NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1002 (3/31/14)

Topic: Lawyer's ethical obligations when in possession of lawfully obtained wills containing confidential information in which unknown third parties have an interest

Digest: Lawyer appointed as executor to estate of deceased lawyer who had custody of client and non-client wills may access and disclose confidential information in the wills insofar as necessary to learn identity of testator, executor, or beneficiary/ies in order to dispose of wills properly.

Rules: 1.6(a), 1.15(c).

FACTS

1. The inquirer is a lawyer who works as a prosecutor and has been named his father's executor. The inquirer's father was an attorney who had a law firm that dissolved. After the firm's dissolution, the inquirer's father operated as a solo practitioner. The inquirer's father safeguarded wills from his dissolved law firm, and in addition agreed to preserve client wills of other attorneys who either retired, died, or whose firms dissolved. While a solo practitioner, the inquirer's father hired his former secretary to help him in locating and returning original wills to former clients and others who entrusted wills to him, and a large number of wills were so disposed. The inquirer's father also had made provision with another attorney to take over his few remaining clients, but not the remaining wills in his possession. The inquirer seeks guidance for ethical obligations applicable to himself as executor in disposing of several hundred wills, mostly from the 1980s, belonging both to former clients of his father and non-clients.

QUESTIONS

2. This inquiry requires us to consider three questions. Does the lawyer have an ethical obligation to notify persons with an interest in the wills that he possesses them? Is the lawyer ethically prohibited from inspecting the wills to identify the executors/executrixes and beneficiaries for notification purposes? How may the lawyer ethically dispose of the wills?

OPINION

3. Although a lawyer who, incident to the lawyer's practice, comes into possession of property in which a third party has an interest has an ethical obligation under Rule 1.15(c) to promptly notify such third party that he or she has possession of the property, the lawyer-executor here does not have such an ethical obligation because he did not come into possession of the wills incident to his practice. Rule 1.15(c) of the Rules of Professional Conduct requires a

lawyer to "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*[.]" (Emphasis added). Rule 1.15(c) further directs 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. The requirements of Rule 1.15(c) expressly apply to a lawyer who receives property in which a third person, who is not the client of the lawyer, has an interest. Subsections (a) and (b)(1) of Rule 1.15 each expressly apply to property or funds of another within the lawyer's possession "incident to the lawyer's practice of law." While that express qualification is not repeated in Rule 1.15(c), we are persuaded that it must necessarily be inferred from the context, including the preceding subsections.

4. Here again, however, it is clear that the inquirer did not come into possession of the wills incident to his practice. Even his father was only safekeeping at least some of the wills prepared by other lawyers. We see no notification obligation under the Rules of Professional Conduct that applies to the inquirer, who merely serves as his father's executor because of the familial relationship, not incident to his practice of law.

5. Turning to the question of confidentiality, in order to make notifications and thereby dispose of the wills that were in his father's possession, he may need to inspect them to identify the testators and/or executors/executrices entitled to receive the wills. The lawyer may ethically do so. Although the wills may contain confidential information protected by the rules of ethics as between the client and the lawyer who prepared the wills, the executor is not prohibited from accessing or disclosing such information to the extent necessary to properly dispose of the wills.

6. We start with our review of a somewhat similar situation in N.Y. State 341 (1974), where a lawyer had a client relationship with the testators of some wills, giving rise to the protections of client confidentiality provided by the Code of Professional Responsibility. Then the lawyer joined a firm, but not all of the lawyer's client relationships continued. Thus, at least for some of the wills in the firm's possession, the relationship was custodial, not professional. The deceased lawyer here likewise had a professional relationship with the makers of some of the wills but only a custodial, non-professional relationship with others.

7. This Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law "holds them only as a custodian. It is generally unethical for him to examine the wills or files without the clients [*sic*] consent." This was because, we assumed, the wills likely contain information that was obtained by the lawyer under an ethical obligation to keep the information confidential. We concluded that the firm was required to notify the lawyer's clients of his retirement. We recognized that the client has two rights when a lawyer retires: "First, to retake the will whenever he retires, or direct the ultimate disposition of it, and, second, to have his confidences concerning the will and information relating to it respected." *Id.*

8. Rule 1.6(a) establishes the client's right to protect confidential information shared with his lawyer. We assume it would apply, at least in part, to information shared by a testator client with a lawyer where, for example, it was requested or intended that the information not be divulged except in certain ways and/or where disclosure would harm the testator. By its plain language, however, Rule 1.6(a) only applies to confidential information "gained during or

relating to the representation of a client." Because the inquirer did not receive the wills from a client or during the representation of a client, but as his father's executor, Rule 1.6(a) does not apply to him. Even if it were applicable, Rule 1.6(a) permits disclosure where the client has given informed consent to disclosure or where "disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The purpose of preparing a will is that the testamentary commands and desires eventually be made known in the appropriate circumstances, but not otherwise in many or most cases.

9. For these reasons, we conclude that Rule 1.6(a) does not prohibit the inquirer from accessing or disclosing the confidential information in the wills insofar as reasonably necessary to dispose of the wills. The inquirer should first attempt to identify and contact surviving testators in order to avoid disclosure to other parties where unnecessary.

10. We emphasize that the lawyer should proceed carefully in order to only review or disclose information to the extent necessary for proper will disposal. *Cf.,* N.Y. State 749 (2001) (lawyers may not ethically use available technology to surreptitiously examine and trace email and other electronic documents because such would, among other things, be prejudicial to the administration of justice); N.Y. State 700 (1998) (ethically improper for lawyer to exploit unauthorized communication of confidential information because doing so would, among other things, be prejudicial to the administration of justice). We add that we do not see any ethical reason why the lawyer could not transfer the wills to another custodian, such as a lawyer who could better serve the purpose of proper and timely notification of executors, at least where to do so would be appropriate in discharging the executor's duties and not for an improper purpose proscribed by the Rules. However, transferring them to someone who is not a lawyer and thus not subject to these constraints, combined with other risk factors, might not be viewed has having been impliedly authorized under Rule 1.6(a).

CONCLUSION

11. To the extent that the lawyer must notify the testators, or executors, or beneficiaries of each of the wills that he possesses that he is holding such property, in order to dispose of them properly, the lawyer may inspect the wills and may transfer them to another custody under certain conditions.

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