

First Supplement to Memorandum 89-88

Subject: Study L-608 - Deposit of Estate Planning Documents With
Attorney (Comments of State Bar Team 4)

Attached to this Supplement as Exhibit 1 is a letter from Team 4 of the Estate Planning, Trust and Probate Law Section of the State Bar, commenting on the draft prepared for the last meeting (Memo 89-72). Although that draft is superseded by the draft attached to the basic memo (89-88), some points made by Team 4 still apply to the present draft. These are discussed below.

§ 704. Document

The staff agrees with Team 4's suggestion to revise Section 704 as follows:

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 a conservator.
- (d) Any other signed original instrument ~~for which the attorney issues a receipt that expressly provides that the deposit is being made under~~ that the attorney and depositor agree in writing to make subject to this part.

§ 710. When attorney may accept a will for deposit

Proposed Section 710 provides:

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.

Team 4 wants to delete Section 710 because it may imply "that it is never in the best interest of a client to have an attorney retain estate planning documents." The section, of course, does not go so far. The section is to deal with concern that attorneys should not ask the client for the will. The staff is reluctant to recommend legislation that may encourage attorneys to engage in a practice that many think is dubious. On the other hand, the staff recognizes that Section 710 is controversial. Does the Commission wish to keep it?

§ 721. Attorney's standard of care

Team 4 would revise subdivision (b) of Section 721 to provide that the attorney is not liable for loss or destruction of a document in the absence of gross negligence or intentional malfeasance. The staff is opposed to this. It would insulate an attorney-depositary against ordinary negligence. As a fiduciary, the attorney should not be so insulated. If it is a questionable practice for an attorney to accept estate planning documents for safekeeping (and the staff thinks it is), the standard of care should not be lower than strangers owe to one another.

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

The staff agrees with the substance of Team 4's suggestion to revise Section 722. The staff would revise the section as follows:

722. ~~A successor attorney who accepts~~ The acceptance by an attorney of a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor imposes no duty on the attorney to inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document .

The Comment should note that Section 722 does not relieve the drafter of the document from the duty of drafting competently.

§ 723. Payment of compensation and expenses

§ 724. No lien on document

Team 4 would revise Section 723 and combine it with Section 724. The staff has no objection. The combined section would read:

723. (a) ~~A depositor is not required to compensate the attorney or pay the attorney's~~ If so provided in a written agreement signed by the depositor, the attorney may charge the depositary for compensation and expenses incurred in safekeeping or delivery of the document unless expressly required to do so in a written agreement signed by the depositor .

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

§ 730. Termination by depositor on demand

Team 4 is divided on the question of whether an attorney in fact acting under a durable power of attorney should be able to demand and receive the depositor's will. The staff thinks an attorney in fact

acting under a durable power of attorney which confers general authority with respect to "estate transactions" is now authorized to do so under Civil Code Section 2467. The staff would make this clear in the Comment to Section 730.

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

Based on the comments of Team 4, the staff would revise Section 733 as follows:

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~~ mailed notice to the last known address of the depositor to reclaim the document and the depositor has failed to do so within a ~~reasonable time~~ 90 days.

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

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

~~(e)~~ (d) 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. If the document is privileged under Article 3 (commencing with Section 950) of the Evidence Code, the document remains privileged after the transfer.

The staff has not made two changes to Section 733 suggested by Team 4:

(1) Team 4 would delete paragraph (1) of subdivision (a), so there need be no showing that the attorney intends to retire, resign, or become inactive. This would allow an attorney-depositary to terminate a deposit at any time. The staff is concerned that this would be contrary to the law of bailments, and probably contrary to the expectation of depositors. On the other hand, if the attorney-depositary cannot find the depositor, should the attorney be required to keep the document indefinitely? This is a policy question for Commission decision.

(2) In subdivision (b), Team 4 would add "shareholder," presumably to deal with the situation where the depositary is a law corporation. See proposed Section 701 ("attorney" includes a law corporation). However, if the depositary is a law corporation, the depositary cannot have died as contemplated in subdivision (b).

§ 734. Termination by depositary after death of depositor

The staff agrees with the following revision suggested by Team 4:

734. (a) Subject to ~~subdivision (b)~~ subdivisions (b) and (c), 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~~.

(b) If the document is a trust, an attorney may terminate a deposit 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), to the depositor's personal representative or (2) to the trustee named in the document.

(c) 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.

Team 4 points out that "document" includes a power of attorney, and asks whether it is appropriate to deliver a power of attorney to the grantor's personal representative. The personal representative seems to be the logical one to receive the power of attorney, but the staff solicits the views of practitioners on this question.

Team 4 would change the order of the subdivisions in Section 734. The staff has not done this, since subdivision (a) states the general rule and subdivisions (b) and (c) state particular rules that are somewhat different. This seems to be the logical order.

