
Confidentiality and data protection

What are my main obligations?

1. Under Principle 7 of the CLSB [Code of Conduct](#), you must keep client information confidential. This is your primary regulatory obligation in relation to your clients' data.
2. If you are obtaining a client's personal data for the purpose of providing them with legal advice or other services, you will also be a data controller under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. Personal data is any information about an individual from which that individual can be identified.
3. Where the GDPR applies, you must ensure that you process your clients' personal data lawfully in accordance with the [seven data protection principles](#). This includes having appropriate security measures in place to protect the personal data you hold, which will also be necessary to meet your obligation to keep client information confidential.
4. Under the GDPR, you must not keep personal data for longer than you need it. In particular:
 - You will need to think about – and be able to justify – how long you keep different categories of personal data. This will depend on the purposes for which the data was collected.
 - You will need a policy that establishes standard retention periods for each category of personal data you hold.
 - You should periodically review the data you hold and ensure you erase or anonymise it when you no longer need it.
 - You must carefully consider any challenges to your retention of data, as individuals have a right to erasure if you no longer need to process their personal data.

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5. All these obligations are the same whether you hold your clients' information electronically or in paper files.

How long should I keep client data and files?

6. There is no set time period for retaining a client's file. You should follow the principles set out above in establishing appropriate internal policies. Whatever approach you take, you should ensure it is documented and communicated to your clients.
7. When setting retention periods, the following factors will be relevant:
 - You will need sufficient information to properly resolve any complaints relating to a matter.
 - You will want to retain certain information to protect yourself in the event of legal action arising from a matter.
 - Your professional indemnity insurer is likely to require you to keep information for a certain period.
 - You might be required by the CLSB to demonstrate compliance with our rules in the event of an audit or if there is a complaint.
 - It could be in the best interests of your client for you to retain certain documents for the client's future use.
8. With those considerations in mind (and subject to any specific insurance requirements), it is common to retain client files for six years after the end of the matter, as this is the usual limitation period for breach of contract and negligence claims.
9. However, you should take the following into account, particularly in relation to personal data that might be included in a client's file:
 - If you never carried out work for the client (for example, the file relates to an enquiry only), then you are unlikely to be able to justify retaining personal data for the full retention period.
 - It might not be necessary to retain all data for the full retention period.

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- You must consider any requests from individuals for their personal data to be erased and, if necessary, justify why you are retaining their personal data for the full retention period.
 - There might be other laws or rules applying to specific types of data, such as client identity records in organisations covered by anti-money laundering legislation.

What happens when the retention period ends?

10. At the end of the retention period you should ensure that the client's file is disposed of securely. This is necessary to meet your obligations under the GDPR (in relation to any personal data in the file) and to ensure the client's information remains confidential.
11. For hard copy files, this might be achieved by shredding physical documents or using a service provider that safely destroys confidential waste. For electronic data, you must ensure that the data is destroyed in such a way that it can no longer be read by an operating system or application, and cannot be recovered and used for unauthorised purposes. Simply deleting the data is unlikely to be sufficient.
12. If you hold any original documents, these should be returned to the client when they are no longer needed by you and should not be destroyed without the client's consent.

What do I need to tell clients?

13. Individuals have the right to be informed about the collection and use of their personal data. This is a key transparency requirement under the GDPR.
14. You must provide individuals with information about the purposes for which you will retain their personal data, your retention periods and who the data will be shared with. In relation to sharing data, you should inform clients that you might

need to share information about their matter with the CLSB for regulatory purposes, such as reporting on complaints.

15. For a checklist of the information that you are required to give clients in relation to their personal data, visit the [Information Commissioner's Office](#) website.

Other GDPR rights and obligations

16. Individual clients have [a number of other rights](#) under the GDPR of which you need to be aware, including the right to access their data and the right to have errors rectified. For more detailed guidance on complying with the GDPR, including your wider obligations beyond retention of client data, see the resources on the [Information Commissioner's Office](#) website.

Ownership of client data and files

Who is my client?

17. Under the [Code of Conduct](#), your client is the person for whom you act, including (where the context permits) a prospective or former client.
18. A professional client is any person or organisation authorised to carry out reserved legal activities under the Legal Services Act, or any unauthorised costs adviser, who instructs you to provide services to or in relation to a client. Information about balancing the interests of your professional client and your ultimate client can be found in the [Ethics Hub](#).

Who owns the file?

19. Where a client seeks the return of documents, the following general principles should be borne in mind about the ownership of documents in the matter file (whether hard copy or electronic). Generally, a client will have a right to receive any documents owned by them.

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20. The following documents will usually be owned by the client:
- original documents sent to you by your client;
 - documents sent or received by you as agent of the client, such as correspondence with third parties;
 - final versions of documents, such as schedules of costs;
 - final versions of documents prepared by a third party, such as expert reports or counsel's advice.
21. The following documents will generally belong to you:
- those prepared for your own benefit or protection, such as drafts and working papers;
 - copies of internal emails and correspondence, and correspondence written by the client to you;
 - accounting records.

What if the client has outstanding unpaid fees?

22. A Costs Lawyer is not able to assert an equitable lien over money held in the same way that a solicitor can (in certain circumstances) when costs remain unpaid. One reason for this is that Costs Lawyers are prohibited from handling client money under Principle 3 of the [Code of Conduct](#). However, a Costs Lawyer might nonetheless have a common law lien over the client's file.
23. A lien is a type of security interest or right that entitles a party to hold onto another party's assets in its possession pending payment of a debt owed. Common law liens are created by operation of law or contract. They arise when a party has obtained and retained lawful possession of an asset until the relevant debt is repaid. Even if documents in your possession belong to a client, you might be entitled to retain those documents if you are exercising a lien in respect of unpaid fees.
24. If you intend to exercise a lien in circumstances of non-payment, it is advisable to expressly set out in your client care letter that you will have a contractual lien over the client's file until all fees have been discharged.

