12/20/85
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Memorandum 85-94

Subject: Topics and Priorities for 1988 and Thereafter

BACKGROUND

There are now 23 topics on the Commission's Calendar of Topics that have been authorized for study by the Commission. The Commission has determined to give the study of probate law and procedure a top priority with a view to drafting a new Estates and Trusts Code for submission to the 1987 session of the Legislature. The staff has prepared a new schedule for work on the new code and that schedule is attached as Exhibit 2. There is a possibility that the Commission will be unable to meet its schedule of submitting the new code to the Legislature in 1987. But even if the schedule is met, the calendar year 1987 will necessarily be devoted almost exclusively to probate law and procedure. There will be a need to consider comments and suggestions concerning the new code and to draft necessary amendments to the bill while it is being considered by the Legislature. Some probate matters will need to be deferred until after the new code has been drafted and will need to be worked on during 1987. It is unlikely that any significant amount of staff or Commission time will be available for consideration of other topics during 1987.

Although work by the Commission itself on other substantial topics will necessarily be deferred until 1988, it would be useful to review the various topics authorized for study and to determine those that will be studied in 1988 or thereafter. In some cases, a research consultant may be needed on a particular topic, and the process of obtaining a consultant can commence during 1986. In cases where an expert consultant is not needed, the staff can begin to collect material relating to each topic that will be studied in the next few years so that relevant material will be available when the staff begins to prepare material on the topic for Commission consideration. In addition, interested persons and organizations need to know whether they can look to the Commission to prepare needed legislation on

particular topics or whether they should look to other methods of obtaining the needed legislation. Finally, the Commission can determine any additional topics (not now authorized for Commission study) that the Commission wishes to study in the future. We can prepare material for inclusion in our next Annual Report requesting authority to study these additional topics.

Exhibit 1 contains a detailed discussion of the 23 topics authorized for Commission study. The discussion indicates the status of each topic, describes the past Commission recommendations concerning the topic, and makes staff recommendations concerning future Commission work on the topic. You should read Exhibit 1 with care because the staff does not plan to cover this exhibit in our oral presentation at the Commission meeting. At the meeting, Commissioners should raise any questions or concerns they have concerning Exhibit 1.

STAFF RECOMMENDATIONS CONCERNING PRIORITIES

These recommendations are based on the assumption that you have read Exhibit 1. That exhibit indicates various aspects of authorized studies that might be given active consideration. We set out below the priorities the staff would give to matters suitable for study. Any decision concerning priorities made at this time will, of course, be subject to change in the light of future developments and legislative indications as to topics to be given priority.

Matters in Need of Immediate Attention

(1) Injunctions and related matters. The staff recommends that the Commission obtain a consultant within the next month or two to make an analysis of the existing law and the draft statute sent to the Commission so that the consultant can make a recommendation to the Commission whether the Commission should give priority to this topic. The consultant should prepare a Scope of Study Statement as a part of this analysis. The staff recommends that the compensation to the consultant be $1,250 with not to exceed $250 for travel expenses.

(2) Repeal of Unconstitutional Statute. Attached as Exhibit 6 is a copy of a letter from Mike Bennett, Managing Editor, concerning Code

of Civil Procedure Section 87 ("Where a corporation is a party in the municipal or justice court it may appear through a director, an officer or an employee, whether or not such person is an attorney at law."), which Mr. Bennett characterizes as "one of the few unrepealed California statutes that is a complete nullity." The staff recommends that the Commission direct the staff to devote sufficient time within the next month or two to verify if this is true and, if so, to prepare a recommendation proposing the repeal of the section.

(3) Extend Municipal Court Jurisdiction to Cover Assessment Liens for Planned Developments. This extension should be made soon and it would not require a great amount of staff or Commission time to prepare a recommendation.

Matters to be Given Attention When New Estates and Trusts Code Drafted

(4) Disposition of Marital Property. The Commission's prior recommendation should be reviewed and a new recommendation submitted to the 1987 legislative session. This review could be made after the Commission has substantially completed its work on the new Estates and Trusts Code. This project probably would not require a great amount of staff or Commission time.

(5) Division of Pensions Upon Marital Dissolution. This is an important and difficult project.

(6) Marital Agreements Made During Marriage. California has enacted the Uniform Premarital Agreements Act. California has detailed provisions covering agreements concerning rights upon the death of one of the spouses. California has no general statute covering marital agreements made during marriage, and such a statute would be useful. This project might involve controversial issues.

(7) Rights of Unmarried Natural Father When Child Adopted. The National Conference of Uniform Law Commissioners is working on this important issue and the statute they develop should be reviewed by the Commission with a view to obtaining enactment of suitable legislation on this subject in California.

(8) Whether the Liens of Junior Creditors Should be Restored When an Execution Sale is Set Aside. This is an important question that should be reviewed by the Commission when the work on the new Estates

and Trusts Code is completed. This project probably would not require a great amount of staff or Commission time.

(9) Powers of Appointment and Powers of Attorney. This is a project to prepare a comprehensive powers of attorney statute and to combine that statute and the powers of appointment statute in the new Estates and Trusts Code as Division 3 of the new code. The "Directive to Physicians" might also be included in the new Division 3. This project is primarily a recodification project but does present the some policy issues, such as the standard of care and fiduciary obligations of the attorney in fact under a power of attorney. This project would require some staff and Commission time but is not a major project.

(10) Uniform Rules on Survival Requirements, Antilapse Provisions, Revocation, and Change of Beneficiaries for Wills and Will Substitutes. One of the studies prepared by Professor French will be useful in this project, but the project is a difficult one.

(11) Application of Marketable Title Act to Obsolete Restrictive Covenants. This project would require some staff and Commission time. It might turn out to be a difficult project.

MATTERS THAT MIGHT BE GIVEN PRIORITY IN FUTURE

There are other matters that the Commission may want to actively consider when the probate and trust law study is completed. These include:

(1) Evidence Code. We have a background study prepared about ten years ago, comparing the California Evidence Code with the Federal Rules of Evidence and reviewing developments under California Evidence Code. The Commission has deferred work on studying the Evidence Code because of the need to give other studies a priority and we might want our consultant to prepare a supplement to the background study we have if the Commission wants to work on this topic.

(2) One of the specific topics authorized for Commission study is default in a civil action. We received a letter suggesting that the Commission study this matter. See Exhibit 14 attached.

(3) One of the specific topics authorized for Commission study is judicial and nonjudicial foreclosure of real property liens. We recently received another letter suggesting the need to revise the

foreclosure auction system. See Exhibit 8 attached. Does the Commission wish to include this matter on its list of matters to be studied in the future when time permits. If so, when time permits, the staff will make a preliminary study of the matter with a view to determining whether an expert consultant is necessary or whether the staff could prepare the necessary background study.

NEW TOPICS

Michael Traynor suggests that the Commission study the issue whether contract damages under existing rules provide adequate compensation for breach of contract. See his letter and the attached article attached as Exhibit 12. This might be an appropriate matter for study by the Law Revision Commission. If there is interest on the part of the Commissioners, the staff could prepare a statement for inclusion in the next Annual Report requesting authority to study the topic. The request for authority probably should be broad enough to cover all aspects of contract law.

The Commission received other letters suggesting various matters for Commission study:

(1) A request from the County Recorders' Association that the Commission review various obsolete or impliedly repealed sections for express repeal. See Exhibit 13 attached.

(2) A request that the Commission study subpenas of peace officers. See Exhibit 14 attached.

(3) A request that the Commission propose legislation to clarify the law as to whether an attorney has a duty to disclose that his or her client has been giving false testimony. See Exhibit 15 attached.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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11/12/85

Memo 85-94

Exhibit 1

BACKGROUND INFORMATION CONCERNING AUTHORIZED TOPICS

The following discussion gives background information concerning each of the topics authorized for study by the Commission. These studies were authorized or directed by concurrent resolution adopted by both houses of the Legislature. The topic the Commission is authorized or directed to study is set out in bold face and underscored below, followed by a discussion of the topic.

CREDITORS' REMEDIES. Whether the law relating to creditors' remedies (including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, and related matters) should be revised. (Authorized by 1983 Cal. Stat. res. ch. 40. See also 1974 Cal. Stat. res. ch. 45; 1972 Cal. Stat. res. ch. 27; 1957 Cal. Stat. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 15 (1957).)

This study was first authorized in 1957 at the request of the Commission in response to a suggestion from a State Bar Committee. The study was a major study. Work on the topic was deferred for a number of years during which the Commission drafted the Evidence Code and worked on other topics. Beginning in 1971, the Commission submitted a series of recommendations covering specific aspects of the topic and in 1980 submitted a tentative recommendation proposing a comprehensive statute covering enforcement of judgments. The comprehensive statute was enacted. The Commission has retained the topic on its Calendar of

Topics so that the Commission would be authorized to submit recommendations to deal with technical and substantive defects in the Enforcement of Judgments Law and to deal with additional aspects of the topic. Since the enactment of the Enforcement of Judgments Law, numerous recommendations have been submitted to the Legislature to make technical and substantive revisions in that law or to deal with additional aspects of the creditors' remedies topic.

Code of Civil Procedure Section 703.120 requires that the Law Revision Commission by July 1, 1993, and every ten years thereafter, review the exemptions from execution and recommend any changes in the exempt amounts that appear proper.

The Commission has recently received several letters identifying provisions of the Enforcement of Judgments Law that should be reviewed and clarified or revised. See Exhibits 9, 10, and 11. Although the Commission does assume the responsibility for reviewing the experience under statutes enacted upon its recommendation and recommending any needed technical or substantive revisions, the staff does not believe the Commission should at this time devote its time and resources to the problems identified in these exhibits. However, the problems may be significant ones and should be given serious consideration when work on the new Probate Code is substantially completed. At that time, the staff plans to review the letters so that the Commission can consider possible revisions in the Enforcement of Judgments Law.

The Commission has deferred consideration of the question whether the liens of junior creditors should be restored when an execution sale is set aside. This is another significant problem that deserves Commission attention, but consideration of the problem must be deferred until work on the new Probate Code is substantially completed.

Another aspect of the creditors' remedies topic that the Commission has recognized in the past as in need of study is judicial and nonjudicial foreclosure of real property liens. The Commission recently received another letter suggesting the need to revise the foreclosure auction system. See Exhibit 8. A study of judicial and nonjudicial foreclosures would be a major study. A background study, prepared by an expert consultant, might be needed if the Commission were to study this matter.

One aspect of the creditors' remedies topic that is specifically noted in the detailed description of the topic is default judgment procedures. From time to time, the Commission has received letters suggesting that this area of law is in need of study so that the existing provisions can be reorganized and improved in substance. Exhibit 14 is another letter along these lines that urges that the Commission study this area of law and propose "a comprehensive arrangement of the provisions relating to entry of default and relief therefrom." This study probably would not be as difficult as the study of foreclosures, but nevertheless may be a study where an expert consultant would be required.

In 1984, upon recommendation of the Law Revision Commission, legislation was enacted to give the municipal court jurisdiction of an action "to enforce and foreclose assessment liens on a condominium created pursuant to Section 1356 of the Civil Code, where the amount of the lien is $15,000 or less." Frederick A. Patterson, San Francisco lawyer, wrote to the Commission to suggest that municipal court jurisdiction should also be extended to cover assessment liens for planned developments. His letter is attached as Exhibit 4. Attached as Exhibit 5 is the relevant portion of the Law Revision Commission Recommendation proposing that municipal courts be given jurisdiction for enforcement of condominium assessment liens. It would appear that the same reasoning would apply to assessment liens for planned developments. Does the Commission wish the staff to investigate this suggestion with a view to drafting a recommendation for submission to the 1986 (or 1987) session of the Legislature? We do not believe that submitting a recommendation would require any significant amount of staff or Commission time.

When work on the new Probate Code has been completed, the staff will give further consideration to the various suggestions concerning creditors' remedies and make recommendations to the Commission as to which, if any, area in this field should be given priority for study. For the present, the staff does not propose that any of the suggestions be given immediate study or that any attempt be made to determine which suggestions should be given priority for study in the future.

The Commission has submitted the following recommendations relating to this topic:

Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment, 10 Cal. L. Revision Comm'n Reports 1147 (1971); 10 Cal. L. Revision Comm'n Reports 1126-1127 (1971). The recommended legislation was enacted. See 1971 Cal. Stat. ch. 1607.

Recommendation Relating to Attachment, Garnishment, and Exemptions from Execution: Employees' Earnings Protection Law, 10 Cal. L. Revision Comm'n Reports 701 (1971); 11 Cal. L. Revision Comm'n Reports 1024 (1973). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1973 Legislature. See Recommendation Relating to Wage Garnishment and Related Matters, 11 Cal. L. Revision Comm'n Reports 101 (1973). See also 11 Cal. L. Revision Comm'n Reports 1123 (1973); 12 Cal. L. Revision Comm'n Reports 530 n.1 (1974). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1975 Legislature. See Recommendation Relating to Wage Garnishment Exemptions, 12 Cal. L. Revision Comm'n Reports 901 (1974). See also 13 Cal. L. Revision Comm'n Reports 2012 (1976) The recommended legislation was not enacted. Two additional recommendations were made in 1976. See Recommendation Relating to Wage Garnishment Procedure, 13 Cal. L. Revision Comm'n Reports 601 (1976), and Recommendation Relating to Wage Garnishment, 13 Cal. L. Revision Comm'n Reports 1703 (1976). See also 14 Cal. L. Revision Comm'n Reports 13 (1978); 14 Cal. L. Revision Comm'n Reports 261 (1978); 14 Cal. L. Revision Comm'n Reports 223-24 (1978) The recommended legislation was enacted in part. See 1978 Cal. Stat. ch. 1133. See also 15 Cal. L. Revision Comm'n Reports 1024 (1980). Additional parts of the recommended legislation were enacted. See 1979 Cal. Stat. ch. 66.

Recommendation and Study Relating to Civil Arrest, 11 Cal. L. Revision Comm'n Reports 1 (1973); 11 Cal. L. Revision Comm'n Reports 1123 (1973). The recommended legislation was enacted. See 1973 Cal. Stat. ch. 20.

Recommendation Relating to the Claim and Delivery Statute, 11 Cal. L. Revision Comm'n Reports 301 (1973); 11 Cal. L. Revision Comm'n Reports 1124 (1973). The recommended legislation was enacted. See 1973 Cal. Stat. ch. 526.

Recommendation Relating to Turnover Orders Under the Claim and Delivery Law, 13 Cal. L. Revision Comm'n Reports 2079 (1976); 13 Cal. L. Revision Comm'n Reports 1614 (1976). The recommended legislation was enacted. See 1976 Cal. Stat. ch. 145.

Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701 (1973); 12 Cal. L. Revision Comm'n Reports 530 (1974). The recommended legislation was enacted. See 1974 Cal. Stat. ch. 1516.

Recommendation Relating to Revision of the Attachment Law, 13 Cal. L. Revision Comm'n Reports 801 (1976); 13 Cal. L. Revision Comm'n Reports 1612 (1976). The recommended legislation was enacted. See 1976 Cal. Stat. ch. 437.

Recommendation Relating to the Attachment Law--Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors, 14 Cal. L. Revision Comm'n Reports 61 (1978); 14 Cal. L. Revision Comm'n Reports 12 (1978). The recommended legislation was enacted. See 1977 Cal. Stat. ch. 499.

Recommendation Relating to Use of Court Commissioners Under the Attachment Law, 14 Cal. L. Revision Comm'n Reports 93 (1978); 14 Cal. L. Revision Comm'n Reports 224 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 273.

Recommendation Relating to Technical Revisions in the Attachment Law, 14 Cal. L. Revision Comm'n Reports 241 (1978); 14 Cal. L. Revision Comm'n Reports 224 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 273.

Recommendation Relating to Effect of New Bankruptcy Law on the Attachment Law, 15 Cal. L. Revision Comm'n Reports 1043 (1980); 15 Cal. L. Revision Comm'n Reports 1024 (1980). The recommended legislation was enacted. See 1979 Cal. Stat. ch. 177.

Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701 (1982); 16 Cal. L. Revision Comm'n Reports 2025 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. ch. 1198. See also 1982 Creditors' Remedies Legislation With Official Comments--The Enforcement of Judgments Law; The Attachment Law, 16 Cal. L. Revision Comm'n Reports 1001 (1982).

Recommendation Relating to Enforcement of Sister State Money Judgments, 11 Cal. L. Revision Comm'n Reports 451 (1973); 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See 1974 Cal. Stat. ch. 211. See also Recommendation Relating to Sister State Money Judgments, 13 Cal. L. Revision Comm'n Reports 1669 (1976); 14 Cal. L. Revision Comm'n Reports 12 (1978). The recommended legislation was enacted. See 1977 Cal. Stat. ch. 232.

Recommendation Relating to Use of Keepers Pursuant to Writs of Execution, 14 Cal. L. Revision Comm'n Reports 49 (1978); 14 Cal. L. Revision Comm'n Reports 12 (1978). The recommended legislation was enacted. See 1977 Cal. Stat. ch. 155.

Recommendation Relating to Interest Rate on Judgments, 15 Cal. L. Revision Comm'n Reports 7 (1980); 15 Cal. L. Revision Comm'n Reports 1427 (1980); 16 Cal. L. Revision Comm'n Reports 2025 (1982); 16 Cal. L. Revision Comm'n Reports (1982). The recommended legislation was enacted. See 1982 Cal. Stat. ch. 150.

Recommendation Relating to Married Women as Sole Traders, 15 Cal. L. Revision Comm'n Reports 21 (1980); 15 Cal. L. Revision Comm'n Reports 1426 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 123.

Recommendation Relating to State Tax Liens, 15 Cal. L. Revision Comm'n Reports 29 (1980); 15 Cal. L. Revision Comm'n Reports 1427 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 600. Additional revisions to the enacted legislation were recommended. See 15 Cal. L. Revision Comm'n Reports 24 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. ch. 202.

Recommendation Relating to Probate Homestead, 15 Cal. L. Revision Comm'n Reports 401 (1980); 15 Cal. L. Revision Comm'n Reports 1428 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 119.

Recommendation Relating to Confession of Judgment, 15 Cal. L. Revision Comm'n Reports 1053 (1980); 15 Cal. L. Revision Comm'n Reports 1024 (1980). The recommended legislation was enacted. See 1979 Cal. Stat. ch. 568.

Recommendation Relating to Agreements for Entry of Paternity and Support Judgments, 15 Cal. L. Revision Comm'n Reports 1237 (1980); 15 Cal. L. Revision Comm'n Reports 1426 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 682.

Recommendation Relating to Assignment for the Benefit of Creditors, 15 Cal. L. Revision Comm'n Reports 1117 (1980); 15 Cal. L. Revision Comm'n Reports 1427 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 135.

Recommendation Relating to Enforcement of Claims and Judgments Against Public Entities, 15 Cal. L. Revision Comm'n Reports 1257 (1980); 15 Cal. L. Revision Comm'n Reports 1426-27 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 215.

Recommendation Relating to Enforcement of Obligations After Death, 15 Cal. L. Revision Comm'n Reports 1327 (1980); 15 Cal. L. Revision Comm'n Reports 1426 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 124.

Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2001 (1980). See also 16 Cal. L. Revision Comm'n Reports 24 (1982); 16 Cal. L. Revision Comm'n Reports 2024 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. chs. 497, 1364. See also 1982 Creditors' Remedies Legislation With Official Comments--The Enforcement of Judgments Law; The Attachment Law, 16 Cal. L. Revision Comm'n Reports 1001 (1982).

Recommendation Relating to Creditors' Remedies, 16 Cal. L. Revision Comm'n Reports 2175 (1982); 17 Cal. L. Revision Comm'n Reports 824-25 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 155.

Recommendation Relating to Creditors' Remedies, 17 Cal. L. Revision Comm'n Reports 975 (1984); 18 Cal. L. Revision Comm'n Reports 23 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 538.

The Commission recommended additional technical and clarifying changes to the Enforcement of Judgments Law but did not print its recommendations. The recommended legislation was enacted. See 1985 Cal. Stat. ch. 41.

Recommendation Relating to Statutory Bonds and Undertakings, 16 Cal. L. Revision Comm'n Reports 501 (1982); 16 Cal. L. Revision Comm'n Reports 2025-26 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. chs. 517, 998. See also Recommendation Relating to Conforming Changes to the Bond and Undertaking Law, 16 Cal. L. Revision Comm'n Reports 2239 (1982); 17 Cal. L. Revision Comm'n Reports 825 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 18.