Team 4 would add language to subdivision (c) to provide that deposit of a will be terminated "only by depositing the document with the court" as provided in Section 8200. The staff's problem with this is that it is an incomplete paraphrase of Section 8200. The staff thinks that one using the statute should look at Section 8200 to determine what its provisions are.

Respectfully submitted,

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September 26, 1989

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BY FAXRe: LRC Memo 89-72, Deposit of Estate Planning Documents

Dear Jim:

On September 8, 1989, Clark Byam, Lloyd Homer, Barbara Miller, Bruce Ross, and I discussed LRC Memo 89-72, Deposit of Estate Planning Documents.

In general, Team 4 thought that Memorandum 89-72 was a great improvement over prior versions dealing with this same subject. Team 4 firmly believes that the Probate Code sections dealing with the Deposit of Estate Planning Documents must be as explicit as possible. Transferring estate planning documents represents a "high risk" area for attorneys. In addition, members of the public are adversely affected when estate planning documents cannot be located thus delaying the opening of a probate, the appointment of a conservator, the disposition of an estate or some other matter to which the missing estate planning documents pertain. For these reasons, these statutes must be explicit, detailed and unambiguous.

In addition to the above general comments, Team 4 has numerous specific comments about the proposed statute. These comments, which will follow the chronological order set forth in the proposed Law Revision Commission draft, are as follows:

1. Section 702(b). Depositary.

1.1 Team 4 is concerned about the scope of the term "depositary". If an attorney sells his/her practice, is the purchaser a transferee under the terms of this Section? The answer is apparently yes; however, Team 4 suggests that the statute be clarified.

1.2 The words "successor" and "transferee" must be used most carefully; Team 4 suggests that their use in this subsection be reexamined.

2. Section 704. Document. This section, and particularly subsection (d), engendered a substantial amount of discussion among the Team 4 members who participated in the conference call. The major issue is whether the provisions of subsection (d) are intended to pertain only to estate planning documents, or whether the section is also intended to apply to other documents which are not traditionally estate planning documents but which may be treated in the same manner, i.e., qualified retirement plan documents. One reason for the concern is that subsection (d) does not confine itself to estate planning documents (the words used are "Any other signed original instrument . . .") nor does it set forth an exception for older documents for which no receipt was requested or received.

Team 4 feels that there may be considerable difficulty in defining exactly what constitutes an estate planning document. For example, do estate planning documents include a premarital agreement, an insurance beneficiary designation, or a qualified retirement plan beneficiary designation? Team 4 discussed several alternative solutions. One is to confine subsection (d) to estate planning documents only; the difficulty with this proposed solution is that defining estate planning documents in and of itself may be difficult (above). Another solution is to say that the section clearly applies to the documents listed in subsections (a), (b) and (c), but that no other document should be included unless the individual so agrees. Team 4 believes that the best solution is that the section should include subsections (a), (b) and (c) and that subsection (d) should be rewritten so that it includes any documents that the parties elect in writing to make subject to this part.

3. Section 710. When Attorney May Accept Document For Deposit. Team 4 feels strongly that section 710 should be reworded. The section seems to imply that it is never in the best interest of a client to have an attorney retain estate planning documents. Team 4, however, believes that the client should have an option to leave documents with an attorney and that at times it may, in fact, be in the client's best interest for the attorney to retain his/her estate planning documents.

Whether or not an attorney retains estate planning documents is not and should not, constitute an ethical violation. Team 4 suggests that section 710 be deleted. However, the Law Revision Commission may want to suggest that a rule of practice be promulgated (as distinguished from a

substantive legal rule) that attorneys, as a general course, not retain original estate planning documents.

4. Section 721. Depositary's Standard of Care.

4.1 Team 4 was particularly concerned with the provisions of subsection 721(b). Subsection (b) could create tremendous liability for attorneys. In addition, various practical problems arise. For example, the depositary may no longer be aware of or be able to find the depositor. In other words, subsection (b) seems to encourage a contrary result to that which is intended. Team 4 believes that, absent gross negligence or intentional malfeasance, the depositary should not be liable for the loss or destruction of an estate planning or any other document which is entrusted to it.

4.2 Under the comments of section 721, Team 4 has the following comments: (a) In the second paragraph, the word "may" should be added after the word "still"; (b) The entire last paragraph of the comment should be deleted inasmuch as it simply repeats the comment to section 720.

5. Section 722. Successor Depositary Not Liable for Failure to Verify Document.

5.1 Team 4's concerns with section 722 echo its concerns about section 721 in that a contrary result to that intended may occur because of the wording used in the section. With respect to section 722, Team 4 suggests that the word "successor" (line one) be deleted in its entirety. Team 4 also believes that the section should be rewritten in order to clearly establish that the depositary has no duty to analyze, correct, contest or otherwise be concerned with the validity or invalidity of a document. The depositary has absolutely no responsibility nor liability respecting the contents of a document. Rather, the depositary's duty is to use reasonable care to safekeep the document. Team 4 suggests that section 722 be rewritten as follows:

"A depositary, acting in the capacity of depositary, has no duty to inquire into the content, validity, invalidity, completeness of any document or

correctness of information contained
in any document received pursuant to
this section."

