

Memorandum 89-88

Subject: Study L-608 - Deposit of Estate Planning Documents With  
Attorney

Attached is a staff draft of a *Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney*. The staff wrote a Memo (89-72) on this for the last meeting, but we did not reach it. The previous draft applied to attorneys and financial institutions who accept estate planning documents for safekeeping. The California Bankers Association objected to the draft (David Lauer letter of 8/28/89), and suggested either that it be rewritten as it applies to banks, or that banks be omitted. The staff has followed the second suggestion by limiting the draft to attorneys. The original proposal by the State Bar Conference of Delegates was to deal with an attorney's problem, and the present draft addresses that limited problem.

The important provision is proposed Section 733. This section permits an attorney intending to go out of practice to transfer estate planning documents to another attorney or to a trust company if the attorney has given reasonable notice to the depositor to reclaim the document and the depositor fails to do so within a reasonable time.

Notice to State Bar

Exhibit 1 is a letter from attorney Michael Miller of Palo Alto, suggesting that the transferring attorney be required to record a "documents transfer deed" showing the new location of documents transferred. Mr. Miller would require the documents to be transferred to another law firm in the same county as the transferor. The documents transfer deed would be recorded in that county.

The staff thinks Mr. Miller's idea of some kind of public notice has merit. The State Bar seems like a better place to file the notice than the county recorder. There is already a provision in existing law for notice to the State Bar when an attorney dies, resigns, or becomes inactive. Bus. & Prof. Code §§ 6180, 6180.1. The State Bar keeps a file of these notices, but the California Public Records Act does not apply. See Cal. Const. Art. VI, § 9; Gov't Code § 6252. The attached draft adds a provision that, when estate planning documents are being

transferred upon an attorney's resignation or becoming inactive, the notice to the State Bar shall include the name and address of the transferee (but not the identity of the depositor), and is a public record.

Attorneys Holding Estate Planning Documents May Be Questionable Practice

This draft may encourage attorneys to accept estate planning documents for safekeeping by making it easier to transfer the documents to another depository. If so, the staff has misgivings about it. State Bar Team 4 has written that

attorneys should not retain original estate planning documents. Attorneys who do not retain original estate planning documents tend to reduce the risk of malpractice. Team 4 is uncertain whether legislation should be enacted, although Team 4 does suggest that appropriate rules of professional conduct be enacted.

Exhibit 3, 7/89 Minutes.

Other attorneys have also criticized this practice: Irving Kellogg has written in a CEB book that it may be solicitation for an attorney to ask the testator to leave the original will with the attorney. Attorney Lloyd Homer of Campbell has told the staff by phone that he thinks attorneys should not accept original estate planning documents. The Wisconsin Supreme Court criticized the practice in a 1972 case (cited in Memo 89-51).

On the other hand, many testators think the safest place for the document is with the attorney who drafted it, and urge the attorney to keep it. We may expect attorneys to continue to keep original estate planning documents, suggesting that we do need statutory authority to transfer the documents if the attorney leaves practice.

Proposed Section 710 in the draft provides that an attorney may accept a will for deposit from a depositor with whom the attorney has no family relationship only if the depositor has made a specific unsolicited request for the attorney to do so. Mr. Miller (Exhibit 1) is "deeply alarmed" by this provision.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

AUG 30 1989

RECEIVED

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RE: L-689 "Disposal of Estate Planning Documents"

Dear Nat:

This letter is a follow-up to our telephone discussion of yesterday. I am deeply alarmed, as are other fellow probate practitioners, with the proposed wording of the study regarding the storage of wills and other documents by attorneys. As I read the proposed language, it could be grounds for discipline for me to even mention to a client that one option is the storage of a will with my firm. As it stands now, I advise clients that they should store the original will in a safe and accessible place, such as my office or with their executor, provided he or she stores it in a safe deposit box. If the proposed fiduciary is a bank, it will generally request that it retain the original. There is a strong danger in having the testator retain the original will. Not only can its production be delayed, if the proposed executor does not have access to the box (or at least a copy of the key), retention of the original will brings into play Probate Code §6124. I have had several probates where photocopies or typed conformed copies of wills have been found, but the original (last known to have been in the testator's possession) could not be located. In each of these cases intestacy proceedings were the result.

Some purists might feel that an attorney retains a will for the purpose of obtaining the probate. This is not the case for most practitioners. They agree to hold on to the wills in order to provide a safe and readily accessible depository. In my own experience, the designated executor often has an existing relationship with another attorney, and we deliver the original will to this firm for the probate.

