

IN BRIEF ARTICLE:
“WHY DID WE EVER WANT TO KEEP ORIGINAL WILLS?”

Well, it seemed like a good idea at the time. Other people were doing it. Our medium-sized firm had plenty of room in the office, and it spared clients from renting a safe deposit box of their own. The firm already had a fireproof filing cabinet, so I didn't think too much about the practice of retaining the original estate planning documents for clients. It seemed to make sense. The firm hoped that the service would be appealing to clients and that it would help us compete with similar services offered by other firms. The senior members of the firm believed that this office practice would pay off in the form of probate work.

That was the logic behind the decision to keep original wills. I did not take the time to glance into the future to examine the space that would be needed (this wasn't my job at the firm), nor did I ever consider the unthinkable – that the firm might split up. That was then. I never really gave it much thought . . . at the time.

You see, I left the medium-sized firm and started a new firm. In the spirit of tradition and mindlessness, I, too, offered the service of storing clients' original estate planning documents. I swallowed hard and purchased a fireproof filing cabinet (price approx. \$1,500 in today's dollars) and arranged to have all 800 pounds of it moved into my new office. In the beginning, it was not a problem. Time moved on, and my practice grew. I ended up moving to a nicer and larger space. This required moving my 800-pound fireproof filing cabinet. I often wondered whether using a regular filing cabinet would have been good enough, but the idea just did not seem wise, even in my weakest moments (moving day). As my practice grew, so did the problem. I had to purchase another cabinet (another \$1,500, another 800 pounds). Soon I had no room in the second fireproof filing cabinet. Soon after that, I realized I had no room in my office. Reality had set in.

I could not stomach the thought of moving again, just so I could make space for more 800-pound monsters. Move avoidance propelled me into two radical decisions. First, I would no longer keep client documents. (No surprise, this was the easy decision.) Second, I would steadfastly and determinedly return the original documents that I had previously held. The reasons I made this second, more difficult decision are described at the end of the article. It was a good decision, but, as the saying goes, “I had no idea.” The fun was just about to begin.

This project took about six months, and at least \$1,500. The cost of returning the documents came in the form of copying the documents (I wanted to keep a file copy), staff (I had to hire temporary personnel), and postage (certified mail). In addition, my legal assistant spent many hours writing letters to clients announcing our new procedure, talking to clients on the phone about our new procedure, arranging for file pickup, obtaining the signature of the client (and the client's spouse when both spouses were clients), writing receipts for files, and other record keeping.

Although this task was overwhelming for a while, I am happy we did it. It completely released me from the bondage of my 800-pound Darth Vadars and freed up space for a wonderful client meeting area. Since I was forced to carefully think this problem through, I want to spare others the pain and expense of keeping original documents. Here is what I learned, and why I vehemently recommend that you do not keep original documents:

First, since my clients never had to get a safe deposit box, they never really knew that I was saving them money by keeping the documents. In that way, my goal of being appreciated for

saving my clients the bother never materialized.

Stress to your clients the importance of safeguarding the original will. One attorney I know discovered his client's original will in the decedent's dresser drawer. Another decedent apparently had a will, but it could not be found. The decedent's brother thought that the will had been kept in the rolled-up window shade in the decedent's apartment! Since I had been told by the decedent that he had a will, I believe it was removed by a relative. Other clients have used a home safe to store their wills, which can easily be carted off by a thief. I fear that those safes are not terribly fireproof or waterproof. A safe deposit box is the best place for an original will.

If you do have an original will of a client, photocopy the entire, fully executed will and place that copy in the client's file before releasing the original will to the client. While it is possible to admit a copy of a will into probate in certain cases, it should not be relied upon. See Idaho Code §15-3-409.

Second, I realized that times have changed. Many clients are uncomfortable about having the lawyer keep their original documents – they feel (correctly) as if the lawyer is trying to retain control of something that is theirs. This feeds the fuel of suspicion that prompted the chant: **DON'T LET LAWYERS AND PROBATE EAT UP YOUR HARD-EARNED MONEY!**

Third, it is important to maintain the integrity of the original will. I have had several clients mark up original wills. Often these original wills were admitted to probate court and became public documents. In one case, the client intended to revise her will, but died before doing so. She had written rather slanderous remarks about her “uncaring and selfish” children on the margins of her will. I was loath to provide those children with a copy of her will.

It is fairly common for clients to cross out specific bequests or add new provisions on the original will. If a new will is never made, the insertions are likely to bring into question the validity of the marked-up will. The moral: When entrusting original documents – especially wills – to the client, clearly mark the original and the copy, and stress the importance of maintaining the integrity of the original. The copy should state the location of the original. Example: “Original kept in safekeeping at US Bank, Main Branch, Boise, Idaho, Box No. . . .” I generally type “Original” on the backer, but am considering stamping the first page as well.

Fourth, more than thirteen years have passed since I started my mission, and I still have some original wills that I have been unable to return to clients for various reasons. It has been a huge time drain and a very expensive process. In addition to the expenses and difficulties already mentioned in this article, I also encountered untold nightmares with storage facilities. These nightmares included flooded storage areas, molding files, dangerous characters lurking around the storage facility, and inconvenient hours. I also had to list the storage locker location on my business insurance and provide proof of insurance to the storage facility.

Fifth, I realized that the practice of keeping original wills is an absolute nightmare for the person who ends up trying to close your practice when you die or become disabled. The person closing your practice will have to return all of the documents, and that is likely to be a difficult and expensive task. Most people move every seven years; many of those people do not think to let their lawyer/holder-of-their-original-will know their new address. As a result, your personal representative, or the person assisting with the closure of your practice, may have difficulty finding the testators.

ORS 112.815 requires that 40 years elapse before a will can be destroyed. This problem may end up being a burden for the person helping you close your practice, your personal representative, and maybe even for his or her personal representative! If you are a member of a firm and breathing a sigh of relief – thinking this doesn't apply to you – think again. My former law firm eventually completely split up. Someone ended up with the albatross of dealing with all of those original wills.

Lastly, and perhaps most importantly, I discovered that even with the best intentions, keeping the original estate planning documents may actually make it difficult for your client, or the family of your client. The client may have left the area, yet the estate documents will be with you. You will have to be found, and the documents will have to be mailed. You may decide to change firms, leave the area, or stop practicing law. Any of these choices could make it difficult for your client, or your client's family members, to find you.

In short, if I had to do it over again, I would never have incurred the expense and liability of retaining original documents. I hope that this testimonial helps new lawyers get on the right track, and inspires some of you more seasoned folks to get on the bandwagon and stop keeping those documents. For those of you who decide to go for it and return the originals you have in your possession, I can assure you that it is worth it in the long run!

Will I EVER Be Free of the Albatross? Reprinted from *In Brief*, March 2007.