PROBATE CODE. Whether the California Probate Code should be revised, including, but not limited to, whether California should adopt, in whole or in part, the Uniform Probate Code. (Authorized by 1980 Cal. Stat. res. ch. 37.)

As the Commission is well aware, the Commission is now devoting substantially all of its time and resources to the project of drafting a new Estates and Trusts Code. This project will require substantially all the time of the staff and Commission during 1986 and 1987. We have prepared a schedule for work on the new code and that schedule is attached as Exhibit 2.

The primary remaining task is to draft the new division on administration of estates of decedents. However, the Commission will need to review the entire existing Probate Code to make any needed technical or substantive revisions in the provisions of existing law to be carried over into the new code. For example, we need to consider the notice required in guardianship-conservatorship proceedings and the matter of sterlization of a conservatee. We need to review the multiple-party account law with a view to making any needed revisions and extending the applicability of the statute to all financial institutions. We need to review the provisions relating to wills. For example, we have a background study from our consultant Susan French suggesting improvements in the anti-lapse statute.

We will need to review the provision relating to property of a predeceased spouse if this provision is extended to personal property by legislation enacted in 1986.

The new code is organized with the view that it ultimately would include the provisions relating to powers of appointment and powers of attorney. Perhaps the provisions relating to the directive to physicians also should be included in this portion of the new code. However, we do not plan to include those provisions in the new code when it is proposed for enactment in 1987. The Commission will work on the provisions relating to powers after the new code is enacted and make its recommendation concerning powers to a later session of the Legislature.

Another needed study in the probate law area is one looking to the enactment of uniform rules on survival requirements, antilapse provisions, revocation, and change of beneficiaries for wills and will substitutes. Our consultant, Susan French, has prepared a background study that will be useful in developing uniform rules, but we plan to defer working on this area of law until after the new code has been prepared.

Luther J. Avery sent a copy of an article from Trusts and Estates (February 1985) suggesting that a needed area of review in the probate law study is the "confidential relationship" doctrine as applied in will contests. See Exhibit 7 for his letter and the article. Does the Commission wish to study this problem as a part of the probate law study?

During 1986, we will need to prepare tentative recommendations covering portions of the new code and distribute them to interested persons and organizations for review and comment. The Commission soon will be able to distribute for review and comment tentative recommendations concerning (1) Independent Administration (after January 1986 meeting), (2) Opening Estate Administration (after January 1986 meeting), and (3) Estate Management (after February 1986 meeting). Additional Tentative Recommendations will be available for distribution after subsequent meetings.

The Commission has submitted the following recommendations relating to this topic:

> Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980); 16 Cal. L. Revision Comm'n Reports 25 (1982). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 511.
>
> Recommendation Relating to Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1605 (1980); 16 Cal. L. Revision Comm'n Reports 25 (1982). The recommended legislation was enacted in part. See 1982 Cal. Stat. ch. 269 (financial institutions given express authority to offer pay-on-death accounts). See also Recommendation Relating to Nonprobate Transfers, 16 Cal. L. Revision Comm'n Reports 129 (1982); 17 Cal. L. Revision Comm'n Reports 823 (1984). The recommended legislation was enacted in part (credit unions and industrial loan companies). See 1983 Cal. Stat. ch. 92.

Recommendation Relating to Missing Persons, 16 Cal. L. Revision Comm'n Reports 105 (1982); 17 Cal. L. Revision Comm'n Reports 822-23 (1984). The recommended legislation was enacted. See 1983. Cal. Stat. ch. 201.

Recommendation Relating to Emancipated Minors, 16 Cal. L. Revision Comm'n Reports 183 (1982); 17 Cal. L. Revision Comm'n Reports 823 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 6.

Recommendation Relating to Notice in Limited Conservatorship Proceedings, 16 Cal. L. Revision Comm'n Reports 199 (1982); 17 Cal. L. Revision Comm'n Reports 823 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 72.

Recommendation Relating to Disclaimer of Testamentary and Other Interests, 16 Cal. L. Revision Comm'n Reports 207 (1982); 17 Cal. L. Revision Comm'n Reports 823 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 17.

Recommendation Relating to Holographic and Nuncupative Wills, 16 Cal. L. Revision Comm'n Reports 301 (1982); 16 Cal. L. Revision Comm'n Reports 2026 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. ch. 187.

Tentative Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 842. See also Recommendation Relating to Revision of Wills and Intestate Succession Law, 17 Cal. L. Revision Comm'n Reports 537 (1984); 18 Cal. L. Revision Comm'n Reports 19 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 892.

Recommendation Relating to Independent Administration of Decedent's Estate; Recommendation Relating to Distribution of Estates Without Administration; Recommendation Relating to Bonds for Personal Representatives, 17 Cal. L. Revision Comm'n Reports 405, 421, and 483 (1984). These three recommendations were combined in one bill. See also 18 Cal. L. Revision Comm'n Reports 19 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 451.

Recommendation Relating to Simultaneous Deaths, 17 Cal. L. Revision Comm'n Reports 443 (1984); 18 Cal. L. Revision Comm'n Reports 20 (1986). The recommended legislation was not enacted.

Recommendation Relating to Notice of Will, 17 Cal. L. Revision Comm'n Reports 461 (1984); 18 Cal. L. Revision Comm'n Reports 20 (1986). The recommended legislation was not enacted.

Recommendation Relating to Garnishment of Amounts Payable to Trust Beneficiary, 17 Cal. L. Revision Comm'n Reports 471 (1984); 18 Cal. L. Revision Comm'n Reports 19-20 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 493.

Recommendation Relating to Recording Affidavit of Death, 17 Cal. L. Revision Comm'n Reports 493 (1984); 18 Cal. L. Revision Comm'n Reports 20 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 527.

Recommendation Relating to Execution of Witnessed Wills, 17 Cal. L. Revision Comm'n Reports 509 (1984); 18 Cal. L. Revision Comm'n Reports 20 (1986). The recommended legislation was not enacted.

Recommendation Relating to Uniform Transfers to Minors Act, 17 Cal. L. Revision Comm'n Reports 601 (1984); 18 Cal. L. Revision Comm'n Reports 19 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 243. An amendment to the 1984 legislation was submitted to the 1985 Legislature though no recommendation was printed. The recommended legislation was enacted. See 1985 Cal. Stat. ch. 90 (authority of donor to designate successor custodians).

Recommendation Relating to Transfer Without Probate of Certain Property Registered by the State, 18 Cal. L. Revision Comm'n Reports 129 (1986); Recommendation Relating to Distribution of Will or Trust, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix VI (1986); Recommendation Relating to Effect of Adoption or Out of Wedlock Birth on Rights at Death, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix VII (1986). These three recommendation, together with additional technical and clarifying revisions to previously enacted probate legislation, were combined in one bill. The recommended legislation was enacted. See 1985 Cal. Stat. ch. 982. See also 1985 Cal. Stat. ch. 359.

Recommendations Relating to Probate Law: Recommendation Relating to Disposition of Estate Without Administration; Recommendation Relating to Small Estate Set-Aside; Recommendation Relating to Proration of Estate Taxes (December 1985). These recommendations will be submitted to the Legislature in 1986 in one bill.

A recommendation to extend the duration of the living will from five to seven years will be submitted to the 1986 Legislature. This recommendation is included in Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701, 710 (1983).

REAL AND PERSONAL PROPERTY. Whether the law relating to real and personal property (including, but not limited to, a Marketable Title Act, covenants, servitudes, conditions, and restrictions on land use or relating to land, possibilities of reverter, powers of termination, Section 1464 of the Civil Code, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon termination or abandonment of a lease, powers of appointment, and related matters) should be revised. (Authorized by 1983 Cal. Stat. res. ch. 40, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.)

As the Commission is aware, the area of real property law most in need of study is landlord-tenant law. If the Commission decides to study this area of law, a consultant should be obtained to prepare a background study so that the study will be available in 1988 when the Commission will be in a position to give some attention to this area of law.

During the past five years, the Commission has made a series of recommendations designed to improve the marketability of title to property. Provisions were enacted upon Commission recommendations designed to remove clouds on title created by (1) ancient mortgages and deeds of trust, (2) dormant mineral rights, (3) unexercised options, (5) powers of termination, (6) unperformed contracts for sale of real property, and (7) abandoned easements. The Commission has long planned to undertake a study to determine whether and how the marketable title statute should be made applicable to obsolete restrictive covenants. The staff probably could prepare the necessary background study on this rather difficult matter.

The Commission has a background study outlining many other aspects of real and personal property law that are in need of study. Reference to this background study sometime in the future will permit the Commission to determine additional areas that might be studied.

. The Commission has submitted the following recommendations relating to this topic:

> Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at B-1 (1961). See also 3 Cal. L. Revision Comm'n Reports at 1-5 (1961). This recommendation was enacted. 1961 Cal. Stat. chs. 1612 (tax apportionment) and 1613 (taking possession and passage of title).
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> Recommendation and Study Relating to Evidence in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at A-1 (1961). This recommendation was submitted to the Legislature several times and was enacted in 1965. 1965 Cal. Stat. ch. 1151.
>
> Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use, 3 Cal. L. Revision Comm'n Reports at C-1 (1961). The substance of this recommendation was enacted in 1965. 1965 Cal. Stat. chs. 1649, 1650.

Recommendation and Study Relating to Condemnation Law and Procedure: Number 4--Discovery in Eminent Domain Proceedings, 4 Cal. L. Revision Comm'n Reports 701 (1963); 4 Cal. L. Revision Comm'n Reports 213 (1963). The recommended legislation was not enacted. See also Recommendation Relating to Discovery in Eminent Domain Proceedings, 8 Cal. L. Revision Comm'n Reports 19 (1967); 8 Cal. L. Revision Comm'n Reports 1318 (1967). The recommended legislation was enacted. See 1967 Cal. Stat. ch. 1104 (exchange of valuation data).

Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding, 8 Cal. L. Revision Comm'n Reports 1361 (1967); 9 Cal. L. Revision Comm'n Reports 19 (1969). The recommended legislation was enacted. See 1968 Cal. Stat. ch. 133.

Recommendation Relating to Arbitration of Just Compensation, 9 Cal. L. Revision Comm'n Reports 123 (1969); 10 Cal. L. Revision Comm'n Reports 1018 (1971). The recommended legislation was enacted. See 1970 Cal. Stat. ch. 417.

Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts, 12 Cal. L. Revision Comm'n Reports 1001 (1974); 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See 1974 Cal. Stat. ch. 426.

Recommendation Proposing the Eminent Domain Law, 12 Cal. L. Revision Comm'n Reports 1601 (1974); 13 Cal. L. Revision Comm'n Reports 2010 (1976); Tentative Recommendations Relating to Condemnation Law and Procedure: The Eminent Domain Law, Condemnation Authority of State Agencies, and Conforming Changes in Special District Statutes, 12 Cal. L. Revision Comm'n Reports at 1, 1051, and 1101 (1974). The recommended legislation was enacted. See 1975 Cal. Stat. chs. 581, 582, 584, 585, 586, 587, 1176, 1239, 1240, 1275, 1276. See also 1976 Cal. Stat. ch. 22.

Recommendation Relating to Relocation Assistance by Private Condemnors, 13 Cal. L. Revision Comm'n Reports 2085 (1976); 13 Cal. L. Revision Comm'n Reports 1614-15 (1976). The recommended legislation was enacted. See 1976 Cal. Stat. ch. 143.

Recommendation Relating to Condemnation for Byroads and Utility Easements, 13 Cal. L. Revision Comm'n Reports 2091 (1976); 13 Cal. L. Revision Comm'n Reports 1615 (1976). The recommended legislation was enacted in part (utility easements). See 1976 Cal. Stat. ch. 994.

Recommendation Relating to Escheat, 8 Cal. L. Revision Comm'n Reports 1001 (1967); 9 Cal. L. Revision Comm'n Reports 16-18 (1969). Most of the recommended legislation was enacted. See 1968 Cal. Stat. chs. 247 (escheat of decedent's estate) and 356 (unclaimed property act).

Recommendation Relating to Unclaimed Property, 11 Cal. L. Revision Comm'n Reports 401 (1973); 11 Cal. L. Revision Comm'n Reports 1124 (1973). The recommended legislation was not enacted. See also Recommendation Relating to Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments, 12 Cal. L. Revision Comm'n Reports 613 (1974); 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was enacted. See 1975 Cal. Stat. ch. 25.

See Recommendation and Study Relating to Abandonment or Termination of a Lease, 8 Cal. L. Revision Comm'n Reports 701 (1967); 8 Cal. L. Revision Comm'n Reports 1319 (1967). The recommended legislation was not enacted. See also Recommendation Relating to Real Property Leases, 9 Cal. L. Revision Comm'n Reports 401 (1969); 9 Cal. L. Revision Comm'n Reports 98 (1969). The recommended legislation was not enacted. See also Recommendation Relating to Real Property Leases, 9 Cal. L. Revision Comm'n Reports 153 (1969); 10 Cal. L. Revision Comm'n Reports 1018 (1971). The recommended legislation was enacted. See 1970 Cal. Stat. ch. 89.

Recommendations Relating to Landlord-Tenant Relations, 11 Cal. L. Revision Comm'n Reports 951 (1973). This report contains two recommendations: Abandonment of Leased Real Property and Personal Property Left on Premises Vacated by Tenant. See also 12 Cal. L. Revision Comm'n Reports 536 (1974). The recommended legislation was enacted. See 1974 Cal. Stat. chs. 331, 332.

Recommendation Relating to Damages in Action for Breach of Lease, 13 Cal. L. Revision Comm'n Reports 1679 (1976); 14 Cal. L. Revision Comm'n Reports 13 (1978). The recommended legislation was enacted. See 1977 Cal. Stat. ch. 49.

Recommendation Relating to Partition of Real and Personal Property, 13 Cal. L. Revision Comm'n Reports 401 (1976); 13 Cal. L. Revision Comm'n Reports 1610-12 (1976). The recommended legislation was enacted. See 1976 Cal. Stat. ch. 73.

Recommendation Relating to Review of Resolution of Necessity by Writ of Mandate, 14 Cal. L. Revision Comm'n Reports 83 (1978); 14 Cal. L. Revision Comm'n Reports 224 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 286.

Recommendation Relating to Evidence of Market Value of Property, 14 Cal. L. Revision Comm'n Reports 105 (1978); 14 Cal. L. Revision Comm'n Reports 225 (1978). The recommended legislation was enacted in part. See 1978 Cal. Stat. ch. 294. Recommendation Relating to Application of Evidence Code Property Valuation Rules in Noncondemnation Cases, 15 Cal. L. Revision Comm'n Reports 301 (1980); 15 Cal. L. Revision Comm'n Reports 1429 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 381.

Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings, 14 Cal. L. Revision Comm'n Reports 291 (1978); 15 Cal. L. Revision Comm'n Reports 1025 (1980). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 31.

Recommendation Relating to Vacation of Public Streets, Highways, and Service Easements, 15 Cal. L. Revision Comm'n Reports 1137 (1980); 15 Cal. L. Revision Comm'n Reports 1429 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 1050. See also 17 Cal. L. Revision Comm'n Reports 825 (1984). The recommended follow-up legislation was enacted. See 1983 Cal. Stat. ch. 69.

Recommendation Relating to Special Assessment Liens on Property Acquired for Public Use, 15 Cal. L. Revision Comm'n Reports 1101 (1980); 15 Cal. L. Revision Comm'n Reports 1428 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 122. See also 16 Cal. L. Revision Comm'n Reports 25 (follow up legislation). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 139.

Recommendation Relating to Quiet Title Actions, 15 Cal L. Revision Comm'n Reports 1187 (1980); 15 Cal. L. Revision Comm'n Reports 1428 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 44.

Recommendation Relating to Marketable Title of Real Property, 16 Cal. L. Revision Comm'n Reports 401 (1982); 16 Cal. L. Revision Comm'n Reports 2026 (1982). The recommended legislation was enacted. See 1982 Cal. Stat. ch. 1268.

Recommendation Relating to Severance of Joint Tenancy, 17 Cal. L. Revision Comm'n Reports 941 (1984); 18 Cal. L. Revision Comm'n Reports 23 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 519.

Recommendation Relating to Effect of Quiet Title and Partition Judgments, 17 Cal. L. Revision Comm'n Reports 947 (1984); 18 Cal. L. Revision Comm'n Reports 22 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 20.

Recommendation Relating to Dormant Mineral Rights, 17 Cal. L. Revision Comm'n Reports 957 (1984); 18 Cal. L. Revision Comm'n Reports 22 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 240.

Recommendation Relating to Rights Among Cotenants In Possession and Out of Possession of Real Property, 17 Cal. L. Revision Comm'n Reports 1023 (1984); 18 Cal. L. Revision Comm'n Reports 23 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 241.

Recommendation Relating to Recording Severance of Joint Tenancy, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix IV (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 157.

Recommendation Relating to Abandoned Easements, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix V (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 157.

FAMILY LAW. Whether the law relating to family law (including, but not limited to, community property) should be revised. (Authorized by 1983 Cal. Stat. res. ch. 40. See also 1978 Cal. Stat. res. ch. 65; 16 Cal. L. Revision Comm'n Reports 2019 (1982); 14 Cal. L. Revision Comm'n Reports 22 (1978).)

The area of family law is in need of study to clarify the law and to make needed substantive changes in the law. This field of law is very controversial. The Commission has submitted a number of recommendations and has several background studies available.

The Commission submitted a recommendation relating to the disposition of marital property to the 1984 legislative session. Senator Lockyer introduced the bill. The bill sought to clarify and improve the law relating to disposition of marital property but proposed no "radical" changes in the existing law. Several organizations representing women objected to the bill because it did not propose changes in existing law that these organizations believe are needed. In preparing its recommendation, the Commission had considered substantially all of these changes and rejected them. The women's organizations did not want to see the Commission recommended bill enacted because they believed its enactment would preclude future changes in this area of the law. The Commission bill was referred to interim study and the Senate Judiciary Committee held a interim hearing on the bill. We have a transcript of the interim hearing. The Commission decided to delay the reintroduction of the bill so that the women's organizations could introduce legislation to present their views for legislative consideration. The Commission believed that those views generally would not be acceptable to the Legislature, and the Commission could present its recommendation (with any necessary revisions) after the proposals of the women's organizations had been considered. The proposals introduced on behalf of the women's organizations generally were not acceptable to the Legislature. A bill passed the Senate, and a watered-down version of the bill is a two-year bill in the Assembly. This area of law is in need of revision. After the work on the new Estates and Trusts Code is completed, the staff recommends that the Commission review its prior recommendation with a view to submitting a revised recommendation to a

future session of the Legislature. We would not need a consultant on this matter; the staff could prepare the revised recommendation.

An important and difficult area of family law is the division of pensions upon marital dissolution. Assembly Member McAlister introduced a bill (Assembly Bill 988) to require the Public Employees Retirement Board to make a study of the feasibility of separation of the interest awarded to the nonemployee spouse in a marriage dissolution case so that each spouse would have his or her own interest in the retirement fund. During the course of its preliminary study of the problem, the Commission had identified the need for this study. The bill was enacted with a $75,000 appropriation to cover the cost of the study. Nat Sterling is interested in this area of law, having published the study he prepared for the Commission as a law review article. There is a working group of lawyers interested in this problem that is willing to work with the Commission on a study of the problem. Recently enacted federal legislation is relevant to the problem. We believe that we do not need to retain a consultant to prepare a study on this matter; the staff already has prepared a study, but the study will need to be supplemented by the staff to reflect recent developments.

California now has the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights upon death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful and the development of the statute might involve controversial issues. Also, the issue whether the right to support can be waived in a premarital agreement should be considered.

When the Commission is in a position to consider additional aspects of this topic for study, the staff will review the background studies on hand and recent developments and make recommendations for additional areas of the family law that are in need of study by the Commission.

The Commission has submitted the following recommendations relating to this topic:

Recommendation Relating to Federal Military and Other Pensions as Community Property, 16 Cal. L. Revision Comm'n Reports 47 (1982); 16 Cal. L. Revision Comm'n Reports 2027 (1982). The recommended resolution was adopted. See 1982 Cal. Stat. res. ch. 44.

Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage, 16 Cal. L. Revision Comm'n Reports 2165 (1982); 17 Cal. L. Revision Comm'n Reports 823-24 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 342. The Commission has prepared follow up legislation to deal with the application of the 1983 statute to cases pending when that statute took effect. Recommendation Relating to Civil Code Sections 4800.1 and 4800.2 (December 1985). This recommendation will be submitted to the 1986 legislative session.