5.2 The comment to this section should state clearly that this section does not affect the depository's duty as an attorney.

6. Section 723. Payment of Compensation and Expenses of Depository. Team 4 suggests that sections 723 and 724 be combined. Team 4 suggests that the new section 723 be reworded so that it says:

"If compensation is charged, then it shall be so provided in a written agreement signed by the depository."

Further, this section should state that no lien shall arise as a result of any such charge.

7. Section 730. Termination by Depositor on Demand. Team 4 had an extensive discussion as to whether or not this section should encompass the conservator of an estate or an individual designated under a durable power of attorney. Unfortunately, Team 4 could not arrive at a consensus, and, therefore, simply presents the question as an issue for the Commission to consider.

Harvey Spitler, a Team 4 member, suggests that the following language reflects the correct approach:

"7.30. A depositor, or his attorney in fact acting under a durable power of attorney, may terminate a deposit on demand, in which case the depository shall deliver the document to the depositor or to the attorney in fact if the depositor is then incapacitated."

As mentioned above, Team 4 has a divergence of views about both the general approach; therefore, I am certain that Team 4 also would have differing views about the above-proposed language.

8. Sections 732 and 733. Termination by Depository by Delivery as Agreed; Termination by Attorney Transferring Document to Another Depository. Team 4 is uncertain as to the interrelation between sections 732 and 733. Team 4

believes that it is these sections in particular that require clarification as to whom each applies. Team 4 believes that section 732 refers to anyone who is acting as a depository, but that section 733 only applies to an attorney who is acting as a depository. Team 4 feels that section 733 should, in the body of the section, make it clear that it is only referring to an attorney.

Harvey Spitler suggests that the following language reflects the correct approach:

"7.32. A depository may terminate a deposit by personal delivery of the document to the depositor, or to the depositor's attorney in fact acting under a durable power of attorney if the depositor is then incapacitated, or by the method agreed on by the depositor and depository."

As mentioned above, Team 4 has a divergence of views about both the general approach; therefore, I am certain that Team 4 also would have differing views about the above-proposed language.

9. Section 733. Termination by Attorney Transferring Document to Another Depository.

- 9.1 Team 4 feels that the provisions of Section 733 are ambiguous inasmuch as it is unclear whether one or two notices are required.
- 9.2 Regarding Section 733(a)(3), is notice reasonable if given to the depositor's last known address? Team 4 feels that because precision is desirable with respect to this part that "reasonable time" should be defined specifically in terms of days, months, etc.
- 9.3 Section 733(b). Team 4 suggests that the words "If the depository intends to retire, resign or become an active," should be deleted in its entirety. The issue in this case is why is it necessary to fit into a particular category. Further, it would seem preferable that, if you could not contact the client, then the provisions of subparagraph (b) would apply. However, the prior notice required under subsection (a) is desirable, and every effort should be made to locate the client in order to provide such notice.

- 9.4 Section 733(c). After the word "partner" there should appear the word ", shareholder,". Further, does the personal representative include a trustee? Team 4 feels that it would be clearer to include after "personal representative" "or the person in possession of the decedent's property".
 - 9.5 Should an attorney be able to "sell" existing estate planning documents? Do the ethical considerations differ from those involved in simply selling a practice?
 - 9.6 Another consideration: when a practice is transferred to another attorney depository, should the State Bar be notified? Although some expense would be involved, such registration certainly would be a public service.
 - 9.7 As required by good legal practice, and by many insurance carriers, how does a transferee do a conflict of interest check?
 - 9.8 Still another issue: Does the privileged communication transfer to a new depository? Team 4 believes that the answer should be yes, but that the statute should be clarified.
10. Section 734. Termination by Depository After Death of Depositor.
- 10.1 Team 4 suggests that the provisions of subsections (a) and (b) be changed so that (a) becomes (b), and (b) becomes (a).
 - 10.2 Further, Team 4 believes that it may be helpful to say that, under subsection (b), that a depository may terminate a deposit only by depositing the documents with the court as provided in Section 8200.
 - 10.3 Under subsection (a), the question arises as to when and to whom such documents as Powers of Attorney should be delivered.
 - 10.4 Finally, under subsection (a), Team 4 believes that the words "if the document is a trust, then personal delivery of the document either (1) to the Clerk of the Superior Court in the proper county for the commencement of a proceeding under Division 9," should

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September 26, 1989
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be deleted. The document should be delivered to the current or successor-named trustee as opposed to the court.

Thank you for your consideration. If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,

Kathryn A. Ballsun

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