

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

ad1
09/06/88

Time
September 8 (Thurs.) 1:30 p.m. - 6:00 p.m.
September 9 (Fri.) 9:00 a.m. - 2:00 p.m.

Place
San Francisco
Airport Hilton
(415) 589-0770.

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

September 8-9, 1988

THURSDAY, SEPTEMBER 8

1. Minutes of July 14-15, 1988, Commission Meeting (sent 7/29/88)

2. Administrative Matters

Schedule for Future Meetings

Memorandum 88-58 (sent 8/22/88)

1988 Annual Report

Memorandum 88-59 (sent 8/22/88)

Draft of Annual Report (attached to Memorandum)

First Supplement to Memorandum 88-59 (Topics and
Priorities) (sent 8/22/88)

Second Supplement to Memorandum 88-59 (New Topics)
(sent 8/25/88)

Third Supplement to Memorandum 88-59 (Priorities) (sent
8/30/88)

Fourth Supplement to Memorandum 88-59 (Unconstitutional
Statutes) (sent 8/31/88)

Budget

Memorandum 88-66 (sent 8/31/88)

Communications from Interested Persons

3. Recommended 1988 Legislation

Status of 1988 Commission Bills

Oral Report at Meeting
AB 2841 (as amended) (sent 8/15/88)

4. Study L-1025 - Probate Code (Notice to Creditors)

Memorandum 88-60 (sent 8/10/88)
Draft of Tentative Recommendation (attached to Memorandum)

5. Study L-3010 - Fees of Corporate Trustees

Memorandum 88-61 (sent 8/16/88)
Draft of Tentative Recommendation (attached to Memorandum)

6. Study L-1060 - Multiple-Party Accounts (Estate of Propst)

Memorandum 88-67 (sent 8/22/88)
Draft of Tentative Recommendation (attached to Memorandum)

7. Study L-1036/1055 - Personal Representative and Attorney Fees in Probate

Special **General Approach**
Order of
Business Memorandum 88-48 (sent 5/23/88)
at 3:00

Tentative Recommendation

Memorandum 88-43 (sent 5/23/88)
Staff Draft of Statute (attached to Memorandum)
First Supplement to Memorandum 88-43 (sent 6/1/88)
Staff Draft of Preliminary Part of Tentative Recommendation
(attached to Supplement)
Second Supplement to Memorandum 88-43 (sent 6/1/88)
Third Supplement to Memorandum 88-43 (sent 7/5/88)
Fourth Supplement to Memorandum 88-43 (sent 7/5/88)
Fifth Supplement to Memorandum 88-43 (sent 7/7/88)
Sixth Supplement to Memorandum 88-43 (sent 8/17/88)

8. Study L-3017 - Petition for Removal of Trustee by Settlor

Memorandum 88-62 (sent 7/29/88)

9. Study L-3016 - Effect of Homicide

Memorandum 88-63 (sent 8/17/88)
Draft of Tentative Recommendation (attached to Memorandum)

10. Study L-1058 - Probate Filing Fees

Memorandum 88-52 (sent 8/10/88)
Draft of Tentative Recommendation (attached to Memorandum)

11. Study L-1026 - Probate Code (Payment of Debts)

Memorandum 88-50 (sent 6/22/88)
First Supplement to Memorandum 88-50 (sent 8/30/88)
(Comments of Bar Associations)
Second Supplement to Memorandum 88-50 (sent 9/2/88)
(Comments of Beverly Hills Bar Association)

FRIDAY, SEPTEMBER 9

12. Study H-111 - Commercial Lease Law (Assignment and Sublease)

Special Memorandum 88-64 (sent 8/12/88)
Order of Draft of Tentative Recommendation (attached to Memorandum)
Business
at 9:00 First Supplement to Memorandum 88-64 (Landlord Remedies) (sent
8/10/88)
Background Study (attached to Memorandum)

Second Supplement to Memorandum 88-64 (Tenant Remedies) (sent
8/12/88)
Background Study (attached to Memorandum)

Third Supplement to Memorandum 88-64 (Involuntary Transfers)
(sent 8/8/88)
Background Study (attached to Memorandum)

Fourth Supplement to Memorandum 88-64 (Use Restrictions) (sent
8/12/88)
Background Study (attached to Memorandum)

Fifth Supplement to Memorandum 88-64 (Rule in Dumpor's Case)
(sent 8/8/88)
Background Study (attached to Memorandum)

Sixth Supplement to Memorandum 88-64 (Comments on Draft) (sent
8/31/88)

Seventh Supplement to Memorandum 88-64 (Residential Tenancies)
(sent 9/2/88)

13. Study F-641 - Limitations on Disposition of Community Property

Memorandum 88-47 (sent 6/6/88)

Note. We will continue review of this memorandum commencing with Section 5125.240 (gifts) on page 14 of the attached draft.

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 88-47 (sent 8/15/88)

14. Continuation of Matters Not Completed Thursday, September 8

MEETING SCHEDULE

September 1988

8 (Thursday)	1:30 p.m. - 6:00 p.m.	San Francisco
9 (Friday)	9:00 a.m. - 2:00 p.m.	Airport Hilton (415) 589-0770

October 1988

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

December 1988

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

STATUS OF COMMISSION STUDIES

(as of August 23, 1988)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
D-1000	Creditors' Remedies -- Miscellaneous Matters	2/88	7/88	7/88	[10/88]	
F-641	Limit Dispos Commun Prop	4/88	[9/88]			
H-111	Commercial Leases -- Assignment & Sublease	2/88	3/88	[9/88]		
L-1	New Probate Code	2/88				
L-612	Simultaneous Death	2/88				
L-636	No Contest Clause	1987	1/88	7/88	[10/88]	
L-1025	Notice to Creditors-- Tulsa case	5/88	7/88	[9/88]		
L-1036/ 1055	Personal Rep & Atty Fees in Probate	8/87	1/88	[9/88]		
L-3005	Anti-Lapse & Other Rules	1/88	5/88			
L-3007	Ancestral Property Doctrine	2/88				
L-3010	Fees of Corporate Trustees	3/88	5/88	[9/88]		
L-3012	Unif Manage Instit Funds	8/88	[10/88]			
	1988 Annual Report	7/88	[9/88]			

[date] = scheduled

STATUS OF 1988 COMMISSION BILLS

(as of September 6, 1988)

Legislative Program:

AB 2779 (Harris): Urgency probate bill

AB 2841 (Harris): Major probate bill

ACR 42 (Harris): Attorney's fees study authorization

SCR 62 (Lockyer): Continuing authority to study topics

BILL STATUS		AB 2779	AB 2841	ACR 42	SCR 62	
Introduced		Jan 13	Jan 26	Jan 20 [‡]	Jan 14	
First House	Policy Committee	Mar 2	Mar 2	4/9/87	Mar 7	
	Fiscal Committee	****	Mar 23	5/7/87	Mar 16	
	Passed House	Mar 10	Apr 4	5/14/87	Mar 24	
Second House	Policy Committee	Apr 19	June 21	Mar 7	May 18	
	Fiscal Committee	****	Aug 5	Mar 16	June 22	
	Passed House	May 2	Aug 11	Mar 24	Aug 10	
Concurrence		May 12	Aug 23	Apr 4	****	
Governor	Received	May 16		****	****	
	Approved	May 24		****	****	
Chaptered by Secretary of State	Date	May 25		Apr 6	Aug 15	
	Ch. #	113		Res 20	Res 81	

‡: ACR 42 introduced in 1987 and amended January 20, 1988,
as attorney's fee study authorization

****: not applicable

[]: date scheduled

- Sterling (Terry) Ross, State Bar Estate Planning, Trust and Probate Law Section, San Francisco (Sept. 9)
Jim Scannell, San Francisco Public Administrator (Sept. 8)
Glenn Sonnenberg, State Bar Commercial and Industrial Subsection, Real Property Section, Los Angeles (Sept. 9)
James J. Stewart, Legislative Committee, Beverly Hills Bar Association, Probate, Trust and Estate Planning Section, Beverly Hills
Michael Whalen, Los Angeles County Bar Association, Probate and Trust Law Section, Los Angeles
Anthony White, State Bar Landlord and Tenant Subsection, Real Property Section, San Francisco (Sept. 9)
Shirley Yawitz, California Probate Referees Association, San Francisco

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF July 14-15, 1988, COMMISSION MEETING

The Commission approved the Minutes of the July 14-15, 1988, meeting, with the following change:

In the middle of page 6, "Subdivision (b)(5)(A)" was changed to "Subdivision (b)(5)(B)".