Recommendation Relating to Liability of Marital Property for Debts, 17 Cal. L. Revision Comm'n Reports 1 (1984). See also 17 Cal. L. Revision Comm'n Reports 824 (1984); 18 Cal. L. Revision Comm'n Reports 20-21 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 1671.

Recommendation Relating to Marital Property Presumptions and Transmutations, 17 Cal. L. Revision Comm'n Reports 205 (1984); 18 Cal. L. Revision Comm'n Reports 21 (1986). The recommended legislation was enacted in part (transmutations). See 1984 Cal. Stat. ch. 1733.

Recommendation Relating to Reimbursement of Educational Expenses, 17 Cal. L. Revision Comm'n Reports 229 (1984); 18 Cal. L. Revision Comm'n Reports 22 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 1661.

Recommendation Relating to Special Appearance in Family Law Proceedings, 17 Cal. L. Revision Comm'n Reports 243 (1984); 18 Cal. L. Revision Comm'n Reports 21 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 156.

Recommendation Relating to Liability of Stepparent for Child Support, 17 Cal. L. Revision Comm'n Reports 251 (1984); 18 Cal. L. Revision Comm'n Reports 21 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 249.

Recommendation Relating to Awarding Temporary Use of Family Home, 17 Cal. L. Revision Comm'n Reports 261 (1984); 18 Cal. L. Revision Comm'n Reports 21 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 463.

Recommendation Relating to Disposition of Community Property, 17 Cal. L. Revision Comm'n Reports 269 (1984); 18 Cal. L. Revision Comm'n Reports 22 (1986). The recommended legislation was not enacted but the subject matter of the Commission's recommendation was referred for interim study by the Senate Judiciary Committee.

Recommendation Relating to Effect of Death of Support Obligor, 17 Cal. L. Revision Comm'n Reports 897 (1984). See also 17 Cal. L. Revision Comm'n Reports 824 (1984); 18 Cal. L. Revision Comm'n Reports 21-22 (1986). The recommended legislation was enacted in part. See 1984 Cal. Stat. ch. 19. See also Recommendation Relating to Provision for Support if Support Obligor Dies, 18 Cal. L. Revision Comm'n Reports 119 (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 362.

Recommendation Relating to Dividing Jointly Owned Property Upon Marriage Dissolution, 18 Cal. L. Revision Comm'n Reports 147 (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 362.

Recommendation Relating to Litigation Expenses in Family Law Proceedings, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix IX (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 362.

PREJUDGMENT INTEREST. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised. (Authorized by 1971 Cal. Stat. res. ch. 75.)

This topic was added to the Commission's Calendar of Topics by the Legislature (not on recommendation of the Commission) because some members of the Legislature believed that prejudgment interest should be recoverable in personal injury actions. This topic was never given priority by the Commission. The Commission doubted that a recommendation by the Commission would carry much weight, given the positions of the Trial Lawyers Association and the Insurance Companies and other potential defendants on the issue. Provisions providing for prejudgment interest in personal injury actions (not recommended by the Commission) were enacted in 1982. See Civil Code Section 3291. This is a topic that could be dropped from the Commission's agenda.

CLASS ACTIONS. Whether the law relating to class actions should be revised. (Authorized by 1975 Cal. Stat. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 524 (1974).)

This topic was added to the Commission's Calendar of Topics upon request of the Commission. However, the Commission never gave the topic any priority because the State Bar and the Uniform Law Commissioners were reviewing the Uniform Class Actions Act which was approved by the National Conference of Commissioners on Uniform State Laws in 1976. As of September 1985, only two states--Iowa and North Dakota--have enacted the Uniform Act. The staff doubts that the Commission could produce a statute in this area that would have a reasonable chance for enactment, given the controversial nature of the issues involved in drafting such a statute. But Commissioner Gregory can provide more information concerning the efforts to obtain enactment of the Uniform Act in California and whether this is a topic that the Commission would want to give priority at some future time.

OFFERS OF COMPROMISE. Whether the law relating to offers of compromise should be revised. (Authorized by 1975 Cal. Stat. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 525 (1974).)

This topic was added to the Commission's Calendar of Topics at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. The Commission raised the question whether some provision should be made for the case involving multiple plaintiffs. Since then Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic any priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic.

DISCOVERY IN CIVIL ACTIONS. Whether the law relating to discovery in civil cases should be revised. (Authorized by 1975 Cal. Stat. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 526 (1974).)

The Commission requested authority to study this topic in 1974. The Commission noted that the existing California discovery statute was based on the Federal Rules of Civil Procedure and that the federal rules had been amended to deal with specific problems which had arisen under the rules. The Commission believed the federal revisions should be studied to determine whether the California statute should be modified in light of the changes in the federal rules.

Although the Commission considered the topic to be an important one, the Commission decided not to give the study priority because the California State Bar was actively studying the matter and the Commission did not want to duplicate the efforts of the California State Bar. A joint commission of the California State Bar and the

Judicial Council have now produced a new discovery act which will be considered by the Legislature in 1986. At the request of the Commission, the staff sent each Commissioner a copy of the new act, but the Commission does not plan to consider the new act. The Commission decided at a recent meeting to retain this topic on its agenda.

PROCEDURE FOR REMOVAL OF INVALID LIENS. Whether a summary procedure should be provided by which property owners can remove doubtful or invalid liens from their property, including a provision for payment of attorney's fees to the prevailing party. (Authorized by 1980 Cal. Stat. res. ch. 37.)

This topic was added to the Commission's Calendar of Topics by the Legislature (not recommended for addition by Commission) because of the problem created by unknown persons filing fraudulent lien documents on property owner by public officials or others to create a cloud on the title of the property. The Commission has never given this topic any priority, but it is one that might be considered on a nonpriority basis in the future when staff and Commission time permit.

SPECIAL ASSESSMENT LIENS FOR PUBLIC IMPROVEMENTS. Whether acts governing special assessments for public improvements should be simplified and unified. (Authorized by 1980 Cal. Stat. res. ch. 37.)

There are a great number of statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. (A number of years ago, the Commission examined the improvement acts and recommended the repeal of a number of obsolete ones. That recommendation was enacted.) This legislative assignment would be a worthwhile project but would require considerable staff time. Sometime in the future the Commission may wish to give this topic some priority.

INJUNCTIONS. Whether the law on injunctions and related matters should be revised. (Authorized by 1984 Cal. Stat. res. ch. 42.)

This topic was added to the Commission's Calendar of Topics by the Legislature in 1984. The topic was added because comprehensive legislation was proposed for enactment and it was easier for the Legislature to refer the matter to the Commission than to make a careful study of the legislation.

We recently received a letter from Irwin J. Nowick who is the one primarily interested in this study. See Exhibit 3 attached. You should note that the letter is on the letterhead of the Assembly Majority Whip. The letter from Mr. Nowick had attached a draft statute.

Since there is legislative interest in this topic, the staff believes that some action should be taken on the topic. Perhaps the best way to deal with the topic would be to retain an expert consultant to advise us whether a study of this topic is needed. If the consultant concludes that a study of the topic is needed, the consultant could prepare a Scope of Study Statement which would indicate the contents of the study should the Commission decide to study the topic. The action suggested by the staff would be a useful method of determining whether the Commission wishes to give the topic a priority in the future.

INVOLUNTARY DISMISSAL FOR LACK OF PROSECUTION. Whether the law relating to involuntary dismissal for lack of prosecution should be revised. (Authorized by 1978 Cal. Stat. res. ch. 85. See also 14 Cal. L. Revision Comm'n Reports 23 (1978).)

The Commission recommended a comprehensive statute on this topic. Recommendation Relating to Dismissal for Lack of Prosecution, 16 Cal. L. Revision Comm'n Reports 2205 (1982); Revised Recommendation Relating to Dismissal for Lack of Prosecution, 17 Cal. L. Revision Comm'n Reports 905 (1984). See also 18 Cal. L. Revision Comm'n Reports 23 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 1705.

This topic was retained on the Calendar of Topics so that the Commission would have authority to recommend any clean up legislation that might be needed. The staff will follow the experience under the new statute and report any problems with it to the Commission.

STATUTES OF LIMITATIONS FOR FELONIES. Whether the law relating to statutes of limitations applicable to felonies should be revised. (Authorized by 1981 Cal. Stat. ch. 909, § 3.)

The Commission submitted a recommendation for a comprehensive statute on this topic. Recommendation Relating to Statutes of Limitation for Felonies, 17 Cal. L. Revision Comm'n Reports 301 (1984); 18 Cal. L. Revision Comm'n Reports 23-24 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. ch. 1270.

The Commission retained this topic on its Calendar of Topics so that any needed clean up legisltion could be submitted.

RIGHTS AND DISABILITIES OF MINORS AND INCOMPETENT PERSONS. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised. (Authorized by 1979 Cal. Stat. res. ch. 19. See also 14 Cal. L. Revision Comm'n Reports 217 (1978).)

The Commission has submitted a number of recommendations under this topic authorization and it is anticipated that more will be submitted under this topic authorization as the need for those recommendations becomes apparent. One possible study would be to prepare a comprehensive statute relating to the rights of minors to medical treatment. The existing statutues are poorly organized and a comprehensive statute dealing with this matter would be useful. Also a study on the right of a minor to contract might be worthwhile.

The Commission has submitted the following recommendations relating to this topic:

Recommendation and Study Relating to Powers of Appointment, 9 Cal. L. Revision Comm'n Reports 301 (1969); 9 Cal. L. Revision Comm'n Reports 98 (1969). The recommended legislation was enacted. See 1969 Cal. Stat. chs. 113, 155. A clarifying revision to the powers appointment statute was submitted to the 1978 Legislature. See 14 Cal. L. Revision Comm'n Reports 225, 257 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 266. See also Recommendation Relating to Revision of Powers of Appointment Statute, 15 Cal. L. Revision Comm'n Reports 1668 (1980); 16 Cal. L. Revision Comm'n Reports 25 (1982). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 63.

Recommendation Relating to Emancipated Minors, 16 Cal. L. Revision Comm'n Reports 183 (1982); 17 Cal. L. Revision Comm'n Reports 823 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 6.

Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980); 16 Cal. L. Revision Comm'n Reports 25 (1982). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 511.

Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984); 17 Cal. L. Revision Comm'n Reports 822 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 1204.

Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984); 18 Cal. L. Revision Comm'n Reports 18-19 (1986). The recommended legislation was enacted. See 1984 Cal. Stat. chs. 312, 602.

Recommendation Relating to Durable Powers of Attorney, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix VIII (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 403.

CHILD CUSTODY, ADOPTION, GUARDIANSHIP, AND RELATED MATTERS. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised. (Authorized by 1972 Cal. Stat. res. ch. 27. See also 10 Cal. L. Revision Comm'n Reports 1122 (1971); 1956 Cal. Stat. res. ch. 42; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 29 (1957).)

Background studies on two aspects of this topic have been prepared by the Commission's consultant, the late Professor Brigitte M. Bodenheimer. See Bodenheimer, The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 Stan. L. Rev. 703 (1971); New Trends and Requirements in Adoption Law and Proposals for Legislative Change, 49 So. Cal. L. Rev. 10 (1975).

There is a need to review the substantive provisions relating to adoption (rights of natural unmarried fathers for example) and there is a need for a well drafted, well organized adoption statute. The Commission has planned to undertake the drafting of a new adoption statute and to give the matter some priority. However, the Uniform Laws Commissioners have a special drafting committee working on some of the problems that would be involved in drafting a new adoption statute, and the Commission has deferred the study of adoption until the work of the Uniform Commissioners become available.

There are other aspects of this topic that are in need of study, but the review and evaluation of those aspects will have to await a future time when the Commission would be in a position to study one or more of them.

The Commission has submitted the following recommendations relating to this topic:

Recommendation Relating to Guardianship-Conservatorship Law, 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 1024-25 (1980). See also Guardianship-Convervatorship Law With Official Comments, 15 Cal. L. Revision Comm'n Reports 451 (1980). The recommended legislation was enacted. See 1979 Cal. Stat. chs. 165, 726, 730. See also 15 Cal. L. Revision Comm'n Reports 1427 (1980) (Guardianship-Conservatorship Law—technical and clarifying revisions). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 246.

Recommendation Relating to Revision of Guardianship-Conservatorship Law, 15 Cal. L. Revision Comm'n Reports 1463 (1980); 16 Cal. L. Revision Comm'n Reports 24-25 (1982). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 9.

Recommendation Relating to Uniform Veterans Guardianship Act, 15 Cal. L. Revision Comm'n Reports 1289 (1980); 15 Cal. L. Revision Comm'n Reports 1428 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 89.

Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980); 16 Cal. L. Revision Comm'n Reports 25 (1982). The recommended legislation was enacted. See 1981 Cal. Stat. ch. 511.

EVIDENCE. Whether the Evidence Code should be revised. (Authorized by 1965 Cal. Stat. res. ch. 130.)

The California Evidence Code was enacted upon recommendation of the Commission. Since then, the Federal Rules of Evidence have been adopted. Those rules draw heavily from the California Evidence Code,

and in drafting the federal rules the drafters made changes in provisions taken from California. The California statute might be conformed to some of these federal provisions. In addition, there is a substantial body of experience under the Evidence Code. That experience might be reviewed to determine whether any technical or substantive revisions in the Evidence Code are needed. The Commission has available a background study that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. However, the study was prepared 10 years ago and probably should be updated before it is considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code (enacted more than 20 years ago) might be useful before the Commission undertakes a review of the Evidence Code. In the past, because of the need to give priority to other topics, the Commission has deferred this study.

The Commission has submitted the following recommendations relating to this topic:

> Recommendation Proposing an Evidence Code, 7 Cal. L. Revision Comm'n Reports 1 (1965). A number of tentative recommendations and research studies were published and distributed for comment prior to the preparation of the recommendation proposing the Evidence Code. See 6 Cal. L. Revision Comm'n Reports at 1, 101, 201, 601, 701, 801, 901, 1001, and Appendix (1964). See also 7 Cal. L. Revision Comm'n Reports 912-14 (1965). See also Evidence Code With Official Comments, 7 Cal. L. Revision Comm'n Reports 1001 (1965). The recommended legislation was enacted. See 1965 Cal. Stat. ch. 299 (Evidence Code).
>
> Recommendations Relating to the Evidence Code: Number 1--Evidence Code Revisions; Number 2--Agricultural Code Revisions; Number 3--Commercial Code Revisions, 8 Cal. L. Revision Comm'n Reports 101, 201, 301 (1967). See also 8 Cal. L. Revision Comm'n Reports 1315 (1967). The recommended legislation was enacted. See 1967 Cal. Stat. chs. 650 (Evidence Code revisions), 262 (Agricultural Code revisions), 703 (Commercial Code revisions).
>
> Recommendation Relating to the Evidence Code: Number 4--Revision of the Privileges Article, 9 Cal. L. Revision Comm'n 501 (1969); 9 Cal. L. Revision Comm'n Reports 98 (1969). The recommended legislation was not enacted; Recommendation Relating to Psychotherapist-Patient Privilege, 14 Cal. L. Revision Comm'n Reports 127 (1978); 14 Cal. L. Revision Comm'n Reports 225 (1978). The recommended legislation was passed by the Legislature but vetoed by the Governor. See also Recommendation Relating to Psychotherapist-Patient Privilege, 15 Cal. L.

Revision Comm'n Reports 1307 (1980). This revised recommendation was not submitted to the Legislature. Portions of the revised recommendation were enacted in 1985. 1985 Cal. Stat. chs. 545, 1077.

Recommendation Relating to the Evidence Code: Number 5--Revisions of the Evidence Code, 9 Cal. L. Revision Comm'n Reports 137 (1969); 10 Cal. L. Revision Comm'n Reports 1018 (1971). Some of the recommended legislation was enacted. See 1970 Cal. Stat. chs. 69 (res ipsa loquitur), 1397 (psychotherapist-patient privilege).

See also report concerning Proof of Foreign Official Records, 10 Cal. L. Revision Comm'n Reports 1022 (1971) and 1970 Cal. Stat. ch. 41.

Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information, 11 Cal. L. Revision Comm'n Reports 1163 (1973); 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was enacted. See 1974 Cal. Stat. ch. 227.

Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 1147 (1973); 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was not enacted. A revised recommendation was submitted to the 1975 Legislature. See Recommendation Relating to the Good Cause Exception to the Physician-Patient Privilege, 12 Cal. L. Revision Comm'n Reports 601 (1974); 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was enacted. See 1975 Cal. Stat. ch. 318.

Recommendation Relating to View by Trier of Fact in a Civil Case, 12 Cal. L. Revision Comm'n Reports 587 (1974); 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See 1975 Cal. Stat. ch. 301.

Recommendation Relating to Admissibility of Copies of Business Records in Evidence, 13 Cal. L. Revision Comm'n Reports 2051 (1976); 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was not enacted.

Recommendation Relating to Admissibility of Duplicates in Evidence, 13 Cal. L. Revision Comm'n Reports 2115 (1976); 13 Cal. L. Revision Comm'n Reports 1615 (1976). The recommended legislation was not enacted.

Recommendation Relating to Evidence of Market Value of Property, 14 Cal. L. Revision Comm'n Reports 105 (1978); 14 Cal. L. Revision Comm'n Reports 225 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 294.

Recommendation Relating to Protection of Mediation Communications, 18 Cal. L. Revision Comm'n Reports, 1985 Annual Report, Appendix III (1986). The recommended legislation was enacted. See 1985 Cal. Stat. ch. 731.

ARBITRATION. Whether the law relating to arbitration should be revised. (Authorized by 1968 Cal. Stat. res. ch. 110. See also 8 Cal. L. Revision Comm'n Reports 1325 (1967).)

The present California arbitration statute was enacted in 1961 upon Commission recommendation. See Recommendation and Study Relating to Arbitration, 3 Cal. L. Revision Comm'n Reports at G-1 (1961). See also 4 Cal. L. Revision Comm'n Reports 15 (1963). See also 1961 Cal. Stat. ch. 461. The topic was retained on the Commission's Calendar of Topics so that the Commission has authority to recommend any needed technical or substative revisions in the statute.

MODIFICATION OF CONTRACTS. Whether the law relating to modification of contracts should be revised. (Authorized by 1974 Cal. Stat. res. ch. 45. See also 1957 Cal. Stat. res. ch. 202; 1 Cal. L. Revi- sion Comm'n Reports, "1957 Report" at 21 (1957).)

The Commission recommended legislation on this topic that was enacted in 1975 and 1976. See Recommendation and Study Relating to Oral Modification of Written Contracts, 13 Cal. L. Revision Comm'n Reports 301 (1976); 13 Cal. L. Revision Comm'n Reports 2011 (1976). One of the two legislative measures recommended was enacted. See 1975 Cal. Stat. ch. 7; Recommendation Relating to Oral Modification of Contracts, 13 Cal. L. Revision Comm'n Reports 2129 (1976); 13 Cal. L. Revision Comm'n Reports 1616 (1976). The recommended legislation was enacted. See 1976 Cal. Stat. ch. 109.

This topic is continued on the Commission's Calendar of Topics so that the Commission has authority to recommend any needed technical or substantive revisions in the legislation enacted upon Commission recommendation.

GOVERNMENTAL LIABILITY. Whether the law relating to sovereign or governmental immunity in California should be revised. (Authorized by 1977 Cal. Stat. res. ch. 17. See also 1957 Cal. Stat. res. ch. 202.)

The comprehensive governmental tort liability statute was enacted upon Commission recommendation in 1963 and additional legislation on this topic was enacted in the following years upon Commission recommendation. The topic is retained on the Commission's Calendar of

Topics so that the Commission has authority to make additional recommendations concerning this topic to make substantive and technical improvements in the statutes enacted upon Commission recommendation and to make recommendations to deal with situations not dealt with by the existing statutes.

The Commission has submitted the following recommendation relating to this topic:

Recommendations Relating to Sovereign Immunity: Number 1--Tort Liability of Public Entities and Public Employees; Number 2--Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3--Insurance Coverage for Public Entities and Public Employees; Number 4--Defense of Public Employees; Number 5--Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6--Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7--Amendments and Repeals of Inconsistent Special Statutes, 4 Cal. L. Revision Comm'n Reports 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). See also 4 Cal. L. Revision Comm'n Reports 211-13 (1963). Most of the recommended legislation was enacted. See 1963 Cal. Stat. chs. 1681 (tort liability of public entities and public employees), 1715 (claims, actions and judgments against public entities and public employees), 1682 (insurance coverage for public entities and public employees), 1683 (defense of public employees), 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers), 1685 (amendments and repeals of inconsistent special statutes), 1686 (amendments and repeals of inconsistent special statutes), 2029 (amendments and repeals of inconsistent special statutes). See also A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 1 (1963).

