Note. Changes may be made in this Agenda. For meeting information, please call John DeMoully (415) 494-1335

ad4
01/05/88

Time	Place
Jan. 14 (Thursday) 1:30 p.m. - 6:00 p.m.	Hyatt at LAX
Jan. 15 (Friday) 9:00 a.m. - 2:00 p.m.	6225 West Century Blvd.
	Los Angeles
	(213) 670-9000

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles January 14-15, 1988

1. Minutes of December 10, 1987, Commission Meeting (sent 12/21/87)

Adoption of Report of Subcommittee

2. Meeting Schedule

The 1988 meeting schedule is attached. The staff suggests that the meetings not be held in February, April, and June 1988 so that the staff can work on the technical aspects of the new Probate Code the Commission wishes to recommend for enactment in 1989. We further suggest that the May meeting be scheduled for Sacramento.

3. Recommended 1988 Legislation

Cleanup Bill for AB 708 (Urgency Bill)

Memorandum 88-1 (sent 12/21/87)
Printed Bill (to be sent)
First Supplement to Memorandum 88-1 (sent 12/30/87)
Memorandum 87-106 (sent 12/21/87)

Bill to Effectuate Recommendations to 1988 Legislature

Memorandum 88-2 (sent 12/21/87)
Printed Bill (to be sent)
First Supplement to Memorandum 88-2 (sent 12/30/87)

Transitional Provisions for 1988 Bill

Memorandum 88-3 (sent 12/31/87)

4. **Study L-831 - Recording of Personal Property Affidavit in Office of Recorder**

Memorandum 88-4 (sent 12/30/87)

5. **Study L-1060 - Multiple Party Accounts (Review of Staff Draft of Tentative Recommendation)**

Memorandum 87-90 (sent 11/25/87)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 87-90 (sent 12/23/87)

6. **Study L-636 - No Contest Clause (Policy Issue Determination)**

Memorandum 87-44 (sent 6/2/87)
First Supplement to Memorandum 87-44 (sent 7/30/87)
Second Supplement to Memorandum 87-44 (sent 10/02/87)
Third Supplement to Memorandum 87-44 (enclosed)

7. **Study L-707- Misuse of Conservatorship Funds (Policy Issue Determination)**

Memorandum 87-105 (sent 12/23/87)
First Supplement to Memorandum 87-105 (to be sent)

8. **Study L-1036 - Attorney Fees (Policy Issue Determination)** **SPECIAL ORDER OF BUSINESS AT 9:00 A.M. ON FRIDAY, JANUARY 15**

Memorandum 87-100 (sent 12/15/87)
First Supplement to Memorandum 87-100 (enclosed)
Second Supplement to Memorandum 87-100 (enclosed)
Third Supplement to Memorandum 87-100 (enclosed)

9. **Study L-1055 - Fees of Personal Representative (Policy Issue Determination)** **SPECIAL ORDER OF BUSINESS AT 9:00 A.M. ON FRIDAY, JANUARY 15**

Memorandum 87-107 (sent 12/15/87)
First Supplement to Memorandum 87-107 (to be sent)
Second Supplement to Memorandum 87-107 (to be sent)

10. **Study L-940 - Fiduciaries' Wartime Substitution Law (Draft of Tentative Recommendation)**

Memorandum 87-78 (sent 10/02/87)
Draft of Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 87-78 (sent 11/09/87)

11. Administrative Matters

Topics and Priorities for 1988 and Thereafter

Memorandum 87-101 (sent 11/25/87)
First Supplement to Memorandum 87-101 (sent 12/02/87)
Second Supplement to Memorandum 87-101 (sent 12/03/87)
Third Supplement to Memorandum 87-101 (sent 12/21/87)
Fourth Supplement to Memorandum 87-101 (enclosed)

Communications from Interested Persons

ad7
12/14/87

MEETING SCHEDULE

January 1988		
14 (Thursday)	1:30 p.m. - 6:00 p.m.	Hyatt at LAX
15 (Friday)	9:00 a.m. - 2:00 p.m.	6255 West Century Blvd. Los Angeles (213) 670-9000
February 1988		
18 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
19 (Friday)	9:00 a.m. - 2:00 p.m.	
March 1988		
10 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
11 (Friday)	9:00 a.m. - 2:00 p.m.	
April 1988		
14 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
15 (Friday)	9:00 a.m. - 2:00 p.m.	
May 1988		
12 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
13 (Friday)	9:00 a.m. - 2:00 p.m.	
June 1988		
9 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
10 (Friday)	9:00 a.m. - 2:00 p.m.	
July 1988		
14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	
August 1988		
No meeting		
September 1988		
8 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
9 (Friday)	9:00 a.m. - 2:00 p.m.	
October 1988		
13 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
14 (Friday)	9:00 a.m. - 2:00 p.m.	
November 1988		
17 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
18 (Friday)	9:00 a.m. - 2:00 p.m.	
December 1988		
8 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
9 (Friday)	9:00 a.m. - 2:00 p.m.	

STATUS OF COMMISSION STUDIES
(as of December 10, 1987)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
L-636	No Contest Clause	•••	[1/88]			
L-655	Inventory & Appraisal	•••	•••	•••	5/87	10/87
L-706	Temporary Guard'n & Cons'r	9/87	10/87	No TR Sent		10/87
L-940	Fiduciary's Wartime Subst'n	•••	9/87	[1/88]		
L-1010	Opening Estate Admin.	•••	•••	•••	9/87	10/87
L-1024	Interest & Income	•••	•••	9/87	11/87	«12/87»
L-1025	Litigation with Decedents	•••	•••	7/87	10/87	11/87
L-1027	Accounts	•••	•••	7/87	10/87	11/87
L-1029	Distribution & Discharge	•••	•••	•••	9/87	«12/87»
L-1036	Probate Attorneys' Fees	8/87	[1/88]			
L-1038	Abatement	•••	•••	7/87	10/87	11/87
L-1040	Public Guardians & Admins	•••	•••	•••	•••	9/87
L-1046	Nondomiciliary Decedents	•••	•••	•••	9/87	«12/87»
L-1048	Rules of Procedure	•••	•••	7/87	10/87	11/87
L-1055	Personal Rep's Fees	10/87	[1/88]			
L-1058	Filing Fees in Probate	9/87	9/87	No TR Sent		10/87
L-1060	Multiple Party Accounts	•••	[1/88]			
L-2006	Misc Provisions in Div. 3	•••	•••	No TR Sent		9/87
L-2007	Conforming Changes Div. 3	10/87	12/87	No TR Sent		«12/87»
L-2008	Probate Cleanup Bill	•••	9/87	No TR Sent		«12/87»
	Annual Report	9/87	11/87	No TR Sent		11/87

[date] = scheduled for consideration
«date» = subcommittee approval
••• = date not available

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 14-15, 1988

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on January 14-15, 1988.

Commission:

Present: Ann E. Stodden, Chairperson; Roger Arnebergh; Bion M. Gregory, Legislative Counsel (Jan. 14); Arthur K. Marshall; Forrest A. Plant, Vice Chairperson

Absent: Elihu M. Harris, Assembly Member; Bill Lockyer, Senate Member; Edwin K. Marzec; Tim Paone; Vaughn R. Walker

Staff:

Present: John H. DeMoully; Nathaniel Sterling; Stan G. Ulrich; Robert J. Murphy III

Consultants:

None

Other Persons:

Josephine D. Barbano, American Association of Retired Persons, San Diego (Jan. 15)
Edward V. Brennan, California Probate Referees' Association, San Diego
Charles Collier, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Jan. 15)
Irwin D. Goldring, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Jan. 15)
Susan T. House, Executive Committee, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles (Jan. 15)
Beatrice Lawson, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (Jan. 15)
David E. Lich, Legislative Committee, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section (Jan. 14)
Richard Lubetzky, Cal Justice, Los Angeles (Jan. 15)
Valerie J. Merritt, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles (Jan. 14)

Charles Moose, HALT of San Diego, San Diego (Jan. 15)
L. Bruce Norman, California Bankers Association, Los Angeles (Jan. 15)
Kenneth Petrulis, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Beverly Hills
Richard Stack, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles (Jan. 15)
E. Kay Trout, California Probate Referees' Association, Los Angeles

ADMINISTRATIVE MATTERS

MINUTES OF December 10, 1987, MEETING (APPROVAL OF SUBCOMMITTEE REPORT)

The Commission approved the minutes of the December 10, 1987, Commission meeting without change and ratified actions taken by the subcommittee at that meeting.

MEETING SCHEDULE

The meeting schedule for 1988 was revised as follows.

February 1988
No meeting

March 1988

10 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
11 (Friday)	9:00 a.m. - 2:00 p.m.	

April 1988
No meeting

May 1988

5 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
6 (Friday)	9:00 a.m. - 2:00 p.m.	

June 1988
No meeting

July 1988

14 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
15 (Friday)	9:00 a.m. - 2:00 p.m.	

August 1988
No meeting

September 1988

8 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
9 (Friday)	9:00 a.m. - 2:00 p.m.	

October 1988

27 (Thursday)	1:30 p.m. - 6:00 p.m.	Sacramento
28 (Friday)	9:00 a.m. - 2:00 p.m.	

November 1988

No meeting

December 1988

1 (Thursday)	1:30 p.m. - 6:00 p.m.	Los Angeles
2 (Friday)	9:00 a.m. - 2:00 p.m.	

TOPICS AND PRIORITIES FOR 1988 AND THEREAFTER

The Commission considered Memorandum 87-101 and the First, Second, Third, and Fourth Supplements thereto, relating to topics and priorities for 1988 and thereafter. The Commission decided not to request authority in 1988 to study any new topics. Of the existing topics on the Commission's agenda, the following should be given priority.

(1) Completion of work on the new Probate Code.

(2) Uniform rules governing anti-lapse and related matters for wills, trusts, and other donative transfers.

(3) Creditor rights against nonprobate assets might be given priority. In order to avoid duplication of effort, the staff should check with the special State Bar team working on creditor rights against trust assets to see whether they will be expanding the scope of their study.

(4) The Uniform Management of Institutional Funds Act should be investigated to determine why it was initially restricted in its application and whether its scope should be expanded. Commissioner Gregory agreed to look into the background of the enactment of the act in California.

(5) Revisiting the Commission's prior recommendation to apply the Uniform Simultaneous Death Act to deaths that occur within 120 hours of each other in the case of intestacy.

(6) Modification of the ancestral property doctrine, possibly to limit it to real property and to eliminate tracing.

(7) The staff should work into the agenda other of the probate back burner projects as staff and Commission time permits.

(8) The commercial lease law study should be activated as soon as the consultant's background study is received.

(9) The creditors' remedies issues of applicability of sanctions in an examination of a judgment debtor, jurisdictional limits on enforcement of a sister state judgment, and revival of junior creditor liens where an execution sale is set aside, should be worked into the agenda when time is available.

(10) A consultant should be retained to prepare an analysis of the possible scope of a background study on administrative law.

(11) The staff should try to work on the issue of disposition of marital property for Commission consideration in 1988 on a low priority basis.

(12) Due to limited funds, the Commission will not give priority to the study of injunctions, absent a legislative directive indicating the need for prompt action on this matter.

STUDY L — RECOMMENDED 1988 LEGISLATION

CLEANUP BILL FOR AB 708 (URGENCY BILL)

The Commission considered Memorandum 88-1, the First Supplement to Memorandum 88-1, and a letter from State Bar Study Team 1 (Exhibit 3, attached to these Minutes), relating to the 1988 urgency bill. The staff reported that the bill was being introduced by Assembly Member Harris, but that it was not yet available in print. The Commission made the following decisions concerning the bill.

Priority of state and federal claims. Probate Code Section 11421 should be amended by the bill thus:

> 11421. As Subject to Section 11420, as soon as the personal representative has sufficient funds, after retaining sufficient funds to pay expenses of administration ~~and debts owned to the United States or to this state that have preference under the laws of the United States or of this state~~, the personal representative shall pay the following ~~debts~~:
>
> (a) Funeral expenses.
> (b) Expenses of last illness.
> (c) Family allowance.
> (d) Wage claims.

Comment. Section 11421 is amended to delete the reference to debts given preference by federal or state law. The amendment recognizes that such debts are not given preference over expenses of administration or charges against the estate, but only over other debts due from the decedent. See, e.g., Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (1954) (federal preference); Estate of Jacobs, 61 Cal. App. 2d 152, 142 P.2d 454 (1943) (state preference). The amendment also has the effect of reinstating the priority given wage claims by former Section 951. See also Rev. & Tax. Code § 19265 (personal income tax priority over claims other than taxes, expenses of administration, funeral expenses, expenses of last illness, family allowance, and wage claims).

The introductory clause of Section 11421 recognizes that the order of priority for payment of funeral expenses, expenses of last illness, family allowance, and wage claims, is the basic order of priority provided in Section 11420.

Statutory form durable power of attorney. Civil Code Section 2502 should be amended to correct a typographical error:

2502. Notwithstanding paragraph ~~(2)~~ (3) of subdivision (a) of Section 2432, a statutory form durable power of attorney for health care is valid, and the designated attorney in fact may make health care decisions pursuant to such authority, only if it (1) contains the date of its execution, (2) is signed by the principal, and (3) is signed by two qualified witnesses, each of whom executes, under penalty of perjury, the declaration set out in the first paragraph of the "Statement of Witnesses" in the form set out in Section 2500, and one of whom also executes the declaration under penalty of perjury set out in the second paragraph of the "Statement of Witnesses" in the form set out in Section 2500.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 2432.