FUTURE MEETINGS

The Commission considered Memorandum 88-58. The Commission adopted the following schedule for 1989 meetings, with the understanding that a meeting may be canceled if the staff finds that, due to time consumed in the production of the new Probate Code, it is unable to produce sufficient material for the meeting.

January 1989

- | | | |
|---------------|-----------------------|---------------|
| 12 (Thursday) | 1:30 p.m. - 6:00 p.m. | Orange County |
| 13 (Friday) | 9:00 a.m. - 2:00 p.m. | |

February 1989

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

March 1989

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

Minutes
September 8-9, 1988

April 1989

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

May 1989

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

June 1989

No meeting

July 1989

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

August 1989

No Meeting

September 1989

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

October 1989

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

November-December 1989

Nov. 30 (Thurs.)	1:30 p.m. - 6:00 p.m.	San Francisco
Dec. 1 (Fri.)	9:00 a.m. - 2:00 p.m.	

1988 ANNUAL REPORT

The Commission considered Memorandum 88-59 and the First through Fourth Supplements thereto. The Commission adopted the draft of the Annual Report as set out in the Memorandum, after deleting the paragraph referring to the new Probate Code at the bottom of page 1160 and the top of page 1161. The staff will incorporate the report on unconstitutional statutes from the Fourth Supplement (and make conforming changes in the recommendation portion of the annual report to reflect the fact that there are no court decisions to report). The staff will also revise the draft to reflect the recommendations the Commission will actually submit to the 1989 legislative session and to include the chapter number for AB 2841 when that information is received.

The Commission adopted the priorities for work during 1989 as set out in the First Supplement, but stressed the importance of giving priority to the study of shifting of attorneys' fees between litigants. With respect to the suggestion on page 3 of the Second Supplement that the Commission obtain authority to study minor and technical defects in the law, the staff should obtain the input of Commissioner Gregory. The Commission does not plan to request authority to study any other topics, or to give any other topics priority, during 1989.

BUDGET

The Commission considered Memorandum 88-60, relating to the Commission's budget for 1989-90. The Commission approved the budget as proposed by the staff in the Memorandum.

COMMUNICATIONS FROM INTERESTED PERSONS

The Commission discussed, but took no action concerning, the problem of last-minute letters concerning agenda items received from interested persons that must be distributed at the meeting and attached to the Minutes.

1988 LEGISLATIVE PROGRAM

The Assistant Executive Secretary made the following report on the status of the 1988 Commission bills.

- AB 2779 (Harris): Urgency probate bill
- AB 2841 (Harris): Major probate bill
- ACR 42 (Harris): Attorney's fees study authorization
- SCR 62 (Lockyer): Continuing authority to study topics

BILL STATUS	AB 2779	AB 2841	ACR 42	SCR 62	
Introduced	Jan 13	Jan 26	Jan 20	Jan 14	

Minutes
September 8-9, 1988

First House	Policy Committee	Mar 2	Mar 2	4/9/87	Mar 7	
	Fiscal Committee	****	Mar 23	5/7/87	Mar 16	
	Passed House	Mar 10	Apr 4	5/14/87	Mar 24	
Second House	Policy Committee	Apr 19	June 21	Mar 7	May 18	
	Fiscal Committee	****	Aug 5	Mar 16	June 22	
	Passed House	May 2	Aug 11	Mar 24	Aug 10	
Concurrence		May 12	Aug 23	Apr 4	****	
Governor	Received	May 16		****	****	
	Approved	May 24		****	****	
Chaptered by Secretary of State	Date	May 25		Apr 6	Aug 15	
	Ch. #	113		Res 20	Res 81	

The Commission also considered a letter from John R. Valencia on behalf of the American Insurance Association (attached as Exhibit 1) indicating concern about provisions of AB 2841 relating to a liability of the decedent covered by insurance and noting that the Association would be sending a letter to the Governor concerning this matter. The staff response to Mr. Valencia's letter should make clear that the staff cannot commit the Commission to any particular course of action on the Association's concerns. The staff should also seek to obtain a copy of the Association's letter to the Governor to see whether a response is called for.

STUDY F-641 - LIMITATIONS ON DISPOSITION OF COMMUNITY PROPERTY

The Commission heard the comments of Daniel Jaffe, a representative of the Executive Committee of the State Bar Family Law Section, concerning the problems raised in Memorandum 88-47 and the First Supplement thereto, relating to limitations on disposition of community property. Mr. Jaffe reported that the Executive Committee has not yet reviewed this material, but plans to do so at the State Bar Convention later this month. Mr. Jaffe's personal opinion is that these memoranda address matters that need statutory clarification. Mr. Jaffe mentioned, in addition, the problem of gifts signed by a single spouse under the Uniform Transfers to Minors Act or as a Clifford trust, the problem of encumbrances on community assets by a spouse acting alone (including a lien for lawyer's fees incurred by a spouse during dissolution litigation), and the problem of termination of a joint tenancy account by one spouse acting alone.

The Commission decided to take up the Memorandum at the October meeting when the State Bar comments are available, and at that time to make a judgment on the priority to be given to the matters raised in the Supplement. The Commission also requested a staff memorandum on the issue of whether some or all of a gift made by a spouse without the written consent of the other spouse can be recovered from the donee by the nonconsenting spouse under existing law.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

The Commission considered Memorandum 88-64 and the attached draft of a tentative recommendation relating to assignment and sublease, together with the Sixth Supplement to Memorandum 88-64, containing comments on the draft. The Commission decided not to attempt to deal with the issues raised in the other supplements to Memorandum 88-64, including whether the statute should be extended to residential leases, but to proceed with the basic draft developed so far for commercial

leases and to take up the related issues separately at a later time. The Commission directed the staff to prepare a revised tentative recommendation for approval at the October meeting that includes the following features.

Civil Code § 1951.4 (lock-in remedy). Subdivision (d) should be rewritten to provide in effect that a lease clause authorizing the landlord to recover some or all of any surplus value generated by the transfer does not preclude use of the Section 1951.4 remedy. In the rewrite, the term "transfer" should not be used as if it were defined for the purposes of Section 1951.4.

Civil Code § 1995.010 (scope of chapter). The reference to a lease "other than for" residential purposes should refer instead to a lease "for other than" residential purposes.

Civil Code § 1995.020 (definitions). Subdivision (a), defining "landlord", should refer to a tenant who "is a sublandlord under" a sublease, instead of to a tenant who "makes" a lease.

Subdivision (c), defining "restriction on transfer", should refer to a provision that "restricts the right of" transfer, instead of to a provision that "limits free" transfer.

Subdivision (d) was rewritten to state that, "'Tenant' includes a subtenant or assignee."

Subdivision (e), defining "transfer", should be broadened to include creation of a security interest in the property (e.g., mortgage or other hypothecation), including assignment of the lease for security purposes.

Civil Code § 1995.030 (right to transfer absent a restriction). The reference in subdivision (b) to "free" transfer should be replaced by a reference to "unrestricted" transfer.

Civil Code § 1995.060 (express standards and conditions for landlord's consent). Subdivisions (b) and (d) should be combined in a single subdivision.

Civil Code § 1995.070 (implied standard for landlord's consent). The redraft should address transitional provisions for pending litigation.

Civil Code § 1995.080 (transfer restriction subject to standards and conditions). This section should be rephrased to validate a lease clause authorizing the landlord to recover some or all of any surplus value generated by the transfer.

In the course of preparing a new draft, the staff should consider whether the law stating that the tenant's failure to request the landlord's consent before making a transfer is a breach of the lease should be codified.

