

**\*\*\*IMPORTANT: PLEASE NOTE MEETING PLACE AND TIME\*\*\***

|                                                                                                                                 |                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------|
| <p><b>DATE &amp; TIME:</b></p> <p>October 24 (Monday) 9:30 am - 3:30 pm</p>                                                     | <p><b>PLACE:</b></p> <p>Sacramento<br/>State Capitol<br/>Room 125</p> |
| <p><b>NOTE:</b> Changes may be made in this Agenda. For meeting information, please call John DeMouilly, at (415) 494-1335.</p> |                                                                       |

**FINAL AGENDA**

*for meeting of*

**CALIFORNIA LAW REVISION COMMISSION**

**MONDAY, OCTOBER 24**

**1. Minutes of September 8-9, 1988, Commission Meeting (sent 9/15/88)**

Approval of Report of Committee

**2. Administrative Matters**

Authority of Commission to Study Minor and Technical Matters  
Memorandum 88-78 (sent 9/22/88)

Meeting Schedule

Communications from Interested Persons

**3. Study D-1000 - Creditors' Remedies**

Memorandum 88-72 (Comments on Tentative Recommendation) (sent 10/4/88)

Tentative Recommendation (attached to Memorandum)

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

Memorandum 88-71 (sent 9/28/88)

Draft of Tentative Recommendation (attached to Memorandum)

**5. Study L-1025 - Probate Law and Procedure (Notice to Creditors)**

Memorandum 88-76 (sent 9/28/88)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 88-76 (comments of Commissioner  
Marshall) (sent 10/4/88)

**6. Study L-3010 - Trustees' Fees**

Memorandum 88-77 (sent 10/4/88)  
Draft of Tentative Recommendation (attached to Memorandum)

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

Memorandum 88-70 (sent 9/15/88)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 88-70 (Commissioner Walker's  
Concerns) (sent 9/22/88)  
Second Supplement to Memorandum 88-70 (Comments on Tentative  
Recommendation) (to be sent)

*Note. Both Commissioner Stodden and State Bar representatives  
have requested that the Commission defer consideration of this item  
until the December 1988 Commission meeting.*

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

Memorandum 88-75 (sent 9/15/88)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 88-75 (Comments on Tentative  
Recommendation) (to be sent)  
Second Supplement to Memorandum 88-75 (Estate of Propst) (sent  
9/28/88)

**9. Study L-2010 - 1989 Probate Cleanup Legislation (Urgency Bill)**

Memorandum 88-68 (enclosed)  
Draft of Bill (attached to Memorandum)

**10. Study L-636 - No Contest Clause**

Memorandum 88-69 (Comments on Tentative Recommendation) (sent  
10/5/88)  
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 (Comments of Bar Associations) (sent 8/30/88)  
Second Supplement to Memorandum 88-50 (Comments of Beverly Hills Bar Association) (sent 9/2/88)

**12. Study F-641 - Limitations on Disposition of Community Property**

Memorandum 88-47 (sent 6/6/88)  
Draft of Tentative Recommendation (attached to Memorandum)

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

First Supplement to Memorandum 88-47 (Kinyon Letter) (sent 8/15/88)  
Second Supplement to Memorandum 88-47 (Comments on Draft) (enclosed)

**13. Study L-3012 - Uniform Management of Institutional Funds Act**

Memorandum 88-65 (sent 9/15/88)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 88-65 (Comments of Attorney General) (sent 10/4/88)  
Second Supplement to Memorandum 88-65 (Comments of Interested Persons) (enclosed)

**14. Study L-1058 - Probate Filing Fees**

Memorandum 88-52 (sent 8/10/88)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 88-52 (Comments of Bar Associations) (sent 9/28/88)

**MEETING SCHEDULE**

**October 1988**

24 (Monday) 9:30 a.m. - 3:30 p.m. Sacramento

**December 1988**

1 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles

2 (Friday) 9:00 a.m. - 2:00 p.m.

**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.

**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.

**July 1989**

13 (Thursday) 1:30 p.m. - 6:00 p.m. Los Angeles

14 (Friday) 9:00 a.m. - 2:00 p.m.

**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.

**STATUS OF COMMISSION STUDIES**

(as of October 4, 1988)

| STUDY           | SUBJECT                                         | Staff Work | Comm'n Review | Approve TR | Review Comment | Approve to Print |
|-----------------|-------------------------------------------------|------------|---------------|------------|----------------|------------------|
| D-1000          | Creditors' Remedies --<br>Miscellaneous Matters | 2/88       | 7/88          | 7/88       | [10/88]        |                  |
| F-641           | Limit Dispos Commun Prop                        | 4/88       | 9/88          | [10/88]    |                |                  |
| H-111           | Commercial Leases --<br>Assignment & Sublease   | 2/88       | 3/88          | [10/88]    |                |                  |
| 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--<br>Tulsa case             | 5/88       | 7/88          | [10/88]    |                |                  |
| L-1036/<br>1055 | Personal Rep & Atty Fees<br>in Probate          | 8/87       | 1/88          | [10/88]    |                |                  |
| 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          | [10/88]    |                |                  |
| L-3012          | Unif Manage Instit Funds                        | 8/88       | [10/88]       |            |                |                  |
|                 | 1988 Annual Report                              | 7/88       | 9/88          | ***        | ***            | 9/88             |

[date] = scheduled

**STATUS OF 1988 COMMISSION BILLS**

(as of September 30, 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 <sup>‡</sup> | 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  | Sept 14 | ****                | ****    |  |
|                                    | Approved         | May 24  | Sept 22 | ****                | ****    |  |
| Chaptered by<br>Secretary of State | Date             | May 25  | Sept 22 | Apr 6               | Aug 15  |  |
|                                    | Ch. #            | 113     | 1199    | Res 20              | Res 81  |  |

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

\*\*\*\*: not applicable

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
OCTOBER 24, 1988  
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on October 24, 1988.

