

<p><i>DATE & TIME:</i></p> <ul style="list-style-type: none"> • September 13 (Thursday) 11:00 am - 6:00 pm • September 14 (Friday) 9:00 am - 3:00 pm 	<p><i>PLACE:</i></p> <ul style="list-style-type: none"> • Concord Holiday Inn 1050 Burnett Ave. Concord, CA 94520 (415) 687-5500
<p><i>NOTE:</i> Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. IF YOU PLAN TO ATTEND THE MEETING, PLEASE CALL (415) 494-1335 AND YOU WILL BE NOTIFIED OF LATE CHANGES.</p>	

REVISED FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

THURSDAY, SEPTEMBER 13 (11:00 am - 6:00 pm)

1. MINUTES OF July 26-27, 1990, COMMISSION MEETING (sent 8/10/90)

2. ADMINISTRATIVE MATTERS

Commission Budget

Oral Report and Handout at Meeting (JHD)

Communications from Interested Persons

3. ADMINISTRATIVE LAW

STUDY N-104 - ADMINISTRATIVE ADJUDICATION: CONTROL OF ALJ CAREER PATH
Memorandum 90-127 (NS) (sent 8/24/90)

STUDY N-105 - ADMINISTRATIVE ADJUDICATION: EFFECT OF ALJ DECISION
Consultant's Background Study
Memorandum 90-112 (NS) (sent 8/21/90)
First Supplement to Memorandum 90-112 (NS) (sent 9/10/90)

STUDY N-100 - ADMINISTRATIVE ADJUDICATION GENERALLY
Draft of Statute
Memorandum 90-113 (NS) (sent 8/24/90)

4. STUDY L-2011 - NEW PROBATE CODE

Urgency Cleanup Bill

Memorandum 90-115 (JHD) (sent 8/24/90)

First Supplement to Memorandum 90-115 (JHD) (Handout at Meeting)

Revised and Supplemental Comments

Memorandum 90-128 (JHD) (sent 8/27/90)

5. PROBATE MATTERS BEING FINALIZED FOR 1991 LEGISLATIVE SESSION

STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

Tax Litigation Issue

Memorandum 90-121 (SU) (sent 8/10/90)

STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS

Draft of Recommendation

Memorandum 90-120 (SU) (sent 8/24/90)

6. PROBATE TENTATIVE RECOMMENDATIONS FOR 1991 LEGISLATIVE SESSION

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

Comments on Tentative Recommendation

Memorandum 90-90 (RJM) (sent 8/24/90)

STUDY L-3038 - ELIMINATION OF SEVEN-YEAR LIMIT FOR DURABLE POWERS
OF ATTORNEY FOR HEALTH CARE

Comments on Tentative Recommendation

Memorandum 90-92 (RJM) (sent 8/21/90)

STUDY L-700 - COMPENSATION OF COUNSEL IN GUARDIANSHIP AND
CONSERVATORSHIP PROCEEDINGS

Comments on Tentative Recommendation

Memorandum 90-94 (RJM) (sent 8/21/90)

STUDY L-1030 - DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

Comments on Tentative Recommendation

Memorandum 90-95 (RJM) (sent 8/21/90)

First Supplement to Memorandum 90-95 (sent 9/07/90)

Second Supplement to Memorandum 90-95 (RJM) (Handout at
Meeting)

7. OTHER PROBATE MATTERS FOR FUTURE LEGISLATIVE SESSIONS

STUDY L-3040 - COMMUNITY PROPERTY PRESUMPTION FOR JOINT TENANCY
UPON DEATH

Manner of Proceeding on Study

Memorandum 90-107 (NS) (sent 8/27/90)

STUDY L-3034 - GIFTS IN VIEW OF DEATH

Draft of Tentative Recommendation

Memorandum 90-97 (RJM) (sent 8/29/90)

STUDY L-3025 - TOD REGISTRATION FOR VEHICLES AND VESSELS
Comments of Affected State Agencies
Memorandum 90-43 (RJM) Comments of DMV (sent 8/21/90)

8. STUDY F-672 - PERSONAL INJURY DAMAGES AS COMMUNITY OR SEPARATE PROPERTY

Memorandum 90-70 (RJM) (sent 8/21/90)
First Supplement to Memorandum 90-70 (sent 8/29/90)
Second Supplement to Memorandum 90-70 (RJM) (Handout at Meeting)

9. CIVIL PROCEDURE MATTERS

STUDY J-501 - DISCOVERY AFTER JUDICIAL ARBITRATION
Comments of Interested Organizations
Memorandum 90-87 (RJM) (sent 8/27/90)
First Supplement to Memorandum 90-87 (RJM) (Handout at Meeting)

STUDY J-501 - RUNNING OF FIVE-YEAR DISMISSAL STATUTE IN ARBITRATION
Memorandum 90-104 (RJM) (sent 8/10/90)

FRIDAY, SEPTEMBER 14 (9:00 am - 3:00 pm)

10. ADMINISTRATIVE MATTERS

Approval of Actions of Subcommittee on Thursday, September 13

Meeting Schedule for 1991
Memorandum 90-111 (NS) (sent 8/10/90)

12. REVIEW OF LEGISLATIVE ACTION ON 1990 LEGISLATIVE PROGRAM

Generally
Memorandum 90-114 (JHD) (sent 8/24/90)

Study L-1036 - Probate Attorney Fees (Assembly Bill 831)
First Supplement to Memorandum 90-114 (JHD) (sent 8/24/90)

Study L-3022 - Access to Decedent's Safe Deposit Box (Senate Bill 1775)
Memorandum 90-118 (RJM) (sent 8/21/90)

Study L-3007 - In-Law Inheritance (Assembly Bill 2589)
Memorandum 90-117 (JHD) (sent 8/27/90)

13. PROBATE TENTATIVE RECOMMENDATIONS FOR 1991 LEGISLATIVE SESSION

STUDY L-3046 - RECOGNITION OF AUTHORITY OF AGENT UNDER STATUTORY
FORM POWER OF ATTORNEY

Draft of Tentative Recommendation

Memorandum 90-119 (SU) (sent 8/27/90)

STUDY L-100 - ALTERNATE BENEFICIARIES FOR UNCLAIMED DISTRIBUTION

Comments on Tentative Recommendation

Memorandum 90-93 (RJM) (sent 8/27/90)

First Supplement to Memorandum 90-93 (sent 9/5/90)

Second Supplement to Memorandum 90-93 (RJM) (Handout at
Meeting)

