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| <p><i>DATE &amp; TIME:</i></p> <ul style="list-style-type: none"> <li>• July 26 (Thursday) 1:30 pm - 6:00 pm</li> <li>• July 27 (Friday) 9:00 am - 2:00 pm</li> </ul>   | <p><i>PLACE:</i></p> <ul style="list-style-type: none"> <li>• San Diego<br/>Travelodge Hotel<br/>on Harbor Island<br/>1960 Harbor Island Dr.<br/>(619) 291-6700</li> </ul> |
| <p><i>NOTE:</i> Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p> |  |

**FINAL AGENDA**

*for meeting of*

**CALIFORNIA LAW REVISION COMMISSION**

**THURSDAY, JULY 26, 1990**

1. MINUTES OF MAY 31/JUNE 1, 1990, COMMISSION MEETING (sent 6/20/90)

2. ADMINISTRATIVE MATTERS

1990 Legislative Program

Oral report at meeting

Election of Officers

Memorandum 90-98 (NS) (sent 6/8/90)

Communications from Interested Persons

3. MATTERS IN CONNECTION WITH 1990 LEGISLATIVE PROGRAM

STUDY L-1036 - PROBATE ATTORNEY FEES

Memorandum 90-105 (JHD) (sent 6/26/90)

First Supplement to Memorandum 90-105 (sent 7/11/90)

Second Supplement to Memorandum 90-105 (sent 7/13/90)

Third Supplement to Memorandum 90-105 (sent 7/13/90)

STUDY L-3007 - IN-LAW INHERITANCE

Memorandum 90-108 (JHD) (sent 7/13/90)

STUDY L-3022 - ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

Memorandum 90-106 (JHD) (sent 6/29/90)

First Supplement to Memorandum 90-106 (JHD) (sent 7/16/90)

STUDY L-3046 - STATUTORY POWER OF ATTORNEY  
Memorandum 90-84 (JHD) (sent 6/8/90)

4. STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

Report of State Bar Probate Section  
Memorandum 90-99 (NS) (enclosed)

5. STUDY L-3048 - NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

Draft of Tentative Recommendation  
Memorandum 90-109 (NS) (sent 7/13/90)

6. STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS

Comments on Tentative Recommendation  
Memorandum 90-80 (SU) (sent 7/11/90)  
First Supplement to Memorandum 90-80 (enclosed)

7. STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

Comments on Tentative Recommendation  
Memorandum 90-81 (SU) (sent 7/11/90)

8. STUDY L-3015 - DEBTS THAT ARE CONTINGENT, DISPUTED, OR NOT DUE

Comments on Tentative Recommendation  
Memorandum 90-82 (NS) (sent 7/3/90)

9. STUDY L-1025 - REMEDIES OF CREDITOR WHERE PERSONAL REPRESENTATIVE FAILS  
TO GIVE NOTICE

Comments on Tentative Recommendation  
Memorandum 90-83 (NS) (sent 7/3/90)

10. STUDY L-3044 - COMPREHENSIVE POWERS OF ATTORNEY STATUTE

Draft Statute  
Memorandum 90-85 (SU) (sent 7/11/90)

11. STUDY L-619 - STATUTORY WILL

Memorandum 90-100 (JHD) (sent 6/8/90)

12. STUDY J-102 - MOTIONS

Memorandum 90-101 (JHD) (sent 6/8/90)  
First Supplement to Memorandum 90-101 (sent 6/26/90)

FRIDAY, JULY 27, 1990

13. STUDY H-112 - COMMERCIAL LEASE LAW: USE RESTRICTIONS

Comments on Tentative Recommendation

Memorandum 90-50 (NS) (sent 5/9/90; another copy sent 6/20/90)  
First Supplement to Memorandum 90-50 (sent 5/17/90; another copy  
sent 6/8/90)  
Second Supplement to Memorandum 90-50 (sent 6/8/90)  
Third Supplement to Memorandum 90-50 (sent 7/11/90)

14. STUDY N-103 - ADMINISTRATIVE LAW: ALJ CENTRAL PANEL

Memorandum 90-89 (NS) (sent 6/29/90)  
First Supplement to Memorandum 90-89 (sent 6/29/90)  
Second Supplement to Memorandum 90-89 (enclosed)  
Third Supplement to Memorandum 90-89 (to be sent)

15. STUDY N-102 - APPLICATION OF ADMINISTRATIVE PROCEDURE ACT

Application of Act to the University of California  
Memorandum 90-71 (NS) (sent 7/11/90)

Application of Act to the Courts  
Memorandum 90-102 (NS) (sent 6/26/90)

Application of Act to the Governor  
Memorandum 90-103 (NS) (sent 6/26/90)

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1990 LEGISLATIVE PROGRAM  
Measures Introduced at Request of Law Revision Commission

Enacted

1990 Stats. Ch. 79 - Assembly Bill 759 (Friedman) New Probate Code

Prior to passing the Assembly, this bill was amended to delete the chapter that provided that the attorney fees would be reasonable rather than be determined by a statutory schedule of fees. This leaves the issue of attorney fees to be dealt with in Assembly Bill 831. The bill was further amended in the Senate to make technical amendments and to provide that the bill will not become operative unless a fee bill is enacted. CORRECTED CHAPTERED BILL PRINTED ON 4-12-90.

