Recommended Method of Executing a Will
(Reprinted for Dukemenier, et al, Wills, Trusts and Estates, 215-218 (7th Ed., 2007))

In executing a will, a lawyer should not rely on the formalities required by the statute in the client's home state. The client's will may be offered for probate in another state. The client may be domiciled elsewhere at death or may own real property in another state, or the will may exercise a power of appointment governed by the law of another state. Under the usual conflict of laws rules, the law of the decedent's domicile at death determines the validity of the will insofar as it disposes of personal property. The law of the state where real property is located determines the validity of a disposition of real property. If a person domiciled in Illinois executes a will, then moves to New Jersey and dies there, owning Florida real estate, some tangible personal property, and some stocks and bonds, the law of Illinois does not govern the validity of the will at all. New Jersey law determines the validity of the disposition of the tangible and intangible personalty, and Florida law governs the validity of the disposition of the real estate.[1] Most states have statutes recognizing as valid a will executed with the formalities required by (1) the state where the testator was domiciled at death, (2) the state where the will was executed. See, e.g., UPC §2-506 (1990). These statutes, where enacted, are not all uniform, however, and sometimes contain ambiguities and internal conflicts. A lawyer should draft wills so that there is no need to resort to such an act. Hence, the careful lawyer in our highly mobile society draws a will and has it executed in a manner that satisfies the formal requirements in all states.[2]

If the procedure set forth below[3] is followed, the instrument will be valid in all states, no matter in which state the testator is domiciled at the date of execution or at death or where the property is located. If all these steps are not followed to the letter, in one or more states the will may be either invalid or extremely difficult to prove as a properly executed will.

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[1] The Hague Convention of 1989 discards the situs rule for real property and the domicile rule for personal property, replacing them with very different choice of law rules. The Hague Convention has not been ratified by the United States and is sharply criticized by Professor Schoenblum, this country's leading choice of law scholar in estate planning matters. See Jeffrey A. Schoenblum, Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates, 32 Va. J. Intl. L. 83 (1991).

[2] If the client owns property in a foreign country or may die domiciled there, the law of the foreign country should be examined and the will executed in compliance with such law. See Jeffrey A. Schoenblum, Multistate and Multinational Estate Planning §§15.01-15.06 (2d ed. 1999); Donald D. Kozusko & Jeffrey A. Schoenblum, International Estate Planning: Principles and Strategies (1991). See also Uniform International Wills Act, found in UPC §§2-1001 to 2-1010 (1990) and adopted in many states, which sets out the procedure to be followed to comply with the 1973 Washington Convention on Wills. The procedure recommended in the text complies with the International Wills Act, except the self-proving affidavit at the end differs slightly from the affidavit required for an international will. For further discussion of the Washington Convention, ratified by the Senate in 1991, see Recent Development. The Resurgence of the International Will: A Call for Federal Legislation, 26 Vand. J. Transnatl. L. 417 (1993).

[3] This procedure is an up-to-date version of the format recommended by Professor W. Barton Leach in his Cases on Wills 44 (2d ed. 1949) and subsequently refined by Professor A. James Casner in his work, 1 Estate Planning §3.1.1 (6th ed. 2004 with Jeffrey N. Pennell).

(1) If the will consists of more than one page, the pages are fastened together securely. The will specifies the exact number of pages of which it consists.

(2) The lawyer should be certain that the testator has read the will and understands its contents.

(3) The lawyer, the testator, three[4] disinterested witnesses, and a notary public are brought together in a room from which everyone else is excluded. (If the lawyer is a notary, an additional notary is unnecessary.) The door to the room is closed. No one enters or leaves the room until the ceremony is finished.

(4) The lawyers asks the testator the following three questions:

(a) "Is this your will?"[5]
(b) "Have you read it and do you understand it?"
(c) "Does it dispose of your property in accordance with your wishes?"

After each question the testator should answer "Yes" in a voice that can be heard by the three witnesses and the notary. It is neither necessary nor customary for the witnesses to know the terms of the will. If, however, the lawyer forsees a possible will contest, added precautions might be taken at this time.

(5) The lawyer asks the testator the following question. "Do you request _____, _____, and _____ (the three witnesses) to witness the signing of your will?" The testator should answer "Yes" in a voice audible to the witnesses.

(6) The witnesses should be standing or sitting so that all can see the testator sign. The testator signs on the margin of each page of the will. This is done for purposes of identification and to prevent subsequent substitution of pages. The testator then signs his or her name at the end of the will.