STUDY L-3013 - UNIFORM STATUTORY RULE AGAINST PERPETUITIES

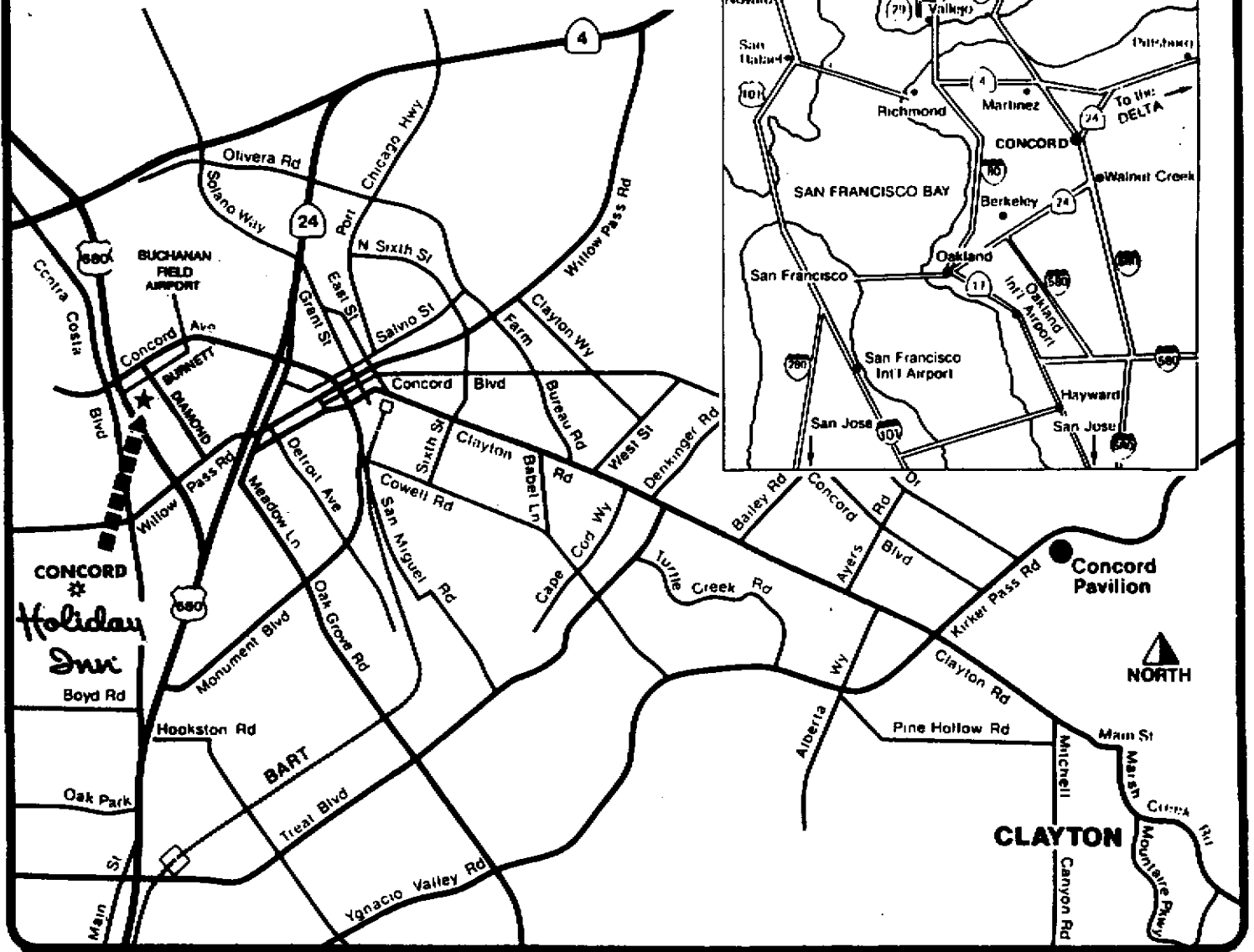
Comments on Tentative Recommendation

Memorandum 90-126 (SU) (sent 9/4/90)

First Supplement to Memorandum 90-126 (SU) (Handout at Meeting)

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CONCORD, CALIFORNIA



Climate: Average yearly temperature ranges between 46° and 73°

Size: 32 Square Miles

Elevation: 72 Ft.

Contra Costa County's largest city with over 110,000 residents

Located 26 miles northeast of San Francisco and 435 miles north of Los Angeles

Located near the intersections of Highways 680, 24 and 4, which provides direct access to the major metropolitan and recreational areas

From Concord, You Are: 45-50 minutes from the Wine Country
 30-35 minutes from Oakland Airport
 40-45 minutes from San Francisco Airport

Landmark: Concord is nestled in the foothills of Mt. Diablo, which majestically rises 3,849 feet to its summit. The Mt. Diablo State Park provides a relaxing area for visitors.

CONCORD HOLIDAY INN

1050 Burnett Ave./Concord, CA 94520/(415) 687-5500/Calif. Toll Free 1-800-368-9090

MEETING SCHEDULE

September 1990

Sep. 13 (Thurs.) 11:00 a.m. - 6:00 p.m. Concord

Sep. 14 (Fri.) 9:00 a.m. - 3:00 p.m.

October 1990

Oct. 11 (Thurs.) 10:00 a.m. - 6:00 p.m. Fresno

Oct. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

November 1990

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

Nov. 30 (Fri.) 9:00 a.m. - 2:00 p.m.

December 1990 No Meeting

1990 LEGISLATIVE PROGRAM

Measures Introduced at Request of Law Revision Commission

Enacted

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

As enacted, new probate code becomes operative only if AB 831 (probate attorney fees) is enacted. AB 831 is dead. Senate Bill 1775 has been amended to make the new code become operative on July 1, 1991, even though Assembly Bill 831 is dead, and to insert in the new code the substance of existing law relating to probate attorney fees. **CORRECTED CHAPTERED BILL PRINTED ON 4-12-90.**

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

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

1990 Stats. Res. Ch. 53 - SCR 76 (Lockyer) Resolution to Continue
Authority to Study Previously Authorized Topics

Passed Both Houses and Sent to Governor for Approval

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

This bill effectuates two recommendations, one proposing the Uniform Statutory Powers of Attorney Act and the other relating to springing powers of attorney. Bill was amended to delete provision providing for attorney fees in action against person who unreasonably refuses to honor power of attorney. This amendment was necessary to eliminate opposition of California Bankers Association and California Land Title Association. **AMENDED May 29, 1990.**

Senate Bill 2649 (Morgan) Uniform Management of Institutional Funds Act
AMENDED MAY 30, 1990.

Senate Bill 1775 (Lockyer) Comprehensive Probate Bill

This bill would effectuate seven Commission recommendations:

- (1) *Survival Requirement for Beneficiary of Statutory Will.*
- (2) *Execution or Modification of Lease Without Court Order.*
- (3) *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding.*
- (4) *Court-Authorized Medical Treatment.*

- (5) *Priority of Conservator or Guardian for Appointment as Administrator.*
- (6) *Notice in Probate Where Address Unknown.*
- (7) *Jurisdiction of Superior Court in Trust Matters.*

Bill has been amended to provide that the new Probate Code (AB 759) will become operative even though Assembly Bill 831 (compensation of estate attorney) is dead and to insert in the new Probate Code the substance of existing law relating to probate attorney fees. Recommended provision relating to access to decedent's safe deposit box was deleted from bill and is to be given further study by the Commission. Bill also would make a number of technical cleanup revisions in new Probate Code.
AMENDED AUGUST 13, 1990.

Dead

Assembly Bill 831 (Harris) Trustees Fees and Attorney Fees

This bill would have effectuated the Commission recommendations concerning trustee fees and attorney fees. Trustee fees provisions are included in new Probate Code and will become operative if new Probate Code becomes operative as provided in SB 1775. Existing law on attorney fees added to new Probate Code by SB 1775. **ASSEMBLY MEMBER HARRIS DROPPED AB 831 AT THE REQUEST OF SENATOR LOCKYER.**

Assembly Bill 2589 (Sher) In-law Inheritance

Amended on March 13 (technical amendment). Bill supported by California Association of Public Administrators, Public Guardians and Public Conservators. Bill opposed by various heir tracers (American Archives Association; Brandenberger & Davis; American Research Bureau; W.C. Cox & Company). State Bar has no position on the bill. **DEFEATED BY 5-4 VOTE IN SENATE JUDICIARY COMMITTEE ON JUNE 19.**

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
SEPTEMBER 13-14, 1990
CONCORD

A meeting of the California Law Revision Commission was held in Concord on September 13-14, 1990.