1990 Stats. Ch. 140 - Senate Bill 1855 (Beverly) Creditors of Decedent AMENDED ON APRIL 17, 1990.

1990 Stats. Ch. 324 - Senate Bill 1774 (Lockyer) Urgency Probate Bill Effectuates the Commission's Recommendation Relating to Disposition of Small Estate by Public Administrator and makes a technical correction relating to the operative date of a 1989 enactment. AMENDED ON MAY 29. OPERATIVE JULY 16, 1990.

Resolution Chapter 53, Statutes of 1990 - SCR 76 (Lockyer) Resolution to Continue Authority to Study Previously Authorized Topics

Passed One House

Senate Bill 1775 (Lockyer) Comprehensive Probate Bill

This bill would effectuate six Commission recommendations:

- (1) *Survival Requirement for Beneficiary of Statutory Will.*
- (2) *Execution or Modification of Lease Without Court Order.*
- (3) *Access to Decedent's Safe Deposit Box.*
- (4) *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding.*
- (5) *Court-Authorized Medical Treatment.*
- (6) *Priority of Conservator or Guardian for Appointment as Administrator.*

Bill also would make a number of technical cleanup revisions in new Probate Code. State Bar Section supports the bill except for the statutory will provision. An effort will be made to amend this bill so that new Probate Code will become operative even if Assembly Bill 831 (compensation of estate attorney) is not enacted. AMENDED ON JUNE 6. SET FOR HEARING BY ASSEMBLY JUDICIARY COMMITTEE ON AUGUST 8.

Senate Bill 1777 (Beverly) Uniform Statutory Powers of Attorney Bill

This bill effectuates two recommendations, one proposing the Uniform Statutory Powers of Attorney Act and the other relating to

springing powers of attorney. State Bar Section supports. Bill was amended to delete provision providing for attorney fees in action against person who unreasonably refuses to honor power of attorney. This amendment was necessary to eliminate opposition of California Bankers Association and California Land Title Association. AMENDED ON MAY 29; CORRECTED ON JUNE 6, 1990. SET FOR HEARING BY ASSEMBLY JUDICIARY COMMITTEE ON AUGUST 8.

Senate Bill 2649 (Morgan) Uniform Management of Institutional Funds Act  
AMENDED MAY 30, 1990. SET FOR HEARING BY ASSEMBLY SUBCOMMITTEE ON  
ADMINISTRATION OF JUSTICE ON AUGUST 7 AND BY ASSEMBLY JUDICIARY  
COMMITTEE ON AUGUST 8.

Assembly Bill 831 (Harris) Trustees Fees and Attorney Fees

This bill would effectuate the Commission recommendations concerning trustee fees and attorney fees. State Bar Section supports. AMENDED APRIL 18. SET FOR HEARING BY SENATE JUDICIARY COMMITTEE ON AUGUST 7.

Defeated in Second House - Reconsideration Granted

Assembly Bill 2589 (Sher) In-law Inheritance

Amended on March 13 (technical amendment). Bill supported by California Association of Public Administrators, Public Guardians and Public Conservators. Bill opposed by various heir tracers (American Archives Association; Brandenberger & Davis; American Research Bureau; W.C. Cox & Company). State Bar has no position on the bill. DEFEATED BY 5-4 VOTE IN SENATE JUDICIARY COMMITTEE ON JUNE 19. MOTION FOR RECONSIDERATION TO BE CONSIDERED ON AUGUST 9; BILL WILL BE VOTED ON IF RECONSIDERATION IS GRANTED.

MEETING SCHEDULE

July 1990

July 26 (Thurs.) 1:30 p.m. - 6:00 p.m. San Diego  
July 27 (Fri.) 9:00 a.m. - 2:00 p.m.

August 1990 No Meeting

September 1990

Sep. 13 (Thurs.) 10:00 a.m. - 6:00 p.m. Concord  
Sep. 14 (Fri.) 9:00 a.m. - 2:00 p.m.

October 1990

Oct. 11 (Thurs.) 10:00 a.m. - 6:00 p.m. Fresno  
Oct. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1990

Nov. 29 (Thurs.) 10:00 a.m. - 6:00 p.m. Los Angeles  
Nov. 30 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1990 No Meeting

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
JULY 26-27, 1990  
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on July 26-27, 1990.