Comment. Section 2502 is amended to correct a section reference.

BILL TO EFFECTUATE RECOMMENDATIONS TO 1988 LEGISLATURE

The Commission considered Memorandum 88-2, the First Supplement to Memorandum 88-2, and a letter from State Bar Study Team 1 (Exhibit 3, attached to these Minutes), relating to the 1988 probate recommendations. The staff reported that the bill implementing the

recommendations was being introduced by Assembly Member Harris, but that it was not yet available in print. The Commission made the following decisions concerning the bill.

§ 8200. Delivery of will. A provision should be added to Section 8200 to the effect that, "No fee shall be charged for complying with the provisions of this section."

§ 8251. Responsive pleading. Subdivision (c) of Section 8251 should be revised to read:

> (c) If a person fails timely to respond to the summons:
> (1) The case is at issue notwithstanding the failure~~,~~ ~~and no entry of default is necessary. The case~~ and the case may proceed on the petition and other documents filed by the time of the hearing, and no further pleadings by other persons are necessary.
> (2) The person may not participate further in the contest, but the person's interest in ~~the proceeding or the~~ estate is not otherwise affected.
> (3) The person is bound by the decision in the proceeding.

A comparable change should be made in Section 11702 (persons entitled to distribution) for parallelism.

§ 8402. Qualifications. Section 8402 should be revised to read:

> 8402. (a) Notwithstanding any other provision of this chapter, a person is not competent to act as personal representative in any of the following circumstances:
> (1) The person is under the age of majority.
> (2) The person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute, the duties of the office.
> (3) There are grounds for removal of the person from office under Section 8502.
> (4) The person is not a resident of the United States.
> (5) The person is a surviving partner of the decedent and an interested person objects to the appointment.
> (b) Paragraphs (4) and (5) of subdivision (a) do not apply to a person named as executor or successor executor in the decedent's will.

§ 8441. Priority for appointment. The staff should give further consideration to the provision governing priority for appointment of an administrator with the will annexed, with the objective of providing a narrowly drawn standard that would allow the court in an appropriate case to vary from the rule that a person who takes under the will has priority over one who does not.

§ 16315. Income on specific gift. This section should be presented for review at the next Commission meeting after further work by State Bar Study Team 1.

TRANSITIONAL PROVISIONS FOR 1988 BILL

The Commission considered Memorandum 88-3, together with a letter from State Bar Study Team 1 (Exhibit 3, attached to these Minutes), relating to transitional provisions for the 1988 probate legislation. The Commission discussed a number of general issues relating to the transitional provisions, and reconfirmed the decision for a deferred operative date of July 1, 1989, applicable to the extent practicable to all proceedings pending on or commenced after that date. The Commission postponed detailed discussion of specific provisions pending receipt of the printed bill and State Bar comments addressed to this matter.

The operative date and transitional provisions should be codified in appropriate places, and perhaps referred to in appropriate Comments. The Comments to the final version of the new Probate Code should include references to any relevant operative date and transitional provisions.

CREDITOR CLAIMS AGAINST TRUSTS

The Commission considered Memorandum 87-106, setting out the request of the State Bar Executive Committee that the Commission send a letter to Assembly Member Calderon indicating that the Commission believes the matter of creditor claims against trust assets is an important problem that should be addressed by legislation. The Commission declined to send the requested letter.

STUDY L-636 — NO CONTEST CLAUSE

The Commission considered Memorandum 87-44 and the First, Second, and Third Supplements thereto, relating to no contest clauses in wills, trusts, and other donative transfer instruments. The Commission decided to retain the basic California rule of strict application of a

no contest clause even though the contest was made with reasonable cause. The Commission directed the staff to prepare a draft that would codify the California rule. The draft should include exceptions for a contest based on forgery or execution of a subsequent will or other instrument. The draft should also include an exception for contest of a gift to the person who prepared, or assisted in the preparation of, the will or other instrument.

Related matters that were raised at the meeting but that the staff was not expressly directed to include in the draft are whether an attempt to modify the terms of a trust could be considered to be a contest of the trust, whether a declaratory relief procedure should be provided to determine whether a particular action would amount to a contest within the meaning of the no contest clause, and whether litigation expenses should be awarded against an unsuccessful contestant regardless of the applicability of the no contest clause.

STUDY L-655 -- INVENTORY AND APPRAISAL

In connection with its discussion of Memorandum 88-3 (transitional provisions), the Commission considered Section 406 (political activities of probate referee). After discussing a number of perceived ambiguities in the statute, including references to persons "seeking" appointment as a probate referee, their involvement "in any manner" with political contributions, the filing date for the proposed verified statement of activities, and the interrelation of community property concepts with contribution limits, among other issues, the Commission requested the staff to work over the draft for clarity without altering policy.

STUDY L-707 -- MISUSE OF CONSERVATORSHIP FUNDS

The Commission considered Memorandum 87-105 concerning misuse of conservatorship funds. The Commission thought the problem is most acute in the case of professional conservators, most numerous in

Southern California. There was sentiment for requiring periodic audit of the conservator's records and accounts. At present, the law requires biennial review (Prob. Code § 1850), but not a detailed audit.

The Commission asked the staff to find out if the Assembly Committee on Aging and Long Term Care is working on this problem and to report back.

STUDY L-831 - RECORDING OF PERSONAL PROPERTY AFFIDAVIT

The Commission considered Memorandum 88-4 and a draft of proposed Probate Code Section 13106.5 which was handed out at the meeting and is attached to these Minutes as Exhibit 1.

The memorandum concerned a problem in the affidavit procedure for collection of personal property of a small estate using the affidavit procedure under Probate Code Sections 13100-13116. The county recorder of Orange County has refused to record the affidavit or declaration where the procedure is used to transfer a debt of the decedent that is secured by a lien on real property.

The Commission was of the view that the draft handed out at the meeting was much too detailed and that a provision would be sufficient that merely provided that recording of the affidavit or declaration is to be given the same effect as is given under Section 2934 of the Civil Code to the recording of an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

The Commission approved the substance of the following provision (to be expanded to cover the right to enforce an obligation, not just the right to collect a debt):

> 13106.5. (a) If the particular item of property transferred under this chapter is a debt secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration, and the affidavit or declaration shall be recorded in the office of the county recorder of that county.

(b) Any duty of the obligor under Section 13105 to pay the debt secured by the lien on the real property to the successor of the decedent does not arise until the debtor has been furnished with a certified copy of the affidavit or declaration that has been recorded under subdivision (a).

(c) The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Section 2934 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

This provision is to be added by amendment to Assembly Bill 2779 (urgency bill introduced upon Commission request at the 1988 legislative session).

STUDY L-940 - FIDUCIARIES' WARTIME SUBSTITUTION LAW

The Commission considered Memorandum 87-78 and the attached draft of the Fiduciaries' Wartime Substitution Law and also the First Supplement to Memorandum 87-78. The Commission approved the draft for inclusion in the 1988 probate bill, subject to the following revisions. The revised provisions will be reviewed by the Commission after amendment into the probate bill.

§ 356. War service

Subdivision (c) of this section should be revised to refer to the United States, omitting the limitation to the continental United States south of the 49th parallel.

§ 373. Reinstatement of original fiduciary

This section should be revised to give the court discretion in removing the substitute fiduciary rather than requiring the removal and reinstatement of the original fiduciary.

§ 374. Immunity of fiduciary for acts of predecessor

This section should be consistent with the terminology of Section 383 which refers to "liability" rather than "responsibility."

STUDY L-1036 - ATTORNEY FEES IN PROBATE PROCEEDING

The Commission considered Memorandum 87-100, the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Supplements to Memorandum 87-100, and a letter from Bruce S. Ross (representating the Estate Planning, Trust and Probate Law Section of the State Bar of California). A copy of the letter from Mr. Ross is attached as Exhibit 2 to these Minutes.

Representatives of various consumer groups and representatives of the State Bar Section and local bar associations made presentations on the issue of whether a reasonable fee requirement should be substituted for the existing California statutory scheme (statutory fee schedule and additional reasonable fee approved by court for extraordinary services). The Commission deferred making a decision on this issue until the March 1988 meeting when more members will be present.

Statement of Josephine Barbano (Representing American Association of Retired Persons)

Madam Chairperson and Members of the California Law Revision Commission, my name is Josephine Barbano of San Diego. I am Chairman of the California State Legislative Committee of the American Association of Retired Persons. Our Committee represents our 2.6 million members before the legislative, executive, and regulatory branches of State Government.

Several years ago our organization promoted the Uniform Probate Code (UPC) in California. The agenda you have today focuses on the policy issue as to whether the statutory fee schedule for lawyer's fees in probate cases should be altered to a reasonable fee schedule. I want to commend your staff for the thorough study presented to the Commission on this topic. It was very comprehensive and quite balanced.

Our membership's concern is one of fairness in charging for services rendered in handling of estates. Older persons want things simple and reasonable. They do not want to leave their estates encumbered to their heirs with unreasonably high legal fees.

Your staff study points out that Idaho has saved consumers money by adopting the Uniform Probate method of determining legal fees. This was documented in a follow-up study in that state since Idaho was the first state to adopt the Uniform Probate Code's method of a reasonable fee schedule. Average probate fees were sliced in half, and the majority of lawyers surveyed said the UPC approach cut the time required to administer a probate estate.

The Maine Supreme Court in June of 1986 ruled in a case known as the "Estate of Davis" that a reasonable fee approach under the State's Uniform Probate Code Section was more appropriate than the older percentage fee schedule. The Supreme Court remanded the case to the lower court that resulted in reducing attorney fees from $44,700 to $14,000. In essence, that court said the five percent fee was not a reasonable way of determining legal fees in probate cases.

AARP encourages the Commission to change the method of establishing fees to a reasonable schedule which takes into consideration work actually performed, the time and skill required for the work, and customary local charges for the work. This is a more equitable way of setting fees since the Stein study concludes that in a simple large estate the statutory fee schedule results in lawyer fees that are much higher than the regular hourly rate. California consumers are doubly disadvantaged because state law allows personal representatives to charge on the same percentage fee basis.

AARP also questions the fairness of current law which does not allow the courts to reduce statutory fees if they think they are unreasonable. More than 90 percent of California lawyers, according to the Commission study, bill at the statutory fee rate. Few bill below the set schedule. Further, lawyers can petition the court for extraordinary fees over and above the statutory schedule. It also seems that current law is administratively burdensome when it requires the court to review attorney fees under the statutory fee schedule when the court has no authority to reduce fees. It seems illogical to require the court to review fees for extraordinary services when there is no dispute over the fees.

AARP also questions those members of the California Bar who believe that quality of service will drop if the statutory fee schedule is replaced by a fee agreement with the attorney. It is hard to believe that higher fees will necessarily bring better service. AARP has seen similar arguments presented by the medical profession and they are unfounded. Additionally, there is no evidence in UPC states that quality of service has been reduced.

In conclusion, AARP recommends that the Commission change to a reasonable fee basis for establishing its fee schedule in which the client knows what he or she is being billed. AARP believes it will reduce costs to the consumer.

Thank you for allowing me to appear here today.

Statement of Charles Mosse
(Representing HALT--San Diego)

I am Charles Mosse, a representative of HALT--San Diego. HALT--San Diego is a chapter of HALT--An Organization of Americans for Legal Reform, the only national public interest organization working to make the legal system more accessible and responsive to legal consumers. HALT has more than 28,000 members in the state of California and more than 2,700 members in the San Diego Area. Thank you for the opportunity to present our views on probate.

HALT--San Diego is pleased that the Legislature has directed the Law Revision Commission to look into the area of probate because, according to HALT's experience, probate is the legal area most fraught with abuses by attorneys. In particular, I will address how the current attorney fee system works and why legal consumers believe it needs to be reformed. In addition, because we understand that some "question" has arisen about whether the new law requiring written fee contracts applies to probate attorneys, I will also address HALT's views on that subject.

California law permits attorneys to charge for estate administration work based on a percentage of the value of the property passing through probate. This percentage declines as the value of the

estate increases. Attorneys may petition the probate court for more than these "ordinary" amounts if they can show they performed "extraordinary services."

A recent study of probate in five states showed that California attorneys rely almost exclusively on the statutory percentages, as opposed to factors like time spent or complexity of the work, in determining their fees. Moreover, California attorneys were the most likely to consider "extraordinary services" as a significant factor in determining their fee, very likely because the California statute permits a fee in excess of the statutory percentage if the attorney performs extraordinary services. Although the percentages have been lowered over the years, HALT--San Diego is opposed to this percentage fee system because, from consumers' point of view, it is unfair and arbitrary.

It is arbitrary because the fee charged need not be tied to the time spent or the work performed. Logically speaking, the value of the estate's assets is irrelevant to the amount of time and work an attorney might have to invest in administering an estate. Instead, the amount of work required depends more upon other factors, such as the kind of assets involved and the amount of pre-death planning that was done.

