NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1078 (12/16/15)

Topic: Confidentiality

Digest: A lawyer does not violate the duty of confidentiality by advising the son of a former client that the lawyer did not draft a will for his deceased father or refer the father to another law firm for will services, and that the lawyer does not possess an original will for the father.

Rules: 1.6(a)

FACTS

1. The inquiring lawyer represented a father and son in legal matters some years ago. Recently, the son contacted the lawyer and advised that his father died several years ago, leaving a surviving spouse (who is not the son's mother). The son also stated that no estate proceedings had been commenced, no one had been appointed as administrator or executor, and he does not know whether his father left a will. He asked if the lawyer had either drafted a will for his father or referred his father to other counsel to draft a will.

2. The lawyer's records indicate that the lawyer never drafted a will for the deceased father and did not refer the father to other counsel for such purpose. Nor is there an original will in the father's closed file.

QUESTIONS

3. May the inquiring lawyer advise the son of a former client that the lawyer has no record of drafting a will for the deceased father or of referring him to another law office for such purpose, and that the lawyer does not possess an original will for the father?

4. If the inquiring lawyer may provide this information to the former client's son, must the lawyer require proof of the son's identity and/or a death certificate of the father before providing the information?

OPINION

5. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") provides that:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to

> the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> > . . . (2) the 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 Rule defines "confidential information" as consisting of:

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

6. In the specific circumstances in this inquiry, the information that the son is requesting is not "confidential information" as defined by Rule 1.6(a). The lawyer's knowledge that the lawyer did not draft a will for a former client, and did not refer him to other counsel for that purpose, may or may not be "information gained during or relating to the representation of a client." However, the requested information is not protected by the attorney-client privilege, which protects communications, not non-communications; it is not "likely to be embarrassing or detrimental to the client if disclosed"; and the inquirer has not suggested that it is "information that the client has requested be kept confidential." Therefore, in these limited circumstances, the lawyer may disclose to the former client's son the fact that the lawyer did not draft a will for the former client or refer him to other counsel for that purpose.

7. Even if the information that the lawyer did not draft a will for the deceased father was considered to be "confidential information" within the purview of Rule 1.6(a), it could be disclosed to the surviving son if disclosure is "impliedly authorized to advance the best interests of the client" and is "reasonable under the circumstances." Rule 1.6(a)(2). Here, it may advance the best interests of the former client for the lawyer to make disclosures to the son, because the disclosures may assist the son in ensuring that any final wishes of his father are brought to light, and the disclosures may save the estate further time and expense of investigating in a futile search for a will.

8. If the information being requested is not confidential information, then the lawyer is not obligated to protect it. However, as a matter of prudence, the lawyer may wish to require satisfactory confirmation of the father's death before advising the son that he does not have the father's will and did not draft one for him. The lawyer may also request confirmation of the son's identity if the lawyer never met or does not remember the son from the lawyer's prior representation of the son. Requiring confirmation of the father's death and the son's identity is not mandatory under the Rules but may be prudent under the circumstances.

CONCLUSION

9. A lawyer may advise the son of a former client that the lawyer did not draft a will for his deceased father or refer the father to another law firm for will services, and that the lawyer's files do not contain an original will for the father.

(31-15)