

Common questions – answered by Lawcover

Production of a Solicitor's File

Solicitors often ask Lawcover for advice about a request from a former client for production of their file. Whilst it may seem counterintuitive to provide the documents, when the purpose for the request may be to frame a claim in professional negligence against you, Lawcover generally encourages solicitors to comply with these requests.

If a claim is likely to be made against you, withholding documents may only prolong the process and result in a less efficient resolution of any claim. There is also the possibility that a file note or document contained in the file will demonstrate that any claim against you is unlikely to succeed. Ultimately if a claim is made against a solicitor and proceedings are commenced, the solicitor's file, and typically most file notes, will become a matter for evidence and production will be required by the Court.

For more information on the complexities surrounding the production of files and file ownership listen to our [Risk on Air Podcast - File ownership and documents – who owns what?](#)

If, at any stage, you do provide your file, it is important that you retain a complete copy of all documents for your records.

Assisting the Court

Another common request for assistance is where a solicitor is being asked to provide affidavit evidence or documents in circumstances where a solicitor has drafted and/or executed a will.

In contested probate proceedings, there is authority for the proposition that a Court may order that a solicitor explain the circumstances in which the will was prepared and executed. Most likely this will be in the form of affidavit evidence but may involve attending Court for examination (*Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671). The position in circumstances where proceedings are not contested is less clear.

Issues commonly arise in relation to concerns over testamentary capacity or undue influence. Issues may also involve inter-vivos transactions, where an estate plan was implemented whilst the testator was still alive. Approaches may be made to a solicitor directly by the legal representatives for competing beneficiaries, including in circumstances where no proceedings are yet on foot. The request may be to hand over the will and file or provide detailed evidence about the client's instructions and how the will was prepared and executed.

Lawcover's approach in these circumstances is that you should seek advice before providing any affidavit evidence or commentary. There is a risk that the duty of confidentiality to the former client will be breached if information is disclosed. Once the former client has passed away the duty of confidentiality continues, with the confidentiality passing to the client's legal personal representative. Further, you may not waive the client's legal professional privilege without consent. Ensure you have informed consent before providing any documents or evidence. Alternatively, wait until an order is issued by the Court, at which point the solicitor's duty to the Court will override other duties, and the solicitor can be compelled to provide the requested evidence.