Commission:

|          |                                     |                                       |
|----------|-------------------------------------|---------------------------------------|
| Present: | Forrest A. Plant<br>Chairperson     | Roger Arnebergh<br>Arthur K. Marshall |
|          | Edwin K. Marzec<br>Vice Chairperson | Vaughn R. Walker<br>Tim Paone         |
|          | Bion Gregory<br>Legislative Counsel |                                       |

|         |                                    |                |
|---------|------------------------------------|----------------|
| Absent: | Elihu M. Harris<br>Assembly Member | Ann E. Stodden |
|         | Bill Lockyer<br>Senate Member      |                |

Staff:

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

Consultants:

None

Other Persons:

Kevin M. Brett, Office of the Governor, Sacramento  
Michael Harrington, California Bankers Association, San Francisco  
David E. Lich, Probate, Trust and Estate Planning Section of the  
Beverly Hills Bar Association, Beverly Hills  
Steve Peters, Los Angeles County Bar Association, Probate and Trust  
Law Section, Los Angeles  
Jim Scannell, San Francisco Public Administrator, San Francisco  
Jim Schwartz, California Attorney General's Office, San Francisco  
Neal Wells, State Bar Estate Planning, Trust and Probate Law  
Section, Los Angeles  
James A. Willett, State Bar Estate Planning, Trust and Probate Law  
Section, Sacramento  
Shirley Yawitz, California Probate Referees Association, San  
Francisco

ADMINISTRATIVE MATTERS

MINUTES OF SEPTEMBER 8-9, 1988, MEETING (APPROVAL OF SUBCOMMITTEE  
REPORT)

The Commission approved the minutes of the September 8-9, 1988, Commission meeting without change and ratified actions taken by the subcommittee at that meeting.

MEETING SCHEDULE

The Commission revised its 1989 meeting schedule to change the March meeting from Los Angeles to San Francisco, the April meeting from Sacramento to Los Angeles, and the September meeting from San Francisco to Sacramento. The date of the May meeting was changed to the 18th and 19th from the 25th and 26th. As so revised, the Commission's meeting schedule is as follows:

|                      |                       |               |
|----------------------|-----------------------|---------------|
| <u>December 1988</u> |                       |               |
| 1 (Thursday)         | 1:30 p.m. - 6:00 p.m. | Los Angeles   |
| 2 (Friday)           | 9:00 a.m. - 2:00 p.m. |               |
| <u>January 1989</u>  |                       |               |
| 12 (Thursday)        | 1:30 p.m. - 6:00 p.m. | Orange County |
| 13 (Friday)          | 9:00 a.m. - 2:00 p.m. |               |
| <u>February 1989</u> |                       |               |
| 9 (Thursday)         | 1:30 p.m. - 6:00 p.m. | Los Angeles   |
| 10 (Friday)          | 9:00 a.m. - 2:00 p.m. |               |
| <u>March 1989</u>    |                       |               |
| 9 (Thursday)         | 1:30 p.m. - 6:00 p.m. | San Francisco |
| 10 (Friday)          | 9:00 a.m. - 2:00 p.m. |               |
| <u>April 1989</u>    |                       |               |
| 13 (Thursday)        | 1:30 p.m. - 6:00 p.m. | Los Angeles   |
| 14 (Friday)          | 9:00 a.m. - 2:00 p.m. |               |
| <u>May 1989</u>      |                       |               |
| 18 (Thursday)        | 1:30 p.m. - 6:00 p.m. | San Francisco |
| 19 (Friday)          | 9:00 a.m. - 2:00 p.m. |               |

July 1989

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

September 1989

|              |                       |            |
|--------------|-----------------------|------------|
| 7 (Thursday) | 1:30 p.m. - 6:00 p.m. | Sacramento |
| 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. |               |

**MEETING ATTENDANCE**

The Commission discussed the matter of Commissioner attendance and the problem of getting a quorum on scheduled meeting dates. The Commission decided to adopt a policy directed toward excusing a certain number of absences and then requesting a truant Commissioner to consider resigning. The Commission directed the staff to develop proposed guidelines for adoption as a Commission policy at the next meeting.

**AUTHORITY OF COMMISSION TO STUDY MINOR AND TECHNICAL MATTERS**

The Commission considered Memorandum 88-78 and approved the proposal to seek amendment to the Commission's enabling statute to provide authority to study and recommend legislation to correct minor and technical defects in the statutes without the need to obtain a specific resolution from the Legislature.