Recommendation Relating to Sovereign Immunity: Number 8--Revisions of the Governmental Liability Act, 7 Cal. L. Revision Comm'n Reports 401 (1965); 7 Cal. L. Revision Comm'n Reports 914 (1965). The recommended legislation was enacted. See 1965 Cal. Stat. chs. 653 (claims and actions against public entities and public employees), 1527 (liability of public entities for ownership and operation of motor vehicles).

Recommendation Relating to Sovereign Immunity: Number 9--Statute of Limitations in Actions Against Public Entities and Public Employees, 9 Cal. L. Revision Comm'n Reports 49 (1969); 9 Cal. L. Revision Comm'n Reports 98 (1969). See also Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees, 9 Cal. L. Revision Comm'n Reports 175 (1969); 10 Cal. L. Revision Comm'n Reports 1021 (1971). The recommended legislation was enacted. See 1970 Cal. Stat. ch. 104.

Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969); 10 Cal. L. Revision Comm'n Reports 1020 (1971). Most of the recommended legislation was enacted. See 1970 Cal. Stat. ch. 662 (entry to make tests) and 1099 (liability for use of pesticides, liability for damages from tests).

Recommendation Relating to Payment of Judgments Against Local Public Entities, 12 Cal. L. Revision Comm'n Reports 575 (1974); 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See 1975 Cal. Stat. ch. 285.

Recommendation Relating to Undertakings for Costs, 13 Cal. L. Revision Comm'n Reports 901 (1975); 13 Cal. L. Revision Comm'n Reports 1614 (1976). The recommended legislation was not enacted.

Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity, 16 Cal. L. Revision Comm'n Reports 2251 (1982); 17 Cal. L. Revision Comm'n Reports 824 (1984). The recommended legislation was enacted. See 1983 Cal. Stat. ch. 107.

Recommendation Relating to Security for Costs, 14 Cal. L. Revision Comm'n Reports 319 (1978); 15 Cal. L. Revision Comm'n Reports 1025 (1980). The recommended legislation was enacted. See 1980 Cal. Stat. ch. 114.

INVERSE CONDEMNATION. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including, but not limited to, liability for damages resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised. (Authorized by 1971 Cal. Stat. res. ch. 74. See also 1970 Cal. Stat. res. ch. 46; 1965 Cal. Stat. res. ch. 130.)

The Commission has made recommendations to deal with specific aspects of this topic but has never made a study looking toward the enactment of a comprehensive statute, primarily because inverse condemnation liability has a constitutional basis and because it is unlikely that any significant legislation could be enacted.

The Commission has submitted the following recommendations relating to this topic:

Recommendation Relating to Inverse Condemnation: Insurance Coverage, 10 Cal. L. Revision Comm'n Reports 1031 (1971); 10 Cal. L. Revision Comm'n Reports 1126 (1971). The recommended legislation was enacted. See 1971 Cal. Stat. ch. 140.

Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969); 10 Cal. L. Revision Comm'n Reports 1020 (1971). Most of the recommended legislation was enacted. See 1970 Cal. Stat. chs. 622 (entry to make tests) and 1099 (liability for use of pesticides, liability for damages from tests).

Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees, 9 Cal. L. Revision Comm'n Reports 175 (1969); 10 Cal. L. Revision Comm'n Reports 1021 (1971). The recommended legislation was enacted. See 1970 Cal. Stat. ch. 104.

Recommendation Relating to Payment of Judgments Against Local Public Entities, 12 Cal. L. Revision Comm'n Reports 575 (1974); 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See 1975 Cal. Stat. ch. 285.

See also Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 1 (1971).

LIQUIDATED DAMAGES. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised. (Authorized by 1973 Cal. Stat. res. ch. 39. See also 1969 Cal. Stat. res. ch. 224.)

The Commission submitted a series of recommendations proposing enactment of a comprehensive liquidated damages statute. Ultimately, the statute was enacted. The topic is retained on the Calendar of Topics so that the Commission has authority to recommend any needed technical or substantive changes in the statute.

The Commission has submitted the following recommendations relating to this topic:

Recommendation and Study Relating to Liquidated Damages, 11 Cal. L. Revision Comm'n Reports 1201 (1973); 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was not enacted. See also Recommendation Relating to Liquidated Damages, 13 Cal. L. Revision Comm'n Reports 2139 (1976); 13 Cal. L. Revision Comm'n Reports 1616 (1976). The recommended legislation was passed by the Legislature but vetoed by the Governor. See also Recommendation Relating to Liquidated Damages, 13 Cal. L. Revision Comm'n Reports 1735 (1976); 14 Cal. L. Revision Comm'n Reports 13 (1978). The recommended legislation was enacted. See 1977 Cal. Stat. ch. 198.

PAROL EVIDENCE RULE. Whether the parol evidence rule should be revised. (Authorized by 1971 Cal. Stat. res. ch. 75. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).)

The Commission has submitted the following recommendation relating to the topic. Recommendation Relating to Parol Evidence Rule, 14 Cal. L. Revision Comm'n Reports 143 (1978); 14 Cal. L. Revision Comm'n Reports 224 (1978). The recommended legislation was enacted. See 1978 Cal. Stat. ch. 150. The topic is retained on the Calendar of Topics so that the Commission is authorized to recommend any technical or substantive changes in the statute.

PLEADINGS IN CIVIL ACTIONS. Whether the law relating to pleadings in civil actions and proceedings should be revised. (Authorized by 1980 Cal. Stat. res. ch. 37.)

The Commission submitted a recommendation proposing a comprehensive statute relating to pleading. Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 499 (1971). The topic is continued on the Calendar of Topics so that the Commission is authorized to recommend technical and substantive changes in the pleading statute. See 11 Cal. L. Revision Comm'n Reports 1024 (1973) (technical change).

REVISED SCHEDULE FOR WORK ON NEW ESTATES AND TRUSTS CODE

February 1986 Meeting

1. L-1020 - Estate Management
   Existing provisions:
   Div. 3, Ch. 8, Art 1 (Prob. Code §§ 570-590)
   Div. 3, Ch. 13, Art. 1-5 (Prob. Code §§ 750-814)
   Div. 3, Ch. 14 (Prob. Code §§ 830-860)
   Div. 3, Ch. 15, Art. 3 (Prob. Code §§ 920-920.5)

2. L-800 - Abatement; Distribution of Interest and Income
   Existing provisions: Div. 3, Ch. 11 (Prob. Code §§ 660-665)

3. L-1034 - Public Administrators
   Existing provisions: Div. 3, Ch. 20 (Prob. Code §§ 1140-1155)

4. Further Work on Matters Considered at Prior Meetings (Redrafts, Additional Research, etc.)

March 1986 Meeting

1. L-655 - Probate Referee System
   Existing provisions: Div. 3, Ch. 23 (Prob Code. §§ 1300-1313)

2. L-1022 - Inventory and Appraisement
   Existing provisions: Div. 3, Ch. 9 (Prob. Code §§ 600-615)

3. L-1021 -Compensation, Commissions, and Fees
   Existing provisions: Div. 3, Ch. 15, Arts. 1 and 2 (Prob. Code §§ 900-911)

4. L-601 - Multiple-Party Accounts
   Existing provisions: Div. 5 (Prob. Code §§ 5100-5407)

5 L-621 - Confidential Relationship Doctrine in Will Contests

6. Further Work on Matters Considered at Prior Meetings (Redrafts, Additional Research, etc.)

April 1986 Meeting

1. L-1056 - Notices
   Existing provisions: Div. 3, Ch. 22, Art. 1 (Prob. Code §§ 1200-1210)

2. L-1053 - Rules of Procedure
   Existing provisions: Div. 3, Ch. 22, Art. 3 (Prob. Code §§ 1230-1233)

3. L-1052 - Orders
   Existing provisions: Div. 3, Ch. 22, Art. 2 (Prob. Code §§ 1220-1224)

4. L-1055 - Ancillary Admninistration
   Existing provisions: Div. 3, Ch. 1, Art. 4 (Prob. Code §§ 360-362; CCP § 1913)

5. L-635 - Anti-lapse Statute
   Existing provision: Prob. Code § 6147

6. L-2000 - Operative Date of New Code

7. Further Work on Matters Considered at Prior Meetings (Redrafts, Additional Research, Review of Comments on Tentative Recommendations, etc.)

May 1986 Meeting

1. L-1054 - Appeals
   Existing provisions: Div. 3, Ch. 22, Art 4 (Prob. Code §§ 1240-1242)

2. L-1060 - Preliminary Provisions and Definitions
   Existing provisions: Div. 1 (Prob. Code §§ 1-12, 20-88)

3. L-1061 - General Provisions
   Existing provisions: Div. 2 (Prob. Code §§ 100-257)

4. L-1062 - Disclaimer of Testamentary and Other Interests
   Existing provisions: Div. 2.5 (Prob. Code §§ 260-295)

5. L-1050 - Guardianship-Conservatorship Law
   Existing provisions: Div. 4, Pts 1-4 (Prob. Code §§ 1400-2808)

6. L-1063 - Management or Disposition of Community Property Where Spouse Lacks Legal Capacity
   Existing provisions: Div. 4, Pt. 6 (Prob. Code §§ 3000-3154)

7. L-1064 - Authorization of Medical Treatment for Adult Without Conservator
   Existing provisions: Div. 4, Pt. 7 (Prob. Code §§ 3200-3211)

8. L-1065 - Other Protective Proceedings
   Existing provisions: Div. 4, Pt. 8 (Prob. Code §§ 3300-3803)

9. L-618 - California Uniform Transfers to Minors Act
   Existing provisions: Div. 4, Pt. 9 (Prob. Code §§ 3900-3925)

10. L-1066 - Wills
    Existing provisions: Div. 6, Pt. 1 (Prob. Code §§ 6100-6390)

11. L-1067 - Intestate Succession
    Existing provisions: Div. 6, Pt. 2 (Prob. Code §§ 6400-6414)

12. L-1068 - Family Protection
    Existing provisions: Div. 6, Pt. 3 (Prob. Code §§ 6500-6580)

13. L-1069 - Escheat of Decedent's Property
    Existing Provision: Div. 6, Pt. 4 (Prob. Code §§ 6800-6806)

14. Further Work on Matters Considered at Prior Meetings (redrafts, Additional research, Review of Comments on Tentative Recommendations, etc.)

June 1986 Meeting

1. Further Work on Matters Considered at Prior Meetings (Redrafts, Additional Research, Review of Comments on Tentative Recommendations)

2. L-2005 - Conforming Revisions of Sections in Other Codes

July 1986 Meeting

1. Further Work on Matters Considered at Prior Meetings (Redrafts, Additional Research, Review of Comments on Tentative Recommendations)

September 1986 Meeting

1. Commission approval of Tentative Recommendation for New Estates and Trusts Code for printing.

2. Commission approval of text of new Probate Code for printing as preprinted bill.

December 1986

Preprint bill introduced as bill.

March 1987

Review of comments on tentative recommendation.
Drafting of amendments to bill.

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

August 23, 1985

Irwin J. Nowick
Office of Assembly Member Steve Peace
State Capitol
Sacramento, CA 95814

Re: Revision of laws regarding injunctions

Dear Irwin:

Thank you for your letter of August 1 submitting to the Law Revision Commission a draft of a proposed bill relating to reform and revision of statutes dealing with injunctions.

Your letter and the attached materials will be presented to the Commission at its September meeting. At that time, the Commission will consider the matters that will be given priority for consideration during 1986. However, because the Commission has determined to devote all resources to the completion of a new Probate Code for California, I believe it is unlikely that the Commission will be able to devote any time to work on this topic in the near future.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:jcr
0169Y

Assembly
California Legislature

STEVE PEACE
ASSEMBLY MAJORITY WHIP

COMMITTEES:
Finance and Insurance
Ways and Means
Water, Parks and Wildlife
Elections and Reapportionment
Chairman
SUBCOMMITTEE ON
WORKERS' COMPENSATION

August 1, 1985

Hon. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303

Re: Revision of laws regarding injunctions.

Dear John,

After discussing the matter with Ray LeBov, this office has decided to submit to the CLRC for study the enclosed proposed bill relating to reform and revision of statutes dealing with injunctions.

We are dealing with you directly to avoid the necessity of introducing the bill and then having Assembly Judiciary referring the bill to the CLRC. We hope the enclosed document will serve as a working model for fufilling the Commision's mandate in this important area.

Sincerely yours,

Irwin J. Nowick

cc: Ray LeBov (w/enclos.)
David Takashima

☐ State Capitol
Sacramento, California 95814
Telephone: (916) 445-7556

☐ 430 Davidson Street - Suite B
Chula Vista, California 92010
Telephone: (619) 426-1617

☐ 1101 Airport Road, Suite D
Imperial, California 92251
Telephone: (619) 352-3101

Memo 85-94 Exhibit 4

ROBERT H. CORNELL
J. KENNETH LYNCH
ANDREW G. LANGE
ROGER C. PETERS
FREDERICK A. PATTERSON
JAMES F. HALLEY

LAW OFFICES OF
HALLEY, CORNELL & LYNCH
A PROFESSIONAL CORPORATION
25TH FLOOR
50 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111-4787

JAMES W. HALLEY
(1921-1976)
(415) 981-7700

27 March 1985

John DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite B-2
Palo Alto, CA 94303

Re: Code of Civ. Proc. §86

Dear Mr. DeMoully:

I am writing pursuant to our conversation of March 25, 1985.

As I indicated in our telephone call, Chapter 538 of the 1984 laws amends Code of Civil Procedure section 86 to include in subsection (b)(6) actions "to enforce and foreclose assessment liens on a condominium created pursuant to Section 1356 of the Civil Code, where the amount of the lien is $15,000 or less." While this amendment is appropriate and helpful, I believe it should have included a parallel provision applicable to assessment liens for planned developments. Planned developments are defined in Business and Professions Code section 11003, and section 11003.3 provides for assessments upon lots, etc., in planned developments. The language of Business and Professions Code section 11003.3 appears to me to be virtually identical to the language of Civil Code section 1356, except that section 11003.3 applies to planned developments.

I am involved in bringing judicial foreclosure actions to enforce assessment liens for homeowners' associations of planned developments and condominiums. While I welcome the amendment extending jurisdiction of municipal courts in the case of condominiums, I see no reason that jurisdiction should not be extended in the case of planned developments as well. While there are some conceptual differences between condominiums and planned developments, these conceptual differences do not significantly affect lien foreclosure proceedings. I believe that a

further amendment to Code of Civil Procedure section 86 extending jurisdiction "to enforce and foreclose assessment liens on a planned development created pursuant to Section 11003.3 of the Business and Professions Code, where the amount of the lien is $15,000 or less" would be appropriate.

I would be happy to co-operate in providing any further information that you or the Commission may request.

Sincerely,

HALLEY, CORNELL & LYNCH

Frederick A. Patterson

Frederick A. Patterson

FAP:jpl

Jurisdiction of Enforcement of Condominium Assessment Liens

Condominium owners may be assessed for the cost of insurance, maintenance of common areas, taxes, and other items.[18] If the assessments are not paid, a notice of assessment may be recorded with the county recorder to create a lien on the condominium.[19] Should the managing body find it necessary to bring an action to foreclose the lien, it appears that the action must be brought in the superior court,[20] even though in most cases the amount is likely to be relatively small.

The Commission recommends that the jurisdiction of municipal and justice courts be expanded to include actions to enforce and foreclose condominium assessment liens where the amount of the lien does not exceed $15,000. Municipal and justice courts already have jurisdiction over enforcement of liens of mechanics, materialmen, laborers, and others, where the amount of the liens does not exceed $15,000.[21]

---

[18] See Civil Code §§ 1355, 1356.

[19] Civil Code § 1356. The lien expires one year after recordation of the notice of assessment, but may be renewed for one additional year by recordation of an extension. *Id.*

[20] See Code Civ. Proc. § 86 (jurisdiction of municipal and justice courts); Holbrook v. Phelan, 121 Cal. App. Supp. 781, 783, 6 P.2d 356 (1931) (municipal court without jurisdiction to foreclose liens on real property except liens of mechanics, materialmen, artisans and laborers).

[21] Code Civ. Proc. § 86(a)(6). Liens enforceable in municipal and justice courts under this provision include liens of artisans, contractors, subcontractors, lessors of equipment, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen. See Civil Code § 3110 (incorporated by Code Civ. Proc. § 86(a)(6)).

Code of Civil Procedure § 86 (amended). Jurisdiction of municipal and justice courts

SECTION 1. Section 86 of the Code of Civil Procedure is amended to read:

86. (a) Each municipal and justice court has original jurisdiction of civil cases and proceedings as follows:

(1) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to fifteen thousand dollars ($15,000) or less, except cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, except the courts have jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant.

(2) In actions for dissolution of partnership where the total assets of the partnership do not exceed fifteen thousand dollars ($15,000); in actions of interpleader where the amount of money or the value of the property involved does not exceed fifteen thousand dollars ($15,000).

(3) In actions to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding fifteen thousand dollars ($15,000) or property of a value not exceeding fifteen thousand dollars ($15,000), paid or delivered under, or in consideration of, the contract; in actions to revise a contract where the relief is sought in an action upon the contract if the court otherwise has jurisdiction of the action.

(4) In all proceedings in forcible entry or forcible or unlawful detainer:

(A) In actions to recover possession of real property where rent is charged, and the amount of the last rental charged is one thousand dollars ($1,000) per month or less, and the whole amount of damages claimed is fifteen thousand dollars ($15,000) or less.

(B) In all other actions to recover possession of real property where the rental value is one thousand dollars ($1,000) per month or less, and the whole amount claimed is fifteen thousand dollars ($15,000) or less.

(5) In all actions to enforce and foreclose liens on personal property where the amount of the liens is fifteen thousand dollars ($15,000) or less.

(6) In all actions to enforce and foreclose liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under the provisions of Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code, *or to enforce and foreclose an assessment lien on a condominium created pursuant to Section 1356 of the Civil Code,* where the amount of the liens is fifteen thousand dollars ($15,000) or less. However, where an action to enforce the lien is pending in a municipal or justice court, and affects property which is also affected by a similar action pending in a superior court, or where the total amount of the liens sought to be foreclosed against the same property by action or actions in a municipal or justice court aggregates an amount in excess of fifteen thousand dollars ($15,000) the municipal or justice court in which any such action, or actions, is, or are, pending, upon motion of any interested party, shall order the action or actions pending therein transferred to the proper superior court. Upon the making of the order, the same proceedings shall be taken as are provided by Section 399 with respect to the change of place of trial.

(7) In actions for declaratory relief when brought by way of cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding otherwise within the jurisdiction of the municipal or justice court.

(8) To issue temporary restraining orders and preliminary injunctions, to take accounts, and to appoint receivers where necessary to preserve the property or rights of any party to an action of which the court has jurisdiction; to appoint a receiver and to make any order or perform any act, pursuant to Title 9 (commencing with Section 680.010) of Part 2 (enforcement of judgments); to determine title to personal property seized in an action pending in such court.

(9) In all actions under Article 3 (commencing with Section 708.210) of Chapter 6 of Division 2 of Title 9 of Part 2 for the recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor where the interest claimed adversely is of a value not exceeding fifteen thousand dollars ($15,000) or the debt denied does not exceed fifteen thousand dollars ($15,000).

(b) Each municipal and justice court has jurisdiction of cases in equity as follows:

(1) In all cases to try title to personal property when the amount involved is not more than fifteen thousand dollars ($15,000).

(2) In all cases when equity is pleaded as a defensive matter in any case otherwise properly pending in a municipal or justice court.

(3) To vacate a judgment or order of such municipal or justice court obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect.

(c) In any action that is otherwise within its jurisdiction, the court may impose liability whether the theory upon which liability is sought to be imposed involves legal or equitable principles.

(d) Changes in the jurisdictional ceilings made by amendments to this section at the 1977-78 Regular Session of the Legislature shall not constitute a basis for the transfer to another court of any case pending at the time such changes become operative.

Comment. Subdivision (a) (6) of Section 86 is amended to make clear that the municipal and justice courts have jurisdiction over actions to enforce and foreclose condominium assessment liens to the same extent as actions to enforce and foreclose mechanics' and laborers' liens.