For example, it takes the same amount of time to call a broker with an order to sell 10,000 shares of stock as it does to sell 100 shares of stock. Yet, the percentage fee system permits an attorney to collect a much higher fee for making the first phone call. And, ironically, the higher the estate value, the more likely it is that the decedent planned the estate, arranging things so as to minimize the probate work required later on. Thus, the time spent on administering a very large estate might be much less than the time required to administer a smaller, unplanned estate. Yet, the attorney's time is not considered in setting the fee.

The probate bar is fond of arguing that percentages aren't arbitrary because the value of the estate is a good approximation for how much time and work will be required. But this argument simply doesn't wash, especially when more direct measurements of time and

effort are available. If it was true that the value of the estate was a good measure of the work required, why are special provisions necessary permitting higher fees when "extra" work is required?

In fact, this system seems more oriented to assuring adequate profits for lawyers than to charging clients a fair price for the work done, which is why the system is also unfair to consumers. The system allows attorneys to collect a quick buck for work that is largely nonlegal and does not involve dispute. The percentages, in combination with the provisions allowing higher fees in some cases, act as a floor, not a ceiling, on probate fees, thereby assuring that lawyers make a windfall no matter how much money is at stake. It is, therefore, no wonder that your own survey found three-fourths of probate attorneys want to keep the statutory fee schedule.

Again, probate lawyers like to argue that, although the percentage fee system may result in undercharging some and overcharging others, the system is fair because it all evens out over time. First of all, HALT--San Diego doubts that anyone gets "undercharged." In the cases in which an attorney is most likely not to make "enough" money -- small estates and estates requiring extra work -- California law already takes care of them.

But even if the undercharge-overcharge argument is true, whose interests are being protected here? This system may indeed "even out" lawyers' profits, but not consumers' expenses. Consumers have a one-time expense, and the price should be a fair one based on the work performed. When it comes right down to it, convenience and ease of computation for attorneys and judges are the system's only virtues. Because the percentage fee system is unfair and arbitrary for consumers, we urge you to recommend to the Legislature that it be abolished and replaced with a more equitable system.

We understand that you are considering a "reasonable fee" approach. Although "reasonableness" sounds good as a standard for measuring fees, it is meaningless unless it is precisely defined. Because neither the Uniform Probate Code (UPC) nor the ABA's Model Rules adequately define "reasonable fees," we urge you to reject those as models.

The UPC doesn't bother to define "reasonable" at all. Experience in states that have adopted the UPC indicated that this "change" has made little difference because lawyers and judges think that charging a percentage of the estate's value is reasonable and continue to think so in the absence of a more precise statutory definition.

The ABA's list of criteria for determining "reasonableness" is an equally poor guide. The factors are largely subjective (e.g., the "reputation and ability" of the lawyer), irrelevant to the consumer (e.g., the extent to which the lawyer was precluded from accepting other employment), or encompassed within more objective criteria (e.g., "novelty" will require more time to be spent and "experience" will be reflected in the attorney's hourly rate). And if that's not bad enough, they add a catch-all factor at the end that permits a judge to consider anything else that might be relevant under the circumstances.

There is no way to assure that fees will really be reasonable unless you recommend that "reasonable" be precisely and objectively defined. To HALT--San Diego, this means a presumption in favor of basing fees on documented time spent and work performed, and requiring the time spent and work performed itself to be reasonable. Requiring attorneys to document the time spent and work done, and then bill on that basis would pose little hardship to attorneys. They already know how to keep time records and bill accordingly. And if a paralegal does the work, the client should be billed at the paralegal's rate.

In the alternative, attorneys could be required to offer prospective clients a choice of fee arrangements (hourly rates, percentages, flat fees, or a combination) and then let clients shop around and pick the one that is best suited to their needs. To make a choice system like this work, attorneys would have to be required to give clients a rough advance estimate and execute written fee agreements that state the client's choice.

This brings me to the subject of written contracts. We understand that some probate attorneys are balking at the prospect of executing written contracts and claiming they are exempt from the new law spearheaded by Sen. Robert Presley. HALT--San Diego sees absolutely no

justification, in either the statutory language or the legislative history, to indicate that the Legislature had any intent to exclude probate attorneys from the written contract requirement.

On the contrary, the statute is clear on its face that, in any case where it is "reasonably foreseeable" that the total expense to the client will exceed $1000, a written contract for services shall be required. The exceptions to this requirement are specified and narrow, and none apply to probate cases as a class.

Moreover, looking at the two laws together, it cannot seriously be argued that the mere existence of the percentage fee statute is sufficient to exempt probate cases from the written contract law. First of all, the two laws cover different subjects. The percentage law deals only with the amount of money an attorney may charge, whereas the new contract law deals with several aspects of attorney-client relations: disclosure of estimated fees, the services to be performed, each party's responsibilities, and other terms. It is not as if complying with both statutes poses any conflict for attorneys -- assuming the percentage law stands, they could still charge those amounts and execute written contracts.

Second, to permit probate attorneys to be exempt from the contract requirement is a serious misinterpretation of the scope and intent of the new law. The Presley law is about disclosure, bargaining, communication, and reaching agreement before commencing representation. Despite the percentage fee statute, it is certainly possible (although rare) that an attorney may charge less than the statute allows. Clients who get this price break would like the deal to be in writing.

There are also other terms to bargain over and decide, such as who is to handle various tasks. This is particularly relevant in the probate context, where so much of the work involves errands and paper-shuffling. To argue probate cases are exempt just because of the fee statute is to argue that the only term to bargain about in the attorney-client relationship is the amount of the fee. Yet, the contract statute makes it clear this is only one of many important terms.

In conclusion, HALT--San Diego urges you to make several recommendations to the Legislature to make the probate process more affordable and responsive to consumers' needs: abolish the arbitrary, unfair percentage fee system and replace it with a requirement that fees be reasonable and based on documented time spent and work performed. If necessary, ask the Legislature to clarify the new contract law to assure that probate attorneys execute written service contracts.

Thanks again for your attention. I'd be happy to answer any questions you may have.

Statement of Richard Lubetzky
(Representing CALJUSTICE)

CALJUSTICE has just a few comments to make. Our position is pretty much laid out in our letter which we sent to the Commission on December 28th. But there are a few points that we would like to emphasize to the Commission without being redundant.

We want to emphasize the fact that consumers as a whole -- at least the feedback we get from consumers -- are not opposed to giving the attorneys their due, or to paying a reasonable fee for work which is performed by a skilled attorney, for work which is actually completed by an attorney, and for work which reflects the efforts of the attorney. I don't believe consumers have any problem with that concept. The problem that is irking the consumer today is the fact that we believe -- our membership believes -- that under the current statutory fee schedule, the awarded fee is not an adequate reflection of the skills of the attorney which is used to conduct the probate of the estate, and it's not an adequate reflection of the amount of work and effort put into the probate of the estate by the attorney. Therefore, we agree with the other consumer groups and with some of the comments made in the staff report which reflect in certain cases that attorneys do get a windfall as a result of the statutory fee schedule, because the statutory fee is not based on the amount of work or effort put in by the attorney but is simply based on the gross value of the

estate, and the two do not often correlate. Therefore, we strongly endorse the replacement of the statutory fee schedule with the reasonable fee provisions of the UPC.

The other comment which I'd like to make is that we feel that there is a little bit of incongruity in the position of the critics who tend to indicate their belief that adoption of the reasonable fees standard would result in an increase in litigation over attorney's fees and involve the court more in the process. We feel that quite the contrary would result from using reasonable fee provisions under the UPC standard, since as a prerequisite for the implementation of the statute the client must have agreed with the attorney beforehand on a fee and that fee presumably is going to be one which both parties believe is fair and reasonable. Presumably the client is not going to agree to a fee in advance which he believes is exorbitant, especially with the added safeguards that would exist if these contracts are required to be in writing, since we believe these contracts are now subject to the written contract requirement under existing California law. If there is a requirement that the attorney give an advance estimation of what he believes, in his best estimation, will be the total cost, this will give the consumer a better perspective of what he is looking at as far as monetary expenditures down the pipeline. Since this is more or less a voluntary, give and take, situation we feel that this will reduce the chance for litigation, because these parties will have agreed to what they feel comfortable with. On the off chance that there is an unforeseen change due to some unexpected contingencies, you do have the safety valve under the UPC where one of the interested parties may still petition the court for relief if they believe that there is some unfairness there.

Lastly, I think it is important to emphasize that all this input has come from the members of the Bar, primarily probate attorneys. It would have been perhaps a little bit more interesting if not objective to have included in some of the sentiments of the probate paralegals who work for probate attorneys and their firms. That sentiment is not really reflected in here. Often paralegals are much more familiar with the processes, since they work on these cases. I think it is important

to note that you also have a letter from Nolo Press. This is one of the largest publishers of legal self-help publications in the state, if not the country. They indicate in their letter that the overwhelming majority of these probate cases are relatively simple cases which require little effort, and that now, with the new legislation and new rules of court being enacted, you have simplified procedures and standardized forms to be completed on these relatively simple cases. Most of this work is delegated out to paralegals to do. And, it is done at less cost because the rate that paralegals charge or work for is obviously much less than a full hourly rate billed by the attorney, and therefore it is a much less expensive proposition. The reasonable fee standard would therefore result in a lesser cost to the consumer than the fee that the consumer is going to have to pay under the statutory fee schedule. And the paralegals that we have talked to all believe that if the statutory fee schedule was replaced with the reasonable fee schedule there would be a definite reduction in the cost of probating estates.

What is incomprehensible to our membership is why the Bar opposes the standard which says little more than an attorney should be given a reasonable fee for the amount of work actually done. We don't understand why the Bar should oppose that. It seems to be a fair standard which is fair to the attorney and it is fair to the consumer. It is obvious to the consumer to say, "Look, we'll give you what's fair, as long as you're doing the actual work."

One of the problems that we have experienced is contrary to the results of the questionnaire that was submitted to the Commission. (I forget who prepared the questionnaire, I think it was one of the bar associations). The responses to the questionnaire indicated that most attorneys, when they compute their fees, charge at the paralegal rate for paralegal work. While it may not have a significance where you have the statutory fee schedule which would set the award, it does have an impact when you are computing your hourly fee for the services performed. But our experience in talking with paralegals (and it has been that in my experience, personally as a paralegal, having worked for various law firms) is that the work which is performed by

paralegals is not always billed to the time based on the hourly rate performed by the paralegal. Many large and more established firms do follow that practice. But there are many smaller firms -- partnerships, and sole practitioners -- who do not; they take the work performed by a paralegal and they charge the client at the full hourly rate as if they had performed the work themselves. And that, of course, results in an inflated cost to the consumer. We thought that it was important to bring the perspective and the standpoint and the input that we have gotten from the paralegals who do work on these cases. And we wanted to bring that to the attention of the Commission and hope they would take that under consideration in their deliberations. Thank you.

Statement of Charles A. Collier, Jr.
(Representing Executive Committee of Estate Planning, Trust and Probate Law Section of the State Bar of California)

I have a number of things I would like to cover. And, if I may, I would like to discuss them as a series of kind of different categories or areas.

Responses of Bar to Polls and Questionnaires

The first point I would like to relate to simply has to do with the responses of the Bar to a series of polls and questionnaires. As to what these have indicated, it has been quite interesting, and it has been very consistent over a period of time.

1984 poll of members of Estate Planning, Trust and Probate Law Section. We might start with Exhibit 8 of the Third Supplement to Memorandum 87-100. This shows the results of a poll we conducted in 1984 of the members of the State Bar Section at that time. This was really in the early years of the Law Revision Commission looking at many aspects of probate change or reform, and the questionnaire at that time covered a number of questions. One of them was executors commissions and another was attorneys fees. Question 8 on Exhibit 8 shows the answers on the question concerning attorney fees. On "Statutory fees (existing law)," out of 1313 that responded, we got

1022 that favored existing law. On a percentage basis, that is about 77%. There were 238 who supported reasonable fees fixed by the court, and 271 who supported reasonable fees by private agreement (that would be the basic UPC concept).

Law Revision Questionnaire. The Law Revision Commission itself conducted a poll in 1986 or early 1987, and sent questionnaires to 800 and got responses from 245 lawyers. One question asked was whether the person answering favored the reasonable fee system over the existing California scheme. The responses are shown on Table O of the background study attached to Memorandum 87-100. Out of the 238 who answered that particular question, 181, or 76% said that they favored retention of existing law.

November 1987 State Bar Section poll. The State Bar Section prepared a new questionnaire, which we sent out about the end of November 1987. A copy of that questionnaire is attached to Exhibit 1 to the First Supplement to 87-101 (The attachment is a letter from Mr. Willett, and the questionnaire itself is attached to that).

Our responses are essentially those which we put forth in the Third Supplement to Memorandum 87-100. We have summarized the responses in the Third Supplement and had categorized those responses first of all for all responses, which covered more than 1,500 people who answered - that's about 40% of our membership. Exhibit 1 to the Third Supplement shows again the four alternatives which the Commission had been considering based upon 87-100 or its predecessor which was 87-49. That showed a breakdown in Exhibit 1 of the way the total went. There was about 70% who favored retention of existing law as the first choice. There were 16% who favored attorneys fees by private agreement with no court involvement unless there was a dispute, which is essentially the UPC arrangement. (It is not so captioned, by the way, in the questionnaire.) There was about 3% who favored the court determining all fees on a reasonable fee basis without any statutory standard of any kind, and about 5% who favored independent administration procedure, where you send out the notice of the proposed fees of the lawyer, and if anybody objects then it goes to court.