**STUDY D-1000 - CREDITORS' REMEDIES**

The Commission considered Memorandum 88-72 concerning comments received on the *Tentative Recommendation Relating to Creditors' Remedies*. The recommendation was approved for printing as a Commission recommendation and for introduction as a bill in the 1989 legislative session.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

The Commission considered Memorandum 88-71 and the attached draft of the tentative recommendation relating to assignment and sublease. The Commission approved the tentative recommendation to distribute for comment.

STUDY L - REPORT ON THE NEW PROBATE CODE PROJECT

The Executive Secretary made a brief report on the progress being made in preparing the new Probate Code.

The staff is planning to have the Legislative Counsel prepare a bill that will contain the existing Probate Code without any change but the bill would not contain the parts of the existing code that deal with the compensation of the attorney and personal representative and with multiple-party accounts. (Those parts will be the subject of recommendations to the 1989 Legislature.) The bill would be introduced in this form and then would be amended to make all the technical and clarifying revisions that are needed. The amended bill can then be reviewed by the staff, the State Bar Section, and other interested persons and organizations. Each change will be easily determined by examining the bill. The Commission can then consider the input of interested persons and organizations and make additional changes or reject or modify changes that would be made by the amended bill. Any significant substantive changes proposed by the staff also can be considered by the Commission at that time. When the recommended legislation relating to compensation of attorneys and personal representatives, multiple-party accounts, and other probate matters has passed the Legislature in 1989, the new Probate Code bill will be amended to include those provisions in the form in which they are enacted in 1989. It is anticipated that the bill to enact the new Probate Code will be a two-year bill, to be enacted in 1990.

The staff has completed a first draft of the Comments to the new code. These will be reviewed and checked and should be available for review by interested persons and organizations by the time the new Probate Code bill is introduced.

STUDY L-636 - NO CONTEST CLAUSE

The Commission commenced, but did not complete, consideration of Memorandum 88-69, together with a letter from Team 3 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 1), relating to comments on the no contest clause tentative recommendation. The Commission made the following decisions with respect to the matters considered.

Prob. Code § 6112 (amended). Witnesses to wills

The references to a "subscribing" witness were deleted from subdivision (b). A sentence was added to the effect that, "The presumption created by this subdivision does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity."

Prob. Code § 21300. Definitions

Subdivision (a) was revised to refer to an attack on an instrument or a provision "in a proceeding." The Comment should note that the attack may occur by means of an objection in a proceeding (as in a will contest) as well as by initiation of a proceeding.

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

The Commission considered Memorandum 88-76 and the attached draft tentative recommendation relating to notice to creditors, together with the First Supplement to Memorandum 88-76 and letters from the State Bar Estate Planning, Trust and Probate Law Section (Exhibits 2 and 3) and from the Probate and Trust Law Section of the Los Angeles County Bar

Association (Exhibit 4). After considerable discussion of the issues raised in these materials, the Commission decided to distribute the tentative recommendation for comment after deleting from Section 9053 (immunity of personal representative and attorney) the references to the attorney for the personal representative. The Comment should state that the references to the attorney are deleted because the attorney has no statutory duty to give notice. The staff will make any necessary conforming or related revisions discovered during preparation of the tentative recommendation.

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

The Commission considered Memorandum 88-70, and the First, Second, and Third Supplements to Memorandum 88-70.

Decision to Consider this Matter at October Meeting

The Commission first considered whether it would defer consideration of this subject until the December meeting (scheduled for December 1 and 2). The Commission decided that it would consider the subject at the October meeting with a view to approving a tentative recommendation at the October meeting so that it could be distributed for review and comment after the October meeting. The Commission made this decision because it considered that it was essential that a tentative recommendation be distributed for review and comment by interested persons as soon as possible. If the tentative recommendation is approved for distribution at the October meeting, the comments received can be considered at the January meeting. At that time the Commission will consider additional comments from the State Bar Section as well as all the comments received from others as a result of the distribution of the tentative recommendation. Hopefully, the Commission can approve a revised recommendation for printing at that meeting, and the recommended legislation can be sent to the

Legislative Counsel by the deadline for preparing bills. The bill itself must be introduced not later than March 6. The Commission concluded that it would be unlikely that legislation could be introduced on this subject in 1989 if distribution of a tentative recommendation were deferred until after the December meeting.

Actions Taken With Respect to Staff Draft

Amendment of Section 1048 of Business and Professions Code Rather than Separate Section Governing Formal Probate Fees

The Commission reaffirmed the decision of the subcommittee at the September meeting that it would recommend enactment of a separate section in the Business and Professions Code to deal with the attorney fee in a formal probate proceeding. This is because much of Section 6148 of the Business and Professions Code will not be applicable to a formal probate and because some new exceptions to the written agreement requirement are needed for formal probate proceedings and other exceptions in Section 6148 are not appropriate for formal probate proceedings. In addition, a separate section will be more understandable to those who are concerned with attorney fees in formal probate proceedings.

Use of "Standard Fee" and "Waiver" Concept for Fee Terminology

The Commission considered the suggestion of the State Bar Section that the statutory fee be referred to as the "standard" fee and that the statute adopt the concept that the attorney can "waive" a portion of the statutory fee. The State Bar Section objected (1) to referring to the statutory fee as the "maximum" fee and (2) to use of the concept that the attorney and client may "agree to" a lower fee rather than using the concept that the attorney can "waive" a portion of the statutory fee. It was noted that Commissioner Stodden had written to advise that she preferred the use of the phrase "standard fee" in the disclosure statement to be provided to the personal representative.

