

Second Supplement to Memorandum 92-39

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney (State Bar Letter)

Exhibit 1 is a letter from the State Bar opposing the Recommendation in its present form (see basic memorandum). If the Recommendation is modified as requested by the Bar, the Bar believes that would avoid imposing new costs on the Bar, and the Bar could withdraw its opposition. The staff recommends we accept the modifications requested by the State Bar. These are:

(1) The State Bar would receive notices of transfer of estate planning documents only for transfers between attorneys. The staff would delete the provision for transfer to a trust company. Trust companies are unlikely to accept stale documents, and it seems undesirable to permit transfer to a trust company without some way to track the document.

(2) The notice of transfer would not describe each document transferred, but would merely show that estate planning documents were transferred collectively to a specified attorney. The notice would not show whether documents were transferred to a court clerk. A person searching for a document would have to check with the clerk in each county where the depositor resided.

(3) The notice of transfer would include the State Bar number of the transferring and receiving attorneys.

(4) The State Bar could respond to inquiries either orally (by telephone) or in writing, at its election.

(5) Information about the transfer would not be kept confidential by the State Bar until the depositor's death, but would be freely available from the date of its receipt.

Possible Opposition of County Clerks

The staff expressed concern in the First Supplement that the clerks might continue to oppose their inclusion as a possible depository. The staff suggested that in such a case the clerks should be deleted from the Recommendation. Don Green of the State Bar Probate Section believes this is the most important provision in the

Recommendation, and that without it the Recommendation would be meaningless. Accordingly, the staff would keep the provision for transfer to the court clerk.

For the time being, the staff would keep the clerk's fee for receiving and storing a document at \$14. The clerks may ask that the fee be increased to \$25, as they have previously. The staff is willing to do this if the clerks will withdraw their opposition. However, a \$25 fee may make it prohibitively expensive for a practitioner to transfer more than a few documents to the clerk.

Staff Recommendation

Exhibit 2 sets out revisions to the recommended legislation (attached to basic memorandum) needed to respond to the State Bar's requests. Exhibit 2 has all the revisions recommended by staff, including those recommended previously in the basic memorandum and First Supplement.

The staff recommends the Commission approve the revisions in Exhibit 2, authorize the staff to have a bill prepared for introduction in the Legislature, and authorize the staff to increase the clerk's fee to \$25 if that is necessary to eliminate the clerks' opposition.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



**THE
STATE BAR
OF CALIFORNIA**

555 FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 561-8200

October 9, 1992

Robert J. Murphy, III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Law Revision Commission Proposal Concerning State Bar Role
in Transfer of Estate Planning Documents

Dear Mr. Murphy:

At its meeting on September 19, 1992, the State Bar Board of Governors reviewed the California Law Revision Commission September 1992 Staff Draft Recommendation concerning deposit of estate planning documents with attorney and Memorandum 92-39 which relates to that recommendation. We appreciate your seeking the comments of the Board of Governors on this proposal.

The Board of Governors agrees that a system to record transfers of estate planning documents from one attorney to another might be helpful for clients who deposit estate planning documents with an attorney, and the depositor's heirs, to locate those documents after the attorney has died, retired, or otherwise left an estate planning practice.

The Board of Governors, however, is opposed to the provisions of Probate Code section 633 as proposed in the Law Revision Commission's September 1992 staff draft because implementation of this section by the State Bar would require substantial additional funds and personnel and the Board of Governors does not believe that the provisions of this section are needed to accomplish the objectives sought.

The Board of Governors urges that the Commission adopt the proposal of the State Bar Section on Estate Planning, Trust and Probate Law as described in a March 9, 1992 letter from Don E. Green to the Commission, with the following modifications and additions:

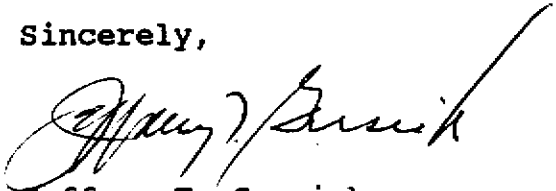
1. The State Bar would receive and record notices of transfer relating only to transfers of estate planning documents between attorneys;

2. The State Bar would record only one notice of transfer for each transferring attorney;
3. The notice of transfer may specify only one transferee attorney; and
4. The State Bar would be required to provide information to the public concerning notices of transfer only by telephone.

A copy of the resolution on this subject which the Board of Governors adopted is attached. Also attached is a staff memorandum which provides further information on this matter.

If you have questions about this, please contact me or David Long, Director of the State Bar Office of Research.

