

Memorandum 93-16

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney (Letters From State Bar and County Clerks)

Attached is a revised draft of the recommendation on *Deposit of Estate Planning Documents With Attorney*. The Commission approved an earlier version at the last meeting. Since then, we have received letters from David Long of the State Bar central staff (Exhibit 1) and Don Swanson of the County Clerks Association (Exhibit 2).

Revisions Requested by State Bar Central Staff

To simplify State Bar record-keeping, the State Bar wants the following additional revisions, consistent with those approved by the Commission at the last meeting: If an attorney transfers estate planning documents to another attorney, (1) all documents must go to the same attorney and (2) the State Bar would be required to receive and record only one notice of transfer for that transferring attorney. If we make these revisions, the State Bar will support the proposal.

The staff recommends we make the revisions requested by the State Bar. The staff discussed these with the Chairperson. With his approval, the staff asked Legislative Counsel to include these in the bill being drafted. The attached revised draft of the recommendation also contains these changes. The changes are set out below for Commission review (section numbers must be changed from 600-series to 700-series because of a 1992 enactment):

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

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

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

(1) Another attorney. All documents transferred under this paragraph shall be transferred to the same attorney.

(2) The clerk of the superior court of the county of the depositor's last known residence domicile. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 732.

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

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

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 734.

Comment. Section 732 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 732 provides one way an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 731 or, if applicable, Section 734.

By permitting an attorney to transfer a document to another depository, Section 732 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d *Bailments* § 97 (1980).

Under Section 732, if an attorney transfers estate planning documents to another attorney, all documents must go to the same attorney. Presumably, the transferring attorney will use this procedure at the time the transferring attorney retires or ceases to practice in the estate planning area. See also Bus. & Prof. Code §§ 6180, 6180.1 (notice of cessation of law practice required when attorney goes out of practice).

There is no limit on the number of times an attorney may transfer estate planning documents to the superior court clerk under Section 732. The fee for transferring a document to the superior court clerk is \$14. Gov't Code § 26827.6.

See also Sections 1215-1217 (mailing of notice).

Staff Note. "Residence" should be changed to "domicile" in paragraph (2) of subdivision (b) because venue for an estate proceeding is determined by domicile. Prob. Code § 7051.

§ 733. Notice to State Bar

733. (a) An attorney transferring a document one or more documents to another attorney under Section 732 shall mail notice of the transfer to the State Bar of California.

The notice shall contain the name of the depositor, the date of the transfer, the name, address, and State Bar number of the transferring attorney, and the name, address, and State Bar number of the attorney to whom the documents are transferred. ~~If the transferring attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.~~

(b) The State Bar shall record only one notice of transfer for each transferring attorney. The State Bar shall prescribe the form for the notice of transfer. On request by any person, the State Bar shall give that person information in the notice of transfer. At its sole election, the State Bar may give the information orally or in writing.

Comment. Section 633 is new.

Opposition of County Clerks

The County Clerks still oppose the proposal. They want one statewide depository, not the clerks of all 58 counties. They say the clerks lack space, personnel, and funds to handle these documents.

Filing fee. The clerks say that if the duty to receive and store estate planning documents is imposed on them, the filing fee for each document should be \$182. This is the new statewide civil filing fee in superior court for a first paper. Gov't Code §§ 26820.4, 26826, 26827, amended by 1992 Cal. Stat. ch. 696.

The staff thinks \$182 is exorbitantly high, and would effectively prohibit use of the county clerks as a depository. The \$182 statewide fee includes amounts for the judge's retirement fund and other court costs. See Gov't Code § 26820.6, amended by 1992 Cal. Stat. ch. 696. It seems inappropriate to include court costs in the filing fee for an estate planning document, since no judicial attention or court time is required. The document will merely be microfilmed and stored.

By analogy, the county clerk must receive and file records of a notary public who goes out of office, and must keep them for ten years. Gov't Code § 8209. The clerk is not entitled to any fee for receiving and storing these records.

For filing and indexing papers for which a charge is not specifically provided by statute, the clerk's fee is \$2.25. Gov't Code § 26850.

