



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1182 (01/23/2020)

Topic: Disposition of Wills

Digest: A lawyer may not dispose of wills even when the testators' locations and/or circumstances are unknown. A lawyer must safeguard the wills indefinitely unless the law provides an alternative.

Rules: 1.15(c)

FACTS

1. The inquiring lawyer is in possession of over five hundred wills where the testators' whereabouts are unknown to the inquirer and/or cannot be discovered with due diligence. The inquirer (or the inquirer's firm) prepared some of these wills, but most came to be in the inquirer's possession by reason of the inquirer's succession to the practices of other lawyers (in some instances, lawyers who had themselves acquired practices and, with them, wills). Among these wills are some prepared more than seventy years ago.

2. The inquirer has conducted a due diligence search of office records, the internet, and the Surrogate's Court in the county where the inquirer's office is located in an attempt to find information about the testators, executors, or beneficiaries. To date, these efforts have been to no avail and we accept the inquirer's assertion that the prospect of discovering the information is unpromising. The inquirer would like to dispose of the wills for which identifying information is lacking and unlikely to emerge.

QUESTION

3. May an attorney dispose of Wills, when after due diligence and significant passage of time the attorney is unable to learn the whereabouts or other circumstances of the testators?

OPINION

4. Rule 1.15(c)(1) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer shall "promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." Rule 1.15(c)(2) - (4) requires the lawyer to preserve such property, keep complete records and render appropriate accounts, and to promptly pay or deliver the property as requested by the client or third person. A will is a piece of property.

5. In N.Y. State 341 (1974), the Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law “holds them only as a custodian and that the firm was required to notify the lawyer’s clients of his retirement.” We have indicated that a lawyer who comes into possession of a will by acquiring the practice of a retiring lawyer is required to take reasonable steps to locate and notify third persons, such as the testator, with an interest in the will. N.Y. State 1035 (2014); *see* N.Y. State 1133 ¶ 9 (2017) (a lawyer “must maintain the files unless and until a client retrieves them or gives notice to the affected clients of some other disposition”).

6. We have not previously resolved the question presented here – that is, to outline a lawyer’s duties in the event that the lawyer is unable to locate the testator or another person with an interest in the will despite a lawyer’s reasonable efforts to do so. The Rules do not explicitly answer that question.

7. In 1999, the New York City Bar Association’s Ethics Committee did address the issue under the N.Y. Code of Professional Responsibility (the “Code”), and in particular the Code’s DR 9-102(c), the language of which was identical to Rule 1.15. In its Opinion 1999-05, the City Bar said that “as to those clients who cannot be located, the lawyer’s obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law.” In so concluding, the City Bar relied on Massachusetts Bar Association Opinion 76-7, which concluded that “if the lawyer, cannot find the testator and does not wish to deposit the will with the appropriate court, [the lawyer] remains obligated to use reasonable care to keep it secure.”

8. We agree with these opinions. When, as here, an attorney is the custodian of wills – whether by reason of the attorney’s own practice or by succession to the practice of other lawyers through acquisition or otherwise – and cannot after due diligence locate a testator, the attorney must maintain the wills indefinitely or act as the law may allow. Our jurisdiction stops at the corners of the Rules, so we have no charter to give legal advice, but we have opined that “[i]n general, when a lawyer is uncertain about what to do with property that he or she holds for safekeeping, the lawyer may seek judicial guidance” N.Y. State 775 (2004). Otherwise put, a lawyer may always seek court permission to dispose of property in accordance with law.

9. We note that Section 2507 of the Surrogate’s Court Procedure Act provides that the court “of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it.” The Law Practice Management Committee of this Association, in the second edition of its *Planning Ahead Guide*, explains (at App. 2C ¶ 12) that “[o]riginal wills and other original documents must be returned to clients and may not be destroyed or otherwise disposed of. In the case of original wills, if you are unable to locate the clients after a diligent search, you may file such wills with the Surrogate’s Court (be aware of filing fees) or deposit them with an appropriate depository (e.g., the appropriate county bar association) and notify the clients in writing, addressed to their last known address”); *see also id.* App. 17 (“If a lawyer or law firm has retained original wills, they must be preserved or returned to the testators for safekeeping. Lawyers who retain original wills should make arrangements for someone else to safeguard them after they retire or cease practicing...Consider filing the wills in the local Surrogate’s court...Some County Bar associations offer will registries which may be useful. Another law office may be willing to retain the wills of a deceased or retired attorney”).

CONCLUSION

10. A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills.

(20-19)