#L-608

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Memorandum 90-135

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney (Comments on Tentative Recommendation)

Attached is a redrafted *Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney*. The previous draft, which was circulated for comment, provided for filing a notice of transfer of estate planning documents with the State Bar. The State Bar Board of Governors objected to that provision, so the Commission directed the staff to delete it and to replace it with a new provision for filing the notice with the county clerk in each county where the transferring attorney maintains an office. That is now in the attached draft, in proposed Section 723.

Might State Bar Withdraw Its Objection to Receiving Notices?

Attorney Lloyd Homer of Campbell says the issue is still open whether the State Bar might be willing to receive notices of transfer. He is discussing with the State Bar ways these notices might be handled without substantial costs. He thinks these discussions may prove fruitful.

The staff thinks we should not decide this question until Mr. Homer concludes his discussions with the State Bar. The staff thinks the State Bar is a better agency for this purpose than the various county clerks. Having one office for filings would make it easier to find a transferred document, and would avoid the burden of multiple filings where the attorney maintains offices in several counties.

Letters of Comment

Attached as Exhibits 1 through 27 are the letters we received commenting on the previous draft:

Exhibit 1: Peter L. Muhs, San Francisco
Exhibit 2: Patricia Jenkins, LA County Counsel's Office
Exhibit 3: Arnold F. Williams, Fresno
Exhibit 4: Kathryn Ballsun for Team 4, State Bar Probate Section
Exhibit 5: John G. Lyons, San Francisco
Exhibit 6: John Hoag, Ticor Title Insurance
Exhibit 7: Ruth A. Phelps, Pasadena
Exhibit 8: Frank M. Swirles, Rancho Santa Fe
Exhibit 9: Rawlins Coffman, Red Bluff
Exhibit 10: Michael J. Anderson, Sacramento
Exhibit 11: Luther J. Avery, San Francisco

Exhibit 12: Henry Angerbauer, Concord
Exhibit 13: Demetrios Dimitriou, San Francisco
Exhibit 14: Allen J. Kent, San Francisco
Exhibit 15: Russell G. Allen, Newport Beach
Exhibit 16: Paul Gordon Hoffman, Los Angeles
Exhibit 17: Peter R. Palermo, Pasadena
Exhibit 18: David W. Knapp, Sr., San Jose
Exhibit 19: Alvin J. Buchignani, San Francisco
Exhibit 20: Linda Silveria, San Jose
Exhibit 21: Michael P. Miller, Palo Alto
Exhibit 22: Jerome Sapiro, San Francisco
Exhibit 23: Kim T. Schoknecht, San Francisco
Exhibit 24: Wilbur L. Coats, Poway
Exhibit 25: Thomas R. Thurmond, Vacaville
Exhibit 26: Ruth E. Ratzlaff, Fresno
Exhibit 27: Carol Reichstetter for ExComm, LA Probate Section

These letters were on the agenda for the May-June meeting. Because of State Bar objections, the Commission did not consider these comments, so we should do so now.

Ten letters (Exhibits 2, 5, 7, 10, 12, 14, 17, 21, 24, and 26) approved of the previous draft without qualification. We also received two copies of the TR with handwritten margin notes supporting it without qualification (from Professor Benjamin Frantz of McGeorge Law School, and from Melvin C. Kerwin of Menlo Park).

The remaining 17 letters have suggestions, discussed below.

Is the Proposed Law Needed at All?

Demetrios Dimitriou (Exhibit 13) says the TR is "legislative overkill." He thinks the existing statutory and common law of bailments is sufficient.

Luther Avery (Exhibit 11) says the proposal may not be needed. He says it would be better to have a rule of professional conduct for attorneys to the effect that an attorney may not accept an estate planning document for deposit without a written agreement containing instructions on what to do with the document in various situations, including the case where the depositor cannot be located. He says, "Then you don't need a new law." The TR provides that the attorney and depositor may agree on how the deposit may be terminated. If they agree, the agreement is controlling. Section 722. The question is whether the other provisions of the TR are needed, such as the manner of holding a document (Section 710), standard of care (Section 711), no duty to verify contents (Section 712), payment of compensation and expenses (Section 713), and no lien on the document (Section 713).

There is some value in having rules that apply where there is no agreement, and that cover these collateral matters.

§ 701. Attorney

Section 701 defines "attorney" to include a law firm and a law corporation. Three commentators suggested a more inclusive definition. Exhibits 4, 22, 27. Jerome Sapiro (Exhibit 22) would define "attorney" to mean "any individual licensed to practice law in the State of California." Carol Reichstetter (Exhibit 27), writing for the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, would make clear that the definition includes a sole practitioner.

But Peter Muhs (Exhibit 1) raises a problem that suggests that "attorney" should be defined to mean the individual attorney with whom a document is deposited, and not the entire firm or law corporation. A law partnership may divide or merge with another firm. Mr. Muhs recommends the old firm be permitted to transfer estate planning documents to the new firm after mailing notice to the depositor without waiting the 90-day period required by Section 723. He says this could be conditioned on attorneys from the old firm continuing practice with the new firm. This problem could be more easily solved by revising Section 701 as follows:

> 701. "Attorney" ~~includes both of the following:~~
> ~~(a) A law firm.~~ means an individual licensed to practice law in this state.
> ~~(b) A law corporation as defined in Section 6160 of the Business and Professions Code.~~

The Comment could note that, although the depositary is the individual attorney, liability for failing to maintain an adequate standard of care may be imposed on the attorney's law partnership or law corporation under traditional rules of vicarious liability. See 2 B. Witkin, Summary of California Law *Agency and Employment* § 115, at 109-111 (1987); 9 B. Witkin, Summary of California Law *Partnership* § 38, at 434-35 (1989).

Team 4 of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 4) suggested using the Business and Professions Code definition of "attorney." However, there is no general definition of attorney in that code.

§ 703. Depositor

Team 4 (Exhibit 4) asks why "depositor" is defined as a "natural" person, and asks whether this is intended to exclude banks and other institutions. The answer is yes: Only a natural person may make a will (Prob. Code § 6100) or other estate planning document.

Team 4 finds the reference to Civil Code Section 1858(a) in the comment to Section 703 confusing. The staff originally included this reference to show the source of the language in Section 703. The staff agrees that it may be more confusing than helpful, and would delete that reference from the comment.

Team 4 asks whether "depositor" includes an attorney-in-fact acting under a durable power of attorney. In this case, the depositor is the principal. The attorney-in-fact is an agent acting for the depositor-principal. The staff suggests we add the following to the Comment to Section 703:

> The definition of "depositor" in Section 703 does not preclude the person whose document is deposited from using an agent, such as an attorney-in-fact, to make the deposit.

Team 4 asks whether "depositor" includes a conservator. The answer is no: The conservator must proceed under the substituted judgment provisions as revised in the TR (Section 2586). We should revise proposed subdivision (d) of Section 2586 to make clear that the conservator may deposit an estate planning document under the substituted judgment provisions:

> (d) For good cause, the court may order that a document constituting all or part of the estate plan of the conservatee, whether or not produced pursuant to an order under this section , shall be delivered for safekeeping to ~~some other~~ the custodian ~~for safekeeping~~ specified by the court. The court may specify such conditions as it deems appropriate for the holding and safeguarding of the document. The court may authorize the conservator to do any acts a depositor could do under Part 14 (commencing with Section 700) of Division 2.

§ 710. Protecting document against loss or destruction

Section 710 requires the attorney-depositary to hold the document "in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction." Frank Swirles (Exhibit 8) and Thomas Thurmond (Exhibit 25) ask what is meant by "other secure place." Mr. Thurmond asks whether "other secure

place" must be as secure as the specifically mentioned places (safe, vault, or safe deposit box), and whether the specifically mentioned places are the only ones that will constitute "reasonable protection." The staff would not try to define "other secure place" in the statute. We could redraft the section to read:

> 710. (a) If a document is deposited with an attorney, 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.
>
> (b) For the purpose of subdivision (a), a safe, vault, or safe deposit box is a secure place where the document will be reasonably protected against loss or destruction.

The staff does not recommend this revision. The draft in the TR is better because it requires that if the document is kept in a safe, vault, or safe deposit box, it must be reasonably protected against loss or destruction in that place. We could add the following to the Comment: "As used in Section 710, 'other secure place' means any place where the document will be reasonably protected against loss or destruction."

Russell Allen (Exhibit 15) would give the attorney-depositary a reasonable time after receiving an estate planning document to put it in a secure place by revising the section as follows:

> 710. ~~If~~ Within a reasonable time after a document is deposited with an attorney, 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.

He is concerned that without this language, an attorney might be liable for not immediately placing the document in a secure place. The staff recommends against this suggestion. If the attorney intends to put the document in a safe deposit box, the attorney should not be required to do so immediately if the document is held in some other secure place. But the attorney should reasonably protect the document against loss or destruction from the moment the attorney receives it.

The staff prefers the suggestion of Peter Muhs (Exhibit 1) that the Comment should say that:

> The duty to hold the document in a safe, vault, safe deposit box, or other secure place is a reasonable one, and allows reasonable periods for the document to be out of safekeeping for the purpose of examination or delivery in appropriate circumstances.

