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Rules for Preparing a "Tamper-proof" Document

by

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It is probably a fair statement that no attorney wants to have anything to do with a forensic document examiner on any Trust or Will documents or, for that matter, any document that they were involved in preparing. A certain percentage of cases, either through bad luck, carelessness, or a momentary oversight in preparation of the documents, may lead to situations where document examiners are retained by disgruntled family members or business associates.

There are several commonsense things that an attorney can do to prevent serious challenges to the documents they prepare. Conversely, there are also many things that an attorney should not do in the preparation of any document, and specifically Wills and Trusts.

Among the "*DO's*" would be:

1. Use a good quality bond paper that has a watermark and has your firm's name printed somewhere on the page. Be sure to use the same paper from the same box for all pages in the Will or Trust documents. This will make it more difficult to substitute a page without detection.

2. Use one printer for all pages of the documents. Make sure that the settings for margin, spacing, paragraph indentations and font remain the same. When changes are made that may only affect certain portions of the document, do not replace only those pages, but re-do the entire document for the final signed copy or copies.

3. If a minor error is discovered at the last minute and must be corrected, lightly cross it out, write in the correction, and have it initialed or signed at least by the client, if not all involved.

4. Select one pen to be used by all parties. Make sure that the pen is properly functioning. Use a good quality pen, preferably a ballpoint. It is recommended that fluid ink pens not be

used. These would include rolling ball writers and fiber-tipped pens.

5. Before signing, the pages of the document must be assembled and attached together. It is recommended that a permanent fastener, such as brass eyelets, be used as opposed to staples. Wills and trust documents should be permanently fastened together so there cannot even be a suspicion that a page has been substituted.

6. The client should sign his customary signature on each and every page using the same pen throughout. The pages should be signed, one on top of the other, so that the signatures indent into the page beneath. It would also be good practice to place earlier pages underneath later pages so that indentations from three or more pages may be found indented into each page in the document.

7. If appropriate, and the client is willing and able, leave a space in the signature area where the client can write a brief statement in his or her own handwriting, such as: "This is my Will. I have read it and understand it, and in the presence of Mr. Smith and Ms. Jones, my witnesses, I hereby sign it at {location} on {date}. {Signature}" The more handwriting that can be attributed to the client, the easier it will be to preclude or refute a capacity challenge.

8. If there is an especially important or potentially controversial provision, the client should also add in his own writing that he particularly approves of the potentially controversial bequest or exclusion.

9. Choose truly independent and responsible witnesses who are young enough so that in all likelihood they will survive the client and make good witnesses if there is a contest. Ask the client to bring one witness, such as his banker or a responsible neighbor. Try to keep the executed Will in your safe; or, if not, have a conformed copy ***and*** a photocopy of the executed document in your file. Keep all notes and supporting material that went into the production of the document. This isn't meant to imply that copies are as good as originals; they are not. Copies can be valuable for other reasons, such as signature exemplars for other disputed documents.

Among the "*DON'T's*" would be:

1. Don't use a committee of typists to prepare a Will or insert corrected pages over a period of time. The final Will should be the result of *one* typist on *one* printer.

2. Don't put all the dispository provisions on one page and the place for the testator to sign on another page.

3. Don't attach the Will together with ordinary staples; as stated earlier, use permanent fasteners such as brass eyelets. Attach all the pages to a proper backing sheet.

4. Don't allow the client or witnesses to use a wide-point, porous-tipped pen. Broad-tipped pens have been compared to writing with a cotton swab. They are the pen of choice for people who are trying to trace a signature. They also leave very little impression on the paper because of the blunt tip.

5. Don't insist on the testator signing his full name (e.g., "John Jefferson Harris") because there may be few, if any, specimen signatures with which to compare it. If the client must sign his full name, then also have him sign his customary signature on the document at the same time with the same pen. If he has several different variations of his signature, have him sign all variations.

6. Don't sign as a witness unless you are the *third* witness.

7. Don't prepare a Will unless you are absolutely sure that you are dealing with the principal. Ask for identification. Don't be the victim of a plot. Even if you've known the client for years, get a copy of current identification.

8. When a Will is to be signed by a client who is in the stages of his final illness or who has been partially paralyzed by a stroke and can no longer write with his normal hand, all the bases must be touched. The importance of independent, knowledgeable, and competent witnesses cannot be overemphasized. Even if it takes an act of Congress, try to get the family doctor, banker or people of equal stature to be present to act as witnesses. And while the lawyer can supervise the execution of the document, it is strongly recommended that he not sign as a witness. Take a photograph or record the signing on a video.

9. Under no circumstances should you either assist or guide the client's hand when they sign the Will or Trust documents. A simple "X" or even a partial scrawly signature is preferable to a non-natural, assisted or guided signature. We will further discuss signatures in general at the end of this paper.

<u>When these conditions exist, take extra care, not only with the drafting, but also in the physical preparation, signing, witnessing and safekeeping of a new Will:</u>

1. Clients with very simple or erratic, inconsistent signatures

2. Second, third or fourth spouses v. children from earlier marriages

3. "Death Bed" Wills

4. Foreign heirs
5. An unequal distribution among the children (a partial or total disinheritance)

6. Brothers and sisters v. an unpopular surviving in-law

7. Charitable bequests v. natural bequests

8. Witnesses to the Will who are incompetent, weak, or have either a financial or personal interest in the estate (an example of the latter would be the sister of the chief beneficiary). Don't use them. (In a recent lawsuit, two witnesses denied their signatures. Their signatures were, in fact, genuine; however, it was to their financial benefit to invalidate the Will.)

