NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 724 – 11/30/99

Topic: Wills; obligations of law firm in regard to wills in its custody

Digest: A lawyer who drafts a client's will should agree in advance whether the lawyer will maintain the original will for safekeeping and, if so, what obligations the lawyer will thereby assume. At least absent agreement to the contrary, if the lawyer has maintained the client's original will, after the client's death the lawyer must assure that the executor and/or beneficiaries are aware of its existence, unless the lawyer knows of a later valid will. Absent agreement, the lawyer has no obligation to take steps to learn of the client's death or to file the original will with an appropriate court. However, the lawyer should clarify in advance whether or not the lawyer is to undertake these or other additional obligations and must comply with whatever agreement is made.

Code: DR 2-103(A), 4-101; EC 2-3, 4-6

QUESTION

If a lawyer keeps custody of a client's original will, absent agreement does the lawyer have an obligation to learn of the client's death and, upon the client' s death, to file the original will with an appropriate court?

OPINION

A lawyer who drafts a client's will has no obligation to maintain the original will for safekeeping. After the client executes the will, the lawyer may provide the original will to the client, along with appropriate advice concerning its safekeeping. The practice of safekeeping clients' wills appears to have become less routine over time, because clients increasingly believe themselves able to keep their own wills safe.[1] Nevertheless, safekeeping the client's will remains an appropriate function for a lawyer to perform.

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. Contractual obligations may arise if there are express or implied agreements or understandings between the client and the lawyer in regard to the lawyer's duties and responsibilities in relation to the will. Thus, the 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. Ordinarily, a lawyer would be obligated to carry out such contractual undertakings, as would the lawyer's firm in the event the lawyer was unable to carry out the undertaking personally. *Cf.* N.Y. County 709 (1995). Whether or not a lawyer undertakes a contractual obligation of this nature in a particular situation raises questions of fact and law about which the Committee cannot provide guidance, since our role is limited to interpreting the Code of Professional Responsibility.

When the lawyer does agree to retain the client's original will, the lawyer obviously may not destroy it,[2] but must keep custody of it until the client requests it or the lawyer is legally obligated to produce it.[3] The lawyer should discuss with the client what, if any, additional obligations the lawyer will assume. 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.[4] Thus, as we have previously observed,

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1 *See generally* Gerald P. Johnston, *An Ethical Analysis of Common Estate Practices–Is Good Business Bad Ethics?*, 45 Ohio St. L.J. 57 (1984).

2 We note that any person may be compelled to produce a will under SCPA 1401, and that under New York Penal Law § 190.30 it is unlawful to conceal a will with intent to defraud.

3 Unless the law firm concludes with certainty that the will is invalid and its return or production will never be required, the law firm should maintain it (*e.g.*, in inactive storage) in case it may be needed at some time.

4 Since a lawyer who has retained an original will may have a unique opportunity to solicit additional business, the lawyer should be sensitive to the anti-solicitation rules once the lawyer has learned of the client' s death. *See* N.Y. State 521 (1980); N.Y. Judiciary Law § 479; EC 2-3; DR 2-103(A).

> where a client has requested his lawyer to retain the original will for safekeeping, and the lawyer later learns of the client's death ... it would appear that the lawyer 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) (citations omitted). Even though the duty of confidentiality under Disciplinary Rule ("DR") 4-101 ordinarily continues after the termination of the lawyer-client relationship and after the client's death, *see* Ethical Consideration ("EC") 4-6, disclosure of the will's existence is permissible in this situation, because the disclosure was impliedly, if not explicitly, authorized by the client.

Whether the lawyer who safeguards the client's will has additional obligations–*e.g.*, whether the lawyer must take steps to learn of the testator's death, or whether the lawyer must file the will with the court upon the testator's death–will be determined in the first instance not by the Code, but by the express or implied understanding between the lawyer and client at the time the lawyer agreed to safeguard the will or by any subsequent understanding. Therefore, the lawyer should make every effort to clarify precisely what the lawyer will and will not do in the event the lawyer maintains the original will. The lawyer has no ethical obligation to agree to read death notices, *see* Massachusetts Op. 76-7 (a lawyer "need not watch the obituary columns"), or to agree to file the original will with the court; the client may have good reason not to ask the lawyer to assume such obligations; and the lawyer generally has no ethical obligation later to undertake responsibilities vis-a-vis the original will in addition to those on which the lawyer and client agreed and those imposed by law. By clarifying the extent and limits of the lawyer's obligations, the lawyer will enable the client to make an informed decision whether the lawyer should safeguard the will and, if so, what additional steps the client should take (*e.g.*, whether to tell others, such as the executor or beneficiaries, where the will is to be found). Doing so will also reduce the risk that the lawyer will later fail to undertake a responsibility that, from the testator's perspective, the lawyer was obligated to undertake.

CONCLUSION

The question is answered in the negative.

(17-99)