The staff would add to this that "at all times the document should be reasonably protected against loss or destruction, although what is reasonable may vary with the circumstances."

Mr. Muhs (Exhibit 1) says a lesser standard of safekeeping should apply to an old estate planning document that is superseded by a later one. His firm keeps superseded documents because they may become vitally important if the later document is invalidated for undue influence or lack of capacity. His firm keeps superseded documents in "storage similar to that for our closed files, rather than in a bank vault or a safe." He suggests an "exception be made in the new law for documents on hand at the effective date of the law which at the time of removal from vault storage appear to have been superseded to the attorney who is safekeeping them." The staff is uneasy about this. First, if such an exception is to be made, it should be based on an objective standard, not on the opinion of the attorney-depositary who has a conflict of interest on that question. Second, if the old document may be revived by failure of the later document, the old document is not really "superseded." As such, it should be kept in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction as required by Section 710. It seems to be a dubious practice to keep a potentially vital estate planning document stored with non-vital closed files.

Mr. Muhs also asks for a lesser standard of safekeeping where the will has been deposited with the attorney by the executor named in the will and the testator has died. But when the testator dies, the custodian of the will must deliver it to the county clerk. Prob. Code § 8200. The executor is entitled to a copy and the attorney may also keep a copy, but the original should no longer be in possession of the attorney.

§ 711. Attorney's standard of care

Section 711 provides:

> 711. (a) Subject to subdivision (b), an attorney shall use ordinary care for preservation of a document deposited with the attorney, whether or not consideration is given.
>
> (b) An attorney is not liable for loss or destruction of a document deposited with the attorney if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

The Comment notes that this raises the standard of care of a gratuitous depositary from slight care (existing law) to ordinary care.

Team 4 (Exhibit 4) wants to delete the introductory clause of subdivision (a) ("[s]ubject to subdivision (b)"). The introductory clause of subdivision (a) is important because subdivision (b) is an exception to the ordinary care requirement in subdivision (a). The introductory clause makes this clear.

Alvin Buchignani (Exhibit 19) says the ordinary care standard should apply prospectively only, and should not apply to documents held by attorneys when the law goes into effect. He thinks it is unfair to attorneys who agreed to accept the deposit under the slight care standard. The staff is willing to delay application of the ordinary care standard for six months. This would be July 1, 1992, if the proposed law is enacted at the 1991 session. This would give attorneys who cannot live with the ordinary care standard time to use the termination provisions of the new law to terminate the deposit. This may be accomplished by revising subdivision (a) as follows:

> 711. (a) Subject to subdivision (b), <u>on and after July 1, 1992,</u> an attorney shall use ordinary care for preservation of a document deposited with the attorney, whether or not consideration is given.

Team 4 would revise subdivision (b) to say that, if the attorney gives thirty days' notice to the depositor at the depositor's last known address that a deposited document has been lost or destroyed, the attorney is not thereafter liable for the loss or destruction. Paul Hoffman (Exhibit 16) supports this view, saying, "what is the attorney to do if he makes reasonable efforts to contact the client and is unable to locate the client?" Subdivision (b) is an exception to the attorney's duty of ordinary care. The staff is opposed to permitting the attorney to escape liability for a lost or destroyed document by giving constructive, not actual, notice to the client. The attorney should be excused from using ordinary care only if the depositor has actual knowledge of the loss or destruction of the document and an actual opportunity to replace it.

The LA Bar (Exhibit 27) is concerned that if a deposited document is lost or destroyed because of lack of ordinary care, the attorney may be liable not only to the depositor, but also to beneficiaries under the missing document. This appears to be a correct statement of the

law. See Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). This risk is minimized because a lost or destroyed will may still be proved and admitted to probate. Prob. Code § 8223. If no copy of the will survives and its contents cannot be proved, there is no reason why the attorney-depositary who failed to use ordinary care should be insulated from liability for the loss or destruction. But, as a practical matter, it may be impossible for potential beneficiaries to prove they would have taken under the missing will and to establish the amount of their damages.

Section 711 does not require the attorney to give notice to the depositor if the deposited document is lost or destroyed despite the attorney's use of ordinary care. Paul Hoffman (Exhibit 16) would require the attorney to give notice to the client in such a case. The staff thinks this is a good suggestion, and would insert the following as the first sentence of subdivision (b):

> If a document deposited with the attorney is lost or destroyed, the attorney shall mail notice of the loss or destruction to the depositor's last known address.

Arnold Williams (Exhibit 3) does not like Section 711. He thinks the requirement in Section 710 that "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" is sufficient. He thinks Sections 710 and 711 might be applied inconsistently with each other. We could perhaps make their interrelationship clearer by combining the two sections into one as follows:

> 711. (a) Subject to ~~subdivision~~ subdivisions (b) and (c), an attorney shall use ordinary care for preservation of a document deposited with the attorney, whether or not consideration is given.
>
> (b) If a document is deposited with an attorney, 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.
>
> ~~(b)~~ (c) An attorney is not liable for loss or destruction of a document deposited with the attorney if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

Frank Swirles (Exhibit 8) asks what is meant by "ordinary care." This term is intended to give broad guidelines to the courts in deciding whether protective measures taken by the attorney-depositary

have been adequate. Like the concept of "negligence," it is impossible to spell out in detail what constitutes ordinary care.

§ 712. No duty to verify contents of document

Russell Allen (Exhibit 15) would make clear that an attorney who accepts a document for safekeeping does not thereby undertake to provide continuing legal services. The staff has no objection if it is clear we are talking about the duty of a depositary, not the duty of the drafter of the document. We could revise Section 712 as follows:

> 712. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to ~~inquire~~ do either of the following:
>
> (a) To inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.
>
> (b) To provide continuing legal services to the depositor, to any signatory, or to any beneficiary under the document. This subdivision does not affect the duty, if any, of the drafter of the document to provide continuing legal services to any person.

The second sentence of subdivision (b) is necessary because the law is unclear whether lawyers must notify clients for whom they once drafted a will that the will might be defective because of changes in tax law. California Will Drafting Practice § 1.9, at 7-8 (Cal. Cont. Ed. Bar 1982).

§§ 721-724. Termination by attorney

Chapter 3 in the TR relates to termination of a deposit. Section 721 says an attorney may terminate a deposit only as provided in Chapter 3. Section 722 permits the attorney to terminate a deposit by personal delivery of the document to the depositor or by the method they agree on. Section 723 permits the attorney to transfer the document to another depositary if the attorney cannot terminate the deposit under Section 721 by personal delivery or by an agreed method. Section 724 provides for termination after the death of the depositor.

Team 4 would delete Section 721, and would rewrite Section 722 to provide that an attorney may only terminate a deposit as provided in Section 722. This will not work under the scheme of the chapter, because an attorney may terminate a deposit under any one of the three sections -- Section 722 (personal delivery or as agreed), 723 (transfer to another depositary), or 724 (after depositor's death).

§ 722. Termination by attorney by delivery or as agreed

The following revision is suggested by three commentators -- Peter Muhs (Exhibit 1), David Knapp (Exhibit 18), and Kim Schoknecht (Exhibit 23) -- and is recommended by staff:

> 722. An attorney may terminate a deposit by ~~either~~ any of the following methods:
>
> (a) By personal delivery of the document to the depositor.
>
> (b) By mailing the document to the depositor by registered or certified mail with return receipt requested.
>
> (c) By the method agreed on by the depositor and attorney.

Luther Avery (Exhibit 11) would permit an attorney to terminate a deposit by personal delivery of the document to the depositor "or to a responsible family member of the depositor the attorney reasonably believes will carry out the safekeeping objectives of the depositor." The staff would not make this change because it may be an invitation to mischief: A family member of the depositor may be a potential intestate taker, and thus have an incentive to conceal or dispose of the document.

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

Section 723 permits the attorney to transfer a document to another attorney or to a trust company. Team 4 (Exhibit 4) asks whether this should be broadened to permit the attorney to transfer a document to a depositary other than an attorney or trust company. The staff is not sure. What other kinds of depositaries are there?

Jerome Sapiro (Exhibit 22) says there is "a great need for a public depositary . . . where the client is unlocatable." David Knapp (Exhibit 18) would add as a possible depositary the clerk of the county of the depositor's last known residence, the California Secretary of State, and the State Bar. Paul Hoffman (Exhibit 16) would use the clerk of the county where the attorney-depositary is located as depositary of last resort if the attorney dies or becomes incompetent and his or her personal representative or conservator can find neither the depositor nor another depositary. An earlier draft (Memo 89-51) proposed using the Secretary of State as depositary of last resort, but the Commission rejected that because of its fiscal implications. Because of the fiscal implications, the staff thinks it will still be unacceptable to propose a public depositary for the document itself

such as the Secretary of State, State Bar, or, while the depositor is living, the county clerk.

