

**WHERE THERE'S A WILL, THERE'S A . . . DUTY?:  
A CLOSER LOOK AT THE SAFEKEEPING OF CLIENTS' ORIGINAL ESTATE  
PLANNING DOCUMENTS**

**Jennifer A. Kosteva**

Before the ink has dried on their newly executed wills, clients often ask their attorneys and other advisors where they should store their original estate planning documents. A number of options are available, each with their own advantages and disadvantages. The options for storing original estate planning documents include in the client's home safe, in the client's safety deposit box at a bank, with the drafting lawyer, with the named fiduciary, with a trusted family member, friend, or advisor, or in some jurisdictions with respect to wills, with the clerk or registrar of the appropriate court. This article examines the duties of a lawyer who retains a client's original estate planning documents for safekeeping. The article also considers safekeeping by a bank, trust company, or other financial institution serving as a fiduciary under a will or trust, or as an advisor to the client.

**Introduction**

The law governing the retention of original estate planning documents varies from state to state. Some states have affirmative laws imposing certain duties on persons in possession of original wills. In other states, the state bar associations have issued ethics opinions on the retention of original estate planning documents. Yet many states provide little or no guidance on the issue. The following discussion draws upon various state laws, legal ethics opinions, and legal treatises. The safekeeping lawyer should become familiar with the laws in the lawyer's state in working to establish "best

practice” policies. Likewise, a bank, trust company, or other financial institution serving as the custodian of original estate planning documents should consider adopting policies akin to those rules applicable to lawyers in their respective states.

## **I. The General Rule**

Generally speaking, the safekeeping of a client’s will does not create any additional duties for the drafting lawyer, such as exercising vigilance to learn of the client’s death or otherwise causing the will to be submitted for probate. See Scholen v. Guaranty Trust Co. of New York, 288 N.Y. 249, 43 N.E.2d 28 (1942) (leading case); see also 79 Am. Jur. 2d Wills § 734; Annotation, Duty and Obligation Assumed by Trust Company or Other Person to Which Will is Delivered for Safekeeping, 141 A.L.R. 1277. Additionally, the ACTEC Commentaries to Model Rule of Professional Conduct 1.8 state that the mere retention of a client’s original estate planning documents does not make the client an “active” client or impose any obligation on the lawyer to inform the client of tax law developments or to learn of any changes with respect to the client’s family status or financial situation.

However, at least one court has indicated its willingness to impose additional legal obligations under contract theory where a lawyer makes certain representations to the client. For example, if a lawyer states to the client that he will monitor the obituaries for news of the client’s death (or states that he has the means for such monitoring) or promises to otherwise cause the client’s will to be probated after the client’s death, the court stated that it would be appropriate to hold the lawyer to his end of the bargain. See, e.g., Scholen, 288 N.Y. 249, 43 N.E.2d 28.

Perhaps taking a cue from the Scholen court, the New York Bar Association has opined that whether a lawyer has additional obligations with respect to the safekeeping of a will is a matter of contract law. See N.Y. Ethics Op. 724 (1999). The contractual duty may be express or implied, creating a heightened need for the safekeeping lawyer to define clearly the custodial relationship. However, absent an express or implied agreement, the lawyer has no positive duty to learn of a client's death or to take other steps following the client's death. Id.; see also Mass. Ethics Op. 76-7 (1976).

## **II. The Common Exception: Notice of a Client's Death**

### **A. State Law and the Uniform Probate Code**

A number of states impose a positive duty on the custodian of a will upon receiving notice of the testator's death. Under these statutes, the custodian of a will must deliver the will to the executor named in the will or to the court having jurisdiction over the administration of the estate. See, e.g., Conn. Gen. Stat. § 45a-282; Md. Code, Est. & Trusts § 4-202; Okla. Stat. tit. 58, § 21; Wash. Rev. Code § 11.20.010; see also 79 Am. Jur. 2d Wills § 730. The Uniform Probate Code also requires any person having custody of a will to deliver the will to a person able to secure its probate (usually the executor) after the death of the testator. See Uniform Probate Code § 2-516.

The legislative intent behind these state statutes and the Uniform Probate Code is to encourage the probate of wills and to prevent persons from benefiting by refusing to probate an unfavorable will in their possession. The state statutes and the Uniform Probate Code refer simply to the "person having custody" of the will and do not distinguish between the lawyer as safekeeper for his client and other persons who may be in possession of a will. Thus, a corporate fiduciary in possession of an original will is

under a legal obligation to produce the will to the appropriate court. Most states with such laws, however, only impose the duty upon actual notice to the will's possessor at the testator's death.

### **B. State Bar Ethics Opinions**

Several state bar associations have issued ethics opinions addressing a safekeeping lawyer's duty upon notice of a client's death, and generally take one of two approaches. New York, for example, treats the safekeeping lawyer as having an ethical obligation to carry out the client's wishes. As discussed above, this obligation appears grounded in contract law and is based on the implied understanding between lawyer and client. In most cases, the New York Bar Association believes that there is an implied understanding between the safekeeping lawyer and his client that upon notice of the client's death, the lawyer will take steps to see that the will is given effect by notifying the executor named therein of the will's existence. See N.Y. Ethics Op. 521 (1980). The New York Bar Association further states that a lawyer may notify either the executor named in the will or the beneficiaries under the will, and that such notification does not violate the duty of confidentiality between lawyer and client. Rather, the client is deemed to have provided implicit authorization for such disclosure. See id.; N.Y. Ethics Op. 724.