The recommendation provides a fee of \$14 for each estate planning

document, the same as the civil and probate filing fee for a subsequent paper. Gov't Code § 26827.4 (probate); Gov't Code 26830 (civil action or proceeding), amended by 1992 Cal. Stat. ch. 696. At the last meeting, the Commission authorized the staff to increase the clerk's fee to \$25 if necessary to get their support, but only after a credible showing why the fee should be so high. The staff would not increase the proposed fee above \$14 until the clerks produce specific cost information. Perhaps even \$14 is too high and should be reduced, for example, to \$2.25, consistent with the catchall fee provision. (We could do this by deleting the fee provision from the recommendation, in which case the catchall provision would apply.)

Confidentiality. The clerks may need statutory protection to limit their duty to respond to public inquiries. After the depositor's death, the custodian of the will must deliver it to the clerk. Prob. Code § 8200(a). Without a showing that public access would create a serious danger of loss of life or property, a will delivered to the clerk under Section 8200 is a public record and the clerk must provide copies to the public on demand. Estate of Hearst, 67 Cal. App. 3d 777, 782-84, 136 Cal. Rptr. 821 (1977); 12 B. Witkin, Summary of California Law Wills and Probate § 335, at 370 (9th ed. 1990).

But before the testator's death, the testator normally has an expectation that the will will be kept confidential by the person holding it. Thus it seems that an estate planning document deposited with the clerk should not be public before the depositor's death. This will both protect the expectation of confidentiality during the depositor's lifetime, and minimize demands on the clerk to search and make copies. After discussing it with the Chairperson, the staff revised proposed new Government Code Section 26810 in the attached recommendation as follows:

Gov't Code § 26810 (added). Microfilming estate planning documents; confidentiality; destruction of originals

26810. (a) The clerk of the superior court may cause the following documents to be photographed, microphotographed, photocopied, electronically imaged, or otherwise reproduced on film and stored in that form:

(1) A document transferred to the clerk under Section 732 of the Probate Code.

(2) A will delivered to the clerk of the superior court under Section 8200 of the Probate Code if the clerk has held the will for at least 10 years.

(b) The photograph, microphotograph, photocopy, or electronic image shall be made in a manner that meets the minimum standards or guidelines recommended by the American National Standards Institute or the Association for Information and Image Management. All ~~such~~ these photographs, microphotographs, photocopies, and electronic images shall be indexed, and shall be stored in a manner and place that reasonably assures their preservation indefinitely against loss, theft, defacement, or destruction.

(c) Before proof of death of the maker of a document or will referred to in subdivision (a), the photographs, microphotographs, photocopies, and electronic images shall be confidential, and shall be made available only to the maker. After proof of death of the maker of the document or will by a certified copy of the death certificate, the photographs, microphotographs, photocopies, and electronic images shall be public records.

~~(e)~~ (d) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to the reproduction authorized by ~~subdivision-(a)~~ this section.

~~(d)~~ (e) Upon making the reproduction authorized by ~~subdivision-(a)~~ this section, the clerk of the superior court may destroy the original document.

Comment. Section 26810 is new and is drawn from other comparable provisions of state law. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007, Health & Safety Code § 10036. See also Gov't Code § 26827.6 (fee for search).

The staff recommends the Commission ratify the foregoing revisions by approving the attached revised draft of the recommendation.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



THE STATE BAR OF CALIFORNIA

OFFICE OF RESEARCH

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November 19, 1992

Law Revision Commission
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Robert J. Murphy, III
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File: _____
Key: _____

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

Dear Mr. Murphy:

Thank you for sending us the October 1992 Recommendation of the California Law Revision Commission concerning deposit of estate planning documents with attorney. As we recently discussed, the State Bar would like changes made to that proposal to incorporate the recommendations of the State Bar Board of Governors concerning the proposed role of the State Bar in the transfer of estate planning documents. The State Bar Board of Governors recommends adoption of the proposal of the State Bar Section on Estate Planning, Trust and Probate Law, as described in a March 9, 1992 letter from Don E. Green to the Law Revision Commission, with the following modifications and additions:

1. The State Bar would receive and record notices of transfer relating only to transfers of estate planning documents between attorneys;
2. The State Bar would record only one notice of transfer for each transferring attorney;
3. The notice of transfer may specify only one transferee attorney; and
4. The State Bar would be required to provide information to the public concerning notices of transfer only by telephone.

Attached are proposed Probate Code sections 632 and 633 showing the recommended changes.

