#D-325 10/27/81

Memorandum 81-72

Subject: Study D-325 - Statutory Bonds and Undertakings (Comments on Tentative Recommendation)

The Commission in June 1981 distributed for comment its tentative recommendation relating to statutory bonds and undertakings. A copy of the tentative recommendation is attached. The objective of this project is to draw together in one place all relevant procedural provisions governing bonds and undertakings in the form of a single uniform statute and to repeal the variant procedures found throughout the codes. In this sense the project is largely a recodification of existing law, although of course it necessitates some selection among the variant but similar provisions in the effort to provide the best overall statute.

The staff believes that nearly all of the comments received make good and thoughtful points which, if accepted, will contribute to a substantial improvement of the law governing bonds and undertakings. We have attempted in every case to accept the suggested change unless it appeared to us to be contrary to public policy. We do not plan to discuss each change outlined in this memorandum at the meeting; rather we will discuss only those changes that a Commissioner has a question about or that we believe present a policy question the Commission should resolve.

General reaction. The general reaction to this endeavor was favorable. Western Surety Company (Exhibit 1) felt it is a "commendable effort to simplify and rationalize the statutory law." The California State Sheriffs' Association (Exhibit 3) felt the work was excellent and concurred with the intent. Michael D. Berk (Exhibit 4) applauded the effort to provide uniformity in the law. J. Terry Schwartz (Exhibit 6) felt it would be of substantial benefit to the bar to have the bond and undertaking laws in a unified, consistent scheme.

Despite the favorable general comments, the Surety Producers Association of California (SPAC) is "unanimously and adamantly opposed" to the proposal unless revisions are made to correct what they view as serious defects. See Exhibit 5. As the discussion below reveals, the staff generally doesn't have much difficulty with the changes SPAC would like

to see, and we have suggested language in most cases to accommodate their problems.

The only other comment of a general nature was from the City of Long Beach (Exhibit 2), which didn't find anything in the tentative recommendation that would alter its requirements in the bond and undertaking area. The State Bar Committee on Administration of Justice also plans to send comments, but they will be late. We will write a supplementary memorandum on their comments when we receive them.

§ 995.060. Transition provision

The rule provided in Section 995.060 is that on the operative date of the new law existing bonds and undertakings, and the law applicable to existing bonds and undertakings, are saved from operation of the new law. Mr. Berk (Exhibit 4) raises the question whether the new law should govern if there is an increase in the amount of the bond or undertaking or if an additional bond or undertaking is given for the amount of the increase.

The staff believes that if there is merely a change in the amount of the bond or undertaking, the old law should continue to apply. But if a surety is substituted or if a new, additional, or supplemental bond or undertaking is given, the new law should apply. This could cause some problems where one surety is governed by old law and one by new, or where the original bond is governed by old law and the supplemental bond by new, but the staff does not believe this will be a serious problem, particularly since old law and new are generally the same in most cases. The staff would add the following language to subdivision (b): "This subdivision does not apply to the extent another surety is substituted for the original surety on or after the operative date of this chapter or to the extent the principal gives a new, additional, or supplemental bond or undertaking on or after the operative date of this chapter."

§ 995.240. Waiver in case of indigency

The inherent power of the court to waive a litigation bond or undertaking for an indigent defendant is recognized in Section 995.240. Mr. Berk (Exhibit 4) suggests either that the statute categorize the various types of litigation bonds and undertakings for the purpose of ascertaining the harm to the beneficiary if a bond or undertaking is

waived or that the statute prescribe criteria for exercise of the court's inherent power.

The staff believes it would be a futile task to attempt to categorize the various bonds and undertakings required in litigation. They were all enacted because it was felt necessary to protect the beneficiary from an unwarranted monetary loss. Every waiver of such a bond or undertaking in favor of an indigent party involves potentially serious damage to the beneficiary, but this concern may be secondary to the policy favoring access by all persons to the courts, whether wealthy or indigent.

The more promising approach suggested by Mr. Berk is to give the court some guidelines for the exercise of its discretion in waiving a bond or undertaking. In fact, the appellate cases on waiver do give some standards, although these are fairly sketchy. The staff would revise Section 995.240 to permit the court in its discretion to waive a bond or undertaking if the court determines that the principal is unable to give the bond or undertaking "because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond or undertaking is waived."

§ 995.380. Defect in bond or undertaking

If a bond or undertaking does not satisfy the technical requirements of the statute providing for it, the bond or undertaking is still valid and enforceable. Section 995.380 includes a statement drawn from the statute governing official bonds that the principal and sureties are "equitably" liable. Both Mr. Berk (Exhibit 4) and SPAC (Exhibit 5) point out that "equitable" liability is ambiguous; it seems to imply that liability may be greater than that specified in the statute providing for the bond. The staff agrees and would delete the language relating to equitable liability.

§ 995.420. Time bond or undertaking becomes effective

Under Section 995.420 a litigation bond or undertaking becomes effective 10 days after a copy is served on the beneficiary. The purpose of the delay in effective date is to permit the beneficiary to make objections. Mr. Berk (Exhibit 4) points out that this delay may be too long where immediate action is necessary, as for a temporary restraining order, and may actually hurt the beneficiary where the damage occurs during the period of delay. Mr. Berk suggests that the bond or undertaking should become effective immediately, subject to the ability of the beneficiary to make objections within 10 days after being served with a copy.

The staff believes Mr. Berk's point is well-taken. In fact the statute already provides that the beneficiary has 10 days after service to make objections. See Section 995.930. In special cases where it is necessary to defer the effective date of the bond or undertaking, this can be done on an individual basis. The staff would revise Section 995.420 to provide that a litigation bond or undertaking is effective at the time it is given unless the statute providing for the bond or undertaking specifies a different date.

