

## Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2778

**Date:** 19-Feb-20  
**From:** Steve Leimberg's Estate Planning Newsletter  
**Subject:** [Mary Vandenack on New York State Bar Association Committee on Professional Ethics Opinion 1182: How Long Do You Have to Keep Old Wills](#)

*“The New York State Bar Committee on Professional Ethics recently issued an opinion that a lawyer has an obligation to indefinitely safeguard wills in the lawyer’s possession. The rule relied on by the New York State Bar is modelled after the ABA Model Rules of Professional Conduct.”*

**Mary E. Vandenack** provides members with commentary on a recent New York Ethics opinion dealing with a lawyer’s duty to safeguard wills.

**Mary E. Vandenack** is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary’s practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Law Practice Group and on the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Editor-in-Chief of Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation.

Here is her commentary:

## **EXECUTIVE SUMMARY:**

The New York State Bar Committee on Professional Ethics recently issued an opinion that a lawyer has an obligation to indefinitely safeguard wills in the lawyer's possession.<sup>[i]</sup> The rule relied on by the New York State Bar is modelled after the ABA Model Rules of Professional Conduct.

## **FACTS:**

It is a common practice for lawyers to safeguard wills for clients. In the instance which promulgated a New York ethics opinion on the subject, a lawyer was in possession of over 500 wills with respect to which the status of the testator was unknown. Some of the wills had been prepared by the lawyer. Others were being safeguarded as a result of having come into the possession of the lawyer via other lawyers by succession to their practices. The lawyer had exercised due diligence in seeking to locate the testators by searching office records, court records and attempting to find information regarding testators, executors and beneficiaries.

The question brought to the New York State Bar Committee on Professional Ethics was whether the lawyer safeguarding the wills could dispose of the wills. The opinion provided that a lawyer is obligated to "safeguard the wills indefinitely unless the law provides another alternative."<sup>[ii]</sup>

## **COMMENT:**

The New York State Bar Committee on Professional Ethics opinion pointed out that the Rule 1.15(c)(1) of the New York Rules on Professional Conduct provides that a lawyer "shall promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." Pursuant to such rule, a lawyer is required to preserve the property, keep records with respect to the property and to deliver the property when a request is made for the same. The opinion states that a will is a piece of property. New York's Rule 1.15 is modelled on Rule 1.15 of the ABA Model Rules of Professional Conduct.<sup>[iii]</sup>

It was noted in the opinion that there existed previous authority requiring a lawyer who inherits wills from another attorney who retires to make reasonable efforts to notify testators that such lawyer holds the wills.<sup>[iv]</sup> The opinion also noted that the issue had been addressed by the New York City Bar Association, which had concluded that a lawyer in possession of wills has an indefinite obligation to continue to safeguard such wills. The longstanding practice of maintaining client wills in attorney safekeeping invokes various ethical duties. Lawyers doing so should maintain detailed logs of wills that are in their custody and notify testators when they inherit wills from a retiring lawyer.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Mary Vandenack*

### **CITE AS:**

**LISI** Estate Planning Newsletter #2778 (February 19, 2020) at <http://www.leimbergservices.com> Copyright 2020 Leimberg Information Services, Inc. (**LISI**). Reproduction in Any Form or Forwarding to Any Person Prohibited – Without Express Permission. This newsletter is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that **LISI** is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of **LISI**.

### **CITATIONS:**

---

<sup>[i]</sup> N.Y.S. Bar Ass'n Comm. on Prof'l Ethics, Op. 1182, 1/23/20.

<sup>[ii]</sup> Id.

<sup>[iii]</sup> American Bar Association, Center for Professional Responsibility. Model rules of professional conduct. Retrieved from [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_15\\_safekeeping\\_property/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_15_safekeeping_property/)

<sup>[iv]</sup> N.Y.S. Bar Ass'n Comm. on Prof'l Ethics, Op. 341, 1974.