Do You Keep Client's Wills? Why or Why Not?

Do you keep the client's will or give it back to them?

I create 2 duplicate original. I keep one original in my file and I give the other original to the client. The simple reason I do this is just in case the client's Will is destroyed or damaged by fire, flood, etc.

Samuel Katz, New York

I don't.

I was of counsel last year to a firm out by you after they lost both their EP and EL partners for a short term. They had been in business for a LOOOONG time. Had file cabinets full of old wills. They had no room anymore.

Most of the people had probably already died and had redone their wills, or didn't need them, and it was getting them crazy.

So, there's a reason why not.

Best,
Ellen

Ellen Victor, New York

I don't keep originals.

In Vermont the Probate Court, for a modest fee, will store a will for safekeeping. I have all my clients use that service. When they sign, they sign the original (unstapled so I can copy/scan for my files) and a duplicate stamped 'copy'. They leave with the duplicate copy, we scan and copy the original for my file and send the original to the probate court for filing.
Sincerely yours,

Michael D. Caccavo, Vermont

I also don't. My name is on the will backing if executor wants to use me but otherwise my feeling is I do not want to risk the fighting beneficiaries calling me up for it.

Years ago, when I used to be an associate of a Wall Street firm, a partner was usually named as executor or co-executor (large wealthy clients). He did not keep original either - just a "conformed copy".

Jon Michael Probstein, New York

Um.

I don't think you can have duplicate original wills.

Ellen Victor

I do so as a matter of course, and it says so on both originals. I do not have any indication that there is a problem with that. Perhaps, time permitting, I'll look into it further.

-Rick

Richard J. Rutledge, Jr., North Carolina

It has always been my understanding that you cannot have two original wills as well. The minute you sign the second will, you revoke the one you just signed.

Erin M. Schmidt, Ohio

Never keep the originals. A good way to obligate yourself for years and years to do something you are not being paid to do and for which serious malpractice can occur if you lose it. If client will not keep it at home, then have him file it with his probate court. We do scan all completed wills into our system in the event we need a copy of the client needs a copy in the future. We also email that scanned document to the client.

Robert W. "Robby" Hughes, Jr., Georgia

I have just reviewed our statutes, and a will is only revoked by a "subsequent" will. It would be hard to argue that two wills, both declaring on their face to be identical copies of each other, could be construed as one subsequent to the other.

From the case law, it does not appear that there is a prohibition on execution in duplicate [here], nor that it is especially uncommon, but here and elsewhere, if an original was known or believed to be in the possession of the Testator, but cannot be found at death, there *may* arise a rebuttable presumption that the will was revoked. The strength of that presumption may be dependent on prior wills, etc., and is a question of fact. Here's an excerpt:

The rule that the presumption of revocation, which arises from the fact that the duplicate copy of the will retained by the testator cannot be found after death, is a rebuttable one, is illustrated by the case of Glockner v. Glockner, 263 Pa. 393 <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=wFRYcOHIbJ9Z%2bZFoEkQJyU008%2fo%2bGTBtpM%2bpgdCFv9seZWxpFFatrCqB3Yte9MfyZ1AHAsuBeMZn7%2bgr%2bknqwaOS8vI1q3EpJ6I4S7ESDUM3pxKjj8wdJL7zSUE9o34D&ECF=Glockner+v.+Glockner%2c++263+Pa.+393> , 106 A. 731 <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=wFRYcOHIbJ9Z%2bZFoEkQJyU008%2fo%2bGTBtpM%2bpgdCFv9seZWxpFFatrCqB3Yte9MfyZ1AHAsuBeMZn7%2bgr%2bknqwaOS8vI1q3EpJ6I4S7ESDUM3pxKjj8wdJL7zSUE9o34D&ECF=106+A.+731> , where the lost will was last seen in the possession of the testator, and evidence was offered that it was thereafter physically impossible for him to have destroyed the will or procured its destruction to the time of his death. It was held that the presumption that he destroyed it with intent to revoke it was rebutted, and judgment sustaining the will was affirmed. An even stronger case for the propounder was Managle v. Parker, 75 N.H. 139 <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=wFRYcOHIbJ9Z%2bZFoEkQJyU008%2fo%2bGTBtpM%2bpgdCFv9seZWxpFFatrCqB3Yte9MfyZ1AHAsuBeMZn7%2bgr%2bknqwaOS8vI1q3EpJ6I4S7ESDUM3pxKjj8wdJL7zSUE9o34D&ECF=Managle+v.+Parker%2c++75+N.H.+139>, 71 A. 637 <https://apps.fastcase.com/Research/Pages/Document.aspx?LTID=wFRYcOHIbJ9Z%2bZFoEkQJyU008%2fo%2bGTBtpM%2bpgdCFv9seZWxpFFatrCqB3Yte9MfyZ1AHAsuBeMZn7%2bgr%2bknqwaOS8vI1q3EpJ6I4S7ESDUM3pxKjj8wdJL7zSUE9o34D&ECF=71+A.+637> , 24 L.R.A., N.S., 180, Ann.Cas.l912A, 269. There the will was executed in duplicate, and the testatrix herself destroyed the copy she had retained. But it was shown that she did so not for the purpose of revocation, but to appease some of her relatives, expressing the intention that the other copy in custody of another should continue to represent her will. Judgment sustaining the will was affirmed. A statement of this principle, as it applies to the probate of a will executed in duplicate, is also found in 2 Greenleaf on Evidence, sec. 682, from which we quote: "If the will was executed in duplicate, and the testator destroys one part, the inference generally is that he intended to revoke the will; but the strength of the presumption will depend much on the circumstances. Thus, if he destroys the only copy in his possession, an intent to revoke is very strongly to be

