I PREPARED THE DECEDENT'S WILL: TO TELL OR NOT TO TELL? THAT IS THE QUESTION

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Private Practice, Columbus, Ohio (1980)
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Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)

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Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
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Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
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President's Academic Achievement Award, Texas Tech University (2015)
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Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (8th ed. 2022); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (5th ed. 2023); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2024); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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This article is a work-in-progress. Your suggestions, comments, and recommendations will be greatly appreciated. Please send them to Gerry at gwb@professorbeyer.com.

I. INTRODUCTION

Clients often entrust attorneys with safeguarding their last wishes.[1] They do so by establishing personal and confidential relationships with their attorneys to prepare estate planning documents, including wills.[2] Drafting attorneys virtually always retain a copy of the executed will and, if the client requests, may also retain the original for safekeeping.[3] Later developments may force these attorneys to face difficult ethical problems. The following four hypothetical scenarios reflect some ethical dilemmas and questions attorneys could face.

Scenario One.[4] An attorney takes over a law practice from another attorney whose files include original wills that clients had requested him to hold. In attempting to return the original wills to the respective testators, the successor attorney finds that many of them cannot be located. Several questions arise in this situation, including the following: Does the attorney have a duty to monitor the unlocatable client's health status so that upon the client's death, the will may be timely submitted for probate? Can that duty be eliminated or otherwise altered via agreements made with the client?

Scenario Two.[5] The widow of a decedent whom an attorney prepared a will for contacts the attorney to request his help regarding the administration of her husband's estate. The widow is the personal representative of the estate. She asks the attorney if he has any documents that will help her administer the estate. Pursuant to an agreement between the attorney and the decedent, the attorney kept the decedent's original will. Several questions arise in this situation as well, including the following: Now that the attorney knows the client died, does he have to disclose the existence of the will? If so, to whom? May the attorney take a passive approach and do nothing?

Scenario Three.[6] A lawyer prepares a will for a client who is a wealthy mystery novelist. The will contains drastic provisions: the client disinherits his entire family and bequeaths his

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[1] *See What Is an Estate Attorney and What Do They Do?*, METLIFE: LEGAL INSURANCE (Oct. 10, 2022), https://www.metlife.com/stories/legal/steps-to-prepare-for-meeting-estate-planning-attorney/.

[2] *See id.*

[3] *See* Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices-Is Good Business Bad Ethics?*, 45 OHIO STATE L.J. 57, 130-31 (1984).

[4] This fact scenario is based on the facts of a 1976 Massachusetts ethics opinion. *See generally* Mass. Bar Ass'n Comm. on Pro. Ethics, Op. 76-7 (1976), https://www.massbar.org/publications/ethics-opinions/ethics-opinion-article/ethics-opinions-1976-opinion-no-76-7.

[5] This fact scenario is based on the facts of a 2020 Colorado Supreme Court case and a 2023 Texas ethics opinion. *See generally* In re Estate of Rabin, 474 P.3d 1211 (Colo. 2020); State Bar of Tex. Pro. Ethics Comm., Op. 697 (2023); https://www.legalethicstexas.com/resources/opinions/opinion-697/#:~:text=A%20lawyer%20should%20not%20make,the%20disclosure%20under%20the%20circumstances.

[6] This fact scenario is based on the plot of the 2019 movie *Knives Out*. *See generally* KNIVES OUT (MRC 2019).

entire estate to his nurse. Understanding the outrage his family would have if they knew the contents of the will, the client asks the attorney to maintain the original will for safekeeping but deliver it to his grandson, his named executor, once the attorney learns of the client's passing. Three years later, the attorney receives a phone call from the client's grandson that the client has passed. Per the agreement with the client, the attorney delivers the original will to the client's grandson. Several weeks later, the attorney hears "through the grapevine" that the client died intestate. The attorney checks the court filings and discovers an application to determine the client's heirs so they may inherit via intestacy. This situation brings about two new questions, including the following: Does the attorney have a duty to inform the court of the existence of the original will? May the attorney opt for inaction without incurring an ethical violation?

Scenario Four.[7] An attorney prepares a will for a close friend. The client believes she can safeguard the will, so she takes the original with her, leaving the attorney with only a copy. Several years later, the attorney receives a phone call from the executor of the client's estate, who is also a beneficiary, asking if the attorney has the original will. He explains that he has looked everywhere for the original but cannot locate it. The attorney informs the executor/beneficiary that the attorney did prepare the will and has a copy but not the original. The executor/beneficiary thanks the attorney for the information and ends the call. Several weeks later, the attorney hears from a mutual friend that the "word on the street" is that the client died intestate. In reviewing the court filings, the attorney discovers an application to determine the client's heirs. In this scenario, is it appropriate for the lawyer to take no action? If the lawyer gives the named executor/beneficiary a copy of the will, is the attorney required to monitor and ensure the probating of the will?

In addition to the questions raised in the above scenarios, one additional question arises. If the attorney fails to take action to ensure the probating of the will in any of the prior fact patterns, what exposure, if any, does the attorney have to non-clients who claim the attorney's inaction caused them harm, that is, the loss of the testamentary gifts?

This article attempts to clarify these questions and an attorney's duties in these scenarios. Accordingly, Part II explores the ethical challenges an attorney may face when the attorney retains the client's original will. Next, Part III discusses similar challenges an attorney may face when the attorney has only a copy of the client's will. Then, Part IV provides an overview of multiple jurisdictional theories of liability that could determine whether an attorney is liable to non-clients. It also discusses several provisions that a client and attorney can utilize so potential beneficiaries are discouraged from bringing suit. Finally, Part V summarizes all information discussed in the article and provides an overview of the ultimate findings.

II. ETHICAL CHALLENGES IN HOLDING ORIGINAL CLIENT WILLS

When an attorney undertakes the duty of safeguarding a client's original will, the attorney should examine several ethical considerations surrounding that practice. The custodianship of these documents often requires lawyers to balance safeguarding a client's interests and complying with ethical obligations. This Part will discuss the ethical dilemmas inherent in maintaining the client's original will and shed light on the potential conflicts and responsibilities attorneys may encounter. For practical guidance, Appendix A provides a sample safekeeping agreement that practitioners can modify to meet the requirements of their jurisdictions and the client's needs.

[7] Sometimes, clients who take original wills leave them in odd places, making it difficult for the family to locate them once the testator dies. *See generally* In re Washington's Estate, 56 So. 2d 545 (Fla. 1952) (noting that the testator kept her important documents in a jar); *Storing Your Will in the Freezer*, DIVORCEINFO, https://divorceinfo.com/willinthefreezer (last visited Oct. 7, 2023) (detailing a response from a woman who claims to keep her will in her freezer).

A. Assessing the Ethics of Retaining the Client's Original Will

Model Rule of Professional Conduct (MRPC) 1.15 establishes a comprehensive framework for attorneys concerning client property management.[8] The American College of Trust and Estate Counsel (ACTEC) has also provided commentary on applying MRPC 1.15 to estate planning scenarios.[9] This section explores these sources to generally answer what an attorney's ethical duties are when retaining the client's original will. While those two sources provide general guidance, practitioners must consult state-specific information to understand their jurisdiction's approach.

Generally, wills are considered client property.[10] For example, some states, such as Washington and New Jersey, explicitly include estate planning documents like wills and deeds within the scope of "property" under their versions of MRPC 1.15.[11] Because wills are considered client property, it is usually not recommended for an attorney to maintain the original because it may limit the client's access to the document.[12] However, courts have found the practice permissible, allowing attorneys to undertake this duty if the client requests.[13] If the attorney agrees, then they must safeguard the will per the provisions of MRPC 1.15 or its state counterpart.[14]

MRPC 1.15 outlines an attorney's general ethical responsibilities when maintaining client property.[15] Under that rule, attorneys must separate client property from their own.[16] The rule also mandates proper identification and safeguarding of property.[17] This includes careful recordkeeping, with records to be retained for five years after the representation is terminated.[18] Upon receipt of property that clients or third parties have an interest in, the attorney must promptly notify the client or third party.[19] Unless an exception applies, the lawyer must also promptly deliver any property the client or third party has an interest in.[20] The attorney must also render a full accounting of the property upon request of the client or third party with an interest.[21] When conflicting claims exist, the attorney must separate the disputed property and distribute undisputed portions without delay.[22]

Additionally, estate planners can find general guidance from ACTEC, which has provided estate-planning-specific commentary on the

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[8] *See* MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR ASS'N 1983).

[9] *See* ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 177–81 (THE AM. COLL. OF TR. AND EST. COUNS. FOUND., 6th ed. 2023), https://www.actec.org/assets/1/6/ACTEC_Commentaries_6th_Rev.pdf?hssc=1.

[10] *See e.g.*, *id.* at 178.

[11] *E.g.*, WASH. STATE CT. RULES: RULES OF PRO. CONDUCT r. 1.15A cmt. 5 (2018) ("Property covered by this Rule includes original documents affecting legal rights such as wills or deeds."); N.J. Sup. Ct. Advisory Comm. on Pro. Ethics, Op. 692 (2001), https://njlaw.rutgers.edu/collections/ethics/acpe/acp692_1.html ("Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property.").

[12] *See* Gerry W. Beyer, *Avoid Being a Defendant: Estate Planning Malpractice and Ethical Concerns*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 224, 250–51 (2015).

[13] *See e.g.*, State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972) ("The correct practice is that the original will should be delivered to the testator and should only be kept by the attorney upon specific unsolicited request of the client.").

[14] *See* THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 178.

[15] *See* MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR ASS'N 1983).

[16] *Id.* r. 1.15(a).

[17] *Id.*

[18] *Id.*

[19] *Id.* r. 1.15(d).

[20] *Id.*

[21] *Id.*

[22] *Id.* r. 1.15(e).

provisions of MRPC 1.15.[23] ACTEC emphasizes the proper identification and secure safekeeping of client wills.[24] Certain states, like California, have specific requirements for preserving estate planning documents, like requiring the documents to be held in secure places.[25] Notably, electronic copies do not meet the preservation requirements of MRPC 1.15.[26] Electronic copies of wills do not meet the preservation requirements because state and model laws—like the Uniform Electronic Transactions Act—do not recognize wills under their electronic preservation provisions.[27] Thus, the attorney must maintain the original paper document.[28] Furthermore, ACTEC recommends that attorneys retaining original wills establish plans for their protection in case of the lawyer's death or incapacity.[29]

Next, ACTEC noted that, under MRPC 1.15, attorneys must maintain property records for a specified time after the termination of the representation.[30] The period varies among states, with most adopting the recommended five-year timeframe.[31] However, some extend the requirement to timeframes ranging from six to ten years.[32] Additionally, unique circumstances might require the retention of files for longer than the standard time.[33] State ethics opinions have specifically designated an attorney's creation of wills or trusts as unique because its interpretations could emerge as a concern many years after its preparation.[34] To address the unique characteristics of wills, attorneys should designate them as files that warrant retention beyond the mandated term and retain them accordingly.[35] Some jurisdictions require lawyers to maintain the client's original will indefinitely unless the law provides an alternative.[36] Consequently, an attorney should review the rules in the attorney's jurisdiction and retain the client's original will for the stipulated time.[37]

Finally, ACTEC noted that, in compliance with the notice and accounting provisions of MRPC 1.15, any notifications to the client should be written, and the writing should state that the attorney is maintaining the will per the client's direction.[38] Also, lawyers should verify their adherence to any other state-specific requirements for notification, accounting, or other obligations regarding client property.[39] Importantly, ACTEC commented that retaining original estate planning documents does not create an active client relationship or obligate lawyers to stay informed about the client.[40]

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[23] *See* THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 177–81.

[24] *Id.* at 178.

[25] *E.g.*, CAL. PROB. CODE § 710 (West 2023).

[26] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 178.

[27] *E.g.*, ALASKA STAT. § 09.80.010(b) (West 2023); UNIF. ELEC. TRANSACTIONS ACT § 3(b)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1999).

[28] *See* THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 178.

[29] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 178; *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-369 (1992).

[30] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 179.

[31] *Id.*

[32] *Id.*

[33] *E.g.*, State Bar of N.M. Ethics Advisory Comm., Op. 2005-01 (2005), https://www.sbnm.org/Portals/NMBAR/AboutUs/committees/Ethics/2005-2006/2005-1.pdf?ver=4scesHNgjHi1Pm-MrgygQA%3D%3D.

[34] *Id.*

[35] *Id.*

[36] N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 1182 (2020), https://archive.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=99373.

[37] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 179.

[38] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 179.

[39] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 179.

[40] THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 179.

In conclusion, MRPC 1.15 allows attorneys to retain a client's original will without violating ethical duties. If the attorney undertakes this duty, the attorney must comply with specific rules, such as recordkeeping, timing requirements, and safekeeping. This information, while helpful, only provides general guidance because states vary in their jurisdictional approaches. Therefore, an attorney needs to consult his or her jurisdiction's rules. However, from a general standpoint, whether an attorney may retain the client's original will appears to be yes if the appropriate guidelines are followed.

B. Ethical Consideration One: The Duty to Stay Informed

Consider the first fact scenario in Part I. Generally, once the client executes the original will, the client may request that the attorney safeguard the original.[41] However, a significant question arises if the lawyer undertakes this duty: Does the attorney have the ethical obligation to stay informed about the client's well-being so that the attorney can probate the will upon the client's death? This section explores this question by examining several ethics opinions. Moreover, it draws general principles from those opinions that practitioners can use to navigate their responsibilities in similar circumstances. This general guidance, however, should be adapted to conform to the laws of the jurisdiction in which the attorney practices.