Commission:

Present:	Roger Arnebergh Chairperson	Arthur K. Marshall
	Bion M. Gregory (Sept. 14) Legislative Counsel	Forrest A. Plant
	Brad R. Hill (Sept. 14)	Sanford M. Skaggs
Absent:	Elihu M. Harris Assembly Member	Edwin K. Marzec Vice Chairperson
	Bill Lockyer Senate Member	Ann E. Stodden

Staff:

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

Consultants:

Michael Asimow, Administrative Law (Sept. 13)
Charles A. Collier, Jr., Probate Law (Sept. 14)
Edward C. Halbach, Jr., Probate Law

Other Persons:

Seymour R. Appleby, California Probate Referees Association, Hayward (Sept. 13)
Camille M. Cadoo, Probate, Trust and Estate Planning Section Legislative Committee, Beverly Hills Bar Association, Beverly Hills
Ronald P. Denitz, Tishman West Companies, Los Angeles (Sept. 13)
Michael R. DiSanto, Chief Administrative Law Judge, California Unemployment Insurance Appeals Board, Sacramento (Sept. 13)
Karl Engeman, Director, Office of Administrative Hearings, Sacramento (Sept. 13)
Ruth Friedman, Association of California State Attorneys and Administrative Law Judges, San Francisco (Sept. 13)
Kristen Haynie, Association of California State Attorneys and Administrative Law Judges, Sacramento (Sept. 13)
Donald B. Jarvis, Administrative Law Judge, National Conference of Administrative Law Judges, and Association of California State Attorneys and Administrative Law Judges, San Francisco (Sept. 13)
Jim Krochka, Executive Committee, Los Angeles County Bar Association, Los Angeles

Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, Sacramento (Sept. 13)
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View (Sept. 13)
Willard A. Shank, Member, Public Employment Relations Board, Sacramento (Sept. 13)
Robert Temmerman, State Bar Estate Planning, Trust and Probate Law Section, Campbell
Stuart A. Wein, Acting Presiding Administrative Law Judge, Occupational Safety and Health Appeals Board, Sacramento (Sept. 13)
Tom Wilcock, Chief Administrative Law Judge, Department of Social Services, Sacramento (Sept. 13)
Shirley Yawitz, California Probate Referees Association, San Francisco

ADMINISTRATIVE MATTERS

APPROVAL OF MINUTES OF JULY 26-27, 1990, MEETING

The Commission approved the Minutes of the July 26-27, 1990, Commission Meeting as submitted by the staff.

APPROVAL OF ACTION OF SUBCOMMITTEE

A quorum not being present, the members of the Commission present on September 13 operated as a subcommittee. The actions of the subcommittee were approved by the Commission on September 14 when a quorum was present. The actions of the Commission reported in these Minutes include actions of the subcommittee that were approved by the Commission on September 14.

SCHEDULE FOR FUTURE MEETINGS

The Commission adopted the following schedule for future meetings. There was general agreement that a change in established meeting dates should be avoided, since any such change causes serious problems for commissioners (and for representatives of other organizations who plan to attend the meeting).

October 1990

Oct. 11 (Thur.) 1:30 p.m. - 6:00 p.m.
Oct. 12 (Fri.) 9:00 a.m. - 2:00 p.m.

San Francisco

November 1990

Nov. 29 (Thurs.) 1:30 p.m. - 6:00 p.m.
Nov. 30 (Fri.) 9:00 a.m. - 2:00 p.m.

Los Angeles

<u>December 1990</u>	No Meeting	
<u>January 1991</u>		San Jose
Jan. 10 (Thur.)	1:30 p.m. - 6:00 p.m.	
Jan. 11 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>February 1991</u>		Los Angeles
Feb. 21 (Thur.)	1:30 p.m. - 6:00 p.m.	
Feb. 22 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>March 1991</u>	No Meeting	
<u>April 1991</u>		Fresno
Apr. 11 (Thur.)	1:30 p.m. - 6:00 p.m.	
Apr. 12 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>May 1991</u>		Los Angeles
May 9 (Thur.)	1:30 p.m. - 6:00 p.m.	
May 10 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>June 1991</u>		Sacramento
June 13 (Thur.)	1:30 p.m. - 6:00 p.m.	
June 14 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>July 1991</u>		San Diego
July 18 (Thur.)	1:30 p.m. - 6:00 p.m.	
July 19 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>August 1991</u>	No Meeting	
<u>September 1991</u>		San Francisco
Sep. 12 (Thur.)	1:30 p.m. - 6:00 p.m.	
Sep. 13 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>October 1991</u>		Sacramento
Oct. 10 (Thur.)	1:30 p.m. - 6:00 p.m.	
Oct. 11 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>November 1991</u>		Los Angeles
Nov. 14 (Thur.)	1:30 p.m. - 6:00 p.m.	
Nov. 15 (Fri.)	9:00 a.m. - 2:00 p.m.	
<u>December 1991</u>	No Meeting	

BUDGET FOR 1991-92 FISCAL YEAR

The Executive Secretary reported that the Legislature approved an appropriation for the Commission for 1990-91 of \$660,000, which was approved by the Governor. However, pursuant to a provision of the budget bill, this amount has been reduced by \$20,000, thereby leaving insufficient funds to add another member temporarily to the legal staff for one year as would have been authorized under the \$660,000

appropriation. The Department of Finance has deleted the temporary one-year legal staff position from the budget for 1991-92 leaving a proposed expenditure of \$627,000 for the 1991-92 fiscal year, and it is likely that this amount will be reduced by 3 percent (\$19,000), leaving a proposed budget for the 1991-92 fiscal year of \$608,000.

The relevant budget materials (handed out and approved at the meeting) are attached as Exhibit 1. Pursuant to this decision, the Commission will submit to the Department of Finance a proposed 1991-92 budget that is the same as the revised budget for 1990-91.

1990 LEGISLATIVE PROGRAM

The Commission reviewed the staff report in Memorandum 90-114 concerning the legislative action on the Commission's 1990 legislative program:

1. **Compensation of Attorneys and Personal Representatives**, 20 Cal. L. Revision Comm'n Reports 31 (1990). Enacted in part (compensation of personal representatives). 1990 Cal. Stat. ch. 79. For further discussion, see discussion *infra* under Study L-1036 - Probate Attorney Fees (Assembly Bill 831).
2. **Notice to Creditors**, 20 Cal. L. Revision Comm'n Reports 165 (1990); 20 Cal. L. Revision Comm'n Reports 507 (1990). Enacted in part. 1989 Cal. Stat. ch 544. Remainder enacted. 1990 Cal. Stat. ch. 140.
3. **Trustees' Fees**, 20 Cal. L. Revision Comm'n Reports 279 (1990). Enacted. 1990 Cal. Stat. ch. 79. (An amendment to a Financial Code section was not enacted in 1990 but will be proposed by the staff for enactment in 1991.)
4. **Springing Powers of Attorney**, 20 Cal. L. Revision Comm'n Reports 405 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1777].
5. **Uniform Statutory Form Powers of Attorney Act**, 20 Cal. L. Revision Comm'n Reports 415 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1777].
6. **Disposition of Small Estate by Public Administrator**, 20 Cal. L. Revision Comm'n Reports 529 (1990). Enacted. 1990 Cal. Stat. ch. 324.
7. **Court-Authorized Medical Treatment**, 20 Cal. L. Revision Comm'n Reports 537 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
8. **Survival Requirement for Beneficiary of Statutory Will**, 20 Cal. L. Revision Comm'n Reports 549 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].

