

FORMAL OPINION NO 2005-43

Client Property: Preserving Will When Former Client Not Found

Facts:

Over a period of many years, Lawyer A has drafted wills for a number of people and retained the originals. As Lawyer A is preparing to retire, Lawyer A endeavors to contact the testators/former clients for whom Lawyer A holds original wills but is unable to do so in several cases.

Lawyer B has also drafted and retained original wills for a number of clients. When Lawyer B dies, Lawyer C undertakes to wind up Lawyer B's affairs. Among the documents in the possession of Lawyer B that Lawyer C receives are a number of wills for which Lawyer C also cannot find the testators/former clients.

Question:

May Lawyer A or Lawyer C discard the wills for which the former clients cannot be found?

Conclusion:

No, qualified.

Discussion:

Client wills unquestionably constitute client property. Consequently, and subject only to the statutory limitations noted below, a lawyer is obligated by Oregon RPC 1.15-1(a) and (d),¹ if not also by

¹ Oregon RPC 1.15-1 provides in part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. . . . Other property shall be identified as

Oregon RPC 1.2(a),² to preserve the wills or to see that they are preserved by competent successor counsel if the testators cannot be located. Cf. Oregon RPC 1.17 (sale of law practice); OSB Formal Ethics Op No 2005-23 (rev 2014) (duty to preserve client confidences and secrets continues even after lawyer retires). The subject of disposition of wills is addressed in ORS 112.800 to 112.830; and ORS 112.815 and ORS 112.820 establish the sole terms and conditions under which lawyers may destroy wills.

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such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

. . . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

² Oregon RPC 1.2(a) provides in part:

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. . . .

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 12.4-1 to § 12.4-2 (client property), § 12.5 (unclaimed client funds and property) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 44–45 (2000) (supplemented periodically); ABA Model RPC 1.2; ABA Model RPC 1.15(a), (d).