1. State Ethics Opinions

In a 1976 ethics opinion, the Massachusetts Bar Association (MBA) considered the ethical obligations of an attorney who inherited original wills from a predecessor.[42] Upon request from the clients, the predecessor maintained the original wills for safekeeping.[43] The successor attorney attempted to locate the clients to reunite them with their respective wills, but he could not find many of them.[44] One of the questions discussed in the opinion was whether the successor attorney, as a part of his safekeeping duties, had to actively monitor obituary notices so he could provide the appropriate parties with the original will when the client died.[45] The MBA's response centered on the attorney's duty to exercise reasonable care in safeguarding the original wills entrusted to his care.[46] The MBA clarified that this obligation did not extend to actively monitoring a client's status.[47] Instead, the attorney's duty was limited to maintaining the wills securely and, if necessary, returning them to the testator or depositing them with the appropriate court.[48]

Similarly, the New York State Bar Association (NYSBA) addressed the duty to stay informed about a client's status in a 1999 ethics opinion.[49] The opinion discussed the following question: "If a lawyer keeps custody of a client's original will, absent agreement[,] does the lawyer have an obligation to learn of the client's death."[50] The NYSBA's response was clear: without a specific agreement, an attorney has no ethical obligation to monitor death notices or check if the client is still alive.[51] Essentially, the ethics opinion concluded that the duty to monitor a client's health status can only arise through a contractual agreement between the attorney and the client.[52] "Contractual obligations may arise if there are express or implied agreements or understandings between the client and the lawyer in regard to the lawyer's duties and responsibilities in relation to

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41 *Supra* Section II.A (discussing the ethicality of retaining the client's original will).

42 Mass. Bar Ass'n Comm. on Pro. Ethics, Op. 76-7 (1976).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 724 (1999), https://archive.nysba.org/CustomTemplates/Content.aspx?id=5524.

50 *Id.*

51 *Id.*

52 *Id.*

the will."[53] Therefore, the lawyer's obligation to learn of the client's death depends on the agreed-upon terms between the lawyer and the client.[54]

2. General Principles Guiding the Duty to Stay Informed

Ultimately, the specific ethical rules and laws of the state of an attorney's practice guide an attorney's duties.[55] However, the MBA and NYSBA opinions offer valuable principles for attorneys to consider when determining their duty to monitor a client's health status. First, when a client entrusts the original will to an attorney for safekeeping, the attorney must exercise reasonable care in protecting it.[56] This duty to protect is consistent with the general principles under MRPC 1.15 and state requirements that lay out the requirements of safekeeping client property.[57]

Next, the obligation to safeguard persists even if the attorney no longer wants to maintain the will.[58] In such cases, the attorney may return the will to the testator or deposit it with the appropriate court for safekeeping if state law has such a procedure.[59] If neither option is available, the attorney must continue exercising reasonable care to safekeep the will.[60] Safekeeping the will, however, does not entail actively monitoring death notices to determine when to return the will to the proper party.[61]

Finally, while actively staying informed about the client's status is not generally required, the mutual agreement with the client determines the responsibilities of an attorney.[62] The scope of these obligations may arise from explicit or implicit agreements between the attorney and the client.[63] Should the attorney assume specific responsibilities, he or she is bound to fulfill these contractual commitments.[64] Thus, an attorney may be required to actively monitor the client's health status if an agreement with the client, either explicit or implicit, is made.

In conclusion, the duty to actively monitor a client's health status to deliver their original will upon death is not a standard requirement for estate planning attorneys. The MBA and NYSBA ethics opinions demonstrate that only a contractual agreement between the attorney and the client can establish this duty. Thus, open communication and agreement are vital to clarify and avoid misunderstandings. While state-specific, the principles discussed in these ethics opinions serve as valuable guidelines for attorneys facing similar dilemmas. However, an attorney should always consult their own state's rules and guidelines.

C. Ethical Consideration Two: Obligations After Notice of a Client's Death

Consider the second fact scenario in Part I. A client may request that the attorney maintain the client's original will.[65] If the attorney agrees and undertakes that duty, absent an agreement to the contrary, the attorney has no duty to stay

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[53] *Id.*

[54] *Id.*

[55] *See Legal Ethics and Legal Profession Research Guide*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=270948&p=1808373#:~:text=The%20ABA%20and%20each%20state,Model%20Rules%20or%20Model%20Code (last visited Oct. 12, 2023).

[56] *See* Mass. Bar Ass'n Comm. on Pro. Ethics, Op. 76-7 (1976).

[57] *See supra* Section II.A (discussing safekeeping client wills under the MRPC and state laws).

[58] *See* Mass. Bar Ass'n Comm. on Pro. Ethics, Op. 76-7 (1976).

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See* N.Y. Bar Ass'n Comm. on Pro. Ethics, Op. 724 (1999).

[63] *See id.*

[64] *See id.*

[65] *Supra* Section II.A (discussing the ethicality of retaining the client's original will).

informed of the client's status.[66] But, an attorney may learn of a client's death without seeking that information. For example, the client's family, executor, or other interested parties may notify the attorney of the client's passing. Also, an attorney may receive notice via newspaper obituaries or internet posts.

However the attorney learns of the client's death, new questions emerge when he or she learns of its occurrence. Namely, once the attorney learns of the client's death, is the attorney required to disclose the existence of the will, and if so, to whom, or can the attorney take a passive approach and do nothing? When faced with this situation, there are three possible courses of action: depositing the will with the appropriate court, delivering the will to the executor or beneficiary, or opting for a more passive approach by doing nothing. This section examines each of these approaches and provides insight into the pros and cons.

1. Option 1: Depositing the Will with the Appropriate Court

The first option an attorney has upon learning of the client's death is to deposit the will with the appropriate court. Most states have statutes explicitly authorizing attorneys to deposit a testator's will with the court.[67] These provisions grant attorneys a clear legal basis for their actions and ensure the proper storage and accessibility of the original will.[68]

For instance, Tennessee's statute allows any person to deposit a written will "with the court exercising probate jurisdiction in the county where the testator lived at the time of the testator's death."[69] Similarly, Ohio permits a person acting on behalf of the testator to deposit a will "in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator."[70] Additionally, Colorado's statute authorizes the testator or the testator's agent to deposit a will "with any court for safekeeping, under rules of the court."[71]

Some states take this requirement a step further, making it mandatory for the will holder to come forward and deposit it with the appropriate court. For example, Texas's Estates Code stipulates that the person possessing the testator's will "shall deliver the will to the clerk of the court that has jurisdiction of the testator's estate" upon receiving notice of the testator's death.[72] Texas courts have held that the explicit use of the word "shall" leaves no room for discretion on the part of the will holder.[73] Illinois's statute also mandates that any person possessing the testator's will must file it with the court clerk immediately upon the testator's death.[74] That statute also allows the court to issue an attachment and compel the production of the will in case of failure or refusal to deposit it.[75] Finally, Michigan law requires the custodian of a will or codicil to "forward it to the court having jurisdiction with reasonable promptness after the death of the testator."[76] Failing to do so without

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66 *Supra* Section II.B (discussing the attorney's duty to monitor a client's health status).

67 *See* Alberto B. Lopez, *Safeguarding A Will: Will Deposit Statutes*, 46 ACTEC L.J. 93, 93-94 (2020).

68 *See generally id.* (discussing requirements of will deposit statutes and their protection of wills).

69 TENN. CODE ANN. § 32-1-112(a) (West 2023).

70 OHIO REV. CODE ANN. § 2107.07 (West 2022).

71 COLO. REV. STAT. ANN. § 15-11-515 (West 2023).

72 TEX. EST. CODE ANN. § 252.201(a) (West 2023).

73 *See* Stiba v. Bowers, 756 S.W.2d 835, 838 (Tex. App.—Corpus Christi–Edinburg 1988, no writ) ("Delivery of the will to the county court, moreover, is not discretionary with the party having custody of a will after testator's death, but is a duty imposed by [Tex. Est. Code § 252.201]."); *see also* Plummer v. Robinson, 666 S.W.2d 656, 658 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (holding that the person who had custody of the will had a duty to deliver it to the county court).

74 755 ILL. COMP. STAT. ANN. 5/6-1(a) (West 2023).

75 *Id.*

reasonable cause subjects the custodian to liability "for damages that are sustained by the neglect."[77]

Thus, depositing the will with the proper court—as determined by state statute—is an appropriate method of handling the will under fact scenario two or similar circumstances. However, "will deposit statutes vary in their requirements."[78] For example, some state statutes "require that a testator deposit a will with the court in the county of testator's residence while others permit a testator to leave a will with 'any court.'"[79] Courts also have different requirements regarding the method of delivery and identifying information that must be included when the will is deposited with the court.[80] Additionally, there is often a statutorily required fee that must be paid before depositing the will with the court.[81] Accordingly, any attorney who wishes to use this method must verify his or her state's requirements beforehand.

Notwithstanding the statutory requirements of the jurisdiction, there are several benefits to depositing the will with the proper court. First, depositing the will with the appropriate court ensures that the original document is securely stored and readily available when needed during the probate process.[82] This practice minimizes the risk of the will being lost, tampered with, or mishandled, thus preserving the integrity of the testator's wishes.[83]

Moreover, depositing the will with the appropriate court can facilitate the efficient distribution of the estate. Once a decedent passes, it can be difficult for the decedent's family, executor, or other interested parties to locate the decedent's will, especially if they do not know the name of the attorney who retained the original document.[84] If these individuals are unable to locate the original will, then there is a possibility that the document will not be probated.[85]

Many states have addressed this issue by including notice provisions in their will deposit statutes.[86] Statutes from Texas and Iowa both provide good examples.[87] When someone deposits a will in Texas, he or she must provide "the name and last known address, if available, of each executor named in the will, including any alternate executors."[88] Under the statute, there are two instances where the county clerk is required to give notice of the will's existence to the above individuals: (1) when someone submits an affidavit to the clerk confirming the death of the testator or (2) when the clerk receives other notice or evidence of the testator's death, convincing them of the fact.[89] The county clerk will deliver the will to those notified upon receipt of a request.[90] Moreover, if there is no response after being notified, the statute permits the court to examine the will and inform the executor or

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[76] MICH. COMP. LAWS ANN. § 700.2516 (West 2023).

[77] *Id.*

[78] Lopez, *supra* note 67, at 94.

[79] *Id; compare* IND. CODE ANN. § 29-1-7-3.1(d) (West 2023) ("A person may deposit a will with the circuit court clerk of the county in which the testator resided when the testator executed the will."), *with* MINN. STAT. ANN. § 524.2-515 (West 2023) ("A will may be deposited by the testator or the testator's agent with any court for safekeeping.").

[80] *Id; see e.g.*, OHIO REV. CODE ANN. § 2107.07 (West 2022).

[81] *E.g.*, ARK. CODE ANN. § 28-25-108(a) (West 2023) (requiring a fee of $5.00); OHIO REV. CODE ANN. § 2107.07 (West 2022) (requiring a fee of $25.00).

[82] Lopez, *supra* note 67, at 94.

[83] *Id.*

[84] *See id.*

[85] *See id.* at 94–95.

[86] *See id.* at 95.

[87] *See generally id.* (discussing the Texas and Iowa statutes).

[88] TEX. EST. CODE ANN. § 252.001(a-1)(2) (West 2023).

[89] *Id.* at § 252.101.

[90] *Id.* at § 252.102.

the beneficiaries mentioned in the will of the will's existence.[91]

Similarly, under Iowa's will deposit statute, a will deposited with the court should include "the name of the person to be notified of the deposit of such will upon the death of the testator."[92] The law requires that the clerk inform the person identified above once the clerk becomes aware of the testator's death.[93] If no one submits a request to initiate the probate process within the subsequent thirty days, the will can be unsealed, and the clerk will send notice to the executor specified in the will.[94] Both of these provisions make it more likely that the document will be offered for probate, since a clerk is likely to have notice of a client's death if the testators family files an application to determine the testator's heirs.

Additionally, depositing a will with a court offers a distinct advantage that is generally unavailable when storing it with an attorney.[95] As individuals age, they may choose to move for various reasons, potentially leading to the misplacement of important documents, including wills, during these transitions.[96] Similarly, attorneys may change offices or leave the legal profession altogether, making it challenging to locate the will when needed.[97] Therefore, the continued presence of the court in the exact location where the attorney initially deposited the will is likely to be an advantage for those trying to locate the will.[98] Accordingly, if an attorney adheres to their state's statutory provisions—like the ones specified above—then the attorney can help streamline the probate process and ensure that estate matters are resolved quickly due to the ease of locating the will.[99] Streamlining the probate process benefits all parties involved by providing them with a quick resolution of their interests.

Finally, depositing the will with the court allows the attorney to step back and conclude his or her involvement with the estate unless he or she discussed other specific tasks with the client. Once the will is deposited, the court takes responsibility for its safekeeping and administration. This prevents the lawyer from becoming involved in disagreements or arguments among beneficiaries or others interested in the estate. This act of "washing their hands" of the case offers attorneys some protection and allows them to focus their attention on other legal matters without being burdened by ongoing involvement in the probate process. However, the attorney should remain available if someone later approaches his or her with legitimate concerns or issues related to the will.

In conclusion, most jurisdictions' statutes support depositing a will with the appropriate court. However, attorneys should ascertain their state's requirements before undertaking this process. Depositing the original will with the court can streamline the probate process and help conclude an attorney's involvement. At the same time, the attorney should remain available to discuss any problems arising from the will. Overall, depositing the will with the court allows attorneys to fulfill their responsibilities in handling their client's estates.

2. Option Two: Delivering the Will Directly to the Executor or Beneficiary

An attorney's second option under the second fact scenario in Part I is to deliver the will to the named executor or beneficiary. The primary concern in this situation is a potential breach of the attorney-client privilege and the lawyer's duty of confidentiality. The United States Supreme Court has held and reaffirmed the enduring nature of the attorney-client privilege,

91 *Id.* at §§ 252.103–.105.