Memo 85-94 Exhibit 6

BCD

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[illegible] Brannan Street San Francisco, California 94107
415 • [illegible]

Mike Bennett
Managing Editor

June 3, 1985

Nathan G. Gray
1009 Financial Center Building
405 Fourteenth Street
Oakland, California 94612

Re: Deering's Civil Practice Codes, CCP § 87
(Your letter of May 28)

Dear Mr. Gray:

I am very familiar with this section and with the Merco case; the question you raise has been discussed both among the members of our editorial staff and with readers. Whether or not you agree with the position I take on this question I hope you will realize that it is a position that has been reached only after long and careful consideration.

CCP § 87 is one of the few unrepealed California statutes that is a complete nullity, and, if this was the extent of the problem, I would not hesitate to include a warning note. But I see no clear distinction between the complete nullity of this section and the partial invalidity of any number of statutes that have been declared unconstitutional in part or unconstitutional in certain applications. By noting the clear case I feel that we would lead the reader to rely on such warnings and misinterpret the absence of warning with respect to a partially invalid section. You point out in your letter that the Deering's unannotated codes include general references. These do not in any way constitute an editorial commentary but are simple practice references--access to the major California practice works. The last time I looked at the question the Merco case had not been treated in the secondary sources. Presumably the new edition of Witkin Procedure will treat this point and we will pick up a reference.

At best an unannotated code can only present a fragment of the jurisdiction's statutory law. The fact that some California codes are available in four different unannotated

editions demonstrates the popularity of the unannotated code but it does not resolve the question of their use without benefit of judicial interpretations, notes preserving uncodified law, and similar explanatory materials. This problem is one that we are careful to point out in the Foreward to each of our uncodified volumes.

I am sending a copy of this correspondence to the Legislative member of the California Law Revision Commission. That Commission has the responsibility of recommending repeal of statutes held to be unconstitutional. Given that Section 87 is more or less addressed to nonattorneys who can not be expected to understand the complexities of Marbury vs. Madison I think that some Legislative action is called for.

Best regards,

Mike Brandt

MB/pb

C: The Honorable Alister McAlister

LAW OFFICES
NATHAN G. GRAY

ANCIAL CENTER BUILDING
FOURTEENTH STREET
ND, CALIFORNIA 94612
PHONE (415) 465-5230

OF COUNSEL
STARK, STEWART, WELLS & ROBINSON
ATTORNEYS AT LAW
TELEPHONE: (415) 834-2200

May 28, 1985

Bancroft-Whitney Company
301 Brannan Street
San Francisco, California 94107

Gentlemen:

I am a subscriber to Parts 1 and 2 of Deering's California Civil Practice Codes. In Part 2, CCP Section 87 (enacted in 1976) permits appearances in behalf of a corporation by one who is not an attorney at law.

In 1978 the California Supreme Court in Merco Const. etc. vs. Municipal Court, 21 Cal. 3d 724, invalidated this statute, declaring it to be unconstitutional. Although I realize that this is not an annotated code, other sections are followed by at least general references.

In view of the fact that this section became a nullity approximately seven years ago, it seems to me that the least that could have been done is that the code section should be followed by some notation alerting the reader accordingly.

Very truly yours,

NATHAN G. GRAY

NGG:FLR

Memo 85-94 Exhibit 7

BANCROFT AVERY & McALISTER

Attorneys at Law

601 Montgomery Street
Suite 900
San Francisco
California 94111

Telephone
415/788-8855

Cable Address BAM
TWX 910-372-6616

Telecopier
415/397-1925

JAMES R. BANCROFT
A Professional Corporation

JAMES H. McALISTER
LUTHER J. AVERY
ALAN D. BONAPART
HENRY L. GLASSER
NORMAN A. ZILBER
EDMOND G. THIEDE
ROBERT L. DUNN
JAMES WISNER
SANDRA J. SHAPIRO
GEORGE R. DIRKES
BOYD A. BLACKBURN, JR.
JOHN R. BANCROFT
DENNIS O. LEUER
BARBARA L. STEINER
CHARLOTTE M. SAXON
ROBERT L. MILLER
JOHN S. McCLINTIC
RICHARD HANDEL
REBECCA A. THOMPSON
KENDALL A. LAYNE
LEWIS WARREN

April 5, 1985

OUR FILE NUMBER
9911.81-35

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

Dear John:

While the Law Revision Commission is revising the Probate Laws, one needed area of review, the "confidential relationship" doctrine as to procedures, is will contests.

I enclose Whitman and Hoopes, "The Confidential Relationship in Will Contests", Trusts & Estates, February 1985, which is a good exposition of some of the issues.

Yours sincerely,

Luther J. Avery

LJA:bal
841.1.jhm

Enclosure
1. Article

The Confidential Relationship In Will Contests

An organized move towards creating a nationally uniform set of rules seems called for

By **ROBERT WHITMAN**
University of Connecticut
School of Law
West Hartford, Conn.
and
DAVID HOOPES
Kahan, Kerensky, Capossela,
Levine, and Breslau
Vernon, Conn.

The existence of a confidential relationship between a testator and beneficiary of a will can be an important factor in a will contest. Indeed, these rules often decide will contests. While it has been suggested that we ultimately develop better legal rules by considering each state as a separate experimental laboratory,[1] the confusion created by widely varying state rules also has been noted.[2] The authors believe it is time to unify and standardize the rules of confidential relationship applied in will contests.

In many jurisdictions, courts now hold that if a substantial beneficiary is found to stand in a confidential relationship with a testator, and that beneficiary actively participated in the preparation or execution of the will, a rebuttable presumption of undue influence arises.[3] But some jurisdictions additionally require that the benefits received be "undue"[4] or "unnatural,"[5] or permit other "suspicious circumstances" to substitute for active participation.[6] While the presumption of undue influence applies, in one form or another, in nearly every jurisdiction,[7] the definition of what constitutes a confidential relationship clearly lacks uniformity.[8]

Confusion also exists as to the effect of the finding of the existence of the presumption.[9] Generally, if the proponent offers no evidence in rebuttal, the contestant is entitled to a directed verdict.[10] If rebuttal evidence is presented, the presumption disappears from the case, leaving the burden of persuasion on the contestant.[11] In a few jurisdictions, however, the presumption creates a prima facie case, permanently shifting the burden of persuasion to the proponents.[12]

The Confidential Relationship

The question of whether a confidential relationship exists is treated differently from state to state. While it is clear that a confidential relationship exists as a matter of law between a testator and his doctor, lawyer, clergyman or close business associate,[13] when other categories of relationships are involved, each state's law must be consulted; for state law varies widely.

For example, consider the question of whether there is a confidential relationship between husband and wife. In some states,[14] "[i]t is generally held that there is no such thing as a confidential relation between husband and wife in the law governing will contests." Yet other jurisdictions follow the rule that the issue of whether a confidential relationship exists between husband and wife is a question of fact.[15]

The law's treatment of consanguinity is similarly erratic. In one jurisdiction,[16] consanguinity is "an important and material fact in considering the question of whether in fact a confidential relationship exists. . ." Yet elsewhere,[17] consanguinity is considered irrelevant.

When a rule of law does not govern the question of whether a particular relationship is confidential for purposes of will contests, then an issue of fact exists. A typical judicial statement of the standard to be used is that a confidential relationship exists "whenever trust and confidence is reposed by one person in the integrity and fidelity of another."[18] In this area there is uniformity. The difficulty arises in determining whether one of the various rules of law applies to render a particular relationship either confidential, or not, as a matter of law.

Active Participation

There is also a lack of uniformity in the requirement of a showing of active participation in the preparation or execution of the will on the part of the person alleged to have unduly influenced the testator by means of a confidential relationship.

In some states, a showing of active participation is necessary in addition to the existence of a confidential relationship between a beneficiary and a testator.[19] In other states, *additional* suspicious circumstances, such as a substantial gift[20] or a weakness of mind of the testator,[21] *must* be shown. And in still

other jurisdictions, weakness of mind[22] or other suspicious circumstances[23] may serve as *substitutes* for active participation, in that *either* active participation *or* other suspicious circumstances may be shown.

Compounding the confusion, there are differing views as to what constitutes active participation. There appear to be two schools of thought. According to one, there is no active participation unless there is personal participation in the actual drafting or execution of the will.[24] According to the other, active participation may be found to exist where there is only conduct by a beneficiary prior to the drafting or execution of the will.[25]

It has been held, moreover, that a presumption of undue influence does not arise where a beneficiary participated in the preparation of the will at the request of the testator.[26]

Unnatural Disposition

Another trap for unwary practitioners in the area of confidential relationship is the rule that, to raise a presumption of undue influence, it must be shown that the person alleged to have unduly influenced the testator received unnatural or undue benefits under the will. This is the law in some states,[27] in others it is not,[28] and, no doubt, in still others no one can be sure what the law is.[29]

Need for Uniformity

The foregoing suggests a need for uniformity in the law governing confidential relationship in will contests.

Under the current state of affairs, it is difficult to give counsel in this area; it is difficult to settle cases. There is no good reason why an attorney should have to search through ancient state decisions to try to find out whether cousins stand in a confidential relationship with each other as a matter of law, whether they *do not* stand in a confidential relationship as a matter of law, or whether the question is one of fact. And there is even less reason for the unpredictability and uncertainty that exists when, as is often the case, there is no clear answer to be found.

This is not a case of jurisdictions deliberating carefully over the pros and cons of various rules, and then deciding on different rules. Rather, the rules in this area arose in almost accidental fashion and were never rationalized by the promulgation of uniform acts or a Restatement. The presumption of undue influence appears to have developed out of the English rule of equity

In some states, to raise a presumption of undue influence, it must be shown that the person alleged to have unduly influenced the testator received unnatural or undue benefits under the will

by which a presumption of undue influence automatically arose when a donee having a confidential relationship with a donor received an *inter vivos* gift.[30]

The *inter vivos* gift rule does not apply very well in a testamentary context. Its rationale is that an *inter vivos* gift passes property that otherwise would be retained by the donor, who is unlikely to part with property without something in return.[31] A testamentary conveyance, on the other hand, passes property in which the testator's interest must cease anyway.[32]

Recognizing that the arguments for the presumption are weaker in the case of testamentary transfers, the English courts early on added the requirement of active participation.[33] For the same reason, American courts have adopted a confusing array of additional requirements making for unnecessary uncertainty in the application of the doctrine.

Determining the Uniform Rules

The diversity of rules in the area of confidential relationship in will contests suggests a need for uniformity more than a need for any particular set of uniform rules.

The root issue is whether the presumption of undue influence is favored or disfavored. On the side of the presumption is a need to protect testators and the expectant objects of their bounty[34] from the machinations of those who would thwart the free will of testators. Also on the side of the presumption is the fact that undue influence is difficult to prove affirmatively. The only evidence is usually circumstantial, and it is easy for wrongdoers to cover their tracks.[35]

Other considerations, however, militate against too much enthusiasm for the presumption of undue influence. In particular, there is the policy, deeply rooted both in the common law[36] and in Anglo-American notions of individual liberty, of freedom of testation.[37] There is every reason to believe that when the issue of confidential relationship is one of fact, jurors will often allow their own feelings as to how the testator should have disposed of his property to influence their conclusion on the confidential relationship issue. Justice Tobringer of California has stated that "[i]t does appear, from the cases appealed, that the jury finds for the contestant in over 75 percent of the cases submitted to it. But the fact that juries exhibit consistent unconcern for the wishes of testators should come as no surprise. Indeed, the tendency of juries in this respect is so pronounced that it has been said to be a proper subject of judicial notice."[38]

Another view sometimes appearing in the judicial decisions, which is used to justify restriction of the presumption of undue influence, is that influence arising from a husband and wife relationship is always proper, and should therefore never result in a presumption of undue influence.[39] One court has stated that "a wife ought to have great influence over her husband, and it is one of the necessary results of proper marriage relations, and that it would be monstrous to deny to a woman who is generally an important agent in building up domestic prosperity, the right to express her wishes concerning its disposal."[40]

This view, however, is far from universal. It could be argued that, in an age in which second marriages are common, there is an increased danger that children of first marriages will be unfairly disinherited by a susceptible parent.

II. Conclusion

A uniform set of rules on confidential relationship could reflect a balancing of the competing goals. Whatever the rules that might ultimately be adopted, an organized move towards creating a nationally uniform set of rules seems clearly called for. □

FOOTNOTES

1. See, Justice Holmes' remarks in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (exalting the benefits of "social experiments . . . in the insulated chambers afforded by the several States").

2. Richard Wellman, for example, Reporter for the Uniform Probate Code, has argued for the need for the Uniform Code by pointing to the disarray that plagues the institution of probate in America. See, Wellman, The Uniform Probate Code: Blueprint for Reform in the 70's, 2 Conn. L. Rev. 453, 455 (1970).

3. *See, e.g., In Re Estate of Schwartz*, 407 So.2d

338, 362 (Fla.App. 1981); ATKINSON ON WILLS § 101 at 550 (2nd.ed.1953). *But see, Blackmer v. Blackmer*, 165 Mont. 69, 74, 525 P.2d 559, 563 (1974) (taking the apparently unique position that "[u]ndue influence is never presumed . . .").

4. *See, e.g., Estate of Weickum*, 317 N.W.2d 142, 145 (S.D. 1982); *In re Estate of Anders*, 88 S.D. 631, 226 N.W.2d 170 (1975); *In re Metz' Estate*, 78 S.D. 212, 100 N.W. 2d 393 (1960); *Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971).

5. *See, e.g., Estate of Niquette*, 264 Cal. App. 2d 976, 71 Cal. Rptr. 83, 87, 88 (1968); ATKINSON ON WILLS § 101 at 550 (2nd ed.1953).

6. *See, Estate of Komarr*, 46 Wis.2d 230, 175 N.W.2d 473 (1970) cert. den. 401 U.S. 909 (to raise the presumption, active participation need not be shown where it is shown that testator was weak of mind).

7. *See, Blackmer, supra*, n.1.

8. For a general discussion, see Comment, *Blackmer v. Blackmer*, Presumption of Undue Influence in Montana, 37 Mont. L. Rev. 250 (1976); Note, Confidential Relationships and Undue Influence in Wills in Mississippi, 42 Miss. L. J. 146 (1971); Note, Will Contests, Burden of Proof as to Undue Influence, Confidential Relationships, 44 Marq. L. Rev. 570 (1961).

9. *Compare, Franciscan Sisters Health Care Corp. v. Dean*, 102 Ill. App.3d 950, 57 Ill. Dec. 797, 429, N.E.2d 914 (Ill. App. 1981) (holding that trial court misconstrued the effect of the presumption of undue influence in shifting the burden of persuasion, rather than merely the burden of production, onto the proponents) with, *Estate of Komarr, supra* (holding that once the presumption is raised, burden of persuasion shifts permanently to the proponents.)

10. *See, e.g., Estate of Carpenter*, 253 So.2d 697 (Fla. 1971); ATKINSON ON WILLS § 101 at 551-552 (2nd ed.1953).

11. *See, e.g., Franciscan Sisters, supra*, n.9; ATKINSON ON WILLS § 101 at 551-552 (2nd ed.1953).

12. *See, e.g., Estate of Komarr, supra*, n.9; ATKINSON ON WILLS § 101 at 551-552 (2nd.ed.1953).

13. ATKINSON WILLS, § 101 at 550 (2nd ed. 1953).

14. *Knight's Estate*, 108 So. 2d 629, 631 (Fla. App. 1959).

15. *Robbins' Estate*, 172 Cal. App. 2d 549, 342 P.2d 933 (1959).

16. *Estate of Gelonese*, 36 Cal. App. 3d 854, 864, 111 Cal. Rptr. 833, 839 (1974).

17. *Estate of Sensenbrenner*, 89 Wis.2d 677, 688-694, 278 N.W.2d 887, 892-895 (1979) (upholding the trial court's finding that no confidential relationship existed between the testator and her son, where the record did not indicate that the son acted as a confidential advisor to his mother on estate planning matters).

18. *Estate of Baker*, 131 Cal. App.3d 471, 480, 182 Cal. Rptr. 550, 556 (1982). See, also, *Heer's Estate*, 316 N.W.2d 806, 808 (S.D. 1982); *Bleidt v. Kantor*, 412 So.2d 769, 771 (Ala. 1982).

19. *In Re Anderson*, 52 Ill.2d 202, 287 N.E.2d 682 (1972).

20. *Estate of Carpenter*, 253 So.2d 697 (Fla. 1971).

21. *Snedeker's Estate*, 368 Pa. 607, 84 A.2d 568 (1951).

22. *Estate of Komarr, supra*, n.8.

23. *Estate of Jennie Berkowitz*, 147 Conn. 474, 476, 477, 162 A.2d 709, 710, 711 (1960) (when beneficiary standing in confidential relationship with testator is a "stranger" to the testator—that is, not a relative—and takes to the exclusion of the natural objects of the testator's bounty, then no evidence of active participation is needed to raise the presumption of undue influence).

24. *Will of Moses*, 227 So.2d 829 (Miss. 1969).

25. *Estate of Carpenter, supra*, n.4.

26. *White v. Irwin*, 220 Ga. 836, 142 S.E.2d 255 (1965).

27. *See n.5, supra*.

28. *See, e.g., Estate of Carpenter, supra* (stating that the presumption of undue influence arises "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will . . ."); n.4, *supra*.

29. Where this requirement exists, "unnatural" disposition is defined largely by reference to the laws of intestate succession. A disposition will be considered unnatural when there is no explanation why those persons the intestacy laws define as the natural objects of testator's bounty did not receive under the will approximately what the law of intestate succession would have provided for. *See, Garibaldi's Estate*, 57 Cal.2d 108, 17 Cal. Rptr. 623, 367, P.2d 39 (1961) (disposition unnatural where, despite testator's "repeatedly expressed desire that her children should share her property equally, each proponent would receive substantially more under the will than each contestant.") *See, also, Pruitt v. Pruitt*, 343 So.2d 495, 499 (Ala. 1977).

30. *See, Barfitt v. Lawless*, LR 2 P & D 462 (1872).

31. 2 PAGE, THE LAW OF WILLS, § 818 at 616 (1941); *Graham v. Cartright*, 180 Iowa 394, 161 N.W.774 (1917).

32. *Id.*

33. *Parfitt v. Lawless, supra*, n.30.

34. Interestingly, this policy is often stated by commentators solely in terms of protecting testators. The interests of the would-be beneficiaries are often ignored. See articles cited at n.8, *supra*.

35. In *Metz' Estate, supra*, n.4, the court stated: "There is no direct proof of undue influence in this case. There seldom is. Undue influence is not usually exercised in the open."

36. ATKINSON, WILLS, § 5 at 34-36 (2nd ed. 1953).

37. *See, Fritschi's Estate*, 60 Cal.2d 367, 373, 33 Cal. Rptr. 264, 267, 384 P.2d 656, 659 (1963).

38. *Id.*

39. *Estate of Robinson*, 231 Kan. 300, 644 P.2d 420 (1982).

40. *Id.*

Robert Whitman is a Professor of Law at the University of Connecticut School of Law. He is a frequent contributor to TRUSTS AND ESTATES.

David Hoopes is a member of the law firm Kahan, Kerensky, Capossela, Levine, and Breslau in Vernon, Conn. He is a graduate of the University of Connecticut School of Law. He holds a B.A. from the University of Massachusetts at Amherst, Mass.

Richard O. Burke
1780 Pleasant Valley Road
Oakland, Ca. 94611
428-1107

May 15, 1985

Mr. John H. De Moully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca. 94303

Dear John:

As per our phone conversation today these are the three changes that must be made to the foreclosure auction system before it can attract the bidders necessary to make it viable.

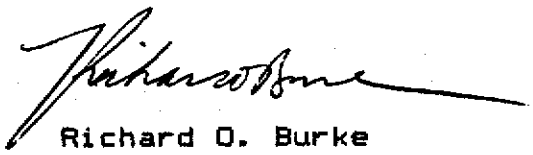
1 - PROPERTIES SHOULD BE ADVERTIZED ONLY WHEN THEY ARE READY TO BE SOLD. The most major problem is that the majority of the good auctions advertized are cancelled (about 95% of those I follow), often at the last minute. After the bidder has gone to the time and expense of estimating the value of a property he is not allowed to physically inspect, and perhaps paying for a title report on the property. If 95% of the time you ran down to Safeway to buy something they had advertized you were told they had cancelled the sale on that item, how long would you bother following their adds?

2 - BIDDERS SHOULD BE TOLD HOW MUCH THEY ARE PAYING FOR THE PROPERTY. Currently it is up to each bidder to obtain their own title report. Even then you are likly to run into a situation where for example you see Bank of America placed a $100,000 deed of trust on the property in 1975. You call up the bank and tell them you will be bidding on the property at the auction and need to know their loan balance inorder to determine how much you will be paying at the auction. The bank replies that they can only disclose that information to the owner and that after you buy the property they will be glad to tell you how much you paid for it.