Commission:

|          |                                     |  |
|----------|-------------------------------------|--|
| Present: | Edwin K. Marzec<br>Chairperson      | Arthur K. Marshall                     |
|          | Roger Arnebergh<br>Vice Chairperson | Forrest A. Plant                       |
|          | Bradley R. Hill                     | Sanford M. Skaggs                      |
| Absent:  | Elihu M. Harris<br>Assembly Member  | Bion M. Gregory<br>Legislative Counsel |
|          | Bill Lockyer<br>Senate Member       |  |

Staff:

|          |   |             |
|----------|---|-------------|
| Present: | John H. DeMouilly<br>Nathaniel Sterling | Stan Ulrich |
| Absent:  | Robert J. Murphy III                    |             |

Consultants:

Michael Asimow, Administrative Law (July 27)  
William G. Coskran, Landlord and Tenant Law (July 27)

Other Persons:

Joseph S. Avila, California Probate Referees Association, Los Angeles  
Clark R. Byam, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Pasadena (July 26)  
Camille M. Cadoo, Probate Trust and Estate Planning Section, Beverly Hills Bar Association, Beverly Hills (July 26)  
Ronald P. Denitz, Tishman West Companies, Los Angeles (July 27)  
Michael D'Onofrio, Administrative Law Judge, Department of Health Services, and Vice President, Association of California State Attorneys and Administrative Law Judges, Sacramento (July 27)  
Karl Engeman, Director, Office of Administrative Hearings, Sacramento (July 27)  
Gary Gallery, Chief Administrative Law Judge, Public Employment Relations Board, Sacramento (July 27)  
Irwin D. Goldring, Executive Committee, State Bar Estate Planning, Trust and Probate Law Section, Los Angeles (July 26)  
Donald B. Jarvis, Administrative Law Judge, National Conference of Administrative Law Judges, and Association of California State Attorneys and Administrative Law Judges, San Francisco (July 27)

Valerie J. Merritt, Executive Committee, State Bar Estate Planning,  
Trust and Probate Law Section, Los Angeles (July 26)  
Tim McArdle, Chief Counsel, California Unemployment Insurance  
Appeals Board, Sacramento (July 27)  
John Sikora, Association of California State Attorneys and  
Administrative Law Judges, Sacramento (July 27)  
Philip E. Spiekerman, Office of General Counsel, University of  
California, Oakland (July 27)  
Lucinda Surber, Menlo Park  
Stuart A. Wein, Presiding Administrative Law Judge, Occupational  
Safety and Health Appeals Board, Sacramento (July 27)  
Paul Wyler, Individually and on behalf of State Bar Public Law  
Section, Los Angeles (July 27)  
Shirley Yawitz, California Probate Referees Association, San  
Francisco

#### ADMINISTRATIVE MATTERS

##### APPROVAL OF MINUTES OF MAY 31-JUNE 1, 1990, MEETING

The Commission approved the Minutes of the May 31-June 1, 1990,  
Commission Meeting as submitted by the staff.

##### ELECTION OF OFFICERS

Commissioner Arnebergh was elected Chairperson of the Commission.

Commissioner Marzec was elected Vice Chairperson. Commissioner  
Marzec stated that in accepting the office of Vice Chairperson he will  
respectfully decline to serve as Chairperson when his term as Vice  
Chairperson is completed.

The new officers will serve for a term of one year, commencing on  
September 1, 1990, and will hold office until August 31, 1991.

The Commission gave its unanimous thanks to Commissioner Marzec  
for his distinguished service as chairperson during the past year.

##### BUDGET FOR 1990-91 FISCAL YEAR

The Chairperson reported on his efforts to obtain approval of the  
Conference Committee on the Budget for the increase in the Commission's  
budget which was provided in the Governor's budget. The Senate Budget  
Subcommittee had refused to approve the increase, but the increase had  
been approved by the Assembly Budget Subcommittee. Although no final  
resolution of the budget issues had been made at the time of the  
discussion at the meeting, it appeared that the budget as approved by

the Legislature will include the increase proposed by the Governor. The Commission commended the Chairperson for the apparent success of his efforts on behalf of the Commission's budget.

#### CONSULTANT CONTRACTS

The Assistant Executive Secretary reported that the consultant contract with Professor Jerry Kasner for a study of issues surrounding consent and revocation of consent to a donative transfer of community property was not processed by the state because of the Governor's moratorium on consultant contracts at the end of the 1989-90 fiscal year. We have re-executed and resubmitted the contract for approval in the 1990-91 fiscal year, but this has not yet been processed by the state because the state budget has not yet been adopted. Professor Kasner is working on the project in anticipation that the contract will eventually be processed.

#### 1990 LEGISLATIVE PROGRAM

The Executive Secretary made the following written report on the 1990 Legislative Program, attached to the Final Agenda for the meeting.