92 IOWA CODE ANN. § 633.287 (West 2023).

93 *Id.* at § 633.289.

94 *Id.*

95 *See* Lopez, *supra* note 67, at 95.

96 *Id.*

97 *Id.* at 96.

98 *See id.*

99 *See generally id.* ("Depositing a will with a court lessens the challenge of locating a decedent's will.").

even after the client's death.[100] Additionally, the duty of confidentiality is a fundamental principle of legal ethics governing the relationship between lawyers and their clients.[101] With few exceptions, all information obtained by a lawyer from or about a client is treated as confidential, regardless of its origin.[102] Hence, in the second scenario, providing someone with the original will could raise concerns about breaching one or both obligations.

a. Case Law Discussing Implied Consent in the Context of Estate Planning

In general, lawyers, under the attorney-client privilege and the duty of confidentiality, are prohibited from disclosing information about a client.[103] However, some state court decisions have highlighted an important concept: the implicit waiver of those concepts in the estate planning context.[104] This waiver pertains specifically to information that relates to the efficient administration of a client's estate.[105] As these court decisions underscore, certain communications become exempt from the traditional shield of privilege when essential for the effective management of estates.[106]

The most prominent example of this is in the case of *In re Estate of Rabin.*[107] In that case, the Colorado Supreme Court discussed an attorney's obligations when disclosing a deceased client's legal file.[108] The decedent's widow, who was also the estate's personal representative, asked the estate planning attorney for the decedent's legal files.[109] The decedent's widow requested this information to help her resolve a claim against her husband's estate brought by the husband's ex-wife.[110]

The Court began its discussion of the attorney's duties by examining the principles underlying the attorney-client privilege and the duty of confidentiality.[111] First, the Court noted that the attorney-client privilege and MRPC 1.6 uphold the confidentiality between clients and their lawyers.[112] In fact, "their protections each survive a client's death."[113] However, these doctrines have distinct approaches that apply when protecting the legal file of a deceased client.[114]

The attorney-client privilege protects the confidentiality of discussions between clients and their attorneys, regardless of whether the topics involve legal advice for litigation, transactions, or other legal services.[115] This safeguard can be overridden if the client explicitly or implicitly waives it or in cases where specific exceptions

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100 *E.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998).

101 Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998).

102 *See id.*

103 *See id.;* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

104 *See generally* John M. Palmeri & Greg S. Hearing, *'til Death Do Us Part the Attorney-Client Privilege and the Duty of Confidentiality After a Client's Death*, 50 COLO. LAW. 15 (2021) (analyzing the impact of two Colorado Supreme Court cases on the attorney-client privilege and the duty of confidentiality following a client's death).

105 *See id.*

106 *See id.*

107 *See* In re Estate of Rabin, 474 P.3d 1211 (Colo. 2020).

108 *Id.* at 1214.

109 *Id.* at 1214–15.

110 *Id.* at 1214.

111 *Id.* at 1218–19.

112 *Id.* at 1218; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 1983) ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.").

113 *Rabin*, 474 P.3d at 1218; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (holding that the attorney-client privilege survives the death of the client).

114 *Rabin*, 474 P.3d at 1218.

115 *Rabin*, 474 P.3d at 1218; *see generally* Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) (discussing the purpose behind the attorney-client privilege).

come into play.[116] Ultimately, the privilege is a barrier that prevents attorneys from being compelled to disclose information without their client's consent.[117]

On the other hand, the duty of confidentiality encompasses a broader scope compared to the attorney-client privilege.[118] It prohibits disclosing any information linked to a client's representation unless the client provides consent or exceptions are applicable.[119] This obligation covers data shared in confidence by the client and all information related to the legal representation, regardless of its origin, both within and outside of legal proceedings.[120] However, during a legal proceeding, the duty of confidentiality may yield to court orders, such as subpoenas.[121] Nevertheless, even in the face of such court orders, MRPC 1.6 permits lawyers to divulge information concerning a representation only to the extent that he or she reasonably believes it is necessary.[122] Consequently, this duty requires lawyers to assert, on behalf of their clients, any valid claims indicating that the court order lacks authorization under other legal provisions or that the sought-after information is safeguarded against disclosure by the attorney-client privilege or other applicable laws.[123]

The Court then applied those principles to the facts of the case to determine whether or not the disclosure of the client's estate planning documents would breach the attorney-client privilege or the duty of confidentiality.[124] The Court noted that "[c]lients can . . . expressly waive the attorney-client privilege in their wills or anywhere else," however, the decedent did not give any explicit waiver in this case.[125] The widow argued that her role as a personal representative allowed her to access this information because the privilege shifted to her upon the decedent's death.[126] However, the Court rejected this argument, finding that it "[ran] counter to [the] court's broader articulation of the attorney-client privilege."[127] The Court stressed that the attorney-client privilege is designed to encourage clients to share information with their attorneys freely.[128] This is because open and honest communication between clients and their attorneys is essential for the attorney to serve the client's interests effectively.[129] Without a guarantee of confidentiality, clients might hesitate to seek legal advice or share their concerns openly because they often reveal information to their attorneys that they would not

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[116] *Rabin*, 474 P.3d at 1218; *see generally* Steven D. Ginsburg, *How to Lose Attorney-Client Privilege*, AM. BAR ASS'N (Mar. 16, 2017), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2017/how-to-lose-attorney-client-privilege/ ("A waiver can occur from a variety of conduct that fails to maintain the confidentiality of the communication. Either voluntary or inadvertent disclosure to outside or non-covered recipients, professional advisors outside the privilege, and experts and consultants, can result in waiver as a matter of law.").

[117] *Rabin*, 474 P.3d at 1218; *see generally Upjohn Co.*, 449 U.S. at 389-90 (discussing the purpose behind the attorney-client privilege).

[118] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 1983).

[119] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6(a)-(b) (AM. BAR ASS'N 1983).

[120] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 1983).

[121] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 1983).

[122] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 1983).

[123] *Rabin*, 474 P.3d at 1219; *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 15 (AM. BAR ASS'N 1983).

[124] *Rabin*, 474 P.3d at 1219-21.

[125] *Id.* at 1219.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 1220.

[129] *Id.*

disclose to their personal representatives.[130] Therefore, preserving the deceased client's status as the privilege holder promotes candid communication between clients and attorneys during the client's lifetime.[131] Ultimately, the Court ruled that, based on the principles supporting the attorney-client privilege, a client still holds it even after death.[132]

However, this decision does not automatically make all confidential communications between the attorney and a deceased client permanently privileged.[133] In cases where there is no explicit waiver, a client's actions before his or her death can imply a waiver of the privilege.[134] As noted by the Court:

A decedent nominates a personal representative precisely because the decedent wants that individual to administer the decedent's estate. . . . To effectively carry out those duties (as well as any other duties specified in the will), a personal representative may need access to material otherwise protected by the attorney-client privilege. Thus, by nominating a personal representative, a client impliedly waives any claim of attorney-client privilege with respect to communications necessary for estate administration, unless the client expressly manifested the intent to maintain the privilege.[135]

Therefore, this case stands for the principle that an attorney may release information related to a client's estate plan, including the client's will, if release is necessary to further the settlement of the client's estate.[136] This release will not be considered a breach of the attorney-client privilege.[137]

The Court came to a similar conclusion under the duty of confidentiality.[138] The Court pointed out that, similar to the attorney-client privilege, a lawyer's obligation to maintain confidentiality isn't absolute and can be waived.[139] According to MRPC 1.6, a lawyer has the implicit authority to disclose client information when appropriate for effectively representing the client.[140] Consequently, disclosure is appropriate if the attorney has valid reasons to believe that releasing the information is implicitly authorized and serves the former client's interests in settling the estate.[141] Therefore, a deceased client's former attorney can provide the personal representative with confidential information required for estate settlement unless the deceased client has explicitly stated otherwise.[142] Importantly, though, the Court noted that the attorney could not hand over the complete legal records to the personal representative unless the deceased client had given informed consent for such comprehensive disclosure in his or her will or elsewhere.[143]

Finally, the waiver is not automatically applied once the client dies.[144] "[T]he personal representative does not take possession or control of some intangible right to access the deceased client's files."[145] Instead, proving a waiver falls on the party seeking to overcome the privilege.[146] Therefore, a personal representative must demonstrate that privileged materials are essential for estate administration.[147]

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130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 1220-21.

138 *Id.* at 1221.

139 *Id.*

140 *Id.; see also* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 5 (AM. BAR ASS'N 1983).

141 *Rabin*, 474 P.3d at 1221.

142 *Id.*

143 *Id.*

144 *Id.* at 1221 n.8.

145 *Id.* at 1217.

146 *Id.* at 1221 n.8.

147 *Id.*

b. State Ethics Opinions Discussing Implied Consent in the Context of Estate Planning

The principles discussed in case law align with ethical opinions issued by state courts. For example, in 2011, the Florida Bar (FB) addressed this matter and provided guidance on disclosing confidential information related to a decedent's estate plan.[148] The decision emphasized that if a personal representative requests information and the decedent's lawyer believes that revealing it would facilitate the proper estate distribution following the decedent's wishes, the lawyer can share the information with the personal representative.[149] However, this is permissible only if the decedent did not explicitly state that the information should remain confidential.[150]

Similarly, if a beneficiary seeks specific information, and the decedent's lawyer determines that disclosing that information would serve the decedent's interests, the lawyer may disclose it to the beneficiary.[151] Nevertheless, if the decedent explicitly instructed the lawyer not to disclose certain information to anyone, the lawyer is prohibited from sharing that information with the beneficiary.[152] The FB noted that its decision was limited to the context of estate planning and emphasized the importance of attorneys exercising discretion and adhering to any explicit instructions provided by the client concerning confidentiality.[153]

More recently, the Illinois State Bar Association (ISBA) addressed this matter in 2021.[154] In that case, an attorney had prepared a will for a client.[155] Following the client's passing, several individuals, including the client's spouse, children, and appointed executor and trustee, requested access to the client's estate planning documents, including the will.[156] Seeking guidance on the attorney's ethical obligations, he contacted the ISBA.[157]

The ISBA provided that Illinois law clearly obliged the attorney to file the client's will with the appropriate court.[158] However, the ISBA recommended steps when dealing with other estate planning documents.[159] The first crucial consideration was whether the client had given informed consent for the disclosure.[160] The attorney needed to check his files for any evidence of consent to disclose the client's estate planning documents or file.[161] If informed consent was not present, the attorney then had to examine whether there was implied consent from the client.[162]

The ISBA noted that, under Illinois law, consent is implied when it is necessary to carry out the client's representation effectively.[163] In this case, because the executor required the client's estate planning documents to carry out the client's intentions, the lawyer was implicitly authorized to provide the executor with the necessary copies of the estate planning documents.[164]

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148 Fla. Bar Pro. Ethics Comm., Op. 10-3 (2011), https://www.floridabar.org/etopinions/etopinion-10-3/#:~:text=A%20lawyer%20may%20disclose%20confidential,information%20sought%2C%20and%20other%20factors.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 Ill. State Bar Ass'n. Standing Comm. on Pro. Conduct, Op. 21-02 (2021), https://www.isba.org/sites/default/files/ethicsopinions/Opinion%2021-02.pdf.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*; *see also* 755 ILL. COMP. STAT. ANN. 5/6-1(a) ("Immediately upon the death of the testator any person who has the testator's will in his possession shall file it with the clerk of the court of the proper county.)

159 Ill. State Bar Ass'n. Standing Comm. on Pro. Conduct, Op. 21-02 (2021).

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

Additionally, the lawyer had the authority to disclose estate planning documents to the client's spouse, who was the designated beneficiary of the estate.[165]

However, the lawyer's authorization to share information with the spouse had a condition attached.[166] This disclosure was limited to providing the spouse with the information essential for her to enforce her rights as outlined in the estate plan.[167] The lawyer could only reveal information to the spouse if the executor had not already disclosed the spouse's beneficiary status and if the spouse was not receiving her rightful benefits under the estate plan.[168] This limited disclosure was justified because it was necessary to effectuate the client's intent.[169]

While some states have specifically addressed implied consent, others have not extended their opinions to documents that affect a decedent's estate or its administration. For example, the State Bar of Texas (SBoT) recently published an ethics opinion that addressed the following question: "Under the Texas Disciplinary Rules of Professional Conduct, is a lawyer permitted or required to turn over a closed litigation file of a deceased client to the executor of the decedent's estate when the file is not related to matters affecting the estate or its administration?"[170] In this opinion, a lawyer represented a client in a trust litigation for breach of fiduciary duty.[171] After the lawsuit settled, the client passed away.[172] A new dispute related to the settlement terms arose, and the decedent's widow, the executor of his estate, sought to access files from the original trust litigation.[173] The files contained confidential information but did not include anything related to the decedent's will or estate.[174]

Ultimately, the SBoT concluded that the lawyer could only reveal the information if permitted by Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which is similar to MRPC 1.6.[175] Additionally, the opinion emphasized the importance of the client's instructions; if a client prohibited disclosure, the attorney may not provide confidential information.[176] Additionally, "[a]lawyer should not make a discretionary disclosure to an executor if the lawyer reasonably believes the client would have opposed the disclosure under the circumstances."[177] However, the opinion expressly declined to address the disclosure of confidential information that directly affects the estate or its administration.[178] The opinion noted that "[w]hether a lawyer has an independent legal duty to comply with an executor's request for confidential information of the decedent that affects the estate or its administration is a question of substantive law outside the purview of the Committee."[179] Thus, this opinion illustrates the importance of a practitioner discerning the approach of his or her jurisdiction.

c. General Principles on Implied Consent in the Estate Planning Context

General concepts raised by the material above provide guiding principles helpful to any practitioner. Under the attorney-client privilege and the duty of confidentiality, lawyers generally

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165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 State Bar of Tex. Pro. Ethics Comm., Op. 697 (2023).