9. **Execution or Modification of Lease Without Court Order**, 20 Cal. L. Revision Comm'n Reports 557 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
10. **Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding**, 20 Cal. L. Revision Comm'n Reports 565 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
11. **Repeal of Probate Code Section 6402.5 (In-Law Inheritance)**, 20 Cal. L. Revision Comm'n Reports 571 (1990). Not enacted. For further discussion, see discussion *infra* under Study L-3007 - In-Law Inheritance (Assembly Bill 2589).
12. **Access to Decedent's Safe Deposit Box**, 20 Cal. L. Revision Comm'n Reports 597 (1990). Not enacted. For further discussion, see discussion *infra* under Study L-3022 - Access to Decedent's Safe Deposit Box (Senate Bill 1775).
13. **Priority of Conservator or Guardian for Appointment as Administrator**, 20 Cal. L. Revision Comm'n Reports 607 (1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
14. **New Probate Code**, 20 Cal. L. Revision Comm'n Reports 1001 (1990). Enacted. 1990 Cal. Stat. ch. 79.
15. **Notice in Probate Where Address Unknown**, 20 Cal. L. Revision Comm'n Reports 2145 (1990), to be published in Annual Report (December 1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
16. **Jurisdiction of Superior Court in Trust Matters**, 20 Cal. L. Revision Comm'n Reports 2153 (1990), to be published in Annual Report (December 1990). Enacted. 1990 Cal. Stat. ch. [SB 1775].
17. **Uniform Management of Institutional Funds Act**, 20 Cal. L. Revision Comm'n Reports 2165 (1990), to be published in Annual Report (December 1990). Enacted. 1990 Cal. Stat. ch. [SB 2649].

**STUDY F-672 - PERSONAL INJURY DAMAGES AS
COMMUNITY OR SEPARATE PROPERTY**

The Commission considered Memorandum 90-70 and the First and Second Supplements concerning personal injury damages as community or separate property. The Commission decided to take no further action on this proposal.

STUDY H-112 - COMMERCIAL LEASE LAW: USE RESTRICTIONS

During the "Communications from Interested Persons" the Commission received a request from Ronald P. Denitz of Tishman West Companies that the Commission reconsider its recommendation relating to use restrictions in commercial real property leases. The Commission decided to schedule consideration of this matter at its next meeting for the limited purpose of deciding whether to expand the Comment to proposed Civil Code Section 1997.040 (effect of use restriction on remedies for breach) to add the following paragraph:

The circumstances that may be considered in determining the reasonableness of enforcement of a use restriction for purposes of this section include the following and all other relevant circumstances whether of a similar or dissimilar character:

(1) The landlord's desire to preserve or encourage a so-called "tenant mix" in a shopping center.

(2) The landlord's intent to preclude commercial uses in a residential building or complex (or vice versa).

(3) The landlord's intent to preclude medical arts uses in an almost exclusively business-use office building (or vice versa).

(4) The fact that a proposed use by a prospective new tenant would require an "exclusive" or contravene a pre-existing "exclusive" already possessed by, or promised to, another party.

(5) The fact that a proposed use is already prohibited by an outside party (e.g. a mortgagee or ground lessor or landlord) under whom the landlord holds.

STUDY J-501 - DISCOVERY AFTER JUDICIAL ARBITRATION

The Commission considered Memorandum 90-87, the attached staff draft of a *Tentative Recommendation Relating to Discovery After Judicial Arbitration*, and the First Supplement. The Commission approved the proposal for printing, and directed the staff to seek to have the Assembly Committee on Judiciary include it in their procedural cleanup bill.

STUDY J-501 - RUNNING OF FIVE-YEAR DISMISSAL STATUTE
IN ARBITRATION

The Commission considered Memorandum 90-104 concerning running of the five-year dismissal statute in arbitration cases. The Commission asked the staff to prepare a memorandum on the effect of the five-year dismissal statute in the following cases:

(1) In contractual arbitration, what happens if no suit is filed and arbitration does not proceed? When is the suit barred?

(2) In contractual arbitration, what happens if suit is filed but is not brought to trial within the five-year period?

(3) In contractual arbitration, what happens if suit is filed and is stayed pending arbitration, but the arbitration case is not brought to hearing?

(4) In judicial arbitration, what happens if suit is filed but the case is not prosecuted diligently and no order is obtained referring the case to arbitration?

(5) In judicial arbitration, what happens if suit is filed and the case is ordered to arbitration, but the arbitration case is not brought to hearing?

STUDY L-100 - ALTERNATE BENEFICIARIES FOR
UNCLAIMED DISTRIBUTION

The Commission considered Memorandum 90-93, the attached *Tentative Recommendation Relating to Alternate Beneficiaries for Unclaimed Distribution*, the attached letters commenting on the tentative recommendation, and the First Supplement with a letter from the California Controller's Office. The Commission decided to table the proposal, and to consider it again in a year or so when the state's fiscal situation may have improved.

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

The Commission considered Memorandum 90-90. The representative of the State Bar Estate Planning, Trust and Probate Law Section reported that the State Bar Board of Governors still opposes the provision for filing a notice of transfer of estate planning documents with the State Bar because of its cost implications. The Commission asked the staff to revise the *Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney* that was on the agenda for the May-June meeting but was not considered by the Commission in detail. The tentative recommendation should be revised to delete the provision for filing the notice of transfer with the State Bar. Instead the tentative recommendation should provide for filing of the notice with the county clerk in each county where the transferring lawyer or law firm maintains an office, and should provide a filing fee that will cover the costs. The staff should bring the revised tentative recommendation back for Commission consideration.

STUDY L-644 - RECOGNITION OF TRUSTEES' POWERS

The Commission considered Memorandum 90-120 and the draft *Recommendation Relating to Recognition of Trustees' Powers*. The Commission also considered a letter from Lisa Alexander on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association which was distributed at the meeting. (See Exhibit 2.) Because the draft varies substantially from the tentative recommendation distributed in March, the Commission directed the staff to distribute the new draft as a tentative recommendation with a quick return date so that comments may be considered in time to submit a recommendation to the 1991 Legislature. The draft was approved with the addition of the following to the Comment to Probate Code Section 18100.5: "A declaration under penalty of perjury may be used instead of an affidavit. See Code Civ. Proc. § 2015.5; see also Code Civ. Proc. § 2015.6 (affirmation instead of oath)."

STUDY L-700 - COMPENSATION OF COUNSEL IN
GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

The Commission considered Memorandum 90-94, the attached *Tentative Recommendation Relating to Compensation of Counsel in Guardianship and Conservatorship Proceedings*, and the attached letters commenting on the tentative recommendation. The Commission made the following decisions:

Probate Code § 1470. Discretionary appointment of legal counsel

A new subdivision (e) should be added to Probate Code Section 1470 to read substantially as follows:

(e) If a guardian or conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.

Probate Code § 1472. Compensation of mandatory court-appointed counsel

The following should be added to the Comment to Section 1472:

Although Section 1472 requires the court to fix compensation of counsel "upon conclusion of the matter," this does not prevent the court from making an award of compensation during the pendency of the guardianship or conservatorship proceeding. See W. Johnstone, G. Zillgitt, & S. House, *California Conservatorships* § 4.57, at 197-98 (2d ed., Cal. Cont. Ed. Bar 1983). The "matter" to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

Probate Code § 2640. Petition by guardian or conservator of estate

Probate Code Section 2640 should be added to the tentative recommendation and amended as follows:

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services rendered in that capacity to that time.

(2) The guardian or conservator of the person for services rendered in that capacity to that time.

