

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2007-173**

- ISSUES:**
1. May an attorney, consistent with ethical obligations, deposit a client's will or other testamentary documents with a private will depository, without the client's consent?
 2. May an attorney, consistent with ethical obligations, register a client's will or other testamentary documents with a private will registry, without the client's consent?

DIGEST: An attorney who retains a client's will or other estate planning documents on deposit may terminate the deposit in accord with the client's instructions and/or consent. If the attorney cannot locate the client, the attorney may only terminate the deposit pursuant to Probate Code section 700, et seq. An attorney may register certain identifying information about a client's will or other estate planning documents with a private will registry if the attorney can determine, based upon knowledge of the client, the client's matter and investigation of the will registry, that registration will not violate the attorney's fiduciary duties of confidentiality and competence.

AUTHORITIES

INTERPRETED: Rule 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California

Business and Professions Code section 6068, subdivision (a) and (e)

Evidence Code section 912(d)

Probate Code sections 700, et seq.

STATEMENT OF FACTS

In 1973, Attorney drafted a will for Client. At the time, Attorney and Client agreed that Attorney would retain possession of the executed original will. By 2003, Attorney is contemplating retirement and would like to terminate the deposit. However, Attorney has not heard from Client for 25 years, and recent efforts to locate the client have been unsuccessful. Attorney wants to ensure that Client can obtain access to his will at a future time or, in the event of his death, that the client's heirs can locate the will. Therefore, Attorney is considering either depositing the original will with a private will depository and/or registering certain information about the will with a private will registry. Attorney's file contains no notes regarding communications with Client, Attorney has limited recollection of Client, and has no independent recollection of any communications with Client.

BACKGROUND INFORMATION

Some lawyers who prepare wills or other estate planning documents retain the original executed documents on deposit for safe-keeping. Consequently, an attorney who is retiring or becomes unable to continue practicing law may have original wills and other estate planning documents in his or her possession. If the attorney can, with reasonable diligence, locate the former client, the attorney is ethically obligated to do so and to act in accordance with the client's lawful instructions regarding disposition of the documents. The more challenging issue is presented when the attorney cannot locate the former client.

There are two types of commercial enterprises that have recently started doing business nationally to address these issues: will depositories and will registries. A will depository is a private, online resource for locating, storing, and retrieving original wills. A will depository involves the actual delivery of a will to a central privately operated entity or person for safekeeping. For purposes of this opinion, a will registry is an online searchable database of vital information about a will, maintained by a private entity or person. The information stored in a registry would normally include the identity of the person making the will, the date the will was executed, the identity of the lawyer who drafted the will and the location of the will at the time of registration. Testamentary documents are not deposited with a will registry.

A California attorney with whom original estate planning documents have been deposited may terminate the deposit only as provided in Probate Code sections 700, et seq. Under Probate Code section 731, an attorney may terminate a deposit by: (a) personal delivery of the document to the depositor, (b) receiving a signed return receipt after mailing the document to the depositor, or (c) the method agreed on by the attorney and the depositor. Where the attorney mails notice to reclaim the document to the depositor's last known address and the depositor fails to reclaim the document within 90 days, the attorney may transfer all unclaimed documents to one other attorney. (Prob. Code § 732(b).) If, but only if, the attorney is deceased, lacks legal capacity, or is no longer an active member of the State Bar, the deposit may be terminated by transferring the document(s) to the clerk of the superior court of the county of the depositor's last known domicile. (Prob. Code § 732(c).)^{1/} If the attorney uses the procedures outlined in sections 732(b) or (c), the attorney is required to provide notice to the State Bar. (Prob. Code § 733.)

If the attorney knows the depositor has died, the attorney may terminate the deposit by transferring the documents to the appointed personal representative or trustee; or, if no representative has been appointed, the attorney must file the will with the superior court and provide a copy to the named representative if that person can be located, or otherwise to a beneficiary. (Prob. Code §§ 734, 8200.) If the attorney is deceased or lacks legal capacity, a deposit may be terminated by another lawyer in the attorney's firm, or by a non-lawyer employee, or by a conservator or attorney in fact acting under a durable power of attorney, or by the attorney's personal representative. (Prob. Code § 735.)