##### 1990 LEGISLATIVE PROGRAM

Measures Introduced at Request of Law Revision Commission

##### Enacted

##### 1990 Stats. Ch. 79 - Assembly Bill 759 (Friedman) New Probate Code

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Bill also would make a number of technical cleanup revisions in new Probate Code. State Bar Section supports the bill except for the statutory will provision. An effort will be made to amend this bill so that new Probate Code will become operative even if Assembly Bill 831 (compensation of estate attorney) is not enacted. AMENDED ON JUNE 6. SET FOR HEARING BY ASSEMBLY JUDICIARY COMMITTEE ON AUGUST 8.

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STUDY D-327 - BONDS AND UNDERTAKINGS

It was suggested that the views of public agencies should also be solicited concerning whether personal sureties are used much and the extent that collecting from personal sureties presents a problem.

STUDY H-112 - COMMERCIAL LEASE LAW: USE RESTRICTIONS

The Commission considered Memorandum 90-50 and the First through Fourth Supplements to it, relating to comments on the Commission's tentative recommendation on commercial lease law use restrictions. The Commission approved the recommendation to print and submit to the Legislature after making the following decisions. The Commission also thanked Professor Goskran for his excellent work as the Commission's consultant on commercial real property lease law matters.

§ 1997.040. Effect of use restriction on remedies for breach

Subdivision (a) was revised to read:

(a) For the purpose of subdivision (a) of Section 1951.2 (damages on termination for breach), the amount of rental loss that could be or could have been reasonably avoided is computed by taking into account any reasonable use of the leased property ~~except to the extent the lease includes a restriction on use that is enforceable under this chapter.~~ However, if the lease contains a use restriction that complies with this chapter, the restriction shall govern except to the extent the tenant proves that under all the circumstances it would be unreasonable to enforce the restriction. The circumstances considered shall include, but not be limited to, those surrounding both the leased premises and any building or complex in which it is located.

Subdivision (b) was revised to read:

(b) The remedy described in Section 1951.4 (continuation of lease after breach and abandonment) is available notwithstanding the presence in the lease of a restriction on use of the leased property, ~~and the~~ . The restriction on use

applies under Section 1951.4 to the extent it is enforceable under this chapter except to the extent the tenant proves that under all the circumstances it would be unreasonable to enforce the restriction. The circumstances considered shall include, but not be limited to, those surrounding both the leased premises and any building or complex in which it is located.

The staff will edit these revisions as necessary to conform with the phrasing of the remainder of the draft.

§ 1997.210. Right of any reasonable use absent a restriction

The statement in the Comment, that enforcement of a use restriction is not prevented by the law governing unreasonable restraints on alienation or by the law governing the implied covenant of good faith and fair dealing, should be left in the Comment and not codified.

§ 1997.230. Prohibition of change in use

The reference in the Comment to this section to unreasonable restraints on alienation and the implied covenant of good faith and fair dealing should parallel the language in the Comment to Section 1997.210, thus: "Neither the law governing unreasonable restraints on alienation nor the law governing the implied covenant of good faith and fair dealing prevents the enforcement of a restriction that absolutely prohibits a change in use in accordance with the express terms of the restriction."

§ 1997.250. Express standards and conditions for landlord's consent

Subdivision (c), making clear that a use restriction may vest in the landlord sole and absolute discretion to give or withhold consent, was stricken from the draft for parallelism with the assignment and sublease statute.

§ 1997.270. Limitation on retroactivity of Section 1997.260

The Comment to subdivision (b) should make clear that "If a lease is made on or after January 1, 1992, under an option signed before that date, the rights between the parties to the lease are governed by subdivision (a)."

STUDY J-102 - MOTIONS

The Commission considered Memorandum 90-101 and the First Supplement to that Memorandum.

The Commission discussed the study suggested by Senator Presley. The Commission concluded that the subject was a complex one that involved policy issues on which reasonable persons may disagree.

The Executive Secretary was directed to send a letter to Senator Presley. The letter should note that the Commission can study only those topics it has been authorized to study by a concurrent resolution adopted by the Legislature. It is not clear that the Commission now has authority to study the topic he suggests for Commission study. In addition, the Commission believes that the topic is sufficiently complex that the Commission would wish to retain a law professor who is an expert in civil procedure to prepare a background study that would identify the policy considerations involved in determining whether to adopt the suggestion of Judge William Rylaarsdam. It is estimated that a consultant could be obtained to prepare the background study for \$6,000. This amount reflects the fact that the consultant would prepare the study primarily as a public service.

STUDY L - SENATE BILL 1775 (1990 GENERAL PROBATE BILL)

The Commission reviewed the amendments to Senate Bill 1775 set out in Exhibit 2 to the Second Supplement to Memorandum 90-105. The amendments would permit the new Probate Code to go into effect even though Assembly Bill 831 (probate attorney fees) is not enacted. The amendments would provide that the existing law concerning probate attorney fees would continue under the new code.