The staff noted that the provisions of the statute governing the attorney fee do not use the phrase "maximum fee." The only place in the statute where the phrase "maximum fee" is used is the disclosure provision which will be compiled in the Business and Professions Code.

Disclosure Statement

The Commission directed its attention to the Third Supplement to Memorandum 88-70 where a revised version of the separate disclosure statement suggested by Commission Walker was set out. The Commission determined that it would recommend a disclosure statement (on a separate sheet) signed by the personal representative. The staff-suggested disclosure statement was revised to eliminate language that referred to the statutory fee as a "maximum" fee. The following disclosure statement was approved in substance by the Commission:

(c) The agreement shall be in writing and shall include, but is not limited to, all of the following:

\* \* \* \*

(4) The following statement which shall be on a separate page and shall be separately signed by the personal representative:

---

DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE

The California statutes govern the compensation of the estate attorney and require that this disclosure statement be provided to you and be signed by you.

For ordinary services, the Probate Code provides that your attorney is entitled to compensation determined by a statutory fee schedule. This statutory fee schedule provides that your attorney shall receive compensation upon the value of the estate, as follows:

- (1) Three percent on the first \$100,000.
- (2) Two percent on the next \$900,000.
- (3) One percent on the next 9 million dollars.
- (4) One-half of one percent on the next 15 million dollars.
- (5) For all above 25 million dollars, a reasonable amount to be determined by the court.

(The value of the estate is the fair market value of the property included in the decedent's probate estate as shown by an appraisal of the property, plus gains over the appraised value on sales, plus receipts, less losses from appraised value on sales.)

For extraordinary services, the statute provides that your attorney shall receive additional compensation in the amount the court determines to be just and reasonable.

THE COURT WILL USE THE STATUTORY FEE SCHEDULE SET OUT ABOVE TO COMPUTE THE FEE OF YOUR ATTORNEY FOR ORDINARY SERVICES. YOU AND YOUR ATTORNEY MAY AGREE TO A LOWER FEE BUT MAY NOT AGREE TO A HIGHER FEE.

IF YOU AND YOUR ATTORNEY AGREE TO A LOWER FEE FOR ORDINARY SERVICES, THE COURT WILL NOT AWARD A HIGHER FEE FOR ORDINARY SERVICES THAN THE AMOUNT PROVIDED IN YOUR AGREEMENT. THE COURT MAY, HOWEVER, AWARD AN ADDITIONAL AMOUNT FOR EXTRAORDINARY SERVICES.

Date: \_\_\_\_\_  
Personal Representative

**Liability for Failure to Negotiate Attorney Fee**

The Commission considered whether the personal representative should be given an express statutory immunity from liability for failure to negotiate an attorney fee that is less than the statutory attorney fee.

After considerable discussion, the Commission concluded that the problem arose from subdivision (b) of Section 10832 of the Staff Draft. Section 10832 of the staff draft reads:

10832. (a) An agreement between the personal representative and the attorney for higher compensation for the attorney than that permitted under this chapter is void.

(b) The personal representative and the attorney may agree that the attorney will receive less than the statutory compensation for services, but the personal representative is under no duty to negotiate attorney compensation less than the statutory compensation. The personal representative is not liable for a refusal or failure to negotiate attorney compensation less than the statutory compensation.

Some Commissioners objected to giving the personal representative an express statutory immunity for failure to negotiate attorney compensation less than the statutory compensation. Others felt that the personal representative should not be subject to a law suit based on a claim that the personal representative unreasonably failed to negotiate for a lower fee. If the express immunity provision were

deleted, it was feared that liability might be imposed by implication from the provision that the personal representative was authorized to negotiate for a lower fee.

The Commission resolved the problem by deleting all of subdivision (b) of Section 10832. It was noted that the separate disclosure statement will inform the personal representative that the personal representative and the attorney may agree to a lower fee than the statutory fee, and this was considered to be sufficient treatment of this matter. Treating the matter in this way avoids the implication that the personal representative has a duty to negotiate for a lower fee and might be liable for failure to do so.

Approval for Distribution for Comment

The Tentative Recommendation (with the revisions made by the Commission and any needed conforming revisions) was approved for distribution to interested persons and organizations for review and comment.

STUDY L-1060 - MULTIPLE-PARTY ACCOUNTS

The Commission considered Memorandum 88-75 and the Second Supplement to Memorandum 88-75. Handed out at the meeting (and attached as Exhibit 5) was an informational sheet explaining the Missouri Multiple Party Accounts Law, to be recommended by the Missouri for enactment in Missouri in 1989.

It was noted that comments had not been received on the staff draft attached to Memorandum 88-75 from the Estate Planning, Probate and Trust Law Section prior to the meeting. Also the Commission will want to receive comments from the Family Law Section before it approves the recommendation for submission to the Legislature. However, it was decided not to delay distributing the tentative recommendation for comment, since this is necessary in order that a recommendation on this subject can be submitted to the Legislature in 1989.