Sincerely,



Jeffrey T. Gersick
Secretary

JTG:ec
Enclosure

- cc: Margaret Morrow
Valerie J. Merritt
Don E. Green
Herbert M. Rosenthal
Diane C. Yu
David C. Long
Linda Schilling

c:\work\bccl\92sep#8a.ltr



THE STATE BAR OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4496

(415) 561-8200

Re: BCAJ/L Agenda Item 8

DATE: September 15, 1992

TO: Members of the Board Committee on Administration of
Justice/Legislation and Board Committee on
Administration and Finance

FROM: David C. Long, Director of Research

SUBJECT: Law Revision Commission Proposal Concerning State Bar
Role in Transfer of Estate Planning Documents

ISSUE

What position should the State Bar take on a Law Revision Commission proposal under which the State Bar would receive and track notices of transfer of estate planning documents by attorneys?

BACKGROUND

In 1990 the Law Revision Commission proposed that the State Bar keep track of transfers by attorneys of estate planning documents to attorneys and others. This was to be accomplished through a Notice of Transfer that would be sent to the State Bar and maintained in State Bar files for disclosure under certain conditions. The original proposal called for the State Bar to keep track of individual estate planning documents and to maintain a list of all transferred documents on a confidential basis; they could be disclosed, for example, based upon a death certificate pertaining to an individual whose estate documents had been transferred.

This proposal was designed (1) to permit attorneys, who hold estate planning documents for safe keeping, to transfer those documents upon retirement, resignation, going inactive or changing to some other kind of practice, and (2) to also permit the depositor of estate planning documents or the depositor's heirs to locate these documents after such a transfer. The proposal that the State Bar receive and track notices of transfer of estate planning documents is part of a broader Commission proposal which would permit attorneys holding estate planning documents for safe keeping to transfer those documents to another attorney, a trust company or the clerk of the superior court of the county of the depositor's last known residence.

The Board of Governors considered this earlier proposal in May 1990 and urged the Law Revision Commission to further study the proposal. Subsequently, State Bar President Alan Rothenberg, sent a letter (attached) opposing the proposal in its present form and requesting that further information be obtained. The State Bar's Section on Estate Planning, Trust and Probate Law has continued to work with the Law Revision Commission and has developed a somewhat modified proposal which will be considered by the Law Revision Commission at its meeting in October of 1992. However, the Commission's staff draft proposal for consideration at this meeting is essentially unchanged from the 1990 version that the State Bar opposed.

The Estate Planning, Trust and Probate Law Section has proposed changes to the Commission draft to make the transfer provisions more acceptable to the State Bar. These suggestions are contained in Don Green's March 9, 1992 letter to the Law Revision Commission which is appended to Law Revision Commission Staff Memorandum 92-39 (attached). These changes include:

1. The State Bar would receive notice of a transfer only when a document is transferred to an attorney or trust company, not to a county clerk.
2. The Notice of Transfer would not describe each document transferred and the State Bar would not keep track of specific estate planning documents.
3. Information in State Bar files would not be kept confidential, and any person could request and obtain the information before or after the depositor's death. Death certificates would not be needed to disclose information.

Staff of the Office of Membership Records have estimated that the proposal made by the Estate Planning, Trust and Probate Law Section would have no additional fiscal impact on the State Bar if one provision of that proposal - that the State Bar track transfers of estate planning documents to trust companies - is eliminated; that is, Membership Records' estimates that this proposal can be implemented within existing budgets and personnel if the State Bar would receive and track only attorney-to-attorney transfers of these documents. "No fiscal impact" also assumes that responses to the public are by phone only, and not in writing.

From discussions with a representative of the Estate Planning, Trust and Probate Law Section, it appears that trust companies are unlikely to accept transfers of estate planning documents from attorneys since the acceptance of documents for a depositor whose whereabouts is unknown is unlikely to lead to future trust business. It appears that the reason the option of transfer to a

trust company is included in the proposal is to permit this option to be used, in the unlikely event that a trust company would accept such documents. The unlikelihood that transfers to trust companies will be used, and the additional cost to the State Bar of maintaining a system to account for them, may outweigh the potential benefits of this option.

This matter will be on the agenda of the Law Revision Commission's October 29-30 meeting. The Commission would like to receive the comments of the State Bar prior to that meeting.

FISCAL AND PERSONNEL IMPACT

The cost of implementing this program, if limited to tracking attorney-to-attorney transfers, can be accommodated within Support Services' currently allocated budget and personnel. If the current budget and personnel allocations are reduced through new cost savings programs, the fiscal impact of this program should be reassessed. If legislation is passed that requires the bar to keep additional data, such as transfers to trust companies, clerks of superior courts, etc., or provide more services than those proposed, significant additional funding will be required.

RECOMMENDATION

The Estate Planning, Trust and Probate Law Section believes that a system of recording transfers of estate planning documents from one attorney to another attorney would provide a useful mechanism for persons who deposit estate planning documents with attorneys, and the depositor's heirs, to locate those documents after the attorney has died, retired or otherwise left an estate planning practice. The Office of Membership Records now receives inquiries concerning the whereabouts of estate planning documents, on the assumption that the State Bar has this information. This system, if it were adopted, would permit the State Bar in the circumstances of an attorney-to-attorney transfer of these documents to aid depositors and their heirs to find these documents.