The representative of the Legislative Committee of the Probate and Trust Law Section of the Beverly Hills Bar reported that the Committee supports SB 1775 as proposed to be amended in Exhibit 2 to the Second Supplement to Memorandum 90-105, in the event that Assembly Bill 831 is not enacted.

The Commission approved the amendments to Senate Bill 1775 as set out in Exhibit 2 to the Second Supplement to Memorandum 90-105.

STUDY L-608 - DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

The staff was requested to review whether the letter (mentioned at page 10 of the Minutes of the May 31-June 1, 1990 Meeting) has been written to advise the State Bar Board of Governors and the State Bar Estate Planning, Trust and Probate Law Section of the Commission's action which tabled the Tentative Recommendation concerning deposit of estate planning documents with the attorney.

STUDY L-619 - STATUTORY WILL

The Commission considered Memorandum 90-100 relating to the need for a revision of the statutory will provisions of the Probate Code.

The Executive Secretary reported that he had received a long letter from Michael V. Vollmer, who served as the Chair of the Committee of the State Bar Section that developed a new form for the California statutory will. The Executive Secretary followed up this letter with a telephone call to Mr. Vollmer. Mr. Vollmer reports that his committee spent many hours in meetings and reviews that resulted in the draft he forwarded with his letter. Many persons were given an opportunity to provide input in the development of the draft. Mr. Vollmer indicated in the telephone call that he thought it would be a good thing if the Commission reviewed the draft. He likes the Commission procedures, which give interested persons an opportunity to comment on tentative drafts. If the Commission recommends the redraft (after making such revisions as the Commission determined appropriate) in the form of a recommendation to the Legislature, it may facilitate the enactment of a new form for the statutory will.

The representative of the Estate Planning, Trust and Probate Law Section stated that, although the draft produced by Mr. Vollmer's committee is very good, it would be useful for the Commission's staff

to review the draft. He shared the belief of the Commission's staff that it would not require much time of the Commission itself to review and recommend enactment of a revised statutory will. He felt that it would be very helpful in presenting the revised statute to the Legislature if it were presented as a cooperative effort of the Commission and the State Bar Section.

The Commission decided it will review the State Bar draft with the view toward a recommendation for enactment at the next legislative session with such revisions as may appear appropriate.

#### STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS

The Commission considered Memorandum 90-80 and the *Tentative Recommendation Relating to Recognition of Trustees' Powers*. The Commission directed the staff to prepare a revised draft for consideration at the next meeting. The revised draft would provide for execution of an affidavit by the trustee stating that the trustee is qualified and has the powers sought to be exercised, whether the powers are statutory or derive from the trust instrument. Third persons would then be subject to liability for unreasonable refusal to rely on the affidavit. In effect, this approach would combine proposed Section 18105 as set out in the tentative recommendation with draft Section 18100 as set out on page 5 of the memorandum.

#### STUDY L-1025 - REMEDIES OF CREDITOR WHERE PERSONAL REPRESENTATIVE FAILS TO GIVE NOTICE

The Commission considered Memorandum 90-83, containing comments received on the tentative recommendation relating to remedies of a creditor where the personal representative fails to give notice. The Commission approved the recommendation to print and submit to the Legislature, without change.

STUDY L-1036 - ASSEMBLY BILL 831 (PROBATE ATTORNEY FEES)

The Commission considered Memorandum 90-105 and the three supplements to that memorandum.

The Executive Secretary reported on the various suggestions for revision of the bill that had been received from consumer groups and also made a report concerning a meeting he and Commissioner Barbara Miller (Alameda County Probate Commissioner) and William Hoisington (State Bar Section Representative) had with Senator Lockyer.

The Executive Secretary reported that Senator Lockyer had expressed his concern about the effect of the bill on attorney fees for probate of a small estate, but that Senator Lockyer had not indicated what revision could be made in the bill to satisfy this concern. (Some probate court judges and probate commissioners have advised Senator Lockyer that they believe that the bill will increase attorney fees for small estates.)

The Executive Secretary briefly outlined the experience in Oregon as reported in a letter received by Commissioner Barbara Miller. Oregon went from a statutory fee to a reasonable fee. Among other things, the letter reported that young probate attorneys were quoting a fee of \$500 for handling the probate of a small estate.

Commissioner Marshall reported that his discussion of the Commission's recommendation with probate attorneys reveals that those attorneys are unanimously against the proposal and also that they believe that the proposal will increase the attorney fee for estates under \$300,000. They favored retaining the existing probate attorney fee provisions. Commissioner Marshall reported that one probate attorney indicated that if the Commission's proposal is enacted the attorney will bill clients in probates on an hourly rate. This is because the attorney often finds that many hours are spent "holding the hands" of nonprofessional personal representatives, and as a result the attorney may spend as much as 100 hours on the probate of a simple estate. Charging at an hourly rate of \$200 an hour in this kind of case would result in a fee that would far exceed the statutory fee.