In this opinion, the Committee addresses the ethical implications presented when, unable to locate the client after a reasonably diligent search, an attorney seeks to (a) deposit estate planning documents with a commercial will depository without the client's express consent or (b) register information about the client's will with a private registry without the client's express consent.

DISCUSSION

1. May an attorney ethically deposit a will with a commercial will depository without the client's express consent?

Because the Probate Code provides the exclusive legal means for disposition of wills and other estate planning documents held on deposit by an attorney, an attorney may not ethically deposit estate planning documents with a private will depository absent consent of the client pursuant to Probate Code section 731(c). To do so would, at the very least, constitute a violation of Business and Professions Code section 6068(a), which requires lawyers to support the laws of this state, and the prohibition against intentionally or recklessly failing to perform legal services with competence. (See Rule of Professional Conduct 3-110.)^{2/}

The attorney in the hypothetical has no record or recollection of obtaining the client's consent in 1973 to use a will depository and cannot now locate the client to obtain consent. Thus, the attorney in the hypothetical may not

^{1/} If the clerk receives a document under Probate Code § 732, the recorded document is confidential and available only to the maker (Government Code § 26810(c)). After the maker's death, as evidenced by a certified copy of the death certificate, it becomes available as a public record.

^{2/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

ethically deposit the former client's will with a will depository.

2. May an attorney ethically register a will with a commercial will registry without the client's express consent?

The essential ethical question is whether the registration of information regarding a client's will with a will registry breaches the attorney's duty to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (Bus. & Prof. Code § 6068(e)(1); rule 3-100.) While the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege, a review of case authorities interpreting the attorney-client privilege may be instructive in evaluating the breadth and scope of the duty of confidentiality. We, therefore, begin with an analysis of the privilege issues.

The statute regarding waiver of privileges, Evidence Code section 912(d), provides: "A disclosure in confidence of a communication that is protected by a privilege provided by section 954 (lawyer-client privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."

Pursuant to this exception and depending on the particular circumstances, a lawyer may disclose privileged client information when the lawyer reasonably believes doing so will advance the client's interests, or is appropriate in furtherance of the representation, unless the client instructs otherwise. (See, Evid. Code § 912(d); *McKesson HBOC, Inc v. Superior Court* (2004) 115 Cal.App.4th 1229 [9 Cal.Rptr.3d 812].)

Registering a client's will with a registry would typically require disclosure of the testator's name, the present location of the will, the name of the attorney who drafted the will, and often the date of execution of the will as well.

A client's identity and address is not typically considered privileged information.^{3/} There are, however, several important (but narrowly construed) exceptions to this rule. Specifically, if disclosure of a client's identity would itself reveal the nature of the client's legal problems for which the attorney was hired, the client's name may be privileged information.^{4/}

Disclosure to the will registry of the client's name as well as information about the documents being registered inescapably reveals the nature of the matter for which the lawyer was retained. However, unlike other cases that have held the identity of the client to be privileged (where criminal conduct or private medical issues are at stake), the mere execution of testamentary documents may or may not be considered "private information."

When an attorney cannot locate a client, or determine whether the client is alive or deceased, providing general information to a will registry could in some circumstances effectively advance the client's interests by making important information available to potential heirs, beneficiaries, and other interested persons. On the other hand, circumstances could exist such that providing even this general information would be detrimental to the client's interests (e.g., where the disclosure of the existence of a will could breed anxiety or concern among potential heirs). Thus, application of Business and Professions Code section 6068(e) is likely to depend upon the facts and circumstances of the particular situation.

Like the evidentiary attorney-client privilege, the attorney's ethical duty of confidentiality is considered fundamental to the attorney-client relationship, involving policies of paramount importance. However, as noted, while the attorney-client evidentiary privilege covers only confidential communications between the attorney and the client, the broader ethical duty of confidentiality requires the protection of all client secrets. In this regard, it is important

^{3/} See *People v. Chapman* (1984) 36 Cal.3d 98, 110 [201 Cal.Rptr. 628] ("[it] is well established that the attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity." [Citations.]")

