

**From:** [Jerome Sapiro Jr.](mailto:Jerome.Sapiro.Jr.)  
**To:** [Difuntorum, Randall](mailto:Difuntorum.Randall)  
**Cc:** [kemohr@charter.net](mailto:kemohr@charter.net); "[Lamport, Stanley W.](#)"; "[Vapnek, Paul W.](#) "  
**Subject:** FW: Practice Succession Plan  
**Date:** Wednesday, October 28, 2009 12:13:27 PM

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Dear Randy:

Thanks for taking the time to speak with me.

Following is the email I sent to Kevin, Stan and Paul. It reflects only my views and applies to more than just the practice succession plan. The others have not responded, surely because of lack of time.

With best regards,

Jerry

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**From:** Jerome Sapiro Jr. [mailto:[jsapiro@sapirolaw.com](mailto:jsapiro@sapirolaw.com)]  
**Sent:** Tuesday, October 27, 2009 10:09 AM  
**To:** 'Kevin Mohr'; 'Lamport, Stanley W.'; 'Paul W. Vapnek (E-mail)'  
**Subject:** Practice Succession Plan

Dear Kevin, Stan, and Paul:

In April, Kevin sent us a copy of the Board of Governors Agenda Item 30-1 regarding the appointment of a career transition planning task force. In the memorandum from Judy Johnson, there were four items under a heading regarding opportunities for enhancing the Rules of Professional Conduct. They are as follows, with my reactions to them.

Now that this has been advanced from December to tomorrow, I do not think we have time to draft a rule, even if we think one should be proposed. But the following are my thoughts on the four subjects. I request your reactions. If I understand the rules *du jour*, if we decide to study the subjects further we could recommend that the subject be held open.

1. ~~Whether the rules should require a lawyer to have a succession plan “. . . such as an estate plan pursuant to Probate Code § 2488 that allows for the appointment of a law practice administrator) that would address issues of sudden death or disability.”~~

~~I do not think that the rules should require a lawyer to have a succession plan, regardless of whether it is keyed to the Probate Code section or not. Such a rule would create an entirely new industry and invite OCTC to audit lawyers, even though there is no indication of misconduct and no client harm.~~

~~If a lawyer is required to have a “succession plan,” then the only way the State Bar Court could enforce such a rule would be by auditing all lawyers to see whether they have adopted a “succession plan” and, if so, to see whether it satisfies some arbitrary standards developed by the bar. If not, and even though a client may not have been harmed by the absence of such a plan, a lawyer could be disciplined.~~

~~And if a lawyer adopts a succession plan today, it may be outmoded or inappropriate next month, so the State Bar’s audit may have to be annually, quarterly, or monthly.~~

~~Conversely, if the bar finds out that a lawyer did not have a succession plan after the lawyer became disabled or died, the proper relief would not be a new disciplinary proceeding but removing the disabled or deceased lawyer from the list of active lawyers. A disciplinary proceeding would be frivolous.~~

~~If a lawyer has formed a partnership or professional corporation, the organizational documents of that entity may provide for succession and control of the practice if one of its members dies or becomes disabled. If it does, the client matters will be transferred to the designated successors in interest without complying with any of the formalities required by Rule 1.17 because it is the ownership of the practice that is being transferred, not the names of the attorneys of record, and a shift in ownership within the firm is not a sale under that rule.~~

~~Conversely, if the lawyer who has died or become disabled has incorporated his or her practice and is a sole shareholder, but does not have a succession plan as part of the articles or bylaws, Rule 1.17 would apply to permit the sale of the practice by the lawyer’s successors in interest.~~

~~If a sole practitioner or sole proprietor is dead or incapacitated, a law practice administrator can be appointed. If that occurs, for your information I have outlined the current statutory scheme at the end of this memorandum.~~

~~Because the requirement of a succession plan would only apply to sole practitioners or sole proprietors, adoption of such a rule will inherently be seen as discriminatory against them.~~

~~On balance, I do not recommend that we venture into this area. In addition, because of the time constraints under which we are now laboring, I do not think we have time to create a new regulatory scheme for succession plans by tomorrow's deadline.~~

~~I therefore recommend that we not propose a rule on this subject.~~

- ~~2. Whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice.~~

~~Although there is vitriolic opposition, it appears that we are going to adopt such a rule. I agree with Ms. Johnson's statement that "Greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement."~~

3. Whether the rules should be changed to facilitate a lawyer's use of private will registries and depositories.

I think this is an idea worth considering. If a lawyer dies or retires, and his or her files cannot be found, the heirs of the former clients may not be able to learn about a will that has not been found.

If a client dies, the client's next of kin may contact the client's attorney to see whether there is a will. If the attorney has died, retired, or become incapacitated, the family may have nowhere to turn. They will try to search banks to see whether the decedent had a safe deposit box, but may come up empty. If the lawyer retained the client's will but subsequently died, retired, or became disabled, the next of kin may not be able to find the lawyer in order to locate the will.

Under Probate Code section 6389, the California Secretary of State is required to establish a registry for wills executed under Probate Code sections 6380 through 6390, which is the Uniform International Wills Act. However, few people execute such wills, so that registry is infrequently used. It is my recollection that, some years ago, there was a proposal to authorize county clerks to receive original testamentary documents of deceased or retired lawyers. However, I do not recall what happened to that legislation.

On the other hand, I am only aware of one private will registry. At [www.globalwillregistry.com](http://www.globalwillregistry.com), you will find a private will registry. I know nothing about it, and I do not know how secure it is.