The representative of the Legislative Committee of the Probate and Trust Law Section of the Beverly Hills Bar reported that the Committee

supports AB 831 as proposed to be amended in Exhibit 1 to the Second Supplement to Memorandum 90-105.

The Commission approved the revision of the bill as set out in Exhibit 1 to the Second Supplement of Memorandum 90-105, and the bill is to be presented to the Senate Judiciary Committee in this form. The effect of the amendment is to delay the operative date of the revision of the probate attorney fee provisions in AB 831 until July 1, 1991.

The Commission directed that the staff make no further effort to develop a consensus on how AB 831 might be modified to deal with the concerns expressed by Senator Lockyer and others.

#### STUDY L-3007 - IN-LAW INHERITANCE

The Commission considered Memorandum 90-108. Assembly Bill 2589 was introduced by Assembly Member Sher to effectuate the Commission's recommendation to repeal Probate Code Section 6402.5 (in-law inheritance). The bill did not receive sufficient votes in the Senate Judiciary Committee to have it reported out of that committee. The memorandum includes a possible amendment to deal with a concern expressed by Senator Lockyer. The Commission decided not to adopt the amendment which would have amended the bill to revise existing law to exclude real property having a value of less than \$250,000 from application of the in-law inheritance statute. A representative of Assembly Member Sher (who is carrying the bill for the Commission) had indicated that Senator Lockyer might be willing to support a proposal along these lines.

The Commission decided to recommend to Assembly Member Sher that he drop Assembly Bill 2589.

The Commission decided to devote a modest amount of staff and Commission time next year to preparing a recommendation to limit the application of the statute by dealing with some of the obvious defects in the statute.

STUDY L-3015 - DEBTS THAT ARE CONTINGENT, DISPUTED, OR NOT DUE

The Commission considered Memorandum 90-82, containing comments received on the tentative recommendation on closing probate where there are debts that are contingent, disputed, or not due. The Commission approved the recommendation to print and submit to the Legislature, after correction of the typographical errors noted in the text. The transmittal letter will acknowledge the contribution of Ken Klug in the development of the recommendation.

STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

The Commission considered Memorandum 90-81 and the *Tentative Recommendation Relating to Litigation Involving Decedents*. The Commission approved the recommendation for printing and introduction in the Legislature, subject to possible revision in light of the comments of Mr. Paul Gordon Hoffman relating to federal tax litigation that were discussed in the memorandum. The staff was directed to contact Mr. Hoffman to discuss his concerns and determine whether any further changes should be considered by the Commission. The staff will report to the Commission on this question at the next meeting and propose any needed revisions in the statute or comments.

STUDY L-3022 - ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

The Commission considered Memorandum 90-106 (which was concerned with the provision of Senate Bill 1775 dealing with access to decedent's safe deposit box) and the First Supplement to that memorandum.

The California Bankers Association objected to the provision of SB 1775 relating to access to the decedent's safe deposit box, and the provision was deleted from the bill.

The Commission reviewed the revision of its recommended provision suggested by the California Bankers Association. The Commission

concluded that the CBA recommended language was inadequate in that it did not deal with the problem of what to do with a will found in the safe deposit box of a decedent.

The Commission requested that the staff prepare a memorandum on this matter for consideration at the Commission's September meeting. The staff should write to the President of the California Bankers Association to request that a representative of the Association be present at the September meeting when this matter is discussed. The letter also should express the desire of the Commission to develop procedures with CBA to improve communications between the Commission and CBA in order to avoid last-minute objections to Commission recommendations by CBA. Many of these last minute objections could be considered and satisfactorily resolved before the legislative session if timely made.

#### STUDY L-3041 - PROCEDURE FOR CREDITOR TO REACH NONPROBATE ASSETS

The Commission considered Memorandum 90-99, including a draft statute from the State Bar Probate Section of a trust claims statute. The Commission decided to continue to defer work on this matter pending the State Bar's further development of its proposal and in light of the other priority matters on the Commission's agenda.

#### STUDY L-3044 - COMPREHENSIVE POWER OF ATTORNEY STATUTE

The Commission considered Memorandum 90-85 concerning the scope of the study on powers of attorney. The Commission made a number of preliminary policy decisions needed to give guidance to the staff in preparation of a comprehensive draft statute:

Terminology. The comprehensive statute should generally use "agent" instead of "attorney in fact", but the definition of "agent" should refer to "attorney in fact".