Luther Avery (Exhibit 11) takes the opposite view: He says an attorney should not be permitted to transfer an estate planning document to a trust company unless authorized in writing by the depositor. He says a trust company is not subject to the same rules of professional conduct as an attorney, has "no ethical restraints," and "cannot be relied upon to keep the documents safely." He cites Bank of America's sale of its trust department to another bank as an example. The staff is not convinced that trust companies are generally less ethical than attorneys. Moreover, trust companies are subject to government regulation. The staff does not see this as a problem.

Three commentators -- Rawlins Coffman (Exhibit 9), Paul Hoffman (Exhibit 16), and the LA Bar (Exhibit 27) -- are concerned about the perpetual nature of the attorney's duty to hold a deposited document. Mr. Hoffman and the LA Bar ask what happens if the attorney cannot find another attorney or trust company willing to accept the document. An early draft of this proposal (Memo 89-51) permitted transfer of old documents to the California Secretary of State who was authorized to destroy a document if all depositaries had held it for more than 50 years without any communication from the depositor, or if the depositor would be more than 150 years old. Later drafts (Memos 89-72 & 89-88) did not provide for destruction. We could restore a provision authorizing destruction of estate planning documents that are at least 100 years old. This could be done by adding new Section 726 to the draft:

> § 726. Destruction of documents at least 100 years old
>
> 726. If a document has a date that shows it was made more than 100 years previous, an attorney no longer has the duties specified in Sections 710 and 711, and the attorney may destroy the document.

Paul Hoffman (Exhibit 16) is concerned about the requirement that the attorney must mail notice to reclaim the document to the last known address of the depositor before transferring the document to another depositary. He asks what happens if the attorney has no address for the client. When his former law firm was dissolved, "the firm was holding wills prepared almost 40 years earlier, and no one in the firm had any idea of the identity of the client, nor how to reach the

client, nor even who had drafted the document." He says in such a case publication of notice should be permitted. The staff thinks it would be more likely to give actual notice to someone with an interest in the matter to mail notice to a person named in the document. That person may know the whereabouts of the depositor and be able to forward the notice to the depositor:

> 723. (a) An attorney may terminate a deposit by transferring the document to another attorney or to a trust company if ~~both~~ all of the following requirements are satisfied:
>
> (1) The attorney does not have actual notice that the depositor has died.
>
> (2) The attorney has mailed notice to reclaim the document to the last known address of the depositor, ~~and the depositor has failed to do so within 90 days~~ or, if the attorney does not have any address for the depositor, the attorney has mailed notice to reclaim the document to any person named in the document, whether as beneficiary, executor, trustee, or otherwise.
>
> (3) The depositor has failed to reclaim the document within 90 days after the mailing.

Team 4 says the notice of transfer (to be given to the county clerk in the attached draft) should include the date. The staff agrees, and would further revise the first sentence of subdivision (b) of Section 723 as follows:

> (b) The attorney shall file notice of the transfer with the clerk of every county in which the attorney maintains an office. The notice of transfer shall contain the name of the depositor or depositors, the date of the transfer, a description of each document transferred, the name and address of the transferring attorney, and the name and address of the attorney or trust company to which each document is transferred.

Team 4 also suggests there be a separate notice for each depositor. It is not apparent to the staff why this is desirable. It simply seems to increase paperwork. Also, the attached draft provides for a $14 filing fee. If a separate notice must be filed for each depositor with a filing fee for each, that will impose a very heavy cost burden on the transferring attorney.

The staff chose $14 for the filing fee arbitrarily, drawing it from the filing fee in a civil action for a notice of motion or other paper requiring a hearing subsequent to the filing of the first paper. Gov't Code § 26830. If we keep the provision for filing with the county clerk (see next paragraph), we should ask the County Clerks

Association to suggest an appropriate amount for a fee. Instead of a flat fee, we could recommend a provision like that found in Government Code Section 68090, authorizing the county board of supervisors to fix certain filing fees, or like that found in Section 9407 of the Commercial Code, authorizing the county recorder to set the fee for a name search "in an amount that covers actual costs, but that, in no event exceeds fifteen dollars ($15)."

Russell Allen (Exhibit 15) says the notice of transfer should go to the California Secretary of State, since the Secretary of State is already responsible for registering wills under the Uniform International Wills Act. Prob. Code § 6389. The Secretary of State also receives filings under the Commercial Code and filings related to California corporations. Although this idea may have merit, the staff continues to think the State Bar is the best agency to receive a notice of transfer of estate planning documents, because an attorney who intends to go out of practice is already required to file a notice of cessation of law practice with the State Bar. Bus. & Prof. Code §§ 6180, 6180.1. If the Secretary of State becomes the agency where a notice of transfer of estate planning documents must be filed, then an attorney going out of practice will have to make two filings -- one with the State Bar as required by the Business and Professions Code and another with the Secretary of State. It seems undesirable to create a double filing system when one should suffice. The staff recommends we defer a decision on this question until Lloyd Homer completes his discussions with the State Bar. (See page 1 above.)

Jerome Sapiro (Exhibit 22) wants a public depositary for the documents themselves. (He objected to filing a notice with the State Bar because of the possible impact on State Bar dues.) The staff thinks a public depositary is not feasible. The cost of holding documents would be significantly greater than the cost of receiving and processing notices.

Luther Avery (Exhibit 11) says filing a notice of transfer of documents "is a useless act that will create management problems and expense . . . with no advantage to the client." (His comment was directed to filing with the State Bar.) The advantage to the client (depositor) is that if the client cannot find the attorney with whom the client originally deposited the document, the client can determine

the identity of the new depositor from the appropriate county clerk.

Instead, Mr. Avery would require notice by mail or by publication to interested persons, including the depositor. But Section 723 may only be used if the attorney-depositor has mailed notice to reclaim the document to the depositor and the depositor has failed to do so. Under Mr. Avery's scheme, it is unlikely the depositor would receive actual notice. Therefore the depositor or the estate beneficiaries might be unable to find the document if the transferring attorney has died or cannot be found. So this does not seem like a practical solution. The staff thinks some kind of central public registry is needed, whether it be the various county clerks, State Bar, California Secretary of State, or some other agency, that an interested person may consult to determine the whereabouts of the transferred document. Michael Miller (author of Exhibit 21) has written previously to support this concept.

Mr. Avery says depositors often deposit estate planning documents with explicit instructions on what to do with them in various situations. The TR recognizes this by providing that the attorney-depositary may terminate a deposit by "the method agreed on by the depositor and attorney." Section 722.

If an attorney has given notice of a transfer to the county clerk, after the depositor's death is established, the notice is a "public record." John Hoag of Ticor Title Insurance (Exhibit 6) would either define "public record" in this context or delete it. The staff believes it is important to keep this provision. After the depositor's death, any interested person should be able to find out from the county clerk where the documents have been transferred. The staff would make the meaning of "public record" clear as follows:

> (e) On request by the depositor and without charging any fee, the county clerk shall furnish to the depositor the information relating to that depositor in the notice of transfer. If the county clerk 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 <u>subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.</u>

The LA Bar (Exhibit 27) is concerned that, if notice to a public agency is required, attorneys will have an implied duty to inquire of the agency whether a notice of transfer has been received by the agency before the attorney takes "any action that could be affected by an

original will, trust, nomination of conservator or power of attorney, thus creating a trap for the unwary." We could negate such a duty by adding a subdivision (h) to Section 723 as follows:

> (h) Nothing in this section imposes a duty on an attorney to inquire of the county clerk whether notice of transfer of an estate planning document has been received by the county clerk.

Demetrios Dimitriou (Exhibit 13) says subdivision (g) (formerly subdivision (e)) should not apply to a trust company, but should be limited to attorneys:

> (g) Transfer of a document under this section by an attorney 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.

The staff has no objection to adding this language, although it would not have any substantive effect because only an attorney can transfer a document under Section 723 (see subdivision (a)), and Sections 950 to 962 of the Evidence Code concern the lawyer-client privilege, so "privilege" in subdivision (g) can only mean the lawyer-client privilege.

§ 724. Termination by attorney after death of depositor

Section 724 permits the attorney to terminate a deposit after death of the depositor by delivering the document to the depositor's personal representative. Team 4 (Exhibit 4) asks what happens if the depositor dies domiciled in some other state. Section 724 is not limited to depositors who die in California. If the depositor dies in some other state, the attorney may terminate the deposit by delivering the document to the depositor's personal representative in the state where the depositor's estate is being administered. The staff will make this clear by adding a statement to the Comment that "personal representative" includes a personal representative appointed in another state. See Section 58.

Team 4 asks what happens if the attorney disappears. If the attorney disappears and fails to pay State Bar dues, the attorney will be suspended. Bus. & Prof. Code § 6143. The superior court may take control of the attorney's practice and appoint another attorney to deliver the client's papers and property. *Id.* §§ 6180, 6180.2,

6180.5. The provisions of the Business and Professions Code appear adequate to deal with this problem.

Rawlins Coffman (Exhibit 9) would revise subdivision (a) (formerly subdivision (c) as follows:

> (a) If the document is a will and the attorney has actual notice of the death of the depositor but does not have actual notice that a personal representative has been appointed for the depositor, or if the will is dated at least 50 years past, an attorney may terminate a deposit only as provided in Section 8200.

