NSBS Guide to Client Property

Intake, Protection & Return

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Introduction

This guide is prepared by NSBS Legal Services Support and Professional Responsibility. It is designed to answer questions about receiving, protecting, and returning client property, and even what to do if you can't find the owner.

Is there material you should not destroy because it is "client property?" Lawyers may encounter important documents at the point where the file should be destroyed. What to do is a common question which can flummox lawyers, to the point where it is clearly a barrier to the destruction of personal, confidential or privileged information. Indeed, from a public interest perspective, NSBS must be careful not to countenance retaining material "just in case" if, for example, it contains information which is personal, privileged, or confidential beyond what is necessary and permitted by privacy law.

Fortunately, the *Code of Professional Conduct* provides an answer.

Code of Professional Conduct

"Client property" is defined in our *Code of Professional Conduct*:

> 3.5.1: In this rule, "property" includes a client's money, securities as defined in the *Securities Act*, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

Please note that "client property" is *not* the same as all the materials in your file, including the work product paid for by the client. It is only those things that came into your possession as property of the client.

> **3.5-2** A lawyer must:
>
> 1. care for a client's property as a careful and prudent owner would when dealing with like property; and
> 2. observe all relevant rules and law[1] about the preservation of a client's property entrusted to a lawyer.

Commentary (*footnotes within the Commentary are the authors' guidance and not part of the Code. They are added for clarity)*

1. The duties concerning safekeeping, preserving, and accounting for client's monies and other property are set out in the regulations of the Society.[2] [3]

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[1] It is suggested these include privacy legislation, duties of confidentiality and privilege, and possibly the law of bailment and the law of trusts.

[2] Our Regulations speak to annual reporting requirements (which allow the Society to ask about matters including property), cover the handling of trust monies in detail, and define "trust property" (below).

> 1.1/1 (cc) "trust property" includes: any property of value belonging to a client, other than trust money, received by a practising lawyer in trust, or to be held on behalf of or at the direction or order of a client, or another person, or money held by a practising lawyer, belonging in whole or in part to a client or another person, which is held under escrow conditions;

The Regulations provide little detail about trust property: "wrongful conversion" may be compensated. See also Succession Plan obligations 4.6.3 *et seq*

[3] 4.6.5 At a minimum, a succession plan must include information and adequate arrangements to allow for the handling of clients and management of the practice with regard to the following, where applicable: open and closed files; wills and wills indices; foundation documents and other important records; other valuable property;….

2. These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. A lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them.
3. Subject to any rights of lien, the lawyer should promptly return a client's property to the client on request or at the conclusion of the lawyer's retainer.
4. If the lawyer withdraws from representing a client, the lawyer is required to comply with rule 3.7-1 (Withdrawal from Representation).

The *Code* goes on to set out other obligations which are geared to property that has a monetary value.

Notification of Receipt of Property

3.5-3 A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Client's Property

3.5-4 A lawyer must clearly label and identify client's property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer must maintain such records as necessary to identify client's property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 A lawyer must account promptly for client's property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary [1] A lawyer should be alert to the duty to claim on behalf of a client any privilege[4] in respect of property seized or attempted to be seized by an external

[4] See NSBS Policy Respecting Law Office Search and Seizure

authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the Income Tax Act (Canada), the Charter and the Criminal Code.

Our Guidance

The preferred ways to deal with client property which are documents, in order of preference, are:

1) never receive it in the first place if you don't need it,
2) scan a copy and return the original immediately,
3) confirm in writing what items you received,
4) return originals at the end of the retainer [5] or
5) where appropriate, have a clause in your retainer agreement which authorises destruction at the end of your retention period. This only works for certain types of property, typically documents, which tend to become useless after the end of a matter or with further time.

Our guidance for non-documentary property and for documents which are valuable (e.g. bonds, share certificates, minute books and wills) is:

1) Don't receive or keep it if you don't have to;
2) Issue a receipt & advise the client upon receipt (this can be a letter),
3) Keep indices for such items. A wills index, minute book tracking index, and index for other property are important and allow you keep track of the comings-and-goings.
4) Keep such items distinct, secure, and safe from fire, water, and other environmental harm. Do not mix with a file. One approach is to use a distinct style or colour for these files, e.g., purple folders. In this way, it is very easy to see when a file includes valuable documents. This can also help to identify foundation documents.
5) Cross reference the file and the items of property.