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.; compare* TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.05 (2022), *with* MODEL RULES OF PRO. CONDUCT r. 1.6(b) (AM. BAR ASS'N 1983).

176 State Bar of Tex. Pro. Ethics Comm., Op. 697 (2023).

177 *Id.*

178 *Id.*

179 *Id.*

cannot disclose information about a client, even after the client's death.[180] However, some state court decisions emphasize the concept of an implicit waiver of these protections in estate planning, specifically for information necessary for efficient estate administration.[181]

The attorney-client privilege safeguards the confidentiality of discussions between a client and his or her attorney, and it can be overridden if the client explicitly or implicitly waives it or in cases where specific exceptions apply.[182] On the other hand, the duty of confidentiality is broader, encompassing all information related to a client's representation, both within and outside legal proceedings.[183] During legal proceedings, it may yield to court orders but should be asserted on behalf of clients to protect their interests.[184]

Both concepts continue even after the client's death; they do not automatically shift to the estate's personal representative.[185] The client can explicitly waive the attorney-client privilege or the duty of confidentiality.[186] However, in the absence of an explicit waiver, a client's actions before his or her death can imply a waiver of the privilege.[187] This allows the release of estate-related information necessary for estate settlement without breaching the attorney-client privilege or the duty of confidentiality.[188]

It is important to note that there are several limitations of the implied waiver. The attorney cannot provide the complete legal records to the personal representative unless the deceased client has given informed consent for such comprehensive disclosure.[189] Also, the responsibility to demonstrate such waivers falls on the party seeking to access privileged materials, often the estate's personal representative.[190] Most authorities underscore the significance of attorneys exercising discretion and respecting client instructions.[191] Additionally, the approach may vary by state.[192] Thus, the attorney must adhere to the rules and regulations in his or her jurisdiction when sharing confidential information related to a decedent's estate plan.[193]

In summary, delivering a will to the executor or beneficiary requires careful consideration of the attorney-client privilege and the potential implications on the duty of confidentiality. While these two concepts are a crucial aspect of the lawyer-client relationship, there are exceptions and situations where limited disclosure may be impliedly authorized to administer the estate and uphold the client's intentions effectively. Attorneys must navigate these ethical considerations while respecting the client's explicit instructions and exercising professional judgment.

d. Additional Concerns

Providing the executor or beneficiary with the decedent's original will is generally permissible[194], but an attorney should consider two additional concerns when this occurs. First, does the attorney have an ethical obligation to

180 *See* In re Est. of Rabin, 474 P.3d 1211, 1218 (Colo. 2020).

181 *See id.;* Fla. Bar Pro. Ethics Comm., Op. 10-3 (2011); Ill. State Bar Ass'n. Standing Comm. on Pro. Conduct, Op. 21-02 (2021).

182 *See* Rabin, 474 P.3d at 1218-19.

183 *See id.*

184 *See id.*

185 *See id.* at 1219.

186 Ill. State Bar Ass'n. Standing Comm. on Pro. Conduct, Op. 21-02 (2021).

187 *See id.*

188 *See id.*

189 *See* In re Estate of Rabin, 474 P.3d 1211, 1221 (Colo. 2020).

190 *See id.* at 1221 n.8.

191 *See* Fla. Bar Pro. Ethics Comm., Op. 10-3 (2011).

192 *See* State Bar of Tex. Pro. Ethics Comm., Op. 697 (2023).

193 *See id.*

194 *See* discussion *supra* Sections II.C.2.i-iii (discussing a possible implicit waiver of the attorney-client privilege and the duty of confidentiality in the context of estate administration).

check if the executor or beneficiary would benefit from the client's intestate death before providing him or her with the original will? Second, must the attorney monitor court records to ensure a will is probated?

Neither of these questions has a clear answer. Under the first question, authorities have not addressed whether the lawyer should check if the executor or beneficiary would benefit from the client's intestate death before providing him or her with the original will. For example, the New York State Bar Association (NYSBA) stated in a 1980 ethics opinion that

where a client has requested his lawyer to retain the original will for safekeeping, and the lawyer later learns of the client's death[,] . . . it would appear that the lawyer has an ethical obligation to carry out his client's wishes, and quite possibly a legal obligation . . . to notify the executor or the beneficiaries under the will or any other person who may propound the will . . . that the lawyer has it in his possession.[195]

Notably, the opinion did not address whether the lawyer had to discern the inheritance status of those he was required to notify.[196] Thus, it appears that, generally, the lawyer has no duty to check whether the person receiving the will would inherit via intestacy. However, since this is a relatively undecided area, the best option for any attorney is to deposit the original will with the court so the executor or beneficiary cannot claim that the client died intestate.[197] Depositing the original will with the court is a protective measure that helps safeguard the client's testamentary wishes by establishing an official record of the will's existence.[198]

Additionally, whether an attorney must monitor court records to ensure the probate of a will likely depends on various factors and the specific circumstances at hand. Generally, an attorney may not have a duty to continually monitor court records to confirm probate proceedings for a will.[199] This is because there can be legitimate reasons why a will is not probated, such as alternative estate planning arrangements or family settlements.[200] However, agreements made with the client, either explicit or implicit, can always modify the attorney's duties.[201] Thus, while generally there would be no duty to monitor, a contract with the client can change this. This is also a situation where depositing the will with the appropriate court would be the best practice for any attorney.[202] Notifying those interested in the will that it has been deposited with the appropriate court would prevent them from claiming that the client died intestate and would absolve the attorney from having to ensure the will is probated.

In conclusion, possibly the best solution to avoid both of these questions is to deposit the original will with the appropriate court. By performing this action, the attorney safeguards the client's interests and ensures that the court is aware of potential misconduct or wrongful actions that could subvert the client's testamentary intentions. Doing so will frustrate the executor or beneficiary who tries to claim the client died intestate or who fails to probate the will for a nefarious reason.

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[195] N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 521 (1980), https://archive.nysba.org/CustomTemplates/Content.aspx?id=7540.

[196] *See id.*

[197] *See* discussion *supra* Section II.C.1 (discussing will deposit statutes).

[198] *See* discussion *supra* Section II.C.1 (discussing the benefits of depositing a will with the appropriate court under a will deposit statute).

[199] *See* discussion *supra* Section II.B (discussing how an agreement with a client may require an attorney to monitor the client's health status to ensure the probating of a will).

[200] *See infra* Section III.A.1 (discussing the presumption of revocation and the reasons for failing to probate a will).

[201] *See* discussion *supra* Section II.B (discussing how an agreement with a client may alter an attorney's duties).

[202] *See* discussion *supra* Section II.C.1 (discussing the benefits of depositing a will with the appropriate court under a will deposit statute).

3. Option Three: Inaction

The final option for an attorney under the second fact scenario is to do nothing. However, opting for this passive approach would likely be an ethical violation because the client allowed the attorney to keep the will so it would be safe and then take effect after the client's death. Failing to effectuate that intent could result in an ethical breach, leading to potential consequences.

First, one of the fundamental ethical duties between an attorney and a client is the duty to provide competent legal representation.[203] "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[204] Various legal authorities have already determined that when the problem in the second fact scenario occurs, the appropriate action is filing the will with the court.[205] In fact, some state statutes make this a mandatory requirement and punish those who fail to act.[206] Additionally, legal authorities have recognized the ability of attorneys to notify and provide interested parties with the testator's original will.[207] Thus, the "standards of competent practitioners"[208] would seem to dictate taking one of those actions since authorities have considered them mandatory or appropriate.[209] Consequently, failing to take one of those actions may demonstrate an attorney's lack of competence in fulfilling his or her responsibilities to the client.

Next, attorneys must "act with reasonable diligence and promptness in representing a client."[210] This requires attorneys to be proactive and timely to protect their client's interests.[211] For example, "[a] client's interests often can be adversely affected by the passage of time . . .; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed."[212] Most jurisdictions have specific statutes of limitations that impose deadlines for initiating the probate of a will.[213] If the attorney does not deposit the will with the court or notify interested parties of its existence, it could lead to a situation where the statute of limitations for probate expires.[214] In some cases, this could prevent the will from being admitted to probate, leaving the deceased person's estate at risk of mismanagement or unintended distribution. Thus, the attorney's failure to file or deliver to the appropriate parties could constitute a failure to exercise due diligence.

Every state has adopted some form of MRPC 1.1 and MRPC 1.3.[215] Under MRPC 8.4, which has

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203 *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (Am. Bar Ass'n 1983).

204 *Id.* at r. 1.1 cmt. 5.

205 *See supra* Section II.C.1 (discussing will deposit statutes).

206 *See supra* Section II.C.1 (discussing mandatory provisions in will deposit statutes that require attorneys to deliver wills upon notice of a testator's death).

207 *See supra* Section II.C.2 (discussing implied consent in the estate planning context).

208 MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (Am. Bar Ass'n 1983).

209 *See supra* Section II.C.1-2 (discussing mandatory provisions in will deposit statutes that require attorneys to deliver wills upon notice of a testator's death and noting that a lawyer may have an ethical duty to inform interested parties that they hold the client's original will).

210 MODEL RULES OF PRO. CONDUCT r. 1.3 (Am. Bar Ass'n 1983).

211 *Id.*

212 *Id.* at r. 1.3 cmt. 3.

213 *E.g.*, Tex. Est. Code Ann. § 256.003(a) (West 2023).

214 *See generally id.* (noting that the statute of limitations to probate a will is four years, absent some exceptions).

215 *See Variations of the ABA Model Rules of Professional Conduct Rule 1.1: Competence*, AM. BAR ASS'N (July 21, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-1.pdf; *Variations of the ABA Model Rules of Professional Conduct Rule 1.3: Diligence*, AM. BAR ASS'N (Nov. 18, 2022),

also been adopted in some form by every state,[216] it is considered professional misconduct for a lawyer to violate the MRPC (or its state counterpart).[217] Thus, if a lawyer breaches a jurisdictional variation of one of these rules, the lawyer could be punished for professional misconduct.[218] Additionally, an attorney could be subject to civil liability through a malpractice claim.[219]

In conclusion, doing nothing under the second scenario may result in an attorney's ethical breach when he or she fails to take necessary actions. This failure to fulfill his or her ethical duties of competence and diligence can lead to severe consequences for the attorney. Those include professional discipline, damage to his or her reputation, and civil liability. Therefore, it is crucial for attorneys to take action when faced with a situation similar to the second scenario.

D. Ethical Consideration Three: Intestate Death Claim After Providing the Original Will

Consider the third fact scenario in Part I: the attorney discovers the client's estate is proceeding via intestacy after handing over the original will. When this scenario occurs, attorneys have a choice about what to do. The proactive route involves notifying the court, which paves the way for the faithful execution of the client's intentions. In contrast, the passive choice of doing nothing raises ethical concerns, potentially subjecting the attorney to liability and allowing claims of intestacy to prevail against the client's wishes.

1. Option One: Notify the Court

Upon learning of assertions of an intestate passing after a client's death, an attorney's recommended course of action is to provide a copy of the will to the court. This is especially true if the attorney believes the will's non-probate status is motivated by malicious or "evil" intent. If the executor or beneficiary is a client and the attorney has concerns about breaching the attorney-client privilege or the duty of confidentiality, this approach is allowable under MRPC 1.6 and its state counterparts. Overall, this approach considers the attorney's ethical obligations and helps ensure that the client's intentions are realized.

If the executor hires the attorney to help resolve the decedent's estate, then the attorney's conduct would be governed by MRPC 1.6 or its state counterpart.[220] "[T]he executor or administrator occupies a fiduciary relationship in respect to all parties having an interest in the estate including heirs, beneficiaries under the will and creditors . . . and, as a fiduciary, has the duty towards such parties to protect their legal rights in the estate."[221] Suppose the executor contacts the attorney so he or she can use the attorney's services to locate and destroy the will. In that

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-3.pdf.

216 *See Variations of the ABA Model Rules of Professional Conduct Rule 8.4: Misconduct*, AM. BAR ASS'N (Feb. 7, 2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

217 MODEL RULES OF PRO. CONDUCT r. 8.4(a) (Am. Bar Ass'n 1983).

218 *See generally Punishment for Professional Misconduct*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/MisconductPunishment.htm (last visited Oct. 13, 2023) (discussing the types of punishment that an attorney may incur for professional misconduct in Texas).

219 *Infra* Part IV (discussing jurisdictional approaches that may subject an attorney to liability by a third party); *see generally* Paul Koning, *Legal Malpractice in Texas – The Basics*, KONING RUBARTS LLP (Nov. 2018) *https://www.koningrubarts.com/wp-content/uploads/2017/06/September-2017-Legal-Malpractice-in-Texas-the-Basics-00013001xC17CD.pdf* (discussing the elements of a legal malpractice claim in Texas).

220 *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2)-(3) (AM. BAR ASS'N 1983).

221 *E.g.*, Nathanson v. Super. Ct., 525 P.2d 687, 693 (Cal. 1974).

case, the executor is using the attorney's legal services to engage in fraudulent or criminal activity, which may result in significant financial harm to the beneficiaries for whom the fiduciary is acting.[222] In most jurisdictions, if such misconduct by the fiduciary occurs, the attorney is allowed to reveal confidential information to the extent necessary to safeguard the interests of these beneficiaries.[223] As discussed later, an attorney may be liable to third parties, even without an attorney-client relationship.[224]

When the attorney notifies the court, he or she must follow several steps. To start, the lawyer must clarify that the deceased client made a will. This information sets the foundation for everything that follows and highlights the legal background of what is happening. At the same time, the lawyer should emphasize that he or she gave the original will to the person named as executor or beneficiary. Sharing this information connects the will to the right person and allows the court to assess the situation concerning that individual.