STUDY L-950 - EFFECT OF HOMICIDE

The Commission considered Memorandum 88-63 concerning the effect of homicide on the killer's right to take property from the victim. The Commission approved the staff recommendation to include in the 1989 probate cleanup bill the following amendment to Probate Code Section 254:

Probate Code § 254 (technical amendment). Determination of whether killing was felonious and intentional

SEC. _____. Section 254 of the Probate Code is amended to read:

254. (a) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this part.

(b) In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this part. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of this part.

Comment. Section 254 is amended to add the words "a final judgment of" in subdivision (b). This makes clear that the civil court may determine the issue by the civil standard of proof during the pendency of an appeal from a criminal conviction of felonious and intentional killing.

Since the civil court may determine whether the killing was felonious and intentional notwithstanding the absence of a criminal conviction, a juvenile may be disqualified under this part from receiving property of the decedent. See *In re Estates of Josephsons*, 297 N.W.2d 444, 448 (N.D. 1980).

STUDY L-1025 - PROBATE CODE (NOTICE TO CREDITORS)

The Commission considered Memorandum 88-60 and the attached draft tentative recommendation relating to notice to creditors. The Commission also considered letters from the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association and from Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, copies of which were distributed at the meeting and are attached to these Minutes as Exhibits 2 and 3.

The Commission approved the draft tentative recommendation to be distributed for comment after it is revised to incorporate the decisions made at the meeting. However, the Commissioners will be given five days to review the revised tentative recommendation and raise any problems before it is distributed generally. The Commission made the following decisions:

Code Civ. Proc. § 353 (statute of limitations). Subdivision (b) should be revised to impose a one year statute of limitations running from the date of death, whether the statute otherwise applicable would expire before or after the one year period.

Prob. Code § 9053 (immunity of personal representative and attorney). The burden of proof of bad faith, or lack of good faith, under this section should be on the creditor to establish liability. The second sentence of subdivision (b) should be moved from the statute to the Comment, with cross-references to the appropriate statutory provisions.

Prob. Code § 9103 (late claims). The discussion in the Comment of the personal representative's liability to creditors should be revised to conform to the revision of Section 9053 (immunity of personal representative and attorney).

Prob. Code § 9392 (known or reasonably ascertainable creditor). Subdivision (a)(1) should be revised to refer to a creditor "reasonably ascertainable" by the personal representative rather than "ascertainable by a reasonably diligent search." The staff should

consider whether this section adequately addresses the situation of a partially distributed estate. The Comment should be revised to conform to the revision of Section 9053 (immunity of personal representative and attorney). It should be made clear that this section is a limited remedy for persons required to be given actual notice who were not given that notice.

Prob. Code § 11429 (unpaid creditor). The Comment should be revised to conform to the revision of Section 9053 (immunity of personal representative and attorney).

**STUDY L-1036/1055 - PERSONAL REPRESENTATIVE AND
ATTORNEY FEES IN PROBATE**

The Commission considered the following materials:

- (1) Memorandum 88-43 (and attached draft statute).
- (2) First Supplement to Memorandum 88-43 (and attached staff draft of preliminary part of Tentative Recommendation).
- (3) Second, Third, Fourth, Fifth, and Sixth Supplements to Memorandum 88-43.
- (4) Memorandum 88-48.

The Commission reviewed these materials with a view to the staff preparing a revised staff draft of a tentative recommendation for review by the Commission at the October meeting. The Commission gave the staff the following directions.

ABA Statement of Principles Regarding Probate Practice and Expenses

The Commission considered the Statement of Principles attached to Memorandum 88-48. After discussion, the Commission reaffirmed its basic decision to retain the California statutory fee system with those changes the Commission determines are needed or desirable to be made in that system.

Technical Revisions in Draft Statute

With the reservation noted below, the Commission approved the technical revisions suggested by Charles Collier and set out in the last four pages of the Exhibit 5 (green pages) to the Third Supplement to Memorandum 88-43. The staff should check into the use of the term "appraisal value" in subdivision (b) of proposed section 10800 and subdivision (b) of proposed Section 10830. Perhaps the phrase should be "gains on sales" instead of "gains over appraisal value on sales."

Written Attorney Fee Agreement for Formal Probate Proceedings

The Commission considered the draft statute provisions attached to the Sixth Supplement to Memorandum 88-43.

Provision concerning attorney fee agreement to be compiled in Business and Professions Code rather than in Probate Code. The Commission decided that the provisions governing the written attorney fee agreement, including the requirement of disclosure that the attorney and client may agree to a lower fee than the statutory probate fee, should be compiled in the Business and Professions Code rather than the Probate Code. The provisions relating to this matter contained in the draft statute attached to Memorandum 88-43 (Sections 10820-10823) should not be included in the revised draft prepared for the October meeting.

Revisions in proposed provision in Business and Professions Code relating to attorney fee agreement. The Commission reviewed the draft statute attached to the Sixth Supplement which proposed a new Section 6147.5 and made a technical amendment to Section 6148.

The following suggestions are to be implemented in redrafting the statute for review by the Commission at the October meeting:

Paragraph (4) of subdivision (c) of proposed Section 6147.5 should be revised to read in substance:

(4) ~~A statement that the~~ The following statement: "The California Probate Code sets the maximum limits on the fee of the attorney, ~~and that~~ but the attorney and client may ~~negotiate agree on~~ agree on a lower fee."

Exception where total expense to estate will not exceed \$1,000.
Paragraph (1) of subdivision (e) of proposed Section 6147.5 should be deleted. This paragraph, which provided an exception where the total expenses to the estate (including the attorney fee) would not exceed \$1,000, would not have any significant application in formal probate proceedings. This is because the affidavit procedure ordinarily will be used to deal with the small estates (estate less than \$60,000). Moreover, the phrase "total expenses to the estate" is unclear in a probate context; does this phrase include such expenses as the fee of the probate referee? Does the phrase include the statutory compensation of the personal representative?

Review of Draft Statute Attached to Memorandum 88-43

The Commission reviewed the draft statute attached to Memorandum 88-43 and the comments and suggestions contained in the various supplements to that memorandum and made the following suggestions for the redrafting of the draft statute.

§ 10800. Compensation for ordinary services

The last sentence of subdivision (b) should be deleted. The Comment should indicate that the sentence is deleted because it is unnecessary.

§ 10801. Additional compensation for extraordinary services

No revisions were made in this section.

§ 10802. Compensation provided by decedent's will

The Comment to this section should include a statement that the decedent's will may allow a greater amount of compensation than the statutory compensation. See the case cited under Section 10833.

§ 10803. Agreement for higher compensation void

No revisions were made in this section.

§ 10804. Use of experts, technical advisors, and other assistants

Staff to prepare memorandum concerning Section 3-715(21) of Uniform Probate Code. The Commission requested that the staff prepare a memorandum on Section 3-715(21) of the Uniform Probate Code relating to employment of persons to advise or assist the personal

representative in the performance of the administrative duties of the personal representative. If a provision is drafted for inclusion in the Probate Code as a result of Commission consideration of that memorandum, any necessary conforming revisions of Section 10804 will be considered at that time. The provisions of the Trust Law should be considered in preparing the Memorandum. This provision, if approved by the Commission, would not be compiled in the portion of the Probate Code relating to fees, but would probably be compiled in the provision relating to powers of the personal representative.

Technical amendment to Section 11004 of Probate Code. The Commission discussed the problem of (1) what expenses are paid from the estate and (2) what expenses are charged to the compensation of the personal representative because the expenses are for ordinary services that the personal representative is expected to provide for his or her statutory compensation. The Commission considered the Fifth Supplement to Memorandum 88-43. The Commission determined that the clean up bill for the 1989 session should include the following amendment to Section 11004 of the Probate Code:

§ 11004 (amended). Expenses of personal representative

11004. The personal representative shall be allowed all necessary expenses in the administration of the estate, including but not limited to necessary expenses in the care, management, preservation, and settlement of the estate.