In an effort to see if there was any variation in these questions from the northern part of the state to the southern part of the state or from big cities to smaller counties, we also took the information and broke it down on a county by county basis.

Exhibit 2, for example, is the northern half of the state. That is basically areas north of the north line of San Luis Obispo County and Kern County, for the north, and the southern half obviously is the reverse of that. There were no really significant differences in the percentage figures - they vary a little bit, but not too significant. Exhibit 3 is the southern half of the state, again, asking those 4 questions and where the breakdown was.

Exhibit 4 is the larger counties in the North. These are basically the metropolitan counties around San Francisco - Alameda, Sacramento, San Francisco, San Mateo, and Santa Clara. Again, to see if there's any significant difference. The next exhibit, Exhibit 5, is the larger counties in the south, Los Angeles, Orange, and San Diego. And then, we tried to simply do it on large counties versus other counties, which is Exhibit 6 and 7. And that, again, did not suggest any particular variation in percentages. I think the consistency in percentages around the state is very interesting and a little bit surprising. I frankly expected to see some more variance from one part of the state or big counties versus small counties. Very consistent.

Informal survey of CEB program participants. Another questionnaire in essence is one I have been conducting in the last week. I'm on a CEB panel on recent developments in estate planning and the panel has made a presentation both in Westwood and in Pasadena. As a panel member, I took the liberty of asking the people in the audience what their reaction was, and this would include a lot of paralegals as well as lawyers who attend these. I asked people who had already voted in our poll to not vote again, so I was trying to supplement and not duplicate any of the votes. The vote at both of those CEB sessions -- and I must say that in each case, we had somewhere between 100-150 in the audience -- was even stronger for statutory fees or retention of the existing system, the poll indicated. I think, speaking of the Pasadena audience, we had about 90% of those who voted who were basically for retention of the existing law.

Conclusion concerning polls and surveys. The thing that is interesting here, from a lawyers' point of view, is that these polls -- whether conducted by the staff or by our section three or four years ago or more current -- have been very consistent. Somewhere in the 70% to 75% range basically in favor of existing law.

Communications From Other Bar Associations

Other bar associations (some that are represented here) have filed letters with the Law Revision Commission:

The San Diego Bar has filed a letter basically supporting the existing system.

The Los Angeles County Bar is here and can make its own presentation.

The Beverly Hills Bar is here and can make its own presentation.

Letters from these organizations are covered in the supplements, or the exhibits to the First Supplement to Memorandum 87-100.

Reasons for Retaining Existing California Attorney Fee Scheme Generally

There was a statement (I'm quoting from the letter from the LA County Bar) I thought was particularly succinct; it's in their letter which is Exhibit 3 to the First Supplement to 87-100. It simply says that the current system combines the percentage fee and reasonable fee method. It protects clients, minimizes opportunities to charge inappropriate fees, produces a reasonable fee for attorneys in a majority of cases, and as a percentage of total cases, leads to relatively few disputes with clients.

We put in our material in the Third Supplement (material that we submitted with a letter, and I've covered part of that) a lot of representative comments taken from the questionnaire. And people have made comments. I don't need to repeat those. You people certainly have a chance to read them, but you will find a lot of comments in there that essentially say that the statutory fee system is simple to explain, it's easy to apply, it's non-adversary between the beneficiary and the personal representative and between the personal representative and the lawyer. And, you have a situation where there is a uniformity

throughout the state. A number of people have commented that we have 58 counties in this state, and we have probably 100 or more judges who are determining probate fees at any given time, given the branch court system. If you get into a reasonable system, you're subject to all kinds of variation from court to court, county to county, in the same court from year to year. A statutory fee has uniformity throughout the state, which we think from a consumer point of view gives a very significant measure of fairness.

Also, our information indicated that if you have a reasonable fee system, what very likely happens (I think we can demonstrate that from some other material we'll get to a little later) is that you in essence have to come up with some kind of a standard if you're going to have the court involved in this at all as to what is a reasonable fee. You do get a percentage, or you get a suggested fee, or you get a combination of factors. And what apparently happens in other jurisdictions is that there becomes kind of an informal statutory concept, if you will. Some kind of informal fee structure. Now that's obviously subject to modification or change. But it isn't just going in the abstract and saying that a reasonable fee is 44 hours of time, X number of dollars, or it's a fixed dollar amount. You do tend to build a system of fees. I will comment a little bit later about percentages in other areas.

We think (and some of our comments can demonstrate this, I think, from numbers) that the existing system is very strongly consumer oriented. The statistics (which we will get into in a few minutes) about the hourly time charges versus the statutory fee would indicate in the vast majority of estates the statutory fee is a very good deal. The time charges tend to be higher if you simply go a straight time charge.

There have been relatively few complaints having to do with the statutory fee system as between the beneficiaries or the personal representatives and the attorneys based upon some of the information that is put in the chart that was prepared by the staff. The chart is Table G in 87-100. According to this table, 38% of the attorneys said they have never had any complaints about the cost of probate, 57% said

they have complaints in fewer than 5% of their estates, and that is a very significant number. There's relevance in some of the material that was read this morning and presented this morning about the Stein report, that's a law review. [Change of Tape; material omitted.] But, about 15% of those had to do with fees, and if you take 15% of 17%, if my math is right, that's about 2 1/2% of the estates that there was some complaint on fees. That's in the Stein article, in pages 1208 to 1212 if you want to look it up.

One of the things that I think that our friends here on this side of the table talk about is the fact that statutory fees are -- and I quote one of you -- scandalous, or a rip-off, or are not fair to the consumer, the consumer ends up paying more. I think that it is interesting if you will look, and I think it is worth taking a moment to look at the basic memorandum, which is 87-100, page 36. This is a chart which was taken from the study by Professor Stein, and it has five states that were selected on a representative basis, because of different kinds of systems - Massachusetts, Maryland, Texas, Florida, and California. And, basically, these others are not statutory fee states at the present time, but again, if my mathematics are right, and I'm always glad to be corrected, of those eight categories that are shown there, California is the lowest cost in 2 of the 8, the second lowest cost in 4 of the 8, is the third lowest cost in 2 of the 8, is the second highest in none, and is the highest in none. Simply taking those numbers would indicate that California, certainly on a statutory basis, has been very much in line with what the so-called reasonable fee states have been charging.

Comparison of Cost of Probate Using Fee Schedule or Hourly Charge

The next part of our response is found in the Third Supplement as Exhibit 9. In this exhibit, we tried to update some information, and this goes to John [DeMoully's] point as far as the cost of probating estates, and whether you go to a reasonable fee structure, or a statutory fee, or some other arrangement.

We sent this questionnaire out and, as I said, we got more than 1,500 responses. Part 2 of the questionnaire asks, if you simply handle an estate on a straight time-charge basis, and that would normally include the lawyer time or the paralegal time (on a time-charge basis, because that's the way people bill) would it cost the same, or more or less than a statutory fee on the same dollar amounts.

Exhibit 9 to the Third Supplement is the summary of that result. And, again, not everybody answered every question, so I can't do the mathematics. You don't always come up with 1,506 answers. But Exhibit 9 to the Third Supplement was an attempt to discuss in an economic sense whether statutory fees were out of line, whether they were high or low, and I think that the answers are very interesting.

If you look at question 1, it says if you probated an estate of $100,000, for normal services, would a time charge be less, about the same as, or higher than a statutory fee. There are only 7.4% who said the cost would be lower if you had a time charge than if you had a statutory fee. Almost 48% said that at a $100,000 estate the time charge would be higher than the statutory fee, and about 30% said that it would be the same, that it's a wash, that the statutory versus time are about the same.

If you move up to the next bracket, as expected the percentages change a little bit. The second question is between $100,000 and $300,000 how, again, it would break. Here, about 16% said that a time charge would be lower than the statutory, 27% said a time charge would be higher than statutory, and about 46% said that it would be the same. So, you're starting to get more that say that a time charge would be lower, but you're still down at a point where 16% are saying the fee would be lower, and the other 84% essentially are saying that it will either be the same or higher, if they charge time as opposed to the statutory fee.

The next question was $300,000 to $600,000. Again, this raises the same question. Here, we've got up to about 36% who say on a time charge it would be lower than the statutory, a time charge would be higher in 12%, and in about 42% the same.

What the trend of this is that it appears from these numbers in the four questions, that you can pretty well demonstrate just from the answers to these questions that the break-even point in terms of the point where statutory fees may be higher than a straight time charge tends to be probably in excess of $300,000. You can't pinpoint it because obviously some estates are different than others, but that's kind of the trend that goes, and you get it there, but even then, it's not a strong shift. If you look at the estate, even one in excess of $600,000, 10% still indicate that time charges would be higher than statutory, 25% say they're about the same, and 46% that say that statutory fees would be higher.

Well, there's a trend in here, the essence of it is that certainly in the vast majority of estates, and I'll talk about size in a minute, the statutory fee is very much consumer-oriented, is very protective of the consumer, and the consumer essentially is getting, if you will, a good deal, because time charges would tend to be somewhat higher if it was done on a straight time-charge basis.

Obviously, there are other factors. Sometimes you can base the fee on additional factors other than time. To make this simple, we simply did a time charge. But CalJustice, in their presentation, talked about time plus, plus the work done as a measure. But it is, I think, indicative that in the smaller estates, in terms of dollar amounts, that the statutory fee is a good, reasonable deal.

Now, what I tried to do in another context, and this ties in in part with some material passed out this morning, was to look at some of the information about size of estates and where the statutory fee fits in in terms of size of estates. Again, in the Third Supplement, if you will look at Exhibit 21. This is something that was taken from the tables put out by the State Controllers Office, on the size of estates subject to inheritance tax. Granted, it's about 10 years old, but I've tried in the cover material to adjust that for cost of living adjustment over the last 10 years. You will see that even with those adjustments, if you will look at the columns that are on the left, it shows the size of the estate and basically the percentages that come in each size category. If you look, for example, in the estate at, say,

$300,000 or less, my mathematics indicate that those in excess of $300,000, based upon numbers 74 and 75, are only about 9% of the estates. The other 90% are basically under $300,000. I tried to adjust those with cost of living, and I got two forms of adjustment in the cover material. One would suggest a 55% adjustment in asset value, that would mean that maybe 14% of the estates are over $300,000, and if you do it on a straight CPI adjustment, you're up to maybe 22% that are over $300,000. As I indicated before, the breakeven point appears to be, statutory versus time-charge, somewhere around $300,000. You obviously can't pin-point it because it varies on a lot of the factors. But, in this context, the vast majority of the estates, and this is a 75-80-85-90%, of all estates, would tend to be under $300,000 on a statistical basis. Not all of those necessarily get into probate, obviously, because this inheritance tax cut-across is not necessarily probate estates. I believe that in Los Angeles County, for example, the average size estate, from what I understand, is somewhere in the $100,000-$150,000 range, if you do statistics. And these are ones which, again, based upon our analysis and numbers, are getting considerable consumer protection out of the statutory fee system. Very frankly, for many smaller estates (and I use smaller in that general context) there is nothing you can get an extraordinary fee for. You don't have any litigation, you don't have any tax work, unless they didn't file tax returns for some years, but many of those are not the kind of things that lend themselves to extraordinary, so you're really looking at a statutory fee, in a great many of those, as the sole type of fee that is available.

Comparison to Fees in Other States

We have made another effort to get some more current information on how California's fee structure relates to other jurisdictions. This information is contained in the letter that was passed out this morning from the Estate Planning, Trust and Probate Law Section, prepared by Bruce Ross. (Attached to these Minutes as Exhibit 2.)

The letter represents an attempt by us to make some inquiries of other major jurisdictions to determine what their fee structure would be, and it ties in a little bit with our numbers in terms of $100,000, $300,000, and $600,000.

The information in the letter was obtained by telephone inquiries to members of the American College of Probate Counsel, and the information represents estimates by these people of what the fees would be.

I would like to factor in, just have you add on the bottom as item 10, because it's not on here, the information for California. For a $100,000 estate, the California rate is $3,150, for a $300,000 estate, the California rate is $7,150, and on a $600,000 estate, the California rate is $12,150.

Now, if you use those numbers -- and I'm not able to vouch for the accuracy of each one of them, but I think that they're again indicative of where you're dealing with reasonable fees -- my mathematics again suggest that on $100,000, California is the fourth highest of the ten, on a $300,000, it the sixth highest, and on a $600,000, it's the fifth highest. This would indicate if you, if you average those, then we're right in the middle, between the series of those which are presented. Now, the fact, for example, that we have this little ripple of $150, in some of these, if you look at Texas, Michigan, Ohio, or Virginia, if you took out that extra $150 we get because of the 4% of the first $15,000, well, even with all of those, that changes the statistics somewhat, in addition, but essentially it would indicate that we're very much in the middle as far as fees on a statutory basis for these sizes of estates, even though the rest are presumably ones which are reasonable fee states. The essence of this, I think is that reasonable fees are not necessarily fewer fees or less fees.

