
E-73-1 Lawyer and safekeeping of wills

Your section has requested the advice, and if desirable the formal opinion of this committee with respect to the ethical propriety of the past and future conduct of those attorneys who engage in the practice of safekeeping wills for clients. Such request was made following the decision of the Wisconsin Supreme Court in *State v. Gulbankian*, 54 Wis. 2d 605 (1972).

In the *Gulbankian* decision, the court condemned certain practices of lawyers in retaining wills of clients following their preparation of this testamentary instrument:

An attorney, merely because he drafts the will, has no preferential claim to probate it. *Estate of Ainsworth* (1971) 52 Wis. 2d 152, 187 N.W. 2d 828. Nor do we approve of attorneys "safekeeping" wills. In the old days this may have been explained on the ground that many people did not have a safe place to keep their valuable papers, but there is little justification today because most people do have safe-keeping boxes, and if not, Sec. 853.09, Stats., provides for the deposit of a will with the register of probate for safekeeping during the lifetime of the testator. *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.* (611-12) (Emphasis added.)

This committee at its two recent meetings has had a well informed and extensive discussion of the possible ethical problems and whether there is need for a clarification or further pronouncement by this group.

After careful consideration of your Section's request and upon our review of the Court's opinion and the ethical principles involved, the committee has concluded that any further attempt by this group to construe or interpret the language of *Gulbankian* would be of little service to the State Bar membership.

Basically, the ethical problem involved is that of the potential use of the preparation of wills and the planning of estates as a means of soliciting or controlling the eventual probate of the testator's estate. All forms of direct and indirect solicitation are prohibited by the present Code of Professional Responsibility and the prior Canons of Professional Ethics because of the long recognized inherent ethical dangers to the public served by our profession. In our opinion, the Supreme Court has condemned such potential solicitation of legal

work in its language concerning the safekeeping of wills unless the client has made an unsolicited request, and the Court has quite clearly stated its opinion regarding this type of conduct.

It was the committee's further opinion that for a lawyer to proceed by means of propounding questions to the client or furnishing a form upon which he could make an election as to a depository would not be an appropriate procedure. The individual lawyer may adopt a personal approach within the guiding principles of the Court's opinion and the Code of Professional Responsibility.

The committee noted that the court's opinion failed to state whether the prohibition was prospective in nature or whether it would apply to wills presently held for clients. Under the Supreme Court Rule, this committee's opinions are advisory only and not binding on the court. Under our committee policy, committee opinions are prospective only.