Comment. Section 11004 is amended to make clear that the phrase "necessary expenses in the administration of the estate" includes the necessary expenses in the care, management, preservation, and settlement of the estate. This amendment did not make a substantive change in the section. See the Comment to Section 11004 as enacted (Section 11004 "generalizes the former language that provided for allowance of expenses in the care, management, and settlement of the estate"). Section 11004 permits expenses such as insurance, gardening, pool maintenance, and maintenance of property pending sale or distribution to be paid from the estate.

Revisions of Proposed Section 10804. The Comment to Section 10804 should point out that subdivisions (a) and (b) cover extraordinary services. Subdivision (a) makes clear that services in connection with

taxes are extraordinary services to be paid out of the estate. Subdivision (b) makes clear that persons providing other extraordinary services are to be paid out of the estate.

Subdivision (c) was revised to read in substance as follows:

(c) The personal representative may employ any qualified person, including a member of the State Bar of California, to assist the personal representative in the performance of the ordinary services of the personal representative and may pay for the services of that person out of the personal representative's own funds. At the request of the personal representative, the court may order payment out of the estate directly to the person assisting the personal representative in the performance of the ordinary services, the payment to be charged against and deducted from the compensation that otherwise would be paid to the personal representative.

The Comment to subdivision (c) should note that a lawyer employed to handle, for example, litigation against the decedent or the estate, would be paid under subdivision (b) rather than under subdivision (c), since the attorney would be providing extraordinary services to the estate.

The Comment also should include the substance of the following:

Nothing in Section 10804 changes the rule that necessary expenses in the administration of the estate, including but not limited to necessary expenses in the care, management, preservation, and settlement of the estate, are to be paid from the estate. See Section 11004 which permits expenses such as insurance, gardening, pool maintenance, and maintenance of property pending sale or distribution to be paid from the estate.

§ 10805. Apportionment of compensation

No revisions were made in this section.

§§ 10820-10823. Written agreement concerning legal services

These sections were deleted. There are replaced by the new section to be added to the Business and Professions Code.

§ 10830. Compensation for ordinary services

The last sentence of subdivision (b) was deleted. The Comment should state that this sentence is unnecessary.

The Commission discussed whether the amount of the fee on the amount of the estate over \$10 million should be "a reasonable amount to be determined by the court." The Commission was informed that the existing \$25 million limit on the percentage fee schedule (amounts on the portion of the estate over \$25 million being "a reasonable fee to be determined by the court") was a negotiated limit. It was noted that the same schedule applies to the fee of the personal representative, and that the personal representative has no incentive to take a lower fee. The Commission decided not to lower the limit from \$25 million to \$10 million.

§ 10831. Additional compensation for extraordinary services

The Commission decided to retain Section 10831 in the form set out in the staff draft. The Commission declined to attempt to state in the statute what specific services constitute extraordinary services. However, the Comment to the section should include a reference to Estate of Schuster, 163 Cal. App. 2d 337, 209 Cal. Rptr. 289 (1984) (defense of will contest before probate). The citation already in the Comment to the Dunton case should have, following the case, "(will contest after will admitted to probate)."

§ 10832. Agreement for higher compensation void; no duty to negotiate for lower compensation

At the next meeting, the Commission should review the policy reflected in the last clause of Section 10832 ("the personal representative has no duty to negotiate attorney compensation less than the statutory compensation"). The staff indicated that the next draft would include a statement in the statute that the personal representative is not liable for failing to negotiate attorney compensation less than the statutory compensation.

§ 10833. Compensation provided by decedent's will

The Comment should make clear that the will may provide more compensation than the statutory compensation. The Commission did not consider the Staff Note to this section.

§ 10834. Personal representative may not receive dual compensation as estate attorney unless authorized by will

No revisions were made in this section.

§ 10835. Apportionment of compensation

No revisions were made in this section.

§ 10850. Partial allowance of compensation

No revisions were made in this section.

§ 10851. Final compensation

No revisions were made in this section.

§ 10852. Matters to be considered in determining compensation for
extraordinary services

Subdivision (f) was revised to read:

(f) The amount of the fee provided by Section 10800 or 10830, and whether it constitutes adequate compensation for ~~ordinary and extraordinary~~ all services rendered.

The Comment should include the substance of the following statement: "It is not anticipated that the court will require a showing under subdivision (f) of the ordinary services rendered unless there is some objection to the request for the fee for the extraordinary services."

§ 10853. Services of paralegal performing extraordinary services

No revision was made in this section.

§ 10854. Limitation on allowance of compensation for extraordinary
services

The word "only" was deleted from the introductory clause of section 10854 as unnecessary.

The substance of the following was added to the Comment:

Section 10854 applies only to compensation for extraordinary services of the personal representative and estate attorney, not to compensation of experts employed under Section 10804 (including, for example, an attorney hired to handle litigation against the decedent or the estate, to do tax returns, and the like).

STUDY L-3010 - FEES OF CORPORATE TRUSTEES

The Commission considered Memorandum 88-61 and the staff draft of a tentative recommendation relating to trustees' fees. The Commission also considered remarks of the California Bankers Association, the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association, and a study team of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section which were distributed at the meeting and are attached to these minutes as Exhibits 4-6.

The Commission approved the draft tentative recommendation to be distributed for comment after it is revised to incorporate the decisions made at the meeting. However, the Commissioners will be given five days to review the revised tentative recommendation and raise any problems before it is distributed generally. The Commission made the following decisions:

§ 15642. Removal of trustee

The new grounds for removing a trustee should be revised as follows:

(b) The grounds for removal of a trustee by the court include the following:

(5) Where the trustee's compensation is unreasonable excessive under the circumstances.

The first sentence of the comment should be revised as follows:

Paragraph (5) is added to subdivision (b) to make clear that a trustee may be removed ~~by the court~~ in the court's discretion where the trustee's compensation is unreasonable excessive under the circumstances.

§ 15661. Selection of successor trustee

This section should be located with the procedure for notice of proposed fee increases commencing with Section 15690.

§ 15690. "Trustee's fee" defined

The definition of "trustee's fee" should be expanded so that the procedure applies to increases in hourly rates and transaction charges. Sections 15690 should be revised as follows:

15690. As used in this article, "trustee's fee" means the trustee's periodic base fee, rate of percentage compensation, ~~or~~ minimum fee, hourly rate, or transaction charge.

The hourly rate should be covered by the proposed statute since an increase in an hourly rate can have a dramatic impact on the total fee charged. The definition should also include transaction charges, such as for deed preparation, sale of stock, check writing, tax return preparation, and the like, since they have a potentially significant impact. (See Section 15692 for a decision intended to eliminate *de minimis* increases in transaction charges from the coverage of the procedure.)

§ 15692. Notice of proposed fee increase

The language describing beneficiaries who are entitled to notice of proposed fee increase is too limited. The notice should be given to all beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated when notice is given. If a beneficiary is a minor for whom no guardian has been appointed, notice should be given to the parent having legal custody of the minor and the parent may represent the interests of the beneficiary under this procedure.

The requirement that the trustee follow this procedure for increasing fees should not apply to transaction charges unless the proposed increase is 10% or more of the fee in effect. This limitation is intended to avoid the need to follow this procedure where transaction charge increases are not significant.

§ 15695. Resignation or removal if all beneficiaries object

This section should be revised to provide a time period during which the trustee may withdraw or compromise the proposed fee increase and thereby avoid the right of all beneficiaries to remove the trustee. This section should also provide that the beneficiaries' right to remove the trustee is suspended if the trustee petitions for approval of the proposed fee increase. The comment to this section should note that a minor's parent who has received notice under Section 15692 may exercise the rights under this procedure.

Exemplary Damages

The provision on exemplary damages was approved for inclusion in the tentative recommendation.

Termination Fees

The Commission discussed regulating termination fees, but decided not to include a provision on this subject in the tentative recommendation. The Commission was informed that termination fees are usually waived and thus should not inhibit replacement of trustees under this procedure. It was suggested that the Commission should monitor the experience under the procedure, if it is enacted, with a view toward offering corrective legislation if a problem develops.