Moreover, the lawyer should provide the court with a physical or electronic copy of the will. This concrete submission is essential because it provides support for the lawyer's assertions and allows the court to see the client's intentions at the time he or she executed the will. The court may use this information to decide the propriety or impropriety of not submitting the original will for probate.

2. Option Two: Inaction

Alternatively, the attorney could opt for inaction. The repercussions of inaction have already been discussed.[225] However, one additional consideration pops up if the attorney suspects misconduct. Many states have laws requiring individuals to report the suspected abuse of vulnerable populations.[226] Thus, failing to do so could subject an attorney to violation of his or her state's mandatory reporting laws.

A " lawyer may be required to disclose [a] fiduciary's misconduct under the substantive law of the jurisdiction in which the misconduct is occurring."[227] For example, many states require attorneys to disclose suspected abuse of elderly individuals.[228] Using Texas law as an example, "[a] person commits an offense if the person knowingly engages in the financial abuse of an elderly individual."[229] Financial abuse includes "the wrongful . . . obtaining . . . of money or other property of another person by a person who has a relationship of confidence or trust with the other person."[230] "[A] person has a relationship of confidence or trust with another person if the person . . . is a parent, spouse, adult child, or other relative by blood or marriage of the other person[or]. . . has a legal or fiduciary relationship with the other person."[231]

Thus, consider the scenario where a daughter is the executor of her father's estate. The daughter knows her father left his substantial estate to his elderly sister. The daughter knows that destroying the will would allow her to inherit the estate instead under the state's intestacy laws. In this case, if the daughter retrieves her father's original will from the attorney and knowingly fails to probate it, she may be committing elder abuse against her aunt, which an attorney would

222 *See generally* THE AM. COLL. OF TR. AND EST. COUNS. FOUND., *supra* note 9, at 84 (discussing instances where an attorney may disclose a fiduciary's commission of, or intent to, commit a crime).

223 *Id.*

224 *Infra* Part IV (discussing jurisdictional theories on how an attorney can be held liable to third parties).

225 *Supra* Section II.C.3 (discussing the possible repercussions for inaction after receiving notice of a client's death).

226 Richard Thomas & Monique Reeves, *Mandatory Reporting Laws*, NAT'L LIBR OF MED.: NAT'L CENT. FOR BIOTECHNOLOGY INFO. (July 10, 2023), https://www.ncbi.nlm.nih.gov/books/NBK560690/.

227 *Id.* at 84.

228 *E.g.*, TEX. HUM. RES. CODE ANN. § 48.052 (West 2023).

229 TEX. PENAL CODE ANN. § 32.55(c) (West 2023).

230 *Id.* at § 32.55(a)(1)-(3)

231 *Id.* at § 32.55(b)(3).

have to report if suspected. Mandatory reporting laws, "and the populations they cover, vary by state, [but] they generally include children, the disabled, and the elderly."[232] Therefore, there are many instances where the law may require an attorney to report if he or she suspects a will's non-probate status is motivated by malicious or "evil" intent.

In conclusion, the option of inaction might inadvertently lead to adverse consequences. The attorney-client relationship rests on the attorney's commitment to safeguarding the client's interests, especially when confronted with challenges after the client's death. By choosing a path of inaction, the attorney risks inadvertently enabling outcomes that defy the client's testamentary intentions and possible liability under state reporting statutes.

E. Best Practices for Attorneys Who Keep the Client's Original Will

When considering whether a lawyer should retain the client's original will, carefully evaluating the pros and cons is essential. On the positive side, retaining the original will can prevent the client from misplacing or concealing it, ensuring its safekeeping and accessibility upon his or her passing.[233] Additionally, this approach guards against a disinherited heir discovering and destroying the will.[234] Furthermore, maintaining the original will increases the likelihood of continued engagement, with clients more inclined to seek the lawyer's assistance for modifications and their families considering the lawyer for probate proceedings.

However, one of the potential drawbacks includes the inability of the client to make changes to or otherwise control the original.[235] Also, the lawyer may incur additional costs and efforts for safeguarding the original will.[236] Finally, the lawyer must devise a plan to manage the will's transfer if the lawyer changes firms, becomes incapacitated, retires, or dies.[237] Careful consideration of these factors is crucial when deciding to retain the original will.

In addition to the pros and cons, attorneys who retain the original will should observe the following guidelines. First, the attorney should prepare a comprehensive contract with the client that clearly outlines the attorney's responsibilities concerning the will.[238] This contract should include specific provisions regarding whether the attorney must ascertain the client's death.[239] Once the client has passed away, the attorney should promptly determine the appropriate entity or individual to whom to give the will.[240] This may include the court, the named executor, a designated beneficiary, or another authorized person.[241] In addition to handing over the will, it is crucial to remain attentive to the probate process. This includes monitoring and confirming whether probate proceedings are initiated. By keeping track of probate activities, the attorney can ensure that the appropriate legal procedures are followed and that the will is given the necessary consideration and effect as the deceased client intended.

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[232] Thomas & Reeves, *supra* note 226.

[233] Beyer, *supra* note 12, at 269.

[234] *Id.* at 269-70.

[235] Beyer, *supra* note 12, at 251.

[236] *See Where to Store a Last Will*, Legal Zoom (Sept. 1, 2023), https://www.legalzoom.com/articles/where-to-store-a-last-will.

[237] *See Should Lawyers Keep Their Clients' Original Documents*, SLUTSKY ELDER L. (July 25, 2021), https://slutskyelderlaw.com/blog/news/should-lawyers-keep-their-clients-original-documents/.

[238] *Infra* Appendix A (providing a sample agreement that attorneys can modify to suit the needs of their client and their jurisdiction).

[239] *Supra* Section II.B (discussing the general lack of duty to monitor a client's health status and how that duty can be added via agreement with the client).

[240] *Supra* Section II.C (discussing the appropriate entity to give a will to after receiving notice of a client's death).

[241] *Supra* Section II.C (discussing the appropriate entity to give a will to after receiving notice of a client's death).

III. ETHICAL CHALLENGES IN HOLDING COPIES OF CLIENT WILLS

In addition to the ethical concerns surrounding the retention of the client's original will, ethical complexities surround the retention of a *copy* of a client's will. When these concerns arise, attorneys must balance the responsibility of maintaining professional integrity with preserving the client's interests. This Part will explore one of the ethical challenges attorneys may face when holding a copy of a client's will. Additionally, appendix B provides sample provisions that an attorney can insert into a contract between the client and attorney to address the issues discussed below.

Generally, nothing prohibits clients from retaining the original copy of their will because the will is the client's property.[242] However, attorneys must guide their clients regarding appropriate safekeeping practices and emphasize the importance of ensuring that the original will is easily accessible upon the client's passing.[243] Misplacing or failing to locate the original document after the client's death can lead to significant complications and potential disputes among beneficiaries.[244] One recommended practice is advising clients to store the original will securely, such as in a safe deposit box at a bank or a fireproof safe at home.[245]

However, consider the fact pattern in scenario four. This scenario illustrates the ethical problems that may result when allowing clients to retain their original will. If the attorney drafts a will for a client and then allows the client to take the original, what duty does the attorney have if he or she later learns that the family is claiming the client has died intestate? Unlike many other scenarios, in this particular case, opting for inaction may be a reasonable choice. This is because the attorney lacks knowledge regarding several potential actions a client might have taken. But what about situations where potential ill will is involved? When faced with such uncertainty, there are several crucial factors that an attorney should consider before deciding whether or not to take any action.

A. Option One: Inaction

When the will is absent upon the testator's passing, a presumption emerges that the testator deliberately destroyed the will as an act of revocation.[246] Subsequently, the person claiming the will's existence has the burden of countering this presumption.[247] Several states have enacted legislative provisions outlining how the claimant can challenge the presumption of revocation.[248] The requirements for overcoming the presumption will vary by state.[249] In most cases, however, to challenge the presumption of revocation, evidence for why the will is not available will need to be presented.[250] The reason presented should be compelling enough to convince the court that no reasonable effort could result in locating the will.[251] Moreover, the will's

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242 *See* N.Y. State Bar Ass'n. Comm. on Pro. Ethics, Op. 724 (1999) ("After the client executes the will, the lawyer may provide the original will to the client, along with appropriate advice concerning its safekeeping.").

243 *See id.*

244 *See* Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices-Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 124 (1984).

245 *Id.* at n.428, 131.

246 *Id.* at n.428, 124 (1984); *see e.g.*, NEV. REV. STAT. ANN. § 136.240 (West 2023) (discussing requirements necessary to overcome the presumption of revocation in Nevada); ARK. CODE ANN. § 28-40-302 (West 2023) (listing requirements to overcome the presumption in Arkansas).

247 Bailey v. Bailey, 171 S.W.2d 162, 165 (Tex. App.—Amarillo 1943, no writ).

248 *See* GA. CODE ANN. § 53-4-46(b); KAN. STAT. ANN. § 59-2228.

249 *See Establishment of Will Lost Before Testator's Death*, 34 A.L.R. 1304 (Originally published in 1925) (analyzing the different requirements under state law to overcome the presumption of revocation).

250 *E.g.*, TEX. EST. CODE ANN. § 256.156 (West 2023).

contents must be adequately substantiated through the testimony of a reliable witness who has either seen the original will, reviewed a copy of it, been present when it was read, or can positively identify a copy of the will.[252] If the claimant meets the applicable requirements, he or she can overcome the presumption of the revoked will.[253]

In at least one jurisdiction, the presumption of revocation has been challenged.[254] The Court in *In re Estate of Catlin* reviewed the interpretation of a will believed to be lost.[255] The testator's son asserted that the available evidence fell short of substantiating the claim that the testator had misplaced rather than intentionally revoked the will.[256] The advocate for the will's validity extensively searched for the testator's original.[257] This search encompassed the testator's residence and workplace, scrutiny of safety deposit boxes at various local banks, and an exhaustive review of the attorney's records, who supposedly drafted the missing original.[258] The Court ultimately held that these searches sufficiently proved that the original will could not be produced.[259] In its ruling, the Court stipulated that the stepson was not required to establish the precise circumstances leading to the will's disappearance.[260] However, "[t]he reasoning of the court of appeals makes it impossible for a testator to revoke a will by physical act because even if the will cannot be found and there is no affirmative reason why it cannot be found, a copy may nonetheless be probated."[261] While this decision shocked many[262], Texas courts have upheld the notion as recently as December 2022 in the case of *Estate of Brown*.[263]

Despite Texas's potentially changing landscape, the presumption of revocation is a crucial factor that any attorney should consider when he or she receives notice of a claim of intestacy and has a copy of the client's will. When faced with such a situation, there are several crucial factors that an attorney should balance before deciding whether or not to take any action. One key factor to assess is the passage of time since the attorney prepared the client's will. If a significant amount of time has passed, the client may have revoked the will. In such circumstances, taking no action may be a prudent approach as the original will the attorney prepared might no longer accurately reflect the client's wishes. A second factor is whether or not the will excluded the primary heirs, who will now receive the entire estate via intestacy. This motivation to inherit may point to a motivation to commit acts that ensure the testator's original will is not probated. Failure to act in that situation may violate an attorney's duties to the client. Therefore, there is no blanket answer as to whether inaction in this scenario is right or wrong. The attorney will need to decide after carefully balancing the factors discussed above.

B. Additional Options: Providing Interested Parties or the Appropriate Court with a Copy of the Will

Another possible action an attorney may take includes providing the named executor or beneficiary with a copy of the client's will. This decision depends on whether that action is implicitly authorized to facilitate the estate's settlement and aligns with the client's

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[251] *E.g., id.*

[252] *E.g., id.*

[253] *Bailey*, 171 S.W.2d at 165.

[254] In re Estate of Catlin, 311 S.W.3d 697 (Tex. App.—Amarillo 2010, pet. denied).

[255] *Id.* at 699.

[256] *Id.*

[257] *Id* at 700.

[258] *Id.*

[259] *Id* at 701.

[260] *Id.*

[261] Gerry W. Beyer, *Wills and Trusts*, 64 SMU L. REV. 597, 608 (2011).

[262] *Id.*

[263] Estate of Brown, No. 01-19-00953-CV, 2022 WL 17813757, at *7 (Tex. App.—Houston [1st Dist.] Dec. 20, 2022, pet. filed)

intentions.[264] If these criteria are met, the attorney may provide a copy as deemed appropriate.[265] If conducted properly, this approach will likely satisfy an attorney's ethical duty to his or her client and should relieve him or her of any further duty.[266] Nevertheless, a concern arises about whether or not the executor will probate the will. Because of this concern, an even better option exists for attorneys to pursue.

The attorney may reveal the existence of the copy and provide the document to the proper court if the attorney suspects malicious intent. However, there is some question of whether this is permissible or not. Most states have statutes authorizing attorneys to deposit a will with the court.[267] These statutes typically refer to the original, signed, and properly executed document.[268] The original will is the preferred document for probate because it is considered the best evidence of the testator's intentions.[269] A copy of a will, on the other hand, may not be treated as the legal equivalent of the original will.[270]

However, state laws also authorize the probate of a copy of the will if the presumption of revocation can be overcome.[271] This statutory authorization recognizes the legal validity of a copy under specific conditions.[272] These statutes indicate that the state places importance on the actual intent of the testator rather than a strict requirement for the original will.[273] Therefore, if the attorney has legitimate suspicions of malice, then the court may be willing to accept a copy of the will. However, there is no authority discussing this.