presumed; but if he was possessed of both copies and destroys but one, it is weaker."

In re Wall's Will, 223 N.C. 591, 27 S.E.2d 728 (N.C. 1943).

-Rick

Richard J. Rutledge, Jr.

Original to client and I keep a signed copy (scanned). Client also gets a scanned signed copy.

Having duplicate originals floating around could create a problems.

Craig Scalise

No, even though attorneys retaining Wills "for safekeeping" is a common and accepted practice in rural upstate NY. First, most clients expect you to safeguard their wills at no cost to them with no time limitation, and I will not provide for free what banks charge for in the form of annual safe deposit box fees. (Although I do know of one attorney who did in fact send annual bills to his clients for safekeeping their wills). Second, retaining a Will may imply a course of continuous service - and no statute of limitations. By giving the client the original Will, the attorney has signified the completion of that service, and fixes a date for the completion of that service and the tolling of the statue of limitations. Third, I do not want to pay the premises / professional liability insurance premium costs attendant to safekeeping original documents - that is obviated by always returning original documents to the client. Fourth, if I should die before I retire, I do not want my wife or the attorney I've designated to wind up my practice to have to go through the time, trouble and expense of having to inventory, catalogue and return the literally hundreds of wills I've drawn over the years. So, in a procedure that adopted and adapted from the practice of the early 1970s USAF Adjudant General's Office, after my client signs the Will, I make two photocopies of the signed Will, and give the client the original and one photocopy of the signed Will, as well as oral and written insructions re the safekeeping of the Will (ie, store the original in the very safest place that you have - usually a bank safe deposit box on which the client has named his/her spouse and/or one or more adult children as deputies - and the photocopy in the next safest place you have - eg, a fireproof metal box). I advise the client that I will retain a photocopy of the signed Will for the client's file.
Rod Klafehn, New York

Good points. I'm not a T&E attorney, but we recently covered this in a CLE. One of the issues here with will clients is that they not only expect continuing representation, but that you may be on the hook if a change in the law (say, tax treatment of an estate) affects the will's validity or effectiveness.

The presenter recommended that you provide the documents to the client, and send them a letter terminating the engagement. Not sure how that would fly with the clients, but that's the "best practice" recommendation from somebody who does mostly malpractice defense work.

kwg

*Kevin W. Grierson, Virginia

Look, I know some lawyers who keep original wills; usually the larger (for our area) firms. And it can be a bitch getting the will out of them if someone doesn't' want to use them for the probate; trust me on this. I mean, jump thru hoops.

Nonetheless, 1) I don't got the storage space; I've done well over 1000 wills over the years, where the heck am I going to keep them. 2) The way people move around, what happens if they move out of the villages? Or out of state entirely? And they die. And I got original will but no one realizes it and it winds up being intestate? How's that help anyone? 3) To the extent that I'm worried that I might not be hired for the probate, I make sure my fingerprints are all over it; I use will cover that's got my name, address and phone number, and I hand it to the client in a zipper bankers bag with my name, address and phone number. Someone picks it up after testator dies, there's no question who drafted the will and who they are almost certainly going to call. About the only case I can think of is one where I'd prepared will, testator died, never got call; but I happen to know that decedent's daughter in law is Florida attorney; she probably decided to DIY it, which was fine.

Leaving aside the theoretical questions of 'do I have continuing liability for keeping them updated with the law".

And, really, if I got original will, it makes it tough for them to revoke it by act, i.e. destruction of will, because I've got it.

Once we sign the will, I fold it, put it in the bankers bag, ask if they got any questions, tell them to put it (and other docs) in safe place, collect my check and wave bye bye.

Ronald Jones, Florida

I have heard of this done and have worked on one years ago - in my experience, it was almost required when there was a very large estate, two institutional co-executors for beneficiary rivalry, etc. who insisted on holding originals, etc. All originals go to probate, lengthy, costly, etc. but then it was a large estate.