STUDY L-3017 - PETITION FOR REMOVAL OF TRUSTEE BY SETTLOR

The Commission considered Memorandum 88-62 concerning a proposal to permit the settlor of an irrevocable living trust to petition the court for removal of a trustee. Consideration of this memorandum had been postponed to give the banks and bar associations more time for review. Although no written comments were received, James Quillinan stated at the meeting that a group from the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section did not believe the proposed amendment would create adverse tax consequences.

The Commission approved the proposed amendment of Probate Code Section 15642, to be included in the recommendation relating to trustees' fees. The comment to the amendment should make clear that permitting the settlor to petition for removal of a trustee does not give the settlor any other rights.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

WILKE, FLEURY, HOFFELT, GOULD & BIRNEY

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS*

300 CAPITOL MALL, SUITE 1300
SACRAMENTO, CALIFORNIA 95814MAILING ADDRESS:
P. O. BOX 15559

SACRAMENTO, CALIFORNIA 95852-0559

TELEPHONE
(916) 441-2430TELE FAX
(916) 442-6664OF COUNSEL
SHERMAN C. WILKE
GORDON A. FLEURY
(1916-1987)SPECIAL COUNSEL
PETER A. NOWINSKIRICHARD H. HOFFELT*
WILLIAM A. GOULD, JR.*
PHILIP R. BIRNEY*
THOMAS G. REDMON*
SCOTT L. GASSAWAY
DONALD REX HECKMAN II*
ALAN G. PERKINS
THOMAS E. BONE
BRADLEY N. WEBB
ERNEST JAMES KRTEL
CRAIG E. MODLIN
ANITA SEIPP MARMADUKE
MARK H. VAN BRUSSEL
MATTHEW W. POWELL
ROBERT R. MIRKIN
MARK L. ANDREWS
REGINA J. SCHRODER
DAVID A. FRENZNICK
CAROL A. MCCONNELL
PETER J. PULLEN
STEPHEN K. MARMADUKE
CHRISTOPHER J. GILL
SCOTT I. RICHERT
NICOLE A. CASE
JOHN R. VALENCIA
CHARLES T. YERXA, JR.
PHYLLIS A. MCKONE
E. ARLENE HILL
LUKE B. MARSH

August 23, 1988

CA LAW REV. COMM'N

AUG 25 1988

RECEIVED

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

RE: AB 2841 (Harris)

Dear Mr. Sterling:

Enclosed for your information is a copy of a letter summarizing our communications on the substance of AB 2841, specifically part 13 "Litigation Involving Decedent," chapter 1 "Liability of Decedent Covered by Insurance." I was surprised, and mildly disappointed, that the bill was presented on the floor of the Assembly today (8/23) while we were attempting to restore proposed Probate Code Section 550(a) to a status reflecting existing law.

As a follow up to our telephone conversation, I would appreciate a written confirmation of our understanding that the American Insurance Association (AIA) will have the opportunity to work with the California Law Revision Commission during the September and October 1988 development of the traditional "trailer bill" which the Commission will sponsor and which will have an effective date preceeding that of AB 2841.

Please be advised that as a matter of record, we will be submitting a letter stating our position on proposed Probate Code Section 550(a) for inclusion in the Governor's office file on AB 2841. Of course, we will be very specific in our commentary and will note for the record that it is not the intention of

Nathaniel Sterling, Esq.
California Law Revision Commission
August 23, 1988
Page Two

AIA to in any way affect or impact any other provision of the bill.

I have appreciated your cooperativeness to date and look forward to continued work with you on this issue. I hope to hear from you at your earliest convenience.

Sincerely,

WILKE, FLEURY, HOFFELT,
GOULD & BIRNEY



JOHN R. VALENCIA

JRV:cah
Enclosure

WILKE, FLEURY, HOFFELT, COULD & BIRNEY

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS*

300 CAPITOL MALL, SUITE 1300
SACRAMENTO, CALIFORNIA 95814

MAILING ADDRESS:

P. O. BOX 15559
SACRAMENTO, CALIFORNIA 95852-0559

TELEPHONE
(916) 441-2430

TELE FAX
(916) 442-6664

OF COUNSEL
SHERMAN C. WILKE
GORDON A. FLEURY
(1916-1987)

SPECIAL COUNSEL
PETER A. NOWINSKI

August 22, 1988

RICHARD M. HOFFELT*
WILLIAM A. GOULD, JR.*
PHILIP R. BIRNEY*
THOMAS G. REDMON*
SCOTT L. GASSAWAY
DONALD REX HECKMAN II*
ALAN G. PERKINS
THOMAS E. BONE
BRADLEY N. WEBB
ERNEST JAMES KRITIL
CRAIG E. MODLIN
ANITA SEIPP MARMADUKE
MARK H. VAN BRUSSEL
MATTHEW W. POWELL
ROBERT R. MIRKIN
MARK L. ANDREWS
REGINA J. SCHRODER
DAVID A. FRENZNICK
CAROL A. MCCONNELL
PETER J. PULLEN
STEPHEN K. MARMADUKE
CHRISTOPHER J. GILL
SCOTT I. RICHERT
NICOLE A. CASE
JOHN R. VALENCIA
CHARLES T. YERXA, JR.
PHYLLIS A. MCKONE
E. ARLENE HILL
LUKE B. MARSH

Deborah De Bow
Committee Counsel
Assembly Committee on Judiciary
State Capitol, Room 6005
Sacramento, CA 95814

RE: AB 2841

Dear Ms. De Bow:

At your direction I contacted the sponsors of Assembly Bill 2841 (Harris), the California Law Revision Commission, on Wednesday, August 17, 1988. At issue in our discussion were the provisions of AB 2841 relating to insurance coverage of decedents, specifically part 13, chapter 1 entitled "Liability of Decedent Covered by Insurance" on page 40 through 42 of the bill as amended in the Senate on August 1, 1988. The status of this bill is that it is presently in the Assembly awaiting concurrence in the amendments taken in the Senate.

I spoke with CLRC attorneys Nat Sterling and John Demouilly regarding the provisions of proposed section 550 of the California Probate Code. That section provides that liability actions against decedents protected by insurance "may be commenced or continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest." I expressed to the CLRC attorneys that this represented a substantive change in the law creating two new aspects of litigation involving decedents covered by liability insurance.

The response of the CLRC attorneys was to contend that the entirety of proposed chapter 1 was a reorganization

COPY

and restatement of existing law. As authority, the CLRC attorneys cited Code of Civil Procedure Section 385(b) and Probate Code Section 721 as existing law. Probate Code Sections 709, 709.1 and 707(b) were cited as indirect authority for the provisions of chapter 1.

I reviewed these provisions and, in a subsequent phone call on August 18, 1988, to the CLRC attorneys, I indicated that my review of the cited code sections led me to concur that explicit or implicit authority exists for most of the provisions reorganized under the heading of proposed chapter 1 with the specific exception of proposed section 550. Code of Civil Procedure Section 385(b) provides only that an action may be continued if a defendant in an action dies after the commencement of the action and had liability insurance applicable to the cause of action, and that the action may be continued without the appointment of a representative or successor in interest. This section further provides that for good cause, a court may order the appointment of a personal representative and his substitution as the defendant. I pointed out to the CLRC attorneys that this differs substantially with the authority in proposed section 550 authorizing commencement of actions against defendants already dead and further, to do so without necessarily joining as a party in the action the decedent's personal representative or successor in interest. I also pointed out that while the express authority to continue actions against decedents exists under certain circumstances, in no event does that authority provide that an action may be continued without necessarily joining the decedent's personal representative or successor in interest, merely that they may be continued without appointing the personal representative or any successor in interest as a substitute defendant.

We arrived at the following agreement on this bill:

1. If the bill were placed in a conference committee for any reason, staff would recommend that the bill be revised to only reflect existing law;
2. If the bill is not placed in a conference committee for further amendment, staff would review our proposed corrective language in October 1988 in conjunction with the development of a "trailer bill" containing an urgency cause and an affective date preceding the stated effective date of AB 2841, which is July 1, 1989; or
3. The commission could work with insurance interests to arrive on an acceptable compromise for language to be included in the cleanup bill, which would represent middle ground between existing law and the proposal contained in section 550.