3 - THE SUCCESSFUL BIDDER SHOULD BE ENTITLED TO POSSESSION OF THE PREMISES AND MARKETABLE TITLE QUICKLY AND SIMPLY. Should a question arise as to whether the auctioneer or the beneficiary made an error in selling the property, this should not effect the successful bidder. As long as the bidder must bear the consequences of a bad buy on a property he is not allowed to physically inspect then on a good buy he should be entitled to either the property or the benefit of his bargain.

Until these changes are made, foreclosure auctions will remain worst buyer beware market place imaginable. I have some suggestions on how to implement these changes. Please call me if you are interested or have any questions.

Sincerely,



Richard O. Burke

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

September 25, 1985

Michael E. Barber
Office of the District Attorney
Sacramento County
Domestic Relations
P.O. Box 160937
Sacramento,CA 95816-0937

Dear Mike:

You wrote asking for an interpretation of CCP 724.250(b). You ask how the word "directed" should be interpreted.

The language in Section 724.250 is taken directly from former CCP Section 674.5 and, without carefully checking, appears to have been added to that section by an amendment made in 1976. We have nothing to indicate that our office was involved in the 1976 amendment.

My reading of the provision is that the officer must be designated by the court in the order. A court would appear to have to make an order "designating" the officer, since the a court acts by "orders" and the officer must be "an officer designated by the court." But I have no recollection of having considered this particular section, although I do recall that there was some section that we did consider where the word "court ordered support" created a problem where the support was provided for in a marriage settlement agreement.

The Commission is now devoting substantially all its time and resources to the drafting of a new Probate Code, so you should not look to the Commission to deal with the matter.

Sincerely,

John H. DeMoully
Executive Secretary

OFFICE OF THE
DISTRICT ATTORNEY
SACRAMENTO COUNTY

JOHN DOUGHERTY
District Attorney

KATHRYN CANLIS
Chief Deputy

September 17, 1985

Mr. John DeMoully
Executive Secretary
Calif. Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94305

Dear John:

We're now taking a real good look at a broad based recording of support order program here in Sacramento County. In developing such a program, we are having some problems interpreting CCP 724.250, and I felt before we took a final position on that statute in a manner that could create significant clerical headaches for our staff, I'd turn to you for final interpretation since your organization is the author of the statute.

More specifically, we're looking at paragraph (b). The run-on sentence there concerning when a public agency is to be involved in signing off on an appropriate document is unclear, at least to me, as to whether or not the support in question must be "directed" (your word) through a public agency by a specific order of the court, or whether the direction may be the result of a statute.

More specifically, under Sec. 11457 W&I Code, the obligated parent is required to pay through a public agency so long as the family is on welfare. This is a statutory mandate and would seem to not require the intervention of the court so long as the defendant has been informed of the welfare status of the family. It would not require a judicial determination of welfare status. It would save us some clerical time if, in fact, such a notice would be sufficient to create the control power provided for under Subsection (b). If, however, as is being read by some of our staff, "directed" means directed by a court order, then in each case we must indulge in an additional clerical step of taking the order back to court to get such a direction.

It is my recollection that your intent in putting the word "directed" in this statute rather than "ordered" was deliberate. That it was intended that the direction could be by the legislature as well as by a court in an individual case, which is the reason you used the broader term "directed" without modifying

DOMESTIC RELATIONS
P.O. Box 160937
Sacramento, CA 95816-0937 (916) 440-5811
20 Bicentennial Circle
Sacramento, CA 95826

it by saying "directed by the court". Your clarification on this would be appreciated.

If "directed" was intended to be read as broadly as I read it, it would probably also be helpful if some language was amended into the statute and possibly forms corrected so that Section 11457 specifically could be introduced in the face of any document so recorded without having to take that document back to court. The matter is particularly important, not only because of the lien program that we're reaching towards instituting but, also, because of the recent decision of Keele v. Reich, 169 CA3d 1129, 215 Cal. Rptr. 756. This decision makes it clear that we must comply rather strictly with the law to protect our rights in any kind of a recording situation and any lien situation. Your interpretation of what the law is in this area would be extremely helpful.

Very truly yours,

JOHN DOUGHERTY
DISTRICT ATTORNEY

Mike

Michael E. Barber

MEB:sm

cc: Carol Ann White
Terry Abbott

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

August 21, 1985

David H. Spencer
Attorney at Law
220 State Street, Suite H
Los Altos, CA 94022

Dear Mr. Spencer:

You wrote to the Law Revision Commission suggesting that it be made clear that a judgment debtor who fails to comply with a subpoena duces tecum served at the same time he is served with an order for examination be subject to the $500 penalty for disobeying the subpoena set forth in Code of Civil Procedure Section 1992.

The Commission will determine at its September 1985 meeting the matters that will be given priority during 1986. You letter will be brought to the attention of the Commission at that time.

You should know that the Commission has determined to devote substantially all its time and resources to the drafting of a new Probate Code. Hence, it is unlikely that the Commission will give priority to your suggestion during 1986.

Sincerely,

John H. DeMoully
Executive Secretary

DAVID H. SPENCER
ATTORNEY AT LAW
220 STATE STREET, SUITE H
LOS ALTOS, CALIFORNIA 94022
(415) 949-1660

August 20, 1985

Mr. John De Moully
California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94303

Dear Mr. De Moully:

It is common practice for attorneys who represent judgment creditors to have judgment debtors served with a subpoena duces tecum at the same time they are served with an order for examination. The affidavit attached to the subpoena requires the judgment debtor to bring to the examination such evidence of asset ownership as car registration certificates, deeds to property, stock certificates, bonds, insurance policies, etc. Unfortunately, it is also common practice for judgment debtors not to comply with the subpoena.

Although judges and commissioners promptly issue a bench warrant for failure to appear for an examination, they have refused to apply the $500.00 penalty for disobeying the subpoena set forth in Code of Civil Procedure section 1992. Because of the wording of section 1992 that forfeiture of the $500.00 and damages may be recovered in a civil action, the bench takes the position that section 1992 applies only to prejudgment discovery.

It is respectfully submitted that section 1992 should be reworded so that it and the following sections apply to miscellaneous creditors' remedies as contained in Code of Civil Procedure sections 708.000 et seq. as well as to prejudgment discovery.

Very truly yours,

DAVID H. SPENCER

DHS:vmn

Memo 85-94 Exhibit 11

LAW OFFICES

COSKEY, COSKEY & BOXER

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

SUITE 1960 WORLD SAVINGS CENTER

11601 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90025-1781

TOBIAS COSKEY (1896-1974)
HAL L. COSKEY
A PROFESSIONAL CORPORATION
SANDOR T. BOXER
MARY ELLEN BALDRIDGE
KEVIN B. WITT

TELEPHONE (213)
473-4583 - 879-9558

August 27, 1985

Mr. John H. DeMoully
Executive Secretary
The California Law Revision
Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Dear Mr. DeMoully:

I am writing to bring to the attention of the Commission some difficulties currently being encountered in the implementation of the California Attachment Law.

As you may recall, our office appeared before the Commission on several occasions with respect to the most recent revision of the California Attachment Law. We typically represent unsecured lenders who frequently seek the protection of the Attachment Law.

I am enclosing a copy of the "Policy re Consideration of Plaintiff's Supplemental or 'Reply' Papers in Attachment Proceedings" issued by Department 66 of the Los Angeles Superior Court. Department 66 is the department to which all attachment matters in the Central District of Los Angeles Superior Court are assigned. It handles a great volume of attachment cases and thus its policies carry substantial impact.

The thrust of the enclosed policy memorandum is that not only must the plaintiff's prima facie case be supported, the Los Angeles Superior Court views the current attachment law as also requiring that all known defenses be anticipated. We are unable to find any support for that position in the Claifornia Attachment Law.

Furthermore, the enclosed memorandum proceeds upon the previously announced position of Department 66 that the mere completion of the Judicial Council form of application for attachment, together with an appropriately verified complaint will, in and of itself generally be insufficient to provide the basis for the issuance of a writ of attachment. It is that Court's position that the Judicial Council form of application for attachment is conclusionary and thus legally insufficient to support the issuance of a writ of attachment. Again, we can find no basis in the law for such a position. We also wonder as to the practicality of presenting forms to the State Bar which are considered by the Court to be legally insufficient.

Department 66 is not the only trial Court which views the attachment law in the fashion set forth by the enclosed memorandum. Similar rulings have been obtained from the Orange County Superior Court. The latter Court has gone one step further. The additional step which the Orange County Superior Court has taken is to also suggest that if the writ is denied, the plaintiff has forever lost the opportunity to obtain any writ of attachment in that case.

We do not believe that unduly restrictive interpretations of the attachment law were the intent of the California Law Revision Commission in the promulgation of the recent attachment law. We seek the Commission's assistance or suggestions as to how the current situation can be rectified.

Respectfully,

Sandor T. Boxer
of Coskey, Coskey & Boxer

STB:gp

Encl.

- DEPARTMENT 66 -

POLICY RE CONSIDERATION OF PLAINTIFFS' SUPPLEMENTAL OR "REPLY" PAPERS IN ATTACHMENT PROCEEDINGS

Not uncommoningly, the plaintiff or applicant seeking a writ of attachment will attempt to submit supplemental or "Reply" papers in response to the defendant's written opposition. This practice is questionable.

The Attachment Law (CCP §481.010 et seq.) prescribes in detail those papers which may be filed either in support of or opposition to the issuance of a writ. As numerous cases have held, these provisions are to be strictly construed and applied. (See, e.g., Nakasone v. Randall (1982) 129 Cal.App.3d 757, 761.) If the defendant asserts a claim of exemption, the plaintiff is authorized to challenge that claim in writing, filed ". . . not less than two days before the date set for the hearing . . ." (CCP §484.070(c).) Beyond that, however, there is no specific provision for the filing of additional papers by the plaintiff.

Nonetheless, it must be recognized that the plaintiff will occasionally be taken off guard by a "surprise" defense contained in the defendant's opposition papers. Thus, the Legislature has allowed the Court some discretion to receive additional proof:

> "The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of the additional evidence or points and authorities." (CCP §484.090(d) - (Emphasis added).)

In view of these provisions, and considering the practical realities of legal practice, the policy of this Department will be as follows:

1. As authorized by Section 484.070(c), the plaintiff may file written opposition to any claim of exemption. To be considered, however, that opposition must be timely served and filed. Also, if other papers are being filed at the same time, this document should be prepared separately, with its own cover sheet. Otherwise, it may be marked "unauthorized" and not considered (see below).

2. The Attachment Law provides that papers may be served personally or by mail on counsel of record. (CCP §482.070(a)&(e).)

All too often, service by mail does not reach opposing counsel in sufficient time to properly respond. For instance, the defendant's opposition and claim of exemption are to be served and filed at least five days before the hearing. (CCP §484.060(a), 484.070(e).) If served by mail, plaintiff's attorney will typically lack sufficient time to prepare an appropriate opposition to the claim of exemption. Similarly, if that opposition is served by mail two days before the hearing, it may not be received by defendant's attorney before appearing in court. Consequently, counsel are encouraged to serve all such papers by personal delivery. If this is not done, requests for continuance by the other side will be favorably received.

3. Evidentiary objections to declarations or exhibits offered by the opposition may be presented orally at the hearing. It is preferable, however, that any such objections be submitted in writing. Accordingly, written objections/motions to strike will be accepted if served by personal delivery and filed no later than 12:00 noon on the court day preceding the scheduled hearing. Again, these documents should be separately bound and captioned from other papers being submitted concurrently.

4. Except for such written objections and opposition to claims of exemption, any additional papers filed by the plaintiff will be marked "unauthorized" upon receipt by the clerk. PAPERS SO MARKED, PARTICULARLY ADDITIONAL DECLARATIONS OR OTHER PROOF, WILL NOT BE READ OR CONSIDERED PRIOR TO THE HEARING.

5. If such supplemental papers have been filed, plaintiff's attorney should be prepared to argue their importance at the hearing. Specifically, counsel will be asked to provide a detailed offer of proof; (a) describing what the supplemental papers contain, (b) how those contents are significant to the issues, and (c) showing good cause (i.e., "surprise") why those papers could not have been presented with the original application. If that offer of proof is considered adequate, the hearing will be continued to a later date so that the Court may have an opportunity to read the papers, and so that the defendant will have a reasonable opportunity to respond. If those papers contain additional evidence (declarations/exhibits) in support of the application, the continuance will not be for less than twenty days.

6. For purposes of showing, "good cause" in this context, plaintiff's counsel must establish that he/she could not reasonably have anticipated the defendant's position in opposition to the writ. If that opposition merely raises technical defects in the application, which defects could easily have been anticipated and cured in the first instance, plaintiff's supplemental papers will not be considered. This commonly occurs where the original application is based upon "form" declarations or verified pleadings alone. Almost invariably, such applications are deficient in one or more technical respects. In cases where the defendant does not appear in opposition, minor problems such as lack of foundation for supporting documents will

generally be overlooked, at least if the Court is satisfied that the copies presented are reasonably trustworthy. Foundational objections are usually considered a matter of affirmative defense.

However, if the defendant does file opposition in which technical defects of this nature are properly asserted, the plaintiff may be out of luck. It is therefore essential that plaintiff's attorney pay close attention to details in preparing the application. If potential deficiencies are overlooked in hopes that the defendant will not appear, the consequences may be fatal to any chance of obtaining a writ.

memo 85-94 Exhibit 12

COOLEY, GODWARD, CASTRO, HUDDLESON & TATUM
ATTORNEYS AT LAW

ONE MARITIME PLAZA
20TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
(415) 981-5252

TELEX
910-372-7370
COOLEY SFO

FIVE PALO ALTO SQUARE, SUITE 400
PALO ALTO, CALIFORNIA 94306
(415) 494-7622

November 28, 1984

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear John:

Pursuant to our telephone conversation a few weeks ago, I am enclosing ten copies of the most recent edition of the State Bar Business Law News that contains my comment on the Seaman's case.

As the comment suggests, the issue whether contract damages under existing rules provide adequate compensation for breach of contract may merit consideration by the Commission.

With all good wishes.

Sincerely,

Michael Traynor

MT:ss
enclosures (10)

business law news

Vol. 8, No. 1 Official Publication of the State Bar of California Business Law Section Fall 1984

New California Banking Authority Clashes with Federal Law

by
John D. Wright
Wilson, Ryan & Campilongo
San Francisco

As legislation expanding bank and bank holding company powers has stalled in Congress, recent California statutes granting broader authority to state chartered banks have taken on new importance. The state statutes raise difficult and as yet unresolved questions regarding the interplay of state and federal banking laws. These questions are likely to receive increasing attention as banks seek to diversify their sources of earnings and to develop products and services competitive with those of other financial services firms.

Several provisions of state law contain general or specific authority for state banks to engage in activities far beyond those permitted to national banks or nonbank subsidiaries of bank holding companies.

Section 206 of the Corporations Code provides that "subject to any limitation contained in the articles and to compliance with any other applicable laws . . . a corporation subject to the Banking Law . . . may engage in any business activity not prohibited by the respective statutes and regulations to which it is subject." With the exception of Section 1643 of the Insurance Code limiting insurance agency activities of state banks, limitations on holding real estate, and a few other restrictions, California law does not specifically limit the types of businesses which a state bank might wish to undertake.

AB 3469, enacted in September 1982, expressly authorized state banks to engage in management consulting, data processing and transmission, real estate appraisal, and other activities. The Chief Counsel of the State Banking Department stated in a December 1982 letter to the California Bankers Association that these activities were already permissible for state banks by virtue of Section 206. The Chief Counsel also stated that these activities did not appear to be unsafe or unsound activities which could be prohibited by the Superintendent of Banks under Sections

Continued on page 7

Bad Faith Breach of a Commercial Contract: A Comment on the *Seaman's* Case

By Michael Traynor
Cooley, Godward, Castro, Huddleson & Tatum
San Francisco

Introduction

If a breach of contract is also a tort, the injured party may be able to recover damages significantly different from the damages that contract law allows. Consequential damages are not limited to those within the contemplation of the parties when they made the contract;[1] instead, "all the detriment proximately caused" by the tort may be recovered "whether it could have been anticipated or not."[2] Damages for noncommercial losses such as emotional distress may be obtained.[3] Punitive damages may also be imposed if the tort is accompanied by oppression, fraud, or malice.[4]

The prospect of larger compensatory awards as well as punitive damages is a powerful incentive to litigants seeking to break down the barriers between contract and tort, particularly when they are demanding redress of a loss caused by another's action in bad faith. Such litigants

[1] *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854); *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 56, 87 Pac. 1093, 1095 (1906); Farnsworth, *Contracts*, 873-81 (1982); Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. Legal. Stud. 249 (1975); Restatement (Second) of Contracts § 351 (1981); Dobbs Remedies, 803-817 (1973); Adams, *Hadley v. Baxendale and The Contract/Tort Dichotomy*, 8 Anglo-American L. Rev. 147 (1979); Gilmore, The Death of Contract 49-53, 82-84 (1974); CEB, California Attorney's Damages Guide, § 1.18 (1974 and Supp. 1984); CEB, California Breach of Contract Remedies, § 4.7 (1980).

[2] Cal. Civ. Code § 3333.

[3] *E.g., Crisci v. Security Ins. Co.*, 66 Cal.2d 425, 426 P.2d 173, 58 Cal.Rptr. 13 (1967); *see* CEB, California Attorney's Damages Guide, §§ 1.24, 1.36 and App. I, § 82 (1974 and Supp. 1984); Dobbs, Remedies 805-807, 819-821 (1973). *See also Molien v. Kaiser Foundation Hosp.*, 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

[4] Cal. Civ. Code § 3294.

Continued on page 9

A Comment on the *Seaman's* Case . . .

Continued from page 1

have achieved notable success in holding insurance companies liable for tort damages and punitive damages for breach of the implied covenant of good faith and fair dealing with their insureds.[5] The next major area for expanded liability in tort is currently developing in lawsuits by former employees claiming that their employers wrongfully discharged them.[6] It is thus no surprise if a case elicits widespread interest when it tests whether tort damages and punitive damages are available for breach of the implied covenant of good faith and fair dealing in commercial contracts other than insurance or employment.

When the Supreme Court of California handed down its decision a few weeks ago in *Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California,*[7] it refrained from holding broadly that a party who breaches a commercial contract in bad faith is subject to tort liability and punitive damages. The court did, however, hold that such exposure is present when a bad faith breach occurs in the context of a special relationship such as insurer and insured or when a breach of contract is accompanied by a denial, in bad faith and without probable cause, that a contract exists. The court also sought to clarify the intent requirements of a cause of action for intentional interference with contract or prospective advantage.[8]

In this comment, I will examine briefly the implications of the court's decision on the availability of tort remedies and suggest the alternative of providing adequate compensation by developing contract damage principles in a commercially reasonable and orderly way.

The *Seaman's* Case

Seaman's leased space for a marine fuel dealership and supply business in a new marina of the City of Eureka. Before leasing the space, the City required Seaman's to have a binding agreement with an oil supplier. Seaman's obtained from Standard a letter stating that Standard proposed to sign a dealership agreement under which Standard would supply oil to Seaman's at a discounted price for an initial term of ten years. Seaman's signed its acceptance of the letter, presented the letter to the City, signed a forty-year lease of the marina space, and discontinued dealership negotiations with Mobil. Within a year, an oil shortage occurred, federal quotas were imposed, and Standard declined to supply the oil. The dealership agreement contemplated by the letter was never signed. Seaman's obtained a federal agency decision requiring Standard to fulfill its supply obligations if the letter arrangement with Seaman's was a valid contract. Standard then refused to stipulate to the existence of a contract and told Seaman's, "See you in court."[9] Seaman's discontinued business shortly before the marina opened.

Seaman's sued Standard for breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, and interference with Seaman's contractual relationship with the City. The jury returned a verdict for Seaman's on all but the fraud claim and awarded $397,050 as compensatory damages for breach of contract; the same sum as compensatory damages for breach of the implied covenant of good faith, plus $11,058,810 in punitive damages; and $1,588,200 as compensatory damages on the interference claim plus $11,058,810 in punitive damages. Seaman's consented to a reduction of punitive damages to $1 million on the good faith count and $6 million on the interference count and judgment was entered accordingly. On appeal, the Court of Appeal affirmed only the judgment for compensatory damages for breach of contract, reversed on the interference claim, and ruled that punitive damages are not available for bad faith breach of the implied covenant in commercial contracts outside the

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[5] *E.g., Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818, 620 P.2d 141, 169 Cal.Rptr. 691 (1979); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 573, 510 P.2d 1032, 108 Cal.Rptr. 480 (1973); *see* Kornblum, *Recent Cases Interpreting the Implied Covenant of Good Faith and Fair Dealing*, 30 Def. L. J. 411 (1981); Levine, Shernoff & Kornblum, Bad Faith 1984 (1984).