§ 995.440. Term of license or permit bond or undertaking

The term of a license or permit bond or undertaking is continuous until the surety withdraws from or cancels the bond or undertaking. SPAC (Exhibit 5) notes that as drafted Section 995.440 is ambiguous because it refers not to withdrawal or cancelation but to "release from liability by the officer." SPAC is correct; the "release" language is a relic from an earlier draft. The staff will insert the proper rule that the bond or undertaking remains in effect "until cancelation or withdrawal of the surety from the bond or undertaking."

§ 995.630. Authentication of bond or undertaking

Western Surety Company (Exhibit 1) points out that Section 995.630(b), which requires that a bond or undertaking by an admitted surety insurer must be acknowledged before an officer "of this state," is inconsistent with general California law that recognizes acknowledgments made before officers outside the state. See Civil Code § 1189 (acknowledgments outside state). The staff agrees and would delete the words "of this state."

§ 995.640. Certificate of authority

The county clerk is required by statute to issue, upon request of any person, a certificate showing whether an admitted surety insurer is authorized to transact surety business. The California State Sheriffs' Association (Exhibit 3) believes the county clerk should likewise be required to issue a certificate showing whether the person who executed a bond or undertaking on behalf of an admitted surety insurer is authorized to do so:

> The county clerk shall, upon request of any person, issue a certificate stating whether a copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, duly certified by the proper authority and attested by the seal of an admitted surety insurer entitling or authorizing the person who executed a bond or undertaking to do so for and in behalf of the insurer, is filed in the office of the clerk.

The Sheriffs' Association states that this would permit the undertaking to be accompanied by the clerk's certificate and will provide the receiving officer all the information necessary to determine whether the undertaking should be accepted, approved, or rejected.

The staff has no problems with this provision. The clerk's fee for this certificate would be covered by Government Code Section 26855.3, as amended in preprint AB 1.

§ 995.710. Deposit of money, certificates, accounts, bonds, or notes

Under Section 995.710, a person may give in lieu of a required bond or undertaking an equivalent amount of cash or other liquid security. Subdivision (a)(5) of Section 995.710 permits as an in lieu deposit "investment certificates or share accounts" issued by insured savings and loan associations. Mr. Berk (Exhibit 4) points out that this authority may be too narrowly phrased; it should include "savings accounts" and "certificates of deposit" issued by savings and loan associations, just as bank savings accounts and certificates of deposit are authorized. The staff agrees and would add language to make clear this authority.

§ 995.740. Interest on deposit

If a deposit is made in lieu of a bond or undertaking, interest that accrues must be paid to the depositor. The California State Sheriffs' Association (Exhibit 3) is concerned about having to account for interest

daily in a situation where the deposit is of a type that accrues daily interest. They suggest that the interest be payable quarterly, on demand. This seems reasonable to the staff and we will make that modification in the language of Section 995.740.

§ 995.830. Bond or undertaking where no beneficiary provided

Many statutes require that a bond or undertaking be given without designating who the beneficiary of the bond or undertaking is to be. This is particularly true of statutes regulating occupations and businesses, which require that a bond or undertaking be given as a condition of a license for the occupation or permit for the business. In these cases it is clear from the context that the intended beneficiary is the people of the state. Section 995.830 is intended to fill the gap in the law by making clear that where there is no beneficiary provided in the statute, the state is the statutory beneficiary.

SPAC (Exhibit 5) apparently misreads this provision to say that if a bond or undertaking fails to specify a beneficiary, the beneficiary is the state, and is concerned about the ambiguity and confusion such a provision would create. In order to minimize the likelihood of the statute being misunderstood, the staff will recast the leadline to read, "Bond or undertaking where statute specifies no beneficiary," and the language of the section to read, "If a statute providing for a bond or undertaking does not specify the beneficiary of the bond or undertaking, the bond or undertaking shall be to the State of California."

§ 995.840. Court approval of bond or undertaking

If a litigation bond or undertaking is given to the state, Section 995.840 authorizes any party to the litigation to make objections to the bond or undertaking. Mr. Berk (Exhibit 4) feels that this provision is unnecessarily broad since in some cases the beneficiaries of the bond or undertaking may be identified by the authorizing statute. The staff agrees that this provision can be narrowed. Any person whose benefit the bond or undertaking is given, not just any party, should be permitted to object to the bond or undertaking.

§ 995.850. Enforcement by or for benefit of persons interested

Many statutes provide that a bond given to the state of California may be enforced by any person "interested" in the bond who is "injured,

aggrieved, or damaged" by breach of the condition of the bond. Section 995.850 generalizes this rule to apply to all bonds given to the state.

Mr. Berk (Exhibit 4) is concerned that the statute should be limited to the intended beneficiaries, that the term "interested" is not sufficiently definite, and that "injured" and "aggrieved" are questionable concepts; SPAC (Exhibit 5) is likewise worried about indiscriminate expansion of the principle. The staff agrees that the statute can and should be tightened up. We would revise subdivision (a) to read:

> (a) The liability on a bond or undertaking under this article may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond or undertaking is given and who are damaged by breach of the condition of the bond or undertaking.

Mr. Berk also questions the utility of subdivision (c), which is found in many statutes and which provides that enforcement of liability on a bond given to the state in an action or proceeding must be upon court order. The staff agrees this subdivision adds nothing to the general provisions governing enforcement of liability and can be deleted.

