

New York State Bar Association

Committee on Professional Ethics

Opinion 775 – 5/4/04

Topic: Incapacitated client; safeguarding wills;
client property

Digest: When a possibly incapacitated former client asks a lawyer to return the client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

Code: DR 2-103; DR 7-104(A)(1); DR 9-102(C)(4); EC 7-11; EC 7-12

QUESTION

When a possibly incapacitated former client requests the return of the client's original will, may the lawyer who has been holding the will for safekeeping communicate with the former client and others to ascertain whether the client is in fact incapacitated or under undue influence, insofar as necessary to determine how to respond to the client's direction?

FACTS

A lawyer drafted a will for an elderly client and maintained the original will for safekeeping. Some time later, the former client signed a letter, evidently prepared by someone else, requesting the return of the original will. The lawyer has reason to believe that the former client is not competent and may be acting under the influence of a family member who would benefit if the will is destroyed and the former client's estate passes through intestacy.

OPINION

If a lawyer is safeguarding a former client's will, the lawyer ordinarily must return the will to the former client upon the client's request. *See, e.g.*, N.Y. State 724 (1999) ("When the lawyer does agree to retain the client's original will, the lawyer . . . must keep custody of

it until the client requests it or the lawyer is legally obligated to produce it”); DR 9-102(C)(4) (requiring a lawyer to “deliver to the client or third person as requested by the client or third person the . . . properties in the possession of the lawyer which the client or third person is entitled to receive”). The question in the inquirer’s case, however, is how to proceed when the lawyer is genuinely uncertain whether the former client is competent to request the return of the will or the lawyer has legitimate cause for concern that the former client is under undue influence. In N.Y. State 746 (2001), we discussed some of the complexities of representing a client with diminished capacity and the “additional responsibilities” doing so places on a lawyer. *See also* EC 7-11 (“responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client”); EC 7-12 (“Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer”). Similar complexities may be raised with respect to responding to the request of an incapacitated *former* client.

No disciplinary provision would bar the lawyer from contacting the former client directly in order to ascertain his or her genuine wishes regarding the disposition of the original will or to make a judgment about competence. DR 7-104(A)(1), which regulates communications with represented parties, is not applicable. That rule generally forbids a lawyer from communicating with a represented party in the course of representing another client. Under the facts cited above, a lawyer’s communications with a former client whose will the lawyer is safeguarding would clearly not occur during the course of the representation of another client. Nor does DR 2-103, which regulates solicitation of prospective clients, have any relevance, since the lawyer would not be soliciting professional employment and, in any event, the rule generally does not apply to a lawyer’s communications with clients or former clients. If, after conducting whatever inquiry the lawyer deems appropriate, the lawyer still believes the former client is or may be incompetent, the lawyer may seek judicial guidance on how to proceed.

In 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. *See, e.g.*, N.Y. 746 (2001) (circumstances under which a lawyer may petition for appointment of guardian for client without client’s consent); N.Y. State 717 (1999) (attorney obligated to pay holders of valid liens from settlement proceeds should consider several options for locating the successor of a lienor that is no longer in business, such as applying to the Supreme Court for an order); N.Y. State 710 (1998) (if escrow agreement is silent with respect to dispute resolution procedures, lawyer acting as escrow agent over funds subject of dispute might consider commencing a stakeholder’s action and depositing the funds with a court).

CONCLUSION

When a possibly incapacitated former client asks a lawyer to return the former client’s original will, the lawyer may communicate with the former client and others to ascertain the former client’s condition and wishes.

(4-04)