(3) The attorney for services rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) such compensation requested in the petition as the court determines is just and reasonable to the guardian or conservator of the estate for services rendered in that capacity or to the guardian or conservator of the person for services rendered in that capacity, or to both, and (2) such compensation requested in the petition as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both. The compensation so allowed shall thereupon be charged to the estate. The compensation allowed to the guardian or conservator of the person and the guardian or conservator of the estate may, in the discretion of the court, include compensation for services rendered before the order of appointment. Legal services for which the attorney may ~~apply to the court for compensation~~ be compensated include those services rendered by any paralegal performing the legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

Comment. Subdivision (c) of Section 2640 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2641 (compensation of guardian or conservator).

Subdivision (c) is also amended to delete the former reference to compensation for which the attorney may "apply to the court." Under Section 2640, the application to the court for the attorney's compensation is made by the guardian or conservator of the estate, not by the attorney.

Probate Code § 2641. Petition by guardian or conservator of person

Probate Code Section 2641 should be added to the tentative recommendation and amended as follows:

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time in such capacity.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate. The compensation allowed to the guardian or conservator of the person may, in the discretion of the court, include compensation for services rendered before the order of appointment.

Comment. Section 2641 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2640 (compensation of guardian or conservator).

Title of Recommendation

The title of the recommendation should be revised to read: "Recommendation Relating to Compensation in Guardianship and Conservatorship Proceedings." This is because the recommendation has been expanded to apply to compensation of the guardian and conservator, as well as to compensation of counsel.

Narrative Portion of Recommendation

On page 3 of the tentative recommendation, the words "against overaggressive counsel" should be deleted.

Approval of Recommendation

The Commission approved the recommendation for printing with the foregoing revisions.

STUDY L-1030 - DISPOSITION OF SMALL ESTATE WITHOUT PROBATE

The Commission considered Memorandum 90-95, the attached *Tentative Recommendation Relating to Disposition of Small Estate Without Probate*, the attached letters commenting on the tentative recommendation, and the First and Second Supplements. The Commission made the following decisions:

Probate Code § 13101. Furnishing affidavit or declaration

Proposed new subdivision (e) to Section 13101, which would require a copy of the will to be attached to the affidavit or declaration, should be deleted.

Probate Code § 13107.5. Substitution of parties without probate

The staff should review the question of whether Section 13107.5 is still needed in view of the Commission's *Recommendation Relating to Litigation Involving Decedents*. If Section 13107.5 is still needed, it should be conformed to that recommendation.

"Less" Liens and Encumbrances

The references in Sections 13110, 13111, 13205, and 13206 to "excluding" liens and encumbrances to determine value should be revised to read "less" liens and encumbrances. Cf. Prob. Code § 13112.

Technical Corrections Suggested by Richard Kinyon

The Commission approved the following technical corrections and drafting changes suggested by attorney Richard Kinyon (shown in double underscore):

Probate Code § 13006. Successor of the decedent

13006. "Successor of the decedent" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of property of the decedent under the decedent's will. For the purposes of this part, the trustee of ~~a trust created during the decedent's lifetime~~ is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will.

(b) If the decedent died without a will, the sole person or all of the persons who succeeded to the particular item of property of the decedent under Sections 6401 and 6402 or, if the law of a sister state or foreign nation governs succession to the particular item of property, under the law of the sister state or foreign nation.

Probate Code § 13051. Guardians, conservators, trustees, custodians, sister state personal representatives

13051. For the purposes of this part:

(a) A The guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) A The trustee of a trust ~~created during the decedent's lifetime~~ may act on behalf of the trust. In the case of a trust that is subject to continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9, the trustee may act on behalf of the trust without the need to obtain approval of the court.

(c) If the decedent's will ~~nominates~~ authorizes a custodian ~~to receive a devise to a beneficiary~~ under the Uniform Gifts to Minors Act or the Uniform Transfers to

Minors Act of any state and ~~the nomination has not been revoked to receive a devise to a beneficiary~~, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

(d) A sister state personal representative may act on behalf of the beneficiaries as provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.

(e) The attorney in fact authorized under a durable power of attorney may act on behalf of the beneficiary giving the power of attorney.

Comment. Subdivision (b) of Section 13051 is amended to eliminate the restriction that the trust must be created during the decedent's lifetime. This deletion allows the trustee of a testamentary trust by whomever created ~~in the decedent's will~~ to act on behalf of the trust. This permits the trustee to use a small estate summary procedure where no proceeding is being or has been conducted in California for administration of the decedent's estate or where the decedent's personal representative has consented to use of the procedure. See Sections 13101(a)(4), 13108(a)(2), 13150(b), 13200(a)(7). See also Section 13006 ("successor of the decedent" defined).

Probate Code § 13101. Furnishing affidavit or declaration

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) Either of the following, as appropriate:
 - (A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
 - (B) "The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration."
- (5) "The current gross fair market value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.
- (7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(8) Either of the following, as appropriate:

(A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."

(9) "No other person has a right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and of Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(e) If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, a copy of the consent and of the personal representative's letters shall be attached to the affidavit or declaration.

Probate Code § 13111. Restitution if estate proceeding commenced or on request of personal representative

13111. (a) Subject to the provisions of this section, if proceedings for the administration of the decedent's estate are commenced in this state, or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after it was delivered or transferred to the person, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from ~~that~~ the property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, valued~~ determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding less any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the ~~fair market value, valued~~ determined as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding less the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

Probate Code § 13154. Court order

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) ~~that--no~~

administration of the decedent's estate is necessary if the petition so requests, that personal property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property.

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) Whichever of the following is appropriate:

(A) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) The decedent's personal representative has consented in writing to use of the procedure provided by this chapter.

(4) The real property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisal that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, exceeds sixty thousand dollars (\$60,000).

Probate Code § 13200. Filing affidavit in superior court; inventory and appraisal

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section ~~13209~~ 1001 stating all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) A legal description of the real property and the interest of the decedent therein.

(4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.

(5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding

the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

(7) Either of the following, as appropriate:

(A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(B) "The decedent's personal representative has consented in writing to use of the procedure provided by this chapter."

(8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The inventory and appraisal of the real property shall be made as provided in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) ~~If the person or persons executing the affidavit claim affiant claims under the decedent's will and no estate proceeding is pending or has been conducted in California,~~ a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. If the decedent's personal representative has consented in writing to the use of the procedure provided by this chapter, a copy of the consent and of the personal representative's letters shall be attached to the affidavit.

(f) The affiant shall mail a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

Probate Code § 13206. Restitution if estate proceeding commenced or on request of personal representative

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided

by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is ~~the fair market value, valued~~ determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, ~~excluding less~~ the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is ~~the fair market value, valued~~ determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, ~~excluding less~~ the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, ~~valued~~ determined as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued determined as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Approval to Print

The Commission approved the tentative recommendation as thus revised for printing.

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

The Commission considered the First Supplement to Memorandum 90-114 and the attached draft of legislation that would effectuate the Commission's recommendation with respect to probate attorney fees. This legislation was redrafted to reflect that the provisions of the recommendation dealing with compensation of the personal representative were enacted in Assembly Bill 759 (bill which enacted the new Probate Code).

The Commission decided that it will not take any action with respect to probate attorney fees at the 1991 legislative session. This will leave the field to consumer groups or others that desire to

sponsor legislation on this subject. If legislation on this subject is not enacted in 1991, the Commission will then consider what action, if any, it will take with respect to its agreed fee recommendation.

The Commission decided not to publish the draft attached to the First Supplement to Memorandum 90-114. The urgency bill for 1991 will continue the existing fee schedule provisions, and an organization that desires to revise the law in this area will need to obtain the enactment of legislation to accomplish their objective. Those persons will have available the staff draft since the material considered at a Commission meeting is a public record, but the draft should not be published since the Commission will not be sponsoring legislation in 1991 on probate attorney fees.