§ 995.920. Grounds for objection

Section 995.920 states that an objection to a bond or undertaking may be made on the ground that the sureties are insufficient or the amount of the bond or undertaking is insufficient. Mr. Berk (Exhibit 4) observes that there are other grounds for objection not included in Section 995.920, such as that the bond or undertaking does not contain statutorily required provisions or that the terms and conditions are improper. In order that the grounds listed in Section 995.920 not be construed to be the exclusive grounds for objection, the staff recommends that a new subdivision (c) be added that objection can be made on the ground that, "The bond or undertaking, from any other cause, is insufficient."

§ 995.960. Determination of sufficiency of bond or undertaking

If an objection is made to a bond or undertaking and the court determines the bond or undertaking is insufficient, the principal must give a sufficient bond or undertaking. If the principal fails to do so, any rights the principal obtained by giving the original bond or undertaking, such as attachment of property or an injunction, cease. Mr.

Berk (Exhibit 4) believes that an ex parte court order vacating these rights should also be authorized. "My experience has been that judicial offers, trustees, etc., will not act in the absence of such an order even if a prior order is of no legal force or effect by operation of law."

The staff has no problem with Mr. Berk's suggestion. We would add to Section 995.960(b)(1) a provision to the effect that where rights have ceased due to the insufficiency of a bond or undertaking, "The court shall, upon ex parte application by the beneficiary, make an order vacating the rights obtained by giving the bond or undertaking." Similar language should be added to Sections 996.010 (insufficient bond or undertaking) and 996.140 (failure to give substitute surety).

§ 996.320. Notice of cancelation or withdrawal

Various statutes provide a procedure by which a surety may relieve itself from further liability on a bond or undertaking. In addition, Civil Code Section 2851 provides a general procedure for the surety on a license or permit bond to relieve itself of liability where the specific statute governing the bond provides no procedure. The tentative recommendation consolidates the various procedures in one uniform procedure in Sections 996.310-996.360. The consolidation is based largely on Civil Code Section 2851, with additional provisions drawn from the other procedures where the provisions appear useful.

Section 996.320 prescribes the basic notice procedure by which a surety can cancel or withdraw from a bond or undertaking and thereby obtain release from further liability. Western Surety Company (Exhibit 1) objects to the provision requiring that the notice be subscribed and verified by affidavit of the surety. This provision is drawn from Government Code Section 1605 (official bonds). Western Surety states that making this a general requirement would as a practical matter complicate the process of canceling bonds without any increase in protection to the beneficiary. The staff believes the point is well-taken and would delete the requirement.

Under existing procedures the surety ordinarily gives notice of cancelation or withdrawal to the officer with whom the bond is filed and at the same time serves notice of cancelation or withdrawal on the

principal. Section 996.320 adds to the persons on whom notice is served the beneficiary and any cosureties, on the theory that these persons also have a substantial stake in knowing that a bond has been canceled or a surety has withdrawn. SPAC (Exhibit 5) is concerned that this imposes a new obligation on sureties and creates ambiguity over the definition of "serving" the notice.

It is true that service on the beneficiary and cosureties is a burden on the surety; the question is whether the burden is substantial compared with the benefit to be obtained by such service. The staff feels that service on cosureties is only marginally beneficial; if the sureties object to this provision, it should be deleted, even though it can work both ways for a surety. On the other hand, notice to the beneficiary would be substantially useful. The difficulty with such notice is that in most cases the bond or undertaking to which the cancelation or withdrawal relates there is no named beneficiary, since the bond or undertaking is ordinarily given as a condition of a license or permit. See Section 996.310. If the bond or undertaking is to the state, the beneficiary is deemed to be the same officer who will already have received the notice of cancelation or withdrawal. See Section 995.130. Because of the limited circumstances in which notice to beneficiaries would be effective, the staff has concluded that in the interest of simplicity this requirement should likewise be deleted.

Thus the staff would follow the suggestion of SPAC and adhere more narrowly to the scheme of Civil Code Section 2851--notice of cancellation or withdrawal is given to the officer and a copy of the notice served at the same time on the principal only:

§ 996.320. Notice of cancelation or withdrawal

996.320. A surety may cancel or withdraw from a bond or undertaking by giving a notice of cancelation or withdrawal to the officer to whom the bond or undertaking was given in the same manner the bond or undertaking was given. The surety shall at the same time serve a copy of the notice of cancelation or withdrawal on the principal.

SPAC also raises the question of the definition of "serving" notice. This is a problem in existing law, which does not prescribe the manner of service. The Commission's tentative recommendation already addresses this point by making clear that the rules for service of process are incorporated. See Section 995.030 (manner of service).

§ 996.410. Enforcement of liability on bond or undertaking

The technical distinction between a bond and undertaking is that a bond is executed by both principal and sureties whereas an undertaking is executed by the sureties alone. It is this distinction that prompts Mr. Berk (Exhibit 4) to question whether Section 996.410 properly permits the beneficiary to enforce the liability on a bond or undertaking against both principal and sureties.

The intent of the tentative recommendation is to treat bonds and undertakings the same, and to make principal and sureties both liable regardless whether the document is technically a bond or an undertaking. See Section 995.210 and Comment thereto (bonds and undertakings interchangeable). The staff recommends no change in this respect.

§ 996.440. Motion to enforce liability

Section 996.440 provides a procedure drawn from existing law for enforcing the liability of a surety on a bond or undertaking given in a court proceeding directly on motion in court rather than by bringing an independent civil action. The motion procedure is availably only after final judgment in the court proceeding.