COPY

Deborah De Bow
August 22, 1988
Page Three

In light of the above, we would like to ask that the bill be referred to the conference committee to reinstate language corresponding to existing law. It is not AIA's intent to impact the bill in any other way.

Sincerely,

WILKE, FLEURY, HOFFELT,
GOULD & BIRNEY



JOHN R. VALENCIA

JRV:cah

COPY

ABBITT, BENNETT, LEHMAN & JACOBS

A PROFESSIONAL CORPORATION

DIANE ABBITT
ROBERTA BENNETT*
MARK E. LEHMAN
MITCHELL A. JACOBS*
ROBERT BERTRAM BURKE
JEFFREY G. GIBSON
KARYN S. BRYSON

SUITE 1100
12121 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025

AREA CODE 213
824-0471
FAX 213 820-5980

OF COUNSEL
KENNETH G. PETRULIS

*CERTIFIED SPECIALIST IN FAMILY LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

CA LAW REV. COMM'N

SEP 06 1988

RECEIVED

September 2, 1988

Nat Sterling
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Memorandum 88-60
Study L-1025 - Probate Code
(Notice to Creditors - Constitutional Requirements)

Dear Mr. Sterling:

Our committee has reviewed the above memo and the State Bar proposal which include distributee liability. We unanimously oppose such a scheme, for the following reasons:

A. Any scheme involving distributee liability introduces a completely new area of liability fraught with the dangers of proliferation of lawsuits and the inequities which must result when solvent beneficiaries suffer the loss of their gifts and profligate beneficiaries escape liability. In such a scheme, charitable or institutional beneficiaries would be the easiest targets.

One of the primary purposes of the probate process is to put the decedent's affairs at an end. The spectre of distributee liability would mean that few businessmen or professionals would ever have their estates laid to rest. Tulsa does not necessitate the elimination of this benefit of the probate system.

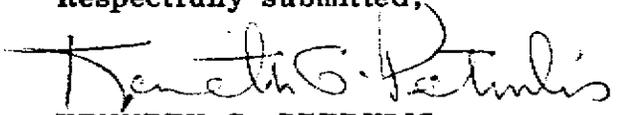
B. The lesson of Tulsa is that due process requires executors to act in a reasonable manner. Good law and good practice are furthered when the statutory scheme encourages the executor to comply with the duty of conducting a search to determine reasonably ascertainable creditors. The scheme proposed by the State Bar encourages bad practice, by providing immunity for the executor who has not conducted a reasonable search, and then shifting potential liability to distributees, upon whom the effect can be disastrous.

We unanimously recommend to the Law Revision Commission that they consider again a scheme which would require the executor to determine reasonably ascertainable creditors and including a finding by the Court in its approval of the final account that, based upon the factual representations of the representative, all reasonably ascertainable creditors have been found.

As an in rem proceeding, such a finding by the Court would be binding on all parties. Anyone aggrieved by such a finding has a procedure through the Code of Civil Procedure, including CCP §473. No new or additional procedure for the aggrieved creditor is thus required.

A number of our members noted anecdotally that, during this period when there is no statutory solution to Tulsa, good practice has required them to instruct personal representatives to conduct a reasonable search to determine all reasonably ascertainable creditors. It will thus be the case that, by the time any legislation is enacted on this subject, careful practitioners will have already instituted a system to determine reasonably ascertainable creditors, in order to protect themselves under the holding of the Tulsa case. A legislative scheme, as we suggest, would be consistent with current prudent practice. The scheme presently proposed, however, would conflict with it and would likely be in conflict with appellate decisions which may well occur during the interim period before legislation becomes effective.

Respectfully submitted,



KENNETH G. PETRULIS
Chairman, Legislative Committee
Probate, Trust and Estate Planning Section
Beverly Hills Bar Association

KGP/ar

cc: Legislative Committee,
Beverly Hills Bar Association

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

ChairD. KEITH BILTER, *San Francisco***Vice-Chair**IRWIN D. GOLDRING, *Los Angeles***Advisors**KATHRYN A. BALLSUN, *Los Angeles*HERMIONE K. BROWN, *Los Angeles*THEODORE J. CRANSTON, *La Jolla*LLOYD W. HOMER, *Campbell*KENNETH M. KLUG, *Fresno*JAMES C. OPEL, *Los Angeles*LEONARD W. POLLARD, II, *San Diego*JAMES V. QUILLINAN, *Mountain View*WILLIAM V. SCHMIDT, *Costa Mesa*HUGH NEAL WELLS, III, *Los Angeles*JAMES A. WILLETT, *Sacramento***Section Administrator**PRES ZABLAN-SOBERON, *San Francisco*

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

Executive CommitteeD. KEITH BILTER, *San Francisco*IRWIN D. GOLDRING, *Los Angeles*JOHN A. GROMALA, *Eureka*LYNN F. HART, *San Francisco*ANNE K. HILKER, *Los Angeles*WILLIAM L. HOISINGTON, *San Francisco*BEATRICE LAIDLAY-LAWSON, *Los Angeles*JAY ROSS MacMAHON, *San Rafael*VALERIE J. MERRITT, *Los Angeles*BARBARA J. MILLER, *Oakland*BRUCE S. BOSS, *Los Angeles*STERLING L. BOSS, JR., *Mill Valley*ANN E. STODDEN, *Los Angeles*MICHAEL V. VOLLMER, *Irvine*JANET L. WRIGHT, *Fresno*

September 6, 1988

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

CA LAW REV. COMMISSION

SEP 06 1988

RECEIVED

Re: LRC Memo 88-60, Notice to Creditors

Dear John:

I have enclosed a copy of Neal Wells's report on the memo noted. The report represents the opinions of Team 1 only. The report has not been reviewed by the Executive Committee. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

James V. Quillinan
James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Terry Ross
 Irv Goldring Ted Cranston

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

Chair
D. KEITH BILTER, San Francisco
Vice-Chair
IRWIN D. GOLDRING, Los Angeles

Advisors
KATHRYN A. BALLSUN, Los Angeles
HERMIONE K. BROWN, Los Angeles
THEODORE J. CRANSTON, La Jolla
LLOYD W. HOMER, Campbell
KENNETH M. KLUG, Fresno
JAMES C. OPEL, Los Angeles
LEONARD W. POLLARD, II, San Diego
JAMES V. QUILLINAN, Mountain View
WILLIAM V. SCHMIDT, Costa Mesa
HUGH NEAL WELLS, III, Los Angeles
JAMES A. WILLETT, Sacramento

Section Administrator
PRES ZARLAN-SOBERON, San Francisco



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8000

August 31, 1988

Executive Committee
D. KEITH BILTER, San Francisco
IRWIN D. GOLDRING, Los Angeles
JOHN A. GROMALA, Eureka
LYNN P. HART, San Francisco
ANNE K. HILKER, Los Angeles
WILLIAM L. HOISINGTON, San Francisco
BEATRICE LAIDLAY-LAWSON, Los Angeles
JAY BOSS MacMAHON, San Rafael
VALERIE J. MERRITT, Los Angeles
BARBARA J. MILLER, Oakland
BRUCE S. ROSS, Los Angeles
STERLING L. ROSS, JR., Mill Valley
ANN E. STODDEM, Los Angeles
MICHAEL V. VOLLMER, Irvine
JANET L. WRIGHT, Fresno

James V. Quillinan, Esq.
Diemer, Schnieder, Luce & Quillinan
444 Castro Street; Suite 900
Mountain View, California 94041

THE LAW REVISION COMMISSION

SEP 06 1988

RECEIVED

Re: Law Revision Commission Memorandum 88-60;
Tentative Recommendation Relating to Notice
to Creditors

Dear Jim:

The special Creditor's Claim Team and Team 3 have reviewed Memorandum 88-60. Our comments and conclusions are as follows:

CCP Section 353 - Statute of Limitations - The Staff notes that this section was just amended, effective July 1st, to extend statutes of limitation expiring within one year after death to the first year death anniversary. The Teams would have no objection to application of this concept to the new one year statute of limitations. As noted by the Staff, the reasons for the recent amendment have not changed. Moreover, a straight one year statute of limitations running from date of death is much easier for creditors to understand and apply than a statute which varies depending upon whether a cause of action would have otherwise expired within the year following death.