The Commission approved the Tentative Recommendation for distribution to interested persons for review and comment.

STUDY L-3010 - TRUSTEES' FEES

The Commission considered Memorandum 88-77 concerning the issue of exemplary damages for breach of trust. After a lengthy discussion and consideration of the views expressed by interested persons at the meeting, the Commission approved the draft *Tentative Recommendation Relating to Trustees' Fees* to be distributed for comment.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

**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. HOMES, 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



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*Executive Committee*  
D. KEITH BILTER, San Francisco  
IRWIN D. GOLDRING, Los Angeles  
JOHN A. GROMALA, Burbank  
LYNN P. HART, San Francisco  
ANNE K. HILKER, Los Angeles  
WILLIAM L. HOASINGTON, San Francisco  
BEATRICE LAUDLEY-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. VOLLMEER, Irvine  
JANET L. WRIGHT, Fresno

October 18, 1988

Reply to: Anne K. Hilker  
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Diemer, Schneider, Luce &  
Quillinan  
444 Castro Street, Suite 900  
Mountain View, California 94041

Re: Response to 88-69, No-Contest Clauses

Dear Jim:

On behalf of Team 3 of the Executive Committee, this will respond to Memorandum 88-69, no-contest clause. As you recall, the Executive Committee has previously supported the memorandum as written, and continues to support the package. However, comments to the memorandum have raised three proposals on which we wish to comment.

1. Section 21307: The meaning of instruction.  
The section as written provides that a no-contest clause is not enforceable with respect to a provision that benefits a person "who gave instructions concerning the contents of the instrument." As a matter of clarification, the team was uniformly in favor of the language contained in the note which would replace the foregoing with "a person who gave instructions concerning dispositive or other substantive provisions of the instrument or who directed inclusion of the no-contest clause in the instrument."

2. Section 6112: Trustee as devisee. Under this section, the fact that a witness to a will also is a devisee under the will creates a presumption of undue influence. Jim Willett's comment to the memorandum points out that the section would by its terms apply to a trustee, who does not receive personal benefit from the devise. We agree that the presumption should not operate

James V. Quillinan, Esq.  
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in this circumstance but suggest that the problem exists not only with respect to trustees but with respect to other fiduciaries (e.g., executors and custodians) as well. Therefore, we suggest that the additional sentence in subparagraph (c) of 6112 be added in the following form: "This subdivision does not apply where the subscribing witness is a person to whom the devise is made solely in a fiduciary capacity."

3. Appointment of special administrator pending the outcome of a will contest. We do not favor a special provision for appointment of an independent administrator in the event of a will contest. We believe the court's current discretion in this regard to be adequate and believe that the automatic appointment of an independent administrator weighs the procedural scales much too heavily in favor of a contestant.

Sincerely,



Anne K. Hilker  
Captain, Team 3

AKH:bm

cc: Andrew S. Garb, Esq.  
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9174m

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

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October 18, 1988

VIA FEDERAL EXPRESS

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

Re: Memorandum 88-76  
Notice to Creditors

Dear Jim:

Team 3 has reviewed the Memorandum and commends the staff for excellent draftsmanship on a highly technical and complex subject. The team urges the Commission to adopt the Memorandum without change.

The team has also reviewed Commissioner Walker's comments. In this regard, it should be noted that the new claims procedures provide creditors the greatest protection ever known under our Probate Code. Creditors who are actually known to a personal representative are entitled to mailed notice; creditors who are not mailed notice and do not otherwise know of a probate proceeding have one year from date of death to file a late claim, or to proceed against distributees if an estate has been distributed; and creditors have a cause of action against a

James V. Quillinan, Esq.  
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personal representative who in bad faith, fails to give notice. To extend protection further by imposing a duty upon a personal representative to search for creditors is not warranted because (i) creditors themselves have a duty of due diligence in protecting their rights, (ii) subjecting personal representatives to potential suits over the extent to which they searched for creditors would place an unfair potential liability upon personal representatives (it is the heirs, not the personal representative who would benefit from any mistake by the personal representative); (iii) the potential liability would cause knowledgeable persons and corporate fiduciaries to decline personal representative appointments; (iv) the potential liability would also cause bonding companies to increase their fees to cover their increased exposure and/or to decline to issue fiduciary bonds to persons of modest means; and (v) the potential liability would delay full distribution of estates by knowledgeable representatives who would appropriately require large reserves until all potential statutes of limitations on suits against the personal representative have run.

The memorandum as presently drafted by staff is technically sound and equitably balances the needs of creditors, beneficiaries and personal representatives. We recommend that it be submitted to the legislature without change.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "J. Neal Wells".

**ETATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
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October 22, 1988

Nathaniel Sterling, Esq.  
 Assistant Executive Secretary  
 California Law Revision Commission  
 4000 Middlefield Road, Suite D-2  
 Palo Alto, California 94303-4739

**Re: Creditors' Claims Procedures  
 and Limitations; Memorandum 88-76**

Dear Nat:

Anne Hilker and I have reviewed the Los Angeles County Bar Association Committee's (LACB) letter of October 19, 1988.

