ETHICAL CONSIDERATIONS FOR LAWYERS RETAINING ORIGINAL WILLS

I. Introduction

This Opinion adopts and endorses New York State Bar Association Ethics Opinion 1182 ("Disposition of Wills") and explains its application to Pennsylvania-licensed lawyers who retain original, signed Wills in the course of representing estate planning clients. In its Opinion, the NYSBA Committee on Professional Ethics opined that a lawyer may not dispose of, and instead must safeguard, these Wills even when the testator’s location and/or circumstances are unknown.

In this Opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility concludes that under Pa.R.P.C. 1.15, the same ethical guidance applies, and lawyers must maintain original, signed Wills until they are permitted to dispose of them in a manner outlined in this Opinion.1

II. Discussion

Many lawyers have agreed to store clients’ original, signed estate planning documents so that the documents are available when needed. Generally, lawyers provide this optional service so that original documents will not get lost or destroyed.2 Because these original Wills and other documents are client property, lawyers have obligations under Pa.R.P.C. 1.15, including (1)

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1 This Opinion addresses only issues relating to storage of Wills and other original estate planning documents under the Rules of Professional Conduct. The Committee recognizes, however, that resolution of how and under what circumstances lawyers must retain or may dispose of original estate planning documents may warrant additional consideration by the General Assembly, the Pennsylvania Supreme Court and/or the Disciplinary Board.

2 See PBA Formal Opinion 2001-300 (wherein this Committee concluded that it is not unethical for a lawyer to retain a client’s original estate planning documents upon the client’s unsolicited request, but the lawyer should inform the client in writing that the documents will be kept safe and secure, the documents will be made readily available to the client upon request, and the named executor is under no obligation to retain the lawyer or the lawyer’s firm for estate administration).
securely storing Wills, (2) maintaining up-to-date address information for the clients, and (3) taking appropriate measures to assure that they have current addresses of the individuals whose Wills they are storing so that they are able to notify the individuals when a lawyer’s office relocates. Related to these obligations is the question of what happens when lawyers fail to verify the current whereabouts of clients, retire, close their practices, or die without making provisions for future storage of the Wills.

The NYSBA Committee on Professional Ethics issued Opinion 1182 in response to an inquiry by an attorney who possessed more than 500 Wills, some more than 70 years old, where the location of the testators was either unknown or could not be discovered with due diligence. The lawyer inquired whether he could dispose of the Wills when, after due diligence and a significant passage of time, he was unable to determine the whereabouts or other circumstances of the testators. The NYSBA Committee concluded that the lawyer may not dispose of the documents because the Wills constitute property under New York Rule of Professional Conduct 1.15, which required the lawyer to safeguard the Wills indefinitely unless the law afforded the lawyer a procedure to file or otherwise dispose of the Wills.

Pa. R.P.C. 1.15 is similar to NY R.P.C. 1.15 with regard to the requirement that lawyers safeguard client property. Pa.R.P.C. 1.15(b) requires that “A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer’s own property. Such property shall be identified and appropriately safeguarded.” Thus, a lawyer must store Wills separately from a lawyer’s own property, and must take appropriate safeguards to protect the documents.

Further, Pa.R.P.C. 1.15(c) requires attorneys to preserve client 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) Thus, lawyers must maintain original Wills until they (1) provide them to the client, the client’s executor or some other person authorized to possess the Will, (2) are notified that the client no longer needs the Wills to be stored (such as when a client drafts a new Will), or (3) are authorized to dispose of them by statute, rule or some other procedure.

The Committee also recommends that lawyers currently storing signed Wills and other original documents 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 clients, when appropriate, that they possess their Wills and other documents, (4) notify clients if their offices have relocated or their contact information has changed, and (5) request guidance from the client as to whether to continue storing 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 Wills, or to advise clients about alternative methods to store and safeguard the documents. Cataloging, tracking, and transferring Wills and notifying clients every time there is a firm move or merger can be daunting, but it is necessary to maintain ethical compliance.
III. Conclusion

Lawyers licensed in Pennsylvania may not ethically dispose of original, signed Wills whose testators’ locations and/or circumstances are unknown. Because Wills are client property under Pa.R.P.C. 1.15, lawyers must safeguard these documents indefinitely unless they are authorized to dispose of them by statute, rule or some other procedure.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.