Mr. Berk (Exhibit 4) believes this provision is too restrictive and that the liability on an undertaking for a temporary restraining order, for example, could be determined before final judgment is entered. "I see no reason to require a beneficiary to await final judgment before seeking to enforce a bond of that type." The staff is not inclined to make the change suggested by Mr. Berk. The requirement of entry of final judgment is existing law and applies specifically to temporary restraining orders. See Code Civ. Proc. § 535. Moreover, the concept of the motion in court is based on the assumption that there is a final judgment and therefor there will be little controversy over the liability of the surety, thereby enabling direct enforcement. If the motion procedure is permitted before judgment is final, there will be stays of enforcement, motions to vacate, etc., thereby defeating the purposes of the motion procedure.

If the surety opposes the motion for enforcement of liability and raises issues of fact that require a trial, the tentative recommendation provides for a trial by court consistent with the character of the motion procedure; existing law does not eliminate jury trial in this

situation. SPAC (Exhibit 5) states that "simple fairness suggests the surety should have the option" of court or jury trial. Although the staff is opposed to jury trial in this situation, we believe that SPAC has a point when they state that the Commission is representing this tentative recommendation as being no more than a recodification so it should not do other things as well. The Commission should decide whether to preserve jury trial in this situation or to point out in the preliminary part of the recommendation that we are proposing a change in the law on this point. One possible intermediate position is a provision found in Code of Civil Procedure Section 535: "Trial by jury shall be waived unless demand therefor is served and filed not later than 10 days after notice of the order fixing the trial date."

§ 996.450. Statute of limitations

The general statute of limitations applicable to enforcement of liability on a bond or undertaking is four years pursuant to Code of Civil Procedure Section 337. Since the beneficiary of a bond or undertaking is not a party to the bond or undertaking, Section 996.450 precludes the principal and surety from shortening by contract the statutory limitation period.

SPAC (Exhibit 5) believes this provision discriminates against sureties because they, unlike other insurers, will not have the right to bargain for a statute of limitations in a private contract. SPAC would allow contractual alteration of the statute of limitation where it has been "agreed to by principal, surety and obligee." If the beneficiary agrees to the shorter limitation period, this should be permitted. The staff would add to Section 996.450 the following language: "This section does not apply to a provision in a bond or undertaking that is agreed to by the principal, beneficiary, and surety."

§ 996.460. Judgment of liability

Under Section 996.460 a judgment of liability on a bond or undertaking must include a reasonable attorney's fee. This provision is drawn from Insurance Code Section 11708 which provides that a workers' compensation insurer's bond must provide for reasonable attorney's fees in actions or proceedings to enforce payment. SPAC points out that generalization of the Insurance Code rule would be contrary to the general rule in California civil litigation that attorney's fees are not ordinarily awarded. The

staff believes SPAC has a valid point and believes the Insurance Code situation is unique and should not be generalized. In fact, we are not proposing the repeal of the Insurance Code provision in our conforming amendments, and we would delete the attorney's fee language from Section 996.460.

§ 996.480. Voluntary payment by surety

Section 996.480 provides that if the liability of the principal is established, and if the beneficiary makes a claim for payment on the bond or undertaking and the surety fails to pay, the surety is liable for costs of the beneficiary in obtaining judgment against the surety including a reasonable attorney's fee and interest from the date of the claim; the liability for costs is not limited by the amount of the bond or undertaking. This provision is drawn from Probate Code Section 554, which applies to bonds and undertakings given pursuant to the Probate Code.

The staff believes this is a good rule that will encourage sureties to pay promptly when their liability is clear. SPAC (Exhibit 5) takes a contrary view, stating that the provision works to "extort" money from sureties: "The clear impact is to discourage good faith investigation and denial of claims. Causing sureties to be liable for attorneys fees and interest to the date of the claim discriminates against sureties by causing them to pay rather than to defend a legitimate denial."

The staff does not believe SPAC's position has merit where the liability of the principal has already been established. Perhaps we need to clarify what "establishment" of liability entails for the purpose of penalizing a surety by attorney's fees and interest. For this purpose the staff would revise the introductory portion of Section 996.480(a) to read: "If the nature and extent of the liability of the principal is established by final judgment of a court and the time for appeal has expired or, if an appeal is taken, the appeal is finally determined and the judgment is affirmed:".

Code of Civil Procedure §§ 689, 689b

One of the conforming amendments to the bond and undertaking statute is improperly drawn because it treats together two different undertakings. The California State Sheriffs' Association (Exhibit 3) demonstrates how

this problem can be resolved by splitting out one undertaking provision and making a separate subdivision out of it. This is a satisfactory solution to the problem.

The Sheriffs' Association also proposes amendments to make clear that where property has been levied upon, even though a third-party claim for the property is made and an undertaking is given, the sheriff cannot release the property without a court order. The staff does not believe this is sound policy. We want to enable quick and automatic release of property whenever possible without the need to obtain a court order. To this end we require notices to be given to the sheriff so that if statutory requirements aren't satisfied there will be an expeditious release of the property.

Code of Civil Procedure § 710c

The California State Sheriffs' Association (Exhibit 3) notes that there is an erroneous reference to service of the undertaking on "the judgment debtor" when in fact the bond and undertaking law requires service on the beneficiary, whether or not the judgment debtor. This error should be corrected.

