Safe custody – valuable asset or pain in the posterior?

Time was the contents of a firm's safe custody holdings were regarded as a valuable asset, jealously guarded and hotly contested on partnership dissolution.

That may remain the case, but years of accumulated documents can also turn into Sisyphean boulder requiring great time and treasure to maintain. To maximise benefit and minimise risk & cost we suggest a review of your safe custody procedures and terms every few years.

Once the duties of bailee are assumed they do not disappear just because a practitioner retires or no longer wishes to have responsibility for the documents.

Ideally, the terms upon which a law practice holds safe custody documents should be agreed in writing by the client when they are deposited.

Issues that may be useful to address include:

- The physical security you can offer (remembering that once you promise a certain level of physical security you must be able to deliver on that promise).
- Policies regarding what goes into safe custody and what does not.
- Is an electronic copy sufficient? Obviously this must be approached circumspectly. Authority to destroy the original and replace it with a scan may be a half way measure that can save cost.
- Advance authority to lodge safe custody with a commercial provider or pass it on to another firm.
- Making it clear that you accept no obligation other than passive retention (if that is the case). For example, monitoring option exercise dates or whether you will be checking death notices to inform executors of the location of wills. In the case of wills, it is possible that a custodian firm assumes a duty to the Court that may not be displaced by contract.[1]
- Authority to destroy the document after an agreed period.
- No charge can be made for document storage without a client's express written consent. [2] Calling the storage charge a "release fee" or "perusal fee" or similar does not escape the prohibition.[3] If a requesting party wishes the documents to be delivered to them, postal or courier charges could be claimed on a cost recovery basis.
- Agreed processes for uplift, including what forms of ID are required and how the authority to release is to be sent to you.[4]
- Such other modification to the common law applicable to bailees as you consider appropriate, bearing in mind that the Australian Consumer Law may apply.

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[1] *Hawkins v Clayton* (1988) CLR 539 per Brennan J at 555. Although that case related to circumstances in which the solicitor had notice of the testator's death, his Honour concluded that the bailment ceases on the death of the Testator and is replaced with other obligations founded on the custodian's status as an officer of the Court. It would not take much modification of that approach to derive from this a positive duty to peruse death notices. Conversely, the analysis of Mason CJ & Wilson JJ at 544-545 is much more amendable to an effective contractual exclusion. Given the uncertainty in the authorities, specific agreement by the Testator that you have no obligation to monitor death notices may well sway the argument in the law practice's favour.

[2] *Australian Solicitors Conduct Rules 2012*, rule 16.

[3] *Legal Services Commissioner v Rose* (no 2) [2007] VCAT 2465.

[4] Ibid.

Release procedures

Where no contractual standard is established, the releasing firm must balance the need to manage their liability as bailee of the documents with the document owner's right to collect them without un-necessary inconvenience.

Having proven a bailment, the onus shifts to a bailee to show that appropriate steps were taken to protect the security of the bailed property. It is even arguable that strict liability applies where a bailee misdelivers property to a person not entitled to it.[5]

Identification

Where the request to uplift safe custody documents is received by mail or electronically, a releasing practice must proceed cautiously. As demonstrated by the *Lawcover* caution note cited below, the fact that we act in good faith may not be a defence to a claim in bailment.

Scans of primary identification documents (or prints generated from such scans) are largely useless as a security measure unless verified. For example, if the identification is ostensibly "certified" by a justice of the peace, a cautious practitioner may contact the JP (using the Dept. of Justice contact database) and verify that they did indeed sight original documents.

Even if the signed authority is provided by another law firm, the releasing firm is nevertheless entitled to check that a reasonable ID process has been followed. As it is their liability, the releasing firm is entitled to some discretion as to what they require. Options could include:

- a warranty from the requesting firm that they have identified the person stated in the release authority to their satisfaction and indemnifying the releaser from loss[6] or
- providing certified copies of identification used by the requesting firm for its own identity check.

Who is entitled to the documents?