We have had some problems in locating original wills of elderly persons when the attorney who drafted the will (often many years ago) has died or has retired. One solution might be the concept of a "Grantor-Grantee" Index. An attorney who has retired (or his estate if he has died) could deliver the ex-attorney's collection of wills and other documents to another law firm in that county. A "Documents Transfer Deed" could be recorded, showing the new location of all documents. In this manner a simple search of the public records could show the successor location of the documents. Then the new depository office could be contacted. I am sure that newer attorneys would welcome the opportunity to take over the files of retired or deceased counsel, in the hope that they would attract some new business. This deposit would have to be recognized as an exception to a duty of confidentiality. Of course, as is the case now, the right to the document would belong to the client (or to his personal representative, if the client is deceased). The Documents Transfer Deed would not list the names of the individual clients, in order to protect their privacy.

The Documents Transfer Deed should be mandatory, unless the retiring attorney or estate of a deceased attorney is successful in returning all original documents to the proper clients. A sample Deed is attached for the use of the Commission.

Sincerely,



Michael Patiky Miller

MPM:md  
encl.

RECORDING REQUESTED BY           !  
Weinberg, Ziff & Miller           !  
When Recorded Mail Deed to       !  
Weinberg, Ziff & Miller           !  
400 Cambridge Avenue #A           !  
Palo Alto, CA 94306               !

SAMPLE

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DOCUMENTS TRANSFER DEED

TRANSFEROR:

Name of Custodian who is  
transferring documents: \_\_\_\_\_

Current Address: \_\_\_\_\_

Name(s) [Including Names of Firms or Associations], and  
Addresses, in which Transferor/Custodian Received Original  
Client Documents in the Course of the Practice of Law:

NAME OF FIRM	ADDRESSES	YEARS
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TRANSFeree:

Name and Address of New Custodian of Client Documents:

\_\_\_\_\_

Dated: January \_\_, 1989

\_\_\_\_\_  
"Attorney A", Transferor

Dated: January \_\_, 1989

\_\_\_\_\_  
"Attorney B", Transferee

STATE OF CALIFORNIA       )  
                                  )  
COUNTY OF SANTA CLARA   )

ss

ACKNOWLEDGMENT

On this \_\_\_\_ day of January, 1989, before me,  
the undersigned Notary Public, did personally appear Attorney A,  
Transferor, and Attorney B., Transferee,  
proved to me on the basis of satisfactory evi-  
dence, or known to me to be the persons whose names are sub-  
scribed on the foregoing instrument, and they acknowledged to me  
that they executed the same.

Executed and sealed by me at Palo Alto, California, on  
January \_\_\_\_\_, 1989.

\_\_\_\_\_  
Notary Public

TENTATIVE RECOMMENDATION  
relating to  
DEPOSIT OF ESTATE PLANNING DOCUMENTS  
WITH ATTORNEY

Wills and other estate planning documents are often left with the attorney who drafted them.<sup>1</sup> This creates a bailment.<sup>2</sup> A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.<sup>3</sup> Thus when an attorney accepts an estate planning document for safekeeping, the attorney must continue to hold the document indefinitely if the depositor cannot be found. This creates a serious problem for estate planning attorneys who want to retire, resign, or become inactive.

The Commission recommends legislation to permit an attorney who intends to retire, resign, or become inactive to transfer estate planning documents in his or her possession to another attorney or to a trust company when the depositor cannot be found, and to require the attorney to give notice of the transfer to the State Bar.<sup>4</sup> The recommended legislation has the following features:

(1) The attorney must keep the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

(2) The attorney shall use ordinary care for preservation of the document, whether or not consideration is paid.<sup>5</sup>

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1. See California Will Drafting Practice § 2.25, at 62-63 (Cal. Cont. Ed. Bar 1982).

2. 8 Am. Jur.2d *Bailments* § 4 (1980).

3. 8 Am. Jur.2d *Bailments* § 97 (1980).

4. Cf. Bus. & Prof. Code §§ 6180, 6180.1.

5. Under existing law, a gratuitous depositary need only use slight care. Civ. Code § 1846.

(3) The attorney is not liable for loss or destruction of the document if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

(4) The depositor need not compensate the attorney for holding the document unless so provided in a written agreement.

(5) The attorney has no lien on the document, even if provided by agreement.<sup>6</sup>

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.<sup>7</sup>

(7) The attorney may terminate a deposit by personal delivery of the document to the depositor, or by the method agreed on by the depositor and the attorney.