The most important policy question raised by the letter is whether California should abolish its general 4 month creditor's claim period (running from date of issuance of first Letters) in favor of a 1 year general creditor's claim period running from date of death (subject to a shortening as to creditors who actually receive mailed notice), with no liability on behalf of the personal representative for failure to mail notice. This question was submitted to the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar at its meeting today. The Executive Committee responded that it favors retention of California's 4 month creditor's claim period because it promotes expeditious distributions of estates.

In this regard, it should be noted that the adoption of a 1 year general claims period commencing with date of death

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should not be considered without a thorough analysis of the impact of such a provision upon Probate Code Sections 1000; 1001; 1004; 922 and related sections. Historically, Probate Code Section 1000 has required a bond for preliminary distributions "unless the time for filing claims has expired and all contested claims have been paid or are sufficiently secured." If the time for filing claims is extended to a date 1 year from death, would a bond be required for all preliminary distributions during the extended period? If not, should a court nevertheless exercise its discretion to require a bond in order to protect creditors who have not as yet filed claims in reliance upon the new extended claims period? If not, how else can a court find (as required by Probate Code Section 1001) that "the estate or any portion thereof may be distributed without loss to the creditors."

Similarly, Probate Code Section 1004 has not permitted the filing of ex parte petitions for distribution pursuant to The Independent Administration of Estates Act until "the time for filing or presenting claims has expired and all contested claims have been paid or are sufficiently secured". If the time for filing claims is extended to a date 1 year from death, would an ex parte petition for preliminary distribution be permitted prior to that time?

Also, Probate Code Section 922 provides that a personal representative "must render a final account and pray a settlement of the administration whenever there are sufficient funds in his or her hands for the payment of all debts and the estate is in a proper condition to be closed." If the general creditor's claims period is extended to 1 year from date of death, may a final account (and distribution) ever be made before the expiration of that time?

The Executive Committee did not readdress the question of whether a personal representative or the personal representative's attorney should be free from liability for their own respective bad faith actions in not giving notice to creditors. This question was resolved over a year ago by compromise prior to the adoption of Probate Code Section 9053. The same section, as set forth in the present draft of Memorandum 88-76, is consistent with the compromise.

A less substantial policy question raised by the LACB was whether C.C.P. 353(b), amended effective July 1, 1988, should be amended again to reverse the decision of the Law Revision

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Page Three

Commission to extend statutes of limitations expiring within 1 year after death to the first year death anniversary. The Executive Committee concurs with earlier comments of the Law Revision Commission staff, the Special State Bar Creditor's Claim Team and Team 3 that it would be inappropriate to make the reversal less than 6 months after the section became effective. A straight 1 year statute of limitations running from date of death is much easier for creditors to understand and apply than a statute that varies depending upon whether a cause of action would have otherwise expired within the year following death. Moreover, it seems fair that the new one year statute of limitations applicable to actions against decedents applies to all creditors of the decedent, those who had less than one year remaining on their statute of limitations against the decedent as well as those who had more than one year to go.

There are two technical problems inherent in LACB's proposals which require comment.

The first is that the potential exposure of personal representatives and attorneys for liability to creditors is created by Probate Code Section 9050, not 9053. The former states "the personal representative shall give notice of administration of the estate to the creditor." This is a statutory duty the negligent breach of which could cause damages to a creditor for which the personal representative could be liable. Hence, the need for Probate Code Section 9053. Moreover, if the attorney assists the personal representative in the giving of notice, and a secretary for the attorney, through oversight, fails to include a creditor, the attorney could likewise be sued. Hence, the need for the protection to the attorney in Section 9053. The reference to bad faith in 9053 is directed to the persons sought to be charged with liability, i.e., the personal representative, if it is the personal representative's actions that are in question, or the attorney, if it is the actions of the attorney or the attorney's secretary that are in question. Hence, the proposed changes to Section 9053 would delete needed protection, not exposure to liability.

Probate Code Sections 9253(a) and 9253(d) are required under current law and will still be required under Memorandum 88-76. Pursuant to Code of Civil Procedure Section 353(b), an action may be commenced against a personal representative within 1 year of date of death. It is not uncommon for a creditor's claim to be filed within 1 year from date of death but not to be paid until more than 1 year after date of death. Without the

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tolling of the statute of limitations provided by Section 9253, all creditors not paid within 1 year of date of death would be required to file suit prior to the anniversary date lest their suits be barred.

Due to the shortness of time, the full State Bar Creditor's Claim Team has not had an opportunity to review the LACB proposals, and Anne Hilker and I have had but one evening to do so. Additional technical problems may become apparent upon review of the LACB proposals by us, the Team, or the LRC staff.

Very truly yours,



H. Neal Wells III

Oct. 24, 1988

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**Los Angeles  
County Bar  
Association**

**Probate and Trust Law**

**Section**



October 19, 1988

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4000 Middlefield Road, Suite D-2  
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**Re: Creditors' Claims Procedures and  
Limitations**

Dear Nat:

The Commission has solicited the comments of the Los Angeles County Bar Association regarding the proposals currently before the Commission regarding creditors' claims and the issues raised by Tulsa v. Pope. The Executive Committee of the Probate and Trust Law Section of the LACB formed a committee to review the creditors' claims law and proposals. I have been asked to convey to you our observations and recommendations. We apologize for the delay in sending our comments. To increase the possibility that all Commissioners will have an opportunity to review this letter before the October 24 meeting, I am sending copies directly to them, as well.

This letter contains our proposal for a comprehensive approach to the creditors' claims procedures and limitations. The three principles which governed the development of this proposal were simplicity, certainty, and finality. We have striven to balance against these principles the equally important policy of fairness to all parties involved, be they creditors, the estate and its beneficiaries or the personal representative. In doing so, we believe that the requirements of Tulsa v. Pope have been met.

We recommend that the law provide the following basic rules:

(1) A creditor must file a creditor's claim in the estate within the earlier to occur of the following deadlines:

- (a) 4 months after the creditor receives Notice of Administration from the personal representative
- (b) 1 year from date of death
- (c) The running of the limitations period which would have applied if the debtor had not died ("the underlying statute of limitations period").

(2) The personal representative will have the duty to send Notice of Administration to all known creditors (as under current law) and the incentive for his or her doing so will be the shortening of the 1-year rule; that duty will extend to include creditors discovered within 8 months of the date of death (i.e., 4 months before the 1-year period has run), provided that the underlying statute of limitations period has not yet run.

(3) A creditor who can show that he did not get actual notice (despite the fact that notice was sent by the personal representative) may obtain the court's permission to file a late claim if it is within the 1-year period and within the underlying statute of limitations period.

(4) The attorney for the estate will have no duty to give Notice of Administration, and the attorney will have no personal liability to creditors; any liability of the attorney will be to the personal representative under the usual theories governing professional malpractice. (Query: Under current law, does the attorney have such a duty? His or her bad faith failure to send notice can result in liability to a creditor!)

(5) The personal representative will never be personally liable to a creditor unless the personal

representative fails to pay a properly allowed claim before final distribution (with obvious exceptions for insolvent estates). The "bad faith" exception has been eliminated since the creditor has a full year in which to act (absent actual notice or the running of the underlying statute of limitations).

(6) Full payment of a debt for which no claim has been filed must be made within the 1-year period or prior to final distribution if no claim is to be required.

Attached is our effort to modify existing (or proposed) sections to effectuate this proposal. The changes occur in Probate Code Sections 9050, 9052, new 9053, 9100, 9103, 9104, 9254, new 9392, and new 11429. There may be other affected sections, but these are the ones most obviously affected.

We recognize that this proposal diverges from current "new" law and the proposals before the CLRC in the following respects:

(1) The creditor cannot file a claim after the underlying statute of limitations period has run. This rule worked well under prior law and should not have been abandoned. Why should a creditor get a longer period in which to sue because the debtor died? Note: Under current law, once the debtor dies, Section 9053(d) appears to provide that the underlying statute of limitations dies with him and the only limitations rule applicable is the 4-month rule (and the new 1-year rule, if adopted). Consequently, Sections 9253(a) and (c) make no sense. If our recommendation is not followed, they should be deleted because there is no statute of limitations to toll!

(2) The attorney cannot be held responsible by a creditor for "bad faith" failure to send the Notice of Administration. Why should the attorney ever be held liable for breach of a duty imposed on the personal representative? Under current law, it can be expected that a disgruntled creditor will always join the attorney in a lawsuit to collect for "bad faith" under Probate Code Section 9053. The attorney is the obvious deep pocket. Even when the attorney successfully defends, how will he or she be compensated for the defense costs? There is the potential for enormous abuse here. (Query: Under current law, what is an attorney to do if he or she advises the personal representative that Notice of

Nathaniel Sterling, Esq.  
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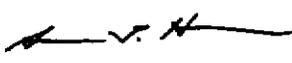
Administration should be sent to a particular known creditor and the personal representative refuses? Will the bad faith of the personal representative be imputed to the attorney? Presumably not, but how will the attorney raise this defense against the creditor if faced with issues of confidentiality, etc.? Even if this obstacle is surmounted, who will pay the defense costs? They could easily exceed the entire fee paid to the lawyer for administration of the estate! We urge the Law Revision Commission to consider this problem even if our other recommendations are rejected and urge that the reference to the attorney be deleted from Section 9053.)

(3) The personal representative cannot be held responsible for "bad faith" failure to give notice. We submit that Section 9053 is an invitation to every disgruntled creditor to sue the personal representative. At the least, if this section is left intact, the Code should provide that the losing party pay reasonable attorneys' fees and costs for the prevailing party, thereby creating some deterrent to "hold-up" suits. Our stronger recommendation, however, is that such potential liability be eliminated completely.

(4) When an estate beneficiary challenges the propriety of the allowance of a claim, the burden of proof should always be on the beneficiary, regardless of whether the claim was allowed by the court or by the personal representative. Under current law, if the personal representative has powers under the IAEA, the personal representative must act at his or her own risk. If the burden is not going to be shifted to the challenging beneficiary per our recommendation, at the least, the IAEA should include a provision allowing the personal representative to give a Notice of Proposed Action on the claim to all interested parties to preclude later second-guessing. Even if the burden is shifted, it may be advisable to include such a provision under the IAEA.

Thank you for your consideration of these suggestions and comments. A representative from our committee will attend the October meeting to answer any questions and clarify anything which remains unclear.

Very truly yours,

  
Susan T. House

STH:mc  
4747L  
Express Mail

Nathaniel Sterling, Esq.  
October 19, 1988  
Page Five

cc: Ann E. Stodden  
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Express Mail

STATUTES

All are Probate Code Sections

Sections 9000 - 9004      No change

Section 9050

(a) If, within 8 months of the date of the decedent's death, the personal representative has knowledge of a creditor of the decedent, .... (no additional change)

(b) No change

Section 9051      Delete

Section 9052

Modify to inform the creditor that he has until the earlier of:

(a) 4 months after the date of the notice

(b) 1 year from the decedent's death on \_\_\_\_\_

(c) the date on which the cause of action would have been barred if the decedent had not died

Section 9053 (proposed)

(a) Delete reference to attorney

(b) Delete subsection

(c) Delete reference to attorney

Section 9054      No change

Section 9100

(a) A creditor shall file a claim before the earlier of the following dates:

(1) 4 months after the date notice of administration is given to the creditor;

- (2) 1 year from the date of the decedent's death; and,
- (3) the date on which the cause of action would have been barred if the decedent had not died.

(b) No change

Sections 9101 and 9102      No change

Section 9103 (proposed)

(a) Substitute "9100(a)" for "9100" in both (1) and (2)

(b)(1)      No change

(2)      No change

(3)      The date on which the cause of action would have been barred if the decedent had not died.

(c)      Leave the first sentence; delete the second sentence.

(d)      No change

Section 9104      No change

Sections 9150 - 9153      No change

Section 9154 (proposed)

Notwithstanding any other provision of this part, if a creditor makes a written demand for payment within the period set forth in Section 9100, the personal representative may waive formal defects and elect to treat the demand as a claim that is filed and established under this part by paying the amount demanded within one year of the date of decedent's death if all of the following conditions are satisfied:

(a) - (d) No change

Sections 9200 - 9205 No change

Sections 9250 - 9252 No change

Section 9253 (proposed)

Keep this section, in toto, if our proposal is adopted; delete Subsections (a) and (c) if our proposal is not adopted.

Section 9254

(a) Delete "except where the personal representative has acted ...."

(b) No change

Sections 9255 and 9257 No change

Sections 9300 - 9304 No change

Section 9392 (proposed)

Omit (a)(1); otherwise, the section is acceptable, but may need some fine tuning to coordinate with other sections.

Section 11429 (proposed)

(a) No change

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor whose allowed claim was not properly paid.

RECEIVED OCT 17 1988  
Prefiled 12-1-88  
85th General Assembly  
First Regular Session

Comments of The Missouri Bar  
Probate and Trust Committee  
T. Jack Challis, Chairman

HOUSE BILL NO. XXX

Issue 10-02-88 #FV. COMM'N

Introduced by Representative Graham

OCT 20 1988

**MISSOURI MULTIPLE PARTY ACCOUNTS LAW**

R E C E I V E D

The Multiple Party Accounts Law is from Section 6.101-6.113 of the Uniform Probate Code. It has been adopted in twenty states. It is proposed for adoption in Missouri in order to standardize the legal incidents of financial accounts held in banks, savings and loan associations and credit unions. For example, section 362.470 RSMo, provides that the joint bank account of a husband and wife "shall be considered a tenancy by the entirety," while section 369.174, RSMo applying to savings and loan companies, provides that such an account between a husband and wife shall not be considered a tenancy by the entirety unless expressly stated to be. Similar accounts with brokers are covered in a companion law, the Missouri Non-Probate Transfers Law.

The pay on death account statutes for banks and savings and loan companies also are different and there is a question whether survivorship of the beneficiaries is required and whether a POD account with a savings and loan association is exempt from the requirements of a will. The proposed law clarifies these matters for customers of banks, savings and loan companies and credit unions. The proposed law also contains provisions to govern accounts held as tenants in common and the authority of persons named as agents on an account.

The concept of the multiple party accounts law is to set forth the rights of account parties as among themselves in one part and to set forth the rights as between the account parties and the financial institution in a separate part. By keeping these relationships separate, confusion is avoided and the desires of parties for flexible survivorship accounts can be provided, while satisfying the need of financial institutions to be protected from becoming involved in the legal disputes of its customers. The full economic benefits of automated banking are more uniformly obtainable under this law.

This proposed law and subcommittee comments were approved by the Probate and Trust Committee on November 15, 1985 and on April 4, 1986. On July 31, 1987, the Board of Governors of The Missouri Bar voted to support passage of this legislation in the 1988 session of the Missouri legislature. On September 18, 1987, it was again approved by the Probate and Trust Committee with a proposed amendment to the definitions section for the terms "other directive" and "sums on deposit". As amended it was again approved by the Board of Governors on October 30, 1987. It was introduced as H.B. No. 1113, 84th General Assembly, Second Regular Session, by Representative Christopher Graham. It was assigned to the Banking and Financial Institutions Committee but was not acted by that committee during the session. On February 19, 1988, a joint study committee of representatives of the Bar and financial institutions was formed to study the bill. The Probate and Trust Committee at its Spring committee meeting April 15, 1988, reaffirmed its recommendation for the Bar to sponsor this legislation. The Board of Governors approved sponsorship on Sep. 14, 1988.

The bill draft in its present form reflects suggestions made during discussions of the interim study committee.