Perhaps there should be a time specified after which an attorney would no longer be required to hold a deposited document (see discussion and draft provision under Section 723), but subdivision (a) of Section 724 is not the place for it. Subdivision (a) refers to Section 8200, which requires the document to be delivered to the clerk of the superior court of the county in which the estate of the decedent may be administered. But if the attorney does not know whether the decedent has died, the attorney will not know where to send the document under Section 8200. Moreover, if the depositor is living, it does not seem to be good policy to substitute the clerk of the court as depositary for the attorney. If the attorney does not have actual notice of the depositor's death, the attorney should either transfer the document to another attorney or trust company using Section 723, or, if the Commission wants to include draft Section 726 above, destroy the document when it is more than some specified age such as 100 years old.

Frank Swirles (Exhibit 8) asks how an attorney-depositor will know of the death of the depositor. The attorney-depositor may not know. In that case, the attorney-depositor will have to terminate the deposit by using Section 723 (transfer to another attorney or trust company).

§ 725. Deceased or incompetent attorney

Team 4 (Exhibit 4) suggested several improvements to Section 725. The staff would revise the section as follows:

> 725. (a) If the attorney is deceased or ~~has become incompetent~~ lacks legal capacity, the following persons may terminate the deposit as provided in Section 722, 723, or 724 ~~, and may give the notice required by subdivision (b) of Section 723~~:
>
> ~~(a)~~ (1) The attorney's law partner , or ~~, if the attorney is a law corporation,~~ a shareholder of the attorney's law corporation.

(2) A lawyer or nonlawyer employee of the attorney's firm, partnership, or corporation.

(b) If a person authorized under subdivision (a) terminates a deposit as provided in Section 723, the person shall give the notice required by subdivision (b) of Section 723.

~~(b)~~ (c) If the attorney is ~~incompetent~~ lacks legal capacity and there is no person to act under subdivision (a) or (b), the ~~attorney's~~ conservator of the attorney's estate or an attorney in fact acting under a durable power of attorney. A conservator of the attorney's estate may act without court approval.

~~(c)~~ (d) If the attorney is deceased and there is no person to act under subdivision (a) or (b), the attorney's personal representative, or, if none, the ~~person entitled to collect the attorney's property~~ successor of the deceased attorney as defined in Section 13006.

Team 4 was concerned that "the person entitled to collect the decedent's property" in subdivision (d) might be construed to include a creditor. The staff recommends substituting "successor of the deceased attorney as defined in Section 13006" for "person entitled to collect the decedent's property" in subdivision (d), and recommends adding the following to the Comment:

> Under subdivision (d), the successor of a deceased attorney as defined in Section 13006 does not include a creditor of the deceased attorney.

Team 4 suggested that "any person who has access to the documents" should be added to the list of those who may act for the attorney, but that seems too broad. The bailee (attorney) is the one who has the duty of safekeeping, and should be relieved of that duty only by his or her own act, or by the act of his or her agent. In the above revisions to Section 725, the staff has limited that authority to an employee of the firm, partnership, or corporation.

Demetrios Dimitriou (Exhibit 13) says Section 725 overlooks the fact that "the bailee is the law firm and not the individual attorney who accepts the bailment since he or she is acting on behalf of the firm." But the staff has tentatively concluded that the bailee should be the individual attorney, because of the difficulty of drafting to cover the situation where the law firm undergoes a merger or division. See discussion under Section 701.

Linda Silveria (Exhibit 20) wants to "allow the personal representative of a deceased attorney to terminate a deposit." This is already authorized by Section 725.

§ 2586. Production of conservatee's will and other relevant estate plan documents

Section 2586 relates to substituted judgment under the conservatorship law. The section permits the court to order that the custodian of the conservatee's will or other estate planning document produce the document for examination by the court. The TR adds a new provision to this section to permit the court for good cause to order that a document thus produced shall be delivered to some other custodian for safekeeping.

Team 4 is concerned that the statute does not define "good cause." The staff believes the court should have the same broad discretion as under the substituted judgment provisions generally. The staff thinks it is not desirable to spell out in the statute what constitutes good cause. The staff could put the following in the Comment:

> Under subdivision (d), "good cause" for ordering a transfer to some other custodian might include, for example, the case where the previous custodian has not used ordinary care for preservation of the document. See Section 711.

Team 4 wants the court to order that an estate planning document be transferred to some other custodian only in exceptional cases. We could substitute for the "good cause" language the following: "Upon a clear and convincing showing that the order would be for the advantage, benefit, and best interests of the conservatee or the estate, . . ." The staff does not recommend this language. The staff prefers to keep the "good cause" language with broad discretion in the court.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Memo 90-135

EXHIBIT 1

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PROFESSIONAL CORPORATIONS
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TELEX 262877 SCOOP

CONTRA COSTA OFFICE
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March 20, 1990

California State Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation Relating to Deposit of Estate Planning Documents with Attorney

Gentlemen:

I have reviewed your tentative recommendation on Deposit of Estate Planning Documents with Attorney.

One problem the tentative recommendation does not address is that of existing documents held at the effective date which are now or become superceded. Where we have retained the original of an estate planning document and have superceded it (either by a new will or a completely restated trust agreement), we customarily retain the previous original document. This is done primarily for the purpose of showing a pattern of documents and to have a back-up document in the event of challenge to the subsequent document based upon undue influence or lack of testamentary capacity. Except in situations where such a challenge appears reasonably likely, we believe that a superceded document may be appropriately maintained in a form of document storage similar to that for our closed files, rather than in a bank vault or a safe. We believe it would be burdensome to have to contact clients in this regard, although it would not be unduly burdensome in the situation of new documents (where we are thereby establishing a new procedure). Accordingly, I would suggest that some exception be made in the new law for documents on hand at the effective date of the law which at the time of removal from vault storage appear to have been superceded to the attorney who is safekeeping them.

A similar problem arises with respect to wills of deceased persons which we have historically maintained on behalf of the named executor, in the situation where the will did not need to be probated either because the estate was not of sufficient size as to probate assets or the will was a prior will to a will which in fact was probated. Under former Probate Code §320, the will could be maintained on behalf of the named executor rather than deposited with the county clerk. (This is still our preferred procedure in an amicable situation where all parties are friendly and in contact with one another.) Again, it would seem appropriate to be able to

deliver those documents to some less onerous form of storage and consistent with the former duty for slight care for a gratuitous depositary with respect to these documents relating to testators now long dead.

With respect to proposed Section 722, it would seem appropriate to allow delivery to an agent for the depositor or by some form of (certified or registered) mail with restricted delivery. It seems unnecessary, in a friendly situation, to have to speak to both clients (husband and wife) when one has requested the return. Again, perhaps the duty could be more onerous in the future, when we have the opportunity to obtain an agreed on method at the time of deposit of the document.

With respect to proposed Section 723, or perhaps in Section 701, a law firm should be allowed to transfer documents to a principal successor law firm (as determined by the former law firm) without waiting 90 days (but perhaps with mailed notice) in the event of a merger or division. This could be conditioned on a continuation of practice with the successor firm by attorneys who are part of the former firm.

Finally, I suggest that, perhaps in the comments to proposed Section 710, it be stated that the duty to maintain the document in a safe, vault, safe deposit box, or other singular place is a reasonable one, allowing reasonable periods for such documents to be out of safekeeping for the purpose of examination or delivery in appropriate circumstances.

The balance of the tentative recommendation seems to me to be an appropriate and useful clarification and codification of reasonable standards for dealing with deposited estate planning documents with an attorney, and for the transfer of documents.

Thank you for the opportunity to comment on this tentative recommendation.

Respectfully submitted,

Peter L. Muhs

PLM:mv

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March 13, 1990

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendations

Dear Sir/Madam:

I support the tentative recommendations with respect to Deposit of Estate Planning Documents with Attorney and Right of Surviving Spouse to Dispose of Community Property.

Very truly yours,

Patricia H Jenkins
Attorney at Law
Probate Division

PHJ:cb

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RICHARD E. HEATTER

DONALD J. MAGARIAN
DANIEL K. WHITEHURST
MORRIS M. SHERR
OF COUNSEL

OUR FILE NO._____

March 13, 1990

The California Law Revision Commission
4000 Middlefield Road, Suite E-2
Palo Alto, CA 94303-4739

Re: Tenative Recommendation Relating to Deposit of Estate Planning Documents with Attorney

Gentlemen:

With regard to the above-mentioned tenative recommendation, I would suggest that the attempts to define the standard of care in Section 711 is sufficient to specify the attorney's duties with regard to documents left with the attorney. I believe that the interpretation of ordinary care in Section 710 is unnecessary, and could, indeed, lead to divergent interpretations of the statute.

With regard to the assumptions concerning the situation, I think it is contradictory to state that a bailee who under current law may have a lien for costs (Your No. 5) would qualify as a gratuitous depository (Your No. 2), since that would be untrue by definition. Such individuals must use more than slight care as the law stands. In general, I am not convinced of the need for a statutory standard of care in this area, although I applaud the procedures established for the transfer of documents.