The proposed change to section 632 would require an attorney who transfers documents to another attorney to transfer all to the same attorney. The comment addition to this section clarifies that this unorthodox method of terminating a deposit is intended

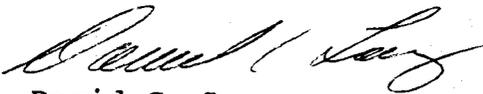
to be used in the exceptional circumstance of retirement, termination of an estate planning practice or death. This may help deter more casual terminations of deposit.

Section 633 has been modified to limit its application only to transfers to another attorney. Language was added to clarify that a notice of transfer shall specify only one transferee attorney and the State Bar shall record only one notice of transfer for each transferring attorney. In addition, we recommend that all of the language linking notices of transfer to notices of cessation be eliminated and replaced with an authorization for the State Bar to develop a form for notices of transfer.

The State Bar Board of Governors' support of the proposal on deposit of estate planning documents with attorney is conditional upon inclusion of the proposed changes to sections 632 and 633. If these recommendations are adopted, the resulting system for recording and reporting on notices of transfer can be incorporated into the State Bar's existing computerized membership records. If the State Bar's role in the transfer of estate planning documents is broadened, additional costs would have to be incurred for implementation.

Please let me know if you have questions or would like to discuss this matter further.

Sincerely,



David C. Long
Director of Research

DCL:ec
Enclosure

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Transfer of Estate Planning Documents
Probate Code Proposed Amendments
Sections 632 and 633

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

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

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

(1) Another attorney.

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

(c) An attorney terminating a deposit under this section by transferring documents to another attorney shall transfer all documents to the same attorney. An attorney may not accept a fee or compensation from a transferee for transferring a document under this section. An attorney may charge a fee for receiving a document under this section.

(d) Transfer of a document by an attorney under this section is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the rules of professional conduct. If the document

is privileged under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

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

Comment. Section 632 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 615, in the depositor's advice of change of address to the attorney, or otherwise.

Section 632 provides one way an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 631 or, if applicable, Section 634.

By permitting an attorney to transfer a document to another depository, Section 632 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d Bailments § 97 (1980).

The method of terminating deposit by transferring a document to another attorney, as authorized by Section 632, is designed for use by the attorney who retires, terminates an estate planning practice, or dies, while in the possession of original estate planning documents.

The fee for transferring an estate planning document to the superior court clerk under subdivision (b) is \$14. Gov't. Code § 26827.6.

See Also Section 1215-1217 (mailing of notice).

§ 633. Notice to State Bar

633. (a) An attorney transferring a documents to another attorney under Section 632 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, the name, address, and State Bar number of the transferring attorney, and, ~~if the documents are transferred to an attorney,~~ the name, address, and State Bar number of that the attorney to whom documents are transferred. A notice of transfer shall specify only one

transferee attorney, and the State Bar shall record only one notice of transfer for each transferring attorney. If the transferring attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice. The State Bar shall develop a form for notices of transfer under this section.

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

Comment. Section 633 is new.

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To: Robert J. Murphy III
 Staff Counsel
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 4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94303-4739

From: Don Swanson, Chair
 Legislative Committee
 County Clerks Association

Date: November 13, 1992

Re: Deposit of Estate Documents

At our recent Legislative Committee meeting on October 30th, this proposal was discussed by the members.

The resulting recommendation is that we oppose the Commission's proposal for the following reasons:

1. We believe that there should be one statewide depository for these estate planning documents. It doesn't make a lot of sense to us to a) deposit the papers locally and then b) have to make up a notice to a central depository. Why not go directly to a central depository?

This would also save time and expense for those who seek these documents.
2. Another reason include the very real lack of space to house these papers.
3. The proposal means a workload increase in a time of reduced staff, shrinking budgets and layoffs in many courts.
4. Insofar as a fee is concerned, since the filing of these documents and their retention is practically the same as other court records, the new statewide filing fee of \$182.00 would seem to be appropriate.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

**Deposit of Estate Planning
Documents with Attorney**

January 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 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 *Deposit of Estate Planning Documents with Attorney*, 23 Cal. L. Revision Comm'n Reports ____ (1993).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

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January 28, 1993

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation clarifies rights and duties where an estate planning document has been deposited with an attorney for safekeeping. If the attorney is unable to return the document because the attorney cannot find the depositor, the attorney would be allowed to transfer the document to another attorney or the superior court clerk of the county of the depositor's last known residence. Notice of a transfer to an attorney must be given to the State Bar.