What would be of more practical benefit than relying on the confidentiality – or lack of confidentiality – of a private will registry would be a state-sponsored will registry. Illinois has adopted a statute. It is Illinois Public Act 096-0137. It authorizes the Secretary of State to accept wills, codicils, and trusts or amendments to trusts into a depository, to be in a

sealed envelope, subject to certain restrictions and payment of a \$15.00 fee. If the Secretary of State is notified of a death and receives a retrieval fee in the amount of \$10.00, the Secretary of State is required to deliver the sealed will envelope to the Clerk of the Court of the county in which the probate may occur. The secretary is also required to tell a person who inquires whether the name of a decedent is the same as a name of a testator whose will is being held. The Secretary of State is authorized to destroy a will if the Secretary of State has not received notice of the death of a testator and at least 100 years have passed since the date the will was deposited.

Adopting such a registry would require legislation, and I think the bar would be well-advised to propose such legislation.

However, private will depositories or registries would to me, be suspect. What would happen if a lawyer deposited estate planning documents with such a depository, and the depository later went out of business? Would the contents of the depository be escheated? Or would the depository's creditors be able to seize them? How would confidentiality of information be protected if the estate planning documents are deposited with a private depository? And if a lawyer deposits estate planning documents with a private depository, the concerns expressed in COPRAC Opinion 2007-173 would not likely be capable of satisfaction. For example, if a client has a privacy interest in whether the client has executed a will or other estate planning document, any registry that is searchable will inherently violate that client's confidentiality rights.

Particularly because we have been jammed by the requirement of producing too much work product in too few days, I do not recommend that we create a rule on this subject in haste. Otherwise, we will repent at our leisure. Instead, later we might recommend legislation similar to Illinois.

4. Whether the rule restricting division of fees between lawyers in different firms should be relaxed to remove compensation barriers on lawyer's ability to undertake to complete unfinished legal services started by a lawyer who has become suddenly disabled.

This is something worth considering, and I would favor it. However, we have already spent a great deal of time considering Rule 2-200 and Rule 1-320. The rules do not permit fee sharing in this reasonable situation if the seller is a nonlawyer, such as a widower. And fee sharing between lawyers requires client consent. My prediction is that a majority of the commission will not approve a special rule in this area that does not require the informed consent of the client, and, again, too few days remain before our arbitrary deadline.

Please give me the benefit of your thoughts.

With best regards to all of you,

Jerry

### Current Statutory Scheme for Practice Administrators for Your Information:

~~When a sole practitioner or sole proprietor cannot practice because of death or incapacity, the lawyer, the lawyer's clients, and the lawyer's heirs are all in jeopardy. The State Bar, a client, or any other interested person or entity may apply to the superior court in the county in which the lawyer resides or has his or her principal place of practice and ask the court to assume jurisdiction of the lawyer's practice. Bus. & Prof. Code § 6180.2. The court can give broad authority to a member of the State Bar who is appointed to act on behalf of the law practice to search the files and records for information regarding pending matters; notify clients about the need to obtain new counsel; file notices, motions, and pleadings on behalf of clients, with client consent, if jurisdictional time limits are involved and no substitute attorney has been retained; arrange for a transfer of client papers or property; and arrange for the appointment of a receiver to take control of bank accounts related to the practice. The attorney appointed is prohibited from conducting the law practice except to apply for extensions of time pending employment of substitute counsel and filing notices, motions, and pleadings on behalf of clients, with client consent, if jurisdictional time limits are involved and substitute counsel has not been retained. Bus. & Prof. Code §§ 6180.5 & 6180.6. The appointed lawyer may not accept employment on matters pending at the time the court assumes jurisdiction over the practice without prior court approval. *Id.*, § 6180.7. Court appointed attorneys are required to preserve the attorney-client privilege. *Id.*, § 6180.10.~~

~~Attorneys may plan for the disposition of their law practices upon death or disability by appointing a "practice administrator" to carry out specified tasks. Prob. Code § 2468 [disabled attorney]; Prob. Code § 9764 [deceased attorney]; Bus. & Prof. Code § 6185 [powers of practice administrator]. The appointment of a law practice administrator does not require involvement of the State Bar. No prior finding of incompetence is required to appoint a practice administrator. The personal representative of the estate of a deceased lawyer, or the conservator of the estate of an incapacitated lawyer, or another person interested in the estate may petition the Probate Court for appointment of a member of the State Bar to be the practice administrator who will take control of the files and assets of the practice of a deceased or incapacitated lawyer. Prob. Code §§ 2468(a), 9764(a), 17200(b)(22) & (23). The appointed practice administrator must be bonded. Prob. Code §§ 2468(d), 9764(d).~~

~~If the lawyer has nominated a practice administrator, the probate court is ostensibly required to appoint the nominee. Prob. Code §§ 2468(f), 9764(f). However, the court may refuse to appoint the nominee if it concludes that that appointment would not be in the best interests of the estate or would create a conflict of interest with any clients of the deceased or disabled lawyer. *Id.*, §§ 2468(f), 9764(f). The attorney who represents the executor or administrator of a deceased attorney is prohibited from being the practice administrator. Prob. Code §§ 2468(e), 9764(e).~~

~~The appointed practice administrator can take control of all operating client trust accounts, business assets, equipment, client directories, and premises, all client files. Bus. & Prof. Code § 6185(a)(1) & (2). He or she can contact clients to tell them what has happened and to discuss options for selection of a successor attorney. *Id.*, § 6185(a)(3). The practice administrator can~~

~~notify appropriate courts or administrative bodies and contact opposing counsel to seek additional time for new counsel to appear. *Id.*, § 6185(a)(4). The practice administrator can determine and pay liabilities, employ assistants, and create a plan for disposition of the practice. He or she can reach fee agreements with successor counsel and can act as successor counsel for clients of a deceased or disabled attorney. *Id.*, §§ 6185(a)(5), (6), (7), (8) & (9).~~