James V. Quillinan, Esq.
August 31, 1988
Page 2

The Teams remain of the view that running the statute from date of death rather than from date of issuance of letters is imperative to avoid the state action rationale of the majority of the Supreme Court in Tulsa v Pope.

The Teams also remain of the view that the one year statute of limitations will not be found unconstitutional due to shortness of time, and that a one year period appropriately balances the needs of estate administration and creditors. It may be noted that the statute of limitations for most tort claims is one year (C.C.P. 340). Thus, a one year statute of limitations is not novel or unduly short.

The Teams are opposed to a floating statute which remains open until the closing of an estate. The floating statute would once again interject the aura of state action because the statute would not be self executing. This could render the entire statute unconstitutional. This risk is not worth any marginal benefits a floating statute might provide.

Probate Code Section 9053 - Immunity - The comment to this section refers to "the liability to an omitted creditor." The section itself addresses "liability, if any."

The difference is significant. Section 9053 was enacted to protect personal representatives and attorneys from exposure which might arise from new notice requirements. We have been operating under the assumption that personal representatives were to be protected by the section unless they acted in bad

James V. Quillinan, Esq.
August 31, 1988
Page 3

faith. The comment to this section together with comments to succeeding sections attempt to use this protection as a sword against personal representatives by creating a new liability for failure to give notice, and then recognize good faith merely as a defense. (See the comment to Section 9103: "If the creditor can establish that the lack of knowledge is a result of a breach of the personal representative's duty... recovery may be available against the personal representative personally or on the bond;" the comment to Section 9392: "an omitted creditor may also have a cause of action against the personal representative in an appropriate case, although the good faith of the personal representative is a defense under Section 9053;" Probate Code Section 11429(b): "Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid;" and the comment thereto: "This amendment is not a change in the law.")

For the reasons set forth in our earlier correspondence to Nat Sterling, and in our oral presentations to the Commission, the Teams are unalterably opposed to the imposition of liability upon personal representatives or attorneys for a negligent failure to give notice or a negligent error in judgment. It is only for an intentional bad faith refusal to give notice that exposure, if any, should lie. We appreciate that the Staff is of a contrary view, but believe that these issues were previously resolved in favor of the State Bar position.

Probate Code Section 9103 - Late Claims - As in the case of Probate Code Section 9293, the late filing of claims should be permitted only if "all of the following conditions are satisfied:

(1) The identity of the creditor was, within four months after the date letters were first issued to a general personal representative, known to or reasonably ascertainable by ~~or ascertainable by a reasonably diligent search~~ by the personal representative, and the claim of the creditor was not merely conjectural.

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate," within four months after the date letters were first issued to a general personal representative.

As currently drafted, the section would permit unascertainable creditors and creditors holding only conjectural claims to be unaffected by published notice. It would also allow known creditors to file a late claim unless the personal representative could prove that the affected creditor actually received a notice mailed pursuant to Chapter 2, or otherwise had notice of the probate proceedings. This would render the four month claim period meaningless and creditors could virtually file claims anytime during a probate proceeding unless they admitted

James V. Quillinan, Esq.
August 31, 1988
Page 5

receipt of actual notice or were personally served with notice by an agent of the personal representative.

Tulsa v Pope does not require such an emasculation of the California four month creditor's claim period, and the Teams respectfully but strenuously continue to oppose efforts to use the case as a springboard for expansive creditors rights.

Probate Code Section 9392 - Known or Reasonably Ascertainable Creditors - The teams would prefer subsection (1) to read "The identity of the creditor was, within four months after the date letters were first issued to a general personal representative, known to or reasonably ascertainable by the personal representative, or ~~ascertainable by a reasonably diligent search by the personal representative,~~ and the claim of the creditor was not merely conjectural."

Tulsa v Pope speaks of "search" only in the negative, "In addition, Mullane disavowed any intent to require 'impracticable and extended searches... in the name of due process.'" When speaking of due process, Tulsa v Pope most often simply uses the phrase "was known or reasonably ascertainable." California codification of the case should use the same language.

The Staff has asked "(c)an we justify allowing a remedy for known or reasonably ascertainable creditors but not for unknown (unascertainable) creditors?" Pursuant to Mullane and Tulsa v Pope the answer is clearly yes. The unknown (unascertainable) creditors are cut off by the four month claims

James V. Quillinan, Esq.
August 31, 1988
Page 6

bar statute just like the creditors who are reasonably ascertainable and given mailed notice by the personal representative.

This is appropriate because creditors have a duty to keep themselves reasonably informed and protected. Once the one year statute is common knowledge, creditors will either take security for obligations maturing in more than a year or calendar annual or semi annual contact with the debtor. They will thus be in a position to be "ascertainable" and receive actual notice. If they don't, it is the creditor, not the heirs who should suffer the consequences of the creditor not being called to the attention of the personal representative.

Probate Code Section 11429 (b) - As noted above, the Teams unanimously oppose the subsection. It strongly infers that there are undefined obligations of a personal representative which are actionable by unpaid creditors. As noted in my prior correspondence to Nat Sterling, these "obligations" and exposure to suits for alleged breach of them will constrain informed persons and corporate fiduciaries from accepting the position of personal representative.

The Teams appreciate that Staff favors (1) the imposition of a duty upon a personal representative to search for, notify and pay creditors (2) the imposition of liability upon a personal representative for failure to discharge the foregoing duty, and (3) the allowance of the filing of claims by

James V. Quillinan, Esq.
August 31, 1988
Page 7

creditors for as long as an estate is open provided others are not unduly harmed. Memorandum 88-60 promotes these concepts.

The Teams, on the other hand, remain of the view that California's creditors claim procedures reflect sound public policy and should be changed only to the extent necessary to be constitutionally sound and workable in light of Tulsa v Pope. As such, the Teams remain strongly in favor of California's four month creditor's claim period and abhor the imposition of exposure to lawsuits and personal liability upon personal representatives.

Sincerely yours,

A handwritten signature in cursive script, reading "J. Neal Wells III". The signature is written in dark ink and is positioned below the typed name "Sincerely yours,".

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

CA LAW REV. COMMISSION

SEP 02 1988

RECEIVED

Executive Committee

D. KEITH BILTZER, San Francisco
 IRWIN D. GOLDRING, Los Angeles
 JOHN A. GROMALA, Eureka
 LYNN F. HART, San Francisco
 ANNE K. HILKER, Los Angeles
 WILLIAM L. HOISINGTON, San Francisco
 BEATRICE LAIDLAY-LAWSON, Los Angeles
 JAY ROSS MacMAHON, San Rafael
 VALERIE J. MERRITT, Los Angeles
 BARBARA J. MILLER, Oakland
 BRUCE S. ROSS, Los Angeles
 STERLING L. ROSS, JR., Mill Valley
 ANN E. STODDEN, Los Angeles
 MICHAEL V. VOLLMER, Irvine
 JANET L. WRIGHT, Fresno



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

(619) 456-3010

August 31, 1988

VIA FEDERAL EXPRESS

Mr. James V. Quillinan
 Diemer, Schneider, Luce & Quillinan
 444 Castro Street, Suite 900
 Mountain View, California 94041

Re: LRC Memo 88-61 Corporate Trustee's Fees

Dear Jim:

In connection with this matter, during the time available to us, the only members of Team 2 that could confer by conference call on the subject were Beatrice Laidley-Lawson, Bill Plageman, and me. As you may recall, prior communication on this subject has been handled by Ken Klug.

Presumably, all of our prior comments on the proposal would be before the Law Revision Commission. There are only a few additional comments we would wish to make.

First, we believe that the issue of exemplary damages should be separated from this proposed bill. For many reasons, including those set forth in the Memorandum 88-61 itself, we believe this is an inappropriate matter to be made part of the trustee's fees proposal.