This study is authorized by Resolution Chapter 37 of the Statutes of 1980, continued in Resolution Chapter 72 of the Statutes of 1992.

Respectfully submitted,

Arthur K. Marshall
Chairperson

DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

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 retire, resign, become inactive, or change to some other kind of practice.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping and cannot find the depositor to transfer the document to another attorney or the clerk of the superior court of the county of the depositor's last known residence,⁴ and to require the attorney to give notice to the State Bar if the transfer is to another attorney.⁵ The recommended legislation has the following features:⁶

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, the superior court clerk receives and stores wills of deceased testators: The custodian of the will must deliver it to the clerk of the superior court of the county in which the decedent's estate may be administered. Prob. Code § 8200.

5. Under existing law, an attorney who intends to go out of practice must give notice of cessation of law practice to the State Bar. Bus. & Prof. Code §§ 6180, 6180.1.

6. The recommended legislation was developed from a proposal approved by the State Bar Conference of Delegates in 1988.

(1) The attorney must use ordinary care for preservation of the document, whether or not consideration is given, and 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 may give written notice to the depositor that the depositor must keep the attorney advised of any changes of address. If the depositor fails to do this and as a result the attorney cannot return a deposited document, the attorney, and any successor attorney who accepts a transfer of the document, need use only slight care for its preservation, the same as for a gratuitous depositary under existing law.⁷

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

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

(5) The attorney has no lien on the document, even if provided by agreement.⁸

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.⁹

(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.

7. Civ. Code § 1846.

8. This is contrary to the general law of depositaries, which allows a lien for costs. Civ. Code § 1856.

9. This is consistent with Civil Code Section 1822. The recommended legislation 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.

(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 the clerk of the superior court of the county of the depositor's last known residence, and, if the transfer is to an attorney, must file a notice of the transfer with the State Bar.

(9) If a document is transferred to a superior court clerk, the clerk may microfilm the document and destroy the original.¹⁰ The clerk's fee for accepting a transfer of an estate planning document is \$14. The clerk's fee for searching for an estate planning document is \$1.75 for each year searched.

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

(11) 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.

10. The recommended legislation also authorizes the superior court clerk to microfilm wills delivered pursuant to Probate Code Section 8200 after the testator's death, and to destroy the original, if the clerk has held the will for at least ten years. Destruction of the original will does not prevent its admission to probate. See Prob. Code § 8223.

OUTLINE OF RECOMMENDED LEGISLATION

New Sections in Probate Code

PART 15. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY	9
CHAPTER 1. DEFINITIONS	9
§ 700. Application of definitions	9
§ 701. Attorney	9
§ 702. Deposit	9
§ 703. Depositor	10
§ 704. Document	10
CHAPTER 2. DUTIES AND LIABILITIES OF ATTORNEY	10
§ 710. Attorney's duty of ordinary care	10
§ 711. Notice on loss or destruction of document	11
§ 712. Nonliability for loss or destruction of document	11
§ 713. No duty to verify contents of document or provide continuing legal services	12
§ 714. Payment of compensation and expenses	12
§ 715. Attorney's notice to client	12
§ 716. Reduced standard of care	14
CHAPTER 3. TERMINATION OF DEPOSIT	14
Article 1. Termination by Depositor	14
§ 720. Termination on demand	14
Article 2. Termination by Attorney	15
§ 730. Attorney may terminate deposit only as provided in this article	15
§ 731. Termination by delivery, mailing, or as agreed	15
§ 732. Termination by transferring document to another attorney or superior court clerk	15
§ 733. Notice to State Bar	17
§ 734. Termination after death of depositor	17
§ 735. Deceased or incompetent attorney	18

Conforming Revisions

Prob. Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents	19
Gov't Code § 26810 (added). Microfilming estate planning documents	20
Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document	21

RECOMMENDED LEGISLATION

Prob. Code §§ 700-735 (added). Deposit of estate planning documents with attorney

PART 15. 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" means an individual licensed to practice law in this state.

Comment. Section 701 is new. Although the depository 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 (9th ed. 1987); 9 B. Witkin, *Summary of California Law Partnership* § 38, at 434-35 (9th ed. 1989).

§ 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. 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.

