

First Supplement to Memorandum 92-6

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

Attached to this supplementary memorandum are letters from the State Bar of California (Exhibit 1) and from Myron S. Greenberg of Larkspur (Exhibit 2) relating to the tentative recommendation on deposit of estate planning documents.

Mr. Greenberg would find the proposal helpful, but has a problem with applying it to duplicate originals in his possession, where the maker of the document already has an original. The statute as drafted would apply to any signed original document, whether or not it is the sole document or a duplicate original. The staff can see arguments both ways: On the one hand, the fact that the maker of the document has an original should render the new statute irrelevant to the duplicate held by the attorney. On the other hand, the reason the attorney is holding the duplicate is to cover the chance of loss of the maker's original, so the attorney should be held to the same standard of care and manner of disposition in order that it will be available when needed. The factor that tips the balance for the staff, however, is the specter of masses of duplicate originals cluttering the county clerk's office, when in fact the maker of the document still has the original, which will be the usual case. The staff concludes on balance that duplicate originals should be excluded from coverage of the statute. We would add to the statute language that it does not apply to "deposit of a document if at the time of the deposit the depositor is in possession of a signed original duplicate of the document."

The State Bar of California is still dissatisfied with the tentative recommendation in terms of the obligations and costs that it would impose on the State Bar. The State Bar indicates, however, that its staff is committed to working with the Estate Planning, Trust and Probate Law Section on the administrative and cost implications of this proposal and on alternative proposals. In addition, the State Bar has

recently conducted a demographic survey of the legal profession which may provide additional insight about the level of use by attorneys of a depository system. The State Bar requests that the Commission defer consideration of this tentative recommendation "until the issues pertaining to this recommendation and alternatives to it are further explored."

Although there is some legislative interest in this problem, and we hear continuing concern from practitioners that the problem should be addressed, the staff does not see any reasonable alternative at this point but to further defer the matter. With both the County Clerk's Association and the State Bar opposed to this proposal, the Legislature will almost certainly want to see the Commission give further study to this matter to see whether the problems can be worked out. The staff recommends that the Commission defer further work on this, but that the staff pursue the matter with the interested parties to see whether any solutions or alternatives can be developed, and report back to the Commission.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary



THE STATE BAR OF CALIFORNIA

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Law Revision Commission
RECEIVED

January 10, 1992

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

File: _____
Key: _____

Dear Mr. Sterling:

I am responding to your letter of September 27, 1991 concerning the California Law Revision Commission's consideration of proposals concerning the deposit of estate planning documents with attorneys.

Subsequent to receipt of your letter I have spoken with Robert Murphy, staff attorney for the Law Revision Commission and Don Green, who has worked on this issue on behalf of the State Bar's Estate Planning, Trust and Probate Law Section. We have also reviewed the Commission's November 1991 tentative recommendation concerning deposit of estate planning documents with attorney.

The November 1991 tentative recommendation appears to be substantially similar to the Commission's January 1990 recommendation in terms of the obligations and costs that it would impose on the State Bar. Specifically, the tentative recommendation does not appear to reflect the thoughts on the earlier tentative proposal which I discussed with Kathryn Ballsun and which are reflected in her July 12, 1991 letter to the Commission, which is quoted in your September 27, 1991 letter.

Our concerns about the Commission's November 1991 tentative recommendation are the same as those expressed in State Bar President Alan I. Rothenberg's letter of May 31, 1990 to the Commission concerning the earlier tentative recommendations. It is also my understanding that there is still some uncertainty about whether the transferees of estate planning documents would in fact include court clerks.

Don Green of the Estate Planning, Trust and Probate Law Section has indicated that the Section is willing to continue to explore the unanswered questions pertaining to this proposal as well as alternative proposals. Our staff is committed to working with the Section on the administrative and cost implications of this proposal and on alternative proposals. In addition, the State

Bar has recently conducted a demographic survey of the legal profession which may provide additional insight about the level of use by attorneys of a depository system.

Consequently, we would request that the Commission defer consideration of this tentative recommendation until the issues pertaining to this recommendation and alternatives to it are further explored.

Sincerely,



David C. Long
Director of Research

DCL:ec

cc: Frank A. Iwama, Chair, Board Committee on Administration of
Justice/Legislation
Robert J. Murphy, III.
Don E. Green
Matthew "Sandy" Rae, Legislative Co-Chair, Estate Planning,
Trust and Probate Law Section
Mark T. Harris, Chief Legislative Counsel and Senior
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PLEASE REFER TO:

January 13, 1992

State of California Revision Commission
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Palo Alto, CA 94303-4739

RE: Revised Tentative Recommendation: Deposit of Estate
Planning Documents With Attorney, November 1991

Gentlemen:

I read with interest the above-captioned proposal in the December, 1991 Estate Planning and California Probate Reporter and have a comment.

I am engaged in Estate Planning and now rarely take documents on deposit for clients. However, occasionally people wish to leave their wills and/or trusts with me and these are placed in safe deposit boxes with a local bank. I believe that the above-captioned law would be helpful to me, especially in light of the fact that I am a sole practitioner and may some day want to retire.

I am concerned, however, with the broad coverage of this statute in one particular circumstance. While I rarely take documents for deposit with clients, I routinely make an original and two copies of estate planning and other documents and all three are originally signed by the clients (except for Wills, of course, of which I only have one original signed). I generally give two originally signed copies of the documents to the client and retain one signed copy in my files. I do not place these in the safe deposit box, but rather simply keep them in my files which sometimes are sent to storage.

It appears to me that this practice would be covered by the proposed statute in the definition of "document", which includes a signed trust, amendment, power of attorney, etc. I do not believe that these documents need to be kept in anything more than my files and that this statute should not cover that situation, but only the one covering original wills, etc., which are now placed in a safe deposit box.

My originally signed file copies are "back-up" to the client's two signed copies, and are easily available should the client misplace their two copies. However, if this statute is passed as proposed, and covers my signed file copies, I will have to

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State of California Revision Commission

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discontinue my practice of keeping a signed copy for the client, since the cost of storing them in a safety deposit box would be prohibitive. This, in my opinion, would work to the detriment of my clients.

Therefore, I recommend that the proposal be changed to provide that if there are multiple original copies of a document in the hands of a client and an attorney, that the attorney's copies not be subject to this statute.

Very truly yours,



MYRON S. GREENBERG

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