(8) If the attorney intends to retire, resign, or become inactive, does not have actual notice that the depositor has died, has given reasonable notice to the depositor to reclaim the document, and the depositor has failed to do so within a reasonable time, the attorney may terminate the deposit by transferring the document to another attorney or to a trust company, and giving notice to the State Bar. When filed with the State Bar, the notice will be open for inspection.

(9) A successor attorney who accepts a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depository.

(10) After the depositor's death, the attorney may terminate the deposit by delivering the document to the depositor's personal representative or trustee, or to the court clerk.

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The Commission's recommendation would be effectuated by enactment of the following measure:

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6. This is contrary to Civil Code Section 1856, which allows a lien for costs.

7. This is consistent with Civil Code Section 1822.

An act to amend Section 6180.1 of the Business and Professions Code, to add Section 6261.5 to the Government Code, and to add Part 14 (commencing with Section 700) to Division 2 of the Probate Code, relating to estate planning documents.

*The people of the State of California do enact as follows:*

Business & Professions Code § 6180.1 (amended). Contents of notice; persons to be notified

SECTION 1. Section 6180.1 of the Business and Professions Code is amended to read:

6180.1. (a) The notice shall contain such information as may be required by any order of disbarment, suspension, or of acceptance of the ~~attorneys'~~ attorney's resignation, and by any rule of the Supreme Court, Judicial Council, or the State Bar.

(b) If estate planning documents are transferred pursuant to Section 733 of the Probate Code, the notice shall include the name and address of the person, firm, or company to whom the documents are transferred. The notice shall not contain the name of, or otherwise identify, the client who deposited the documents with the attorney.

(c) ~~It~~ The notice shall be mailed to all persons who are then clients, to opposing counsel, to courts and agencies in which the attorney then had pending matters with an identification of the matter, to any errors and omissions insurer, to the State Bar, and to any other person or entity having reason to be informed of such death, change of status, or discontinuance or interruption of law practice.

(d) In the event of the death or incompetency of the attorney, the notice shall be given by the personal representative or guardian or conservator of the attorney or, if none, by the person having custody or control of the files and records of the attorney. In other cases, the notice shall be given by the attorney or a person authorized by the attorney or by the person having custody and control of the files and records.

Comment. Section 6180.1 is amended to add subdivision (b) to require the notice to include the name and address of the transferee when estate planning documents are being transferred under Section 733 of the Probate Code. See also California Rules of Court, Rule 955 (duties of disbarred, resigned, or suspended attorney).



Gov't Code § 6261.5 (added). Notice of transfer of estate planning documents

SEC. 2. Section 6261.5 is added to the Government Code, to read:

6261.5. Notwithstanding Section 6252, a notice filed with the State Bar of California pursuant to Section 6180.1 of the Business and Professions Code shall be open for inspection.

Comment. Section 6261.5 is new, and permits public inspection of notices filed with the State Bar that an attorney has ceased to practice law. If the attorney has transferred wills or other estate planning documents to another attorney, firm, or company, the notice will indicate where the documents have been transferred. See Bus. & Prof. Code § 6180.1.

Prob. Code §§ 700-734 (added). Deposit of estate planning documents with attorney

SEC. 3. Part 14 (commencing with Section 700) is added to Division 2 of the Probate Code, to read:

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS  
WITH ATTORNEY

Chapter 1. Definitions

§ 700. Application of definitions

700. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 700 is new.

§ 701. Attorney

701. "Attorney" includes both of the following:

(a) A law firm.

(b) A law corporation as described in Section 6160 of the Business and Professions Code.

Comment. Section 701 is new.

§ 702. Deposit

702. "Deposit" means delivery of a document by a depositor to an attorney for safekeeping, or authorization by a depositor for an attorney to retain a document for safekeeping.

Comment. Section 702 is new.

### § 703. Depositor

703. "Depositor" means a natural person who deposits the person's document with an attorney.

Comment. Section 703 is new and is drawn from Civil Code Section 1858(a).

### § 704. Document

704. "Document" means any of the following:

(a) A signed original will, declaration of trust, trust amendment, or other document modifying a will or trust.

(b) A signed original power of attorney.

(c) A signed original nomination of conservator.

(d) Any other signed original instrument for which the attorney issues a receipt that expressly provides that the deposit is being made under this part.

Comment. Section 704 is new. "Will" includes a codicil. Section 88.

## Chapter 2. When Attorney May Accept a Will for Deposit

### § 710. When attorney may accept a will for deposit

710. (a) An attorney may accept a will for deposit from a depositor with whom the attorney has no family relationship only if the depositor has made a specific request, not solicited by the attorney, for the attorney to do so.

(b) With the approval of the Supreme Court, the Board of Governors of the State Bar may provide by rule for the sanction for violation of this section.