California had many years ago (and I must say John [DeMoully] didn't think much of my chart which is found in the Third Supplement), from an article from the 1966 issue of Trust & Estate (that's obviously 20 years old--it's Exhibit 23), and at that time, California was 41st from the top, out of 50 states, on a estate of $100,000. I adjusted that, assuming everybody else was constant, on Exhibit 24 to, again,

the Third Supplement. I assumed that everybody else was constant, put in the current rates in California, and we moved up from 41st to 31st from the top, so again, we were still on the low side, if you will, as far as fees.

I was quite interested in the case which John [DeMoully] had attached to the last supplement, which is the Sixth Supplement I believe, that had in it the information on percentage fees. And I just call this to your attention that the Sixth Supplement, which came out the other day, has attached at the back as Exhibit 2 a case from Colorado which is a reasonable fee state. The Estate of Tinker is the case. The estate was a million-dollar estate, and in this reasonable fee jurisdiction, it's a UPC jurisdiction, the fees which had been allowed by the court for the attorney were $42,000. The court reversed as being excessive. The California fee on that same estate is $21,150 - approximately 50% of what had been allowed at least at the trial level in Colorado. Which indicates, I think that it's interesting to note, that reasonable fees are not always reasonable. What the parties ultimately got, I don't know, but the case would indicate that, at least the trial court level, the fees ran at double the amount you'd ever get in California for that same kind of service.

There is something else I mention for your information. The American College of Probate Counsel several years ago did a study of fees of executors, administrators, and trustees, and then they had another section on, I think it was attorneys fees, state by state, and it's based upon basically 1983 or 1984 data. I went through this, and many of these are reasonable fee states, but most cases there is a guideline, a suggested, a customary fee charged. I went through those for a number of states, to see how $100,000, $300,000 in California would line up with these other jurisdictions. I'll just tell you what my jurisdictions are. I went through them to pick up some randomly. I used Arizona, which is a UPC state, Connecticut, which is a reasonable fee state, Florida, which is a UPC and a reasonable fee state, Illinois, which is a reasonable fee state, Indiana, which is a reasonable fee state, Maryland, which is a statutory fee state, Minnesota, which is a UPC state, Montana, which is a UPC state, Ohio,

which I think is not UPC, Pennsylvania, which is not but has a reasonable, and Virginia, and California. Using $100,000 as a number, again, just based on a study, there were eight states out of the twelve that I listed that were higher than California on a $100,000 estate, four that were lower. At $300,000 there were ten that were higher and two that were lower. Which again, seems to me simply to demonstrate that the fee structure in California is not, to quote some of these other people, "scandalous" or "outrageous". The feeling of California lawyers for some time has been that the California structure in fact is much lower than many other jurisdictions. And the information which I have been able to gather suggests that. Therefore, I think there's a lot of consumer protection and consumer benefit in a statutory fee system.

Comparison to Fees Charged in Other Areas of Legal Practice

There are a couple of statements in Memorandum 87-100, dealing with the fact that lawyers occasionally make huge fees on statutory situations and that it's a great profit center in law firms. I must tell you that I attended a seminar a year ago at the American College of Probate Counsel at their annual meeting. The title of the seminar was Trust and Estate Lawyers - The Endangered Species. And the cover comment said, in recent years, this presentation will trace the diminished role and importance of trust and estate practice over recent years, to include a frank discussion about the sensitive topics of compensation, productivity, role in the firm, and so forth. Now, that does not suggest that probate lawyers are the ones making all the money. I think if you look at most law firms, you'll find that probate is not the great profit center that some people believe it is. In fact, some times we have trouble holding our own in law firms, because of the fact that others bill on a straight time charge, and many of our probate fees simply do not cover our time, and therefore we're not able to bill.

Summary by Mr. Collier

I think I've covered the basic issue at this point in terms of the fundamental policy issue of statutory versus reasonable fee. Our charts, our questionnaires indicate that the lawyers are extremely strong throughout the state on retention of the existing system. Our analysis of the costs in other jurisdictions which are reasonable suggest that those fees are no lower than and on a average tend to be higher than California. We think the statutory system provides a certainly in dealing with clients, in dealing with representatives, and is a very efficient way to handle fees. We think is it good public relations to have a legislatively-established fee system. For these reasons, the State Bar strongly supports it.

One comment I would like to make that I think is important. I have heard this over the last year or two, and it's something that is not before you. New York has had a statutory system for a number of years. It went to a reasonable system, but as you can see from our charts it's not reasonable in our sense of the word. It is still very high, but apparently the IRS auditors in New York, on Federal estate tax returns, have been raising questions about the fees when they are so-called reasonable fees as opposed to a statutory. These questions were never raised when there was a statutory fee and a straight court-fixed or legislatively-fixed percentage. They went through without question. Now that it's a "reasonable" fee, the IRS, at least in New York, has been asking, notwithstanding the court approval of the fee, for back-up information. Some of the lawyers think it is a great mistake to depart from statutory fees because of the tax problems.

I will also comment that there is an indication in 87-100 that many of the large estates are basically not in the probate system at all, that they are using inter vivos trusts. I would comment on that in two ways. In our own law firm, for example, we're fortunate to have a number of fairly well-to-do clients. I think we do wills for 80% of our estate planning, as opposed to trusts. We just think that they're much more certain, the creditor rights are clear, the tax rights are clear, the trust law is not nearly as clear. So for most of our clients, we do not recommend a trust as a basic vehicle if we think

we've got any creditor problems or if we think we've got any tax problems. Secondly, a couple of years ago, when this issue first came up before the Executive Committee of the Estate Planning, Trust and Probate Law of the State of California, I asked around the table: "How many of you basically use a will, which obviously involves the probate process, as opposed to an inter vivos trust, as your basic planning." There are about 25 people on the Executive Committee, and they come from all parts of this state. A very strong majority of those people said we use wills. We just think that the will procedure, the probate procedure, is much better, much cleaner, it protects because of creditors, the tax rules are well-known, the court overview is satisfactory. It is not the fact that all large estates or even the majority of them are getting outside of the probate system in California.

I appreciate your courtesy, and if we get into some of the other subsidiary issues, I'd be glad to comment on those in due course. Thank you.

Statement of Richard Stack
(Representing Los Angeles County Bar Association, Probate and Trust Law Section)

I won't try to top Chuck Collier, who's done a masterful job as always, with his presentation. But I would like to add a few points if I may. I'll jump around just a bit.

I guess that there's a thought that the change is needed because this is an opportunity to add certain fairness that it is claimed not to be present in the law now, and the thought is that there are windfalls to lawyers in probate. The county bar disagrees, and supports the position taken by the State Bar Section that the system already works, and works quite well. All the elements are in place; it's just a matter of using them.

The system already allows out small estates ($60,000 and under) by a simple affidavit procedure, which is very useful. And of course we have other procedures, in joint tenancy, payable on death, etc., to be sure. And for those smaller estates (and I would up it to

$300,000--State Bar talks about $150,000, but I would say up to the range of $300,000), I don't think lawyers are making vast sums on statutory fees. It just isn't happening.

The statutory fee is useful in the lower bracket estates because, quite frankly, if the attorney is going to take them on he has to be efficient. They are not big money-makers. You have to beef up your staff, you have to use paralegals; otherwise you're just not going to survive. Probate law just isn't that profitable. Without the statutory fee, I would suggest that the fees on estates of $300,000 or less would escalate, and I think steeply so. An example to substantiate the point: many of the banks will not accept estates under $300,000 because they can't make ends meet. That's just a plain fact. As I think I've said, without the statutory fee, at least on the low end of estates (when I say low end I mean under $300,000), you just don't have the incentive in the attorney to streamline his office. Also, without the statutory fee, I question whether the executor has that much of an interest in keeping the fees down. Certainly, if it's kept within a family situation, possibly, that would be the case.

The other end, of course, is the one million to five million to ten million dollar estate -- this is a great windfall for the attorney? Well, somehow, the larger the estate, the greater the profit? I don't know how it happens, I've never, ever had an estate where I walked in and there was a million dollars in the bank and nothing else.

But there is also a safeguard in this system, that I don't know that people really recognize it -- there is nothing to prevent an executor from contracting with a attorney to work on an hourly fee basis with a limit of the statutory fee. I've done it, and other attorneys have done it as well. So, if you have a very large estate and find that the work is going to be minimal, or believe that is the case, it's simply a matter of sitting down with the attorney and saying we would like to make an adjustment here, we would like to contract with you on an hourly rate, or some other reasonable rate, with a cap of the statutory fee limit. What better situation could you have? You have the backstop of the statutory fee, plus the right of contract.

And that does not mean that I diminish at all the right of contract even under a statutory fee. I believe that it is important that in all instances the attorney and client have a clear understanding of the responsibilities of each and the obligations of each.

Now as to the benefits of the statutory fee, I think that one of the large benefits is the matter of certainty. From day one, the parties have a strong idea of what the responsibilities and expenses of this administration are going to be. And, I think that is very important.

As far as the awarding of extraordinaries, that's always a thorny, a difficult situation. All estates don't have the same problems. In some you'll have litigation, you'll have tax work, and it is based on a reasonableness basis. And, there is another check in this system that does not allow an attorney to get a windfall, so to speak, in the statutory fee area, and then be able to come into court and claim extraordinaries. There is Estate of Walker, which says that in examining a request for statutory fees, the court is to review and reflect on whether the statutory fee is not an adequate compensation for extraordinary services. So, there is that check in the system. As far as the claim that paralegals time is being charged out at attorney time, that probably does happen in certain instances, but I do not believe that is the case with the majority of lawyers.

I believe that the current system works; it benefits the estate and makes lawyers efficient in most, in the highest number, of estates. And I think the system has enough checks and balances in it that we don't need to change. I think that it's been exhibited that those states that have gotten into the area of a reasonable fee do not guarantee in any sense that the actual cost of administration would be any less than they are right now in California. Thank you.

**Statement of Kenneth Petrulis
(Representing the Probate, Trust and Estate
Planning Section of the Beverly Hills Bar Association)**

The Beverly Hills Bar also supports the statutory fee system. This recommendation was worked out in committee and then submitted to our bar association as a whole, and approximately 75% of them supported the statutory fee system.

I think it's helpful to look at the way our committee worked when we arrived at this conclusion. Most of the members of the committee are from small firms and are rather consumer-oriented. When we held this meeting, we weren't talking about what we could do to hold our place in this system. There was really no concern for what's going to happen to us as attorneys under a reasonable fee system. Rather, all of the discussion in committee centered on what are the needs and concerns of the consumers, not particularly versus the ethical attorney. An ethical attorney is going to be in favor of a fee contract, and a reasonable fee. There's no problem for the consumer there. But, we see a lot of problems that come to us when estates haven't been properly handled, when excessive fees might be being incurred, and we feel that the statutory fee system provides a lot of protection for the consumer. We would hate to see those protections done away with. The statutory fee system as it is set up right now is really a maximum fee, with the possibility for the consumer to negotiate a lower fee. And clients do come to me and ask me whether I will accept, or handle a case, on a reasonable fee system. And, if it is in the proper range, I'll say "Yes, we'll negotiate a reasonable fee." I think that is the experience of most attorneys.

We have had some experience with clients in California who are dealing with estates in Massachusetts or other states. What we see is that, where there is no statutory fee system, that is where there is a possibility for abuse. We see that there are attorneys who are dealing with unsophisticated clients who don't have a good idea of what a proper fee is to charge, and that when those attorneys negotiate fees, they often inflate the fees, or use the pressure of the situation to get an advantage that they wouldn't be able to get under the California fee system.

We like the system because it eliminates some friction between us and our clients. We can say, here's what a reasonable fee is in the majority of situations. And that provides some confidence to the person who is negotiating with the attorney, some assurance that he's not getting ripped off. If you don't have a statutory fee system, a good recommendation in place, then the consumer really doesn't have a gauge of whether they're going to get a good deal in dealing with this attorney, or whether they're going to pay some inflated price.

Now, I've talked to some people who are consumer advocates, who are sophisticated to a certain extent and familiar with the law, and they feel, rightfully so, that they can negotiate a better contract in certain circumstances. And I think that's true, for a sophisticated lay person, they can negotiate a better contract. But a point brought out by our committee is that in a lot of cases you're not dealing with a sophisticated lay person. And what's more you're dealing with a person who's under the pressure of a recent death, of numerous bills, of funeral problems. This person really isn't in the best position to negotiate.

Sometimes, the fee is negotiated between an executor who's not a family member and an attorney. In that case, the consumer isn't protected either, because the consumer is a third party and is left out of the contract. And the contract can be negotiated between the executor and the attorney, who may work together on a number of cases.

The outcome of all of these problems is that our committee decided that the statutory fee system, with what is in essence a maximum limit and the possibility of negotiating a lower reasonable fee within that maximum limit, is a good protection for the consumer, particularly because it also allows for court review, and, as Mr. Collier stated, it also provides certain tax advantages, certain tax certainties. Based on that, we made our recommendation, and the large majority of the members of the Beverly Hills Bar agreed with us.

