

## First Supplement to Memorandum 90-1

Subject: Study L-644 - Recognition of Trustee's Powers (Comments of State Bar)

Attached to this supplement are the comments of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section on the draft *Tentative Recommendation Relating to Liability for Failure to Accept Trustee's Powers* (attached to Memorandum 90-1).

The State Bar has mixed feelings about this proposal. The State Bar accepts that the proposed amendment may accomplish the desired result of encouraging third parties to read the relevant provisions of the Trust Law and abide by its terms. However, the State Bar notes that the proposed statute does not deal with the more common problem of the costs necessitated by a third party's requirement that the trust be modified or that the trustee obtain an opinion of counsel.

The staff does not believe it would be appropriate to attempt to extend the liability provisions to cover these situations. It might be possible to put some additional hortatory language into the statute so that trustees could point to it with indignation when dealing with unreasonably recalcitrant third persons. It also bears repeating that Section 18100 protects third persons who act in good faith and without actual knowledge that the trustee is exceeding the trustee's powers. In addition, this section explicitly provides that the third person has no duty of inquiry as to the existence of the power. It would be possible to go further and require third persons to accept statutory powers except where they reasonably believe that the trust instrument limits or forbids exercise of the power.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

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

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REPLY TO: Valerie J. Merritt, Esq.  
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January 8, 1990

California Law Revision Commission  
4000 Middlefield Road, #D-2  
Palo Alto, California 94303-4739

**RE: CALIFORNIA LAW REVISION COMMISSION MEMO 90-1  
RE RECOGNITION OF TRUSTEE'S POWERS**

Dear Commissioners:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California has reviewed this proposal and believes it is acceptable, so far as it goes, but has no illusions it will solve the problem raised by Mr. Provenza or the many problems encountered by practitioners.

This proposal only shifts the costs of attorneys' fees if a court action or proceeding is necessary to convince a third party of the power of the trustee. As such, it is extremely limited in scope. Much more common is the third party requiring an opinion of counsel as to the existence of the trustee's powers. Such an opinion is a significant expense to the trust, but would not be reimbursable under the proposed change to the statute. Also common is the insistence by a third party that certain powers be expressly stated in an amendment to the trust if the trust is still susceptible to amendment by the settlor. This too is an expense to the settlor and/or trustee which would not be reimbursable by the proposed change.

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Our committee also noted that the provision may shift costs from a particular trustee to the third party, but the third party is likely to shift its costs as well. Thus, all title insurance for transactions involving trusts may increase in cost as a result of such a provision. Still, such a provision may encourage such third parties to read the law and abide by its terms, thus avoiding such costly proceedings altogether. That would be a desirable result.

Sincerely,

A handwritten signature in cursive script, appearing to read "Valerie J. Merritt", followed by a large, stylized flourish or checkmark.

Valerie J. Merritt

cc: James V. Quillinan  
Irwin D. Goldring  
Sterling L. Ross