[5] As required by Commentary 3

6) Return all items promptly at the end of the retainer, or earlier upon request.
7) Make sure your staff are trained and office manual includes appropriate procedures developed to implement this guidance;
8) Use fireproof storage, either a locked cabinet or a safe, if a careful and prudent owner would.

Property Remaining in Your Possession

If you find yourself with something which fits the definition of “client property” long after the matter is concluded, your options depend on the nature of the property. Your starting point, however, is the commentary that you “should” have returned it at the end of the retainer, but didn’t, either by agreement with the client (which should be followed) or inadvertence.

Property with Tangible Value

If the property is something which itself still has value (e.g., a bond, jewellery, money in trust, etc) then you must return it to the client. If you are unable, it will have to be transferred to whomever is lawfully entitled to it (e.g. the personal representative or sole heir at law). If in doubt, the matter must be determined by a court. It is important that your efforts to return property with tangible value be carefully documented. Keep copies of emails, notes detailing phone messages, etc. The Court will expect that you showed a commensurate degree of due diligence in light of the value or significance of the item(s). You might first wish to consult with NSBS’ Professional Responsibility Counsel.

Original Wills

The starting point is that it is rarely advisable to keep original wills. If you are reading this and have original wills, the best time to begin returning these to clients is now. It will only get more challenging with the passage of time. It only increases the risk that the testator will pass away and the family will be unable to locate the will.

If the document is an original will, you should first make all reasonable efforts to locate the client and return it. If that doesn't work, here are some alternatives that some lawyers have tried:

a) Try to locate and reach the named personal representative or next of kin to determine if the client is deceased. You can only give the personal representative the will if the client is deceased.
b) Check for obituaries and possibly local probate records. If the client died and their estate was processed as testate, you might find the will has been updated elsewhere.

If you are still stuck, your choices are:

c) Keep the will until you retire and then pass it along to your successor lawyer, with an index of your wills (see Regulation 4.6.5 re requirements for your firm's succession plan).

If you are still stuck, your choices are:

d) Keep the will until you retire and then pass it along to your successor lawyer, with an index of your wills (see Regulation 4.6.5 re requirements for your firm's succession plan).
e) If you know your client passed away, but have no mandate to deal with probate, you may complete a "proof in file" by filing proof of death, the original will, a Form 2 and a fee (currently $13.30) at your Registry of Probate. If proof of death is something less than a death certificate, e.g. a published obituary, you may try approaching your local Registrar to see if they would accept a proof in file on that basis.
f) Establish a reasonable retention period relative to the age of the client. Some authors suggest 100 yrs or more.

   We get asked about scanning wills. We are advised that photocopies of wills have been proven in solemn form in NS, and know of one

reported case where a scan was accepted[6]. However, the reported decision was about costs and does not deal with the issue, and so is of limited value. We do know from the lawyer that the will had previously been filed in the Land Registry, so there was additional evidence of validity. Section 69 of the Probate Act does allow for the proof in solemn form of a copy where a will is “lost or destroyed”. It does not specifically authorise scanning as an alternative to retaining the original.

For now, as much as scans of documents have become part of everyday life, wills are a solemn and important document governed by statute. We can only say that it would be a leap to conclude that courts will accept a scan of a will if the scan came about as a means of simplifying retention for the lawyer where contact with the client had been lost.

Powers of Attorney, Personal/Health Care Directives

Typically, if retained, these documents are a second original kept in case it is needed quickly and the client or person helping them cannot find their own original at a time of need. That’s what they were intended to be. They are also a document that might be updated periodically. The client already has an original. Destruction at the end of the retention period for that file makes sense.

