ASSIGNMENT 12  
To: Supervising Attorney From: Paralegal  
Re: Mrs. Joyce Helger—probate of copy of lost original will  

Statement of Assignment  
The purpose of this assignment is to assess the likelihood of the probate court granting a petition for administration of a conformed copy of a will and codicil when the originals cannot be located.  

Issue  
Under Florida case law governing the probate of wills, may conformed copies of a will and codicil be administered in probate when the originals of both cannot be located after the death of the testator?  

Brief Answer  
Uncertain. It is difficult to predict whether a court will view conformed copies of a will and codicil as competent and substantial evidence sufficient to overcome the presumption that a will and codicil that were originally in the testator’s possession but cannot be located after death were intentionally destroyed by the testator.  

Facts  
Mrs. Joyce Helger is our client in the probate of her late husband’s estate. Since her husband’s sudden death a month ago, Mrs. Helger has been unable to locate the originals of his will and codicil. She knows that her husband prepared a will. She has both a conformed copy of the will, executed December 1, 2001, and a conformed copy of the codicil, executed May 6, 2006. Mrs. Helger thought the law firm that prepared the will kept the original, but the law firm cannot locate the original. The firm’s senior partner told Mrs. Helger that the firm does not keep the original of wills or codicils. Mrs. Helger wants to submit the conformed copies of the will and codicil to the probate court for administration.  

Analysis  
This issue is governed by case law, as there are no directly applicable statutes. The general rule of law is a “presumption that a will which was in the possession of the testator prior to death and which cannot be located subsequent to death was destroyed by the testator with the intention of revoking it.” In re Estate of Parson, 416 So. 2d 513, 515 (Fla. Dist. Ct. App. 1982). This
presumption “may only be overcome by competent and substantial evidence,” id. at , and logically applies to both wills and codicils. The court in In re Estate of Kuszmaul, 491 So. 2d 287 (Fla. Dist. Ct. App. 1986), addressed the question of whether a conformed copy of a will found together with an original, properly executed codicil, could be administered in probate. The trial court denied the petition for administration, but the appellate court reversed, finding that the presumption of revocation was overcome by competent and substantial evidence.

In Kuszmaul, the court distinguished another case with somewhat similar facts, In re Estate of Baird, 343 So. 2d 41 (Fla. Dist. Ct. App. 1977). In Baird, the court denied probate of an original codicil that was not accompanied by a copy of the will, which were not the same facts as in Kuszmaul. The testators in both Baird and Kuszmaul showed continuing affection for the beneficiaries of their wills, but the testator in Kuszmaul left additional evidence of intent by writing a letter to one of his beneficiaries after execution of the will which stated that the property devised “would ‘someday ... be yours.’” Kuszmaul at .

The court in Kuszmaul found the facts of the case to be analogous to Will of Herbert, 89 Misc. 2d 340, 391 N.Y.S.2d 351 (1977), which also involved a copy of a will and an original codicil. The Herbert court held that the presumption of revocation was overcome by the fact that the testator kept both the copy of the will and the original codicil in his personal possession, making it unlikely that he intentionally revoked the will. The court in Kuszmaul also noted two relevant Florida statutes. One, Florida Statutes section 732.5105, states that the execution of a codicil that refers to a previous will has the effect of republishing the will as modified by the codicil, although it is silent on whether it is applicable when the original of the will cannot be found. The other, Florida Statutes section 732.511, states that even if a will has been revoked, it may be republished and made valid by a codicil that is executed with the formalities required for wills. The codicil in Kuszmaul was executed with the requisite formalities, and the court concluded that the presumption of revocation was overcome.

Our case is more like Kuszmaul and Herbert than like Baird, where only the original codicil, and neither the original nor a copy of the will, was located. In our case Mrs. Helger has a conformed copy of both the executed will and the executed codicil. Both of these documents existed in the Kuszmaul and Herbert cases, although in those cases the codicil was an original. Nonetheless, the
reasoning of those cases may apply to our case. Mr. Helger presumably kept the conformed copies of his will and codicil in his possession, which may indicate his intention not to revoke them.

The counterargument is that conformed copies of a will and codicil, standing alone, do not constitute substantial and competent evidence to overcome the presumption. As neither document is an original, the Kuszmaul and Herbert cases are not on point. Nor are the two Florida statutes referenced above, as they do not indicate whether they are applicable when the original of the will or the codicil cannot be found. The fact that neither can be found suggests that Mr. Helger intended to revoke them, and in fact the conformed copies may not have been in Mr. Helger’s possession at the time of his death. We do not know whether the originals were ever in his possession, or where Mrs. Helger found the conformed copies. There are many unknown facts in our case. We need to do more research to assess the likelihood of whether Mrs. Helger will prevail in the probate court. See the Recommendations section below.

Conclusion
The courts have developed a presumption that a will that was originally in the testator’s possession, but that cannot be located after death, was destroyed by the testator with the intent of revoking it. This presumption may be overcome only by competent and substantial evidence. The courts in Kuszmaul and Herbert held that an original codicil found with a copy of the will is sufficient to overcome the presumption that the will was revoked. In our case, where only copies of both the will and the codicil have been located, it is difficult to predict how likely the probate court would be to administer these documents. We need to conduct more research, as recommended below.

Recommendations
We should conduct more case law research into the amount of evidence required to overcome the presumption of revocation when the originals of testamentary documents cannot be found. We also should conduct more factual research. For example, did Mr. Helger ever have the originals of the will and codicil in his possession? Where did Mrs. Helger find the conformed copies? Does the codicil refer to the previous will or attempt to republish it? Was the codicil properly executed? Did Mr. Helger make any statements to his beneficiaries indicating his intent that they would inherit? Would testimony by someone at the law firm that prepared the documents be helpful? Would
this testimony be admissible? Are there any other places to search for the originals of the will and codicil?