STUDY L-2011 - URGENCY PROBATE CLEANUP BILL

The Commission considered Memorandum 90-115 and the First Supplement to Memorandum 90-115. The Commission reviewed the technical urgency bill (attached to Memorandum 90-115) which would make a number of technical revisions and corrections in the new Probate Code. The staff indicated that any additional typographical and other technical errors discovered in the new Probate Code also will be corrected in the urgency bill. In addition, the urgency bill will adjust the new Probate Code to reflect amendments and additions to the repealed Probate Code made by legislation enacted in 1990 by bills not recommended by the Commission. The Commission approved the urgency bill for submission to the 1990 legislative session.

STUDY L-2011 - REVISED AND SUPPLEMENTAL COMMENTS TO NEW PROBATE CODE

The Commission considered Memorandum 90-128 and the attached Revised and Supplemental Comments to the New Probate Code. The Commission approved the Revised and Supplemental Comments to the New Probate Code for publication.

STUDY L-3007 - IN-LAW INHERITANCE (ASSEMBLY BILL 2589)

The Commission considered Memorandum 90-117 relating to Assembly Bill 2589, the bill introduced to effectuate the Commission's recommendation to repeal the so-called in-law inheritance statute.

After considerable discussion and a review of the possible revisions of the in-law inheritance statute noted in Memorandum 90-117, the Commission decided to sponsor a bill in 1991 to again propose repeal of the in-law inheritance statute. The representative of the Estate Planning, Trust and Probate Law Section indicated that the Section supports the repeal of the statute. The Commission requested that the Probate and Trust Law Section of the Los Angeles County Bar Association and the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association review the issue with a view to supporting the repeal of the in-law inheritance statute.

STUDY L-3013 - UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The Commission considered Memorandum 90-126 and the First Supplement thereto concerning comments received on the *Tentative Recommendation Relating to Uniform Statutory Rule Against Perpetuities* (March 1990). The Commission approved the recommendation to be printed and submitted to the 1991 Legislature, subject to the following:

Retroactivity. The USRAP rule should apply to nonvested interests regardless of whether they are created by instruments executed before or after the operative date. The recommendation will be revised to implement this policy based on the alternate provision set out in the Note following Section 21202 on page 20 of the tentative recommendation.

USRAP § 1(e): Disposition of two-pronged perpetuity saving clauses. The recommendation should include a provision to deal with two-pronged perpetuity saving clauses based on USRAP Section 1(e). The uniform act language should be revised for clarity and to take account of the comments of Professor Dukeminier in his letter attached to the First Supplement to Memorandum 90-126. The staff will work with Professor Edward Halbach and Charles Collier, Jr., the Commission's consultant on this subject, to revise this language. The revised draft

will be circulated to the Commissioners and if there are any problems, the draft will be presented at the next meeting for further consideration before the recommendation is printed.

Duration of trusts. Probate Code Section 21230 in the tentative recommendation should be revised as proposed on pages 10-11 of Memorandum 90-126, by omitting subdivision (a) and continuing subdivisions (b) and (c) as Sections 15413 and 15414 in the Trust Law. Section 15414 should be revised as follows:

§ 15414 (added). Termination of trust after perpetuities period

15414. Notwithstanding any other provision in this chapter, if a trust continues in existence after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11, the trust may be terminated in either of the following manners:

(1) On ~~the~~ request petition of a majority of the beneficiaries.

(2) On petition of the Attorney General or of any person who would be affected by the termination, if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Treatment of executory interests and options. The staff should prepare a draft tentative recommendation, separate from the USRAP recommendation, concerning appropriate treatment of executory interests and options. It is anticipated that this would probably involve expansion of the marketable title statute to deal more consistently with these interests.

Honorary trusts. Probate Code Section 15210 should be revised to provide that a trust for the care of a specific domestic or pet animal may be performed by the trustee for the life of the animal, rather than for 21 years.

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

The Commission considered Memorandum 90-118 concerning access to decedent's safe deposit box, and a letter from Kathryn Ballsun for Team 4 of the State Bar Estate Planning, Probate and Trust Law Section which

was handed out at the meeting. A copy of the letter is attached to these Minutes as Exhibit 3. The Commission approved proposed new Section 331 of the Probate Code in the following form:

Probate Code § 331 (added). Access to decedent's safe deposit box

331. (a) This section applies only to a safe deposit box in a financial institution held by the decedent in the decedent's sole name, or rented by the decedent and others where all are deceased.

(b) A person who has a key to the safe deposit box may, before letters have been issued, obtain access to the safe deposit box only for the purposes specified in this section by providing the financial institution with both of the following:

(1) Proof of the decedent's death. Proof shall be provided by a certified copy of the decedent's death certificate or by a written statement of death from the coroner, treating physician, or hospital or institution where decedent died.

(2) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this paragraph if the requirements of Section 13104 are satisfied.

(c) The financial institution has no duty to inquire into the truth of any statement, declaration, certificate, affidavit, or document offered as proof of the decedent's death or proof of identity of the person seeking access.

(d) When the person seeking access has satisfied the requirements of subdivision (b), the financial institution shall do all of the following:

(1) Keep a record of the identity of the person.

(2) Permit the person to open the safe deposit box under the supervision of an officer or employee of the financial institution, and to make an inventory of its contents.

(3) Make photocopies of all wills and instructions for the disposition of the decedent's remains found in the safe deposit box, and keep the photocopies on file for a period of five years. The financial institution may charge the person given access with a reasonable fee for photocopying.

(4) After photocopying, permit the person given access to keep the wills and instructions for the disposition of the decedent's remains.

(e) The person given access shall deliver all wills found in the safe deposit box to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary as provided in Section 8200.

(f) Except as provided in subdivision (d), the person given access shall not remove any of the contents of the decedent's safe deposit box.

(g) Nothing in this section prevents collection of a decedent's property pursuant to Division 8 (commencing with Section 13000).

Comment. Section 331 is new, and permits a person who has a key to a decedent's safe deposit box to gain immediate access in order to obtain a copy of the decedent's wills, remove instructions for disposition of the decedent's remains, and inventory the contents of the box. If no other directions have been given by the decedent, the right to control the disposition of the decedent's remains devolves, in order, on the surviving spouse, children, parents, other kindred, and the public administrator. Health & Safety Code § 7100.

If the person seeking access does not have a key to the safe deposit box and is not the public administrator, the person must obtain letters from the court to gain access to the box. Concerning the authority of the public administrator, see Section 7603.

Subdivision (e) requires the person given access to deliver the wills to the clerk of the superior court and mail or deliver a copy to the person named in the will as executor or beneficiary "as provided in Section 8200." Section 8200 requires the custodian to deliver the will to the clerk of the superior court in the county in which the estate of the decedent may be administered, and to mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the custodian. For the county in which the estate of the decedent may be administered, see Sections 7051 (for California domiciliary, county of domicile), 7052 (nondomiciliary). See also Sections 40 ("financial institution" defined), 52 ("letters" defined), 88 ("will" includes a codicil).

The staff should prepare this as a Tentative Recommendation and send it out for comment.

STUDY L-3025 - TOD REGISTRATION OF VEHICLES AND VESSELS

The Commission considered Memorandum 90-43, the attached staff draft concerning TOD registration of vehicles and vessels, and letters from the Department of Motor Vehicles and Department of Housing and Community Development. The representative of the State Bar Estate Planning, Probate and Trust Law Section expressed concern about the potential liability of a TOD transferee arising from an accident immediately after death of the owner and before the TOD transferee is aware that ownership has passed under the TOD designation. The staff should include a statutory provision protecting the TOD transferee from

liability until title is transferred to the TOD transferee. This is consistent with what appears to be existing law. See Veh. Code § 17150 ("owner" liable); Bunch v. Kin, 2 Cal. App. 2d 81, 85, 37 P.2d 744 (1934) ("owner" in this context means "registered owner").