The cases, both third party cases and first party cases, are critically analyzed in a forthcoming book. Ashley, Bad Faith Actions: Liability and Damages (Callaghan & Co. 1984).

[6] *See, e.g., Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 179, fn. 12, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980); *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal.App.3d 467, 199 Cal.Rptr. 613 (1984). *See generally*, CEB, Handling Wrongful Discharge Litigation (1984); Lopatka, *The Emerging Law of Wrongful Discharge*, 40 Bus. Law 1 (1984).

[7] 36 Cal.3d 752, 686 P.2d 1158, 206 Cal.Rptr. 354 (1984). A petition for rehearing is pending and the court has extended, until November 29, 1984, the deadline for granting or denying a rehearing.

For a leading article preceding the *Seaman's* case, *see* Diamond, *The Tort of Bad Faith Breach of Contract: When, If at All, Should it be Extended Beyond Insurance Transactions?* 64 Marq. L. Rev. 425 (1981). For analysis of the Diamond article, *see* Ashley, *supra*, n.5 at §§ 11.13, 11.14.

[8] 36 Cal.3d at 765-767. This comment concentrates on the issue of bad faith breach of contract and hence does not analyze the interference question in the *Seaman's* case. For discussion of interference claims, *see* Restatement (Second) of Torts §§ 762-774B (1979); Palmer, Law of Restitution § 2.6 (1978 and Supp. 1982); Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504, 525-529, 553-554 (1980). The court also has pending before it, as of October 22, 1984, *Petrich v. Nurseryland Garden Centers, Inc.* (LA 31759). 140 Cal.App.3d 243 (1983).

[9] In reviewing the evidence of bad faith, the court stated: "The timing of the denials and the circumstances in which they were made would support the conclusion that Standard was cynically attempting to avoid *both* performance *and* liability for nonperformance of contractual obligations which it privately recognized to be binding." 36 Cal.3d at 771. "On the other hand, Standard offered conflicting evidence from which the jury could have concluded that it acted in good faith." *Id.*

A Comment on the *Seaman's* Case . . .

Continued from page 9

area of insurance or comparable relationships.[10] The Supreme Court granted a hearing in May 1982 and handed down its decision on August 30, 1984.[11]

The court ruled that the letter signed by Standard and accepted by Seaman's was an enforceable requirements contract notwithstanding Standard's defenses that the letter did not specify a quantity provision, was uncertain, and did not satisfy the Statute of Frauds.[12] It then reversed the judgment for Seaman's on the interference count on the ground that there was no evidence "that Standard acted with the purpose or design of causing Seaman's to breach its contract with City."[13] Instead, "the breach was merely an incidental, if foreseeable, consequence of Standard's action."[14]

The court then addressed the principal issue of bad faith. It declined to enter "largely uncharted and potentially dangerous waters" with a broad ruling that a breach of the implied covenant always gives rise to an action in tort.[15] Instead, it referred to the insurance cases as involving a " 'special relationship' between insurer and insured, characterized by elements of public interest, adhesion, and fiduciary responsibility."[16] Inviting further expansion of the "special relationship" category, it stated, "no doubt there are other relationships with similar characteristics and deserving of similar legal treatment,"[17] citing a leading termination of employment case[18] and a recent law review article.[19]

Perhaps most significantly, the court held also that "it is not even necessary to predicate liability on a breach of the implied covenant. It is sufficient to recognize that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that a contract exists."[20] Holding further that the trial court erred in failing to instruct the jury that Standard's denial would not have been tortious if made in good faith, and that the error was prejudicial, the court reversed the judgment for Seaman's and remanded the case for retrial.[21] The court did not elaborate on the precise nature of the instructional error,[22] or discuss the effect on the bad faith issue of the jury's award of punitive damages based on malice or oppression,[23] or explain its "without probable cause" test or state whether it was imposing both an objective test and a subjective test of the conduct of a party who denies the existence of a contract.

In justifying its establishment of the tort of denial of a contract's existence, in bad faith and without probable cause, the court relied on an Oregon case imposing restitutionary liability and punitive damages on a party who coerces payment of more than is due by threatening unjustifiable litigation.[24] "There is little difference, in principle, between a contracting party obtaining excess payment in such manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of

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[10]181 Cal.Rptr. 126 (1982). *See also Wagner v. Benson*, 101 Cal.App.3d 27, 33-35, 161 Cal.Rptr. 516 (1980); *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal.App. 3d 101, 135, fn. 8, 135 Cal.Rptr. 802 (1977); *Battista v. Lebanon Trotting Assn.*, 538 F.2d 111, 118 (6th Cir. 1976); *Nifty Foods Corp. v. Great Atlantic and Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980); *Iron Mtn. Sec Storage Corp. v. American Specialty Foods, Inc.*, 457 F.Supp. 1158, 1168 (E.D. Pa. 1978); *Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775, 790 (1975), *appeal dismissed and cert. denied*, 424 U.S. 902 (1976); *Tibbs v. Nat. Homes Const. Corp.*, 52 Ohio App.2d 281, 369 N.E.2d 1218 (1977).

[11]*See* n.7, *supra*. As of October 22, 1984, the court still has pending before it important cases in this area: *Smithers v. Metro-Goldwyn-Mayer Studios, Inc.* (LA 31739), 139 Cal.App.3d 643, 189 Cal.Rptr. 20 (1983); *MPB Assocs. v. United California Bank*, (SF 24508) (no former published opinion).

[12]36 Cal.3d at 762-765.

[13]36 Cal.3d at 765-767.

[14]36 Cal.3d at 767.

[15]36 Cal.3d at 769.

[16]36 Cal.3d at 768.

[17]36 Cal.3d at 769.

[18]*Tameny v. Atlantic Richfield Co., supra*, n.6. For a recent application of the *Seaman's* case to a post-employment payment contract, see *Wallis v. Kroehler Mfg. Co.*, 160 Cal. App. 3d 1109 (1984). For claims by commercial lessees that the lessor's consent to an assignment was wrongfully withheld, *see Schweiso v. Williams*, 150 Cal. App. 3d 883, 198 Cal. Rptr. 238 (1984); *Cohen v. Ratinoff*, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983); *Prestin v. Mobil Oil Corp.*, ... F. 2d ... (9th Cir. 1984) (84 Daily Journal D.A.R. 3465).

[19]Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F. L. Rev. 187, 220-226 (1981) (four criteria: superior bargaining power; security or peace of mind motive, not profit; weaker party places trust in larger entity; larger entity intends to frustrate weaker party's enjoyment of contract rights). For critical analysis, *see* Ashley, *supra*, n.5 at §§ 11.11, 11.12 (criteria are underinclusive and do not adequately explain insurance cases). See generally Prosser, Torts 613-622 (4th ed. 1971).

For careful analysis of the enforceability of promises in contexts that may involve unconscionability, *see* Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741 (1982).

[20]36 Cal.3d at 769.

[21]36 Cal.3d at 770-774.

[22]There may be a difference, for example, between erroneously rejecting a proposed instruction and merely giving an unclear or incomplete instruction that counsel does not attempt to clarify or amplify. *See* Richman, *Jury Instructions*, Chapter 17, § 17.31 in CEB, 2 California Civil Procedure During Trial 350-351 (1984).

[23]Proof of bad faith does not necessarily establish malice or oppression. *See, e.g., Neal v. Farmer's Ins. Exchange*, 21 Cal.3d 910, 921 n.5, 582 P.2d 980, 148 Cal.Rptr. 389 (1978); *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452, 462-463, 521 P.2d 1103, 113 Cal.Rptr. 711, 718 (1974). Proof of malice or oppression, however, will in many cases indicate bad faith. *See, e.g., Adams v. Crater Well Drilling Inc.*, 276 Or. 789, 556 P.2d 679, 681 (1976) ("the jury in assessing punitive damages must have found defendant's conduct to be in bad faith").

[24]*Adams v. Crater Well Drilling, Inc., supra*, n.23.

A Comment on the *Seaman's* Case . . .

Continued from page 10

contract. It offends accepted notions of business ethics."[25] The court concluded its brief rationale for the new tort by stating that "acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expectations of the contracting parties."[26]

The Oregon case relied on by the court is a familiar type of case requiring the restitution of money obtained by tortious conduct, namely, duress.[27] It is not a breach of contract case and does not involve the defense that no contract exists.[28]

The Chief Justice concurred in the court's ruling that a contract existed and in its effort to clarify the law of interference with contract. She dissented in part however, from the ruling on the bad faith issue and stated that the court "should forthrightly recognize the principle that, under certain circumstances, a breach of contract may support a tort cause of action for breach of implied covenant."[29] Because the implied covenant of good faith and fair dealing exists in every contract,[30] this view, had it prevailed, would have opened the door widely to the imposition of tort liability and punitive damages in breach of contract cases.

Some Lessons From The *Seaman's* Case

The immediate lessons of the *Seaman's* case for negotiating and drafting seem obvious. Decide at the outset whether the relationship is contractual and, if not, make clear that no contract is intended; the stakes for denying a contract are now higher. Avoid relationships, letters of intent or other documents or statements that are ambiguous unless ambiguity is important. If ambiguity is important (as it might be in occasional letter of intent or requirements situations), inform your client that denying a contract later may create the risk of tort liability and punitive damages. If the relationship is contractual, either express or disclaim (depending on your client's interests) a "special relationship" of trust and confidence or comparable relationship calling for special treatment. Consider drafting remedies clauses more specifically, for example, on the availability of specific performance, consequential damages, attorney's fees, interest, and liquidated or limited damages, and providing that contract termination or nonrenewal in your client's discretion will not be deemed to be a breach of the implied covenant of good faith and fair dealing.

In the contract dispute area, when claiming contractual liability, assert that a contract exists and consider provoking a response that it does not. On the other hand, when denying contractual liability, distinguish carefully between denying that a contract exists and merely denying that an obligation exists under the contract, for example, on grounds of interpretation, the other party's nonperformance, or your client's excuse from performance. Assure yourself that any defense of nonexistence of a contract is well-grounded. Do not lightly assert the Statute of Frauds, incapacity, lack of mutual assent, fraud in the formation, revocation of an offer before acceptance or other claim that an enforceable contract was never formed. Avoid "stonewalling." Recognize that you as well as your client may be sued for conspiring tortiously and without privilege in a bad faith denial of the existence of a contract just as lawyers advising insurance carriers on coverage issues are sometimes being sued along with their clients when coverage is denied. Although the risk of actual liability may not seem substantial, you may be obliged to defend yourself, be a witness, and possibly withdraw as counsel for your client because of the potential conflicts.

If you find these lessons troubling, as I do, you may find the implications for rational development of the law equally troubling. A distinction between denying the existence of a contract and denying a contractual obligation under an existing contract seems artificial, and applying it to oral contracts or loosely written contracts seems unworkable. The distinction may spawn more artificial dis-

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[25] 36 Cal.3d at 769-770, citing *Jones v. Abriani*, 169 Ind. 556, 350 N.E.2d 635 (1976). The *Jones* case states that punitive damages may be available when an independent tort such as fraud is committed, not for breach of contract. 350 N.E.2d at 649-650. *See* Restatement (Second) of Contracts § 355 (1981).

[26] 36 Cal.3d at 770.

[27] *See*, e.g., 2 Palmer, Law of Restitution, §§ 9.3, 9.7 (1978 and Supp. 1982).

[28] The Supreme Court of Oregon recently made clear that *Adams v. Crater Well Drilling, Inc., supra*, n.23, is a tort case, not a contract case. *Davis v. Tyee Industries*, 295 Or. 467, 668 P.2d 1186 (1983). It bears noting that the court in *Seaman's* recognized a new tort of "stonewalling" and avoided ruling that the tort results from a breach of the implied covenant of good faith and fair dealing. Even in the insurance cases, it has been a minor mystery just why it is that breach of a contract obligation becomes a tort. The courts have had no little difficulty explaining or containing this theory. *See* Ashley, *supra*, n.5, Chapter 11, and *passim* (tracing history of the implied covenant and critically analyzing its development); Kornblum, *supra*, n.5; Diamond, *supra*, n.7.

[29] 36 Cal.3d at 775 (separate opinion). Although this comment concentrates on the majority opinion, the view here expressed that it is premature to turn to tort remedies and punitive damages before utilizing the resources of contract law would apply as well to the separate opinion. Space does not permit separate critical analysis of that opinion. *See* Ashley, *supra*, n.5 at § 11.15.

[30] *E.g., Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818, 620 P.2d 141, 169 Cal.Rptr. 691 (1979); *Crisci v. Security Ins. Co.*, 66 Cal.2d 425, 429, 426 P.2d 173, 58 Cal.Rptr. 13 (1967); *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198 (1958); *Brown v. Superior Court*, 34 Cal.2d 559, 564, 212 P.2d 878 (1949); Restatement (Second) of Contracts § 205; (1981); Cal. Comm. Code § 1203. *Compare* Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810 (1982); *with* Burton, *Breach of Contract and The Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980) *and* Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497 (1984).

Continued from page 11

tinctions, particularly since the court provided no guidance for implementing the idea that denying a contract relationship should be treated more severely than denying a contract obligation. Consider the following defense to a claimed employment or requirements contract: "I agreed to an indefinite term, terminable on reasonable notice, not to a five year term." Does that statement admit a contract and merely deny its scope or does it deny the existence of a contract, one with a five-year term? "Stonewalling" in any form, whether by denying a contract or denying a particular obligation under a contract arguably may become tortious behavior as the court's theory is developed in litigation.

Consider also an agent's claim for commissions payable out of the net proceeds from sales of the principal's equipment in the territory. Is a defense in bad faith that "net proceeds" excludes sales by the principal itself, or that the item sold was not "equipment" or that the place of delivery was not in the "territory" only a matter of interpretation or, especially if incautiously phrased—"we never contracted for that"—does it become a denial of a contract? Artful pleadings setting forth additional causes of action for the bad faith denial of a contract's existence are already beginning to appear in the trial courts. As these cases proceed, we may see a refined body of doctrine develop, akin to the old forms of action, drawing nice distinctions between contract existence issues and interpretation and performance issues. To what end?

Apart from damages and other remedies, the critical issues in contract law concern formation, interpretation, performance, the rights of third parties, and, in some cases, unconscionability.[31] These issues are frequently interrelated. Treating the formation of contract issue differently from the others by placing it in the arena of tort liability and punitive damages seems likely to distort the law, the way that contracts are entered into, interpreted and performed, and the way that contract disputes are negotiated and litigated. It may also weaken and facilitate evasion of the statutory rule that punitive damages are not available for breach of contract.[32]

An Alternative Approach: Amplified Contract Damages For Bad Faith Breach

It is possible to look beyond the immediate difficulties of the *Seaman's* case and to interpret the case more generously. The decision may be read as a signal that the court is concerned about bad faith conduct by contracting parties, is not prepared to go so far as to convert every claim of bad faith breach into a claim for tort liability and punitive damages, but is willing to consider ways of imposing more than ordinary contract liability in appropriate cases. The "by the court" authorship of the opinion and the long period of twenty-seven months the court took to decide the case may reflect an intellectual struggle that yielded only a majority of votes for a result, not any agreement on the rationale for developing the law coherently.

When Robert Frost wrote of mending a wall, he asked to know what he "was walling in or walling out."[33] The court has not resolved that question in looking askance at a so-called "stonewall" in the field of contracts. What is the *ratio decidendi* for walling in or walling out? It might better serve the future of contractual relations to make reasonable adjustments in the serviceable walls of contract law than to make mischief with a rockpile in a hit or miss game of punitive damages.

With this perspective, I would like to venture some suggestions for consideration by lawyers, the courts, the Law Revision Commission, and the Legislature:

The central question is whether compensatory damages for breach of contract should be amplified in appropriate cases, especially when the breach is in bad faith. A crucial related question is whether punitive damages should ever be permitted in such cases.

If judges, legislators, and lawyers focus on the adequacy of compensation for breach of contract, they will be focusing on the central problem.[34] Spending energy and refined analysis on whether a breach of contract is also or alternatively a tort diverts attention from this central economic problem, results in an unproductive search for an elusive rationale, creates opportunities for clever pleading and position-taking strategems, stimulates litigation over categories such as "special relationships" and "denial of the existence of a contract," and encourages evasion of the present statutory mandate that punitive damages are not available for breach of contract.

There are several ways in which damages for bad faith breach of contract could be amplified to yield an adequate compensatory award without radically altering the existing framework of contract law:

First, the *Hadley v. Baxendale* rule that consequential damages are limited to those in contemplation of the parties when the contract was made could be relaxed in accordance with the current trend; both the applicable statutory language and existing case law support compensatory damages that go beyond that limit

Continued on page 13

[31] *See* Eisenberg, *supra,* n.19.

[32] Cal. Civ. Code § 3294.

For historical review and analysis of the policies involved, *see* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change,* 61 Minn. L. Rev. 207 (1977).

[33] *See* Frost, Mending Wall, in Collected Poems 47 (Holt, Rinehart & Winston 1964).

[34] *See, e.g.,* Cal. Civ. Code §§ 3306, 3307 (for breach of real estate sales contracts, allows consequential damages and interest).

A Comment on the *Seaman's* Case . . .

Continued from page 12

and that approach or are comparable to compensatory damages in tort cases.[35]

Second, contractual limitations on the amount of damages or on the availability of consequential damages could be denied enforcement or circumscribed; doing so would provide a second look, at the damages phase, at clauses whose mere existence might not cause the bargain to be unconscionable but whose enforcement in a bad faith case could produce an unconscionable result.[36]

Third, the present discretion of courts to award prejudgment interest when the amount of the liability is not certain could be exercised more broadly to ameliorate the loss of opportunity and delay that results from the breach.[37]

Fourth, by legal rule and jury instruction, trial courts and juries could be encouraged as well as guided in bad faith cases to award a higher rather than a lower compensatory award within the leeways and the range of uncertainty that presently exist in the law of contract damages; such a development would recognize what now occurs frequently, although ad hoc, in practice.[38]

Fifth, in appropriate cases, a court could consider invoking principles of restitution and unjust enrichment to take away the profits resulting from a bad faith breach and award them to the party whose expectations were destroyed.[39]

The foregoing suggestions are by no means exhaustive; there may be additional opportunities for rationally developing the resources of contract law to improve compensatory damages when a contract is broken in bad faith.[40]

The exposure to punitive damages should be strictly curtailed, if not eliminated, in commercial breach of contract cases and the present legislative judgment should be respected that punitive damages are not available for breach of contract.[41] Exposing contracting parties to punitive damages injects excessive uncertainty into an area of law intended in part to promote certainty of expectations and inhibits commercial decisions such as the "efficient" although intentional breach of contract that may result in a gain to the economy.[42] Given the reality that a breach of contract is frequently a breach of faith (although not necessarily in bad faith) and that contract law traditionally permits intentional breaches at the risk of paying dam-

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[35]Cal. Civ. Code §§ 3300 provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

See Overstreet v. Merritt, 186 Cal. 494, 505, 200 Pac. 11, 16 (1921); Harris & Graham, *A Radical Restatement of the Law of Seller's Damages: California Results Compared,* 18 Stan. L. Rev. 553, 554 n.8 (1966) (historical note on Cal. Civ. Code § 3300). For insurance cases, *see, e.g., Silberg v. California Life Ins. Co.,* 11 Cal.3d 452, 460-462, 521 P.2d 1103, 1108-1110, 113 Cal.Rptr. 711, 716-718 (1974); Diamond, *supra,* n.7, 64 Marq. L. Rev. at 434 n.38. *Compare* Note, *Moral Damages for Breach of Contract: The Effect on Recovery of an Obligor's Bad Faith,* 42 La. L. Rev. 282 (1981) (discussing Louisiana law).

[36]*Cf.* Samuels, *The Unconscionability of Excluding Consequential Damages Under the Uniform Commercial Code When No Other Meaningful Remedy is Available,* 43 U. Pitt. L. Rev. 197, 245-246 (1981); Cal. Civ. Code § 1670.5(a); Cal. Comm. Code § 2719(3); *see* Eisenberg, *supra,* n.19.