(9930.16:527:vy)

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## McCurdy, Lauren

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**From:** McCurdy, Lauren  
**Sent:** Monday, October 26, 2009 5:43 PM  
**To:** Kevin Mohr; Jerome Sapiro; Stan Lamport; Paul Vapnek  
**Cc:** Harry Sondheim; Difuntorum, Randall; Kevin Mohr; mtuft@cwclaw.com  
**Subject:** November Assignment for Ill.O. re Private Will Depository Rule  
**Attachments:** RRC - Will Deposit - COPRAC Op. 2007-173.pdf; RRC - Will Deposit - Transition Task Force - 06-18-08 Memo to BOG.PDF

Jerry & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28<sup>th</sup>.

sent by:

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**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Tuesday, April 07, 2009 5:00 PM  
**To:** Jerome Sapiro; Stan Lamport; Paul Vapnek  
**Cc:** Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr  
**Subject:** RRC - Private Will Depository Rule

Greetings drafters - Jerry, Stan & Paul:

As members of the drafting committee, I'm providing you with some materials I have concerning the proposed "Practice Succession Plan" Rule. Jerry is lead drafter.

I've attached the following:

1. A 6/18/08 Memo from Judy Johnson to the BOG concerning the Bar's appointment of a Career Transition Planning Task Force.
2. COPRAC Ethics Op. 2007-173.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

The concept for this Rule, together w/ the proposed rule on a practice succession plan, grows out of the Bar's appointment of a Career Transition Planning Task Force, as described in the 6/18/08 Johnson Memo. This is all I have on the topic at present. I haven't heard of anything further that the Task Force has done.

**Finally, please note that this Rule is not calendared until the December 2009 meeting.**

However, some of you have requested being provided with the relevant materials in the interim and I'm doing so.

Please let me know if you have any questions. Thanks,

Kevin

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# AGENDA ITEM

**July 30-1**

Appointment of a Career  
Transition Planning Task  
Force

DATE: June 18, 2008

TO: Members of the Board of Governors  
Members of the Board Committee on Member Oversight

FROM: Judy Johnson, Executive Director, State Bar of California

SUBJECT: Appointment of a Career Transition Planning Task Force

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## **BACKGROUND AND ISSUES**

### **Aging State Bar Membership**

Approximately 77 million babies were born in the United States during the years 1946 to 1964. During 2011 the oldest “baby boomers” will turn 65, and, on average, can expect to live to 83. Boomers are now nearly 28 percent of the adult US population. Demographic trends indicate that the average age of State Bar members is climbing steadily, with middle-aged and senior attorneys together comprising the largest demographic group in the Bar; 64 percent of the respondents to a survey of the membership conducted by the State Bar in 2006 were 45 years old or older. The average age of our inactive members is 56, and the average age of California judges is 58.

Unlike their parent’s generation, fewer boomers expect to retire completely from the practice of law by age 65. A recent survey by the Oregon Bar revealed that only 18 percent of respondents were planning to retire completely. Some respondents planned to continue practicing full-time as long as they are able (12 percent), while others were planning to practice part-time (42 percent), either for the income that part-time practice would provide or mainly for stimulation, a sense of purpose, and satisfaction.

The fact that so many of today’s attorneys expect to practice law (at least part-time) well into their later life raises concerns about the adequacy of our membership’s retirement planning, financial planning, and contingency planning. Only 41 percent of the Oregon survey respondents had developed a financial plan that includes specific goals for retirement, and little more than half had discussed non-financial aspects of retirement with close family members and friends. Should the State Bar of California be doing more to facilitate this planning?

## **Contingency and Transition Planning**

Failure on the part of attorneys in private practice to establish contingency plans (sometimes referred to as exit plans) for emergencies, accidents, unplanned absences and for later life is an important issue for the Bar. The death or disability of a lawyer can have significant adverse consequences on an attorney's clients, family and colleagues if arrangements have not been made in advance for appointment of successor counsel (or a practice administrator). When the solo practitioners in the Oregon survey were asked if they had taken steps to protect their clients in the event of death, disability or incapacity, only 21 percent had made arrangements with another attorney to cover their practice in the event of temporary disability or extended absence from practice, and 10 percent had made arrangements with another attorney to close their practice in the event of permanent disability or death. Nearly two-thirds of the respondents (61 percent) reported that they have not taken any steps or prepared any exit plans.

## **Disciplinary Issues**

With an increasing number of attorneys actively practicing law well into later life, we will need to respond to more complaints about attorneys with age-related impairments that have negatively impacted their ability to serve the interests of their clients. Our current disciplinary rules and procedures are not well suited to identifying or responding to such impairment in a manner that protects client interests while preserving the dignity of a valued member of the legal community.

## **Opportunity for Enhancing the Rules of Professional Conduct**

Currently, the State Bar's Rules Revision Commission is developing comprehensive proposed amendments to the Rules of Professional Conduct and an opportunity exists for referring possible enhancements to the Commission for action. Among the potential concepts that could be considered are the following:

1. Whether the rules should require a lawyer to have a "succession plan" (such as an estate plan pursuant to Probate Code §2488 that allows for the appointment of a law practice administrator) that would address issues of sudden death or disability.
2. Whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. California's rule requires that "all or substantially all" of a practice be transferred in a sale but the comparable ABA Model Rule permits the sale of a discrete geographic area or practice area. Greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement.
3. Whether the rules should be changed to facilitate a lawyer's use of private will registries and depositories. Retention of client files that include original wills, trusts or other instruments are a longstanding practice management concern and the use of private will registries and depositories may ease the burden of file retention and better protect client interests.
4. Whether the rule restricting fee-splits among lawyers in different firms should be relaxed to remove compensation barriers on a lawyer's ability to undertake

to complete the unfinished legal services started by a lawyer in another firm who has become suddenly disabled.