Code of Civil Procedure §§ 1213, 1215, 1220

The bond and undertaking statute is intended to cover only civil bonds and undertakings and not bail bonds and undertakings. See Section 995.020. The Code of Civil Procedure provisions governing civil contempt speak of release from a bench warrant by letting a person to "bail." This terminology is misleading because it is a civil undertaking that is given to obtain release, and a criminal bail bond may not satisfy the civil requirements. This problem is easily solved by simple amendment of Sections 1213 and 1215 of the Code of Civil Procedure to delete the references to bail and by making conforming revisions in related sections:

> 1213. Whenever a warrant of attachment is issued ~~,~~ pursuant to this title ~~,~~ the court or judge must direct, by an endorsement on ~~such~~ the warrant, that the person charged may ~~be let to bail for his~~ give an undertaking for the person's appearance ~~,~~ in an amount to be specified in ~~such~~ the endorsement.
>
> Comment. Section 1213 is amended to substitute the more accurate reference to an undertaking for the misleading reference to "bail." The other changes in Section 1213 are technical.
>
> 1215. ~~When a direction to let the person arrested to bail is contained in the warrant of attachment, or endorsed thereon,~~

~~he~~ The person arrested must be discharged from the arrest ~~,~~ upon executing and delivering to the officer, at any time before the return-day of the warrant, ~~a written~~ an undertaking ~~, with two sufficient sureties,~~ to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge ~~thereupon; or they will pay as may be directed, the sum specified in the warrant~~ .

Comment. Section 1215 is amended to delete the reference to "bail" and to delete provisions duplicated in the Bond and Undertaking Law. See Sections 995.310 (sureties on undertaking), 995.320 (contents of undertaking).

1220. When the warrant of arrest has been returned served, if the person arrested does not appear on the return day, the court or judgment may issue another warrant of arrest or may order the undertaking to be ~~prosecuted~~ enforced, or both. If the undertaking ~~be prosecuted~~ is enforced, the measure of damages ~~in the action~~ is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued ~~, and the costs of the proceeding~~ .

Comment. Section 1220 is amended to delete a provision duplicated in the Bond and Undertaking Law and for consistency with the provisions of the Law. See Sections 996.410-996.495 (liability of principal and sureties) and 996.460 (judgment of liability).

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Memo 81-72

Study D-325

EXHIBIT 1

Western Surety Company

Office of General Counsel

July 27, 1981

Mr. John Demoully
Executive Director
California Law Revision Committee
4000 Middlefield Road
Room D-2
Palo Alto, CA 94306

Dear Mr. Demoully:

Re: Statutory Bonds and Undertakings

This Company has been furnished with a copy of the Commission's tentative recommendation relating to statutory bonds and undertakings. We are a corporate surety doing business through approximately 4300 licensed agencies in the state of California and would appreciate an opportunity to comment on the tentative recommendation. For your information, our Company does business in 48 states and writes more fidelity and surety bonds than anyone else in the country.

Our preliminary review of your tentative recommendation indicates that it is very comprehensive, and a truly commendable effort to simplify and rationalize the statutory law regarding bonds and undertakings. The introductory materials referred to several "occasional, minor, substantive change(s)". A footnote then refers the reader to a change in the claim and delivery statutes. If available, we would very much appreciate being furnished with a listing of any other substantive changes of which the Commission is aware. We have reviewed the tentative recommendation several times and will no doubt stumble across most such substantive changes. In no event, however, can our reading of this document be as comprehensive as that of your staff. Accordingly, we would appreciate any further information along these lines which might be available.

We are also curious as to the relationship between this tentative recommendation and AB 1 which was recently introduced before the California legislature. Our reading of AB 1 indicates that it comprises the repealer and amendatory provisions of the Commission's proposal but not the newly-proposed chapter of the Code of Civil Procedure. We would appreciate any information you can provide in that regard.

We would also appreicate the Commission's consideration of several minor substantive points. Proposed Section 995.630(b) would continue the conflict between Superior Court Rule 242(a) and Civil Code §1189. Both the proposed new section and Rule 242(a) require acknowledgment "before an officer of this state...". This conflicts with California's long-standing public policy (embodied in Civil Code §1189) in favor of valid acknowledgments regardless of the state in which they were taken. Civil Code §1189, which is in agreement with the Uniform Acknowledgment Act currently in force in most states, reads as follows: "An acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state...". We hope the Commission will give some thought to revising §995.630(b) to omit the words "of this state".

Proposed §996.320 would apparently enact a new and cumbersome restriction on bond cancellations. This proposed section would require that the notice of cancellation "be subscribed and verified by the affidavit of the surety". This affidavit requirement does not appear in Civil Code §2851 nor are we aware that it appears anywhere else in California law. As a practical matter, this requirement would complicate the process of cancelling surety bonds in California. This seemingly redundant procedure would not, however, increase in any way the protection of the bond beneficiary. We hope the Commission will consider the omission of the second sentence of proposed §996.320.

We want to thank you and the Commission for the opportunity to comment on the tentative recommendation. We look forward to your reply to our questions and trust you will let us know if we can be of any assistance in your continuing review of this area of the law.

Yours very truly,

DAN L. KIRBY

DLK:n

EXHIBIT 2

CITY OF LONG BEACH
DEPARTMENT OF GENERAL SERVICES
333 WEST OCEAN BOULEVARD • LONG BEACH, CALIFORNIA 90802 • (213) 590-6277

PURCHASING DIVISION
(213) 590-6361

July 27, 1981

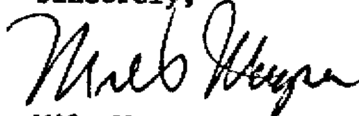
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Gentlemen:

I have just received the tenative recommendation relative to statutory bonds undertaking, and I have no recommendations to make.

In the Purchasing field, we are concerned with Bid Deposit Bonds and Faithful Performance Bonds, and I cannot find anything in this recommendation that would alter our requirements in this field.