With this revision, the Commission approved the staff draft for distribution for comment.

STUDY L-3034 - GIFTS IN VIEW OF DEATH

The Commission considered Memorandum 90-97 and the attached staff draft of a *Tentative Recommendation Relating to Gifts in View of Death*. The Commission made the following decisions:

§ 5701. Application of general law of gifts

The following should be added to the Comment to Section 5701:

The same essentials of intent, delivery, and acceptance apply to a gift in view of death as to gifts of personal property generally. 4 B. Witkin, *supra*. Thus, for example, a verbal gift is not valid unless the means of obtaining possession and control of the property are given, or, if the property is capable of delivery, unless there is actual, constructive, or symbolic delivery of the property to the donee. See Civ. Code § 1147.

§ 5702. Gift in view of death defined

Section 5702 and Comment should be revised as follows:

5702. A gift in view of death is one which is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes from the peril.

Comment. Section 5702 continues the substance of former Section 1149 of the Civil Code, with two exceptions:

(1) Section 5702 is phrased in terms of condition subsequent rather than condition precedent. If the giver intends the gift to become absolute only upon the giver's death, with title passing at the instant of death (condition precedent), the gift is testamentary. J. Cribbett & C. Johnson, *Principles of the Law of Property* 156 (3d ed. 1989). In such cases, the courts hold the attempted gift in view of death to be ineffective, and the property must be restored to the decedent's estate. See *Yates v. Dundas*, 80 Cal. App. 2d 468, 182 P.2d 305 (1947). If the condition is

subsequent, with the donee's title vesting immediately on delivery, subject to revocation if the giver survives the peril, the gift is not testamentary and can be sustained. J. Gribbett & C. Johnson, *supra*; see Yates v. Dundas, *supra*.

(2) Section 5702 defines a gift in view of death as one made in contemplation, fear, or peril of "impending" death. This codifies case law. See, e.g., Rosenberg v. Broy, 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103 (1961); 4 B. Witkin, *Summary of California Law Personal Property* § 108, at 100 (9th ed. 1987). This negates a possible construction that a gift in view of death is any gift made in contemplation of death, whether imminent or remote, such as a gift to reduce estate taxes or to avoid probate. Cf. *In re Estate of Pauson*, 186 Cal. 358, 199 P. 331 (1921) (construing inheritance tax law).

A gift in view of death of community or quasi-community property is subject to the rights of the giver's spouse. See Civ. Code § 5125; Prob. Code §§ 100-102.

To make an effective gift in view of death, the giver must have legal capacity. *LaMar v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 Cal. 252, 22 P.2d 689 (1933); see *Larsen v. Van Dieken*, 34 Cal. App. 2d 352, 93 P.2d 563 (1939).

A gift in view of death is not nullified because the giver dies by suicide. *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 130, 336 P.2d 975 (1959).

With these revisions, the Commission approved the tentative recommendation for distribution for comment.

STUDY L-3038 - SEVEN-YEAR LIMIT ON
DURABLE POWER OF ATTORNEY FOR HEALTH CARE

The Commission considered Memorandum 90-92, the attached *Tentative Recommendation Relating to Elimination of Seven-Year Limit on Durable Power of Attorney for Health Care*, and the attached letters commenting on the tentative recommendation. The Commission made the following decisions:

(1) The staff should make sure that if the principal designates his or her spouse as attorney in fact under a durable power of attorney for health care and the power does not expressly provide otherwise, dissolution of marriage revokes the designation of the spouse. [This is now the law. Prob. Code §§ 2355, 2437.]

(2) The last sentence of the Comment to Civil Code Section 2436.5 should be deleted. That sentence reads: "A durable power of attorney for health care is also revoked by death of the principal or attorney in fact. Civ. Code §§ 2355, 2356."

The Commission authorized the staff to make these revisions without bringing the recommendation back to the Commission, and approved it for printing as revised.

STUDY L-3040 - COMMUNITY PROPERTY PRESUMPTION
FOR JOINT TENANCY PROPERTY UPON DEATH

The Commission considered Memorandum 90-107. The Commission directed the Executive Secretary to execute a contract on behalf of the Commission with Professor Jerry Kasner to prepare a background study on how joint tenancy property held by married persons should be treated upon the death of one of the spouses, including but not limited to whether there should be a community property presumption for joint tenancy property upon death. The study would be due on August 31, 1991. The compensation for the study would be \$5,000, and the contract should provide for travel expenses of the consultant in attending Commission meetings and legislative hearings at the Commission's request.

STUDY L-3046 - RECOGNITION OF AGENT'S AUTHORITY
UNDER STATUTORY FORM POWER OF ATTORNEY

The Commission considered Memorandum 90-119 and the draft *Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney*. The Commission approved the tentative recommendation to be distributed for comment with a quick return date so that comments may be considered in time to submit a recommendation to the 1991 Legislature.

STUDY L-3018 - LITIGATION INVOLVING DECEDENTS

The Commission considered Memorandum 90-121 concerning the tax litigation issue. The Commission also considered a letter from Lisa Alexander on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association which was distributed at the meeting. (See Exhibit 4.) The Commission approved the proposed revisions of Code of Civil Procedure Sections 377.310 and 377.320 and their Comments as set out in the memorandum. These changes will be incorporated in the *Recommendation Relating to Litigation Involving Decedents* which was approved to print at the July 1990 meeting.

STUDY N-104 - ADMINISTRATIVE ADJUDICATION:
CONTROL OF ALJ CAREER PATH

The Commission considered Memorandum 90-127, relating to the possibility of external control of administrative law judge pay raises and promotions, similar to the federal system. The Commission decided not to devote further resources to this matter.

STUDY N-105 - ADMINISTRATIVE ADJUDICATION:
EFFECT OF ALJ DECISION

The Commission considered Memorandum 90-112 and the attached background study prepared by Professor Asimow titled "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs", along with the First Supplement to Memorandum 90-112. The Commission requested the staff to prepare for the next meeting, for review by the Commission and interested persons, a draft that would embody the following recommendations by Professor Asimow:

(1) Agency heads could hear cases themselves, but all agencies could delegate the initial hearing to hearing officers for preparation of an initial decision.

(2) Agencies would have the power to delegate final (rather than merely initial) decisionmaking authority to hearing officers, either in classes of cases or on a case-by-case basis. Agencies could make the review of initial decisions discretionary rather than available as a matter of right. The reviewing function could be delegated to subordinate appellate officers or to panels of agency heads.

(3) The existing provisions relating to petitions for reconsideration would be revised to permit the administrative law judge to make corrections of errors in the proposed decision for a period following issuance of the proposed decision.

(4) Agency heads could summarily approve all proposed hearing officer decisions. The parties would be entitled to receive a copy of an initial decision and file briefs with the agency prior to summary approval.

(5) Hearing officers would be required to identify findings based substantially on credibility. Reviewing courts would be required to give great weight to hearing officer credibility determinations.

The draft should also preclude the agency from rehearing the case de novo after hearing before an administrative law judge, but should not preclude the agency from remanding for further proceedings before the administrative law judge; the grounds for remand (e.g., newly discovered evidence) should be specified.

The draft is only for purposes of focusing discussion and consideration of the issues and does not represent a Commission determination of policy on any of the issues.