**Statement of Beatrice Lawson
(Representing the State Bar Estate Planning, Trust and Probate Law Section)**

I'm not going to try to supplement anything Mr. Collier stated so well. I'm just going to indicate that I'm a practicing attorney in the Greater Los Angeles Area and Bakersfield, and that the majority of my clients have estates that are well under half a million dollars, usually between the $100,000 and $300,000 mark.

I am for fees remaining as it is, because it does give an awful lot of certainty when you negotiate with the personal representative, whomever that may be. It takes that particular problem out of the harangue, as we may say.

The majority of my clients do not estate-plan. Consequently, they do not come in with a will. And, I represent minority -- people of all kinds of minorities -- and they tend not to plan their estate, they tend not to make wills. I think if you checked that against the different minorities in counties in Los Angeles, San Francisco, you would find that it's true.

It's usually one member (who's considered to be the member of the family -- who's the smartest, the most educated, or whatever) who comes into the law office and hires the attorney. The rest of them either do what that particular member says, or the fight starts. At least the attorney can perhaps cut through some of that inner-family fighting, by indicating that their fee is set by the court, it's in the code section, you can pull out the book and put it on the table, and you can then attempt to negotiate between those family members.

Now, if in fact the majority of my cases were liquid assets in the bank, there would be no problem. The majority of the assets that my clients come in with is a house, a piece of real estate, a piece of rental property. Half of the members don't want to sell the house because they want to live there, the other half wants their money. And, they want it now. You have the problems of a rental. You have the problems of the house being where it may be vandalized, so you have to get a tenant in there. You have unlawful detainer problems. You have drug problems. You have houses where the rental income has to be

collected, where you have to do everything that a property manager would have to do. I spend innumerable amounts of time on the telephone with the personal representative, because he's usually not a sophisticated person, and he usually has no idea how to handle the problems before him. And, if anything, his fee is usually too high, because the attorneys, in small estates, do the work. The personal administrator usually signs the papers, period. The certainty that you have when you can cut out the fee certainly cuts down on the harangue.

Now, I talked to my other partners and I told them I was coming here today, and they said, "Hey, you know, it's to our advantage, because we don't make a lot of money at this, that we go on reasonable fees." Just from the telephone calls and the meetings that you're going to have with the heirs -- and I'm talking about hours and hours of trying to get them to not go into court with all kinds of nonsensical matters--Can we have the money today? Why do we have to wait until the estates close? Can we borrow against it? What about that minor child that he had, he really is the child's father? However, we never acknowledged that he was the child. You've got adoption problems. You've got illegitimate problems. You've got all kinds of other problems that the attorney has to handle. And I handle them.

And, I can go through my list of cases and indicate that if I had a reasonable fee schedule, I would make a heck of a lot more money on each one of my cases, down to the last one I closed yesterday where I had to go to the bank, originally with the personal representative because the bank didn't believe she was the administrator because seven other people had been to that particular bank trying to get the money. The man died on a Thursday, and six wives were in the bank on Monday morning, attempting to get the money. There was $62,000 in the bank, plus a house. Now, I had to go with the personal representative, after we went to court, to get the account book changed over. And I talked to the banker, I was screaming at him on the phone, he says, "Look, lady, I've had five women in here, with the babies, and I'm not turning over any money. You come in and introduce your client, and you show me that you're the attorney, and I'll set this account up in the administrator."

And it happens that way. It may not happen that way in rural counties, but it happens that way in Los Angeles. And it certainly happens that way in Bakersfield, because I do probate there too. So, I'm simply saying that by having a set fee for attorneys (and, you know, you can handle your extraordinary fees as every attorney chooses to) the attorney can at least sort of sit as an arbitrator among the other members of the family over issues, then.

Many of our wills come in, and they have a piece of real property. There are five persons' names that are on that piece of real property. Half of them want to sell the real property today, so that they can take out their inheritance. The other half want to live in the house. That's the majority of my cases. The decedent thought when he prepared his will that he did everything that was necessary. However, he forgot that half of his heirs were not going to be able to buy a house in this market, and that the other half needed the money.

Basically, that sort of give you a little thumbnail sketch of what happens, what I consider out here in the real world, of problems, of practical problems you're going to have.

Statement of Edward V. Brennan
(Representing the California Probate Referees' Association)

Just a comment. I'm a probate referee, and we deal with the good lawyers -- the experts -- as well as the general practitioner. In the small estates, those experts have to be extremely efficient in order to do the job properly and they get paid adequately on a statutory fee. But, in California, there are so many lawyers, and there are so many general practitioners who do practice probate law. If they counted all their time on these small estates, my experience is that the estates would pay a lot of money in excess of the statutory fee. This isn't just experience with the general practitioner, who we deal with through our probate referee office, who is not an expert. If he or she charged for all their time, in getting these estates through, I think it would be much larger than the statutory fee. That's just my experience as a referee.

Questions and Answers

Question asked of Mr. Collier by Commissioner - In what percentage of cases are extraordinary fees allowed?

Collier: You will probably have to ask the court representative. I can only speak from my own experience. If we have litigation in an estate, we're going to charge extraordinary fees for that almost invariably. I don't think we have litigation more than maybe 1 in 20 estates, or 1 in 30. It's not that common, but when it does, that's always an extraordinary.

Most of the estates that we have are large enough that we have to file tax returns, and, in those cases, we may or may not charge extraordinary. I would think that, probably, when we do a Federal or State tax return, we charge an extraordinary fee for that in let's say 50%, but I don't have a statistic, but we have a lot of the large estates.

In response to [the AARP] comment, where we do, basically, do it on a time-charge rather than a statutory fee. When we get into the tax areas, we try and cover our time, and sometimes we'll try and cover our time plus a little more to pick up what we lose, if you will, on the small estates. So, it comes out. But there are very few large estates that we just do on a straight statutory fee. On most of it, it's a negotiated fee basis, and that's been true for some years. I don't think we get any significant extraordinary fees in very many of the estates we have. I can't really give you numbers, I've never broken it down.

Question asked of Mr. Collier by Commissioner - What I'm getting at is, in your chart showing comparative costs for legal services...

Collier: I've assumed that there are no so-called extraordinary, because I think the information we got from the other jurisdictions was based upon what we just call "ordinary services." We try to exclude the will contests, or the tax things, that are normally not covered by a statutory or a reasonable fee. Those are extra charges.

Question continued by Commissioner - Then getting to the point more specifically, where you compare the fee of a reasonable fee state as compared to the statutory fee in California, was any consideration given to the fact that in some California cases there would be extraordinary fees, where as in the reasonable charge state that would be the full fee?

Collier: Let me answer that question by saying that that is not specifically reflected, for example, in the letter that Bruce Ross wrote to the Commission. What we were asking for there is: "Assuming that you have a normal probate, what would be the fee, that is a reasonable or normal fee?" I think in that case, we've taken out -- both for California purposes and for other jurisdictions -- essentially the litigation or the complicated tax work, and so forth. I think the figures are based upon pretty much the same premise, that the fee given is for the usual services for which you'd ask compensation.

When you get into any estate where you have complex matters that are not part of the kind of ordinary services -- there is just no limit to what that may involve in a particular estate -- the fee may be 10% of what your usual fee would be or it might be 300% of what your usual fee might be because of the fact that you've got extended litigation or something. I think we've taken those out as best we can.

Question asked of Mr. Collier by Commissioner - On a reasonable-fee basis, is there a probability that different judges would allow a different fee for the same amount of legal work?

Collier: I think that is one of the real concerns we had. I must say that is true now, around the state, in terms of extraordinary fees. We don't have anybody here, I guess, from the San Francisco Bay area, but I have heard from my friends up there. There are five counties in which they practice around the bay, and every county has a different idea of what extraordinary fees are. How you determine them, what you do or do not allow for tax work, what you do or do not allow for sales and litigation -- there's a tremendous variance in the extraordinary fee area. And, if you simply had a reasonable fee for

the whole thing -- for all services -- you would tend to accelerate that difference. And, as I pointed out in my presentation, you have 58 counties, and I would judge at least 100 judges who award fees.

I have in my material (I didn't mention it) some suggested extraordinary fees in San Diego County for all kinds of services, up to a certain dollar amount that the probate examiner's automatically authorized to approve. Beyond that, you've got to go to the court. But that is the kind of thing we would anticipate would be done on almost a county-by-county basis. What is done in Torrance is not necessarily what is going to be done in San Fernando or Glendale. There is a certain amount of certainty in terms of the statutory system. You know going in that, assuming the assets are X (or whatever they are) that the fee's essentially going to be in the statutory range. You can negotiate -- and we certainly negotiate in a lot of the ones we have -- but the statutory fee schedule gives you an outside figure for normal services. One of the problems with a reasonable fee agreement is that I would be very hard-pressed to give a client, at a first meeting, an idea that this is going to take 50 hours of my time, or 100 hours of my time, because you don't know what the complexities are, what the problems are, whether you've got asset problems in tracing, or title problems, or things like that, that may be complicated. You may have very difficult assets to value. And even though you have a probate referee doing that, you still have an awful lot of legwork to dig that information out. I would find it very hard to tell a client anything other than we'll make a straight time charge, we will bill you monthly, or whatever, and we don't know what it is going to cost.

That is kind of my reaction to what a reasonable fee is. We can tell them the time charge, but we really have no way of knowing until we've gotten into that some way just what that charge is going to be. And, I think, Beatrice [Lawson], you might have somewhat the same views. It's very hard to go with, you know, the first week, or month, that you start, to really know how much time a particular estate is going to take. The statutory fee system is an equalizing, system, if you will. Some we certainly lose money on, some we take a horrible

bath on, others we make a little money on. Hopefully, over the end of the year, or the end of a period of time, you come out pretty close to your time charges. With individual estates, you don't have the knowledge to determine what is involved in the estate until you're well downstream.

Question asked of Mr. Collier by Commissioner - Would you be able to make an estimate of how much additional court time you think it would take if in every case the court had to fix a reasonable fee, as distinguished from a statutory fee?

Collier: Well, let me answer it on this basis. It would seem to me, first of all, that what would have to happen, over a period of time, is each court, or each county, would start developing kind of reasonable fee concepts. You know, x for a 706, or whatever. But, those are only guides, they're not firm numbers. And then, if you for example, had a 706 that had very complicated issues, you're going to have to go in and justify that. And, it's going to take, first of all, a tremendous amount of additional time, apart from the contest, just for the presentation of your services in great detail, as to what was done in inventory, in valuation, in handling real estate, that Beatrice [Lawson] talked about. So first of all you're going to add to the court file, in terms of quantity of paperwork to be processed and read. I would think that, if you have a simple, reasonable fee, where the court fixes it, you're going to get probably a situation where you're going to be required to send a copy of that to all interested parties, They say, "It's my money, I'm going to come in and fight." And the statutory fee largely eliminates that.

I just can't give you a number, but my feeling is it would take a tremendous amount of additional court time simply to process this, because the court would have to review the material, determine it -- say it's the judge, determine the calendar, and Department 5 or 11 in Los Angeles -- I think it would probably double in size, probably, just in terms of the number of things the judge has to pass on every day. After a while, the court really has to develop a rule of thumb as to

how to handle things anyway. It does that, pretty much, on extraordinaries now, but you're now adding all that statutory into the system.

I just think that it would take, apart from the contests, a tremendous amount of additional court time to process. It takes a tremendous amount of additional attorney time, or paralegal time, if you will, to put this information together. And the net saving, based upon our statistics, is going to be zero, because, I think it's going to cost the consumer more when you get done, apart from the contests. And then, I think, there would be a lot of contests that would develop, simply because there is no fixed amount and to pick up examples several people here have mentioned, you get the general practitioner, who doesn't do very much of this, he or she may spend endless hours trying to figure out what they do next or what happens, and they want to come in and be paid for their time. It seems to me in those situations, you're increasing your costs and you're inviting contests. Rick [Stack] and others have made the comment that to make money when you have a statutory fee, you've got to be pretty efficient. If you can't make money on it, you get out of the business. But, I just see a lot of increased costs to everybody concerned if you go to a reasonable fee system as a basic structure if you're going through the court.

And, I must say, on our statistics, that, of the 1,506 responses that we tabulated, we got the lowest support for that of any of the four alternatives. About 3% said they would like the court to fix all fees on a reasonable basis, without any statutory standard. The other night in Pasadena, at our CEB program, that was one of the alternatives, and I didn't get a single hand raised for that one. I think we had 150 there that night. People see it as a problem; they just see all kinds of complications, and extra costs and delay. It's not efficient from our perspective.

Response of CALJUSTICE to Mr. DeMoully's question - How do you feel about Mr. Collier's comment?

Lubetzky: I still think that we would probably disagree that a voluntary contract necessarily would result in endless litigation. I still think that we would still keep to the basic premise that people

who enter into contracts voluntarily are basically going to abide by those contracts. And that would lessen the amount of litigation.

I do think, though, that Ms. Barbano's comment does have a lot of merit. If the Commission were to conclude that to keep the statutory scheme was more of a benefit than a detriment, it would be constructive possibly to consider requiring that attorneys do tell consumers when they come into their office that they do have the alternative of negotiating a contract with them as an alternative to the statutory fee schedule, so that consumers who are not aware of this when they walk into the office are not under the impression that the statutory fee schedule is the only avenue that they have. They are unaware, otherwise, of their ability to negotiate some kind of a contract.