Sincerely,



Milt Wagner
Buyer II

EXHIBIT 3

California State Sheriffs' Association

Organization Founded by the Sheriffs in 1894

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August 5, 1981

California Law Revision Commission
Attn: John H. DeMoully
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Tentative Recommendation relating to Statutory Bonds and Undertakings

Dear Mr. DeMoully:

Please accept my thanks for permitting my attendance at your July meeting in San Diego. I found it most informative. At that meeting I was provided copies of your commission's recommendation on bonds and undertakings and Preprint AB 1, and requested to review them.

Generally, your commission has done excellent work, as always, and I concur with the intent. A major problem in understanding the law on almost any subject is that relevant sections are scattered throughout many different codes.

I perceive few problems from the enforcement officer's point of view with your proposals. My comments on the tentative recommendations are as follows:

Page 21, first paragraph:

Stating that a surety may not be the principal, officer or attorney is excellent. Many attornies appear not to be aware of these court rules and case law decisions.

Page 23, Section 995.640, amend and add:

Precede the stated paragraph with (a). Add subdivision (b):

(b) The county clerk of any county shall, upon request of any person, issue a certificate stating whether a copy of the transcript or record of the unrevoked appointment, power of attorney, by-laws, or other instrument, duly certified by the proper authority and attested by the seal of the insurer entitling or authorizing the person who executed the bond or undertaking to do so for and in behalf of the insurer, is filed in the office of the clerk of the county in which the court or officer is located.

RATIONALE: Adding this subdivision will permit the undertaking to be accompanied by the clerk's certificate which indicates that the conditions stated in the first two paragraphs of Section 955.630 have been satisfied. This will provide the receiving officer all of the information necessary to determine whether the undertaking should be accepted, approved, or rejected. The selected wording is taken from subdivision (b) of 995.630.

Page 28, Section 995.740, Subdivision (a), amend:

(a) Quarterly, on demand, ~~Pay~~ pay any interest on the deposit, when earned in accordance with the terms of the account or certificate, to the principal.

RATIONALE: Many accounts pay daily interest. To require daily payment to the principal is obviously impractical. Paying quarterly, on demand [see subdivision(b)], would appear practical and protect the principal's interest.

Suggested changes in Preprint Assembly Bill No. 1 are:

Page 98, line 31 through page 99, line 4, amend:

(d) If the undertaking is given, the levy shall continue and the officer shall retain possession of ~~any~~ the property for the purposes of the levy under the writ. ~~If an undertaking is given under the provisions of Section 710b the property and the levy shall be released.~~ Notice of any objection to the undertaking shall be given as provided by statute and additionally shall be delivered to the levying officer. If a notice of objection is not received by the levying officer within the time required by statute for making an objection, the beneficiary shall be deemed to have waived any and all objections to the undertaking. ~~or if~~ If the court determines upon an objection that the undertaking is insufficient and a sufficient undertaking is not given it its place, the court shall direct the levying officer to release the property and the levy.

Page 100, following line 40, add:

(f) Notwithstanding subdivision (d), if an undertaking is given under the provisions of Section 710b, the levying officer shall release the property and the levy upon receipt of the court's order directing the levying officer to release.

RATIONALE: Subdivision (d) as amended by P AB 1, refers to two different undertakings. First, the creditor's undertaking to indemnify a third party claimant for the continued levy and sale of property, and second, the third party claimant's undertaking which indemnifies the creditor to obtain release of the property from the levy. As amended it would require that the property be released under either undertaking if objection is not made or if the undertaking is ruled insufficient by the court. This is not correct.

If the creditor's undertaking is not objected to the property should be held under the writ. If ruled insufficient the property should be released.

Conversely, if the third party's undertaking is not objected to the property should be released. If ruled insufficient the property should be held.

The suggested changes would clarify this situation, alert attorneys that notice of objection must be served on the beneficiary as well as the levying officer (see your proposed 995.370, Bond and Undertaking Law), require the court to order release of the property which is the common practice, (see California State Sheriffs' Associations's "Civil Procedural Manual", page 10.07, paragraph J.), and eliminate the difficult phrasing by stating the reference to 710b separately.

Page 103, lines 15 through 22, amend:

Notice of any objection to the undertaking shall be given as provided by statute and additionally shall be delivered to the levying officer. If a notice of objection is not received by the levying officer within the time required by statute for making an objection, the beneficiary shall be deemed to have waived any and all objections to the undertaking. ~~or if~~ If the court determines upon an objection that the undertaking is ~~unsufficient~~ insufficient and a sufficient undertaking is not given its place, the court shall direct the levying officer ~~shall~~ to release the property and the levy.

Page 104, between lines 14 and 15, add:

(11) Notwithstanding subdivision (9), If an undertaking is given under the provisions of Section 710b, the levying officer shall release the property and the levy upon receipt of the court's order directing the levying officer to release.

RATIONALE: The same rationale as previously stated for changes to §689, apply equally to these changes to §689b.

Page 105, line 1, amend:

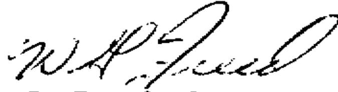
on the ~~judgment debtor.~~ beneficiary.

RATIONALE: The beneficiary must be notified of the undertaking so that he may object to it if he desires. The debtor would have no reason to object to the undertaking as its becoming effective would result in the release of the debtor's property. Your proposed Section 995.370 under the Bond and Undertaking Law requires service on the beneficiary.

I assume your commission is looking into the interelationship between this proposal and AB 707. I will attempt to review AB 707 and AB 798 and call to your attention those sections which would appear to be affected.

Thank you for permitting me to submit my input to your endeavor.