A Board Task Force could consider the policy implications of these or other possible enhancements to the rules and give direction to the Rules Revision Commission for development and action.

## **RECOMMENDED ACTION**

The **Joint Committee on Aging Lawyers** of the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers (“Joint Committee”) examined the disciplinary problems created by an aging Bar (NOBC-APRL Joint Committee on Aging Lawyers, Final Report, May 2007). The Joint Committee determined that current lawyer regulatory rules and procedures do not adequately protect the interests of clients who are likely to suffer adverse consequences when an age-related impairment significantly affects their lawyer’s ability to practice. The Joint Committee recommended that each jurisdiction take the following steps to prepare for an increase in age-related lawyer impairment:

1. Make a demographic assessment of the lawyers in their jurisdiction.
2. Take steps to identify lawyers with age-related impairments.
3. Provide planning ahead and law practice transfer instruction to their membership (including guidelines for designation of successor or caretaker counsel, sale or transfer of law practice, preservation and handling of client files).
4. Develop local response teams of trained lawyers prepared to act when a lawyer becomes incapacitated or dies without adequate succession planning.
5. Implement programs specifically aimed at addressing impairment of senior lawyers’ ability to practice in the same fashion that similar programs in many jurisdictions successfully assist lawyer impaired by substance abuse and mental and physical health problems.

In June of 2007, the **Senior Lawyers Division of the ABA** submitted a Report and Recommendation (#105) requesting that the ABA House of Delegates adopt a policy “urging bar associations and courts” to “adopt procedures and programs” that would encourage lawyers to plan for law offices contingencies by voluntarily designating successor counsel to step in when the lawyer is disabled, dies, or is otherwise unable to practice law. The **Executive Committee of the State Bar of California Law Practice Management Section** issued a statement that the approach suggested by the ABA’s Senior Lawyers Division is too narrow to protect the interests of clients, and to address the wide array of issues that arise when lawyers fail to plan adequately for their disability or death. Specifically, the Committee stated that the death or disability of a lawyer can have significant adverse consequences on the lawyer’s clients, colleagues, family and the public’s perception of the profession. Therefore, the Committee suggested that the State Bar adopt policies and procedures that educate each of these constituencies about the financial and other benefits that result from early and effective succession planning.

From a member benefit perspective, should the State Bar be helping middle-aged and senior attorneys plan for the later stages of their career? From a public protection point of view, should the State Bar be encouraging more solo practitioners and small firm attorneys to develop exit plans? What other steps should be taken to protect the public, the membership and their families from experiencing adverse consequences associated with aging problems?

#### **FISCAL AND PERSONNEL IMPACT**

None known.

#### **BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE**

There is no known impact on the Board Book.

#### **STATE BAR RULES IMPACT**

None known.

#### **RECOMMENDATIONS/RESOLUTIONS**

If the members of the Board Committee concur with the various recommendations above, it would be appropriate for the Board Committee to adopt the following resolution:

**RESOLVED**, that the Board Committee on Member Oversight recommends that the Board of Governors appoint a Task Force to (1) review the contingency, succession and retirement planning resources and assistance available to the membership from the State Bar; (2) identify any additional instruction and outreach that might be necessary to increase the rate of contingency, succession and retirement planning; (3) consider possible enhancements to the Rules of Professional Conduct and give direction to the Rules Revision Commission for development and action; (4) determine what California-specific instructional materials need to be posted on the website and otherwise distributed to the membership; (5) determine the appropriate role of the State Bar Lawyer Assistance Program in assisting senior lawyers and their families with aging-related challenges; (6) determine how the State Bar might better identify attorneys with age-related impairments before clients suffer adverse consequences; and (7) examine the feasibility of establishing interoffice response teams at the State Bar to intervene when it comes to the attention of the Bar that a member is experiencing age-related impairment.

**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION NO. 2007-173**

**ISSUES:**

1. May an attorney, consistent with ethical obligations, deposit a client's will or other testamentary documents with a private will depository, without the client's consent?
2. May an attorney, consistent with ethical obligations, register a client's will or other testamentary documents with a private will registry, without the client's consent?

**DIGEST:**

An attorney who retains a client's will or other estate planning documents on deposit may terminate the deposit in accord with the client's instructions and/or consent. If the attorney cannot locate the client, the attorney may only terminate the deposit pursuant to Probate Code section 700, et seq. An attorney may register certain identifying information about a client's will or other estate planning documents with a private will registry if the attorney can determine, based upon knowledge of the client, the client's matter and investigation of the will registry, that registration will not violate the attorney's fiduciary duties of confidentiality and competence.

**AUTHORITIES**

**INTERPRETED:**

Rule 3-100 and 3-110 of the Rules of Professional Conduct of the State Bar of California

Business and Professions Code section 6068, subdivision (a) and (e)

Evidence Code section 912(d)

Probate Code sections 700, et seq.

**STATEMENT OF FACTS**

In 1973, Attorney drafted a will for Client. At the time, Attorney and Client agreed that Attorney would retain possession of the executed original will. By 2003, Attorney is contemplating retirement and would like to terminate the deposit. However, Attorney has not heard from Client for 25 years, and recent efforts to locate the client have been unsuccessful. Attorney wants to ensure that Client can obtain access to his will at a future time or, in the event of his death, that the client's heirs can locate the will. Therefore, Attorney is considering either depositing the original will with a private will depository and/or registering certain information about the will with a private will registry. Attorney's file contains no notes regarding communications with Client, Attorney has limited recollection of Client, and has no independent recollection of any communications with Client.