§ 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. Attorney's duty of ordinary care**

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

Comment. Section 710 is new. Under Section 710, an attorney must use ordinary care for preservation of the document deposited. This applies the rule of Civil Code Section 1852 (deposit for hire) to the attorney-depositary, whether or not consideration is given. This is a departure from Civil Code Section 1846, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

The duty imposed by Section 710 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. At all times the document should be reasonably protected against loss or destruction, although what is reasonable may vary with the circumstances.

Although Section 710 applies to attorneys who are holding documents on July 1, 1994, an attorney is not liable for action taken before that date that was proper when the action was taken. Section 3.

For an exception to the standard of care provided in Section 710, see Section 716 (slight care after specified steps taken).

§ 711. Notice on loss or destruction of document

711. If a document deposited with an attorney is lost or destroyed, the attorney shall give notice of the loss or destruction to the depositor by one of the following methods:

(a) By mailing the notice to the depositor's last known address.

(b) By the method most likely to give the depositor actual notice.

Comment. Section 711 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 712. Nonliability for loss or destruction of document

712. Notwithstanding failure of an attorney to satisfy the standard of care required by Section 710 or 716, the attorney is not liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

Comment. Section 712 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 713. No duty to verify contents of document or provide continuing legal services

713. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to do either of the following:

(a) Inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.

(b) Provide continuing legal services to the depositor 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.

Comment. Section 713 is new. Section 713 does not relieve the drafter of the document from the duty of drafting competently.

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

714. (a) If so provided in a written agreement signed by the depositor, an 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, whether before or after its transfer, even if provided by agreement.

Comment. Section 714 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depository's lien).

§ 715. Attorney's notice to client

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

NOTICE AND ACKNOWLEDGMENT

To: _____

(Name of depositor)

(Address)

(City, state, ZIP)

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

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

(Signature of attorney)

(Address of attorney)

(City, state, ZIP)

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

Dated: _____

(Signature of depositor)

Comment. Section 715 is new. By giving the notice and obtaining the acknowledgment provided by this section, the attorney's duty of

care may be reduced to slight care if the requirements of Section 716 are satisfied. See also Section 731 (mailing document to address shown in notice and acknowledgment).

§ 716. Reduced standard of care

716. Notwithstanding Section 710, if an attorney has given written notice to the depositor, and has obtained written acknowledgment from the depositor, in substantially the form provided in Section 715, and the requirements of subdivision (a) of Section 732 are satisfied, the attorney, and a successor attorney that accepts transfer of a document, shall use at least slight care for preservation of a document deposited with the attorney.

Comment. Section 716 is new. The "slight care" standard of Section 716 is the same as the standard of care of a gratuitous depositary under Civil Code Section 1846.

CHAPTER 3. TERMINATION OF DEPOSIT

Article 1. Termination by Depositor

§ 720. Termination on demand

720. A depositor may terminate a 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 statutory form power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2493.

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.

Article 2. Termination by Attorney

§ 730. Attorney may terminate deposit only as provided in this article

730. An attorney with whom a document has been deposited, or to whom a document has been transferred pursuant to this article, may terminate the deposit only as provided in this article.

Comment. Section 730 is new. The methods by which an attorney may terminate a deposit under this article are provided in Sections 731-735.

§ 731. Termination by delivery, mailing, or as agreed

731. An attorney may terminate the deposit by one of the following methods:

(a) Personal delivery of the document to the depositor.

(b) Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving a signed receipt.

(c) The method agreed on by the depositor and attorney.

Comment. Section 731 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 731 provides some of the ways an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 732 or, if applicable, Section 734.

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

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

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

(1) Another attorney. All documents transferred under this paragraph shall be transferred to the same attorney.

(2) The clerk of the superior court of the county of the depositor's last known domicile. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 732.

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

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

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 734.

Comment. Section 732 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 732 provides one way an attorney may terminate a deposit. An attorney may also terminate a deposit as provided in Section 731 or, if applicable, Section 734.

By permitting an attorney to transfer a document to another depositary, Section 732 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).

Under Section 732, if an attorney transfers estate planning documents to another attorney, all documents must go to the same attorney. Presumably, the transferring attorney will use this procedure

at the time the transferring attorney retires or ceases to practice in the estate planning area. See also Bus. & Prof. Code §§ 6180, 6180.1 (notice of cessation of law practice required when attorney goes out of practice).