Very truly yours,

DOWLING, MAGARIAN,
PHILLIPS & AARON

Arnold F. Williams

AFW:ped

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PLEASE REFER TO FILE NO.
899001L.765

March 1, 1990

James Quillinan, Esq. BY FAX
Diemer, Schneider, Luce & Quillinan
444 Castro Street, #900
Mountain View, California 94041

Re: Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorneys

Dear Jim:

On February 2, 1990, Harley Spitler, Lloyd Homer, Clark Byam, Robert Temmerman and I discussed the Tentative Recommendation Relating to Deposit of Estate Planning Documents with Attorneys. Our comments follow:

I. Section 701. Attorney.

Team 4 suggests that Section 701 be reworded to ensure that the primary reliance for the definition of "attorney" is that set forth in the Business and Professions Code. Team 4 further questions whether the definition of "attorney" as set forth includes a sole proprietorship and a partnership. Both of these forms of doing business should be incorporated within the definition of "attorney".

II. Section 703. Depositor.

Team 4 suggests that the proposed comments to Section 703 be deleted inasmuch as Civil Code Section 1858(a) appears to have nothing whatsoever to do with the term "depositor" and merely confuses the issue.

In addition, Team 4 has the following questions:

(a) Does the term "depositor" include an attorney-in-fact acting under a durable power of attorney or a conservator.

(b) What is the meaning and reason for the use of the word "natural".

(c) Whether or not the Law Revision Commission intentionally intended to exclude banks and other institutions, particularly in view of Probate Code Section 56 which defines "person" so as to include "corporations".

III. Section 711. Attorneys' Standard of Care.

With respect to Section 711, Team 4 suggests the following:

(1) Delete from subsection (a) the initial clause which provides: "subject to subdivision (b)".

(2) Team 4 is concerned that the depositor will not have been given the current address. Therefore, the section should provide that notice may be sent to the last known addressee. It is important that the standards set forth in this section be made more explicit so that the burden imposed upon attorneys is reasonable. Therefore, Team 4 suggests that the Code Section be reworded as follows: "If an attorney gives thirty (30) days' notice to the depositor at the depositor's last known address, then an attorney shall not thereafter be liable for the loss or destruction of a document deposited with the attorney."

IV. Section 721. Attorney May Terminate Deposit Only As Provided in This Chapter.

Section 722. Termination By Attorney By Delivery or As Agreed.

Team 4 suggests that Sections 721 and 722 be combined as follows:

(a) Delete Section 721; and

(b) Rewrite Section 722 as follows: "An attorney may only terminate a deposit by one of the following methods: (i) by personal delivery of the document to the

depositor; or (ii) by any method agreed on by the depositor and attorney (new words underlined).

V. Section 723. Termination by Attorney Transferring Document to Another Attorney or Trust Company.

An issue is whether the term "depositary" should be limited to a "trust company" as provided in Section 723(a) or whether the terminology should be broadened.

Under Section 723(b), Team 4 suggests that the notice of transfer include the date.

Finally, a separate notice should be required for each depositor.

VI. Section 724. Termination by Attorney after Death of Depositor.

Section 724 requires clarification in two respects:

(1) If an individual dies domiciled outside of California; and

(2) The situation where the attorney has disappeared. Team 4 believes that the staff should address both of these issues.

VII. Section 725. Deceased or Incompetent Attorney.

Throughout Section 725, the word "incompetent" should be deleted, and the term "incapacitated" used.

Line 3 of Section 725 should have the word "may" deleted, and the term "shall" substituted in place of it.

Section 725 should be revised to include:

(1) "The attorney's law partner, if the attorney is a law corporation or shareholder of that corporation"; and

(2) "Any associate or person in charge of the records of the incapacitated attorney or any employee of the firm

or any person who has access to the documents that are subject to the depository."

The second line of subparagraph (b) should read, "the conservator of the attorney's estate."

Under subsection (c), Team 4 urges that great care be taken with respect to the clause, "the person entitled to collect the attorney's property." This clause could be construed as referring to a creditor, and Team 4 feels certain that this is not the result intended by the Law Revision Commission.

VIII. Probate Code Section 2586, amended; Production of Conservatee's Will and Other Relevant Estate Plan Documents.

With respect to the new proposed subsection (d), Team 4 strongly suggests that the court be given guidance as to what constitutes "cause". The Law Revision Commission should articulate specific instances and emphasize the fact that good cause will be the exception rather than the rule.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
STANTON AND BALLSUN
A Law Corporation

KAB/mkr

cc: Terry Ross, Esq. (By Fax)
Irwin Goldring, Esq. (By Fax)
Valerie Merritt, Esq. (By Fax)
Team 4 (By Fax and Federal Express)

EXHIBIT 5

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March 1, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: #L-608
Deposit of Estate Planning
Documents

Gentlemen:

I approve of this recommendation. It should fill a real need.

Very truly yours,

John Lyons

John G. Lyons

JGL:ea

TICOR TITLE INSURANCE

John C. Hoag
Vice President and
Senior Associate Title Counsel

February 21, 1990

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation On Deposit of Estate Planning Documents With Attorney

Dear Mr. DeMoully:

The recommendation is thoughtful as well as well-crafted.

I suggest one revision for the sake of clarity. On page 6, section 723,subsection (C): The words 'public record' should be left out; or, what those words mean should be made clear. The words 'public record' are words of art in real estate practice, and the title industry-generally taken to mean those public records which impart constructive notice to the public.

Very truly yours,

John Hoag

JCH:j

cc: Larry M. Kaminsky

Ticor Title Insurance Company of California
6300 Wilshire Boulevard, Suite 836, Los Angeles, California 90048 (213) 852-6155

EXHIBIT 7

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Edward M. Phelps
Deborah Ballins Schwarz
Ruth A. Phelps

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Facsimile: (818) 795-9586

January 31, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating To
Deposit of Estate Planning Documents
With Attorney

Dear Sir/Madame:

I have read the tentative recommendation relating to deposit of estate planning documents with attorney.

I approve of it.

Very truly yours,

Ruth A. Phelps
PHELPS, SCHWARZ & PHELPS

RAP:sp

FRANK M. SWIRLES
LAW CORPORATION

FEB 22 1990
RECEIVED

February 20, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations on

Right of Surviving Spouse to Dispose of Community Property
and
Deposit of Estate Planning Documents with Attorney

Gentlemen:

Your tentative recommendations regarding the right of the surviving spouse to dispose of community property appears to be sound.

I have some questions regarding the recommendation for the deposit of estate planning documents with an attorney, however. In section 710, how would you define "or other secure place"? In section 711 (a), what is "ordinary care"? In section 724, how is the attorney to know of the death of a former client? For example, I have a former client who now lives in Italy. He must be about 90 years old by this time, if he is still alive. Will I have to keep his documents forever?

Very truly yours,

Frank M. Swirles

RANCHO SANTA FE, CALIFORNIA 92067

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February 13, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: TENTATIVE RECOMMENDATION #L-608

Ladies and Gentlemen:

With respect to your TENTATIVE RECOMMENDATION #L-608:

I approve your recommendation entitled:

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY.

However, I would amend proposed Section 724(c) to read as follows:

> (c) If the document is a will and the attorney has actual notice of the death of the depositor, or if the will is dated at least 50 years past, an attorney may terminate a deposit only as provided in Section 8200.

(NOTE: I inherited many old wills in the late 40's and again in 1950 when my partner went on the bench. I have no idea who the testators are; my presumption is that they are deceased.)

Very truly yours,

J. Rawlins Coffman

RAWLINS COFFMAN

RC:mb

Memo 90-135

EXHIBIT 10

Study L-608

CA Law Revision Comm'n

FEB 13 1990

RECEIVED

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Michael J. Anderson

February 7, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

In respect to the Deposit of Estate Planning Documents with Attorney I have no changes to that recommendation.

In respect to the Probate Code section, I think that the language may create a problem. Some title companies hold that "to sell" does not necessarily mean to convey. So I think that if we add "convey" after the word "sell" it would avoid that problem.

In respect to Code Section 13545, I would assume that it might possibly be construed as redundant, but in the sixth line where it says, "surviving spouse alone", possibly adding "and otherwise not denoted as the sole and separate property of the deceased spouse".

In all other respects I agree with the proposal.

Sincerely,

MICHAEL J. ANDERSON

MJA/fa

BANCROFT AVERY & MCALISTER

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JOHN R. BANCROFT
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LAURIE A. LONGIARU
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LEAH R. WEINGER
DAVID K. KAGAN SERGI

February 5, 1990

OUR FILE NUMBER

9911.81-35

Mr. John DeMoully
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

TENTATIVE RECOMMENDATION: DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Dear Mr. DeMoully:

The proposal that an attorney who is holding an estate planning document for safekeeping be authorized to transfer the documents to another attorney or a trust company when the depositor cannot be found, and to require the attorney to give notice of the transfer to the State Bar is interesting. However, in my opinion the proposal needs change.

First, notice to the State Bar is a useless act that will create management problems and expense for the State Bar with no advantage to the client. Notice to the State Bar is, at best, a way of helping the safekeeping attorney who has accepted the bailment.

