

4/26/78

Memorandum 78-27

Subject: Research Consultants

The Commission has generally deferred making contracts with research consultants until toward the end of the fiscal year when it is possible to determine the amount of money that will be available for this purpose after other fixed expenses have been covered.

Funds available for research consultants. A review of our present fiscal condition reveals the following amounts appear to be in excess of the amount we estimate will be required for the purposes indicated:

Printing -----	\$ 6,000	(After this transfer to research, we would have \$5,000 available for printing in the current fiscal year and we also have available \$5,750 from funds appropriated for 1976-77 for composition of the guardianship-conservatorship revision.)
In-state Travel -----	\$ 2,000	
Out-of-state Travel -----	\$ 600	
Research Consultants -----	<u>\$ 3,900</u>	
	\$12,500	

To the extent these funds are not used for research consultants, we would use them for composition of the tentative recommendation relating to enforcement of judgements. However, we believe that we can finance the cost of the composition of that publication from funds to be appropriated for 1978-79.

Research consultant on liability of community to third-party creditors and exemptions allowed married persons. At the last meeting, Commissioner Walker pointed out that an adequate study has not been made of the extent to which married persons should be allowed to claim exemptions when community property is levied on by a creditor of one or both of the spouses. This problem has troubled the Executive Secretary for some time. The problem is not one that requires merely a determination

whether each spouse should be entitled to claim an exemption, thus giving a double exemption. The policy issue presented requires, I believe, a careful analysis of the extent to which community and separate property is to be liable for the payment of a debt or liability incurred by one spouse or by both spouses and the effect of whether the judgment on such a debt is obtained against one or both spouses. The extent of liability of a community property separately managed business also presents difficult problems. The enactment of the new community property reforms has created considerable uncertainty in an area where the law previously was not entirely clear. See, e.g., Pedlar, The Implications of the New Community Property Laws for Creditor's Remedies and Bankruptcy, 63 Calif. L. Rev. 1610 (1975) (outlining many of the uncertainties that exist in the new law).

The staff recommends that the Executive Secretary, the Chairman, and any other Commissioners who wish to serve, be designated a subcommittee to select a law professor or other qualified person to serve as a consultant to prepare a background study on this problem and that the Executive Secretary be authorized and directed to make a contract on behalf of the Commission, in the usual form of such contracts with research consultants, with the person so selected. We need to make the contract as soon as possible if we are to use the money available this fiscal year for this purpose. The staff recommends that the compensation for the study be \$5,000, with not to exceed \$500 addition to cover travel expenses in attending Commission meetings, staff conferences, and legislative hearings, when this subject is under consideration.

The staff considers this study to be the top priority for use of our research funds, and we are hopeful that we can find a consultant who can work on the study this summer. We believe we need the study before we make our recommendation to the Legislature on enforcement of judgments.

Research consultants on marketable title study. A major study that the Legislature directed the Law Revision Commission to make is the following:

(1) Whether the law relating to possibilities of reverter and powers of termination should be revised.

(2) Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use should be revised.

The Uniform Law Commissioners have approved the Uniform Simplification of Land Transfers Act. The ABA approved the act by a 120-119 vote. At my request, the California Land Title Association appointed a special committee which is reviewing the Uniform Act and will report on whether the marketable title provisions of the Uniform Act are a sound approach and what changes should be made if the provisions were to be proposed for enactment in California. The staff has not made any study of the matter and is not yet expert in this field.

This week, I received a letter from Professor James Blawie. (The letter was in response to one I wrote to Professor Blawie at the request of Assemblyman McAlister indicating that Assemblyman McAlister had determined to add a small topic--the repeal of Civil Code Section 1464--to the Commission's agenda.) A copy of Professor Blawie's letter is attached. You should read it. He first expresses great concern that the Commission have available the expert advice of the leading property law teachers when it conducts this study. He next suggests that there is a real opportunity for the Commission greatly to simplify the law in this area, stating "it would be a matter of the greatest pride to California lawyers to be the first in the common law world to break the bonds of the medieval estate law, while at the same time retaining the best and most useful concepts and mechanisms in that area."

I think that Professor Blawie has identified the opportunity offered by this study. While the Commission may ultimately recommend far less than a radical revision of existing concepts, his suggestion may not be beyond the range of what is possible to accomplish.

The staff view is that the Marketable Title study is probably the next major study on our agenda that the Commission should consider. The study could be conducted on a long-range basis (like the eminent domain and evidence studies), and we could consider other studies--both major and minor--during the period the Marketable Title study is underway. If the Commission shares this view, the staff believes that it would be

best if the staff worked in close cooperation with one primary consultant. We also suggest that we obtain a number of other consultants to attend our meetings and give expert advice when the subject is under consideration by the Commission.