In conclusion, the rules and requirements vary from state to state, and some jurisdictions may allow for copies under specific circumstances. However, without any direct legal authority, it may be challenging to know whether or not the court will accept the copy. Nevertheless, if the attorney suspects malicious intent is the reason behind not probating the original will, then the attorney should bring the copy to the court's attention, which will likely satisfy his or her ethical duty to the client.

IV. POTENTIAL LIABILITY TO NON-CLIENTS

In the introductory scenarios, it is obviously not the client who might bring legal action against the estate planning attorney because the client is deceased. Instead, the prospective beneficiaries who would inherit under the will are the ones who would sue the attorney, believing that the attorney's failure to share important information caused their mistreatment. These beneficiaries might believe that if the attorney had disclosed details about the will, they could have received a more significant portion of the estate compared to what they received through the laws of intestacy. In this instance, the following question arises: Does the attorney have any legal responsibility towards unrelated parties? Depending on the situation, a lawyer might be held accountable to beneficiaries who are not direct clients. The extent of this liability depends on whether the jurisdiction follows the strict privity doctrine. Alternatively, a jurisdiction might permit third parties to take legal action

264 *Supra* Section II.C.2 (discussing implied consent in the context of estate planning).

265 *Supra* Section II.C.2 (discussing when an attorney may provide an interested person the testator's will).

266 *Supra* Section II.C.2 (discussing the attorney's ethical obligations after providing an interested person with the testator's will).

267 *Supra* Section II.C.1 (discussing state statutes that allow an attorney to deposit a will with the appropriate court).

268 *See e.g.*, OHIO REV. CODE ANN. § 2107.07 (West 2023).

269 See Julie Leonard Smith, *Allowing the Probate of Duplicate Wills: Overcoming the Presumption of Revocation and Conflicts with the Statute of Wills*, 9 Conn. Prob. L.J. 87 (1994).

270 *See id.*

271 *See e.g.*, KAN. STAT. ANN. § 59-2228 (West 2023).

272 *See id.*

273 *See id.*

against the attorney based on claims of negligence, a third-party beneficiary, or a modified version of the third-party beneficiary claim. However, an attorney can recommend several methods to the client to reduce the likelihood of potential beneficiaries filing suit. This section discusses each of these concepts.

A. Historical Malpractice Liability: The Doctrine of Strict Privity

Historically, the prevailing view was a stringent notion known as strict privity.[274] According to this doctrine, "the attorney did not owe a duty to an intended beneficiary, a non-client, because there was no privity between the attorney and the beneficiary."[275] The jurisdictions that adhered to this doctrine consistently refused to grant beneficiaries standing, regardless of whether their claim involved negligence or the concept of third-party beneficiary contracts.[276]

Some states still follow the doctrine of strict privity.[277] The courts in these states argue for preserving strict privity by emphasizing the potential problems that may arise if potential beneficiaries can bring lawsuits against attorneys.[278] These potential lawsuits could allow disappointed beneficiaries to contest a decedent's will, potentially undermining the attorney's ability to provide effective client representation.[279] Moreover, concerns arise about the potential erosion of attorney-client confidentiality.[280] Expanding the scope of liability could force attorneys to disclose confidential information contrary to the testator's wishes, weakening the attorney's duty to prioritize the client's best interests.[281] Overall, these states highlight the balance between maintaining strong attorney-client relationships, preventing unlimited legal exposure, and preserving a testator's intent.[282]

Some states abide by the strict privity doctrine but allow executors to sue an estate planning lawyer for malpractice on the estate's behalf.[283] Usually, claims that arise from estate planning malpractice and that seek recovery for pure economic loss are limited to recovering property damage.[284] These states recognize that estate planning malpractice claims can survive if the alleged negligence occurred during the client's lifetime.[285] However, an estate is not a legal entity capable of suing or being sued.[286] Instead, these states allow the estate's personal representative the capacity to bring such claims.[287] These states recognize a relationship similar to privity between the estate's personal representative and the estate planning attorney, which enables the estate to bring claims for

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[274] Beyer, *supra* note 12, at 230.

[275] *Id.*

[276] Charles A. Redd, *Malpractice in Estate Planning: Some Guidance on How to Avoid It*, HEART OF AM. FELLOWS INST. 3 (Mar. 1, 2019) https://hoafellowsinstitute.org/wp-content/uploads/2020/01/March-1-2019-Hearts-of-America-Fellows-Institute-Outline-Malpractice-in-Estate-Planning_-Some-Guidance-on-How-to-Avoid-It.pdf.

[277] *Id.*

[278] *See generally* Robinson v. Benton, 842 So. 2d 631, 636–37 (Ala. 2002) (providing background information on the doctrine of strict privity and the concerns it addresses); Baker v. Wood, Ris & Hames, P.C., 364 P.3d 872, 876–78 (Colo. 2016) (discussing the doctrine of strict privity).

[279] *Robinson*, 842 So. 2d at 637; *Baker*, 364 P.3d at 878.

[280] *Baker*, 364 P.3d at 877–78.

[281] *Id.*

[282] *See generally* Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996) (discussing the reasons for maintaining a strict privity requirement in the context of estate planning).

[283] Redd, *supra* note 276, at 3.

[284] Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 785 (Tex. 2006).

[285] *Id.* at 786.

[286] *Id.*

[287] *Id.* at 786-87; Estate of Schneider v. Finmann, 933 N.E.2d 718, 720 (N.Y. 2010).

negligent estate planning.[288] These courts do not find the rationale supporting the strict privity doctrine relevant in malpractice cases brought on behalf of an estate.[289]

Additionally, these states assume that serving as the estate's personal representative will dissuade beneficiaries from filing suit to address their inheritance losses.[290] This is because personal representatives who mishandle their responsibilities can be removed from the position.[291] Additionally, any damages will be incurred by the client's estate, paid to the estate first, and then distributed according to the decedent's estate plan.[292] Therefore, any recovery to disappointed beneficiaries is contingent upon provisions within the estate plan that benefit them and align with the decedent's intentions.[293]

Finally, the general practice in states that adhere to the doctrine of strict privity is that non-clients can only file claims for fraud or negligent misrepresentation.[294] For example, if an attorney's negligence caused the estate to incur enhanced estate tax liability, then the executor may file a negligence action on behalf of the estate against the attorney.[295] Therefore, attorneys in strict privity jurisdictions likely will not have to worry about third-party claims so long as the claims do not involve fraud, misrepresentation, or an executor's claim of negligent estate planning on behalf of the estate. Consequently, the doctrine only provides a remedy for egregious malpractice.[296] For that reason, numerous jurisdictions have been shifting towards alternative approaches that could potentially grant beneficiaries the opportunity to initiate legal proceedings.

B. Modern Malpractice Liability: The Imposition of Liability

A prevailing trend across jurisdictions has been to abandon the strict privity doctrine and permit beneficiaries to pursue legal action.[297] This shift is often observed in courts rather than through legislative adoption.[298] These state courts have usually adopted one of three approaches: a balancing of factors test, the California approach, the Florida-Iowa rule, and a third-party beneficiary of contract theory.[299]

1. Balancing of Factors Under a Tort Claim – The California Approach

In 1958, the California Supreme Court modified the strict privity rule in malpractice actions, sparking change across the United States.[300] That case, *Biakanja v. Irving*, held that a beneficiary could still seek and recover damages for a loss in tort when an attorney negligently prepared an invalid will, even if privity was absent.[301] The defendant in that case was not a licensed attorney but was a notary public.[302]

In *Lucas v. Hamm*, the Court extended its holding to attorneys.[303] The Court allowed the plaintiff to

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288 *Belt*, 192 S.W.3d at 786–87; *Estate of Schneider*, 933 N.E.2d at 720-21.

289 *Belt*, 192 S.W.3d at 787.

290 *Id.* at 787–88.

291 *Id.*

292 *Id.*

293 *Id.*

294 Kaitlyn C. Kelly, *Put Privity in the Past: A Modern Approach for Determining When Washington Attorneys Are Liable to Nonclients for Estate Planning Malpractice*, 91 WASH. L. REV. 1851, 1870 (2016).

295 *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006); Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010).

296 Estate of Cabatit v. Canders, 105 A.3d 439, 442-43 (Me. 2014).

297 Fabian v. Lindsay, 765 S.E.2d 132, 137 (S.C. 2014).

298 *Id.*

299 *Id.*

300 *Id.*

301 Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).

302 *Id.* at 17.

303 Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).

recover via a tort theory and through a third-party beneficiary of contract theory.[304] The Court looked at the factors laid out in *Biakanja* and stated,

[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.[305]

The Court went on to apply those factors, reasoning that one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.[306]

Additionally, because the defendant in that case was an attorney, the Court added an extra factor "not present in *Biakanja*, namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."[307] In this case, the Court did not find an undue burden on the profession.[308] They found that, while exposure to this type of liability could be significant and unpredictable, the exposure to beneficiaries injured by a negligently drawn will would not differ from the possible liability an attorney could face from his or her client (which could also be significant and unpredictable).[309] When making this determination, the Court stressed that coming to the opposite conclusion would force an innocent beneficiary to bear the consequences of an attorney's professional negligence.[310]

Since these decisions, other jurisdictions have enacted similar approaches.[311] One court in Arizona, for example, held that "the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors."[312] Additionally, Kansas courts have found the reasoning of the California approach persuasive, concluding "that an attorney may be liable to parties not in privity based upon the balancing test developed by the California courts."[313] These cases illustrate the erosion of the strict privity doctrine in favor of a more liberalized approach. Therefore, any attorney in a jurisdiction that follows the California approach could be held liable to beneficiaries injured by the attorney's negligence. This could encompass any of the scenarios discussed above, such as failing to deposit the will with the appropriate court or failing to notify interested parties of the original will's existence.

2. The Florida-Iowa Rule

Other jurisdictions have adopted another form of recovery that allows third-party beneficiaries to seek recovery for the improper drafting of a will, known as the Florida-Iowa Rule.[314] The Florida-Iowa doctrine arose from the California Court of Appeals' judgment in *Ventura County Humane*

304 *Id.* at 688-89.

305 *Id.* at 687.

306 *Id.* at 688.

307 *Id.*

308 *Id.*

309 *Id.*

310 *Id.*

311 Fabian v. Lindsay, 765 S.E.2d 132, 138 (S.C. 2014).

312 Fickett v. Super. Ct. of Pima County, 558 P.2d 988, 990 (Ariz. App. 2d Div. 1976).

313 Pizel v. Zuspann, 795 P.2d 42, 51 (Kan. 1990).

314 *Fabian*, 765 S.E.2d at 138.

Society v. Holloway, decided after the *Biakanja* and *Lucas* cases.[315] In that case, the attorney drafted a will containing a bequest worded ambiguously as a donation to the "SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (Local or National)."[316] This situation prompted the plaintiffs and other humane societies to initiate several claims in probate court.[317] This ultimately led to costly and time-consuming proceedings to determine the validity of the claims and the postponement of estate distributions.[318] While the Court found that the plaintiffs had standing to sue based on the criteria set out in *Biakanja* and *Lucas*, it ultimately ruled that "an attorney may be held liable to the testamentary beneficiaries only . . . if due to the attorney's professional negligence the testamentary intent expressed in the will is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence."[319]

Although *Ventura County Humane Society* has not been overruled, a subsequent California Court of Appeals ruling limited its applicability to scenarios where ambiguities within the will arise due to inadequate instructions provided by the testator to the drafting attorney.[320] Notwithstanding that decision, Florida and Iowa courts embraced the principles outlined in *Ventura County Humane Society* and established what is now referred to as the Florida-Iowa rule.[321] This rule determines whether intended beneficiaries can assert legal malpractice claims.[322] Under the Florida-Iowa rule, the focus is on the testamentary intent expressed in the will, thereby precluding the use of extrinsic evidence to contradict the testator's intentions as manifested in the will.[323]

The rule is laid out as follows:

> [a]n attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third-party beneficiaries). However, liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, "as expressed in the will, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence. There is no authority—the reasons being obvious—for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, the testator's testamentary intent was other than as expressed in his solemn and properly executed will.[324]

Stated differently, "a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."[325]

Some jurisdictions have expressed concerns over barring extrinsic evidence, finding that it is often necessary to resolve claims.[326] However, jurisdictions other than Florida and Iowa have

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315 Max N. Pickelsimer, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose A Duty to Intended Beneficiaries of A Will?*, 58 S.C. L. REV. 581, 589 (2007).

316 Ventura County Humane Socy. v. Holloway, 115 Cal. Rptr. 464, 466 (Cal. App. 1st Dist. 1974).

317 *Id.*

318 *Id.* at 466-67.

319 *Id.* at 468.

320 Bucquet v. Livingston, 129 Cal. Rptr. 514, 520 (Cal. App. 1st Dist. 1976).

321 Pickelsimer, *supra* note 315, at 589.

322 *Id.*

323 *Id.* at 589-90.

324 DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. 3d Dist. App. 1983).

325 Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987).

326 Fabian v. Lindsay, 765 S.E.2d 132, 139 (S.C. 2014).

implemented this theory.[327] Therefore, this theory remains a viable possibility for an attorney to be held liable by intended beneficiaries.

