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

Opinion 1035 (11/14/14)

Topic: Taking over practice of retiring attorney; obligations as to original wills

Digest: A lawyer receiving an original will must take reasonable steps to locate and notify the testator or others with an interest in the will. The lawyer may review or disclose confidential information from the will as necessary for its appropriate disposition, and may file the original will with the local surrogate's court.

Rules: 1.15(c), 1.6

FACTS

1. The inquiring lawyer has recently taken over the law practice of a retiring solo practitioner through a sale of the practice. An agreement between the retiring lawyer and the inquirer provided, inter alia, that the inquirer assumed the obligation to notify the clients whose wills had been drafted by the retiring lawyer.

2. The inquirer received from the retiring lawyer original wills of his clients dating back to 1970. Some of these wills were inherited when the retiring attorney took over the practices of other lawyers. At the time the practice was sold, none of the testators were clients of the inquirer, and we assume that none have become clients of the inquirer since then.

3. The inquirer has no original files related to any of the wills dated between 1970 and 2000, nor does she know whether clients of practices taken over by the retiring lawyer were notified that he had taken over those practices. Many of the wills contain phrases such as "I [name of testator], residing in the City of [named], State of New York," and "to my [unnamed] children, if they survive me," and do not include any more detailed address or beneficiary information.

4. The inquirer has painstakingly researched the whereabouts of the testators through Internet searches, obituaries, estate proceedings and real property records. To the testators whose whereabouts could be confirmed, the attorney sent letters with a request that the testators contact her regarding the original wills.

5. The inquirer also has confirmed that some of the testators are deceased. Some of those had moved out of state before they died. The inquirer has been unable to confirm whether other testators are still alive or whether they have moved out of state.

6. The inquirer also discovered that in some cases, estate proceedings were commenced in New York and in other jurisdictions, and those estate proceedings are now closed.

In some of those cases, the testators had newer wills that were probated. In others, administrative proceedings were commenced because no wills were found.

QUESTIONS

7. What is the lawyer's obligation with respect to original wills when (a) the lawyer cannot determine the testator's whereabouts; (b) administrative proceedings were filed because the petitioner did not know of the will, and that estate matter is closed; (c) probate proceedings were filed based upon a more recent will of the deceased, and that estate matter is closed; or (d) the testator has died and no estate proceedings have been filed?

8. May the lawyer file the original wills with the local surrogate's court if she cannot determine the testator's whereabouts?

OPINION

9. The principal ethical obligations applicable to the inquiry are set forth in Rule 1.15(c) of the New York Rules of Professional Conduct (the "Rules"). Rule 1.15(c)(1) 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." The Rule further requires the lawyer to preserve such property, keep complete records and render appropriate accounts, and promptly pay or deliver the property as requested by a client or third person entitled to receive it. Rule 1.15(c)(2)-(4).

10. "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." N.Y. State 1002 ¶3 (2014); *cf*. N.Y. City 1999-05 (interpreting prior Code of Professional Responsibility to require that lawyer in possession of original will, including successor to lawyer who drafted the will, must keep original will of a missing testator secure, comply with any legal obligations regarding that will, or, if appropriate, follow legal procedures to deposit the will with the court"). However, Rule 1.15(c) applies only to property obtained incident to the lawyer's practice of law. N.Y. State 1002 ¶3 (2014).

11. The obligation to protect confidential information is also relevant. We have previously discussed confidentiality obligations of lawyers with respect to original wills. In N.Y. State 341 (1974) we opined that an attorney who retires from practice may transfer clients' executed wills to another attorney, but that "the receiving attorney holds them only as a custodian" rather than in an attorney-client relationship, and that it would "generally" be unethical for the receiving attorney to examine the wills without consent from the transferring lawyer's clients.

12. More recently, we opined that a lawyer who received wills not from a client or during the representation of a client, but rather as his father's executor, was not prohibited by Rule 1.6 from "accessing or disclosing the confidential information in the wills insofar as reasonably necessary to dispose of the wills." N.Y. State 1002 ¶¶ 8-9 (2014). Although the lawyer did not represent those testators, and did not even come into possession of the wills incident to his practice, we followed N.Y. State 341 in recognizing certain imperatives of

confidentiality. In particular, we emphasized that "the lawyer should proceed carefully in order to only review or disclose information to the extent necessary for proper will disposal." N.Y. State 1002 ¶10.

13. We next apply these principles to this inquiry. The importance of respecting confidentiality, and also the authority to access and disclose confidential information as necessary to dispose properly of the will, apply to the inquirer – who holds the wills as custodian incident to her law practice – just as they applied to the lawyer in N.Y. State 1002 who came into possession of wills other than incident to his practice. Thus, even though there may well be confidential information in the wills, the inquirer may access or disclose that information as reasonably necessary to provide for appropriate disposition of the wills and ultimately of the property subject to those wills. For that purpose, she may notify testators, executors, or beneficiaries of the wills.