APPROVED AS SUBMITTED _____

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

Date

Chairperson

Executive Secretary

EXHIBIT 1

PROPOSED BUDGET FOR 1991-92

	Actual 1989-90	Budgeted 1990-91	Revised 1990-91	Proposed* 1991-92
<u>PERSONAL SERVICES</u>				
Authorized Positions	\$367,316	\$446,000	\$426,000	\$414,000
Staff Benefits	91,420	100,000	100,000	97,000
Estimated Salary Savings		(15,000)	(15,000)	(13,000)
TOTAL PERSONAL SERVICES	458,576	531,000	511,000	498,000
<u>OPERATING EXPENSE AND EQUIPMENT</u>				
General Expense	11,052	12,000	12,000	12,000
Printing	24,335	24,000	24,000	24,000
Communications - Telephone	2,006	2,000	2,000	2,000
Postage	11,192	9,000	9,000	9,000
Travel-in-State	11,968	14,000	14,000	14,000
Travel-Out-of-State	683	2,000	2,000	2,000
Facilities Operations	17,364	18,000	18,000	18,000
Cont.& Prof. Services-Interdept.	19,000	19,000	19,000	19,000
Cont.& Prof. Services-External	11,000	22,000	22,000	22,000
Data Processing	8,450	7,000	7,000	7,000
Equipment	7,700	0	0	0
TOTAL OPERATING EXPENSE AND EQUIPMENT	124,750	129,000	129,000	129,000
TOTALS	583,326	660,000	640,000	627,000*
Reduction per § 3.80 of Senate Bill 899		(20,000)		
<u>TOTAL AGENCY EXPENDITURES</u>	583,326	640,000	640,000	627,000**

* These represent projected figures, and do not include any additional amounts that may be provided by the Department of Finance for operating expense increases or for the 5% general salary increase scheduled for January 1991.

** It is likely that this \$627,000 will be reduced by 3% in the same manner as our current year budget. Such reduction would be in the amount of \$19,000, and would reduce our budget to \$608,000.

FILLED, AUTHORIZED, AND PROPOSED POSITIONS

CLASS TITLE	Filled 1989-90	Authorized 1990-91	Proposed 1991-92
Commission Members (7) - per diem.....	--	--	--
Executive Secretary.....	1	1	1
Assistant Executive Secretary.....	1	1	1
Staff Counsel.....	1.8	3	2
Associate Governmental Program Analyst..	1	1	1
Composing Technician II.....	0.4	1	1
Office Technician - General.....	0.3	1	1
Sr. Word Processing Technician.....	0.6	0	0
Word Processing Technician.....	0.5	0	0
Temporary Help Blanket.....	0.3	1	1
TOTALS - AUTHORIZED POSITIONS.....	6.9	9	8

Proposed Text for Governor's Budget
[Showing changes from last year's language]

The primary objective of the California Law Revision Commission is to study the statutory and decisional law of this state to discover defects and anachronisms, and to recommend legislation to effect needed reforms.

The Commission consists of a member of the Senate, a member of the Assembly and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel is an ex officio member of the Commission.

The Commission assists the Legislature in keeping the law up to date by studying complex and controversial subjects, identifying major policy questions for legislative attention, gathering the views of interested persons and organizations, and drafting recommended legislation for legislative consideration. The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems in preparing background studies, resolving intricate legal problems, and drafting needed legislation. The Commission thus enables the Legislature to accomplish legal reform that otherwise might not be made because of the heavy demands on legislative time. In some cases the Commission's study discloses that no new legislation on a particular topic is needed, thus avoiding the need for further study.

The Commission may only study only topics that the Legislature authorizes by concurrent resolution. The Commission currently has an agenda of 25 26 topics, ~~one of which was added by the Legislature in 1988.~~

~~In 1989 the Commission recommended four bills to improve probate law and procedure, one bill to correct miscellaneous creditors' remedies problems, and one bill to codify the law governing assignment and sublease of commercial real property leases. Five bills were enacted; the sixth bill will be acted on in 1990.~~

In 1990, more than 4000 statute sections were affected by legislation enacted upon Commission recommendation. The enacted legislation included a new Probate Code.

~~In 1991, the Commission plans to recommend the enactment of a new Probate Code, to replace the existing Probate Code. The Commission also plans to work on administrative procedure, on a new family relations code, and on issues related to other topics.~~

In 1991, the Commission plans to work on administrative procedure, on a new Family Code, on probate law, and on issues related to other topics.

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September
11th
1990

WRITER'S DIRECT DIAL NUMBER

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OUR FILE NUMBER

600,000-004

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: Stan Ulrich

Re: Study L-644, Memo 90-120
Recognition of Trustee's Powers

Ladies and Gentlemen:

The Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association, has reviewed and discussed the above Memo and approves of the revised recommendation to provide for reliance on a trustee's affidavit. However, we suggest that the proposed legislation be revised to provide for the execution of either an affidavit or declaration under penalty of perjury under the laws of the State of California. We would recommend offering the proposed legislation in the 1991 Legislative Session and not waiting for the completion of the revision of the Power of Attorney provisions.

Very truly yours,

LISA ALEXANDER
Chair
Legislative Committee
Probate, Trust & Estate Planning Section
Beverly Hills Bar Association

cc: Phyllis Cardoza, Administrative Vice Chair,
Legislative Committee

Kenneth G. Petrulis, Esq., Chair of PTEP Section

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PLEASE REFER TO
FILE NO.

Team4.011.L7

September 11, 1990

Valerie Merritt, Esq.
Kindel & Anderson
555 S. Flower Street
29th Floor
Los Angeles, CA 90071

BY FAX

RE: Law Revision Commission Memorandum [REDACTED]
Access to Safety Deposit Box

Dear Valerie:

On September 10, 1990, Team 4 (Clark Byam, Lloyd Homer, Harley Spitler, James Quillinan and I), discussed the above-referenced Law Revision Commission Memorandum. Team 4 approves of the apparent compromise set forth in the memorandum concerning a bank's responsibilities for estate planning documents in its possession. Thus, Team 4 urges the Commission to accept and adopt the recommendation.

Thank you for your consideration.

Cordially

Kathryn A. Ballsun (gls)

KATHRYN A. BALLSUN
A Member of
Stanton and Ballsun
A Law Corporation

KAB\tc

cc: Team 4 (By FAX)
Terry Ross, Esq. (By FAX)

EXHIBIT 4
O'MELVENY & MYERS

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OUR FILE NUMBER
600,000-004

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attention: Stan Ulrich

Re: Study L-3018, Memos 90-81 and 90-121
Litigation Involving Decedents

Ladies and Gentlemen:

The Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association, has reviewed and discussed the above Memos, and supports the Tentative Recommendation, as revised in response to the concerns raised by Paul Gordon Hoffman concerning federal tax litigation, without change.

We do not believe the Commission should impose a 40-day delay on the ability of a decedent's successor in interest to commence or to continue an action unless there is some built-in safeguard to provide for the situation where the statute of limitations is near expiration and immediate action is necessary. Such a built-in safeguard would address Mr. Howard Serbin's very valid concern that an heir who may not act in the estate's best interest could present an affidavit and commence an action or proceeding to continue a pending action or proceeding as the decedent's successor in interest before a personal representative could be appointed.

We agree with the Staff that where a successor in interest is reluctant or unwilling to assume a decedent-plaintiff's role in litigation, a special administrator should be appointed rather than forcing the unwilling successor to take on the burden of litigation.

Very truly yours,



LISA C. ALEXANDER
Chair
Legislative Committee
Probate, Trust & Estate Planning Section
Beverly Hills Bar Association

PC:abt

cc: Phyllis Cardoza, Administrative Vice Chair,
Legislative Committee
Kenneth G. Petrulis, Esq., Chair of PTEP Section