What principles govern equitable liens?

25. Most of the case law relating to the exercise of common law liens over client files concerns solicitors. From a regulatory perspective, we would expect similar legal principles to be applied to authorised Costs Lawyers. However, please note that this is not legal advice and a court’s view might differ. This guidance is intended to help you understand the position for solicitors, which is arguably analogous to the position a court would adopt in relation to a Costs Lawyer asserting a lien.
26. The key principles were set out in *Donaghy v JJ Haughey Solicitors Ltd* [2019] NICH 1 and later repeated in *Ellis v John Hodge Solicitors* [2022] EWHC 2284 (Comm). Their effect can be summarised as follows.
- Subject to any agreement to the contrary, a solicitor has a common law right to exercise a general lien in respect of costs over any property belonging to the client that properly comes into the solicitor’s possession in that relationship. As was said in *Ismail v Richard Butler* [1996] 2 All ER 506: “The basic rule is that a solicitor has the general right to embarrass his [or her] client by withholding his [or her] papers in order to force him [or her] to pay what is due and the court will not compel him [or her] to produce them at the instance of the client.”
 - Solicitors as officers of the court are subject to its supervisory jurisdiction and the court can therefore interfere with the enforcement of a common law lien on equitable principles.
 - Where the lawyer terminates a retainer, they should seek an undertaking by the client’s new lawyer to preserve the original lien (or a court may make a similar order).
 - Where the client terminates a retainer, this is a weighty factor against interfering with the exercise of the lien, but the court would retain the power to do so on an equitable basis.

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- When invited to interfere with the exercise of a lien, the court should make the order that best serves the interests of justice, in particular weighing the risk that the client would be deprived of material relevant to the conduct of the case against the principle that litigation should be conducted with due regard to the interests of those who have a payment justly due to them.
 - In determining the appropriate order to make, the court should have regard to all the circumstances of the case including in particular:
 - (a) when and why the lawyer/client relationship ended;
 - (b) who ended it;
 - (c) the nature of the case;
 - (d) the stage that the litigation had reached;
 - (e) the conduct of the lawyer and client respectively;
 - (f) the balance of hardship which might result from the order that the court is asked to make;
 - (g) the fact that the value of the lien is likely to be considerably reduced if the file is handed over.

Is it ethical to exercise a lien over a client's file?

27. You must remember your duty under Principle 1 of the [Code of Conduct](#) to act with integrity, and you must balance carefully any conflicting professional principles when considering whether it is appropriate to exercise a lien. No two cases are exactly the same, and the overriding principles for you to consider will always be maintaining the confidence that the public places in you and the profession, and upholding the rule of law and the proper administration of justice. See our [Guidance Note](#) on Client Confidentiality and Acting with Integrity for more information on balancing professional duties.
28. Principle 3.1 of the [Code of Conduct](#) states: "You must act at all times in the best interests of your client except where this conflicts with your duty to act independently in the interests of the proper administration of justice or where otherwise permitted by law." You will therefore also need to consider whether a conflict has arisen between your own interests and those of your client, and/or

between your client's interests and your regulatory duties, when deciding whether to exercise a lien. See our [Guidance Note](#) on Conflicts of Interest for more information.

29. Where your client is a lay individual acting in person, you should consider whether the client could be regarded as a vulnerable consumer and balance the situation appropriately. See our [Guidance Note](#) on Vulnerable Consumers for more information.

Examples of scenarios in which a lien might be exercised

Scenario 1

Facts: You have prepared a final bill on behalf of a litigant in person who now requests the return of her file. The client has not paid your invoiced fees. You have not stipulated in your client care letter that you retain a contractual lien over the client's file for non-payment.

Considerations: You may assert a common law lien over the file for the outstanding fees, although the lien would be stronger if it had been stipulated by contract.

Scenario 2

Facts: You are instructed to prepare a bill of costs by a professional client. During the course of the work, your ultimate client informs you that he has terminated your professional client's retainer and now requires you to send him the file as he intends to continue acting in person. He no longer wishes to instruct you as a Costs Lawyer. You have not been paid for the work.

Considerations: You may consider asserting your common law (or contractual) lien over the file until you have been paid either by the ultimate or professional client. It is reasonable to expect that if your professional client is a firm of solicitors, it will have client money on account from

which to discharge your fees. In any event, your professional client may be contractually bound to pay your fees.

If you cannot recover your fees from your professional client, you may consider informing the ultimate client, courteously, that you are happy to make the file available but you will require payment of your outstanding fees first. You will need to make clear that you believe you are entitled to retain possession of the file until you are paid.

You should bear in mind that if you remain unpaid because the professional and ultimate clients disagree over who is responsible for payment, and if there are ongoing court proceedings for which your file is required, you may need to justify to the court your right to withhold the file in accordance with the principles governing liens, and ask the court for guidance.

Scenario 3

Facts: After accepting instructions from a professional client, A, and undertaking costs work on its behalf, you receive a communication from a firm of solicitors, B, enclosing a form of authority from their ultimate client (for whom A formerly acted) asking for your file against an undertaking by B to pay outstanding fees owed to you.

Considerations: You should first satisfy yourself of the form of authority and the precise nature of the undertaking (for your own protection and that of the ultimate client). An undertaking given by a named solicitor is binding upon that solicitor. You may then transfer the file to B, although it would be courteous to inform A that you are transferring the file against a form of authority from the ultimate client.

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