**BACKGROUND INFORMATION**

Some lawyers who prepare wills or other estate planning documents retain the original executed documents on deposit for safe-keeping. Consequently, an attorney who is retiring or becomes unable to continue practicing law may have original wills and other estate planning documents in his or her possession. If the attorney can, with reasonable diligence, locate the former client, the attorney is ethically obligated to do so and to act in accordance with the client's lawful instructions regarding disposition of the documents. The more challenging issue is presented when the attorney cannot locate the former client.

There are two types of commercial enterprises that have recently started doing business nationally to address these issues: will depositories and will registries. A will depository is a private, online resource for locating, storing, and retrieving original wills. A will depository involves the actual delivery of a will to a central privately operated entity or person for safekeeping. For purposes of this opinion, a will registry is an online searchable database of vital information about a will, maintained by a private entity or person. The information stored in a registry would normally include the identity of the person making the will, the date the will was executed, the identity of the lawyer who drafted the will and the location of the will at the time of registration. Testamentary documents are not deposited with a will registry.

A California attorney with whom original estate planning documents have been deposited may terminate the deposit only as provided in Probate Code sections 700, et seq. Under Probate Code section 731, an attorney may terminate a deposit by: (a) personal delivery of the document to the depositor, (b) receiving a signed return receipt after mailing the document to the depositor, or (c) the method agreed on by the attorney and the depositor. Where the attorney mails notice to reclaim the document to the depositor's last known address and the depositor fails to reclaim the document within 90 days, the attorney may transfer all unclaimed documents to one other attorney. (Prob. Code § 732(b).) If, but only if, the attorney is deceased, lacks legal capacity, or is no longer an active member of the State Bar, the deposit may be terminated by transferring the document(s) to the clerk of the superior court of the county of the depositor's last known domicile. (Prob. Code § 732(c).)<sup>1/</sup> If the attorney uses the procedures outlined in sections 732(b) or (c), the attorney is required to provide notice to the State Bar. (Prob. Code § 733.)

If the attorney knows the depositor has died, the attorney may terminate the deposit by transferring the documents to the appointed personal representative or trustee; or, if no representative has been appointed, the attorney must file the will with the superior court and provide a copy to the named representative if that person can be located, or otherwise to a beneficiary. (Prob. Code §§ 734, 8200.) If the attorney is deceased or lacks legal capacity, a deposit may be terminated by another lawyer in the attorney's firm, or by a non-lawyer employee, or by a conservator or attorney in fact acting under a durable power of attorney, or by the attorney's personal representative. (Prob. Code § 735.)

In this opinion, the Committee addresses the ethical implications presented when, unable to locate the client after a reasonably diligent search, an attorney seeks to (a) deposit estate planning documents with a commercial will depository without the client's express consent or (b) register information about the client's will with a private registry without the client's express consent.

## DISCUSSION

### **1. May an attorney ethically deposit a will with a commercial will depository without the client's express consent?**

Because the Probate Code provides the exclusive legal means for disposition of wills and other estate planning documents held on deposit by an attorney, an attorney may not ethically deposit estate planning documents with a private will depository absent consent of the client pursuant to Probate Code section 731(c). To do so would, at the very least, constitute a violation of Business and Professions Code section 6068(a), which requires lawyers to support the laws of this state, and the prohibition against intentionally or recklessly failing to perform legal services with competence. (See Rule of Professional Conduct 3-110.)<sup>2/</sup>

The attorney in the hypothetical has no record or recollection of obtaining the client's consent in 1973 to use a will depository and cannot now locate the client to obtain consent. Thus, the attorney in the hypothetical may not ethically deposit the former client's will with a will depository.

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<sup>1/</sup> If the clerk receives a document under Probate Code § 732, the recorded document is confidential and available only to the maker (Government Code § 26810(c)). After the maker's death, as evidenced by a certified copy of the death certificate, it becomes available as a public record.

<sup>2/</sup> Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

## 2. May an attorney ethically register a will with a commercial will registry without the client's express consent?

The essential ethical question is whether the registration of information regarding a client's will with a will registry breaches the attorney's duty to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (Bus. & Prof. Code § 6068(e)(1); rule 3-100.) While the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege, a review of case authorities interpreting the attorney-client privilege may be instructive in evaluating the breadth and scope of the duty of confidentiality. We, therefore, begin with an analysis of the privilege issues.

The statute regarding waiver of privileges, Evidence Code section 912(d), provides: "A disclosure in confidence of a communication that is protected by a privilege provided by section 954 (lawyer-client privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."

Pursuant to this exception and depending on the particular circumstances, a lawyer may disclose privileged client information when the lawyer reasonably believes doing so will advance the client's interests, or is appropriate in furtherance of the representation, unless the client instructs otherwise. (See, Evid. Code § 912(d); *McKesson HBOC, Inc v. Superior Court* (2004) 115 Cal.App.4th 1229 [9 Cal.Rptr.3d 812].)

Registering a client's will with a registry would typically require disclosure of the testator's name, the present location of the will, the name of the attorney who drafted the will, and often the date of execution of the will as well.

A client's identity and address is not typically considered privileged information.<sup>3/</sup> There are, however, several important (but narrowly construed) exceptions to this rule. Specifically, if disclosure of a client's identity would itself reveal the nature of the client's legal problems for which the attorney was hired, the client's name may be privileged information.<sup>4/</sup>

Disclosure to the will registry of the client's name as well as information about the documents being registered inescapably reveals the nature of the matter for which the lawyer was retained. However, unlike other cases that have held the identity of the client to be privileged (where criminal conduct or private medical issues are at stake), the mere execution of testamentary documents may or may not be considered "private information."