Staff recommends that if this proposal is approved, it be with the understanding: (1) that the State Bar would be responsible for receiving and tracking transfers of estate planning documents only between attorneys; (2) that no individual estate planning documents would be tracked; (3) that the State Bar would only record one transferee attorney for each transferor attorney; (4) that information about transferred documents would be provided only by telephone; and (5) that if any of these conditions is not met, the Board of Governors authorizes opposition to this proposal based on the additional costs required for implementation.

Excerpt - Board of Governors Meeting
September 19, 1992

RESOLVED, that the Board of Governors opposes the provisions of Probate Code section 633 as proposed in the Law Revision Commission's September 1992 staff draft of legislation relating to deposit of estate planning documents with attorneys, because implementation of this section would require substantial additional funds and personnel and the provisions of this section are not needed to accomplish the objectives sought; and it is

FURTHER RESOLVED, that the Board of Governors recommends that the Law Revision Commission adopt the proposal of the State Bar Section on Estate Planning, Trust and Probate Law as described in a March 9, 1992 letter from Don E. Green on behalf of the Section to the California Law Revision Commission, with the following modifications and additions that would specify: (1) that the State Bar would receive and record notices of transfers relating only to transfers of estate planning documents between attorneys; (2) that the State Bar would record only one notice of transfer for each transferring attorney; (3) that the notice of transfer may specify only one transferee attorney and (4) that the State Bar would provide information to the public concerning notices of transfer only by telephone. If these provisions are not included in the proposed legislation, the Board of Governors authorizes opposition to this proposal based upon the additional costs required for implementation.

c:\work\bcclmisc\92sep8a.bog

§ 610. Attorney's duty of ordinary care

610. If a document is deposited with an attorney, the attorney, and a successor attorney ~~or trust company~~ that accepts transfer of the document, shall use ordinary care for preservation of the document on and after July 1, 1994, whether or not consideration is given, and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

§ 615. Attorney's notice to client

615. An attorney may give written notice to a depositor, and obtain written acknowledgment from the depositor, in the following form:

NOTICE AND ACKNOWLEDGMENT

To: _____
(Name of depositor)

(Address)

(City, state, and ZIP)

I have accepted your will or other estate planning document for safekeeping. I must use ordinary care for preservation of the document.

You must keep me advised of any change in your address shown above. If you do not and I cannot return this document to you when necessary, I will no longer be required to use ordinary care for preservation of the document, and I may transfer it to another depository attorney and give notice of the transfer to the State Bar of California, or I may transfer it to the clerk of the superior court of the county of your last known residence.

(Signature of attorney)

(Address of attorney)

(City, state, ZIP)

My address shown above is correct. I understand that I must keep you advised of any change in this address.

Dated: _____

(Signature of depositor)

§ 616. Reduced standard of care

616. Notwithstanding Section 610, if an attorney has given written notice to the depositor, and has obtained written acknowledgment from the depositor, in substantially the form provided in Section 615, and the requirements of subdivision (a) of Section 632 are satisfied, the attorney, and a successor attorney ~~or trust company~~ that accepts transfer of a document, shall use at least slight care for preservation of a document deposited with the attorney.

Note. The staff would restore "at least" preceding "slight care," consistent with the standard for a gratuitous depositary in Civil Code Section 1846. To say an attorney "shall use slight care" without "at least" looks peculiar and may be troubling, especially to a lay person.

§ 632. Termination by transferring document to another attorney or superior court clerk; reduced standard of care

632. (a) An attorney may terminate a deposit under this section if the attorney has mailed notice to reclaim the document to the depositor's last known address and the depositor has failed to reclaim the document within 90 days after the mailing.

(b) Subject to subdivision (e), an attorney may terminate a deposit under this section by transferring the document to any either of the following persons:

(1) Another attorney.

~~(2) A trust company~~

~~(3)~~ (2) The clerk of the superior court of the county of the depositor's last known residence. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 632.

(c) The An attorney may not accept a fee or compensation from a transferee for transferring a document under this section. An attorney may charge a fee for receiving a document under this section.

(d) Transfer of a document by an attorney under this section is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the rules of professional conduct. If the document is privileged under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 634.

§ 633. Notice to State Bar

633. (a) An attorney transferring a document under Section 632 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, ~~a description of each document transferred,~~ the name and address, and State Bar number of the transferring attorney, and the name and address, and State Bar number of the attorney, ~~trust company, or clerk of the superior court to which each document is to whom the documents are~~ transferred. If the attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.

~~(b) Except as provided in subdivisions (c), (d), and (e), when filed with the State Bar, information in the notice of transfer relating to a depositor shall be confidential, is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.~~

~~(c) (b)~~ On request by ~~the depositor~~ any person, the State Bar shall ~~furnish to the depositor~~ give that person information relating to ~~that depositor~~ in the notice of transfer. At its sole election, the State Bar may give the information orally or in writing.

~~(d) On request by an attorney who gave a notice of transfer, the State Bar shall furnish to the attorney the information in the notice of transfer.~~

~~(e) If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.~~