9. Litigious family members

10. A cunning, scheming testator who makes false promises about the distribution of his estate in order to keep control over his family and employees. Several years ago in a Will contest, the determination was made that the testator's signature was genuine; however, the two witness signatures were not. The same pen was used for all three signatures. As best as can be determined, the testator wanted to change his Will without going through the whole process of having it re-signed. Presumably he figured that the witnesses would recall signing a Will, and not dispute the new Will that he had created.

11. A bachelor or spinster who outlives the immediate family

12. Any estate with loads of money

As is to be expected, our ever-changing technology has created new problems in terms of creating the perfect unchallengeable document. Technology has also created useful techniques for validating documents.

The liquid ink that is commonly used for fiber tip pens can be chemically indistinguishable from the ink used for inkjet printers. The resolution of inkjet printers is at such a state that what purports to be a signature written by an individual may, in actuality, be printed by an inkjet printer. It is relatively easy to scan in an individual's signature and then print it out on an inkjet printer. To avoid this potential problem, only non-aqueous inks should be used. What this means is use a properly-functioning ballpoint pen that indents into the paper.

A recent innovation that we've become aware of has the potential of becoming a serious problem. Usually, when one has a facsimile or rubber stamp prepared, it is easy to recognize the "signature" as actually being a facsimile stamp. A new machine, however, has become commercially available. This machine is relatively inexpensive and could conceivably be purchased by the general public. An individual could scan a signature, modify it using a Photoshop-type program, and prepare a very realistic looking signature that might be intended for a very limited usage.

Normally, facsimile stamps have a very clunky appearance, primarily because they are designed

to be durable because of repeated usage. Under this new process, a more delicate looking signature stamp could be created. Depending on the ink used, this delicate looking facsimile impression conceivably could be mistaken for a written signature prepared with a liquid ink pen, such as a Flair pen. An examination of this type of facsimile stamp signature might not be detectable unless examined with appropriate equipment.

Common photocopier or printer paper should not be used for final drafts of Wills or Trust documents. Despite the fact that the pages came from the same box, it is possible that the individual reams of paper may have come from as many as five separate production lines. Each production line might vary slightly, for example, in the selection and use of the optical brighteners. To avoid this problem, it is recommended that good quality watermarked paper from the same box be used.

Among the plusses technology has produced is a technique whereby indented writing can be detected in individual sheets of thin paper. One of the instruments used for this purpose is an instrument called an Electrostatic Detection Apparatus or ESDA. The ESDA creates a permanent record of what is indented into a piece of paper. Indentations can be detected anywhere from three to five pages above the page processed. Indentations are a function of the thickness of the paper, the type of writing instrument, and the pressure applied. The power of this technique is that it can link all pages of a document. When a Will or Trust document is signed by the client and/or witnesses, all pages should be one on top of the other. Previously signed pages should be placed so they are now underneath pages being signed.

While the use of computer printers might lead one to believe that entries could not be added later to an existing document, the opposite is true. It is surprisingly easy to reinsert a printed document into a laser printer and add additional sentences and/or paragraphs. As a general rule, don't leave any empty spaces where a creative person could add a sentence or paragraph. It is especially important not to leave a blank space between the body of text and the area for the signatures. If a space must be left, "x" out the area using either the printer or a pen. Better a messy looking document than a lawsuit where your integrity and livelihood is at risk.

One of the surprising things that technology has not improved on is the use of signatures as a method of uniquely identifying a document to a particular individual. This process is several thousand years old and not likely to be changed in the immediate future.

Everyone assumes that if an individual is literate, that person has a signature. Surprisingly, a certain percentage of the population truly does not have a signature in the sense that their signature has complexity and consistency. If an individual's signature is not complex, the possibility of someone successfully simulating it is increased. If an individual lacks consistency in their signature, then telling what is an unusual variation of their signature as opposed to a good simulation becomes difficult.

Not surprisingly, as a person ages and is afflicted with the unpleasant selection of diseases that humans suffer from, an individual's signature can start to develop considerable variation.

Obtaining credible verifiable contemporaneous examples of an individual's signature can be difficult, if not impossible.

The examination of signatures is, in essence, a three-step procedure. First, the signature is examined to determine if it was actually written by a human and was not produced by a copy process. Second, the overall spontaneity or naturalness of the original signature is evaluated. The purpose of this is to determine if one is dealing with natural handwriting as opposed to a tracing or a slowly written simulation. The third step involves the comparison of the overall form and design of the questioned signature to a verified representative sampling of the individual's signature.

If you ever do need to retain a Forensic Document Examiner or are on the receiving end of scrutiny by one, there are several things that you need to know with respect to document examiners in general.

First of all, unlike attorneys, there is no state licensing of document examiners. While the field overall is very small, there is considerable diversity in terms of the background, training, and qualifications of those individuals who present themselves as document examiners. This situation is not unique to the area of forensic document examination. It is a problem shared by the thousands of areas of expert testimony.

If you have any familiarity with Federal practice, you may well be familiar with the trilogy of decisions concerning experts: *Daubert, Joyner,* and *Kumho Tire*. These decisions have attempted to address the problem related to experts in the legal system.

When dealing with document examiners, we would refer you to two articles. The first was in the February, 2000, issue of the *ABA Journal* and is entitled "Expertise for Sale," written by Mark Hansen. The second is a *Law Review* article (Vol. 66, No. 2, Winter 1997, University of Missouri-Kansas City School of Law) entitled "Handwriting Identification Evidence in a Post-Daubert World" by Andre J. Moenssens. These two articles, along with routine checking of background, credentials, and references, should ensure that you're dealing with a qualified Forensic Document Examiner.

Hopefully, this presentation will help you avoid situations that could challenge not only your professional integrity but your livelihood. As we have told doctors when speaking to them, we enjoy meeting them socially, but we have no real desire to meet them professionally and we are quite sure that they share the same sentiment with respect to us.