When an attorney cannot locate a client, or determine whether the client is alive or deceased, providing general information to a will registry could in some circumstances effectively advance the client's interests by making important information available to potential heirs, beneficiaries, and other interested persons. On the other hand, circumstances could exist such that providing even this general information would be detrimental to the client's interests (e.g., where the disclosure of the existence of a will could breed anxiety or concern among potential heirs). Thus, application of Business and Professions Code section 6068(e) is likely to depend upon the facts and circumstances of the particular situation.

Like the evidentiary attorney-client privilege, the attorney's ethical duty of confidentiality is considered fundamental to the attorney-client relationship, involving policies of paramount importance. However, as noted, while the attorney-client evidentiary privilege covers only confidential communications between the attorney and the client, the broader ethical duty of confidentiality requires the protection of all client secrets. In this regard, it is important to keep in mind that the decision whether to apply the privilege is made by judges or other arbiters in judicial or quasi-judicial proceedings. The duty of confidentiality is necessarily broader because it applies in non-litigation contexts where judicial protection may not be present. (Bus. & Prof. Code § 6068(e); rule 3-100; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, n.5, [120 Cal.Rptr. 253]; Cal. State Bar Formal Opn. 1993-133.)

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<sup>3/</sup> See *People v. Chapman* (1984) 36 Cal.3d 98, 110 [201 Cal.Rptr. 628] ("[it] is well established that the attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity." [Citations.]")

<sup>4/</sup> See *Rosso, Johnson, Rosso & Ebersold v. Superior Court (Fitzpatrick-Potter)* (1987) 191 Cal.App.3d 1514 [237 Cal.Rptr 242] (disclosure of clients' identities under the circumstances would reveal private information regarding clients' medical condition).

State Bar ethics opinions have defined the ethical duty of confidentiality as encompassing not only privileged communications, but also any information related to the representation of a client, from any source, which a client does not want disclosed or the disclosure of which would be embarrassing or likely be detrimental to the client. (See Cal. State Bar Formal Opn. Nos. 1976-37, 1980-52, 1981-58, 1986-87; see also Los Angeles County Bar Association Formal Opn. Nos. 386 (1980), 436 (1985), and 456 (1990).)

The identity of a client who has executed a will, trust or other legal document may or may not be protected by the evidentiary attorney-client privilege. The client's identity may nevertheless be a client confidence or secret protected by Business and Professions Code section 6068, subdivision (e) and rule 3-100, or be deemed confidential information protected by the client's Constitutional right of privacy.<sup>5/</sup> In any event, if information about the will or its execution would be embarrassing to the client or likely be detrimental to the client's interests, the attorney (absent express consent of the client) should protect the confidentiality of that information.

Thus, before registering testamentary documents with a will registry without client consent, a lawyer must determine, from a review of the client's file and any independent recollection of communications with the client, whether registration would further the client's objectives as communicated to the attorney during the course of the attorney-client relationship or whether registration would breach the duty of confidentiality either because the client would want to keep the information private, or registration would embarrass the client or likely be detrimental to the client's interests. In the context of the hypothetical facts presented in this opinion, the attorney must also consider the effect of the substantial lapse of time on whether disclosure would be embarrassing or likely be detrimental to the client. As there can be no bright-line rule applicable in all circumstances, the attorney who registers a will without the client's express consent acts at his or her peril.

In addition, an attorney who seeks to register a will or other testamentary document, with or without client consent, has a duty to act competently. In that regard, an attorney registering information about a testamentary document has a duty to determine whether the registry adequately protects the interests of the client and otherwise complies with California law. (See, e.g., Civil Code § 1798.82, et seq., pertaining to system security breaches of businesses that own or maintain computerized personal information.)

Because the attorney in the hypothetical has no recollection of communications with Client, and no notes that refresh his recollection regarding Client's wishes, the Committee believes that the attorney does not have sufficient information to conclude that publication of information in a will registry would advance Client's interests. In the same vein, attorney appears to lack sufficient information to conclude that Client would consent to dissemination of information to a will registry, or that publication of the information in a will registry would not be embarrassing or likely be detrimental to Client. Thus, without some basis for making the relevant determinations, the attorney in the hypothetical could not ethically disseminate information about that client to the will registry.

## CONCLUSION

In light of the statutory scheme set forth in Probate Code sections 700, et seq., a California attorney may not, in conformance with his or her duties to the client, deposit a will with a will depository without the client's express consent. A California attorney may not ethically use a will registry without the client's express consent unless the attorney concludes, based upon a review of the file, any recollection of communications with the client, and all of the relevant facts and circumstances, that disclosure would further the client's interest and would not be embarrassing or likely be detrimental to the client. An attorney who registers a will without a client's express consent acts at his or her peril.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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<sup>5/</sup> In *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1006 [101 Cal.Rptr.2d 341], the court stated that "clients routinely exercise their right to consult with counsel, seeking to obtain advice on a host of matters that they reasonably expect to remain private." The court gave several examples, including: "a family member who desired to rewrite a will may also consult an attorney with the expectation that the consultation itself, as well as the matters discussed therein, will remain confidential until such time as the consultation is disclosed to third parties."