Pennsylvania takes a different approach. The Pennsylvania Bar Association has opined that the safekeeping lawyer has an "absolute obligation" to take steps to cause a will to be probated upon notice of a client's death. See Pa. Ethics Op. 97-66 (1997). Pennsylvania views the safekeeping lawyer as an "officer of the legal system and a public citizen having special responsibility for the quality of justice." Id. Not causing a

will to be submitted to probate is synonymous with conduct prejudicial to the administration of justice. Id. The seemingly strong language of this ethics opinion may be tempered somewhat by the particular facts presented to the state's ethics committee. In that matter, the executor refused to probate an unfavorable will known to be in the lawyer's possession in order to benefit himself. Whether Pennsylvania would impose the same ethical duty where no self-dealing was present remains unclear.

### **III. Best Practices for the Safekeeping of Original Estate Planning Documents**

#### **A. General Considerations**

The American Bar Association has long maintained that it is permissible for a lawyer to act as the custodian of a client's original will. See ABA Informal Op. 981 (1967). However, some states have cautioned against the safekeeping of original documents absent a client's affirmative request because the lawyer may be perceived as impermissibly soliciting business. These states caution that the retention of original documents may exert pressure on clients to retain the same lawyer for future matters or on executors named within the documents to retain the lawyer with respect to estate administration matters. See, e.g., State v. Gulbankian, 54 Wis.2d 605, 196 N.W.2d 733 (1972); Tex. Ethics Op. 280 (1964). In most states, however, an informative discussion between the drafting lawyer and client regarding the lawyer's possible role as custodian does not raise an ethical concern so long as the lawyer does not exert influence over the client or the client's wishes. See, e.g., N.Y. Ethics Op. 521; Pa. Ethics Op. 01-300 (2001).

Because of these concerns and others, the client may wish to ask another party to retain his original estate planning documents. For example, a bank, trust company,

or other financial institution can provide a secure place to safekeep original documents against loss or destruction. Moreover, the corporate institution will have ready access to the documents if its services are needed as a fiduciary under the will or trust.

## **B. Best Practices**

Regardless of whether the drafting lawyer, a corporate institution, or another person retains the original estate planning documents, the safekeeper should adopt “best practices.” These best practices, as enumerated by a multitude of sources including the ACTEC Commentaries, include the following:

- Provide written receipt to the client indicating the safekeeping of the document. The written receipt should:
  - Identify which documents are being stored;
  - State that the safeguarding of the documents is per the client’s request;
  - Request that the client notify the safekeeper of any change in address; and
  - If a lawyer is serving as safekeeper, indicate that the fiduciary named in the documents is not required to retain the lawyer for assistance in administering the estate or providing other legal services.
- Provide a copy of the original documents to the client. The copy should be marked clearly as “copy” and indicate where the original documents are being stored.
- Advise the client that the client has the right to request and promptly receive the documents at any time.

- Define the nature of the custodial relationship (*i.e.*, no obligation of the safekeeping lawyer to review the client’s estate plan; no obligation of the safekeeping lawyer or corporate fiduciary to learn of the client’s death), including any steps the client should take. For example, the safekeeper might advise the client to inform close family members or friends of the location of the original documents.
- Retain documents in accordance with Model Rule of Professional Conduct 1.15:
  - Properly identify the documents;
  - Appropriately safeguard the documents in a safe, vault, safe deposit box, or other secure place where they will be reasonably protected against loss or destruction; and
  - Comply with the client’s written direction regarding disposition of the documents.

A safekeeping lawyer or financial institution should consider clarifying the nature and extent of its custodial role with the client. Particularly when operating in a contract regime such as New York, the lawyer or financial institution should proactively avoid the creation of an inadvertent implied obligation. Although this conversation may be awkward or perhaps offensive to some clients, such discussion allows the client to make an informed decision regarding the safekeeping of estate planning documents and provides an opportunity to inform the client as to additional steps the client should take, such as telling others where to locate the original documents. See Pa. Ethics Op. 01-300.

#### IV. Terminating the Custodial Relationship

Once a custodial relationship has been established, the safekeeping lawyer may question when and under what circumstances it is appropriate to dispose of original estate planning documents. Numerous state ethics opinions require a lawyer to retain and ensure the safekeeping of original estate planning documents *indefinitely*, absent a controlled return of the documents to the client or compliance with state law. See, e.g., Conn. Ethics Op. 98-23 (1998) (distinguishing between ordinary client files and original estate planning documents); N.Y.C. Ethics Op. 1999-5 (1999); Or. Ethics Op. 1991-60 (1991); Pa. Ethics Op. 01-300; Utah Ethics Op. 132 (1993).