3. Third-Party Beneficiary of Contract Theory

A final theory recognized by jurisdictions is based on a third-party beneficiary of a contract approach.[328] Generally, the third-party beneficiary approach states, "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person."[329] Courts that have adopted the third-party beneficiary approach have extended the principle to third-party beneficiaries of a will.[330]

Essentially, "[t]his approach focuses upon whether the primary purpose of the client-attorney relationship was to benefit the non-client."[331] The core idea behind a third-party beneficiary's claim is that multiple parties have mutually agreed to benefit the third party, but one party in the agreement fails to fulfill their obligation.[332] This approach "focuses the existence of a duty entirely on whether the plaintiff was the person intended to be benefitted by the legal services and does not extend to those incidentally deriving an indirect benefit."[333] In simpler terms, non-clients must be intended beneficiaries rather than incidental ones.[334]

In the 1983 case of *Guy v. Liederbach*, the Pennsylvania Supreme Court set forth a two-part test to determine if a person is an intended third-party beneficiary under the Restatement (Second) of Contracts § 302 (the intended and incidental beneficiaries provision).[335] The Court stated the test as follows:

There is thus a two part test for determining whether one is an intended third party beneficiary: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.". . . If the two steps of the test are met, the beneficiary is an intended beneficiary "unless otherwise agreed between promisor and promisee."[336]

The test's first element establishes a prerequisite for legal standing: the right to performance should align with the parties' intentions for any lawsuit to proceed.[337] This condition limits the second part of the test, which categorizes intended beneficiaries as creditor beneficiaries or donee beneficiaries, though the Restatement (Second) of Contracts does not define these terms.[338] Section 302(2) designates unintentional beneficiaries as incidental beneficiaries.[339] The standing requirement grants trial courts discretion to decide if acknowledging third-party beneficiary status is suitable.[340]

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327 *See* Mieras v. DeBona, 550 N.W.2d 202 (1996) (holding that the beneficiary named in a will may bring a tort-based action for negligence in drafting the will, but the court will not look at extrinsic evidence).

328 *Fabian*, 765 S.E.2d at 139.

329 Bob Hammond Const. Co., Inc. v. Banks Const. Co., 440 S.E.2d 890, 891 (S.C. App. 1994); *see also* Donahue v. Shughart, Thomson, & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995) (holding that privity is not required if "an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs.").

330 *Fabian*, 765 S.E.2d at 139.

331 Blair v. Ing, 21 P.3d 452, 461 (Haw. 2001).

332 Copenhaver v. Rogers, 384 S.E.2d 593, 596 (1989).

333 *Donahue*, P.C., 900 S.W.2d at 628.

334 *Ing*, 21 P.3d at 460.

335 Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983)

336 *Id.*

337 *Id.*

338 *Id.*

339 *Id.*

340 *Id.*

By introducing this cause of action, some courts have held that it does not significantly deviate from the existing legal malpractice framework.[341] They found that when a client engages an attorney for estate planning intending to provide for beneficiaries, an attorney-client relationship emerges, forming the foundation for the attorney's responsibility to fulfill the client's intent.[342] "This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries."[343] Thus, offering recourse for beneficiaries in cases where the client has passed away effectively enforces the client's intention, "and the third party is in privity with the attorney."[344] The actionable misconduct in such scenarios is the breach of the attorney's duty to the client.[345] These courts have held that maintaining strict privity would "improperly immunize this particular subset of attorneys from liability for their professional negligence."[346] They also found that the third-party contract beneficiary theory would not impose an undue burden on the profession, holding that it would place attorneys in a position similar to attorneys in other practice areas.[347] Therefore, jurisdictions that recognize this theory could subject an attorney to liability by intended beneficiaries.

C. Reducing the Likelihood of Potential Beneficiaries Filing Suit

There are several ways an attorney might influence the client to formulate the will in such a manner as to reduce the likelihood of potential beneficiaries filing suit. Those include no-contest provisions, carefully choosing the language in the will, carefully drafting the disposition provisions in the will, and utilizing ante-mortem probate procedures, if available. The cost and predictability of results associated with these techniques can vary considerably.[348] Additionally, an attorney must individually assess each case's merits before determining which, if any, of the methods to employ.[349] Furthermore, the attorney must delve into state laws to ascertain the validity and efficacy of each approach.[350]

1. No-Contest Provisions

A no-contest provision in a will states that if a beneficiary contests the will, he or she may lose some or all of the benefits specified in the will.[351] These provisions are favored because they are cost-effective and low-risk, as they don't incur penalties if deemed unenforceable.[352] They aim to fulfill the testator's intentions and avoid intestacy.[353]

Most jurisdictions uphold no-contest provisions, but some consider them invalid.[354] Even when valid, courts strictly interpret no-contest provisions and try to avoid forfeiture, treating beneficiary suits as will interpretation rather than contests to prevent loss of benefits.[355] No-contest provisions are justified as safeguarding the testator's intent, preventing wasteful litigation, and family conflicts.[356] However, enforcing no-contest provisions can be against public policy, especially if they aid a wrongdoer who fraudulently influenced the will.[357] Some

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341 Fabian v. Lindsay, 765 S.E.2d 132, 140 (S.C. 2014).

342 *Id.*

343 *Id.*

344 *Id.*

345 *Id.*

346 *Id.*

347 *Id.*

348 Gerry W. Beyer, *Will Contests – Prediction and Prevention*, 4 Est. Plan. & Cmty. Prop. L.J. 1, 5 (2011).

349 *Id.*

350 *Id.*

351 *Id.* at 7.

352 *Id.*

353 *Id.*

354 GERRY W. BEYER, WILL, TRUSTS, & ESTATES 222 (Rachel E. Barkow et al. eds., 8th ed. 2022).

355 *Id.* at 222-23.

356 *Id.* at 223.

357 *Id.*

jurisdictions limit no-contest provisions so beneficiaries can bring contests in good faith and with probable cause without worry that forfeiture will occur.[358]

To make a no-contest provision effective, the attorney must carefully draft the provision to specify the conduct triggering forfeiture.[359] The testator should designate an alternate recipient for the forfeited property who will defend the will vigorously.[360] Some states may require the testator to provide a gift to another person upon breach of the provision.[361] The attorney should explicitly state the client's intent behind the provision regarding good faith and probable cause to provide clarity for beneficiaries and the court.[362]

2. Carefully Choosing the Language of the Will

Carefully selecting the language in a will can also discourage potential beneficiaries from challenging it.[363] The testator can explain his or her reasons for specific bequests, such as providing more to a mentally challenged child, one with substantial medical expenses, a large family, or still in school.[364] They may also justify significant charitable donations and mention that family members have sufficient assets.[365] This approach assumes that dissatisfied heirs are less likely to contest the will if they understand the rationale behind their smaller share.[366]

Moreover, testators should avoid using hurtful language in their wills.[367] Heirs who feel emotionally and financially slighted are more prone to contest the will.[368] Additionally, the estate could face liability under the doctrine of testamentary libel if the will is made public after probate.[369] Courts have differing views on testamentary libel, with some removing offensive content, some holding the estate accountable for damages, and others denying the cause of action based on privileges or the testator's death in personal injury cases.[370]

3. Carefully Drafting the Disposition Provisions in the Will

Unconventional dispositions in a will, like disinheriting close family members or treating children differently, can lead to legal challenges.[371] To mitigate this, the attorney may advise the testator to consider aligning his or her plan with a more traditional arrangement, even if it's not his or her preferred choice.[372] This adjustment can reduce the motivation for potential beneficiaries to bring suit.[373]

Alternatively, estate planning techniques, such as non-probate transfers like inter vivos gifts, multiple-party accounts, and life insurance, can be used to carry out unique dispositions.[374] For example, the testator could make a substantial inter vivos gift to a disinherited heir when he or she executed the will, which is considerably less than what the heir would receive through intestacy.[375] This strategy reduces the likelihood of the heir contesting the will based on the testator's mental capacity, as the heir would have accepted a gift from someone lacking capacity.[376] If the contest is successful, the heir may have to

358 *Id*.

359 Beyer, *supra* note 348, at 9.

360 *Id.* at 10.

361 *Id*.

362 Beyer, *supra* note 354, at 224.

363 Beyer, *supra* note 348, at 11.

364 *Id.*

365 *Id.*

366 *Id.*

367 *Id.* at 12.

368 *Id.*

369 *Id.*

370 Beyer, *supra* note 354, at 226.

371 Beyer, *supra* note 348, at 42.

372 *Id.* at 42-43.

373 *Id.* at 43.

374 *Id.*

375 *Id.*

376 *Id.*

return the received property to the estate or use it to offset his or her intestate share.[377]

4. Ante-Mortem Probate

The widely used post-mortem probate model in the United States faces a significant flaw, as the testator, a crucial witness, is deceased, leaving courts with only indirect evidence, which dissatisfied beneficiaries can manipulate to initiate baseless will contests.[378] Although various techniques discussed earlier can help, they do not provide the ideal solution of having the testator physically present for observation during probate proceedings.[379] Ante-mortem probate offers a remedy.[380] Under the contest model of ante-mortem probate, a testator executes a will and seeks a declaratory judgment to validate it while confirming that the testator and attorney met all formalities, the testator had the required capacity, and wasn't under undue influence.[381] Beneficiaries and potential heirs are notified and can contest the probate.[382] If the court deems the will valid, it remains effective for disposing of the testator's property upon his or her death unless the testator makes a new will or revokes the old one.[383] This process aims to prevent post-mortem disputes and baseless challenges.[384]

Ante-mortem probate can act as a powerful deterrent against potential will beneficiaries filing suits.[385] By confirming the validity of the will before the testator's death, any concerns about undue influence, lack of testamentary capacity, attorney negligence, or other irregularities can be addressed, providing a clear and legally approved document.[386] This significantly reduces the motivation for beneficiaries to file suit after the testator's passing, as the court has already confirmed its authenticity, making it a robust preventive measure against legal challenges.[387]

V. CONCLUSION

Although state law governs permissible actions, there are several general principles that an attorney can rely on when faced with how to proceed in the scenarios analyzed in this article. These general principles are as follows.

Generally, an attorney may retain the original will for safekeeping if the client asks. Doing so does not create any duty to monitor the client's health status unless the parties form an agreement to the contrary. However, if the attorney receives notice of the client's passing, the best course of action is to deposit the will with the proper court or deliver it to the named executor or beneficiary. Opting for inaction is likely an ethical violation and should be avoided. However, providing the named executor or beneficiary with the original will is a decision that the attorney should consider carefully, as those individuals might have ill intentions. For that reason, opting to notify the court, whether in place of or in conjunction with providing the will to the named executor or beneficiary, is likely the best course of action.

In addition to those challenges faced by retaining the original will, an attorney may face challenges even though he or she only retain the copy. If an attorney receives notice of a client's intestate death but only has a copy of the will, he or she should balance several factors before deciding to take action. Unlike other scenarios, inaction may be appropriate as the attorney doesn't know whether or not the client revoked the will. Two other options may also be appropriate depending on the circumstance. Those include providing the will to the proper court, the named executor, or the named beneficiary. The attorney should

377 *Id.*

378 Beyer, *supra* note 354, at 230.

379 *Id.* at 231.

380 *Id.*

381 *Id.*

382 *Id.*

383 *Id.*

384 *Id.*

385 *Id.*

386 *Id.*

387 *Id.*

carefully balance all necessary factors to ensure he or she is not interfering with the client's intent.

Finally, an attorney's liability to non-clients will depend on his or her jurisdiction's approach. If the jurisdiction follows a strict privity approach, the client will generally be unable to sue or recover from the attorney. Other state courts, however, have done away with the strict privity requirement. Some of these states have abandoned the requirement generally and allow non-clients to sue if certain factors favor it. Other states only allow non-clients to bring suit if they were incidental beneficiaries of the arrangement. The status as an incidental beneficiary may only be proven using the four corners of the will or may be proven using extrinsic evidence. However, no matter the approach taken by the jurisdiction, there are several steps an attorney can take to reduce the likelihood of potential beneficiaries filing suit.

VI. APPENDIX A: SAMPLE LAST WILL AND TESTAMENT SAFEKEEPING AGREEMENT

If an attorney and a client agree that the attorney will safekeep the client's original will, then several questions should be contemplated and put into an agreement. Those questions include the following:

1. Where will the attorney hold the will for safekeeping?
2. In what manner will the attorney store the will?
3. If the agreed-upon method for storing the will requires the payment of extra fees, who will be responsible for covering those costs?
4. How can the client access the will, if necessary?
5. Are other parties, besides the client, able to access the will? If so, under what circumstances?
6. What should be done with the will if the attorney moves offices, retires, or becomes incapacitated?
7. How long will the attorney hold on to the will?
8. To whom will the attorney deliver the will once the agreed-upon time has expired? What happens if the attorney is unable to locate that individual?
9. Is the attorney required to periodically review the will to ensure compliance with applicable law or to address changing circumstances? If so, how often will the attorney undertake this review? In what manner, if any, will the attorney be compensated for doing so? Who should the attorney contact if the will needs changing? What action should the attorney take if he or she cannot reach that person?
10. Does the attorney have a duty to monitor the client's health status so he or she knows when the client dies? What method should the attorney use to keep track of this? Who should the attorney contact once he or she learns of the client's death? What happens if that individual cannot be reached?
11. If the attorney is not required to monitor the client's health status, what actions should the attorney take if the attorney does happen to find out about the client's death? Can he or she file the will with the court? Can he or she give the will to the executor? What happens if he or she is unable to locate the executor?
12. If the attorney can provide the executor with the client's will, must the attorney monitor court records to ensure the will is probated? What action should the attorney take if it is not?
13. If the attorney can provide the executor with the client's will, does the attorney have to check if the executor would inherit more via intestacy? If so, who should the will be delivered to instead?

14. If the attorney is permitted to provide the executor with the client's will, and then the attorney subsequently learns that the executor is claiming the client died intestate, should the attorney notify the court?

The following sample agreement addresses those questions and can be executed by a client and an attorney if an attorney safeguards a client's will. It is important to note that this is a sample agreement, and parties should review and customize it to ensure it complies with the specific laws and regulations of the attorney's jurisdiction and meets the client's and attorney's needs. An attorney should carefully review the agreement's provisions with the client so the client understands its terms.