With respect to the proposal itself, we believe that any final version agreed upon by the Commission should be carefully scrutinized for possible tax consequences. Section 15661(b) allows a successor trustee to be selected by agreement of all beneficiaries entitled to notice under Section 15691 without the need for court approval. If there is only one beneficiary entitled to notice, one beneficiary may make the

Chair

D. KEITH BILTZER, San Francisco

Vice-Chair

IRWIN D. GOLDRING, Los Angeles

Advisors

KATHRYN A. BALLSUN, Los Angeles
 HERMIONE K. BROWN, Los Angeles
 THEODORE J. CRANSTON, La Jolla
 LLOYD W. HOMER, Campbell
 KENNETH M. KLUG, Fresno
 JAMES C. OPEL, Los Angeles
 LEONARD W. POLLARD, II, San Diego
 JAMES V. QUILLINAN, Mountain View
 WILLIAM V. SCHMIDT, Costa Mesa
 HUGH NEAL WELLS, III, Los Angeles
 JAMES A. WILLETT, Sacramento

Section Administrator

FRES ZARLAN-SOBERON, San Francisco

Mr. James V. Quillinan
August 31, 1988
Page 2

selection. There are circumstances where this may create possible tax problems. We would recommend that the staff ask one or more members of the Executive Committee to review the final proposal for tax flaws.

Section 15696 authorizes the court to award costs and attorney's fees "in the interest of justice". A proceeding in connection with the removal of the trustee may be very involved. The fee issue may merge into other issues concerning the conduct of the trust administration. One could imagine circumstances where the costs and fees involved would be quite substantial. It might be difficult to segregate the fees and costs allocable to the fee portion of the dispute. Rather than introduce this concept into the law, we believe it is preferable that other rules now in place concerning the awarding of costs and attorney's fees be left unmodified. We would recommend that this provision not be a part of the final proposal.

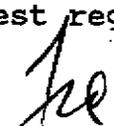
The memorandum discusses termination fees. In practice, it has been our experience that resigning corporate trustees will waive termination fees. Whether or not that is the case, we believe that the issue of termination fees is better left to the market place. Any proposed rule in this regard, such as the Delaware rule, would require further study and Team 2 does not have the personnel or the time at the moment to undertake that study. We believe that the termination fee issue would be best left out of the proposed draft. Certainly, if a court determines that there was an unreasonable fee increase proposed and terminates the relationship of the trustee for that reason, it would seem appropriate for the court to disallow any termination fee, and perhaps to that limited extent there should be some mention of the termination fee in the proposal if the Commission wishes to mention it at all.

Ken Klug could not participate in our conference call because he was on vacation. As you know, he has followed this matter closely. I hope he will be able to give input to the Commission. He is to return on September 6, 1988, and by a copy

Mr. James V. Quillinan
August 31, 1988
Page 3

of this letter, I am encouraging him to do what he can to make his thoughts known to you and our LRC representative prior to the September 8 Law Revision Commission meeting.

Best regards,


Theodore J. Cranston
For
GRAY, CARY, AMES & FRYE

TJC:vk

cc: Chuck Collier
Sterling Ross
Jim Opel
Valerie Merritt
Irv Goldring
Beatrice Laidley-Lawson
Ken Klug
Jim Goodwin
Jay MacMahon
Bill Plageman, Jr.

LAW OFFICES
DAVID E. LICH
A PROFESSIONAL CORPORATION

CA LAW REV. COMM'N

SEP 06 1988

RECEIVED

SUITE 900, WILSHIRE BRENTWOOD PLAZA
12400 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025
TELEPHONE (213) 820-4500

OUR REF. NO.

September 2, 1988

Stan G. Ulrich, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Memorandum 88-61
Study L-3010
Fees of Corporate Trustees

Dear Mr. Ulrich:

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (the "Committee") has reviewed the above-referenced Memorandum. I have been requested to comment, on behalf of the Committee, on the provisions of proposed Sections 15692 and 15694 with regard to notice to, and the rights of, remaindermen who are not entitled to current distributions.

THE PROBLEM:

Remaindermen not entitled to current distributions, are not entitled to notice of proposed fee increases pursuant to Section 15692, and are therefore not entitled to invoke the procedures enumerated in Section 15694. Notwithstanding the fact that the Trustee's fee will be typically be charged one-half (1/2) to principal, such remaindermen have no power to invoke the automatic procedures required of the Trustee set forth in proposed Section 15694.

DISCUSSION:

Proposed Section 15692 requires notice of proposed fee increases to beneficiaries "to whom income or principal is required or authorized in the Trustee's discretion to be currently distributed under the Trust..." Proposed Section 15694 invokes the requirement of a petition by the Trustee only upon receipt of objection from a person "entitled to notice under Section 15692..."

Trustee's fees are typically charged (ne-half (1/2) to income, and one-half (1/2) to principal (Section 16312(a)(5)). Therefore,

PAGE 2

Stan G. Ulrich, Staff Counsel
California Law Revision Commission
September 2, 1988

the amount of the Trustee's fee directly impacts the corpus of the Trust and those who will eventually be entitled to the Trust corpus.

Although remaindermen with relatively minor interests, or contingent interests, should not be permitted to invoke the procedures of proposed Section 15694, this Committee believes remaindermen should be entitled to notice under proposed Section 15692, and remaindermen with significant present interests should be allowed to invoke the procedures of proposed Section 15694. Remaindermen with minor or contingent interests in corpus, on the other hand, should be entitled to notice, but not the enumerated procedures of proposed Section 15694 (those minor or contingent remaindermen would still be entitled to the protection of amended Section 17200).

RECOMMENDATION:

This Committee suggests that proposed Section 15692 require notice to all remaindermen with present (as opposed to contingent) interests in corpus. Furthermore, proposed Section 15694 should invoke the procedures set forth therein upon the objection of a remainderman with at least a specified minimum present interest in corpus (say, 5% or 10%).

Thank you for your consideration of this matter.

Respectfully submitted,


DAVID E. LICH, Member
Legislative Committee
Probate, Trust & Estate Planning Section
Beverly Hills Bar Association

DEL/smt

ccs: Kenneth Petrulis, Chairman
Phyllis Cardoza, Executive Vice Chair
[FEECORP.LTR:s]



California Bankers Association
Established 1891

CA LAW REV. COMM'N

SEP 06 1988

RECEIVED

September 1, 1988

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Trustee Fees (Memoranda 88-36, 88-45, 88-61)

Dear Mr. DeMouilly:

The California Bankers Association has reviewed Memorandum 88-61 which includes a proposed statute concerning fees of trustees. We have studied the proposal and it is unacceptable in its current form. The CBA would oppose the proposed legislation as presented in the Memorandum.

There are a number of specific aspects of the proposal which give the CBA serious concern. In particular, two major areas of concern can be summarized as follows:

1. The definition of "beneficiary" under Section 15692(a) is too limited. The Principal and Income Act provides for charging fees equally between the principal and income accounts of a Trust. However, remainder beneficiaries who thereby partially bear the cost of a fee increase would not be given notice. In addition, the remainder beneficiaries might be excluded from the procedures for removal of a serving trustee and selection of a successor trustee under Sections 15695 and 15661.
2. As written, the proposal at Sections 15693 and 15694 gives one beneficiary the ability to block a fee increase and force either a petition to the court or a resignation of the trustee. These provisions would allow the beneficiary to force a trustee to file a court

Mr. John H. DeMouilly
September 1, 1988
Page Two

petition or resign even if no other beneficiary objected to the increase. This procedure empowers the beneficiary to interfere with the proper administration of the trust by creating an unreasonable burden on the trustee to file such a petition.

The CBA will have representatives present at the September 8-9, 1988 meeting. We remain committed to working with the Commission and again request the Commission to reevaluate the earlier proposal made by the CBA.

Very truly yours,

David W. Lauer

David W. Lauer
Chairman, California Bankers
Association Trust
State Governmental Affairs Committee
(415) 983-3751

DWL/ka