documents created for the lawyer's benefit at the lawyer's expense. In *Chantrey Martin & Co v Martin*, a case concerning chartered accountants, the English Court of Appeal noted that "even in the case of a solicitor there must, we should have thought, be

instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients."[6] This principle applying to lawyers was adopted into both Nova Scotia and Ontario law.[7] Examples of documents in this category include:

- inter-office memoranda;
- internal notes or communications (including conflicts checks);
- lawyer's working notes meant to aid memory;
- internal requisition forms;
- ethics consultation notes.

In *Cordery*, entries of attendances belong to this category, but in practice these documents are more difficult to categorize.[8] Notes of meetings with witnesses or officers of the court, for example, will likely be made primarily for the client's benefit. Hope JA of the New Zealand Court of Appeal criticized the *Cordery* categories at pages 358-359 in *Wentworth v de Montfort* where he found

> The notes made by a solicitor of telephone conversations with persons other than his client, but relating to the client's affairs, may obviously fall into an almost indefinite number of classes. . . . As I have indicated *Cordery* suggests that both "entries of attendance" and "proofs of evidence" are the property of the solicitor. No authority is cited for these suggestions, and I would have thought that they each both fell squarely within the first of the four categories described in *Cordery* and that they each belonged to the client. "*The Guide to the Professional Conduct of Solicitors"* issued by the (English) Council of the Law Society (1974) states (at 39) that a memorandum of a telephone conversation with a third party made by a solicitor is the property of the client, and is accordingly to be handed over on a change of solicitors. On the other hand, a solicitor may well make a note of a telephone conversation which he has with a person relating to the work he is doing for a client, but the conversation may be solely for the benefit of the solicitor and not be chargeable to the client.[9]

Determining who owns a lawyer's entries of attendances and notes requires an examination of who the third party was and the content of the notes or recordings.

Documents sent to the lawyer by the client

Documents sent to the lawyer by the client generally belong to the lawyer. These include instructions and other correspondence. In the same way, letters and correspondence sent by the lawyer to the client belong to the client.

Documents sent to the lawyer by third parties

Documents sent to the lawyer by third parties belong to the client. The lawyer receives them as the client's agent. Examples of such documents include letters, receipts, vouchers for disbursements, or expert witness reports.[10]

Documents that do not appear to fit into one of the four categories

If a document does not seem to fit into any of the four categories, consider the principles that appear to underlie the *Cordery* categories to make a determination.

1. If a lawyer comes to control a document through his or her role as the client's agent, the client owns the document.[11]

2. If a document is created for the client's benefit, it likely belongs to the client; and if the document is created for the lawyer's benefit, it likely belongs to the lawyer.

3. If the client paid for the document, it likely belongs to the client.

Once ownership has been established, a lawyer can refer to the Law Society's practice resource article, *Closed Files – Retention and Disposition*, July 2015 to review document retention and disposition considerations. This article includes discussion of statutory, regulatory, ethical and practical reasons for retention (defending against claims and complaints) and a suggested minimum retention and disposition schedule for specific records and files.

Summary

The following is a non-exhaustive list based on the above principles of ownership. It is meant as a guide and is not definitive.

The client owns:

- documents in existence before the retainer;

- correspondence from the lawyer or third parties;

- expert reports;
- client's medical records;
- examination for discovery transcripts;
- trial transcripts;
- notes or recordings of conversations with witnesses or officers of the court;
- documents for use in court (case law, briefs, pleadings, factums);
- memoranda of law;
- originals, copies and drafts of wills, powers of attorney, representation agreements, contracts;
- receipts for disbursements;
- corporate seals.

The lawyer owns:

- correspondence from client;
- time entry records;
- inter-office memoranda and other internal communications (including conflicts checks);
- internal requisition forms;
- calendar entries;
- accounting records;
- cash receipt book of duplicate receipts;
- notes prepared for lawyer's benefit or protection at the lawyer's expense;
- ethics consultation notes.

Conclusion

While this article provides guidance to assist lawyers, lawyers will ultimately have to do their own research to determine document ownership and to ensure that they meet their professional and legal obligations. To help prevent issues, lawyers should consider how they will respond to document requests and develop a law firm policy for the organization, retention, and disposition of client files (see *Closed Files: Retention and Disposition*). Also, lawyers may wish to include wording in their retainer agreements as to how file documents and property will be managed during the course of the lawyer-client relationship and when transferring or closing the file. As part of a lawyer's duty to provide courteous, thorough and prompt service to clients (Code rule 3.2-1), providing a client with correspondence and copies of documents regularly during the course of the engagement may lessen the likelihood that a client will request the same information again later. However, the fact that a lawyer has already provided the information to the client once does not mean the client is not entitled to receive the same information again.

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[1] *3464920 Canada Inc v Robert C Strother, Davis & Company, et al*, 2002 BCSC 1179 at para 153.
[2] FT Horne, *Cordery's Law Relating to Solicitors*, 8th ed. (London: Butterworths, 1988) ("*Cordery*"). Mentioned in *Davis v Canada (Attorney General)*, 1997 CarswellBC 3181 (BCSC) at para 35; *Bank of Nova Scotia v Imperial Developments (Can) Ltd*, [1987] CLD 1454 (MBCA); adopted in *Price v Lambrinos* 2012 ONSC 4856 at para 18 quoting from *Aggio v Rosenberg* (1981) 24 CPC 7 (ONSCM) ("*Aggio*").
[3] *Aggio*, at para 17. See note 2.
[4] *Cordery*, at 89. See note 2.
[5] *Ibid*, at 89.
[6] *Chantrey Martin & Co v Martin*, [1953] 2 QB 286 (Eng CA) at 695.
[7] *Spencer v Crowe*, 1986 CarswellNS 251 (NSSC) at para 20; *Bowman v Rainy River (Town)*, 2007 CarswellOnt 1053 (ONSC) at para 14.
[8] *Cordery*, at 90. See note 2.
[9] *Wentworth v de Montfort*, (1988) 15 NSWLR 348 (NSWCA) at 359.
[10] *Re Ellis & Ellis*, [1908] WN 215 (Ch D).
[11] *Leicestershire County Council v Michael Faraday & Partners Ltd*, [1941] 2 KB 205 (Eng CA) at 215.