If, however, it is the sole original, it is important to first determine if the lawyer agreed to serve a “gatekeeper” function, whereby it would only be if a certain event transpired that the document would be released to be acted upon. That event might be incapacity, proven in a specified way. If that is the case, the terms to which the lawyer agreed must be fulfilled. But if it is just a second original, with no gatekeeping responsibilities, then it ought to be returned.

[6] Re Sweeney Estate, additional information provided by Andrew Nickerson KC

Original Documents which have been Recorded

Deeds and other documents which are known to be recorded or registered and are thus reproducible have little if any utility. In another time, they were considered more important. While it is possible there could be utility if execution were to be contested, that would have to happen within a relevant limitation period. Therefore, your firm's retention policy for real estate files or minute books might be appropriate, although it would have been better had it been returned to the client as per the commentary to the Rule.

If the document is unrecorded, that would be different.

An unrecorded survey, for example, could be very useful.

Other documents not having a Monetary Value

Sometimes lawyers reach the stage where it is time to destroy a file yet find themselves concerned about a document which itself cannot be exchanged for value. If the item is nevertheless "client property," and it cannot be handled as above, then you should apply:

> 3.5-2 A lawyer must care for a client's property as a careful and prudent owner would when dealing with like property, and observe all relevant rules and law[7] about the preservation of a client's property entrusted to a lawyer.

In doing so, be mindful of the commentary. If the client can still be reached, we suggest you get instructions. Maybe they are fine with destruction.

If the client is unreachable, we suggest that a careful and prudent document owner in current times, acting at the end of a reasonable retention period for the entire file for the matter at hand, would weigh a variety of factors:

a) Does the document reasonably have any remaining utility or value?
b) Is the document reasonably useful to prove something that hasn't already been dealt with and is not limitation barred?
c) Is it recorded or otherwise available from another source?

[7] It is suggested these include privacy legislation, duties of confidentiality and privilege, the law of bailment and the law of trusts.

d) Can you identify any harm that would result if it is destroyed?
e) Is there a burden to retaining it? (cost, responsibility)
f) Is retaining it forever a reasonable option?
g) Is the burden reasonable given the utility or value?
h) Did the terms of your retainer suggest or state you would keep it forever or return it?
i) Would destruction help safeguard privacy, confidentiality, or privilege?
j) Has there been an opportunity to get it back?
k) Whether any option for a particular document, other than destruction, would be prudent or feasible in light of the broader need to protect privacy for all clients of that lawyer.
l) The alternative: if there is no alternative available other than permanent retention, that is a factor.

From a broad public interest perspective, NSBS is aware that if all lawyers are not destroying documents at an appropriate time, it is inevitable that there will be resulting breaches of privacy, confidentiality, and privilege. Consequently, NSBS must be clear that destruction must be the norm. If there are multiple file-by-file exceptions to destruction, the smooth operation of timely destruction could easily be impaired.

Climbing the File Mountain step by step

Perhaps you have been practicing for decades and excited about retiring, but you are now facing dealing with stacks of boxes. Perhaps you work with a firm and have inherited client files. Maybe you just want to be able to pick up and move to a tropical oasis without delay should you win the lottery. These are all good reasons to start today.

1. Develop/update your firm's file retention policy;
2. Revisit your retainer letter to address client property;
3. Update your office manual to establish practice for receiving, logging, identifying, and returning client property;
4. Apply these policies to all new files;
5. For current files, when you touch a current file, speak to the client about your file retention policy, identify, log, and return client property. Copy and return client documents;
6. Address client property at your last meeting with your client. Depending on your practice, use a trigger such as the final invoice

as a reminder to address client property. Never close a file without addressing client property.

7. Set up a schedule for addressing open client files, perhaps a goal of 1 per week. That is almost 50 per year assuming you take a vacation or two.
8. Identify closed files most likely to contain valuable client property, such as wills, POAs, foundation documents, etc. Start with the most recent files and work backwards.

If your time is too valuable, consider hiring a law student or a legal assistant in training. Learning what legal files look like, how to identify documents, contacting and speaking with clients then documenting these efforts are all very valuable skills. Some students value the experience, a reference, and appreciate some flexibility with work hours so they can study while earning an income.

For further information, contact lss@nsbs.org