Jon Michael Probstein

We do offer to keep the original will for clients, and about 1/2 take us up on it. In Florida, you _can't_ deposit a will for safekeeping with the Clerk until the testator dies (in Georgia you can, and I did so with my own will). But we don't keep wills with the will files, and don't put them in a regular file cabinet (see below). We will give them back to the testator at any time, no questions asked, but we do require that they show ID and sign a receipt. No one else can pick up the original. We explain this when we offer to keep it.

I think it comes down to a few practical issues and local custom. We have 30+ years of wills - once you start you can't really get rid of the old ones (literally thousands), so you may as well continue to do it. Plus, there is no flippin' way we are moving those 2 fireproof cabinets out of here - they weigh a ton each (probably literally) and survived the roof being blown off the building during a hurricane in 2004. That's right, folks, the will safes stayed put and stayed dry (internally) when the roof was blown off the (1-story) building in a hurricane.

Fewer and fewer people are renting safe deposit boxes, which is traditionally where most people keep this stuff, but more and more folks have home safes. Most of the local attorneys who practice in this area do offer to keep wills, except of course, a few solos.

There are those who think that you are more likely to get the probate or trust administration case if you keep the original will. I'm not so sure that is true, though it makes logical sense. We don't track at the moment whether our new probate cases are from those wills we kept for safekeeping. But if I receive a death certificate or letter confirming death from a funeral home, Florida law says I have to send the original will to the Clerk of the Court for safekeeping within 10 days.

Cynthia V. Hall, Florida

I was at a presentation a year or two ago where Suffolk County (NY) Surrogate Czygier described the practice of lawyers holding onto the original will as 'retirement planning.' It got a good laugh because of its candid truthfulness. A practitioner's vault of 20 or 30 years worth of wills is a goldmine of reasonably guaranteed income stream if it's worked diligently. If you let the documents sit there and do nothing with them, obviously you can't expect continuing business. But there is downside risk too, as others have mentioned.

Rick Bryan, New York

Ellen - Do you have any authoritative citations for that?

Samuel Katz,

You can have duplicate original wills. But it is a bad idea. There is case law where and attorney kept a duplicate original. Client later decided to revoke his will and wrote revoked on the copy he had, but because the copy the attorney had was never destroyed the court decided the will had not been properly revoked. I don't like exposing myself to potential male practice issues if i don't have to. what something happens to the will in your possession. Or the client tells you to destroy it but you never get the message. I would never keep an original will.

Koren Boyd

Whether you can have duplicate original wills is jurisdiction specific, I believe. But I think it's not a good idea to have duplicate original wills. Also, I keep a copy of the executed Will but not the originals, for many of the reasons already stated. Our statute allows us to probate a copy of the Will if the original can't be found (subject, of course, to claims that the prior Will was revoked or amended or challenges to the completeness or accuracy of the copy but those issues would exist for an original will, too).

Naomi C. Fujimoto, Hawaii

The issues of the attorney holding an original (or copy), and the issue of whether there can/should be duplicate originals are, to my mind, very distinctly different issues.

As noted, I routinely execute with duplicate originals. I do NOT retain original documents. I only retain original powers of attorney that are granted to me (and they are invariably subject to expiration dates).

-Rick

Richard J. Rutledge, Jr.

On Thursday, August 2, 2012 3:30 PM, Rick Bryan wrote: "I was at a presentation a year or two ago where Suffolk County (NY) Surrogate Czygier described the practice of lawyers holding onto the original will as 'retirement planning.' It got a good laugh because of its candid truthfulness. A practitioner's vault of 20 or 30 years worth of wills is a goldmine of reasonably guaranteed income stream if it's worked diligently ..." Good point, Rick. For all solos interested in someday selling their law practice - especially small town EP practitioners - prospective purchasers are very interested in your will file and the value of those wills, as evidenced by the estate inventory you had your clients prepare at the time they made their wills. Obviously, the prospective purchaser would place a premium on having the wills "on site". But I would still think that photocopies of the signed wills, together with the completed estate inventories, would create an "asset" that someone would be interested in. I must admit, though, that where I practice, clients are typically reticent about sharing the details of their estate assets with me beyond my inquiry as to whether or not their holdings exceed the threshhold amount for filing a NYS estate tax return and, if so, whether estate tax planning considerations may be in order. Consequently, I have far, far more wills standing alone than I have wills accompanied by completed estate inventories. And prospective purchasers have absolutely no interest whatsoever in your computer and other office equipment and furnishings and books (if you still use them). Even your client contact list is of limited value. Bottom line: If you're a small town solo practitioner, invest - but don't over-invest - in your practice. 'Cause it may not be that valuable an investment come retirement time.

Rod Klafehn

If you sell your clients' wills/files as part of selling your law practice, I would imagine that you would have to get a release/consent from each client before doing so or else breach confidentiality. I would find having to get in touch with all my past and current clients and getting that consent and sorting out which ones consented and which ones didn't (or couldn't be found) to be daunting.

Naomi C. Fujimoto