Several state statutes and ethics opinions address how a lawyer may terminate the custodial relationship. For example, a lawyer who is retiring or whose firm is dissolving may notify the client and request instructions for the disposition of the original will. See N.Y.C. Ethics Op. 1999-5. If the lawyer is able to reach the client and the client requests the return of the original document, the lawyer must take adequate steps to verify that it reaches the client safely. See, e.g., Mass. Ethics Op. 76-7 (1976). In attempting to reach the client, the safekeeping lawyer must be vigilant to avoid revealing the contents of or the existence of a client's will to anyone outside the attorney-client relationship. See Va. Ethics Op. 378 (1980). Thus, the ability to properly notify a client and terminate the custodial relationship rests on two assumptions: (1) the safekeeping lawyer has current contact information for the client and (2) the safekeeping lawyer is confident that his communications will reach the client and only the client.

Perhaps in recognition of the difficulties of terminating the custodial relationship, several states have enacted statutes governing how and when a lawyer may terminate

a custodial relationship. California enacted one of the more protective statutes in 2007. See Cal. Prob. Code §§ 700 *et seq.*; see also Cal. Ethics Op. 2007-173 (2007).

California's Probate Code provides that a lawyer may generally terminate a deposit by: (1) personal delivery of the document to the client; (2) mailing the document to the client's last known address, by registered or certified mail with return receipt requested, and receiving a signed receipt; or (3) a method agreed on by the client and lawyer. See Cal. Prob. Code § 731.

In the case of a client's death, a California lawyer may terminate the deposit by personal delivery of the document to the client's personal representative (or by personal delivery of the document to the client's trustee if the document is a trust). Id. § 734(a), (c). If the lawyer does not have actual notice that a personal representative has been appointed for the client, the lawyer must (1) deliver the will to the Clerk of the Superior Court of the county in which the estate of the decedent may be administered and (2) mail a copy of the will to the person named in the will as the personal representative, if the person's whereabouts is known to the lawyer, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the lawyer. Id. §§ 734(b); 8200.

The California statute further provides that where a safekeeping lawyer has not received notice of a client's death, the lawyer may transfer original estate planning documents to another lawyer. In such an event, the transferring lawyer must first mail notice to reclaim the document to the client's last known address and wait 90 days for the client's response. Id. § 732(a). Additionally, if a lawyer is deceased, lacks legal capacity, or is no longer an active member of the State Bar, a deposit may be

terminated by transferring the original document to the Clerk of the Superior Court of the county of the client's last known residence. Id. §§ 732(c); 735. In the event of a transfer to another lawyer or to the Court, the transferring lawyer (or the person transferring documents on behalf of the lawyer) must provide notice to the State Bar of California. See id. § 733. Despite these protective features for the safekeeping lawyer, California's statute does not apply to other safekeepers, such as banks, trust companies, or other financial institutions.

By comparison, Indiana's statute enacted in 2006 applies to any person in possession of an original will. See Ind. Code § 29-1-7-3.1; see also David A. Smith, "Filing Wills with the Circuit Court Clerk, Res Gestae (June 2006). The Indiana statute generally permits a person to deposit a will with the Clerk of the Circuit Court of the county in which the testator resided when the will was executed. The Indiana statute applies whether or not the testator is still living and permits any person, not just a safekeeping lawyer, to deposit the will with the Circuit Court. See Ind. Code § 29-1-7-3.1. Upon deposit, the will is placed in a sealed envelope and is deliverable only to the testator or to persons authorized by the testator in a signed writing. Id.

However, the Indiana statute only applies to wills, not other estate planning documents such as trusts, advance medical directives, or powers of attorney, and is of limited value. Further, the Circuit Court may collect a fee upon deposit. Notably, the Clerk must retain the will for 100 years after the date of deposit if no notice of death is received. If notice of death is received, the Clerk may deliver the will to the appropriate court having jurisdiction over the administration of the decedent's estate. Id.

Most states do not afford lawyers the luxury of a statutory regime like California's and Indiana's probate codes. Absent such a statute, upon retirement or dissolution, the safekeeping lawyer should index the original estate planning documents of missing clients and place them in storage or turn them over to a successor lawyer who is assuming control of the lawyer's firm or active files. See Assoc. of Bar of City of New York, 55 The Record 42 (2000); ABA Formal Opinion 92-369 (1992). Again, the safekeeping lawyer must proceed cautiously to preserve the confidences and secrets of the testator client.

### **Conclusion**

In light of the duties discussed above, a drafting lawyer should carefully consider the custodial services of original estate planning documents offered to clients. The lawyer may wish to discuss the nature and extent of this service with clients and provide for a method of terminating the custodial relationship. As law firm vaults continue to be filled with original estate planning documents, it is likely that other states will enact protective statutes addressing when and under what circumstances a safekeeping lawyer may dispose of original estate planning documents. In any event, the safekeeping lawyer should become familiar with the affirmative laws in his or her state and the legal ethics opinions governing document retention. Because the statutes and ethics opinions discussed deal with lawyers and not financial institutions, these institutions should consider adopting "best practice" policies akin to the rules applicable to lawyers in their respective states, as their conduct is likely to be measured by the rules applicable to the safekeeping lawyer.