Second, I am not sure the description of the bailment law is accurate. It is my experience that the depositor will leave the instrument with instructions, e.g., if I die give these documents to my executor (family, etc.). The safekeeping attorney is not accepting the bailment for indefinite safekeeping. Rather, the safekeeping attorney is accepting a form of agency in which the safekeeping attorney is given the discretion to determine what happens to the documents if the depositor dies, becomes incapacitated or can't be found.

In general, the mere fact that the agent has received property from his principal which he is to deliver to a third party will not make him liable to the third party if he fails to deliver it to him. There are three exceptions to this rule. First, the agent may agree

with the third party to turn the property over to him, and such an agreement will be enforced. Second, where the agreement between the agent and his principal is construed as being primarily for the benefit of the third party, the agent may be held liable by the third party if he refuses to turn the property over to him. Third, where the agent receives the property in trust for the third party, as a trustee, he will be liable for breach of his fiduciary duty if he refuses to turn the property over to the third party when he is entitled to do it. In either of the last two instances, the agent is no longer subject to the principal's control and is no longer truly an agent.

It seems to me your study is focused on the wrong law. Your study does not understand the purpose of the deposit of estate planning documents or the dynamics of the relationship. When the client deposits documents for safekeeping, the deposit is usually pursuant to a writing that directs the attorney to hold the documents for safekeeping pursuant to the instructions of the clients and in the absence of instructions (e.g., because of illness or death) to turn the documents over to a responsible person or act upon the documents in the way the attorney feels is consistent with the law and will best accomplish the intent of the depositor in leaving the documents with the attorney. Sometimes, for example, documents are deposited to assure secrecy, with the idea that the scheme set forth in the documents will be disclosed upon the occurrence of an event if the client cannot be found (dead?).

I have no problem with a law that provides that the attorney can turn the documents over to another attorney. I do have a problem with turning the documents over to a trust company. The delivery to another attorney who is subject to the same rules of professional conduct and who will be expected to execute an agreement to accomplish the same agency duties as the original attorney is a suitable protection for the client. However, instead of notifying the State Bar, I would require "reasonable notice" to interested persons, including the client, by certified mail or by publication.

I believe the trust company is inappropriate both because it has no ethical restraints related to the documents and because trust companies cannot be relied upon to keep the documents safely. Witness, for

example, the host of clients who relied upon the "continuation forever" of Bank of America only to find later that all trust department activities are sold to another bank; or, witness the number of bank failures in the past few years and the continuing possibility of failures by banks.

If have no problem with the provisions of the proposed legislation features (1), (2), (3), (4), (5), (6), (7), (8), (9) and (10) on pages 1 and 2 of the study. I believe (7) should be expanded to include "attorney delivery to a responsible family member the attorney reasonably believes will carry out the safekeeping objectives of the client." I believe (8) should not include a transfer by the attorney to a trust company unless the original deposit agreement included that alternative. If the client has authorized in writing deposit by the attorney of the documents with a specified trust company, the attorney will simply be carrying out the agency. In (8) also I believe notice to the State Bar is useless to the client or his family. The attorney should have a greater obligation to attempt to notify interested parties (e.g., family) and to notify them of documents of interest to them.

Naturally, with my approach the proposed statutes would need to be rewritten.

In fact, as I think about it, why not a rule of professional conduct that says a lawyer cannot accept a deposit of original estate planning documents for safekeeping without a written agreement containing instructions on what to do with the documents, including what to do if the client cannot be located? Then you don't need a new law.

Yours sincerely,

Luther J. Avery

LJA:cet/12.691

HENRY ANGERBAUER, C.P.A.
4401 WILLOW GLEN CT.
CONCORD, CA 94521

2/11/90

California Law Revision Commission

I have reviewed your tentative recommendation relating to Deposit of Estate Planning Documents with Attorney and I agree with your conclusions and recommendations with no exceptions thereto. Thank you for permitting me to make my views known.

Respectfully

HA

DEMETRIOS DIMITRIOU
ATTORNEY AT LAW
ONE MARKET PLAZA
SPEAR STREET TOWER, 40TH FLOOR
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(415) 434-1000

February 1, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Deposit of Etate Planning
Documents With Attorney

Dear Commissioners:

At the outset may I suggest that your proposal is an example of "legislative overkill". If a lawyer, or anyone else decides to be a bailee why should we add to existing laws which govern that relationship. Assuming there is a "burning need" however, I do have some concerns with your tentative recommendation.

In section 723(e) you provide that the transfer does not wiave any privilege or confidentiality etc. Why is a trust company covered by any existing rules which may bind attorneys? If the privilege or claim is the client's and the law allows the client's attorney to claim the privilege, how can that rule apply to a non lawyer such as a trust company?

In section 725 you seem to overlook the fact that the bailee is the law firm and not the individual attorney who accepts the bailment since he or she is acting on behalf of the firm. In those instances covered under subsections (b) and (c) my comments under section 723(e) are applicable. The consevator, attorney in fact or personal representative is not bound by the rules governing attorneys. The process of discovering the existance of the documents and necessary mailing information may in itself be an action which would subject the attorney or the attorney's estate to liability for damages suffered by a bailor if the attorney's duty to maintain client confidences etc. are breached.

I would suggest that procedures similar to those set forth in Prob. Code section 2586 would be an appropriate way to handle the issues raised above with respect to client confidences etc. I hope my observations are of some assistance.

Very truly yours,

Demetrios Dimitriou

DD/

DOOLEY, ANDERSON, JOHNSON & PARDINI

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MICHAEL M. LIPSKIN
*PROFESSIONAL CORPORATION

OF COUNSEL
BERNARD P. KENNEALLY
WILLIAM W. WASHAUER
HAL WASHAUER

January 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to:
1. **Commercial Real Property Leases (Remedies for Breach of Assignment or Sublease Covenant)**
2. **Commercial Real Property Leases (Use Restrictions)**
3. **Right of Surviving Spouse To Dispose of Community Property**
4. **Deposit of Estate Planning Documents With Attorney**

Greetings:

Please be advised that I approve of the tentative recommendations relating to the Right of Surviving Spouse To Dispose of Community Property, the Deposit of Estate Planning Documents With Attorney and Commercial Real Property Leases (Use Restrictions).

However, I believe some more thought should be given to the tentative recommendation relating to Commercial Real Property Leases (Remedies For Breach of Assignment or Sublease Covenant).

I do not believe that the tenant should have the right to terminate a lease if a landlord unreasonably withholds consent to a transfer in violation of the tenant's rights under the lease. Property owners often wish to have specific types of tenants in particular locations in a multi-tenant situation. Indeed, even in a single tenant situation, the landlord may wish to have a particular type of tenant. There are

also other considerations that a landlord utilizes in deciding what type of tenant it wishes to have in its leased premises.

For these reasons, I believe the right to terminate the lease by the tenant should not be made a part of this proposed legislation. I realize in saying so that the hypothesis stated is that the landlord has unreasonably withheld consent to a transfer. However, in my opinion, whether or not the right to terminate the lease exists should be a matter that is subject to negotiation between the parties and not created by legislative fiat.

Thank you for giving me the opportunity to review these very interesting tentative recommendations.

Very truly yours,

Allen J. Kent

AJK:eyr

skent/ajk/pers/303

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January 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating (1) to Deposit of Estate Planning Documents With Attorney and (2) Uniform TOD Security Registration Act

Dear Ladies and Gentlemen:

I suggest you consider using the registration system already established by the Secretary of State for international wills -- or an adjunct to it -- rather than the State Bar to track the location of documents that may be transferred by an attorney to another attorney or trust company as contemplated in proposed Section 723.

I suggest proposed Section 710 be amended to read as follows:

> "Within a reasonable time after a document is deposited with an attorney, 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."

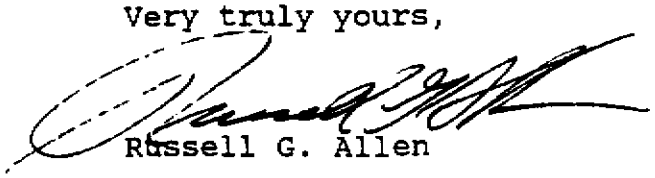
Obviously, I am concerned that the proposed statute could be the basis for liability if a document is not "immediately" placed in a "secure place."

I suggest proposed Section 712 be amended by revising the title to read "No Duty to Verify Contents of Documents or Provide Continuing Legal Services" and to add the following second sentence to proposed Section 712: "Similarly, acceptance imposes no duty to provide continuing legal services to depositer, any signatory or any beneficiary of a document." Here, I seek to distinguish the continuing obligation to safeguard the document that is

deposited from any obligation to provide ongoing advice or other services.

I generally support enactment of each of these proposed recommendations.

Very truly yours,



Russell G. Allen

RGA/br

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January 26, 1990

California Law Revision Commission
4000 Middlefield Rd.
Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney (Study L-608)

Ladies and Gentlemen:

I commend you for addressing the issue of a lawyer's obligations with respect to estate planning documents deposited with the lawyer. However, I urge you to make several changes in the proposal.