**RRC – Rule on Use of Will Depositories  
E-mails, etc., -- Revised (11/3/2009)**

**Table of Contents**

June 18, 2008 Memo from Judy Johnson to BOG:..... 1

April 7, 2009 KEM E-mail to Drafters (Sapiro, Lamport & Vapnek), cc Chair & Staff:..... 4

August 27, 2009 McCurdy E-mail to Sapiro, cc Chair, Vapnek, Tuft & Staff: ..... 5

October 26, 2009 McCurdy E-mail to Drafters (Sapiro, Lamport, Vapnek), cc Chair, Tuft & Staff:..... 7

June 18, 2008 Memo from Judy Johnson to BOG:

July 30-1  
Appointment of a Career  
Transition Planning Task Force

DATE: June 18, 2008

TO: Members of the Board of Governors  
Members of the Board Committee on Member Oversight

FROM: Judy Johnson, Executive Director, State Bar of California

SUBJECT: Appointment of a Career Transition Planning Task Force

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## BACKGROUND AND ISSUES

### Aging State Bar Membership

Approximately 77 million babies were born in the United States during the years 1946 to 1964. During 2011 the oldest “baby boomers” will turn 65, and, on average, can expect to live to 83. Boomers are now nearly 28 percent of the adult US population. Demographic trends indicate that the average age of State Bar members is climbing steadily, with middle-aged and senior attorneys together comprising the largest demographic group in the Bar; 64 percent of the respondents to a survey of the membership conducted by the State Bar in 2006 were 45 years old or older. The average age of our inactive members is 56, and the average age of California judges is 58.

Unlike their parent’s generation, fewer boomers expect to retire completely from the practice of law by age 65. A recent survey by the Oregon Bar revealed that only 18 percent of respondents were planning to retire completely. Some respondents planned to continue practicing full-time as long as they are able (12 percent), while others were planning to practice part-time (42 percent), either for the income that part-time practice would provide or mainly for stimulation, a sense of purpose, and satisfaction.

The fact that so many of today’s attorneys expect to practice law (at least part-time) well into their later life raises concerns about the adequacy of our membership’s retirement planning, financial planning, and contingency planning. Only 41 percent of the Oregon survey respondents had developed a financial plan that includes specific goals for retirement, and little more than half had discussed non-financial aspects of retirement with close family members and friends. Should the State Bar of California be doing more to facilitate this planning?

### [Page 2] Contingency and Transition Planning

Failure on the part of attorneys in private practice to establish contingency plans (sometimes referred to as exit plans) for emergencies, accidents, unplanned absences and for later life is an important issue for the Bar. The death or disability of a lawyer can have significant adverse

## **RRC – Rule on Use of Will Depositories E-mails, etc., -- Revised (11/3/2009)**

consequences on an attorney's clients, family and colleagues if arrangements have not been made in advance for appointment of successor counsel (or a practice administrator). When the solo practitioners in the Oregon survey were asked if they had taken steps to protect their clients in the event of death, disability or incapacity, only 21 percent had made arrangements with another attorney to cover their practice in the event of temporary disability or extended absence from practice, and 10 percent had made arrangements with another attorney to close their practice in the event of permanent disability or death. Nearly two-thirds of the respondents (61 percent) reported that they have not taken any steps or prepared any exit plans.

### **Disciplinary Issues**

With an increasing number of attorneys actively practicing law well into later life, we will need to respond to more complaints about attorneys with age-related impairments that have negatively impacted their ability to serve the interests of their clients. Our current disciplinary rules and procedures are not well suited to identifying or responding to such impairment in a manner that protects client interests while preserving the dignity of a valued member of the legal community.

### **Opportunity for Enhancing the Rules of Professional Conduct**

Currently, the State Bar's Rules Revision Commission is developing comprehensive proposed amendments to the Rules of Professional Conduct and an opportunity exists for referring possible enhancements to the Commission for action. Among the potential concepts that could be considered are the following:

1. Whether the rules should require a lawyer to have a "succession plan" (such as an estate plan pursuant to Probate Code §2488 that allows for the appointment of a law practice administrator) that would address issues of sudden death or disability.
2. Whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. California's rule requires that "all or substantially all" of a practice be transferred in a sale but the comparable ABA Model Rule permits the sale of a discrete geographic area or practice area. Greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement.
3. Whether the rules should be changed to facilitate a lawyer's use of private will registries and depositories. Retention of client files that include original wills, trusts or other instruments are a longstanding practice management concern and the use of private will registries and depositories may ease the burden of file retention and better protect client interests.
4. Whether the rule restricting fee-splits among lawyers in different firms should be relaxed to remove compensation barriers on a lawyer's ability to undertake **[Page 3]** to complete the unfinished legal services started by a lawyer in another firm who has become suddenly disabled.

A Board Task Force could consider the policy implications of these or other possible enhancements to the rules and give direction to the Rules Revision Commission for development and action.

### **RECOMMENDED ACTION**

## RRC – Rule on Use of Will Depositories E-mails, etc., -- Revised (11/3/2009)

The **Joint Committee on Aging Lawyers** of the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers (“Joint Committee”) examined the disciplinary problems created by an aging Bar (NOBC-APRL Joint Committee on Aging Lawyers, Final Report, May 2007). The Joint Committee determined that current lawyer regulatory rules and procedures do not adequately protect the interests of clients who are likely to suffer adverse consequences when an age-related impairment significantly affects their lawyer’s ability to practice. The Joint Committee recommended that each jurisdiction take the following steps to prepare for an increase in age-related lawyer impairment:

1. Make a demographic assessment of the lawyers in their jurisdiction.
2. Take steps to identify lawyers with age-related impairments.
3. Provide planning ahead and law practice transfer instruction to their membership (including guidelines for designation of successor or caretaker counsel, sale or transfer of law practice, preservation and handling of client files).
4. Develop local response teams of trained lawyers prepared to act when a lawyer becomes incapacitated or dies without adequate succession planning.
5. Implement programs specifically aimed at addressing impairment of senior lawyers’ ability to practice in the same fashion that similar programs in many jurisdictions successfully assist lawyer impaired by substance abuse and mental and physical health problems.