Last Will and Testament Safekeeping Agreement

This Agreement ("Agreement") is entered into on [Date], between [Client's Full Legal Name], a resident of [City], [State], [County], hereinafter referred to as "Client," and [Attorney's Full Legal Name], a licensed attorney in the state of [State], hereinafter referred to as "Attorney."

A. Location of Safekeeping

The Client shall deposit their original Last Will and Testament ("Will") with the Attorney for safekeeping. The Attorney will hold the Will in safe storage at [Attorney's Office Address].

B. Storage Method

The Attorney agrees to store the Will securely, protected from damage or unauthorized access. The Will shall be stored in a fireproof and tamper-evident container, which is kept in a secure location within the Attorney's office.

C. Extra Fees

If additional costs are incurred for enhanced security or storage facilities, such as safety deposit boxes or vault storage, the Client shall be responsible for covering these costs. The Client will be notified in advance of any such fees.

D. Access to the Will

The Client may access their Will at any time during regular office hours by providing reasonable notice to the Attorney. The Attorney shall ensure prompt access to the Will for the Client. No third parties, including family members or beneficiaries, shall have access to the Will without the Client's written consent.

E. Relocation or Incapacitation

If the Attorney relocates offices, retires, or becomes incapacitated, the Attorney shall make arrangements for the safe transfer of the Will to a qualified attorney, as designated by the Client. The Client will be notified promptly of such changes.

F. Duration of Safekeeping

The Attorney agrees to retain the Client's Will for a period of [Number of Years] years, commencing from the date of this Agreement, unless the Client requests its earlier release in writing.

G. Delivery at Expiry

At the end of the agreed-upon period, the Attorney shall deliver the Will to the Client or their designated representative, as specified in writing by the Client. If the designated individual cannot be located, the Attorney shall deposit the Will in the appropriate court pursuant to **[**Statute Authorizing Deposit].

H. Will Review

The Attorney is not required to periodically review the Will unless expressly requested in writing by the Client. If such review is requested, the Client and Attorney shall mutually agree on the terms, timing, and compensation for the review. If changes are needed, the Client will be responsible for directing the Attorney to undertake the appropriate changes to update the will or designating a new attorney.

I. Monitoring Health and Living Status

The Attorney is not obligated to monitor the health status of the Client or confirm that the Client remains alive.

J. Actions Upon Learning of Death

If the Attorney learns of the Client's death, they shall provide the Will to the designated executor or personal representative, as specified in writing by the Client. If the executor or representative

cannot be located, the Attorney shall deposit the Will in the appropriate court pursuant to **[**Statute Authorizing Deposit].

K. Monitoring Probate

The Attorney is not obligated to monitor court records for the probate of the Will. If the Attorney is made aware that the Will is not being probated, they shall notify the Client's designated representative, if known. If the Attorney suspects a malicious reason for the will not being probated, they shall notify the appropriate court by providing them with a copy of the Will.

L. Inheritance via Intestacy

The Attorney is not responsible for checking the executor's or personal representative's inheritance status before providing them with the Will. If the Attorney suspects a malicious reason for the will not being probated, they shall notify the appropriate court by providing them with a copy of the Will.

M. Notification of Intestacy Claim

If the Attorney has provided the Will to the executor or personal representative and subsequently learns that they are claiming the Client died intestate, the Attorney shall notify the court and provide them with a copy of the Will.

_____

This Agreement constitutes the entire understanding between the Client and Attorney regarding the safekeeping of the Will. Any modifications or amendments to this Agreement shall be made in writing and signed by both parties.

Client's Signature: _____

Client's Name: [Client's Full Legal Name]

Date: [Date]

[Client's Contact Information]

Attorney's Signature: _____

Attorney's Name: [Attorney's Full Legal Name]

Bar Number: [Bar Number]

Date: [Date]

[Attorney's Contact Information]

VII. APPENDIX B: PRESUMPTION OF REVOCATION AND SUSPECTED MISCONDUCT

When an attorney only retains a copy of the client's will, the permitted actions the attorney may take upon learning of claims of intestacy may vary. However, if the attorney suspects potential fraud as the reason for the non-probating of the will, it is hard to know what actions the attorney is permitted or even required to take. The following sample provisions address the presumption of revocation and suspected misconduct, and the attorney can insert them into a representation agreement with the client. It is important to note that this is a sample agreement, and parties should review and customize it to ensure it complies with the specific laws and regulations of the attorney's jurisdiction and meets the client's and attorney's needs. An attorney should carefully review the agreement's provisions with the client so the client understands its terms.

Section X: Presumption of Revocation and Suspected Misconduct

X.1 Presumption of Revocation

The Client acknowledges and understands that under the law, a presumption of revocation may apply if the original last will and testament ("Will") is not found among their assets at the time of their passing. The attorney, **[Attorney's Name],** will take all reasonable steps to provide the Client with their executed original Will. However, the Client recognizes that once the Client takes possession of the original Will, **[Attorney's Name]** will have no further duty or obligation concerning the Will. **[Attorney's Name]** will not be held responsible for the handling, safekeeping, or whereabouts of the Client's original Will once it has been delivered to the Client. The Client is encouraged to ensure the proper safeguarding of the original Will and is responsible for any consequences resulting from the loss or destruction of the Will.

X.2 Suspected Misconduct

In the event that **[Attorney's Name]** becomes aware or has reasonable grounds to suspect that misconduct, undue influence, fraud, or any other circumstances that might compromise the Client's testamentary intent is the reason the Will is not being probated, **[Attorney's Name]** shall act in accordance with their ethical obligations and professional responsibility. This includes but is not limited to promptly notifying the relevant court and authorities and providing them with a copy of the executed Will and any relevant information.

X.3 Confidentiality

[Attorney's Name] will maintain the confidentiality of the Client's information and the contents of the Will to the fullest extent allowed by law, except in cases of suspected misconduct or as otherwise required by law.

SAEPC SOUTHERN ARIZONA ESTATE PLANNING COUNCIL

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"I Prepared the Decedent's Will"
To Tell or Not to Tell?
That is the Question

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

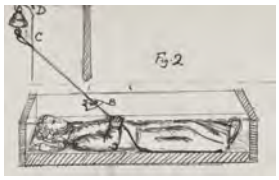
1

Death Certificate Request Form

2

2

Taphophobia



3

3

Coffin Furniture

4

4

Overview of Presentation

- What are your legal and ethical duties after a client's death for whom you prepared a will under different circumstances?

5

5

Fact Pattern One – The Facts

- You prepared client's will and retained the original.

6

6

Fact Pattern One – The Ethics

- Model Rule of Professional Conduct 1.15
  - Drafting attorney may ethically retain client's will if client so requests.
  - Keep will separate from attorney's own property.
  - Safeguard will
    - Method not specified – consider safe, fireproof box, bank safe deposit box, etc.
    - Must preserve physical will, not merely a digital version.
  - Deliver to client upon client's request.
  - Make plans for what happens to will after attorney dies or becomes incapacitated.

7

7

Fact Pattern One – The Wisdom – The Pros

- Client-based reasons:
  - Safe from client hiding or losing.
  - Safe from disinherited heirs finding and destroying it.
- Attorney-based reasons:
  - More likely client will hire attorney to make changes.
  - More likely client's family will hire attorney to probate the will.

8

8

Fact Pattern One – The Wisdom – The Cons

- Harder for client to make changes or otherwise control the original.
- Additional hassle for attorney to safeguard.
- Additional planning for handling original when attorney moves firms, retires, or dies.

9

9

Fact Pattern Two

- You retain original will but take no action to see if client remains alive.

10

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Fact Pattern Two – Ethics

- Ethics opinions in other states are consistent that unless otherwise agreed, the attorney has no duty to monitor death notices or check to see if the client is still alive.

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Fact Pattern Three

- You retained the original, learn that client has died, and no one approaches you about your possession of the will.

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Fact Pattern Three – Possible Action 1

- If no request by interested person, do nothing.
  - "After the death of a testator and on request of an interested person, a person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate or, if none is known, to an appropriate court." Ariz. Rev. Stat. § 14-2516.
- Unlike many states, *no duty* to deliver the will to the court upon notice of death.

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Fact Pattern Three – Possible Action 2

- Tell interested person that you have the original
  - Statute does not authorize you to do so!
  - However, it does not prohibit you from doing so.
- I personally think that not taking some action is in violation of your duties to the client.
- The client left you in possession of the will so that he/she would be assured that the testamentary instructions are carried out.

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Fact Pattern Four

- You retained the original and an interested person makes a request.

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Fact Pattern Four – "Interested Person"

- Under § 14-1201(34), "interested person includes any "trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. Interested person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding."

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Fact Pattern Four – Ariz. Rev. Stat. § 14-2516

- You must "deliver it with reasonable promptness to a person able to secure its probate or, if none is known, to an appropriate court."
- If you willfully fail to do so, you are "liable to any person aggrieved for any damages caused by this failure."
- If you a court orders you to do so and you do not, you are "subject to penalty for contempt of court."

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Fact Pattern Four – Concerns before delivery

- Concern: What if executor or beneficiary would benefit more from an intestate death?
- Ethical Obligation: Do you have an ethical obligation to check before you hand over the will to a person with an incentive to destroy it?
- Possible Solution: Deposit will with court to force executor or beneficiary to have a harder time claiming the client died intestate.

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Fact Pattern Four – Concerns after delivery

- Concern: Do you have a duty to monitor court records to make certain will is actually probated?
- Ethics: Probably not because of possible good reasons will is not probated:
  - Client's property was all non-probate assets.
  - Family settlement.
- But, what if you know the reason is "evil" and defeats your client's intent?

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Fact Pattern Five

- You give will to executor or beneficiary. Later, you find out via court proceedings, media, word-of-mouth, etc. that the family is claiming the client died intestate.

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Fact Pattern Five – Possible Action 1

- Notify court:
  - Client had a will.
  - You gave original will to _____.
  - Provide court with a copy of the will.

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Fact Pattern Five – Possible Action 2

- Do nothing
- This is likely an ethical violation as the client expected you to be the protector of the client's final wishes.

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Best practices if keep original will

- Prepare comprehensive contract with client explaining your duties with regard to:
  - Ascertaining client's death.
  - Turning over will to:
    - Court,
    - Executor,
    - Beneficiary, or
    - Another person.
  - Ascertaining if probate actually occurs.
  - Sample agreement in materials.

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Fact Pattern Six

- You prepared the will and the client to takes the original will.

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Fact Pattern Six – Ethics

- No ethical issue
  - The will is the client's property and the client is entitled to take the original will.
  - However, the attorney should advise the client about:
    - proper safekeeping procedures, and
    - the importance of the original being locatable upon the client's death.

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Fact Pattern Seven

- You prepared the will, allowed the client to take the original, and learn via court filings, media, word-of-mouth, etc. that a claim is being made that the client died intestate.
  - You have no knowledge that the will you prepared was revoked.
  - The will's dispositive provisions are *not* the same as intestacy.

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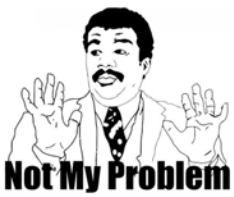
Fact Pattern Seven – Possible Action 1

- Do nothing.



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Fact Pattern Seven – Possible Action 1

- The "do nothing" factors:
  - Has it been a long time since you prepared the client's will so that revocation is a viable option?
  - Were the primary heirs (e.g., children) excluded from the will and they will now receive the entire estate via intestacy in contravention of the client's intent?
  - Balancing of these factors necessary to decide if doing nothing violates your duties to the client.

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Fact Pattern Seven – Possible Action 2

- Reveal existence of will and provide a copy to the named executor or beneficiary.
- This is likely to satisfy your ethical duty to client and should relieve you of any further duty.
- However, what if they take no action to probate the will?

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Fact Pattern Seven – Possible Action 3

- Reveal existence of will and provide a copy to the court.
- This satisfies your ethical duty to client and should relieve you of any further duties.

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Fact Pattern Eight

- If in any of the prior fact patterns, if you fail to take action to be sure the will is probated, what exposure do you have to beneficiaries who claim your inaction caused them to lose out on their gifts?

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Malpractice Liability – History

- Contract privity required thus disgruntled beneficiaries had no standing.

PRIVITY

  - Good = attorney's loyalty only to client
  - Bad = no remedy for egregious malpractice

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Malpractice Liability – Changes

- Privity not needed:
  - Will beneficiary is a third-party beneficiary of a contract, and/or
  - Tort action (negligence of attorney damaged will beneficiary).

PRIVITY

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Malpractice Liability – Modern Status

1. Privity still required (about 10 states)
2. Abandon requirement generally
   - Allow extrinsic evidence
   - Prohibit extrinsic evidence
3. Abandon requirement but only if plaintiff is mentioned in the will

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Malpractice Liability – Arizona

- Arizona follows a balancing test to determine if an attorney is liable to a third person such as a will beneficiary who is not in privity.
  1. The extent to which the transaction was intended to affect the plaintiff.
  2. The foreseeability of harm to plaintiff.
  3. The degree of certainty that the plaintiff suffered injury.
  4. The closeness of the connection between the attorney's conduct and the injuries suffered.
  5. The moral blame attached to the attorney's conduct.
  6. The policy of preventing future harm.
     - *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976), quoted with approval in *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965 , 967 (Ariz. 2002).

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Concerns not limited to wills!

- Ethical issues may also arise regarding other estate planning documents you kept or the client took:
  - Durable power of attorney.
  - Medical power of attorney.
  - Guardian self-designation.
  - Directive to physicians ("living will")
  - Body disposition document.
  - Mental health treatment declaration

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Conclusion

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