Sincerely,



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*NOT ADMITTED IN CALIFORNIA

September 4, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: D-325, Tentative Recommendation Relating
To Statutory Bonds and Undertakings, 6/1/81

Gentlemen:

I have reviewed the tentative recommendation of the Commission relating to statutory bonds and undertakings, more particularly the proposed Bond and Undertaking Law, CCP §§ 995.010-996.560. Addressing the proposed law as a whole, I applaud the efforts of the Commission to provide uniformity in the laws pertaining to the posting and enforcement of bonds and undertakings. Other than the specific comments set forth below, I am in agreement with the tentative recommendation.

I have the following comments concerning certain proposed provisions (they are mostly in the form of questions rather than proposed revisions):

1. § 995.060, subd. (b). If a bond or undertaking is substituted for one already existing on January 1, 1983, or if the amount is increased due to a change in circumstances, what law will govern the substitute bond or undertaking or the portion of the increase?

2. § 995.240 applies to all bonds and undertakings. I believe that it should be limited to specifically enumerated ones based upon a determination by the Commission considering the possible impact on a beneficiary if a bond or undertaking were not posted and the availability of alternative relief by the beneficiary for damages resulting from the action calling for the posting of a bond or undertaking. At least,

the Commission should set forth criteria for the court's exercise of discretion in determining whether the requirement of a bond would be waived rather than denying the relief requested. The time required for judicial review of the court's exercise of discretion in the circumstances where a bond ordinarily is required would, in my opinion, render review moot, while on the other hand, substantial damages could be imposed upon the party who would otherwise be the beneficiary under a bond or undertaking.

3. § 995.380. I do not understand the term "equitably liable". Why not provide that the bond or undertaking will be deemed to include the statutory requisite provisions?

4. § 995.420, subd. (1). I suggest that the provision read "10 days after service on the beneficiary". In any event, the law should provide that the bond or undertaking is immediately effective, although subject to challenge for sufficiency, etc. A 10-day delay before a bond or undertaking becomes effective could create substantial problems for a beneficiary. For example, an undertaking on a temporary restraining order ordinarily will not last that long. The statute could provide instead that the adequacy of the bond or undertaking could be challenged by objection made within 10 days after service or based upon a change in circumstances. Furthermore, based on the present language of the subdivision, I am not certain whether the effective date of the bond or undertaking would be affected by CCP § 1013 if the service of a copy of the bond or undertaking was by mail.

5. § 995.640, subd. (5). While the term "investment certificates or share accounts" would seem to be inclusive of savings deposits in a state chartered savings and loan association, in order to ensure the inclusion of savings deposits in a federally chartered savings and loan association, the language should be revised to add the words "savings accounts" and "certificates of deposit".

6. § 995.840. I do not understand why any party should be permitted to object to the bond or undertaking; if a beneficiary is identified, then the right to object should be limited to the beneficiary.

7. § 995.850, subd. (a). If the beneficiary is identified, then enforcement should be limited to the beneficiary. I am not certain whether the term "all persons interested in the bond" is sufficiently definite. Finally, I do not understand what the terms "injured" and "aggrieved" add to the term "damaged". If a person has not been damaged, on what basis could he seek enforcement of the bond or undertaking?

8. § 995.850, subd. (c) does not set forth procedures for enforcement of liability on the bond or undertaking. Is it the intention of the Commission that the procedures set forth in § 996.440 be followed when seeking enforcement under this section?

9. § 995.920 does not authorize objecting to the terms and conditions set forth in a bond or undertaking or to the omissions to include statutorily required terms.

10. § 995.960, subd. (b)(1) should provide a procedure for obtaining ex parte orders vacating a prior order granting whatever rights were obtained based upon the requirement of the filing of the bond or undertaking. My experience has been that judicial officers, trustees, etc., will not act in the absence of such an order even if a prior order is of no legal force or effect by operation of law. I have the same comments respecting §§ 996.010 and 996.140. (*Cf.*, 996.020, subd. (c).)

11. § 996.410 seems to me to be ambiguous in that it presumes liability of a principal on an undertaking. I have the same comments respecting § 996.460, subd. (a).

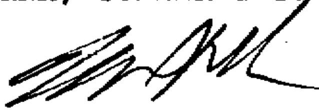
12. § 996.440 seems to me to be too restrictive. For example, the liability on an undertaking for a temporary restraining order could be determined before final judgment is entered. I see no reason to require a beneficiary to await final judgment before seeking to enforce a bond of that type.

LAW OFFICES
McKENNA, CONNER & CUNEO

I hope that at least some of my comments will be helpful and appreciated the opportunity to review the tentative recommendation.

Very truly yours,

McKENNA, CONNER & CUNEO



By
Michael D. Berk

MDB:lk

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September 30, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: California Law Revision Commission tentative recommendation relating to statutory bonds and undertakings

Gentlemen:

The Surety Producers Association of California is unanimously and adamantly opposed to your proposal relating to statutory bonds and undertakings unless revisions are made to correct what we view as serious defects.

When the proposal was first introduced it was suggested by your staff that the proposal was merely a recodification and unification of existing surety law. Our legislative committee, almost exclusively composed of lawyers specializing in surety defense law, have concluded that the proposal creates new substantive law, that many sections are ambiguous and confusing, that the proposal fails to clearly distinguish between different classes of surety, and that it unfairly discriminates against sureties.

The enclosed summary is limited to our major objections to your proposal. The many ambiguities and language problems have been omitted in the interests of brevity and in the hopes that the CLRC will meet with our representatives to discuss our complete package of objections in more detail.

Without meeting to discuss changes in the proposal, our association must take an opposed position. We are circularizing our position to all insurance companies in the State of California and shall recommend concerted opposition until a meeting is held by the CLRC to more fully explore our objections.

We stand ready to assist your staff in a more in-depth analysis of our objections.