14. The inquirer has not only the *ability* to take steps toward the proper disposition of the wills (even if it requires reviewing or disclosing confidential information), but also a *responsibility* to take at least one such step. Rule 1.15(c) applies here because the wills in question constitute property in which third parties have an interest, and the inquirer obtained them incident to her practice of law. Thus she would generally have an obligation to notify the testators of her receipt of their wills, even apart from having agreed with the retiring lawyer to do so.[1]

15. We note two common-sense exceptions to that general obligation. First, if the agreement for transfer of the practice had been different, and the retiring lawyer had been the one to notify his clients of the will transfers, then the notice requirement would have been satisfied. The inquirer need not give an additional notice contemporaneous with and duplicative to a notice given by the retiring lawyer. *Cf.* N.Y. State 341 (1974) (opining that when a lawyer who drafts and holds an original will later retires and transfers the will to the lawyer's partners, the firm is not required to give the client notice that the lawyer has retired, and that the will is now in the firm's possession, if the lawyer was already part of the firm at the time of the representation, or if the lawyer later joined the firm and the client had become aware of the lawyer's membership in the firm).

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[1] This ethical obligation arises from receiving the property of others, but there can be contractual obligations as well. In an opinion involving the retention of wills by the lawyer who had drafted them, we discussed agreements with clients:

> Whether the lawyer will maintain the original will and, if so, what additional obligations the lawyer will assume, are primarily matters to be agreed upon by the lawyer and client after consultation. … Ordinarily, a lawyer would be obligated to carry out such contractual undertakings…. At least absent agreement to the contrary, there will ordinarily be an implied understanding that after the client's death, if the lawyer has maintained the original will and, as far as the lawyer knows, there is no later valid one, the lawyer must take steps to ensure that the executor and/or beneficiaries are aware of the will's existence.

N.Y. State 724 (1999). Here, while the inquirer has contractual obligations to the retiring lawyer, she never entered into agreements with the testators.

16. Second, when Rule 1.15(c)(1) requires an attorney to give notice to a third person whose location is unknown, the attorney should take reasonable steps to locate and notify that person. But the rule does not impose the impossible requirement of notifying someone who cannot be found. *Cf.* Massachusetts Opinion 76-7 (stating that lawyer who succeeds to another's practice, including files with wills that the prior lawyer's clients requested be held for safekeeping, "is obligated to make a reasonable effort" to locate the testators). Here the inquirer has made appropriate and extensive efforts to locate the testators and notify them of the existence and location of the wills. Based on the facts as presented, it appears that she has exercised due diligence and has satisfied the requirements of the Rule.

17. The inquiry includes various scenarios as described in paragraph 7 above, but the basic ethical analysis is the same for each: Rule 1.15(c)(1) requires the inquirer to notify those with an interest in the property received. In some cases, the inquirer has successfully contacted the testator or executor and transferred the will. In other cases, the inquirer has learned that the testator is deceased, but it still may be possible to locate third persons with an interest in the property that has been received by the inquirer. Rule 1.15(c) requires her to notify such persons if it is reasonably possible to identify and locate them, and she may use information from the wills to try to do so. All this remains true even if there have been administrative or probate proceedings and the estate has been closed. Notifying administrators, executors or beneficiaries may not be an empty exercise if, for example, someone with an interest in the will should choose to pursue legal action.

18. Finally, the inquirer asks whether she may file the original will with the local surrogate's court under section 2507 of the Surrogate's Court Procedure Act.[2] We see no ethical bar to that practice. As discussed in paragraph 12 above, even though the inquirer should be protective of confidential information in the wills, she is nevertheless free to make disclosures as reasonably necessary, and the statute explicitly protects the confidentiality of filed wills.[3] There may be good reasons to file the wills with surrogate's court when the testators' whereabouts cannot be determined. The prudential benefits of filing with the court would depend on the facts and circumstances of the particular case. In some circumstances, it might be prudent for the attorney to remain as custodian of the will.

CONCLUSION

19. 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

[2] "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…" SCPA §2507(1); *see* SCPA §2507(3)(d) (providing for delivery of will to surrogate's court if deposited with officer other than a surrogate). There is a statutory fee for filing a will for safekeeping, "except that the court in any county may reduce or dispense with such fee." SCPA §2402(9)(v). We are advised that some jurisdictions in New York permit an attorney to file such wills without fee, and that others require the attorney to remit a filing fee but could be amenable to a waiver of the fee.

[3] *See* SCPA § 2507(2) ("will shall be enclosed in a sealed wrapper so that the contents thereof cannot be read … and shall not on any pretext whatever be opened, read or examined until delivered to a person entitled to it" under § 2507(3)).

testator, with an interest in the will. In certain circumstances the obligation is excused if the third person otherwise has the necessary information, such as if the retiring lawyer has provided the notice. Although the lawyer newly in possession of the will may be holding it as a custodian rather than in an attorney-client relationship with the testator, the lawyer should nevertheless respect the confidentiality of information in the will. The lawyer may, however, review or disclose confidential information in the will to the extent reasonably necessary to help ensure the will's proper disposition, and the lawyer may file the will with the local surrogate's court.

(8-14)