I think that the other comment also has a great deal of merit. Under the current statutory fee system, the attorney has the right to petition the court for extraordinary fees, if he feels that the time consumed has exceeded what he can be awarded under the statutory fee ...

Chairperson Stodden: I don't think that's quite right, sir, the statute as it presently is, is that he gets statutory fees for performing ordinary services. If he is required to do something which is outside the ordinary, then he gets extraordinary, he really gets reasonable fees for extraordinary services.

Lubetzky: I stand corrected. I think what I was getting at is this: In situations in which the consumer perceives that the statutory fee schedule is overcompensating the attorney for work performed, the consumer should have an opportunity to petition the court to reduce that fee where they feel that is excessive, whereas under the current statutory fee schedule, even if the court were to look at it and feel that, yes, the attorney was being overcompensated under the statutory fee schedule, they're powerless right now to reduce that.

Chairperson Stodden: The court is powerless to reduce the statutory fees. However, the court is required, under Estate of Walker, to consider the reasonableness of the statutory fee when granting the reasonable fees for extraordinary services, so that protection is built-in to that extent.

Lubetzky: To the extent of protection for extraordinary fees. But not to give you the protection under the statutory fee if the amount that you're getting for the ordinary services is excessive.

Responses of CALJUSTICE to questions

DeMoully: OK, but if the client contracts to pay the statutory fee, then you wouldn't allow him to try to set aside that agreement by going in and trying to get the fee lowered? That's what you said.

[Answer unintelligible]

Commissioner: I have one question. I had understood you to say that you're recommending a voluntary agreement. Is there anything under the statutory fee system to prevent that?

Lubetzky: Only to the extent that an attorney doesn't want to negotiate with you and insists on imposing the statutory fee schedule.

Response of Ms. Lawson to Question by Commissioner

Chairperson Stodden: I'd like to ask Ms. Lawson a question. If you were to have a contract between your representative of the estate and the attorney, do you think that the other beneficiaries would be willing to abide by that, or do you think that they might object to that contract as being against their interests?

Lawson: In my case, they probably won't, because I think they have all kinds of problems right now. But certainly, they are not bound by that contract, because you're only entering into it with the personal representative, or the particular person who goes in and opens the estate, if there is no will, being that the executor or one member of the family. The contract is only between that member of the family and the attorney. All of the other beneficiaries have the right to challenge that contract. And, they are not bound by it because they were not a party to it. So certainly, even if the two parties agree, and are not going to have any litigation among themselves, all the other people could come in and have some litigation. Depending on how upset they are over the procedures that are going on, you are going to have, that's just another thing that you can litigate.

Comment by Mr. DeMoully

DeMoully: Another interesting thing is that in Delaware, which I guess you'd say is a reasonable fee state, in order to avoid all litigation, the court has adopted a court rule, that has a percentage schedule, and it's the highest percentage fee of all the states that we found. The rate under that schedule gives the attorney more money than in any other state as far as we know, and it's a lot more than in California, for example. So, there's no assurance, that even if you had a reasonable fee, that the court is going to look at every case; they're going to have some kind of a standard, that, if it's within this range, we'll approve it, and in Delaware the standard fee is really high.

Further Discussion of Views of American Association of Retired Persons

Chairperson Stodden: Do we have any other comments?

Barbano: I just want to make a comment. When you're dealing with older people, you have to make things very simple and plain for them to understand even with a contract, because that's where a lot of problems

come in later on, when their heirs are told one thing by their parents, and then find out later that things were different from what they were expecting.

Collier: I was going to say, the statutory arrangement, where you're making things simple, there's a schedule of what basic fees are. That is simpler than trying to explain these multiple factors, such as time, expertise, and complexities of issues, and so forth, and give that a monetary value, or saying a straight time-charge, in terms of knowing where you come out. People want to kind of know what the end result is, and the statutory gives you an end-result figure, kind of going in. You know what it is, so it seems to me that does meet your simplicity, easy to explain, easy to understand.

Barbano: However, you're going to have to deal with a lot of seniors who came from the depression-day era, and when you think back to your youth, fees were very reasonable. And now when you come up and you say oh my God, is that what I have to pay, what my heirs have to pay, and it's very difficult for them to understand that times have changed. Inflation is here, but, in their own minds, they can't recognize or understand it. So, this is something I want to bring up to all of you.

DeMoully: Of course, all the prices have gone up, you know.

Unidentified: The size of the estate has gone up, too.

Barbano: In their minds, a lot of people can't understand that.

DeMoully: But, don't you think it's easier for them to, won't they feel more secure if you say, now this is the way the rate is computed -- it's such and such a percent of the estate. They would feel less secure if you say, the fee is going to be so much an hour, $130 an hour, but I can't tell you how many hours. It is kind of an open-ended thing when you tell somebody that, they don't have a lot of security when you tell them that.

Barbano: All right, now, supposing a person leaves just a house, say it's worth at today's prices $300,000, you have two heirs, two children. It seems unreasonable for one little thing to charge the statutory fee of $2,000 on the house which is one transaction.

Unidentified: In that case, I think, if the two children agree, they can go and negotiate with any attorney they so choose.

Barbano: True, but up until now, I didn't know that you could negotiate.

Lubetzky: There's also a question of whether an attorney would negotiate.

DeMoully: I think, if you want to, you could negotiate, and if the attorney won't, then you could go to another lawyer. That's what you do in all legal matters, you know. The thing is, though, that I think people are willing to pay the price for a first-class attorney who knows what he's doing, at least I would be, and get it done right.

Collier: I might just comment on your cost, because if you sell a $300,000 house, you're paying a broker at, ah, normally five or six percent, that's $15,000, maybe $18,000. You probate that thing, it would be about half of that amount. Your broker is getting twice for sale what your attorney gets for running through the probate, doing the transfer, tax work, paying creditors, and so forth. So, if you look at, you say you can't relate to that number, ...

Barbano: I'm not speaking for myself, but the people in my generation, they just don't understand law.

Collier: But if you look at brokers transactions, they tend to run five or six percent of the gross value of the property. Certainly some of the comments I got back on my questionnaires indicate I'm in the wrong business. The brokers are making more money on estates

because they sell property than even the lawyer gets. That's because the broker basically gets five or six percent in those cases, that's what the court will allow, and those are often much bigger numbers than the fee for administrators.

Vote on Issue Deferred

Chairperson Stodden: Since we don't have a quorum here, we're not able to do anything in the way of a vote today. I want to thank all you people for coming and giving us your input. We really appreciate it, and we will have to put this over to another meeting when we do have a quorum. I think we'll adjourn at this point.

STUDY L-1055 - FEES OF PERSONAL REPRESENTATIVE

The Commission briefly considered Memorandum 87-107, relating to the fees of the personal representative.

The staff was requested to prepare material for the next meeting that more specifically identifies the policy issues involved in dealing with fees of the personal representative and includes staff recommendations on those issues.

STUDY L-1060 — MULTIPLE-PARTY ACCOUNTS

The Commission considered Memorandum 87-90, the attached staff draft of a *Tentative Recommendation Relating to Multiple-Party Accounts*, and the First Supplement to Memorandum 87-90.

The representative of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section expressed concern about the provision imposing survivorship on a tenancy in common account (Prob. Code § 5302). The provision may defeat intent because most parties who establish a tenancy in common account do so because they do not want survivorship.

There is a need for a comprehensive procedure for the personal representative to recover nonprobate assets, including revocable trusts (Prob. Code § 18201), when the probate estate is insolvent. The comprehensive procedure should limit the right to recover nonprobate assets to the personal representative as proposed Section 5307 does; the surviving beneficiary should not have to deal with an array of creditors. The comprehensive procedure should limit the right to recover nonprobate assets to the case where the estate is insolvent as proposed Section 5307 does and as is provided for revocable trusts (Prob. Code § 18201) and powers of appointment (Civ. Code § 1390.3(b)). The comprehensive procedure should make clear that decedent's creditors must present their claims in the probate proceeding, and that failure to file a timely claim bars the debt as in probate generally; this is reasonably clear in subdivision (d) of proposed Section 5307 and in the power of appointment provision (Civ. Code § 1390.3(b)). Pending development of a comprehensive procedure, the staff should make proposed Section 5307 clearer on these issues, consistent with the foregoing policy.

The Commission made the following decisions:

(1) To change the rule imposing survivorship on a tenancy in common account to provide instead that a tenancy in common account ordinarily does not have survivorship.

(2) To clarify proposed Section 5307 (liability for debts) as discussed above.

(3) To make a renewed effort to get comments on the proposal from banks and savings and loan associations.

(4) To set the proposal as a special order of business at a future meeting, and to invite representatives of banks and savings and loan associations to appear and give their views to the Commission.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____ (for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

Prob. Code § 13106.5. Recording of affidavit or declaration where property is debt secured by lien on real property

13106.5. (a) If the particular item of property transferred under this chapter is a debt secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration, and the affidavit or declaration shall be recorded in the office of the county recorder of that county. The county recorder shall index the affidavit or declaration in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the affidavit or declaration shall be indexed as a grantee.

(b) Any duty of the obligor under Section 13105 to pay the debt secured by the lien on the real property to the successor of the decedent does not arise until the debtor has been furnished with a certified copy of the affidavit or declaration that has been recorded under subdivision (a). If the requirements of subdivision (a) and Sections 13100 to 13103, inclusive, are satisfied, receipt by the obligor of the certified copy of the affidavit or declaration constitutes sufficient acquittance for the payment of the debt pursuant to this chapter and, to the extent of such payment, discharges the obligor from any further liability with to respect to the debt. The obligor may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(c) Except as provided in subdivisions (d) and (e), if the requirements of subdivision (a) and Sections 13101 to 13103, inclusive, are satisfied:

(1) The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Section 2934 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

(2) If a mortgage upon the real property was given to secure the debt, the person or persons executing the affidavit or declaration as successor of the decedent, or their successors in interest, have the same rights and duties as they would have if they were an assignee of the mortgage.

(3) If a trust deed upon the real property was given to secure the debt, the person or persons executing the affidavit or declaration as successor of the decedent, or their successors in interest, have the same rights and duties as they would have if they were an assignee of the beneficial interest under the deed of trust.

(d) If a mortgage upon the real property was given to secure the debt and the requirements of subdivision (a) and Sections 13100 to 13103, inclusive, are satisfied, a good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent or by their successors in interest.

(e) If a trust deed upon the real property was given to secure the debt and the requirements of subdivision (a) and Sections 13100 to 13103, inclusive, are satisfied:

(1) The trustee under the deed of trust may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(2) A good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt may rely upon a recorded reconveyance of the trustee under the deed of trust.

~~(d) The county recorder shall index the affidavit or declaration recorded under subdivision (a) in the index of grantors and grantees. The deceedent shall be indexed as the grantor and each person designated as a successor to the property in the affidavit or declaration shall be indexed as a grantee.~~

Comment. Section 13106.5 is a new provision that covers the situation where the particular item of property transferred under this chapter is a debt (including a promissory note) secured by a lien on real property. Where the instrument (including a mortgage or deed of trust) creating the lien has been recorded, subdivision (a) requires that the affidavit or declaration be recorded in the office of the

county recorder of the county where the real property is located instead of being furnished to the holder of the property as required by the introductory clause of subdivision (a) of Section 13101. Recording of the affidavit or declaration in the real property records is mandatory in order that the title records will reflect the transfer of the debt and security interest under this chapter to the person or persons executing the affidavit or declaration as successor of the decedent and to establish of record their authority to execute a satisfaction or release of the mortgage where the debt is secured by a mortgage.

Subdivision (a) also requires that the affidavit or declaration include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration. This is required because the affidavit or declaration is to be recorded in the real property records. The requirement also avoids the need to furnish the obligor on the debt with reasonable proof of the identity of each person executing the affidavit or declaration. See Section 13104(e). The affidavit or declaration must be in the form prescribed by Section 13101. The affidavit or declaration must be executed under penalty of perjury under the laws of the State of California. See Section 13101(a)(11). A certified copy of the decedent's death certification must be attached to the affidavit or declaration. Section 13101(c).

The first sentence of subdivision (b) makes clear that the obligor on the debt has no duty to make payment to the person or persons executing the affidavit or declaration until the obligor has been furnished with a certified copy of the recorded affidavit or declaration. This is consistent with Civil Code Section 2935 (recording of assignment of a mortgage or of the beneficial interest under a deed of trust is not of itself notice to the debtor so as to invalidate any payments made by the debtor to the person holding the note.). See also Section 13102 (evidence of ownership). The last two sentences of subdivision (b) are consistent with subdivision (a) of Section 13106.

Under subdivision (c), the recording of the affidavit or declaration operates as constructive notice of its contents to all persons. See Civil Code Section 2934. The person or persons executing the affidavit or declaration as successor of the decedent have the same rights and duties as they would have if they were an assignee of the mortgage or an assignee of the beneficial interest under the deed of trust. See Civil Code Section 2941. Giving these persons these rights would, for example, permit a title insurer to rely upon the affidavit or declaration in case of a reconveyance by the trustee under a deed of trust or a recording of a certificate of discharge of a mortgage or the recording of a notice of default in a non-judicial foreclosure of the deed of trust or the mortgage (with a power of sale). The duties include, for example, the duty to execute a certificate of discharge of the mortgage if the lien is secured by a mortgage.