Requirements for creation of durable power of attorney. A durable power of attorney should be in writing and need be signed only by the principal. The requirement of a statement of durability as provided in Civil Code Section 2400 should be continued; the Commission rejected the Illinois and Oregon approach of making all powers of attorney durable unless otherwise limited. The statute should not require the power of attorney to be dated or acknowledged. However, a relevant comment should point out that acknowledgment is essential for effectively dealing with real property matters.

Acceptance of power of attorney and duty to act. Provisions governing the effect of being named as an agent in a power of attorney, acceptance by action or agreement, and the circumstances under which there may be a duty to act should be developed on the basis of the Missouri statute, as proposed in the memorandum. The draft of an acceptance provision patterned after the trust law rules is too formal and burdensome as applied to a friend or relative who is willing to be named as an agent as an accommodation to the principal.

General powers. The comprehensive power of attorney statute should provide a general set of powers by granting all powers the principal could exercise (with some exceptions, such as for health care decisions, making a will, revoking a trust, etc.) and incorporating the powers provided under the Uniform Statutory Form Power of Attorney. The statute should also specifically authorize powers of attorney to incorporate statutory powers provided in other laws.

Standard of care. The standard of care applicable under the California Uniform Transfers to Minors Act (Prob. Code § 3912) should be the starting point for developing a standard of care applicable to agents under powers of attorney. This would provide a lesser standard of care for uncompensated agents. The staff should also draft a provision for a higher standard of care for professional or expert fiduciaries that would apply regardless of whether the fiduciary is compensated.

General duties. A general set of duties should be developed, drawing from existing agency and trust law and also considering the Missouri statute.

Right to compensation. The statute should provide for reasonable compensation, perhaps along the lines of the Missouri statute.

Delegation of powers. The statute need not attempt to specify rules governing delegation of powers.

Multiple agents. The statute should recognize the possibility of designating multiple agents and provide as a default rule that they must act unanimously (the trust rule) unless the power of attorney provides some other rule.

Successor agents. The statute should authorize the power of attorney to provide for successor agents and provide that the successor is not liable for the actions of the predecessor.

Termination and modification. Termination and modification rules should be developed based on existing agency and power of attorney law. The staff should also provide other options for consideration by the Commission. The draft statute should also provide a means for implementing termination and modification, perhaps by giving notice to third persons or recording.

Reliance by third persons. The staff will prepare a detailed provision based on the Missouri statute specifying the matters that may be relied on by third persons. The statute will also include an affidavit procedure consistent with the decisions made concerning recognition of trustees' powers by third persons.

Use of copies. The staff should prepare a proposed provision detailing the use of copies of powers of attorney.

Judicial proceedings. The existing judicial procedures for enforcing and interpreting powers of attorney appear satisfactory. The staff will raise any issues in this area when the draft statute is prepared, including whether the principal's grandchildren should be added to the list of permissible petitioners.

Foreign powers of attorney. The draft should include a provision recognizing the validity of powers of attorney prepared in other states that meet the requirements of the law of the governing jurisdiction.

Missing principal. The statute should include a provision providing that a missing principal is presumed to be alive until adjudicated otherwise.

Disposition of general agency statutes. The general view was that the power of attorney statute should be self-contained and separate from the general agency statutes.

Miscellaneous. The staff will present other matters in the development of the draft statute.

Possible Revision of Standard Under UTMA

In the course of considering the standard of care applicable to a custodian under the Uniform Transfers to Minors Act in Probate Code Section 3912, it appears that the rule in subdivision (b)(1) is circular. Accordingly, the staff should investigate whether this section should be revised as follows:

3912. (a) A custodian shall do all of the following:

(1) Take control of custodial property.

(2) Register or record title to custodial property if appropriate.

(3) Collect, hold, manage, invest, and reinvest custodial property.

(b) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries except that:

(1) If a custodian is not compensated for his or her services, the custodian is not liable for losses to custodial property unless they result from the custodian's bad faith, intentional wrongdoing, or gross negligence, ~~or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in this section.~~

(2) A custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(c) A custodian may invest in or pay premiums on life insurance or endowment policies on (1) the life of the minor only if the minor or the minor's estate is the sole beneficiary or (2) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

(d) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is

so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words:

"as a custodian for \_\_\_\_\_

(Name of Minor)

under the California Uniform Transfers to Minors Act."

(e) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of 14 years.

#### STUDY L-3046 - STATUTORY POWER OF ATTORNEY

The Commission considered Memorandum 90-84 and a letter from Harley J. Spittler (dated July 16, 1990).

Senate Bill 1777, as recommended by the Commission, included a provision that would require that the court award attorney fees to the agent (attorney in fact) if the court finds that a third person (such as a bank) acted unreasonably in refusing to honor the statutory form power of attorney. The provision was deleted because of objections from the California Bankers Association and the California Land Title Association.