[37]Cal. Civ. Code § 3287(b). *See* Note, *Prejudgment Interest: Survey and Suggestions,* 77 Nw. U. L. Rev. 192 (1982); Note, *Prejudgment Interest: An Element of Damages Not to be Overlooked,* 8 Cumb. L. Rev. 521 (1977).

[38]*See Farber, Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract,* 66 U. Va. L. Rev. 1443, 1473 (1980); 5 Corbin, *Contracts,* § 1077 at 440 (1964); *cf.* Farnsworth, *Legal Remedies for Breach of Contract,* 70 Colum. L. Rev. 1145, 1175 (1970) (jury discretion to fix reasonable damages between the market value differential and the cost of completion); *Donahue v. United Artists Corp.,* 2 Cal. App. 3d 794, 804, 83 Cal. Rptr. 131 (1969) (party who willfully breaches bears risk of uncertainty or difficulty of computing damages).

[39]*See* Farber, n.38, *supra* 66 U. Va. L. Rev. at 1449 n.27 and 1455 n.46; 1 Palmer, *Law of Restitution,* § 4.9; Friedmann, *supra,* n.8, 80 Colum. L. Rev. at 515-527 (1980); Simon & Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts,* 92 Harv. L. Rev. 1395, 1437 (1979); Jones, *The Recovery of Benefits Gained from a Breach of Contract,* 99 Law Q. Rev. 443 (1983); *cf. Snepp v. United States,* 444 U.S. 507 (1980).

[40]*See* Farber, *supra,* n.38, 66 U. Va. L. Rev. at 1470-1473 ("when repair or completion costs exceed market value loss, many courts award the higher measure of damages if the breach was willful"); Yorio, *In Defense of Money Damages for Breach of Contract,* 82 Column. L. Rev. 1365, 1391-92, 1408-13 (1982); *cf. United States v. Behan,* 110 U.S. 338 (1884) (reliance losses).

Modification of the general rule that attorney's fees are not available unless provided for by express covenant or statute might also be considered. *See* Cal. Code Civ. Proc. § 1021; Cal. Civ. Code § 1717.

[41]Cal. Civ. Code § 3294. *See* Restatement (Second) of Contracts § 355 (1981). *See generally,* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach,* 31 Hastings L. J. 639 (1980); *Symposium: Punitive Damages,* 56 So. Calif. L. Rev. 1-203 (1982). Even in the tort and insurance cases, punitive damages awards have created much controversy. Does the court really wish to open up new areas for comparable controversy in relationships such as vendor and purchaser, lender and borrower, owner and contractor or architect, trustee and beneficiary, landlord and tenant, attorney and client, doctor and patient, or even husband and wife (notwithstanding "no-fault" dissolution)?

[42]*See* Farber, *supra,* n.38, *passim,* for discussion of the "efficient" breach theory and citations to relevant authorities; Note, *Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics,* 97 Harv. L. Rev. 978 (1984). How would the court deal with a party who admits that a contract exists but adamantly refuses to perform it?

Continued from page 13

ages,[43] the introduction of punitive damages to contract cases will undermine the nonfault premises of contract law, impede negotiated settlements of disputes, and stimulate litigation. Moreover, as adequate compensatory damages become available, any purported need for punitive damages should be correspondingly reduced. Increased awards of compensatory damages in bad faith breach of contract cases are in accord with developing trends in contract law;[44] they are limited by the well-established principle of compensation; and they should not unduly upset the commercial expectations of contracting parties. By contrast, punitive damages are a rare occurrence in contract cases not involving insurance;[45] they are not limited except by vague concepts of punishment, net worth of the defendant, and some indefinite relationship to compensation;[46] and they bring volatility to an area that is meant to function with stability. Why should courts and juries be able to award punitive damages in contract cases when the parties themselves are foreclosed from providing for penalties and forfeitures?[47]

Let us test this contract-oriented approach by applying it to the *Seaman's* case. The jury verdict awarding compensatory damages of less than $400,000 on the breach of contract claim but over $1.5 million on the interference claim indicates that Seaman's suffered substantial and foreseeable economic losses and that the breach of contract award may have been inadequate. The jury's implicit finding of malice or oppression underlying its award of punitive damages reflects a serious issue of bad faith. Although punitive damages should not be available, an opportunity to obtain an adequate award of compensatory damages should be available. One party should not be able through a bad faith breach to put the other in such distress that it is forced out of business without full recovery in contract. The court accordingly might have remanded the case for retrial on compensatory damages under instructions that would have authorized the jury to grant a larger award, not limited by *Hadley v. Baxendale*, if it found that Standard breached its implied covenant of good faith and fair dealing. Prejudgment interest should also be available.

If the alternative of gradually expanding compensatory damages does not deter bad faith breaches of contract and if serious uncompensated losses continue to result from such breaches, then it may be appropriate for courts to begin articulating principles of tort liability and attendant punitive damages. It seems premature at this juncture, however, to move in that direction without first exploring the possibility of improving contract damage rules in contract cases.

Conclusion

The court struggled to meet the growing challenge that existing principles of contract law may not afford adequate compensation for breach of contract, particularly when the breaching party has acted in bad faith. It did so, however, not by reexamining those principles and addressing the problem at its roots, but by confirming the existing tort category of special relationship cases such as insurance and creating a separate tort category of the denial of a contract's existence, in bad faith and without probable cause. Although the court was concerned and cautious, appropriately so, about introducing the risk of punitive damages into commercial transactions, it nonetheless enlarged that risk via these categories. In doing so, it undermined the statutory mandate that punitive damages are not available for breach of contract. The alternative of allowing the law of contract damages to grow in a commercially reasonable way that improves the prospect of adequate compensatory awards, not discussed by the court, remains to be developed. The case was a difficult one and although the court did not resolve the central issue of compensation in bad faith cases or address it in a compelling way, it did recognize the need for clarifying the law of intentional interference with contract. Perhaps with its next bad faith breach of contract case, the court can advance the law within the context of reasonable contract principles, curbing the unseemly growth of punitive damages in commercial settings while also assuring an adequate award.

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[43]*See Iron Mountain Sec. Storage Corp. v. American Specialty Foods, Inc.*, 457 F.Supp. 1158 (E.D. Pa. 1978), discussed in Diamond, *supra*, n.7, 64 Marq. L. Rev. at 432; Holmes, The Common Law 236 ([1881] Howe ed. 1963); Gilmore, The Death of Contract 14-16 (1974).

[44]*See* notes 1, 34-40, *supra*.

[45]*See* Ashley, *supra*, n.5; Kornblum, *supra*, n.5; Diamond, *supra*, n.7.

[46]*See* n.41, *supra*.

[47]Cal. Civ. Code §§ 1671, 3275, 3358, 3359; Cal. Comm. Code § 2718.

Memo 85-94 Exhibit 13

County Recorders' Association of the State of California

Vera L. Lyle • P.O. Box 1750 • San Diego, CA 92101 • (619) 236-3255

January 10, 1985

Mr. John R. DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite 2
Palo Alto, California 94303

Dear Mr. DeMoully:

This is in regard to obsolete sections of the Government Code affecting county recorders.

Sections 27371 and 27375 are no longer used by county recorders. Section 27371, which allows for the computation of fees for copying a map, is no longer applicable since recorders now exclusively use some type of photocopy method. Section 27375 also needs to be repealed since recorders no longer are permitted to take acknowledgments of instruments since Civil Code Section 1181 was amended about three years ago.

This Association would appreciate your assistance in reviewing these sections for possible repeal.

Please let me know if you have any questions.

Very truly yours,

DICK HUGHES
Co-Chairman, Legislative Committee
227 North Broadway, Suite 35
Los Angeles, CA 90012
(213) 974-6603

ao
cc: Board of Directors
Legislative Committee
Leesa Speer

Memo 85-94

Exhibit 14

HICKS & NOLAN
attorneys at law

DAVID HICKS
a professional corporation
THOMAS J. NOLAN
CHRISTOPHER VALLE-RIESTRA

WATERGATE TOWER SUITE 370
1900 POWELL STREET
OAKLAND, CALIFORNIA 94608
TELEPHONE (415) 652-1333

March 14, 1985

California Law Revision Commission
1303 J Street
Suite 600
Sacramento, California 95814

Gentlemen:

In the course of a wide-ranging practice involving much civil litigation, one from time to time runs across errors or ambiguities in the wording of California statutes. I would like to bring to your attention three areas of the law relating to civil litigation that, in my opinion, require revision. They involve technical oversights that have left difficulties of interpretation resulting in disputes affecting my practice. Please consider the appropriateness of proposing legislation to cure these ambiguities.

1. **Subpenas of peace officers.**

The first problem relates to the requirement that a party issuing a subpena on any one of a class of specified peace officers to reimburse the officer's salary and actual expenses, and follow other special procedures relating to such subpenas. These statutes were originally enacted as Government Code §§68097.1, 68097.2, 68097.3, 68097.4, and 68097.5, by Stats. 1963 ch. 1485. All these sections originally applied only to peace officers within certain traditional police agencies. A 1980 amendment to §68097.2 expanded the definition of peace officer under that section so that if included all peace officers specified in Penal Code Part 2, Title 3, including, for example, a designated officer of the Division of Labor Standards Enforcement. The Legislature's intent appears to have been to require reimbursement of salary and an advance deposit as security upon the issuance of a subpena for the attendance of any peace officer, as defined in the Penal Code. Unfortunately, the language of the amendment failed to accomplish that purpose (and I have obtained a court ruling to that effect). Section 68097.2 requires such a reimbursement only in case of "a subpoena issued pursuant to Section 68097.1". Section 68097.1 was not amended, and describes only the more restrictive class of peace officers included in the original 1963 act. Thus, §§68097.1 and 68097.2 continue to apply only to subpenas issued for the attendance of employees of the Department of Justice, CHP, State Fire Marshal, or a Sheriff, Marshall, fire department or city police department.

Perhaps the Legislature only intended the expanded definition of "peace officer" to apply to deposit of the first day's expenses. If so, only an amendment to §68097.2 is necessary. If, on the other hand, the Legislature also intended to expand the definition for the purposes of method of service of the subpena and deposit of additional days' witness fees, amendments to §§68097.1 and 68097.5, conforming the definitions, will also be necessary.

2. Defaults in civil actions.

The law relating to relief from defaults in civil actions has grown piecemeal since 1872. The original statute on the subject, CCP §473, has been amended several times. In 1969, the Legislature added CCP §473.5, relating to relief where service of the summons has not resulted in actual notice to defendant. CCP §587 contains provisions regarding service of an application for entry of default.

Section 473 generally allows relief from default or default judgment where taken against a party "through his or her mistake, inadvertence, surprise or excusable neglect." The statute places an absolute deadline for an application for such relief at six months after the entry of default or default judgment. Furthermore, case law makes it clear that a court may not grant relief from a default judgment in any case in which the underlying default occurred more than six months before the application; such relief is viewed as useless, standing alone, because unless the underlying default is removed, the defendant will not be entitled to answer and defend the action.

CCP §473.5 allows a somewhat greater period for relief from a default or default judgment where service of the summons has not resulted in actual notice to the defendant. An application for relief in such a case may be made up to two years after the entry of an actual judgment. However, if plaintiff serves a written notice on defendant of the entry of a default or default judgment, the defendant must bring a motion to set aside that proceeding within 180 days thereafter.

The difficulty in interpreting the relationship of these two sections comes about in determining what form of "written notice" commences the running of the 180-day period for a motion under CCP §473.5. I have seen it seriously asserted in Superior Court that the only effective form of notice is one that itself results in actual notice to the defendant. On the other hand, it can plausibly be argued that the mailing of an application to enter default (pursuant to CCP §587) is sufficient to start the 180 days running, at least so long as the address to which it is mailed is a valid address of the defendant. It has been held that the purpose of CCP §587 is to prevent surprise to litigants, so it would seem the mailing required by it should be given some effect in limiting a defendant's time to respond. Upon a proper application to enter default, such entry is a ministerial act of the clerk; notice of the application should thus be deemed the equivalent of notice of the entry of default.

I suggest that, as presently written, CCP §473.5 is unworkable in practice. No one can tell just what sort of notice will trigger the 180-day period. If only actual notice will suffice, the two-year outside period will be the only effective limit in almost every case. In those rare cases where plaintiff is able to prove that the notice of entry of default has resulted in actual notice to defendant, even though service of the summons did not, the "reasonable time" language would surely bar a motion to set aside default within a short period, certainly within the 6 months allowed on grounds of "excusable neglect" under §473. Thus, according to this scenario, the six-month limitation of §473.5(a)(ii) would never come into play. Surely the Legislature did not intend such a result. It must have seen the "written notice" needed to invoke the six-month limit as something less than actual notice. Just what notice it intended to be effective is not clear.

Amendments are badly needed to clarify what sort of notice will suffice. I suggest a notice mailed, or otherwise delivered as provided for by the statutes regarding service generally, to a true business or residence address of defendant should be sufficient. If defendant alleges that, by misfortune, the notice was not given to him by whomever physically received the notice, such an allegation is beyond the capability of the typical plaintiff to disprove; plaintiff should not be penalized if such an event transpires, for typically it will have been the result of defendants' negligence in failing to make suitable arrangements for mail handling at his home or place of business.

Also, the law should specify that proper service of the application for Entry of Default pursuant to CCP §587 is to be deemed sufficient notice of entry of the default within the meaning of §473.5.

All of this should be part of a comprehensive rearrangement of the provisions regarding entry of default and relief therefrom. The present sections are scattered and confusing to read.

3. Enforcement of judgments law.

Finally, several sections of the Enforcement of Judgments Law contain cross-references to §§693.010-693.060, which were repealed in 1984. Conforming amendments are needed.

I hope these suggestions assist your work. The Law Revision Commission has done much to make the lawyer's work easier. We rely heavily on your continued efforts.

Very truly yours,

Chris Valle-Riestra

CHRISTOPHER P. VALLE-RIESTRA

CVR:lmh

JACK E. COOPER
ATTORNEY AT LAW
225 BROADWAY, SUITE 1500
SAN DIEGO, CALIFORNIA 92101
(619) 232-4625

December 14, 1984

California Law Revision Commission
4000 Middlefield Rd., Ste. D-2
Palo Alto, CA 94306

Re: Business & Professions Code, section 6068 (d) & (e)

Gentlemen:

The above referenced code provisions provide:

"It is the duty of an attorney:
. . . .
(d) to employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client.
. . . ."

The December issue of the California Lawyer contains an article ETHICS Perjury In Civil Cases concerning the action to be taken by attorneys when they discover their clients have been giving false testimony. The article seems to indicate that if all else fails, the attorney should disclose the perjury to the court.

Formal Opinion No. 386 of the Los Angeles County Bar considers the same question and concludes the attorney must not disclose the perjury.

It seems clear that when a client commits perjury the attorney must elect to abide by one or the other of the above-referenced code provisions, but at the same time will be violating the other. If you read the L.A. County Opinion No. 386 you will quickly see that there is a wide diversity of opinion as to what the attorney is to do. I respectfully submit that it is something that should properly be resolved by legislative action. An legislative action should be with regard to both civil and criminal matters, although they do not necessarily have to be the same.

Very truly yours,

Jack E. Cooper

Jack E. Cooper

Sugg. federal lien

November 14, 1984

David R. Frank
Deputy County Counsel
County of Shasta
1558 West Street
Redding, CA 96001

Dear Mr. Frank:

You wrote on October 18 concerning the statutory provisions that apply to an action to set aside a sale of real property made to satisfy a judgment (CCP §§ 701.680 and 701.630). The Commission considered your letter at its November 9 meeting.

The Commission decided to make the amendment you suggest in Section 701.680 to make clear that the judgment debtor is the one that can bring an action to set aside an execution sale. The amendment will be made in a bill the Commission plans to arrange to have introduced at the 1985 legislative session to make technical revisions in the Enforcement of Judgments Law.

The second problem you identify in your letter is whether the liens of junior creditors should be restored when an execution sale is set aside. The Commission believes that this matter should be reviewed when time permits. However, the Commission is now devoting its time and resources almost exclusively to the drafting of an entire new Probate Code. The Commission plans to complete its work on the new code in time for the 1986 session of the Legislature.

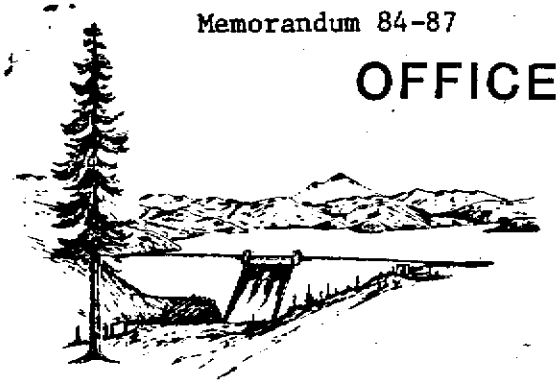
We appreciate your taking the time to write to us concerning these problems under the Enforcement of Judgments Law. The Commission does assume the responsibility of reviewing the experience under statutes enacted upon its recommendation. Unfortunately, we cannot study your second problem at this time.

Sincerely,

John H. DeMoully
Executive Secretary

JHD:jcr

bc: Edwin K. Marzec



OFFICE OF COUNTY COUNSEL

COUNTY OF SHASTA

1558 West Street
Redding, California 96001
(916) 246-5711

JOHN SULLIVAN KENNY
COUNTY COUNSEL

DEPUTY COUNTY COUNSEL
DAVID R. FRANK
KAREN KEATING JAHR
SUSANNA CUNEO

October 18, 1984

John H. DeMoully
Executive Secretary
California Law
Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Re: Action to Set Aside Sale of Real Property Made to Satisfy Judgment - CCP §§701.680 and 701.630

Dear Mr. DeMoully:

Recently this office encountered an ambiguity regarding the above code sections, enacted as portions of the Enforcement of Judgments Law. The first sentence of paragraph (1) of subdivision (c) of section 701.680 states that an action may be commenced within six months after an execution sale to set aside that sale if the purchaser is the judgment creditor. The ambiguity is that the paragraph does not identify who may bring such an action.

Our problem arises from a civil case in San Mateo Superior Court in which defendant defaulted and plaintiff, represented by counsel, proceeded to compel the sale of the defendant's property in Shasta County. At the sale, plaintiff, as judgment creditor, bid an even $43,000, about $350 more than was required for the judgment creditor to break even. The judgment creditor credited all of the judgment against the purchase price, leaving the $350 "overage" to be paid to the sheriff for transmission to the judgment debtor. Now, two months after the sale, the sheriff has been served with an order to show cause issued out of the San Mateo Superior Court as to why the sale should not be set aside because of irregularity in the sale proceedings. Note that the order to show cause was issued in the same action - in which the sheriff is not a party - and was obtained by the judgment creditor not the judgment debtor. The allegation in the application for the order to show cause is that the sheriff somehow mislead the judgment creditor into believing that the judgment creditor had to bid some amount higher than the amount of his judgment.

It appears to us that the statute does not contemplate any such action by a judgment creditor. Rather, the provision appears to exist solely for the benefit of the judgment debtor. (The judgment creditor, having chosen to enforce his judgment by forced

sale, and having further chosen to bid in the judgment amount plus cash, is hardly in a position to complain about "irregularities". Moreover, an action to set aside a sale appears to be wholly separate from the action in which the judgment sought to be enforced was originally obtained. Hence, the use of the order to show cause procedure against the sheriff and the judgment debtor appears to be unauthorized by statute.) This reading of paragraph (1) is consistent with the provision of paragraph (2) of this subsection which permits only a judgment debtor to recover damages for impropriety in the sale.

Assuming that I'm not misunderstanding the Enforcement of Judgments Law, I suggest that this paragraph be amended to read:

> "An action may be commenced by the judgment debtor within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor. . . . . "

The second problem involves the construction of the second sentence of paragraph (1) of subdivision (c) of Section 701.680. It provides that if the sale is set aside, the judgment is revived to reflect the amount that was satisfied from the proceeds of the sale. The judgment creditor is entitled to interest on the amount of the judgment, as if there had been no sale. This sentence does not address the revival of any liens extinguished by operation of section 701.630. Unless I (again) misunderstand something in the Enforcement of Judgments Law, I would suggest that this sentence be amended to read:

> "~~Subject to paragraph (2), if the sale is set aside,~~ If the sale is set aside, (i) all liens extinguished by operation of Section 701.630 are revived as if the sale had not been made, and (ii) subject to paragraph (2), the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the revived judgment as ~~so revived~~ as if the sale had not been made."

The thoughts of you or your staff on these suggestions would be appreciated. Thank you for your time and consideration.

Very truly yours,

DAVID R. FRANK
Deputy County Counsel

DRF:je