By DANIEL J. SIEGEL

When There's an Original Will, There's Only One Way

What does one do with an excess of Wills?

It is not uncommon for lawyers to store important documents, including their clients' wills, so that the documents are available when needed. Storing documents has its benefits and its drawbacks, and the time may have come for lawyers and law firms to re-evaluate that process. Here are some of the pros and cons of doing so.

Lawyers offer numerous rationales for storing original documents, such as wills; among them: (1) the client "plans" to use the same lawyer or firm the rest of her life; (2) the lawyer has a secure, fireproof location where all important documents are stored; or (3) the document will not get lost or be destroyed. Of course, another reason is so that a client's estate feels obligated to retain the lawyer to handle the estate.

Just as there are valid reasons for storing a will at a law firm, there are also reasons not to do so. For example, if a client decides that he no longer wants to follow the plan laid out in the will, he cannot simply destroy the document, thereby invalidating it. Or, if the client moves, and never tells the lawyer her new address, the lawyer may be unable to locate the client. Similarly, if a client passes and did not inform his heirs, or they do not remember being told, where the will is stored, the heirs may be unable to probate the will, leaving the estate to follow the applicable intestacy laws and not the client's wishes.

There, explanations focus on a client's needs and mortality. There is also the corollary: What happens if a lawyer retires and closes her practice, or dies without making provisions for future storage of the documents?

These situations happen. When I opened my own practice about 15 years ago, I rented a building that had housed offices of a then-deceased attorney who apparently had stored some original client documents. How did I know? Clients called or stopped by and asked if I was handling the attorney's practice (I was not) or knew who was (I did not). They needed information that no one seemed to possess. And it was unclear whether the attorney possessed original documents such as wills.

These situations are real and can impact countless clients. For example, an attorney contacted the New York State Bar Association Committee on Professional Ethics and explained that he possessed more than 500 wills, including some prepared more than 70 years ago, where the testators' whereabouts were either unknown or could not be discovered with due diligence. The attorney had either prepared the documents or possessed them because other attorneys who were part of his practice possessed them.

Despite searching the Internet and local estate records, the attorney could not locate these individuals and asked, "May an attorney dispose of Wills, when after due diligence and significant passage of time the attorney is unable to learn the whereabouts or other circumstances of the testators?" The Committee's response was "[No.] A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute property, and the lawyer must safeguard the Wills indefinitely unless the

law affords the lawyer an avenue to file or otherwise dispose of the wills."

This conclusion, in NYSBA Ethics Opinion 1182, is based upon a review of New York Rule of Professional Conduct 1.15, which has requirements similar to those in Pennsylvania's R.P.C. 1.15. In particular, the Rule requires attorneys to promptly notify a client or third person when the attorney receives property such as a Will in which a client or third person has an interest. Pennsylvania's version of Rule 1.15(c) also requires attorneys to preserve the property "for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, *whichever is later*." (emphasis supplied).

The Opinion noted that the New York Rules of Professional Conduct are silent about a lawyer's duties when unable to locate the testator or another person with interest in the will, as are Pennsylvania's Rules. While no Pennsylvania-based ethics committee has opined on this question, Massachusetts reached a similar conclusion in 1976, and it is likely that any Pennsylvania opinion would reach a similar conclusion.

But the real questions are: (1) what should lawyers who are currently storing original Wills and other documents do; and (2) should lawyers continue storing clients' Wills? There is no easy answer, although in my experience, most lawyers err on the side of providing the originals to the clients and avoiding the problems that arose in New York.

Lawyers who store wills should: (1) promptly review their files; (2) confirm that they have current contact information for every client and, if not, take reasonable steps to obtain the information; (3) notify every client that they possess their Wills and other documents; and (4) request guidance from the client whether to continue to store the documents, return them to the client or meet with the client to review and revise them.

In addition, law firms must decide whether to continue storing client Wills, or to advise clients about ways to store and safeguard the documents. After all, lawyers move, their offices have fires, and files get misplaced. Most importantly, lawyers change firms—now more than ever—and the thought of cataloging, tracking, and transferring wills and notifying clients every time there is a firm move or merger is a daunting task, but a necessary one to remain ethically compliant. The alternative—trying to locate 500 missing clients in the days before you retire—is a challenge no attorney should want to undertake. ■

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