Of greatest importance would be some reasonable time limit after which the lawyer's duties would cease. I was a member of a law firm that had been in existence for over 40 years. When the firm dissolved, it was discovered that the firm was holding Wills prepared almost 40 years earlier, and no one in the firm had any idea of the identity of the client, nor how to reach the client, nor even who had drafted the document.

Your proposal requires that the lawyer hold the document in a safe, vault, safe deposit box, or other secured place where it will be reasonably protected against loss or destruction. Presumably, this duty continues indefinitely. The attorney's only option appears to be secure another lawyer or trust company who will agree to hold the document, and apparently this new holder must again hold the documents in a safe, vault, or similar safe place. But what if he cannot find someone to assume this duty? Such a transfer can only be accomplished if the original lawyer sends a notice to the client at the last known address of the client. What if he has no record of an address?

It seems to me that if a lawyer makes reasonable efforts to locate a client and fails to do so, then after

some reasonable period of time (say, 25 years) the documents should be able to be removed from such storage. Otherwise lawyers may be forced to keep in safekeeping documents prepared 100 years earlier. There is no simple way of knowing whether a client has died if one cannot locate the client. It is entirely possible that a client may have moved to another state or country, so a check of death records will not necessarily locate the fact of the client's death. If the lawyer has no record of the client's address, then publication of notice should be permitted.

I am also concerned about the provisions of proposed Section 711(b). That section provides that an attorney is not liable for loss or destruction of a document if a depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document. Again, what is the attorney to do if he makes reasonable efforts to contact the client and is unable to locate the client?

The comment to Section 711 should also make it clear what obligation (if any) the lawyer has to notify a client if a document is destroyed. It appears to be that if a lawyer used ordinary care for the preservation of the document, but the document is nevertheless destroyed, the attorney has no obligation to notify the client. It would seem to me that the lawyer under these circumstances should be required to make reasonable efforts to contact the client to notify him of the destruction. Of course, in many cases, it will not be possible to notify the client since in a large scale disaster (for example, a fire destroys an entire office) the lawyer may lose all records including the identity of the persons who deposited the documents with him or her.

Consideration could also be given to amending Section 725. Suppose a sole practitioner dies or is incompetent, and the personal representative or conservator is unable to locate the client, and no other law firm or trust company is willing to assume custody of certain very old Wills. What obligations are placed on the custodian or executor? What is the executor or conservator permitted to do with the documents? I suggest that if the client cannot be located under these circumstances, that the executor or

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conservator be authorized to deposit the original documents with the clerk of the probate court in the county in which the attorney is located, or if the document sets forth the county of residence of the client, then the clerk of the court of the county in which the client was stated to have resided.

Very truly yours,

Paul Gordon Hoffman

PGH/mem/P33

EXHIBIT 17

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January 29, 1990

California Law Revisions Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Deposit of Estate Planning Documents with Attorney

Gentlepersons:

I am in favor of the above proposed legislation and wish you well in its passage.

Sincerely,

PETER R. PALERMO

PRP/dml

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DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

January 29, 1990

California Law Revision Commission
4000 Middlefield Road Suite D-2
Palo Alto, CA 94303-4739

Re: DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

I have read the tentative recommendations with great interest and completely agree with the same, however would make the following comments:

1. Paragraph 7 states in part that the attorney may terminate a deposit by personal delivery....etc. It is my believe, in order to make certain there is no misunderstanding, that "personal delivery" should include either registered or certified mail with a return receipt. Such inclusion should be placed within said paragraph.

2. Paragraph 8 only gives two options of transfer, i. e. to another attorney or to a trust company. It may be that "another attorney" could not be found and quite probably a "trust company" would not accept, hence other options should be allowed the attorney. These could be the County Clerk of the County of last residence of depositor, or, the Secretary of State, or (heaven forbid) the State Bar itself!

Very truly yours,

DAVID W. KNAPP, SR.
KNAPP & KNAPP
DWK:dd

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January 30, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Deposit of Estate Planning Documents with Attorney

Ladies & Gentlemen,

I believe the tentative recommendation should have detailed transitional provisions. The main issue is whether the new act will apply to documents which were left with attorneys before the effective date of the new law. I do not believe it should, since attorneys who accepted the deposit of documents under existing law, which only requires slight care, should not be held to a higher standard of care automatically by reason of a change in the law which occurred after they agreed to accept the deposit.

Very sincerely,

Alvin G. Buchignani

AGB/pzg

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Attorney and Counselor at Law

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January 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Tentative Recommendation relating to
DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Gentlemen:

I am generally in favor of the tentative recommendations.

I would suggest that the section be expanded to allow the personal representative of a deceased attorney to terminate a deposit.

Very truly yours,

Linda Silveria

EXHIBIT 21

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MICHAEL P. MILLER
MANAGING PARTNER

January 25, 1990

Law Revision Commission
Attn: N. Sterling, Esq.
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

RE: L-608 "Deposit of Estate Planning Documents with Attorney"

Dear Nat:

I was pleased to see the Commissions's tenative recommendations for the holding of wills and similar documents. As you will recall, I wrote to you on August 30, 1989, to express my strong concerns regarding a related study, L-689. That proposal seemed to indicate that it would be an unethical act for an attorney to serve as a depository. I am pleased that the emphasis of the legislation now follows my suggestion for a registry system so that an attorney who retires or dies can leave a record of where the documents have been deposited. The staff's use of the state bar instead of county recorders makes sense. Overall, I think the staff has done an excellent job of coming up with a creative solution to an old problem, and I am glad that my suggestions have helped you in this effort.

Sincerely,

Michael P. Miller

MPM:md

EXHIBIT 22

JEROME SAPIRO
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Jan. 24, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA, 94303-4739

Re: Tentative Recommendation L-608
Deposit of Estate Planning Documents

Hon. Commissioners:

Review of tentative recommendation above-referred to has been made.

My comments are:

1. There is a great need for a public depository of so-called estate planning original documents where the client is unlocatable, it is not known whether he or she is alive or deceased, and another attorney or trust company may not want to receive transfer of such documents under such circumstances. The proposed or recommended legislation does not cover this, and it should do so. This is a recurring problem when attorneys retire, die or resign.

2. The definition of "Attorney" in proposed §701 should first include: Any individual licensed to practice law in the State of California." It would seem that you have written some of us off.

3. I am against bringing the State Bar into the act as is set forth in proposed §723 (2) (b). Of course, it has to have notice of cessation of practice, but to impose on it the duties and expense of keeping records of transfers of documents seems unreasonable. The public depository referred to above is preferable. As you should be aware, the State Bar had to increase dues and is now planning another increase, which has brought forth an opposing outcry from its members. I trust that upon reconsideration you will not add to it.

Respectfully,

Jerome Sapiro

JS:mes

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PAMELA D. FRASCH

January 24, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Deposit of Estate Planning Documents With Attorney

Dear Sir or Madam:

Thank you for forwarding a copy of your tentative recommendation regarding the above.

My only suggestion is that proposed Probate Code Section 722 be amended to include a third method of terminating a deposit, by mailing the documents via certified or registered mail, return receipt requested, to the address given by the depositor to the attorney.

This might prevent the practical problem which would arise when an attorney receives a brief letter from a client in which the client asks the attorney to "send me the original of my Will". If the depositor lives several hundred miles away, the attorney would not want to personally deliver the document, yet there would be no "method agreed on" by the depositor and attorney for delivery of the documents. It would be necessary for the attorney to write or call the client to inquire if transmittal by mail or other method would be acceptable to the depositor, and for the depositor to respond to such a question. If the new Section 722 provided that an attorney may mail the document via certified or registered mail,

with return receipt requested, to the address indicated by the depositor, a good deal of time and delay could be avoided.

Sincerely,

Kim T. Schoknecht

KTS:mjf

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

January 26, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca 94303-4739

In re: Deposit of Estate Planning Documents With Attorney

Dear Commissioners:

I concur with the tentative recommendation cited above. The provision for dealing with the original estate planning documents deposited with an attorney will assist in resolving a long standing problem.

Very truly yours,

Wilbur L. Coats

Wilbur L. Coats

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January 25, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: **Deposit of Estate Planning Documents with Attorney**

I believe that this tentative recommendation achieves a worthwhile purpose in better regulating the retention of wills and other documents by attorneys.

§ 710 requires that the document be held in "a safe, vault, safe deposit box, or other secure place ...". It is not clear whether "other secure place" requires a location similar to those expressly specified in the statute or could allow the use of a relatively less secure storage place. Are the cited examples the only ones that would constitute "reasonable protection"?

With the exception of this one clarification, I support the proposed legislation as it is drafted.

Yours very truly,

Thomas R. Thurmond
Attorney at Law

TT/sr

EXHIBIT 26

RUTH E. RATZLAFF
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January 25, 1990

Re: Deposit of Estate Planning Documents

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Commissioners:

I have reviewed your tentative recommendation related to deposit of estate planning documents with attorney.

Although I do not keep originals of client documents, I know many attorneys do. It appears that the tentative recommendation formalizes the procedures used by many attorneys, which is a positive step.