Subdivision (d) makes clear that a good faith purchaser, lessee, or lender may rely in good faith upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent (or by the successor in interest of such a person). Subdivision (e) makes clear that the trustee under the deed of trust can execute a reconveyance in reliance upon the statements made in the affidavit or declaration and protects a

good faith purchaser, lessee, or lender who relies upon the recorded reconveyance. These protections are consistent with the protection given the holder of the decedent's property under Section 13106. They are necessary to protect the obligor on the debt who has paid the debt to the person or persons executing the affidavit or declaration and needs to have the property title records reflect the fact that the debt has been paid and the security released.

Except as specifically provided in Section 13106.5, the provisions of this chapter--including but not limited to Sections 13109-13113 (liability of persons to whom payment, delivery, or transfer of property is made under this chapter)--apply to money collected pursuant to Section 13106.5.

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

CA LAW REVISION COMM'N

January 12, 1988 JAN 1 1988 (213) 621-9541

RECEIVED

Mr. John DeMolley
California Law Revision Commission
4000 Middlefield, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. DeMolley:

I have enclosed information on how other states with large metropolitan areas determine attorney fees in a probate estate. Attorneys practicing in the probate and estate planning area were contacted directly and surveyed as to that state's fee structure, if any, and then asked them what attorney fees would be for estates valued at $100,000, $300,000 and $600,000. The fees reflect probate of a relatively simple estate with no major valuation issues (i.e., closely held business) or disputes between persons interested in the estate. All attorneys contacted stated the fees granted would be higher if complexities arose during probate. To repeat, these are very rough fee approximations.

Sincerely,

Bruce

Bruce S. Ross

BSR/cmm
cc: Charles A. Collier, Jr., Esq.
(via Rapifax)

(Dictated but not read)

L14892[99996]23

		Attorney Fees If Value of Estate		
		$100,000	$300,000	$600,000
1.	New York - Generally follows executor fee schedule 5% - first $100,000 4% - next $200,000 3% - next $700,000 2½% - next $4,000,000 2% - excess over $5,000,000	$ 5,000	$ 13,000	$ 22,000
2.	Florida - Reasonable fee statute	2,000	7,500	18,000
3.	Pennsylvania - Reasonable fee statute	5,000	13,000	22,000
4.	Texas - Reasonable fee statute	3,000	6,000	10,000
5.	Illinois - Reasonable fee statute	5,000	10,000	16,000
6.	Michigan - Reasonable fee statute	3,000	7,000	10,000
7.	Ohio - Reasonable fee statute	3,000	6,000	10,000
8.	Georgia - Reasonable fee statute	2,500	7,500	12,000
9.	Virginia - Reasonable fee statute	3,000	7,000	9,000

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

January 11, 1988

Mr. John H. DeMoully
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: LRC Memos 88-1 to 3

Dear John:

I have enclosed copies of Study Team 1's technical report on Memos 88-1, 88-2 and 88-30. The reports have not been reviewed by the Executive Committee and represent the opinion of the Team only. I am sending them to you for your information and comment. They are intended to assist in the technical review of those sections involved.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/hl
Encls.
cc: Chuck Collier Jim Opel Valerie Merritt
Keith Bilter Jim Devine
Irv Goldring Ted Cranston

R E P O R T

TO: VALERIE J. MERRITT
JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: JANUARY 8, 1988

SUBJECT: LRC MEMORANDUM 88-1 (Cleanup Bill for AB 708) (Urgency Bill -- priority of federal and state claims)

Study Team No. 1 held a telephone conference on January 8, 1988. Charles A. Collier, Richard S. Kinyon, Sterling Ross, Michael Vollmer, Lynn Hart and William V. Schmidt participated. We have the following comments:

The staff states that the proposed amendment restores the law to what it was before AB 708 was enacted. We feel this is desirable and we support this concept. However, we would suggest the elimination of the word "debts" which precedes the colon and follows the word "following." Prior Probate Code Section 950 does not use the word "debts" in this particular place and we think it is better to delete it to eliminate any possible confusion. The Comment states that Section 11421 is amended to delete reference to debts given preference by federal and state law. It is in this spirit that we make our recommendation.

We also note that prior Probate Code Section 950 states that the listed debts are to be "paid in the following order:" Should this concept be retained and introduced into the revision of Section 11421?

Respectfully submitted,

STUDY TEAM NO. 1

By: _____
William V. Schmidt,
Captain

R E P O R T

TO: VALERIE J. MERRITT
JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
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JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: JANUARY 8, 1988

SUBJECT: FIRST SUPPLEMENT TO LRC MEMORANDUM 88-1; Study L - Cleanup Bill for AB 708 (Urgency Bill-- Filing of Creditor Claims; Statutory Form Durable Power of Attorney for Health Care)

Study Team No. 1 held a telephone conference on January 8, 1988 with Charles A. Collier, Richard S. Kinyon, Sterling Ross, Michael Vollmer and Lynn Hart. We have the following comments:

We agree with Professor Frantz that the present system is working very well indeed. We would like to see prior law retained which we understand what was the position of Study Team No. 3 when this question was earlier presented to the commission.

We understand and can appreciate that Commissioner Stodden has seen many cases where a creditor who filed a claim with the personal representative was not been paid. What she does not see is how many creditors that file such a claim are in fact paid. It is the our collective experience (three of us practice in northern California and three of us

practice in southern California and our counties include Los Angeles, Orange, San Francisco and Santa Rosa) that only a few creditors that file claims with a personal representative are not paid and the great majority are paid. The public policy argument of protecting those few who are not paid is therefore not as strong an argument in our mind as it is in her mind.

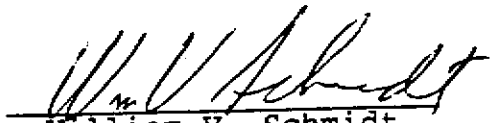
We feel that the change that AB 708 made from existing law will work to the disadvantage of those creditors who are not aware of the requirement that they must file their claim with the clerk of the court, or those creditors who do not know how to properly file their claim with the court and thus fail to do so. This could constitute a trap to those creditors and result in the nonpayment of their claims.

We also feel that there will be instances of claims filed with the clerk of the court where, for one reason or another, no duplicate copy will be received by the personal representative. In such cases the personal representative and the attorney for the personal representative may well be unaware of the creditor's claim until late in the administration of the estate. This will not only cause them additional work and trouble, but could cause them to miss tax deductions to the detriment of the estate simply because they were unaware of creditor claims. We feel that these public policy considerations outweigh the public policy

consideration which concerns Commission Stodden because they are more likely to occur routinely in practice.

Respectfully submitted,

STUDY TEAM NO. 1

By: 
William V. Schmidt
Captain

REPORT

TO: VALERIE J. MERRITT
JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: JANUARY 8, 1988

SUBJECT: LRC MEMORANDUM 88-2 (Bill to Effectuate Recommendations to 1988 Legislature) (Suggested Changes)

Study Team No. 1 held a telephone conference on January 8, 1988. Charles A. Collier, Richard S. Kinyon, Sterling Ross, Michael Vollmer, Lynn Hart and William V. Schmidt participated. We have the following comments:

§ 8200. Delivery of Will. We understand that some counties including Los Angeles and Orange charge a nominal fee for a will to be deposited for safekeeping by its custodian Our committee unanimously feels that this is poor policy and we feel that appropriate language should be written into the statute which would eliminate such a fee.

Although we did not have proposed § 8200 in front of us at the time of our discussion, we assume that it is similar to existing Probate Code § 320. There is very good reason for a custodian of a will, after being informed that its

maker is dead, to deliver the will to the clerk of the superior court or to the executor for safekeeping. Such a custodian may well be a person who is not a beneficiary or a fiduciary under the will and has no interest in the will other than the fact that he or she has custody of the will. Such a person should be encourage to deposit the will for safekeeping. This is a public duty that the law should encourage. Such a person should not, in our opinion, be in any way penalized or discourage from performing this duty by the charging of a filing fee by the county clerk.

We do feel, however, that any party who is interested in the will and desires to obtain a certified copy or desires to file a petition for its probate should be charged the appropriate fee.

§ 8251. Responsive Pleading. We agree with the changes the staff proposes and would encourage the commission to adopt them.

§ 8402. Qualifications. We agree with the proposed changes of the staff and would encourage the commission to adopt them.

§ 9050. Notice Required to Creditors. We agree with the staff. We feel that this matter has already been put to rest. We share the view of the staff that the decision by the commission was based on grounds of public policy and fairness as well as constitutional issues. We feel that the decision by the Missouri Supreme Court is not sufficient reason to reconsider that decision. A decision by the U.S.

Supreme Court may provide sufficient reason but such a decision is for a future day.

§ 16315. Income on Specific Gift. Our study team which includes Richard Kinyon who we understand proposed the concept for such a statute, had a good deal of trouble with the language of this section and we feel that it needs much more work and consideration. The words "the date the gift is required to be distributed" gave several of our members problems. This is not always clear in a trust situation.

We assume that the rules could not apply to a revocable trust because any trust which is revocable gives the person capable of revoking it the power to cancel or undue "a gift which is required to be distributed." We assume then that the statute was intended to refer only to testamentary trust or an inter vivos trust which was irrevocable.

In comparing this situation to a probate, the one year period of time runs from the date of death which is certain and easy to ascertain. If the "date a gift is required to be distributed" refers to the death of the settlor or the life beneficiary or the attainment of a specified age by a beneficiary or the expiration of a specific period of time after the occurrence of any of these events, then we would have greater clarity and certainty. However, such language is not incorporated into the proposed sections.

Our committee felt that much more work and thought

needed to be given to this section then we could afford at the time of our conference call.

Respectfully submitted,

STUDY TEAM NO. 1

By: _____
William V. Schmidt,
Captain

R E P O R T

TO: VALERIE J. MERRITT
JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: JANUARY 8, 1988

SUBJECT: FIRST SUPPLEMENT TO LRC MEMORANDUM 88-2 - Bill to Effectuate Recommendations to 1988 Legislature (Priority for Appointment Administrator CTA)

Study Team No. 1 held a telephone conference on January 8, 1988 with Charles A. Collier, Richard S. Kinyon, Sterling Ross, Michael Vollmer and Lynn Hart. We have the following comments:

We unanimously feel that attorney Francis B. Dillon has a good point which justifies a modification of the proposed statute. However, we also unanimously feel that the modifying language proposed by the staff present problems which very much concern us.

The problem posed by Mr. Dillon stems from the words of the statute that a person who takes under the will has priority over a person who does not. Under the statute, both existing and proposed, this is a mandatory requirement. We would propose that it not be a mandatory requirement but only a matter to be considered by the court in exercising its discretion. We think that Mr. Dillon would be happy with

this proposed modification and that it would, in all probability, solve the problem that he poses. Once this modification is made, we prefer to keep § 8441 in the same form as it currently exist.

Priority for appointment be based on the person taking the greatest share in the estate causes us great concern because the time when the appointment is made generally occurs at the beginning of the estate and at that time it is very difficult to determine who is going to take the greatest share of the estate. For example, we generally do not know at the beginning of an estate the size of the residue and the residuary shares of an estate. They will, of course, depend on the overall size of the estate, the amount of the creditor claims paid during the administration of the estate, the size of extraordinary fees and commissions and other matters. Most of these are not known and can not be predicted with any great accuracy at the beginning of the estate. We therefore feel that the new language proposed by the staff could cause serious problems. Hopefully, Mr. Dillon's problem can be solved in most cases by the modification that we proposed above.

Respectfully submitted,

STUDY TEAM NO. 1

By: 
William V. Schmidt,
Captain

REPORT

TO: VALERIE J. MERRITT
JAMES V. QUILLINAN
LLOYD W. HOMER
D. KEITH BILTER
CHARLES A. COLLIER, JR.
JAMES D. DEVINE
IRWIN D. GOLDRING
JAMES C. OPEL
THEODORE J. CRANSTON
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: JANUARY 8, 1988

SUBJECT: LRC MEMORANDUM 88-3 (Study L - Transitional Provisions for 1988 Probate Bill)

Study Team No. 1 held a telephone conference on January 8, 1988. Charles A. Collier, Richard S. Kinyon, Sterling Ross, Michael Vollmer, Lynn Hart and William V. Schmidt. We have the following comments:

Charles A. Collier of our committee states, and the balance of the study team agrees, that it is very difficult to work on transitional provisions in the abstract. He and the study team, therefore, would prefer to wait until the 1988 legislative proposal is put in bill form and then consider the transitional provisions with the bill in front of us.

In view of the numerous amendments which were made to AB 708, we hope that the staff and the commission agree with us and give us another opportunity to comment on the

transactional provisions after the 1988 proposal has been put in bill form.

Secondly, we would like to point out that most of the members of our committee received memorandum 88-3 only one or two days prior to the time of the conference call. Although most of them had read it, we did not feel, in view of the scope of the provisions, that we could intelligently comment on the provisions in this report.

Respectfully submitted,

STUDY TEAM NO. 1

By: _____
William V. Schmidt,
Captain