There is no limit on the number of times an attorney may transfer estate planning documents to the superior court clerk under Section 732. The fee for transferring an estate planning document to the superior court clerk under subdivision (b) is \$14. Gov't Code § 26827.6.

See also Sections 1215-1217 (mailing of notice).

§ 733. Notice to State Bar

733. (a) An attorney transferring one or more documents to another attorney under Section 732 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, the name, address, and State Bar number of the transferring attorney, and the name, address, and State Bar number of the attorney to whom the documents are transferred.

(b) The State Bar shall record only one notice of transfer for each transferring attorney. The State Bar shall prescribe the form for the notice of transfer. On request by any person, the State Bar shall give that person information in the notice of transfer. At its sole election, the State Bar may give the information orally or in writing.

Comment. Section 733 is new.

§ 734. Termination after death of depositor

734. (a) In cases not governed by subdivision (b) or (c), after the death of the depositor an attorney may terminate a deposit by personal delivery of the document to the depositor's personal representative.

(b) If the document is a will and the attorney has actual notice that the depositor has died 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.

(c) 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.

Comment. Section 734 is new. Subdivisions (a) and (c) are permissive, but subdivision (b) is mandatory. If subdivision (b) does not apply, an attorney may terminate a deposit, for example, by the method agreed on by the depositor and attorney. Section 731.

As used in Section 734, "personal representative" includes a successor personal representative and a personal representative appointed in another state. Section 58. "Trustee" includes a successor trustee (Section 84), and "will" includes a codicil (Section 88).

§ 735. Deceased or incompetent attorney

735. (a) If the attorney is deceased or lacks legal capacity, a deposit may be terminated as provided in this article by the attorney's law partner, by a shareholder of the attorney's law corporation, or by a lawyer or nonlawyer employee of the attorney or the attorney's partnership or corporation.

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

(c) If the attorney is deceased and there is no person to act under subdivision (a), a deposit may be terminated by the attorney's personal representative.

(d) If a person authorized under this section terminates a deposit as provided in Section 732, the person shall give the notice required by Section 733.

Comment. Section 735 is new.

CONFORMING REVISIONS

Prob. 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 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 the

custodian designated by the court. The court may impose such conditions as it determines are appropriate for holding and safeguarding the document. The court may authorize the conservator to do any acts a depositor could do under Part 15 (commencing with Section 700) of Division 2.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents be delivered to some other custodian for safekeeping. 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 710. See generally Sections 700-735 (deposit of estate planning documents with attorney).

Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals

26810. (a) The clerk of the superior court may cause the following documents to be photographed, microphotographed, photocopied, electronically imaged, or otherwise reproduced on film and stored in that form:

(1) A document transferred to the clerk under Section 732 of the Probate Code.

(2) A will delivered to the clerk of the superior court under Section 8200 of the Probate Code if the clerk has held the will for at least ten years.

(b) The photograph, microphotograph, photocopy, or electronic image shall be made in a manner that meets the minimum standards or guidelines recommended by the American National Standards Institute or the Association for Information and Image Management. All these photographs, microphotographs, photocopies, and electronic images shall be indexed, and shall be stored in a manner and place that reasonably assures their preservation indefinitely against loss, theft, defacement, or destruction.

(c) Before proof of death of the maker of a document or will referred to in subdivision (a), the photographs, microphotographs, photocopies, and electronic images shall be confidential, and shall be made available only to the maker. After proof of death of the maker of the document or will by a certified copy of the death certificate, the photographs, microphotographs, photocopies, and electronic images shall be public records.

(d) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to the reproduction authorized by this section.

(e) Upon making the reproduction authorized by this section, the clerk of the superior court may destroy the original document.

Comment. Section 26810 is new and is drawn from other comparable provisions of state law. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007, Health & Safety Code § 10036.

Gov't Code § 26827.6 (added). Fee for filing and searching estate planning document

26827.6. (a) The fee for receiving and storing a document transferred to the clerk of the superior court under Section 732 of the Probate Code is fourteen dollars (\$14).

(b) The fee for searching a document transferred to the clerk of the superior court under Section 732 of the Probate Code is the same as the fee under Section 26854 for searching records or files.

Comment. Section 26827.6 is new. The fee for filing is the same as the fee under Section 26827.4 for filing a subsequent paper in a probate proceeding. The fee for searching under Section 26854 is \$1.75 per year searched.