I have no suggestions or other substantive comments on the tentative recommendation. It reminded me why I decided not to keep client documents.

Sincerely,

Ruth Ratzlaff

Ruth E. Ratzlaff

RER/tih

CAROL A. REICHSTETTER
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1163 WEST 27TH STREET
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(213) 747-6304

March 20, 1990

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Deposit of Estate Planning Documents with Attorney

Dear Mr. Sterling:

The Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association has reviewed the Tentative Recommendation of the Commission regarding deposit of estate planning documents. As a member of the Executive Committee, I have been asked to convey to the Commission our observations. We support the general premise of the Tentative Recommendation, both because it is an improvement on the existing common law of bailment and because it will serve to encourage the retention of such original documents by the depositors rather than by their attorneys.

However, we have certain concerns about the practical application of the proposal. We are doubtful that attorneys or trust companies will agree to take possession of original documents for depositors who cannot be located, especially where compensation is expressly precluded. What recourse would an attorney have who is unable to find a successor bailee?

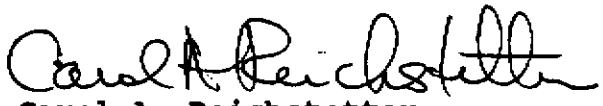
We are also concerned that attorneys may become obligated by the proposal to confirm with the State Bar that no transferred documents have been reported when initiating any action that could be affected by an original will, trust, nomination of conservator or power of attorney, thus creating a trap for the unwary.

In addition, the definition of "attorney" under Section 701 would seem to exclude sole practioners.

Finally, Section 711(b) provides that there is no attorney liability for the loss or destruction of documents if the depositor is notified and has a reasonable opportunity to replace the document. Could attorneys become liable to heirs, beneficiaries or third parties if the depositor cannot be located or cannot replace the document? This, combined with subsection (a) which changes the standard of care from "slight" to "ordinary", would seem to open the door to litigation.

Thank you for your consideration of these comments. I expect to attend the April meeting and will be glad to answer any questions that may arise.

Very truly yours,



Carol A. Reichstetter

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Deposit of Estate Planning Documents With Attorney

November 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Deposit of Estate Planning Documents With Attorney*, 20 Cal. L. Revision Comm'n Reports XXXX (1990).

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
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SANFORD M. SKAGGS
ANN E. STODDEN

November 29, 1990

To: The Honorable George Deukmejian
Governor of California, and
The Legislature of California

This recommendation permits an attorney who is holding for safekeeping a will, trust instrument, power of attorney, or nomination of a conservator to transfer the document to another attorney or to a trust company when the depositor cannot be found, and to require the attorney to file a notice of the transfer with the county clerk in each county where the attorney maintains an office. This recommendation also clarifies the duties of the attorney-depositary while holding the document for safekeeping.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Roger Arnebergh
Chairperson

RECOMMENDATION

Wills and other estate planning documents are often left with the attorney who drafted them.[1] This creates a bailment.[2] A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.[3] 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 an estate planning attorney who wants to change to some other kind of practice, retire, resign, or become inactive.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping to transfer the document to another attorney or to a trust company when the depositor cannot be found, and to require the attorney to file a notice of the transfer with the county clerk in each county where the attorney maintains an office. 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 must use ordinary care for preservation of the document, whether or not consideration is given.[4]

(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.

---

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

(5) The attorney has no lien on the document, even if provided by agreement.[5]

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.[6]

(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 is unable to deliver the document to the depositor and does not have actual notice that the depositor has died, the attorney may mail notice to reclaim the document to the depositor's last known address. If the depositor fails to reclaim the document within 90 days, the attorney may transfer the document to another attorney or to a trust company. The attorney must file a notice of the transfer with the county clerk in each county where the attorney maintains an office. The fee for each filing is $14. Before the depositor's death, only the depositor may get from the appropriate county clerk the name and address of the transferee. After the depositor's death, the name and address of the transferee is a public record.

(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 depositary.

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

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

6. This is consistent with Civil Code Section 1822. The Commission's recommendation also would amend Section 2586 (substituted judgment) to provide that if the depositor has a conservator of the estate, the court may order that the depositor's estate planning documents be delivered to some other custodian for safekeeping.

The Commission's recommendation would be effectuated by enactment of the following amendment and addition:

Probate Code §§ 700-725 (added). Deposit of estate planning documents with attorney

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 that the attorney and depositor agree in writing to make subject to this part.

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

CHAPTER 2. DUTIES AND LIABILITIES OF ATTORNEY

§ 710. Protecting document against loss or destruction

710. If a document is deposited with an attorney, 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 710 is new. Although Section 710 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.

§ 711. Attorney's standard of care

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

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

Comment. Section 711 is new. Under Section 711, an attorney must use ordinary care for preservation of the document deposited, whether or not consideration is given. 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 711 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.

§ 712. No duty to verify contents of document

712. The acceptance by an attorney of a document for deposit 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.

Comment. Section 712 is new. Section 712 does not relieve the drafter of the document from the duty of drafting competently.

§ 713. Payment of compensation and expenses; no lien on document

713. (a) If so provided in a written agreement signed by the depositor, the attorney may charge the depositor for compensation and expenses incurred in safekeeping or delivery of a document deposited with the attorney.

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

Comment. Section 713 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depositary's lien).

CHAPTER 3. TERMINATION OF DEPOSIT

§ 720. Termination by depositor on demand

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

Comment. Section 720 is new, and is consistent with Civil Code Section 1822, except that under Section 714 no lien is permitted against the document deposited.

If the depositor has an attorney in fact acting under a durable power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2467.

If the depositor has a conservator of the estate, the court may order the attorney to deliver the document to the court for examination, and for good cause may order that the document be delivered to some other custodian for safekeeping. Section 2586.

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

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

Comment. Section 721 is new.

§ 722. Termination by attorney by delivery or as agreed

722. An attorney may terminate a deposit by either of the following methods:

(a) By personal delivery of the document to the depositor.

(b) By the method agreed on by the depositor and attorney.

Comment. Section 722 is new.

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

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

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

(2) The attorney has mailed notice to reclaim the document to the last known address of the depositor, and the depositor has failed to do so within 90 days.

(b) The attorney shall file notice of the transfer with the clerk of every county in which the attorney maintains an office. The notice of transfer shall contain the name of the depositor or depositors, a description of each document transferred, the name and address of the transferring attorney, and the name and address of the attorney or trust company to which each document is transferred.

(c) Except as provided in subdivision (e), when filed with the county clerk, 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.

(d) The fee for filing the notice of transfer is $14 in each county where the notice is filed.

(e) On request by the depositor and without charging any fee, the county clerk shall furnish to the depositor the information relating to that depositor in the notice of transfer. If the county clerk 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.

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

(g) 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 Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

Comment. Section 723 is new. By permitting an attorney to transfer a document to another depositary, Section 723 departs from the common law of bailments under which a depositary ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d *Bailments* § 97 (1980). See also Section 701 ("attorney" includes a law corporation).

The fee provided in subdivision (d) for filing a notice of transfer with the county clerk is $14, the same as the filing fee in a civil action for a notice of motion or other paper requiring a hearing subsequent to the first paper. See Gov't Code § 26830.

§ 724. Termination by attorney after death of depositor

724. (a) If the document is a will and the attorney has actual notice of the death of the depositor but does not have actual notice that a personal representative has been appointed for the depositor, an attorney may terminate a deposit only as provided in Section 8200.

(b) If the document is a trust, after the death of the depositor an attorney may terminate a deposit by personal delivery of the document either to the depositor's personal representative or to the trustee named in the document.

(c) In cases not governed by subdivision (a) or (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.

Comment. Section 724 is new. As used in Section 724, "personal representative" includes a successor personal representative (Section 58), "trustee" includes a successor trustee (Section 84), and "will" includes a codicil. Section 88.

§ 725. Deceased or incompetent attorney

725. If the attorney is deceased or has become incompetent, the following persons may terminate the deposit as provided in

Section 722, 723, or 724, and may give the notice required by subdivision (b) of Section 723:

(a) The attorney's law partner, or, if the attorney is a law corporation, a shareholder of the corporation.

(b) If the attorney is incompetent and there is no person to act under subdivision (a), the attorney's conservator of the estate or an attorney in fact acting under a durable power of attorney. A conservator of the estate may act without court approval.

(c) If the attorney is deceased and there is no person to act under subdivision (a), the attorney's personal representative, or, if none, the person entitled to collect the attorney's property.

Comment. Section 725 is new.

Probate Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents

2586. (a) As used in this section, "estate plan of the conservatee" includes but is not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.

(b) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee shall deliver such document to the court for examination by the court, and, in the discretion of the court, by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.

(c) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person.

If such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.

(d) For good cause, the court may order that a document produced pursuant to an order under this section shall be delivered to some other custodian for safekeeping. The court may specify such conditions as it deems appropriate for the holding and safeguarding of the document.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents produced pursuant to this section be delivered to some other custodian for safekeeping. See also Sections 700-725 (deposit of estate planning documents with attorney).