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[4] Vermont is the only state that still requires three witnesses, but Louisiana requires two witnesses plus a notary. Both of these states have statutes providing that a will executed out of state is valid if it is valid either in the state where executed or in the state of the testator's domicile. La. Stat. Ann. §9-2401 (2004); Vt. Stat. Ann. Tit. 14, §112 (2004). Yet even in states requiring two witnesses, using three witnesses is common -- among other reasons, to reduce the harm should an interested witness be among the three. Pennsylvania is the only state that does not require witnesses at all for formal wills, so long as the testator's signature is not by a simple mark or signed by someone else at the testator's direction. Pa. Cons. Stat. Tit. 20, §3132 (2004).

[5] The testator's declaration that the instrument is his will is called *publication*. The purpose of publication is to assure that the testator is under no misapprehension as to the instrument that the testator is signing and to impress upon the witnesses the importance of the act and their consequent duties to vouch for the validity of the instrument. Nonetheless, the requirement of publication, a formality mandated in some states, is rarely a bar to probate since the testator may indicate to the witnesses that the instrument is a will by words, signs, or conduct; even the words of another saying it is the testator's will are sufficient. It is only necessary that the evidence show that the testator and the witnesses understand that the instrument is a will. Jackson v. Patton, 952 S.W. 2d 404 (Tenn. 1997).

(7) One of the witnesses reads aloud the *attestation clause*, which attests that the foregoing things were done. Here is an example: "On the _____ day of foregoing instrument was her last Will, and she requested us to act as witnesses to it and to her signature thereon. She then signed the Will in our presence, we being present at the same time. We now, at her request, in her presence, and in the presence of each other, hereunto subscribe our names as witnesses, and each of us declares that in his or her opinion this testator is of sound mind."

(8) Each witness then signs and writes his or her address next to the signature.

(9) A *self-proving affidavit*, typed at the end of the will, swearing before a notary public that the will has been duly executed, is then signed by the testator and the witnesses before the notary public, who in turn signs and attaches the required seal. Why attach a self-proving affidavit? Due execution of a will is usually proved after the testator's death by the witnesses testifying in court or executing affidavits. If the witnesses are dead or cannot be located or have moved far away, a self-providing affidavit reciting that all the requirements of due execution have been complied with permits the will to be probated. The will is valid without such an affidavit,[6] but the affidavit makes it easy to probate the will. The affidavit must be invention of the UPC that has proven very popular.

UPC §2-504 (1990) authorizes two kinds of self-proving affidavits. UPC §2-504(a) authorizes a *combined* attestation clause and self-proving affidavit, so that the testator and the witnesses (and the notary) sign their names only once; hence this is called a "one-step" self-proving affidavit. UPC §2-504(b) authorizes a self-proving affidavit to be affixed to a will already signed and attested, an affidavit that must be signed by the testator and witnesses in front of a notary *after* the testator has signed the will and the witnesses have signed the attestation clause. In our recommended procedure, we have followed this "two-step" process authorized by UPC §2-504(b), which is permitted in more states than is the combined attestation clause and self-proving affidavit.

UPC §3-406 provides that, if a will is self-proved, compliance with signature requirements for execution is conclusively presumed. In states adopting the UPC, a self-proved will cannot be attacked on grounds of failure to comply with signature requirements buy may, of course, be attacked on other grounds such as undue influence or lack of capacity. In states that permit self-proved wills but have not adopted UPC §3-406, a self-proved will may give rise to only a rebuttable presumption of due execution. See Bruce H. Mann, Self-Proving Affidavits and Formalism in Wills, Adjudication, 63 Wash. U.L.Q. 39 (1985).

(10) Although not required, after the ceremony the lawyer supervising the execution should make photocopies of the original executed will. In a quiet moment after everyone has left, the lawyer should review the will to check that all the signatures are in the correct places and each page is initialed or signed in the margin. If an error was

[6] But see footnote 4, supra, for Louisiana law.

made, it is easier to correct by redoing the execution ceremony than by litigation after death. The lawyer should then write a short memo to the file noting that the firm's usual execution practices were followed and noting any problems. If the firm is retaining possession of the original (as we recommend in states where this is not expressly discouraged by local courts), the lawyer should place the original in the vault or safe-deposit box and place the copies in the client files. Many law firms then send a booklet to the client containing a photocopy of the will (marked "copy"), a cover letter stating where the original will be stored, and a copy of any earlier letters describing the estate scheme, so that after death the family might find both a copy of the will and the address of the firm having custody of the original.