In view of Professor Blawie's interest and long experience in this field, the staff would recommend he be retained as the primary consultant. He would have the responsibility for preparing a basic background study along the lines suggested in his letter. The staff would supplement the research to the extent necessary as the study progresses. In addition, we suggest that we invite a number of the leading law professors in the property law field to also serve as consultants at meetings when this subject is considered.

We recommend that the Commission approve a contract with Professor Blawie for the study as outlined above with compensation of \$6,500 with not to exceed \$500 for travel expenses. We will determine those other professors who are interested in participating in the study and would make contracts (subject to prior Commission approval next fiscal year) with compensation at \$50 per day for attending meetings plus reimbursement for travel expenses.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Memo 78-27

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**MESSAGE**

TO    Atty. John H. DeMbully  
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       PERSONAL  
       4-20-78

DATE

**REPLY**

DATE

Dear John— It was kind of you to write your recent letter. I have nice thoughts of you and your staff, and enjoyed my contact with them. I hope you will not mind if I write to you in my practicing attorney persona, since I am at home and don't have any Santa Clara Law stationery on hand.

As to the repeal of CC 1464: I will be happy to see that one go. There are perhaps another dozen statute sections in the areas of titles and estates which really ought to be eliminated as well. They serve no purpose, and hinder modern conveyancing and estate planning. I mean some day soon to do some research on this point and pull them together for Alister's and your attention.

I am a little fearful of what will come out of the work being done toward a marketable title act for California. There are so few people really expert in the area. I have taught the subject of trusts and estates for about 16 years now, 2 or 3 times each year. I am still learning a good deal each time I review the materials preparatory to teaching. It seems to me that the knowledge even of bank legal officers and of title company lawyers is limited and exact in this area. It is one of the few areas in which the law professors are almost alone in perceiving the full dimensions of the legal principles involved. Even these slip—I have in mind the wretched paperback called Titles in a Nutshell which West put out three or four years back. It is written by a young professor of law at Golden Gate. It is so wrong and basic principles are so erroneously stated that it makes one wonder if those lawyers at West ever really went to law school.

I do like the idea of a committee of the land title association working on the Uniform Act. How-

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TO

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ever, the Uniform Act is just what it proclaims itself to be. It will not solve some of the problems which probate and estate planning counsel encounter in their specialized area which is outside the scope of land title problems. What California needs is a comprehensive act which covers all parts of the subject of titles to property of every sort. This means that the authors must be expert in (to use the old-fashioned titles) trusts, wills, future interests, personal property, real property, and modern land transfer. That's a large order, and I can state that there are damned few of us around, who have had the experience both of teaching in those areas over an extended period of time, and also in drafting those instruments and carrying on probate and civil litigation in these areas in practice. I hope that the Commission will be able to dig up one or more of the senior professors at Cal, Stanford, UCLA, etc., so that a comprehensive job will be done.

It may sound strange to you, but I take real pride in referring to the California powers of appointment statute, or to our rule against perpetuities statute. Those products of yours are so damned good that they make me want to cry. I would like to see you do the same in both the fields of land titles and conveyancing, and in trusts, estates, and future interests where a different aspect of title law is encountered. For instance, I have formed the firm opinion over the years that no purpose is served by the existence of two differing sorts of defeasibility in our law, where one would do. The estate on condition subsequent should be replaced by a simple power of revocation, thus interests. Also, the power of termination should be replaced by a simple power of appointment, thus avoiding needless complication and making the law more rational. In turn, both of these types of powers should be included within the area of powers of appointment, which is where they really fit. There is no reason for any distinction to be made as among remainders, executory interests, and reversionary interests, and they should be named and treated the same, divided according to the presence or absence of conditions precedent. In short, the number of possible titles should be reduced drastically. The result would not be confusion, but would rather be a rational body of title law which could be learned without sweat. It would also lack traps for fools, in which the current title law abounds. I believe that the Cal. Land Title Assn. committee will serve you well in the land title and transfer area, but I would recommend strongly that you employ other

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## MESSAGE

## REPLY

TO more expert assistance in the area of trusts-wills-future <sup>DATE</sup> interests and related areas. You will have no royal commission or uniform act to guide you, but it would be a matter of the greatest pride to California lawyers to be the first in the common law world to break the bonds of the medieval estate law, while at the same time retaining the best and most useful concepts and mechanisms in that area.

However, this is a practical world, and I know that you have just so much time and resources to address to pressing problems. I will continue to send in suggestions as they occur to me, with a confidence in you that I have in very few governmental agencies.

Best wishes,



P.S. By the way, we must get together during the summer when some opportunity offers.

BY

SIGNED