Sincerely,

R. Spencer Douglass,
Legislative Chairman
Surety Producers Association of California

Enclosure

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SURETY PRODUCERS ASSOCIATION OF CALIFORNIA

SUMMARY OF SPECIFIC OBJECTIONS

TO CALIFORNIA LAW REVISION COMMISSION TENTATIVE RECOMMENDATIONS RELATING TO

STATUTORY BONDS AND UNDERTAKINGS

995.380 - Defect in Bond or Undertaking

This section creates equitable liability on behalf of the surety not withstanding the statutory language of the bond. It opens up and creates the right of the court to interpret the bond as they see fit.

Under current law, in the case of statutory bonds, the statute is read into the bond and controls over the terms of the bond. See Powers Regulator Co. vs. Seaboard Surety Co. of New York 204 CA 2nd 338, 22 Cal. Rptr. 373 (1962). This legislative section is unnecessary as the issue has already been decided. Passage of this section will create new and uncertain liabilitie for sureties resulting in more restrictive issuance of statutory bonds.

995.440 - Term of License or Permit Bond or Undertaking

This section is concerned with the form, effect, and term of bonds. The last phrase of the proposed section references the surety being released from liability by the officer. This is at best ambiguous. Civil Code 2851 and 2852 are much clearer and lack the ambiguity contained in this section.

995.830 - Bond or Undertaking Where No Beneficiary Provided

This section states that if there is not a named obligee in the bond, then it will automatically be presumed that the obligee is the State of California. This creates ambiguity and confusion and should be deleted.

995.850 - Enforcement By of For Benefit of Persons Interested

This section creates the right of any interested person to enforce the liability under a bond or undertaking not withstanding the fact that they are not the named obligee. Granted, this is in fact the law in certain circumstances, however, as a concept it should not be enlarged to cover every type of bond or undertaking that might relate in any way, no matter how remote, to various statutes.

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996.320 .330 .360 - Notice of Cancellation or Withdrawal

These sections create ambiguity concerning the definition of serving a copy of the Notice of Cancellation or Withdrawal. It creates an obligation upon the surety to serve not only the Obligee but also the principal, officer or any co-sureties.

The comment of the LRC states that this section is drawn from numerous provisions of former law, citing Civil Code Section 2851. That section, however, does not contain even vaguely similar language to the proposed new section.

996.440 (D) - Motion to Enforce Liability

This section limits the right of the surety to a court trial on the issues created as opposed to a jury trial. Simple fairness suggests the surety should have the option.

996.450 - Statute of Limitations

This section sets forth a Statute of Limitations of four years regardless of bond language to the contrary which may have been agreed to by principal, surety and obligee. This section discriminates against writers of surety bonds as opposed to writers of other forms of insurance. Title insurance policies and other forms of insurance policies have for many years contained a statute of limitation less than four years. To create a statute whereby sureties do not have the right to bargain for a statute of limitations in a private contract is clearly discriminatory.

996.460 - Judgment of Liability
996.470 - Limitation on Liability of Surety

These sections are of extreme concern. They create liability for attorneys fees arising out of bonded transactions which do not exist under the current laws of the State of California.

These statutory proposals are clearly subject to the interpretation that the surety's liability for attorneys fees can exceed the penalty of the bond.

The clear intent of the LRC proposal can be seen when comparing 996.460(b), 996.470 and 996.480(a)2.

996.480 in effect operates as a waiver of 996.470 to allow attorneys fees in excess of the bond penalty.

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SURETY PRODUCERS ASSOCIATION OF CALIFORNIA

996.460 - 996.470 - Attorneys Fees (continued)

Under present law, a party to a civil action is only responsible to pay attorneys fees if attorneys fees are granted by statute or contract. These sections would obligate all sureties on all undertaking to be responsible for reasonable attorney fees once liability has been determined. In that this is not true in other forms of insurance, absent bad faith, there is no reason to extend this liability to sureties when such liability is not placed upon other parties to a contract who operate in the private sector. Such a provision discriminates against sureties and would create an underwriting nightmare where no surety could properly ascertain the maximum exposure on any bond written.

996.480 (2) - Voluntary Payment by Surety

This section creates the obligation for reasonable attorneys fees plus interest from the date the claim was originally made. Coupled with the potential for attorneys fees in excess of the bond amount this section works to extort money from the sureties. The clear impact is to discourage good faith investigation and denial of claims. Causing sureties to be liable for attorneys fees and interest to the date of the claim discriminates against sureties by causing them to pay rather than to defend a legitimate denial.

EXHIBIT 6

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IN REPLY REFER TO:

April 28, 1981

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

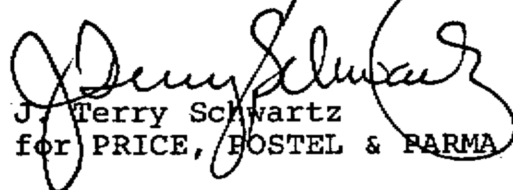
Dear Mr. Sterling:

I received with great pleasure the packet of materials concerning the statutory bonds and undertakings proposals which you forwarded to me about a month ago. The only general comment I would make is that it will certainly be of substantial benefit to the Bar to have the bond/undertaking laws in a unified, consistent scheme.

Quite frankly, I was also amazed that my observations and comments concerning the claim and delivery bond provisions were apparently seriously considered by the staff. It was most gratifying to learn that you and your colleagues actually consider and act upon practitioner comments and that they do not simply wind up in someone's circular file.

Again, thank you for the opportunity of reviewing the materials. I will follow the progress of the new bond law with interest.

Very truly yours,



J. Terry Schwartz
for PRICE, POSTEL & PARMA

JTS/jb