In June of 2007, the **Senior Lawyers Division of the ABA** submitted a Report and Recommendation (#105) requesting that the ABA House of Delegates adopt a policy “urging bar associations and courts” to “adopt procedures and programs” that would encourage lawyers to plan for law offices contingencies by voluntarily designating successor counsel to step in when the lawyer is disabled, dies, or is otherwise unable to practice law. The **Executive Committee of the State Bar of California Law Practice Management Section** issued a statement that the approach suggested by the ABA’s Senior Lawyers Division is too narrow to protect the interests of clients, and to address the wide array of issues that arise when lawyers fail to plan adequately for their disability or death. Specifically, the Committee stated that the death or disability of a lawyer can have significant adverse consequences on the lawyer’s clients, colleagues, family and the public’s perception of the profession. Therefore, the Committee suggested that the State Bar adopt policies and procedures that educate each of these constituencies about the financial and other benefits that result from early and effective succession planning. **[Page 4]** From a member benefit perspective, should the State Bar be helping middle-aged and senior attorneys plan for the later stages of their career? From a public protection point of view, should the State Bar be encouraging more solo practitioners and small firm attorneys to develop exit plans? What other steps should be taken to protect the public, the membership and their families from experiencing adverse consequences associated with aging problems?

### **FISCAL AND PERSONNEL IMPACT**

None known.

### **BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE**

There is no known impact on the Board Book.

### STATE BAR RULES IMPACT

None known.

### RECOMMENDATIONS/RESOLUTIONS

If the members of the Board Committee concur with the various recommendations above, it would be appropriate for the Board Committee to adopt the following resolution:

**RESOLVED**, that the Board Committee on Member Oversight recommends that the Board of Governors appoint a Task Force to (1) review the contingency, succession and retirement planning resources and assistance available to the membership from the State Bar; (2) identify any additional instruction and outreach that might be necessary to increase the rate of contingency, succession and retirement planning; (3) consider possible enhancements to the Rules of Professional Conduct and give direction to the Rules Revision Commission for development and action; (4) determine what California-specific instructional materials need to be posted on the website and otherwise distributed to the membership; (5) determine the appropriate role of the State Bar Lawyer Assistance Program in assisting senior lawyers and their families with aging-related challenges; (6) determine how the State Bar might better identify attorneys with age-related impairments before clients suffer adverse consequences; and (7) examine the feasibility of establishing interoffice response teams at the State Bar to intervene when it comes to the attention of the Bar that a member is experiencing age-related impairment.

### **April 7, 2009 KEM E-mail to Drafters (Sapiro, Lamport & Vapnek), cc Chair & Staff:**

As members of the drafting committee, I'm providing you with some materials I have concerning the proposed "Practice Succession Plan" Rule. Jerry is lead drafter.

I've attached the following:

1. A 6/18/08 Memo from Judy Johnson to the BOG concerning the Bar's appointment of a Career Transition Planning Task Force.
2. COPRAC Ethics Op. 2007-173.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

The concept for this Rule, together w/ the proposed rule on a practice succession plan, grows out of the Bar's appointment of a Career Transition Planning Task Force, as described in the 6/18/08 Johnson Memo. This is all I have on the topic at present. I haven't heard of anything further that the Task Force has done.

### **Finally, please note that this Rule is not calendared until the December 2009 meeting.**

However, some of you have requested being provided with the relevant materials in the interim and I'm doing so.

Please let me know if you have any questions.

**August 27, 2009 McCurdy E-mail to Sapiro, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

**October 16 & 17, 2009 Meeting**

**Assignments Due: Wed., 9/30/09**

**RRC – Rule on Use of Will Depositories  
E-mails, etc., -- Revised (11/3/2009)**

**1. III.MM. Rule 1.17 Purchase & Sale of a Geographic Area or Substantive Field of a Law Practice [2-300] (Post Public Comment Merged Rule Draft #1.1 dated 1/6/09 to be revised following the July 2009 meeting)  
Codrafters: KEHR (Co-lead), Melchior, Martinez**

**Assignment:** (1) a chart comparing proposed Rule 1.17 to MR 1.17; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response

**2. III.PP. Rule 3.10 Threatening Charges [5-100] (Post Public Comment Draft to be revised following the August 2008 meeting) Codrafters: Melchior, Snyder**

**Assignment:** (1) a chart comparing proposed Rule 3.10 to RPC 5-100; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

**Assignments Due: Wed., 11/28/09**

**1. IV.N. Possible Rule re: Practice Succession Plan (no counterpart rules) (consideration of a possible rule arose from the Board’s Career Transition Planning Task Force, Judy Johnson memo dated 6/18/08) Codrafters: Sapiro, Vapnek**

**Assignment:** (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

**2. IV.O. Possible Rule re: Use of Private Will Depositories (no counterpart rules) (consideration of a possible rule arose from the Board’s Career Transition Planning Task Force, Judy Johnson memo dated 6/18/08) Codrafters: Lampert, Vapnek**

**Assignment:** (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

**RRC – Rule on Use of Will Depositories  
E-mails, etc., -- Revised (11/3/2009)**

**October 26, 2009 McCurdy E-mail to Drafters (Sapiro, Lamport, Vapnek), cc Chair, Tuft & Staff:**

Jerry & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28th.

RRC - Will Deposit - COPRAC Op. 2007-173.pdf

RRC - Will Deposit - Transition Task Force - 06-18-08 Memo to BOG.pdf