Comment. Section 710 is new, and is consistent with Rule 1-400(C) (solicitation) of the Rules of Professional Conduct of the State Bar of California. Subdivision (b) is drawn from Section 6076 of the Business and Professions Code.

As used in Section 710, "will" includes a codicil. Section 88. Section 710 applies only to original documents, not to copies. See Section 704 ("document" defined).

## Chapter 3. Duties and Liabilities of Attorney

### § 720. Protecting document against loss or destruction

720. The attorney 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.

Comment. Section 720 is new. Although Section 720 applies to attorneys who are holding documents on the operative date, an attorney is not liable for action taken before the operative date that was proper when the action was taken. Section 3.

§ 721. Attorney's standard of care

721. (a) Subject to subdivision (b), an attorney shall use ordinary care for preservation of the document, whether or not consideration is paid.

(b) The attorney is not liable for loss or destruction of a document if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

Comment. Section 721 is new. Under Section 721, an attorney must use ordinary care for preservation of the document deposited, whether or not consideration is paid. This is a departure from Civil Code Sections 1846 and 1852, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

Although Section 721 applies to attorneys who are holding documents on the operative date, an attorney is not liable for action taken before the operative date that was proper when the action was taken. Section 3.

§ 722. Successor attorney not liable for failure to verify document

722. A successor attorney who accepts a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor.

Comment. Section 722 is new.

§ 723. Payment of compensation and expenses

723. A depositor is not required to compensate the attorney or pay the attorney's expenses incurred in safekeeping or delivery of the document unless expressly required to do so in a written agreement signed by the depositor.

Comment. Section 723 is new.

§ 724. No lien on document

724. No lien arises for the benefit of an attorney on a document deposited with the attorney, even if provided by agreement.

Comment. Section 724 is new, and is a departure from Civil Code Section 1856 (depository's lien).

#### Chapter 4. Termination of Deposit

##### § 730. Termination by depositor on demand

730. A depositor may terminate a deposit on demand, in which case the attorney shall deliver the document to the depositor.

Comment. Section 730 is new, and is consistent with Civil Code Section 1822, except that under Section 724 no lien is permitted against the document deposited. If the depositor has a conservator of the estate, the court may order the attorney to deliver the document to the court for examination. Section 2586.

##### § 731. Attorney may terminate deposit only as provided in this chapter

731. An attorney may terminate a deposit only as provided in this chapter.

Comment. Section 731 is new.

##### § 732. Termination by attorney by delivery or as agreed

732. An attorney may terminate a deposit by personal delivery of the document to the depositor, or by the method agreed on by the depositor and attorney.

Comment. Section 732 is new.

##### § 733. Termination by attorney transferring document to another attorney or trust company

733. (a) An attorney may terminate a deposit by transferring the document to another attorney or to a trust company if all of the following requirements are satisfied:

(1) The attorney intends to retire, resign, or become inactive.

(2) The attorney does not have actual notice that the depositor has died.

(3) The attorney has given reasonable notice to the depositor to reclaim the document and the depositor has failed to do so within a reasonable time.

(b) If the attorney has died, the attorney's partner or personal representative may terminate the deposit as provided in subdivision (a).

(c) Transfer of a document 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.

Comment. Section 733 is new. By permitting an attorney to transfer a document to another depository, Section 733 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur.2d *Bailments* § 97 (1980).

If an attorney transfers estate planning documents under Section 733, notice must be given as provided in Sections 6180 and 6180.1 of the Business and Professions Code. The notice must include the name and address of the transferee, may not include the name or other identification of the depositor, and must be sent to the State Bar. Bus. & Prof. Code § 6180.1.

§ 734. Termination by attorney after death of depositor

734. (a) Subject to subdivision (b), after the death of the depositor an attorney may terminate a deposit by personal delivery of the document to the depositor's personal representative, or, if the document is a trust, by personal delivery of the document either (1) to the clerk of the superior court in the proper county for commencement of a proceeding under Division 9 (commencing with Section 15000), or (2) to the trustee named in the document.

(b) If the document is a will and the attorney has actual notice of the death of the depositor, an attorney may terminate a deposit only as provided in Section 8200.

Comment. Section 734 is new. Subdivision (a) permits delivery of a trust document to the clerk of the superior court of the proper county for commencement of a proceeding under Division 9 (trust law). The proper county is specified in Section 17005. As used in subdivision (a), "personal representative" includes a successor personal representative (Section 58) and "trustee" includes a successor trustee (Section 84).

As used in subdivision (b), "will" includes a codicil. Section 88.