Instructions to place documents in safe custody should be drawn by a legal practitioner and fully inform support staff of key details – most importantly, who the owner(s) of the documents are. Your software or safe custody procedure should record that information, together with several forms of contact if available.

The authority requesting release and each document in the packet should be checked by a legal practitioner before release, not left to the most junior employee in the firm.

It should not be assumed that all items in a safe custody packet have been accurately described, or that all documents in a particular packet are in fact owned by the same person or entity.

It is quite common for documents owned by different entities or trusts to be stored in the same packet or even misfiled completely, and an authority must be scrutinised carefully to ensure that it applies to all documents in a packet.

Where the documents are owned jointly, the releasing law practice should ensure that all owners consent although a copy could be requested by each joint client severally.

Where authority to collect is – apparently – vested in an attorney, care must be taken to ensure that any conditions have been satisfied. Even where the power is stated to commence "immediately" it may be prudent to contact the principal for instructions. Attorneys are usually not entitled to original wills, although they may be entitled to a copy.

The usual verification process should be followed to ensure that the instrument conferring authority on an agent to collect documents is genuine and that the person presenting themselves as the appointed agent is who they say they are.[7] Consent or agency ***cannot*** be inferred from a marital or familial relationship.

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[5] *Jackson v Cochrane* [1989] 2 Qd. R. 23; Couston G, "Is your safe custody room full of time bombs?" (31 August 2010) Mondaq website <http://www.mondaq.com/australia/x/108896/Insurance/The+Dangers+in+Safe+Custody+of+Documents>.

[6] The terms of any indemnity need to be drafted carefully and considered by both releasing and collecting firm. A very stringent indemnity will waste a lot of time in debate, If the requesting firm declines to provide an indemnity – as they are perfectly entitled to do – the releasing firm may insist that the client use another uplift options such as collection in person or verification using a Justice of the Peace or paid VOI service (such as Australia Post).

[7] *Chandra & Anor v Perpetual Trustees Victoria Ltd & Ors* [2007] NSWSC 694.

What will you keep and how long are you going to keep safe custody documents?

If you are entering into an express bailment agreement where safe custody is accepted, it is very useful to obtain instructions to destroy documents in appropriate circumstances. An appropriate retention period is entirely dependent upon the document, and may exceed 100 years. Without specific authority to destroy safe custody documents, it can be necessary to retain them essentially indefinitely.

It is doubtful that a general authority to destroy client records contained in a retainer agreement could be relied upon to destroy safe custody documents.

Careful consideration should be given to the volume of material placed in safe custody packets, and consider whether it is really necessary to do so. This policy must be communicated to those managing the archive. As years go by the cost of maintaining a large volume of material in an appropriately fire and flood proof facility can become very onerous.

Accepting another practitioner's safe custody documents

Lexon's "Information Sheet: Buying Selling, Dissolving & Otherwise Modifying Practices" (1 July 2014)[8] must be considered prior to accepting another practitioner's safe custody documents.

The terms upon which the documents will be held should be expressly agreed.

For example:

- who accepts liability for a lost certificate of title?
- how good are the records?
- can you decide you no longer want them. If so, what then?

In almost every case a stringent audit to confirm that all documents stated to be incoming are in fact present is a wise precaution on the part of the firm taking over responsibility for them.

If the owners of a document do not specifically consent to the transfer of a document and the terms upon which it will be held, any terms imposed by the sub-bailee will not be binding upon the owner and can only apply to the original bailee.

We suggest that on receipt a full audit of the documents held be carried out, and any missing or inaccurately described documents be followed up.

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Ethics Solicitor
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[8] Lexon Insurance, 'Information Sheet: Buying Selling, Dissolving & Otherwise Modifying Practices' (1 July 2014) Lexon Insurance website <file:///C:/Users/adrianat/Downloads/Information_Sheet_-_Buying_Selling_Dissolving_or_Otherwise_Modifying_Law_Practices_2014_-_2015.pdf>.