

Preserving Client Wills: What Are a Lawyer's Obligations?

BY ROY SIMON

When you draft a will, do you retain the original for your client? If you do, what are your obligations? Do you have to read the obituary pages to find out whether your client has died? Do you have to file the original will with a court if you learn that your client has died? What must you do with a client's original will if you want to retire or dissolve your law firm? And what if you can't locate a client?

In two recent opinions, N.Y. State Bar Op. 724 (1999) and N.Y. City Bar Op. 1999-05, the ethics committees of the New York State Bar Association and the Association of the Bar of the City of New York Addressed these and related questions.

Preserving An Original Will: What Are Your Obligations?

The State Bar Ethics Committee began with the proposition that a lawyer who drafts a client's will has no obligation to maintain the original will for safekeeping. A lawyer may instead deliver the original will to the client, along with appropriate advice concerning its safekeeping. Nevertheless, safekeeping the client's will remains an appropriate function for a lawyer to perform, and many lawyers do it (though not as many as in years past).

When a lawyer does agree to preserve an original will for safekeeping, the lawyer "must keep custody of it until the client requests it or the lawyer is legally obligated to produce it." Absent any agreement to the contrary, there is ordinarily an "implied understanding" that when the client dies "the lawyer must take steps to ensure that the executor and/or beneficiaries are aware of the will's existence." *See* N.Y. State 724. Moreover, pursuant to DR 9-102(C)(2), the lawyer must place the original will in "a safe deposit box or other place of safekeeping as soon as practicable" and "[m]aintain complete records" of that property-and if a client asks for the return of an original Will, the lawyer must return it "promptly." *See* N.Y. City 1999-05.

When The Client Dies

What happens when the client dies? Nearly twenty years ago, the State Bar Ethics Committee observed that a lawyer who retains the original of a client's will for safekeeping and learns of the client's death "has an ethical obligation to carry out his client's wishes, and quite possibly a legal obligation...to notify the executor or the beneficiaries under the will or any other person that may propound the will...that the lawyer has it in his possession." N.Y. State 521 (1980).

Beyond that, the lawyer's obligations are determined by contract, not by the Code of Professional Responsibility. For example, "a lawyer and client may agree that the lawyer will undertake the responsibility to learn of the client's death (*e.g.*, by reading death notices). They may also agree that, upon learning of the client's death, the lawyer will file the will with the appropriate court." Absent an express

or implied agreement, however, a lawyer "has no ethical obligation to agree to read death notices,...or to agree to file the original will with the court."

In sum, when a lawyer agrees to preserve an original will, the lawyer should make every effort to clarify precisely what the lawyer will and will not do in the event of the client's death. The understanding between lawyer and client should be confirmed in a detailed memo, a copy of which is given to the client.

What If You Retire Or Your Firm Dissolves?

What if you decide to retire, or your law firm dissolves? Ethical Consideration 4-6 suggest that a lawyer "might provide for the personal papers of the client to be returned to the client"-but what if you have lost track of a client? In N.Y.C. Bar op. 1999-05 (1999), the Association of the Bar of the City of New York said that a lawyer who loses track of a client

should make reasonable efforts to locate the client or the client's representative. For example,, the lawyer can send a letter to each client's last known address asking the client either to pick up his files or to give permission for the lawyer to destroy them. (If the client's address is not available, the lawyer may publish a notice in the local newspaper.)

That all sounds fine. But what if the testator cannot be located despite the lawyer's reasonable efforts? N.Y. C. Bar Op. 1999-05 expressly addressed this question. The opinion noted that the Code of Professional Responsibility does not cover this problem. The closest provision is DR 9-102(F), which applies when a lawyer is holding "money" for a client who cannot be located. In that situation, if the money did not result from litigation, "the lawyer shall apply...to the Supreme Court in the county in which the lawyer maintains an office for the practice of law..." But, again, DR 9-102(F) mentions only a "sum of money"; it does not mention wills or other client property.

Some states, such as Massachusetts, offer a lawyer the statutory alternative of depositing a missing client's will with the appropriate court. In keeping with its limited jurisdiction, the Ethics Committee did not attempt to determine whether any New York statutes, rules, or cases establish procedures for filing original wills with a court for safekeeping. However, the City Bar Ethics Committee quoted the following passage from Massachusetts Op. 76-7 (1976):

If the lawyer cannot find the testator and does not wish to deposit the will with the court, he remains obligated to use reasonable care to keep it secure. While he need not watch the obituary columns, if he does learn of the testator's death, [Massachusetts law] requires him either to deliver the will to the executors named therein, or to file it, within 30 days after he receives notice of the testator's death, in the probate court having jurisdiction over the proceedings.

Next, the City Bar reviewed various ethics opinions regarding a lawyer's general obligations regarding closed files. Under N.Y. State 623 (1991), the Committee noted that certain types of documents may require special treatment, such as "documents that the client would foreseeably need to establish substantial or property rights." Absent instructions from the client, a lawyer should continue to maintain these documents "according to law and/or the reasonably foreseeable needs of the client." This is consistent with ABA Informal Opinion 1384 (Mar. 14, 1977), which advised that a lawyer should not destroy or discard original documents if their return "could reasonably be expected by the client,"

without the client's consent. Obviously, a missing client cannot provide further instructions. What, then, is a lawyer to do if the lawyer cannot locate the client despite reasonable efforts?

The City Bar reached the following bottom line:

We...believe that the lawyer...whether the original drafter, her firm, or a successor lawyer or firm - must keep the original Will of a missing testator secure, comply with any obligations of law regarding the original Will, or, if appropriate, employ procedures provided by law to deposit the Will with the court.

Accordingly, a lawyer who is retiring or dissolving a law firm should therefore "index the Wills of missing clients and place them in storage or turn them over to a successor lawyer who is assuming control of the lawyer's or firm's active files, while preserving the confidences and secrets of the testator/client."

A Helpful Checklist

The City Bar Ethics Committee ended its opinion with the following helpful checklist:

In short, a lawyer who is retiring or whose firm is dissolving should take these steps:

1. Communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills.
2. If clients cannot be located, the lawyer must retain the will in safekeeping indefinitely or in accordance with law. The lawyer has three basic choices:
 - a) The lawyer may send the original wills to storage, provided they are indexed and maintained in a manner that will protect client secrets and confidences.
 - b) The lawyer may transfer custody to a successor attorney (who will then assume the obligation to index and maintain the wills in a manner that will protect client confidences and secrets).
 - c) If appropriate, the lawyer may use whatever procedures are available for filing original wills with a court for safekeeping.

(Don't you wish more ethics opinions ended with such a concise and specific checklist?)

[Note: The full text of N.Y.C. Bar Op. 1999-05 is available online at www.abcny.org (click on "Publications," then "Overview," then scroll down and click on OPINIONS OF THE COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, then click on "1999," then scroll down to Op. 1999-05). The full text of N.Y. State Bar Op. 724 is available online at www.nysba.org (click at the right on "Ethics," then scroll down to the bottom for a summary, then click on the opinion number to get the full text).]

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