The Commission decided this matter merited further study by the Commission. The staff was requested to prepare a memorandum on this matter for consideration at a future meeting. The memorandum might be prepared in connection with the general power of attorney statute that is now under study by the Commission. Perhaps a tentative recommendation might be prepared on this matter.

It was suggested that this matter also should be mentioned in the letter to be sent to the California Bankers Association concerning the legislation relating to access to the decedent's safe deposit box. Perhaps it would be desirable to schedule consideration of both matters as a special order of business.

STUDY L-3048 - NONPROBATE TRANSFERS OF COMMUNITY PROPERTY

The Commission considered Memorandum 90-109, relating to the ability of a spouse to make a nonprobate transfer of the spouse's interest in community property. The staff reported it had received a letter from the Commission's consultant, Professor Jerry Kasner, concerned about possible overbreadth in the proposed statute. The Commission decided to defer this matter for later consideration with the Commission's general study of consent and revocation of consent to community property donative transfers, with the object of comprehensive legislation in the area.

STUDY N-102 - APPLICATION OF ADMINISTRATIVE PROCEDURE ACT

The Commission reviewed the application of the Administrative Procedure Act to various branches of the state government. The Commission made the following determinations.

University of California. After considering Memorandum 90-71 and hearing the oral remarks of Philip E. Spiekerman of the Office of General Counsel of the Regents of the University of California, the Commission decided it will not recommend that the Administrative Procedure Act be applied to the University of California. Commissioner Marzec opposed this decision. Commissioner Plant noted that he had opposed the Commission's previous decision to apply the Act to the University.

The Courts. After considering Memorandum 90-102, the Commission decided it will recommend that the Administrative Procedure Act not be applied to the courts or judicial branch. The Commission noted that this decision applies to administrative adjudication by the courts and judicial branch and to administrative rulemaking by the courts; the Commission has not yet reviewed the exemption for the judicial branch to determine whether it should extend to administrative rulemaking as well.

The Governor and Governor's Office. After considering Memorandum 90-103, the Commission decided it will recommend that the Administrative Procedure Act not be applied to the Governor or Governor's Office. This decision applies only to administrative adjudication and not to administrative rulemaking, which has not yet been reviewed. The staff noted that the general rule with regard to administrative adjudication is subject to specific statutory exceptions, which would not be disturbed.

STUDY N-103 - ALJ CENTRAL PANEL

The Commission considered Memorandum 90-89 and the First through Fourth Supplements to it, relating to the concept of removing administrative law judges from various state agencies to a central panel or having hearings of various state agencies conducted by central panel administrative law judges.

The Commission adopted the general position that an agency's administrative law judges or functions will not be recommended for transfer to a central panel unless the agency or function has first been specifically identified as one appropriate for transfer, a convincing case has been made of the need for the transfer, and the agency has been given an opportunity to respond to the specifics. The staff will so inform the various state agencies that have been concerned about this issue. The proponents of central panel treatment will be allowed the time necessary to make specific suggestions to the Commission with supporting specific reasons. In addition, if during the course of review of the statutes the Commission's consultant or staff discovers any specific agency functions for which central panel treatment appears warranted, these will be brought before the Commission following the same procedure.

As indicated in the First Supplement to Memorandum 90-89, the Unemployment Insurance Appeals Board has been identified as an agency for which there may be an appearance of unfairness in the use of its own administrative law judges. The Commission decided to defer decision on the UIAB pending receipt of further information from

central panel proponents, at which time the Commission will schedule this matter for decision. The staff should inform the UIAB of the Commission's general position against transfer of administrative law judges, that UIAB has been identified as a specific agency for which transfer may be appropriate and specific reasons have been given, that there may be additional specifics forthcoming, and that UIAB will be notified of all the specifics and given an opportunity to respond before the Commission makes a decision on this matter.

The Commission will investigate alternate means of achieving a separation between prosecutorial and adjudicative functions within an agency. These may include prohibition of ex parte contacts between the hearing officer and other agency personnel, giving the hearing officer's findings of fact greater weight in the review process, and precluding the person serving as adjudicator from also conducting investigative or prosecutorial work for the agency. The Commission expects that its consultant will report to it on these matters.

The Commission will also investigate the possibility of external control of administrative law judge pay raises and promotions. Control of pay raises and promotions of federal administrative law judges, for example, may be controlled by an agency other than the employing agency. The same may be true of the federal armed services legal officers corps. There may be other models within the state or in other states. The Commission requested the staff to report back to it suggesting the scope of this effort, proposed allocation of staff resources to it, and perhaps alternative approaches to deal with the matter.

The Commission decided it will not investigate the concept of a voluntary temporary transfer of administrative law judges between agencies. It may be useful to authorize the Office of Administrative Hearings, the State Personnel Board, or another appropriate agency to adopt rules to implement such a system if there is sufficient interest in it.

APPROVED AS SUBMITTED \_\_\_\_\_

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary