

<p><i>DATE &amp; TIME:</i></p> <p>April 13 (Thursday) 10:00 am - 3:30 pm</p>	<p><i>PLACE:</i></p> <p>Sacramento State Capitol Room 125</p>
<p><i>NOTE:</i> Changes may be made in this Agenda. For meeting information, please call (415) 494-1335.</p>	

\*\*\*IMPORTANT--PLEASE NOTE CHANGE OF MEETING DATE\*\*\*

FINAL AGENDA

*for meeting of*

CALIFORNIA LAW REVISION COMMISSION

THURSDAY, APRIL 13

1. Minutes of February 9-10, 1989, Commission Meeting (sent 2/21/89)

2. Administrative Matters

ACR 30 (sent 2/27/89)

Communications from Interested Persons

3. 1989 Legislative Program

Handout at Meeting

AB 156 (Friedman)--Probate urgency bill

Memorandum 89-39 (sent 3/29/89)

AB 156 (as amended 3/28/89) (sent 3/31/89)

AB 158 (Friedman) - General probate bill

AB 158 (as amended 3/28/89) (sent 3/31/89)

Compensation of Attorney and Other Persons

Memorandum 89-37 (sent 3/17/89)

Recommendation (attached to Memorandum)

120-Hour Survival Requirement

Memorandum 89-40 (sent 3/20/89)  
Recommendation (attached to Memorandum)

No Contest Clauses

Memorandum 89-41 (sent 3/20/89)  
Recommendation (attached to Memorandum)  
First Supplement to Memorandum 89-41 (sent 3/29/89)

Brokers' Commissions

Memorandum 89-42 (enclosed)  
Staff Draft (attached to Memorandum)

AB 831 (Harris) - Trustees' fees

Memorandum 89-36 (sent 3/10/89)  
Draft statute (attached to Memorandum)

SB 985 (Beverly) - Multiple-party accounts

Memorandum 89-38 (sent 3/17/89)  
Recommendation (attached to Memorandum)  
Senate Bill 985 (as amended) (to be sent)

Miscellaneous matters

Memorandum 89-35 (sent 2/27/89)  
First Supplement to Memorandum 89-35 (sent 3/1/89)  
Second Supplement to Memorandum 89-35 (sent 3/29/89)  
AB 157 (sent 3/1/89)  
SB 536 (as amended 03/27/89) (sent 3/31/89)

MEETING SCHEDULE

April 1989

13 (Thursday) 10:00 a.m. - 3:30 p.m. Sacramento

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.

STATUS OF 1989 COMMISSION BILLS

(as of March 30, 1989)

Legislative Program:

AB 156 (Judiciary/Friedman): Urgency probate bill  
 AB 157 (Harris): Miscellaneous creditor remedies  
 AB 158 (Friedman): General probate bill  
 AB 625 (Harris): Statutory authority of CLRC  
 AB 831 (Harris): Trustees' fees

SB 536 (Beverly): Assignment and sublease  
 SB 985 (Beverly): Multiple-party accounts  
 SCR 11 (Lockyer): Continuing authority to study topics

BILL STATUS		AB 156	AB 157	AB 158	AB 625	AB 831	SB 536	SB 985		SCR 11
Introduced		12/19/88	12/19/88	12/19/88	2/14/89	2/22/89	2/17/89	3/7/89		12/19/89
First House	Policy Committee	Feb 8	[Apr 26]	[Apr 26]	Mar 29	[May 17]				Feb 7
	Fiscal Committee	----	----	----			----			Feb 27
	Passed House	Feb 23								Mar 2
Second House	Policy Committee	Mar 14								Mar 29
	Fiscal Committee	----	----	----			----			
	Passed House									
Concurrence										
Governor	Received									----
	Approved									----
Chaptered by Secretary of State	Date									
	Ch. #									

----: not applicable

[ ]: scheduled

SCHEDULE FOR WORK ON NEW PROBATE CODE

PROJECT	SCHEDULED	COMPLETED
Introduction of bill	March 10, 1989	Feb. 22, 1989 AB 759 (Friedman)
Staff review of bill completed and draft prepared for amendments to bill	June 10, 1989	
Staff prepares draft of official Comments	June 10, 1989	
Commission approves substantive amendments to bill	July meeting	
Amendments sent to Legislative Counsel	July 21, 1989	
Bill amended	August 21, 1989	
Draft of Comments checked by staff and Comments sent to printer for printing	October 15, 1989	
Review of bill, as amended, completed by staff, Bar, and other interested persons	December 1, 1989	
Review of official Comments completed by staff, Bar, and other interested persons	December 1, 1989	
Commission approves bill as amended and any additional amendments	January 1990 meeting	
Report containing revised and new Comments approved by Commission	January 1990 meeting	
Bill passes Assembly	January 1990	
Bill amended in Senate to make any needed additional amendments	February 1990	
Legislative Committees approve Report containing new and revised Comments	April 1990	
Bill passes Senate; Assembly Concurrence in amendments; Bill sent to Governor	May 1990	

STATUS OF COMMISSION STUDIES

(as of March 9, 1989)

STUDY	SUBJECT	Staff Work	Comm'n Review	Approve TR	Review Comment	Approve to Print
F-641 /L-3020	Limitations on Disposition of Community Property	4/88	9/88			
H-111	Assignment & Sublease --related issues	12/88				
L-3005	Anti-Lapse & Other Rules	1/88	5/88			
L-3007	In-Law Inheritance	2/88	12/88			
L-3010	Trustees' Fees	3/88	5/88	10/88	1/89	[4/89]
L-3012	Uniform Management of Institutional Funds Act	8/88	12/88	2/89		
N	Administrative Law	[10/89]				

[date] = scheduled

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
APRIL 13, 1989  
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on April 13, 1989.

Commission:

Present:	Forrest A. Plant Chairperson	Bion M. Gregory Legislative Counsel
	Edwin K. Marzec Vice Chairperson	Arthur K. Marshall
	Roger Arnebergh	Tim Paone
		Vaughn R. Walker
Absent:	Elihu M. Harris Assembly Member	Ann E. Stodden
	Bill Lockyer Senate Member	

Staff:

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

Consultants:

None

Other Persons:

Mike Belote, California Land Title Association, Sacramento  
Michael Harrington, California Bankers Association, Trust State  
Government Affairs Committee, San Francisco  
Anne Hilker, Executive Committee, State Bar Estate Planning, Trust  
and Probate Law Section, Los Angeles  
David Lauer, California Bankers Association, Trust State Government  
Affairs Committee, San Francisco  
David E. Lich, Legislative Committee, Beverly Hills Bar Association,  
Probate, Trust and Estate Planning Section, Beverly Hills  
Maurine C. Padden, California Bankers Association, Sacramento  
Terry Ross, Executive Committee, State Bar Estate Planning, Trust  
and Probate Law Section, Mill Valley  
Richard Stack, Executive Committee, Los Angeles County Bar  
Association, Probate and Trust Law Section, Los Angeles  
Stan Wieg, California Association of Realtors, Sacramento  
Shirley Yawitz, California Probate Referees Association, San  
Francisco

ADMINISTRATIVE MATTERS

MEETING SCHEDULE

The Commission meeting scheduled for September 7-8, 1989, was rescheduled for August 31-September 1 in Sacramento.

1989 LEGISLATIVE PROGRAM

The staff made the report on the 1989 Legislative Program attached to these Minutes as Exhibit 1.

FAMILY RELATIONS CODE

The Executive Secretary reported that ACR 30, which would have the Commission study the establishment of a Family Relations Code, has been amended to require the Commission to give the study the same priority as the administrative law study, and as so amended has passed the Assembly Judiciary Committee.

CONSULTANT CONTRACTS

The Assistant Executive Secretary reported that funds under the contract with Professor William G. Coskran to cover travel expenses and per diem when attending Commission meetings and legislative hearings at Commission request concerning commercial lease law (contract number LRC-7007) are nearly exhausted. Legislative hearings on SB 536 are still pending, and Professor Coskran has prepared additional studies for the Commission on related matters that the Commission has not yet considered. The Commission unanimously approved an addendum to the contract to augment the funds available under the contract by an amount not to exceed \$1,000, and to extend the term of the contract until June 1, 1991.

STUDY H-111 - ASSIGNMENT AND SUBLEASE

The Commission considered the portion of Memorandum 89-35, together with a staff draft of proposed amendments and revised Comments to SB 536 (Beverly) (copy attached to these Minutes as Exhibit 2),

relating to assignment and sublease of commercial real property leases. The staff reported that the proposed amendments and revised Comments respond to issues raised by the consultant to the Senate Judiciary Committee, and are approved by the Commission's consultant, Professor Coskran. The Commission approved the proposed amendments and revised Comments, except with respect to the issue of retroactivity of the commercial reasonableness standard announced in Kendall and codified in the Commission's recommendation. On that issue, the bill should be amended to provide that the commercial reasonableness standard applies to all leases executed on or after September 23, 1983, the date of the case of Cohen v. Ratinoff, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983), which foreshadowed the Kendall ruling.

STUDY L - PROBATE CODE

The Commission considered Memorandum 89-35, and the Second and Third Supplements thereto, relating to miscellaneous probate matters. The Commission took the following actions concerning the matters raised in the memoranda.

County Counsel as Attorney for Public Guardian

The Commission agreed with the staff that this is not a matter the Commission should become involved in.

Controlled Account

The Commission approved the following amendments to go into AB 158:

§ 8401. Deposit in controlled account

8401. (a) Notwithstanding Section 8400, a petitioner for appointment as personal representative may deliver ~~money, securities, or personal~~ property in the petitioner's possession to a trust company or financial institution, or allow a trust company or financial institution to retain ~~money, securities, and personal~~ on deposit property already in its possession, ~~for deposit in an insured account in the financial institution as provided in Chapter 3 (commencing with Section 9700) of Part 5.~~

(b) The petitioner shall obtain and file with the court a written receipt including the agreement of the trust company or financial institution that the ~~money, securities, or other personal~~ property on deposit, including any earnings thereon, shall not be allowed to be withdrawn except on order of the court.

(c) In receiving and retaining ~~money, securities, or other personal~~ property under this section, the trust company or financial institution is protected to the same extent as though it had received the ~~money, securities, or other personal~~ property from a person who had been appointed personal representative.

Comment. Section 8401 is amended to simplify drafting and to refer to the procedures in Sections 9700 to 9705 for depositing money in an insured account in a financial institution and depositing personal property with a trust company. This continues a provision of former Section 541.1(b).

§ 8483. Reduction of bond by deposit of assets

8483. (a) This section applies where property in the estate has been deposited ~~in an insured account in a financial institution~~ pursuant to Chapter 3 (commencing with Section 9700) of Part 5 on condition that the property, including any earnings thereon, will not be withdrawn except on authorization of the court.

(b) In a proceeding to determine the amount of the bond of the personal representative (whether at the time of appointment or subsequently), on production of a receipt showing the deposit of property in the estate in the manner described in subdivision (a), the court may order that the property shall not be withdrawn except on authorization of the court and may, in its discretion, do either of the following:

(1) Exclude the property in determining the amount of the required bond or reduce the amount of the bond to an amount the court determines is reasonable.

(2) If a bond has already been given or the amount fixed, reduce the amount to an amount the court determines is reasonable.

Comment. Section 8483 is amended to refer to the procedures in Sections 9700 to 9705 for depositing money in an insured account in a financial institution and depositing personal property with a trust company. This continues a provision of former Section 541.1(a).

Finality of Court Order Settling an Account

The court order settling an account should be final, as other orders in probate are, notwithstanding the legal disability of a party affected by the order. Consequently, the conflict between Probate Code Sections 9612 and 11006 should be resolved by repeal of the conflicting portion of Section 11006. This change should be made in AB 158.

STUDY L-612 - 120-HOUR SURVIVAL REQUIREMENT

The Commission considered Memorandum 89-40 and the attached *Recommendation Relating to 120-Hour Survival Requirement*. The Executive Secretary reported that the State Bar withdrew its earlier objection to this recommendation.

STUDY L-636 - NO CONTEST CLAUSE

The Commission considered Memorandum 89-41 and First Supplement thereto, together with a letter from State Bar Study Team 3 (copy attached to these Minutes as Exhibit 3), relating to no contest clauses. The Commission approved amendment of AB 158 to make the following change:

21307. A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

(a) A person who drafted or transcribed the instrument.

(b) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive provisions of the instrument contents of the provision or who directed inclusion of the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter of the instrument to include the contents of the provision or the no contest clause.

(c) A person who acted as a witness to the instrument.

Comment. As used in subdivision (b), a person who gave directions concerning dispositive or other substantive ~~provisions of an instrument~~ contents of a provision does not include a person who merely provided information such as birthdates, the spelling of names, and the like. Subdivision (b) only applies where the beneficiary directs the draftsperson of the instrument without concurrence of the transferor. The subdivision does not apply, for example, where the transferor and beneficiary together discuss the contents of the instrument with an estate planner and the transferor agrees that the provision or the no contest clause should be included in the instrument.

STUDY L-700 - BOND OF GUARDIAN OR CONSERVATOR

The Commission considered proposed amendments to Probate Code Section 2320 which were handed out at the meeting. The Commission approved the amendments for inclusion in the Commission's general probate bill (AB 158) as follows:

Probate Code § 2320 (amended). General requirement of bond;  
amount

2320. (a) Except as otherwise provided by statute:

~~(1) Every~~ every guardian and conservator shall give a bond in the amount fixed by the court, conditioned upon the faithful execution of the duties of the office according to law, to protect the ward or conservatee and all persons interested in the guardianship or conservatorship estate.

~~(2) Unless (b) Except as otherwise provided by statute,~~ unless the court increases or decreases the amount upon a showing of good cause, the amount of a bond given by an admitted surety insurer shall be the sum of the following:

(1) The value of the personal property and the value of the estate.

(2) The probable annual gross income of all of the property in the guardianship or conservatorship of the estate.

(3) The sum of the probable annual gross payments from the following:

(A) Part 3 (commencing with Section 11000) of, Part 4 (commencing with Section 16000) of, or Part 5 (commencing with Section 17000) of, Division 9 of the Welfare and Institutions Code.

(B) Subchapter II (commencing with Section 401) of, or Part A of Subchapter XVI (commencing with Section 1382) of, Chapter 7 of Title 42 of the United States Code.

(C) Any other public entitlements of the ward or conservatee.

~~(b)~~ (c) If the sureties on the bond are personal sureties, the bond shall be one approved by the court and shall be for twice the amount required for a bond given by an admitted surety insurer.

STUDY L-1025 - NOTICE TO CREDITORS

The Commission considered Memorandum 89-39 and the First Supplement thereto, relating to the provisions of AB 156 concerning notice to creditors in probate. The Commission made the following decisions concerning revision of the notice to creditors provisions, which should be implemented in AB 158 if it is not convenient to add them to AB 156 at this point in the legislative process.

Probate Code § 9053 (amended). Immunity of personal representative

This section should remain as originally proposed by the Commission and as set out on page 1 of Memorandum 89-39. There should be added to it a provision, in wording that is technically correct, that an action against the personal representative on a liability for failure to give notice must be commenced within one year after the expiration of the time notice was required to be given. This amounts to one year and four months after appointment of a general personal representative.

Probate Code § 6611 (amended). Small estate set-aside

Subdivision (c) of this section was deleted, and subdivision (d) should be made "subject to Section 353 of the Code of Civil Procedure."

Probate Code §§ 13109, 13156, 13204, 13554 (amended). Nonprobate transfers

Each of these sections should be made "subject to Section 353 of the Code of Civil Procedure."

Code of Civil Procedure § 353.5 (repealed). Passage of property to surviving spouse

Section 353.5 of the Code of Civil Procedure should be repealed.

Probate Code § 9391 (amended). Obligation secured by mortgage, deed of trust, or other lien

The following sentence should be added to Probate Code Section 9391: "Section 353 of the Code of Civil Procedure does not apply to an action under this section."

Code of Civil Procedure § 353 (amended). Statute of limitations

The one year limitation period in Section 353 should be revised to read:

(b) Except as provided in subdivisions (c) and (d), if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply. The time provided in this subdivision for commencement of an action is not tolled or extended for any reason.

STUDY L-1026 - ENFORCEMENT OF JUDGMENT LIEN IN PROBATE

The Commission considered the First Supplement to Memorandum 89-35 concerning enforcement of judgment lien in probate. The Commission approved the following amendment to Code of Civil Procedure Section 686.020 in Assembly Bill 157:

Code of Civil Procedure § 686.020 (amended). Enforcement of judgment after death of judgment debtor

686.020. After the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor's estate is governed by the Probate Code, and not by this title.

Comment. Section 686.020 is amended for conformity with the scope of the Probate Code provisions relating to enforcement of judgments. See Prob. Code §§ 9300-9304, 9391. As a consequence, property transferred subject to an enforcement lien before the death of the judgment debtor may be applied to the satisfaction of a money judgment as if the judgment debtor had not died. See Section 695.070 (enforcement of lien after transfer).

Under Section 686.020 and Probate Code Section 9300, after death of a judgment debtor, enforcement of judgment is under the Probate Code, not under the Code of Civil Procedure. Therefore, the filing of an abstract of judgment after death of the judgment debtor does not create a lien on estate property. See also Prob. Code § 9304 (conversion of attachment lien to judgment lien). The language "and not by this title" is added to make this clear.

STUDY L-1036/1055 - COMPENSATION OF ATTORNEY,  
PERSONAL REPRESENTATIVE, AND OTHER PERSONS

The Commission considered Memorandum 89-37, the attached *Recommendation Relating to Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, a letter from attorney David Lich for the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association, and a letter from attorney Stephen Zetterberg of Claremont. Copies of the letters were handed out at the meeting, and are attached to these Minutes as Exhibits 4 and 5, respectively. The Commission made the following decisions:

Probate Code § 9680. Authority to hire attorneys, advisors, and others

The Commission approved the following revision of proposed Section 9680:

9680. (a) Except as restricted or otherwise provided by the will or by court order and subject to subdivision (b) and to Section 10804, the personal representative, acting reasonably for the benefit of the estate and in the best interest of interested persons, may hire persons to advise or assist the personal representative in the administration of the estate, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

(b) A provision in the will directing the personal representative to hire a particular person to advise or assist the personal representative in the administration of the estate is not binding on the personal representative, and the personal representative may, but is not required to, hire that person.

The Commission approved the staff recommendation to add the following language to the Comment to Section 9680:

Subdivision (b) codifies the case law rule that a direction in the will to hire an attorney or other advisor is precatory and not binding on the personal representative. See *In re Estate of Ogier*, 101 Cal. 381, 35 Pac. 900 (1894). The personal representative is responsible for the administration of the estate and is liable for failure to carry out the duties of the office. Accordingly, the personal representative must be free to select the attorney and other persons hired to advise or assist the personal representative in the administration of the estate.

Probate Code § 9684. Court review of employment and compensation  
Probate Code § 9684.5. Order for refund of excessive compensation

The Commission approved revisions to proposed Section 9684, and approved adding new Section 9684.5, as follows:

9684. (a) On petition of the personal representative or an interested person, the court may review the following:

(1) The propriety of employment by the personal representative of any person under Section 9680 who has been or is to be paid out of funds of the estate.

(2) The reasonableness of the agreed compensation under subdivision (a) of Section 9681 of any person who has been or is to be paid out of funds of the estate.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) The person whose employment or compensation is in question.

(2) Each person listed in Section 1220.

(3) Each known heir whose interest in the estate is affected by the petition.

(4) Each known devisee whose interest in the estate is affected by the petition.

(5) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(c) If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation and may order the person who has received excessive compensation to make an appropriate refund. Unless the person ordered to make the refund is the attorney for the personal representative, the order for the refund may be obtained only in a proceeding under Section 9684.5.

(d) Except as provided in subdivision (e), nothing in this section limits the right to contest the account of the personal representative under Chapter 3 (commencing with Section 11000) of Part 8.

(e) The petitioner and all persons to whom notice of the hearing on the petition was given pursuant to subdivision (b) are bound by the determination of the court under this section.

9684.5. (a) Any interested person may commence a proceeding under this section to obtain an order that a person determined by the court to have received excessive compensation make an appropriate refund. The proceeding under this section may be combined with the proceeding to determine whether the compensation is excessive. There shall be no additional filing fee if the petition under this section is combined with the other proceeding.

(b) A proceeding under this section shall be commenced by filing a petition requesting that an order be made under this section and referring to the other proceeding brought to determine whether the compensation is excessive.

(c) Not less than 30 days before the hearing, the petitioner shall do both of the following:

(1) Cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to any other petitioner in the other proceeding to determine whether the compensation is excessive.

(2) Cause a summons and a copy of the petition to be served on the person whose compensation is claimed to be excessive. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

(d) If the court determines that the person who received excessive compensation should make an appropriate refund, the court shall so order. The order is a judgment that may be enforced against the person ordered to make the refund.

(e) An order that the attorney for the personal representative make an appropriate refund may be made without compliance with the requirements of this section.

Comment. Section 9684.5 is a new provision that provides a procedure for obtaining an order that a person who received excessive compensation make an appropriate refund. Since the attorney for the personal representative already is subject to court orders, the procedure provided in this section need not be followed in order to obtain an enforceable order that the attorney refund any excess compensation the attorney has received.

#### Will Registry

The Commission decided not to include will registry provisions in the 1989 probate bill. Instead, the staff should ask for comments from the State Bar and other interested bar groups, and should prepare a memorandum on this subject for a future meeting.

#### Letter from Beverly Hills Bar Association

The Commission considered Mr. Lich's letter (Exhibit 4), and made the following decisions:

The Commission did not accept the suggestion that notice of the proposed hiring of, and of the fee agreement with, the estate attorney and other experts be included in the notice of death. Instead, the Commission decided to revise proposed Section 9685 in AB 158 as follows:

#### Probate Code § 9685. Attorney's right to decline employment

9685. Nothing in this chapter limits the right of an attorney to decline to be the attorney for the personal representative or the right of an attorney to withdraw as the attorney for the personal representative, and, in such case, the attorney is entitled to reasonable compensation for the legal services actually provided.

As suggested in Mr. Lich's letter, the Commission decided to amend paragraphs (2) and (3) of subdivision (a) of proposed Section 10585.5 in AB 158 as follows:

(2) If the person hired is an attorney, each person given notice of proposed action shall also be provided with a copy of the written fee contract made pursuant to Section 6148 of the Business and Professions Code shall-be-attached to-the-notice-of-proposed-action.

(3) If the person hired is not an attorney, each person given notice of proposed action shall also be provided with a copy of the written contract, if any, governing the hiring and compensation shall-be-attached-to-the-notice-of-proposed-action.

The staff should consider how the contract is presented to the court for approval if a person given notice of proposed action objects.

The Commission did not accept the suggestion that the personal representative's final report should show attorney's fees, notwithstanding that the final account has been waived. Thus the Commission reaffirmed its decision to delete this requirement from Section 10954, as AB 158 does.

Letter from Stephen Zetterberg

The Commission noted Mr. Zetterberg's letter (Exhibit 5), and took no further action.

STUDY L-1060 - MULTIPLE-PARTY ACCOUNTS IN FINANCIAL INSTITUTIONS

The Commission considered Memorandum 89-38 and the attached *Recommendation Relating to Multiple-Party Accounts in Financial Institutions*. The Commission approved the following revision to proposed Section 5204 (SB 985):

Probate Code § 5204 (added). Special power of attorney for account transactions

5204. (a) In addition to a power of attorney otherwise authorized by law, a special power of attorney is authorized under this section to apply to one or more accounts at a financial institution. For the purposes of this section, "account" includes checking accounts, savings accounts, certificates of deposit, savings certificates, and any other depository relationship with the financial institution.

(b) The special power of attorney under this section shall:

(1) Be in writing.

(2) Be signed by the person or persons giving the power of attorney.

(3) Explicitly identify the attorney in fact or attorneys in fact, the financial institution, and the account or accounts subject to the power.

(c) Language in substantially the following form is sufficient to create a power of attorney under this section: "Transactions regarding this account/certificate of deposit may be made by the named agent(s). This agency is governed by Section 5204 of the California Probate Code. Under Section 5204, (1) the agent has no present or future ownership or right of survivorship in this account, (2) the agent must keep a record of the transactions and disbursements made under the agency, and (3) the agent may make disbursements from this account only to or for the benefit of the account owner unless the account owner has authorized the disbursement in writing."

(d) The power of attorney granted under this section shall endure as between the grantor and grantee of the power until the earlier to happen of the following:

- (1) Revocation by the grantor of the power.
- (2) Termination of the account.
- (3) Death of the grantor of the power.
- (4) Appointment of a guardian or conservator of the estate of the grantor of the power.

(e) A financial institution may rely in good faith upon the validity of the power of attorney granted under this section and ~~shall be held harmless from any liability for doing so. Payment made in reliance upon the validity of the power of attorney granted under this section discharges the financial institution from all claims for the amounts so paid.~~ is not liable to the principal or any other person for doing so if (1) the power of attorney is on file with the financial institution and the transaction is made by the attorney in fact named in the power of attorney, (2) the power of attorney appears on its face to be valid, and (3) the financial institution has convincing evidence of the identity of the person signing the power of attorney as principal.

(f) For the purposes of subdivision (e), "convincing evidence" requires both of the following:

(1) Reasonable reliance on a document that satisfies the requirement of Section 2511 of the Civil Code.

(2) The absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person signing the power of attorney as principal is not the individual he or she claims to be.

(g) The protection provided by this subdivision (e) does not extend to payments made after written notice is received by the financial institution as to any of the events of termination of the power under subdivision (d) and the financial institution has had a reasonable time to act on the notice. No other notice or any other information shown to have been available to the financial institution shall affect its right to the protection provided by this subdivision (e).

(h) The attorney in fact acting under the power of attorney granted under this section shall maintain such books or records as will permit an accounting of the acts of the attorney in fact if an accounting is requested by a legal representative of the grantor of the power.

(i) The attorney in fact acting under a power of attorney granted under this section is liable for any disbursement other than a disbursement to or for the benefit of the grantor of the power, unless the grantor has authorized the disbursement in writing.

(j) Nothing in this section limits the use or effect of any other form of power of attorney for transactions with a financial institution. Nothing in this section is intended to create an implication that a financial institution is liable for acting in reliance upon a power of attorney under

circumstances where the requirements of subdivision (e) are not satisfied. Nothing in this section affects any immunity that may otherwise exist apart from this section.

(i) (k) Nothing in this section prevents the attorney in fact from also being designated as a P.O.D. payee.

STUDY L-1061 - BROKERS' COMMISSIONS IN PROBATE

The Commission considered Memorandum 89-42 and the attached proposed amendments concerning brokers' commissions in probate. The Commission approved the amendments for inclusion in Assembly Bill 158, with the following exception: Proposed Section 10162.8 would have limited compensation to a commission on the original bid in a case where the broker representing the original bidder ultimately makes the successful overbid. The Commission decided that the broker in this case should receive compensation based on the full amount for which the sale is made. The staff will prepare appropriate amendments to implement this policy. The Commission will consider any objections or suggestions for improvement in drafting at the July meeting.

STUDY L-1062 - PRIORITY FOR APPOINTMENT AS ADMINISTRATOR

The Commission considered the portion of Memorandum 89-35 relating to priority for appointment of the administrator. The Commission approved inclusion in AB 158 of the revision of Probate Code Section 8461 set out in Exhibit 2 to the memorandum.

STUDY L-3010 - TRUSTEES' FEES

The Commission considered Memorandum 89-36, and the revised draft *Recommendation Relating to Trustees' Fees* attached thereto, and the First Supplement to Memorandum 89-36. The Commission also considered comments from Team 2 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (see Exhibit 6) and of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar

Association (see Exhibit 7), which were distributed at the meeting. The staff reported on the conference between the staff and representatives of the California Bankers Association on February 28. The Commission approved the compromise suggested in the First Supplement to Memorandum 89-36, with the revisions noted below in response to suggestions made by representatives of the California Bankers Association. The staff will prepare amendments to Assembly Bill 831 (the spot bill on trustees' fees) implementing the Commission's decisions.

The Commission made the following decisions with respect to the draft statute attached to Memorandum 89-36:

Probate Code § 15645 (added). Costs and attorney's fees in proceedings for transfer of trust to successor trust company

Section 15645 should be revised to change the standard for awarding costs and attorney's fees in subdivision (b)(2):

15645. (a) Subject to subdivision (b), in proceedings under Section 17200 to remove a trustee and transfer administration of the trust to a trust company:

(1) The petitioners are entitled to costs and reasonable attorney's fees incurred in the proceeding, to be paid by the trustee and not from the trust.

(2) The trustee may not charge the trust for the costs and attorney's fees incurred in opposing the petition.

(b) This section applies only where both of the following requirements are satisfied:

(1) The court makes an order removing the existing trustee and appointing a trust company as successor trustee.

(2) The court determines that the existing trustee's refusal to resign and transfer the trust property to a successor trust company was without ~~substantial-justification~~ good cause.

(c) Nothing in this section limits any power the court may otherwise have to award or not award costs or costs and attorney's fees.

Probate Code § 15686. Notice of proposed fee increase

This section should be revised to direct the notice of fee increases to the beneficiaries whose interests would be affected by the fee increase:

15686. (a) As used in this section, "trustee's fee" includes, but is not limited to, the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

(b) A trustee may not ~~increase the charge an increased~~ trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days' written notice of ~~the proposed that increased fee increase~~ to each beneficiary ~~to whom income or principal is required or authorized in the trustee's discretion to be currently distributed of the trust~~ whose interest may be affected by the increased fee.

(c) If a beneficiary files a petition under Section 17200 for review of the increased trustee's fee or for removal of the trustee and serves a copy of the petition on the trustee before the expiration of the 60-day period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed.

Probate Code § 16443. Liability for exemplary damages

This section that would limit exemplary damages to three times compensatory damages should be deleted from the recommendation and from AB 831. Elimination of this provision will simplify AB 831 and avoid any conflict with current developments in the law relating to punitive damages.

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

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

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

## STATUS OF 1989 COMMISSION BILLS

(as of April 10, 1989)

Legislative Program:

AB 156 (Judiciary/Friedman): Urgency probate bill  
 AB 157 (Harris): Miscellaneous creditor remedies  
 AB 158 (Friedman): General probate bill  
 AB 625 (Harris): Statutory authority of CLRC  
 AB 831 (Harris): Trustees' fees

SB 536 (Beverly): Assignment and sublease  
 SB 985 (Beverly): Multiple-party accounts  
 SCR 11 (Lockyer): Continuing authority to study topics

BILL STATUS		AB 156	AB 157	AB 158	AB 625	AB 831	SB 536	SB 985		SCR 11
Introduced		12/19/88	12/19/88	12/19/88	2/14/89	2/22/89	2/17/89	3/7/89		12/19/89
Last Amended		3/28/89		3/28/89			3/27/89			
First House	Policy Committee	Feb 8	[Apr 26]	[Apr 26]	Mar 29	[May 17]	[May 16]	[May 10]		Feb 7
	Fiscal Committee	----	----	----	[Apr 19]		----	----		Feb 27
	Passed House	Feb 23								Mar 2
Second House	Policy Committee	Mar 14								Mar 29
	Fiscal Committee	----	----	----			----	----		[Apr 19]
	Passed House									
Concurrence										
Governor	Received									----
	Approved									----
Chaptered by Secretary of State	Date									
	Ch. #									

----: not applicable      [ ]: scheduled

AMENDMENTS TO SB 536 (BEVERLY)  
AS AMENDED MARCH 27, 1989

AMENDMENT 1

On page 4, strike out lines 11 to 16, inclusive.

AMENDMENT 2

On page 5, line 23, after "any" insert:  
express

AMENDMENT 3

On page 7, line 16, strike out "withheld, except", and strike out lines 17 to 19, inclusive, and insert:  
withheld. For purposes of this

\*\*\*\*\*

AMENDMENT 3

On page 7, strike out lines 17 to 19, inclusive, and insert:  
that if the restriction on transfer was executed between September 23, 1983, and December 5, 1985, there is a presumption affecting the burden of producing evidence that the parties intended that the restriction on transfer be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. For purposes of this

Civil Code § 1951.4 (amended). Continuation of lease after breach and abandonment

Comment. Subdivision (a) of Section 1951.4 is amended to provide a "safe harbor" of specific language that satisfies the requirement that the lease provide for the remedy in this section. The amendment should not be construed to imply that no other form of language will satisfy the requirement. Whether any other language will satisfy the requirement depends on the language used and the understanding of the parties.

Subdivision (b)(1) is amended to recognize that a lessee may sublet the property or assign the lessee's interest in the lease whether or not the lease permits it, so long as the lease does not prohibit it. Cf. Section 1995.210 (right to transfer commercial lease absent a restriction). Under subdivision (b)(1), a lessor may not include a prohibition against subletting or assignment and thereafter take advantage of the remedy of this section by waiving the prohibition; the lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the remedy provided in this section.

The parties may agree to express standards and conditions for assignment and sublease. Section 1995.240 (transfer restriction in commercial lease subject to standards and conditions). Subdivision (b)(2) is amended to make clear that an express standard or condition on transfer is presumed reasonable; the presumption is only for the purpose of applying subdivision (b)(2). This is consistent with cases involving the reasonableness standard generally and with the underlying philosophy of this chapter. See Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loy. L.A.L. Rev. 405, 474 (1989). ~~See also subdivision (d).~~

Subdivision (b)(2) also is amended to clarify existing law that the lessor may waive a standard or condition on subletting or assignment that, although originally reasonable, has become unreasonable, and still take advantage of the remedy provided in Section 1951.4. See *Recommendation Relating to Real Property Leases*, 9

Cal. L. Revision Comm'n Reports 153, 168 (1969) ("Occasionally, a standard or condition, although reasonable at the time it was included in the lease, is unreasonable under circumstances existing at the time of the subletting or assignment. In such a situation, the lessor may resort to the remedy provided by Section 1951.4 if he does not require compliance with the now unreasonable standard or condition."). However, subdivision (b)(2) does not permit the lessor to take advantage of the remedy provided in this section by including in the lease a standard or condition that is originally unreasonable and thereafter waive it; the lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the remedy provided in this section.

Subdivision (b)(3) is amended to recognize that the lessor's consent to an assignment or subletting may not unreasonably be withheld, even though the lease does not require reasonableness, if the lease provides no standard for giving or withholding consent. Section 1995.260 (implied standard for landlord's consent in commercial lease). Under this subdivision a lessor may not take advantage of the remedy provided in this section by including in the lease a clause that gives the lessor absolute discretion or the right unreasonably to withhold consent or that subjects the lessor's consent to unreasonable limitations, and thereafter waiving the clause; the lessee must have a legal right to sublet or assign subject only to reasonable limitations from the outset if the lessor is to have the remedy provided in this section.

~~Under subdivision (c), a provision in the lease that the lessor may elect either to consent to a subletting or assignment or to terminate the lessee's right to possession, would not constitute a termination of the lessee's right to possession, so long as the lessor does not make the election to terminate the lessee's right to possession.~~

~~Subdivision (d) is new. See Section 1995.240 and Comment thereto (transfer restriction in commercial lease subject to standards and conditions).~~

The other changes in Section 1951.4 are technical, intended to render the provision gender-neutral.

The amendments apply to leases executed before, on, or after the operative date of the amendments, except as provided in Section 1952.

Civil Code § 1995.240. Transfer restriction subject to standards and conditions

Comment. Section 1995.240 codifies the ~~rule-stated~~ statement in Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), that "nothing bars the parties to commercial lease transactions from making their own arrangements respecting the allocation of appreciated rentals if there is a transfer of the leasehold." 40 Cal. 3d at 505 n. 17. This section does not apply, and Section 1995.250 does apply, to a restriction on transfer of a tenant's interest in a lease that requires the landlord's consent for transfer.

The authority provided in this section for the parties to agree to an express lease provision governing allocation of consideration for transfer of the tenant's interest in a lease is not intended to create an implication that absent an express provision the landlord is not entitled to demand all or part of the consideration as a condition for consenting to the transfer in a case where the lease requires the landlord's consent. Whether such a demand would be "unreasonable" within the meaning of Section 1995.250(a) (express standards and conditions for landlord's consent) or 1995.260 (implied standard for landlord's consent) is a question of fact that must be determined under the circumstances of the particular case. See Comments to Sections 1995.250 and 1995.260.

Section 1995.240 is a specific application of subdivision (a) of Section 1995.210 (lease may include transfer restriction). It should be noted that an unreasonable restriction on transfer precludes the landlord's use of the remedy provided in Section 1951.4 (continuation of lease after breach and abandonment). See Section 1951.4 and Comment thereto. Moreover, Section 1995.240 remains subject to general principles limiting freedom of contract. See Section 1995.210 and Comment thereto.

Civil Code § 1995.250. Express standards and conditions for landlord's consent

Comment. Section 1995.250 is a specific application of the broad latitude provided in this chapter for the parties to a lease to contract for express restrictions on transfer of the tenant's interest in the lease. Such restrictions are valid subject to general principles governing freedom of contract, including the adhesion contract doctrine, where applicable. See Section 1995.210 and Comment thereto (right to transfer absent a restriction). It should be noted that an unreasonable restriction on transfer precludes the landlord's use of the remedy provided in Section 1951.4 (continuation of lease after breach and abandonment). See Section 1951.4 and Comment thereto.

The meaning of "unreasonably withheld" under subdivision (a) is a question of fact that must be determined under the circumstances of the particular case, applying an objective standard of commercial reasonableness as developed by case law.

Subdivision (b) makes clear that the lease may condition the landlord's consent in any manner. Standards and conditions for the landlord's consent may include, for example, a provision that, if the lessee receives consideration for the transfer in excess of the rent under the lease, the landlord may recover some or all of the consideration as a condition for consent. Cf. Section 1995.240 (transfer restriction subject to standards and conditions).

Subdivision (c) settles the question raised in Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985), of the validity of a clause granting absolute discretion over assignment or sublease to the landlord. 40 Cal. 3d at 499 n. 14. A lease clause of the type described in subdivision (c) is not invalid as a restraint on alienation, and its exercise by the landlord is not a violation of the law governing good faith and fair dealing.

~~The inclusion in the lease of a provision that the landlord may elect either to consent or to terminate the tenant's right to possession, does not preclude the landlord's use of the remedy provided in Section 1951.4, so long as the landlord does not exercise the election to terminate the right to possession. See Comment to Section 1951.4.~~

\*\*\*\*\*

Civil Code § 1995.270. Limitation on retroactivity of Section 1995.260

Comment. Section 1995.270 limits the retroactive application of Section 1995.260 (implied standard for landlord's consent) and the *Kendall* case which it codifies. *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837 (1985). The date of applicability of Section 1995.260 is December 5, 1985, the date of the *Kendall* opinion. If there is a sublease on or after December 5, 1985, under a lease executed before that date, the rights as between the parties to the sublease are governed by Section 1995.260. See Section 1995.020(b) ("lease" means lease or sublease).

Section 1995.270 also recognizes the effect of the Court of Appeal case of *Cohen v. Ratinoff*, 147 Cal. App. 3d 321, 195 Cal. Rptr. 84 (1983), which foreshadowed *Kendall* and was announced on September 23, 1983. Under this section, the parties are presumed to have acted with knowledge of *Cohen*; however, the presumption is limited to a presumption affecting the burden of producing evidence.

Limitation of retroactive operation of Section 1995.260 is supported by the public policy stated in subdivision (a) of Section 1995.270, including the need for foreseeability, reliance, and fairness, and is consistent with case law expressly limiting retroactivity of *Kendall*. See Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 Loy. L.A.L. Rev. 405, 433-35 (1989); *Kendall*, *supra*, 40 Cal. 3d at 507-11 (dissent); *Kreisher v. Mobil Oil Corporation*, 198 Cal. App. 3d 389, 243 Cal. Rptr. 662 (1988), review denied May 5, 1988.

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CA LAW REV. COMMISSION

APR 12 1989

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April 12, 1989

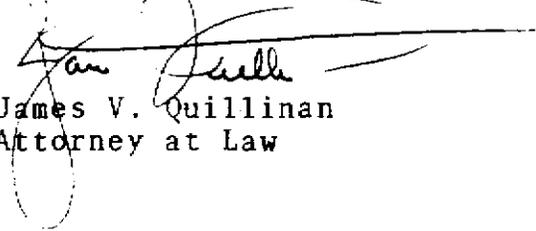
John H. DeMouly  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

Re: LRC Memos 89-41

Dear John:

I have enclosed copies of Team 3's report on memo 89-41. The report has not been reviewed by the Executive Committee and represent the opinions of the author only. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

  
James V. Quillinan  
Attorney at Law

JVQ/h1  
Encls.  
cc: Valerie Merritt  
Terry Ross Irv Goldring

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April 11, 1989

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BY FEDERAL EXPRESS

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

Re: State Bar Comments -- 89-41

Dear Jim:

This will respond to the revisions to 21307,  
concerning no-contest clauses.

In its conference call, Team 3 sought to clear up  
a perceived ambiguity with respect to whom the  
"directions" in (b) are given. We would suggest that (b)  
should read "A person who gave directions to the  
draftsperson of the instrument concerning dispositive or  
other substantive contents of the provision or who  
directed the draftsperson to include the no-contest clause  
. . ." This aligns the description of the person defined  
in (b) with the exception contained in the last half of  
the sentence, where similarly the draftsperson receives  
equivalent instructions from the transferor.

James V. Quillinan, Esq.  
April 11, 1989  
Page 2

In other respects we are in agreement with the language.

Sincerely,



Anne K. Hilker  
Captain, Team 3

AKH:bm

cc: Nathaniel Sterling, Esq.  
H. Neal Wells, Esq.  
Andrew S. Garb, Esq.  
Charles G. Schulz, Esq.  
Leonard W. Pollard, II, Esq.  
John A. Gromala, Esq.  
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OUR REF. NO.

April 12, 1989

John H. De Mouilly, Esq.  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Study L-1036  
Compensation of Attorney, Advisors and Others;  
Compensation of Personal Representative

Dear Mr. De Mouilly:

I am writing on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (the "Committee").

We have the following comments regarding the presently proposed legislation:

I. Notice of Proposed Hiring and Paying of Expert Included in Notice of Death.

The Commission's recommendation includes a provision to be added to the Independent Administration of Estates Act permitting the personal representative to give a Notice of Proposed to Action with respect to the hiring and payment of the estate attorney or other person hired by the personal representative. We concur in this recommendation and believe this will give both the attorney (or other expert) and the beneficiary an opportunity to be advised of the proposed compensation at an early time in the course of the administration. However, the Committee believes consideration should be given to including in the published and mailed Notice of Death, a notice of the proposed hiring and paying of the attorney or other expert. The Notice would invite any interested party to object to the proposed agreement and/or compensation at the time of the hearing on the Petition for Probate. In the event of an unresolved objection, then the proposed estate attorney (or other expert) could opt not to accept appointment on the occasion of the hearing of the original Petition.

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John H. De Mouilly, Esq.  
Executive Director  
California Law Revision Commission  
April 12, 1989

The Committee proposes the presently mandated "Notice of Death" be titled "Notice of Death and Proposed Hiring and Paying of Experts to Assist in Administration of Estate". The published and mailed Notice should provide that a copy of the Petition for Probate and Fee Agreement can be obtained by contacting the attorney for the personal representative named in the Notice. If this Notice is mailed to a person who fails to object to the proposed hiring and fee agreement, that person would waive the right to have the Court later review the action. Proposed §10585.5 would also apply to require a Notice of Proposed Action if the compensation will exceed the estimate set forth in the Proposed Fee Agreement.

II. Necessity of Filing Copy of Written Fee Contract.

Proposed §10585.5(a)(2) provides that a copy of the written Fee Contract shall be attached to the Notice of Proposed Action. This would require the filing of the Fee Agreement with the Court at the time of filing the Notice of Proposed Action. This Committee would suggest that the Section be amended to provide for the written Fee Contract "to be served with" the Notice of Proposed Action as opposed to "attached to" the Notice of Proposed Action. This would prevent the Fee Agreement from becoming part of the Court file, and would protect the confidentiality of the Fee Agreement and disclosure to other than interested parties.

III. Section 10954, Contents of Report on Waiver of Account.

Section 10900 includes new language requiring fee information in the report accompanying the Final Account. However, §10954 has been amended deleting the fee information upon a Waiver of Account.

We agree that if the beneficiaries and other interested parties have already waived any objection to the compensation, there is no necessity to report the amount paid from Estate funds to the attorney or other advisors. However, the beneficiaries, creditors, and other interested parties must have an opportunity to seek Court review (pursuant to §9684) of the payment of compensation under the following circumstances:

a) If there has been no Notice of Proposed Action under §§10580(b) and 10585.5; or

b) If there was a Notice, but the total compensation exceeds the last previous estimate (as in §10585.5(b)).

PAGE 3

John H. De Mouilly, Esq.  
Executive Director  
California Law Revision Commission  
April 12, 1989

Thank you for your consideration of these suggestions.

Very truly yours,



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

DEL/smt  
[EXPRTFEE.LTR:s]

APR 12 1989

## ZETTERBERG, PERSIMMON &amp; GOLDMAN

STEPHEN H. ZETTERBERG  
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TELEPHONE (714) 62-2971RECEIVED  
OF COUNSEL  
CATHERINE M. GOLDMAN

April 8, 1989

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, Ca. 94303-4739

Dear Commission Members:

RE: Proposal for "Hiring and Paying" Attorneys. (A.B. 158)

Symposium lecturer Michael Whalen said you would (still) be open to comments. I am embarrassed not to have made myself aware of your proposal earlier, and sent you comments before. But I suppose anything I might say, or have said, has been better said before. But let me try - at least a few comments. If you are digging into a beehive you won't mind being reminded that bees sting.

1. I asked Ann Stodden why the L.A. Clerk's office now does most probate orders. She replied, "because the attorneys don't." Once the petition (for whatever) is approved and a minute order made, I'm sure some attorneys have simply gone on to other endeavors. So Ann and her colleagues in other counties have a job to make us do our job. How much worse will her job be if 10,000 lawyers can make 10,000 agreements for probate fees, all for pay-as-you-go? Will there be a common hold-back to keep us on the job? "Ridiculous," called out one attorney at the symposium.

2. Questions at the symposium showed that lawyers will propose hourly rates under the prospective "contract." How much probate work is worth the lawyer's hourly rate? A live client can say, "never mind; don't do it; at your hourly it would cost too much!" But in probate it has to be done. Isn't the present system supposed to keep the lid on fees? Will an hourly "agreement" protect the estate better under the proposal? Will the (obvious) goal of cutting probate costs be realized?

3. What about small estates? Surely you are aware of the two toughest problems. First, to get a bank or trust company to be the personal representative. They will tell you "No. Why should we take it? We lose money!" Second, to get a competent substitute for a professional. You usually end up with a relative with no

experience. So who does the work? The lawyer. Ironically the proposed law leaves the percentage fee intact for the fiduciary, including Uncle Joe, but not for the lawyer. So what is the lawyer's remedy? Contract for his hourly rate? Withdraw under Section 9685? Neither is practical if you are the family attorney. More important, what is best for the estate? Hourly pay? Competitive bidding? Or a uniform fee schedule that is a "lid?"

"No matter," said one corporate probate attorney at the symposium, "we make it up on other family business. They are used to paying our hourly." Not so with the small firms and small estates.

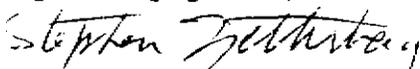
4. A real beehive of problems is set up under Section 9683. When is an attorney to be paid out of the estate and when out of the personal representative's "own funds?" The personal representative's compensation (commission?) is preserved intact. Maybe we can get Probate Policy Memoranda to define in detail what is lawyer work and what is Uncle Joe's job as executor. Is this going to be one to negotiate with Uncle Joe, or will the issues be served up to the courts to decide, estate by estate?

5. What happens if no contract is negotiated with the personal representative, or with the deceased in his will? Will it be a "reasonable value of attorneys' services" situation, to be decided, case by case, by the court?

Has any study been made of the experience in other States? What are the fees by law elsewhere? What is the experience with compensation by contract in other probate jurisdictions? It is conventional wisdom that one should "avoid probate." I sense that the proposed law is partly the result of acceptance of this "conventional wisdom." But is it wisdom?

You say that big estates overpay lawyers, but that little estates underpay. Are you proposing anything that will correct these inequities? Is there not a way to accomplish your goals without injecting a whole new array of litigations into the system? Is there merit in retaining the old Probate Code Section 901 as an alternative? Otherwise, will you not end up underpaying the lawyer on the little estate and overpaying on the big estates, yet accomplishing less efficiency, less manageability, in the statewide probate system?

Very truly yours,

  
Stephen I. Zetterberg

California Law Revision Commission  
April 8, 1989  
Page 3.

cc:Micheal Whalen  
Ann Stodden  
L.A. County Bar

CA LAW REV. COMM'N

APR 10 1989

RECEIVED

## M E M O R A N D U M

TO: JAMES V. QUILLINAN  
IRWIN D. GOLDRING  
STERLING L. ROSS

FROM: VALERIE J. MERRITT *VJM*

DATE: APRIL 6, 1989

RE: CALIFORNIA LAW REVISION COMMISSION  
MEMORANDUM 89-36 ON NEWEST REVISED DRAFT  
RECOMMENDATION RELATING TO TRUSTEE'S FEES

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Team 2 has reviewed this memorandum, and believes that this revised draft is less beneficial to the beneficiaries of trusts than the prior version. It sets up a procedure which can not accomplish the goals of beneficiaries at low cost and without court intervention so well as prior versions. However, we are also not so naive as to think any proposal will pass which generates the adamant opposition of the California Bankers Association. Since that organization has apparently endorsed the essence of this concept, we will focus the balance of our comments to the current proposal.

While this issue arose in the context of fee increases by trust companies, we should not lose sight of the possibility that individual trustees may also charge high and unreasonable fees. Some have been known to charge fees that equal or exceed the fees of trust companies and then perform less services. Similarly, when the currently acting trustee is charging an unreasonably high fee, it may be that the most appropriate successor trustee is not another trust company but a qualified individual, such as an accountant, business advisor, or close friend of the family. Frequently small trusts can be managed easily by a certified public accountant for a fee that is less than the minimum fee charged by any of the available trust companies. Some areas of the state have only one trust company acting, and there is no potential successor if the statute does not allow the successor to be an individual. This failure of the proposal to address the entire range of trustees--individuals as well as trust companies--is a major defect in our view.

Specific changes to broaden the scope of the proposal would be to change the wording of §15660 (c) to delete the words "trust company" on the second and third lines and replace them with "successor trustee". Similarly, throughout the provisions of Sections 15700-15703, including the heading, the references to

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Irwin D. Goldring  
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Executive Committee  
April 7, 1989  
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trust companies should be deleted. The heading could indicate "to Successor Trustee", and references to "the acting trustee" and "the proposed successor trustee" could replace references to "trust company" currently found in the provisions. A minor additional change would be to delete the word "identified in the request" from §15702(b)(4) as it may work an injustice if the request identifies Trust Company A and Trust Company A is acquired by Trust Company B during the pendency of the matter and the order is in favor of Trust Company B. There may be other circumstances where this limitation might also prove to work an injustice.

There is a typographical error in §15660(d) on the 5th line. It should read "original number or ...."

While we have been sympathetic to the desire of trustees to set a ceiling on potential exemplary damages, we believe the wording of proposed §16443 is too narrow. By limiting damages to three times the liability under §16440, it may limit the damages to an amount less than three times actual damages. Other measures of actual damages are provided in §§16441 and 16442. We would like to see the cross-reference expanded or the section reworded to refer to "compensatory damages" or "actual damages," or another concept that is already fairly well understood by courts as it is used in other contexts.

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CA LAW REV. COMM. N.

March 14, 1989

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Suite D-2  
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Re: LRC Memo 89-22 - Trustees' Fees  
and PR

Dear John:

The Beverly Hills Bar Association Legislative Committee of the Probate, Estate Planning and Trust Section, has reviewed the above memo regarding trustees fees and has the following suggestions and comments:

A. Probate Code Section 15691.

The Committee agreed that de minimus increases in the trustees' fees should not require compliance with Article 6 requiring notice and review of fee increases.

Increases in hourly rate or transaction charges may in a particular trust constitute either a large or small part of the total trustees' fee charged. Therefore, in determining whether an increase is de minimus, the appropriate figure to compare the increase to is the total trustees' fee.

We feel that the statute as presently drafted is not sufficiently sensitive to these factors, because it refers to charges in the aggregate and it does not include, among the fees which may be de minimus, hourly charges. We believe in most trusts hourly charges will be de minimus and, therefore, they should be referred to in this section.

In order to prevent successive de minimus increases in fees from occurring over a number of years, we also believe a concept of a base year should be introduced into the section, so that total increase over the base year is taken into account. We therefore recommend that Section 15691 be revised to read as follows:

"15691. Notwithstanding any provision in the trust:

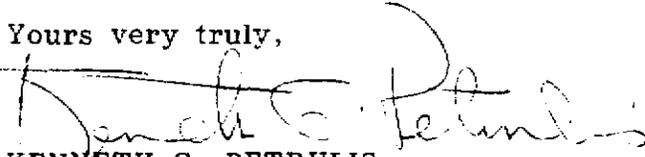
"(a) Subject to subdivision (b), the trustee may increase the trustee's fee only after compliance with this article or pursuant to a court order.

"(b) The requirement of subdivision (a) does not apply to hourly rate or transaction charges in either of the following circumstances:

"(1) Where the aggregate amount of increase in transaction charges and hourly charges ... over the base year of the trust does not exceed five percent of the total trustee's fee charged ..... during ... the prior year. For purposes of this subsection, the base year is the year in which the trustee first charged a fee or last gave notice under Section 15692 of this Article.

"(2) Where the aggregate amount of transaction charges in the current fiscal year of the trust does not exceed the aggregate amount of transaction charges charged the trust in the preceding fiscal year of the trust."

Yours very truly,



KENNETH G. PETRULIS

Former Chair

BEVERLY HILLS BAR ASSOCIATION

Probate, Trust and Estate Planning

Legislative Committee

cc: David E. Lich  
Barbara J. Bailey  
Peter Kaplan  
Herb Graham  
James Stewart  
Phyllis Cardoza