^{4/} See *Rosso, Johnson, Rosso & Ebersold v. Superior Court (Fitzpatrick-Potter)* (1987) 191 Cal.App.3d 1514 [237 Cal.Rptr 242] (disclosure of clients' identities under the circumstances would reveal private information regarding clients' medical condition).

to keep in mind that the decision whether to apply the privilege is made by judges or other arbiters in judicial or quasi-judicial proceedings. The duty of confidentiality is necessarily broader because it applies in non-litigation contexts where judicial protection may not be present. (Bus. & Prof. Code § 6068(e); rule 3-100; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, n.5, [120 Cal.Rptr. 253]; Cal. State Bar Formal Opn. 1993-133.)

State Bar ethics opinions have defined the ethical duty of confidentiality as encompassing not only privileged communications, but also any information related to the representation of a client, from any source, which a client does not want disclosed or the disclosure of which would be embarrassing or likely be detrimental to the client. (See Cal. State Bar Formal Opn. Nos. 1976-37, 1980-52, 1981-58, 1986-87; see also Los Angeles County Bar Association Formal Opn. Nos. 386 (1980), 436 (1985), and 456 (1990).)

The identity of a client who has executed a will, trust or other legal document may or may not be protected by the evidentiary attorney-client privilege. The client's identity may nevertheless be a client confidence or secret protected by Business and Professions Code section 6068, subdivision (e) and rule 3-100, or be deemed confidential information protected by the client's Constitutional right of privacy.^{5/} In any event, if information about the will or its execution would be embarrassing to the client or likely be detrimental to the client's interests, the attorney (absent express consent of the client) should protect the confidentiality of that information.

Thus, before registering testamentary documents with a will registry without client consent, a lawyer must determine, from a review of the client's file and any independent recollection of communications with the client, whether registration would further the client's objectives as communicated to the attorney during the course of the attorney-client relationship or whether registration would breach the duty of confidentiality either because the client would want to keep the information private, or registration would embarrass the client or likely be detrimental to the client's interests. In the context of the hypothetical facts presented in this opinion, the attorney must also consider the effect of the substantial lapse of time on whether disclosure would be embarrassing or likely be detrimental to the client. As there can be no bright-line rule applicable in all circumstances, the attorney who registers a will without the client's express consent acts at his or her peril.

In addition, an attorney who seeks to register a will or other testamentary document, with or without client consent, has a duty to act competently. In that regard, an attorney registering information about a testamentary document has a duty to determine whether the registry adequately protects the interests of the client and otherwise complies with California law. (See, e.g., Civil Code § 1798.82, et seq., pertaining to system security breaches of businesses that own or maintain computerized personal information.)

Because the attorney in the hypothetical has no recollection of communications with Client, and no notes that refresh his recollection regarding Client's wishes, the Committee believes that the attorney does not have sufficient information to conclude that publication of information in a will registry would advance Client's interests. In the same vein, attorney appears to lack sufficient information to conclude that Client would consent to dissemination of information to a will registry, or that publication of the information in a will registry would not be embarrassing or likely be detrimental to Client. Thus, without some basis for making the relevant determinations, the attorney in the hypothetical could not ethically disseminate information about that client to the will registry.

CONCLUSION

In light of the statutory scheme set forth in Probate Code sections 700, et seq., a California attorney may not, in conformance with his or her duties to the client, deposit a will with a will depository without the client's express consent. A California attorney may not ethically use a will registry without the client's express consent unless the attorney concludes, based upon a review of the file, any recollection of communications with the client, and all of

^{5/} In *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1006 [101 Cal.Rptr.2d 341], the court stated that "clients routinely exercise their right to consult with counsel, seeking to obtain advice on a host of matters that they reasonably expect to remain private." The court gave several examples, including: "a family member who desired to rewrite a will may also consult an attorney with the expectation that the consultation itself, as well as the matters discussed therein, will remain confidential until such time as the consultation is disclosed to third parties."

the relevant facts and circumstances, that disclosure would further the client's interest and would not be embarrassing or likely be detrimental to the client. An attorney who registers a will without a client's express consent acts at his or her peril.