

Third Supplement to Memorandum 88-43

Subject: Study L-1036/1055 - Compensation of Personal Representative
and Estate Attorney

Attached to this Supplement are five letters from attorneys concerning the staff draft attached to the basic memo:

Exhibit 1: Letter of 6/14/88 from Charles Collier for the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.

Exhibit 2: Letter from Luther Avery.

Exhibit 3: Letter from Jeffrey Dennis-Strathmeyer.

Exhibit 4: Letter from David Adelson.

Exhibit 5: Letter of 6/22/88 from Charles Collier.

These letters are discussed below.

Written Agreement for Legal Services

Mr. Collier (Exhibit 1) states the unanimous view of the Executive Committee that the provisions in the staff draft concerning the written agreement for legal services in probate (proposed Sections 10820-10823) be deleted. Instead, the Executive Committee wants to revise Business and Professions Code Section 6148 to apply to probate. A draft is attached to Mr. Collier's letter.

The staff finds the Executive Committee draft flawed for the following reasons:

(1) It fails to carry out the Commission's decision to require the attorney to disclose to the personal representative that the fee is negotiable and that they may agree to a fee lower than the statutory fee.

(2) It proposes to revise the general attorney fee statute (Bus. & Prof. Code § 6148), which may go beyond the Commission's authority to study topics. (Although in 1988 the Commission asked the Legislature for new authority to study attorney's fees, the resolution was amended at the urging of the California Trial Lawyers Association to limit it to the question of shifting attorney's fees between litigants.)

(3) It merely requires the contract to contain the "hourly rate or other standard or statutory rates, fees and charges," and lacks the detailed information about the statutory fee for the estate attorney

provided in Sections 10821 and 10822.

(4) If the attorney fails to comply with the written contract requirement, existing law allows the attorney a reasonable fee. Staff-proposed Section 10820 provides that on noncompliance the reasonable fee shall not exceed the statutory fee. The Executive Committee draft provides that for noncompliance the statutory fee is presumed reasonable. This would effectively gut the statute, because there would be no penalty for noncompliance unless the presumption is overcome.

Mr. Collier says the Commission decided to put the written contract and disclosure provisions for probate in the Business and Professions Code. On the contrary, at the May meeting the Commission agreed with staff that the provisions should be carefully tailored for probate, and therefore should be in the Probate Code. This is reflected in the May Minutes (page 6):

The required contents of the contract between estate attorney and personal representative should be in the Probate Code. The general contract requirement in Section 6148 of the Business and Professions Code should make a cross-reference to the Probate Code contract requirement.

The revised draft attached to the basic memo (88-43) carries out this decision (proposed Sections 10820-10823). The staff thinks this decision was sound.

Negotiability of Fee

In Mr. Collier's second letter (Exhibit 5), he says he would delete the portion of the second sentence of proposed Section 10832 which provides that "[t]he personal representative and the attorney may agree that the attorney will receive less than the statutory compensation for services."

At the March meeting, the Commission decided to require the estate attorney to disclose to the personal representative that the fee is negotiable, notwithstanding the statutory fee schedule. Consistent with that decision, proposed Section 10821 requires the written fee contract to contain a statement that the "attorney and client may agree that the attorney will receive less than the statutory compensation." Since that advice is required, it seems desirable to have a substantive provision in the statute making clear that the fee is negotiable.

Attorney David Adelson (Exhibit 4) objects to requiring disclosure that the fee is negotiable. He says it "is an unnecessary thrust in the direction of more consumerism." His argument is that on estates of less than \$200,000, the fee is already too low. This, when combined with the fact that the estate attorney usually ends up doing most of the work of the personal representative, makes mandatory disclosure of negotiability another adverse pressure on the overworked, underpaid probate attorney.

The staff supports the Commission's decision to require disclosure. The fee is negotiable under existing law. The attorney is a fiduciary. Particularly where there is a statutory fee, the attorney's fiduciary role makes it important that the attorney advise the personal representative fully concerning the fee system.

Contingent Fee Contracts

Mr. Avery (Exhibit 2) wants to provide that the estate can hire an attorney for a fee contingent on the recovery of assets for the estate. The staff recommends against doing this for the following reasons.

Litigation to recover an asset of the estate is an extraordinary service. See Prob. Code §§ 902, 910; Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.28 (Cal. Cont. Ed. Bar 1987).

A contingent fee contract between the personal representative and estate attorney for services to the estate is invalid. Estate of Kerr, 63 Cal. 2d 875, 878, 409 P.2d 931, 48 Cal. Rptr. 707 (1966); Estate of Hastings, 108 Cal. App. 2d 713, 716, 239 P.2d 684 (1952); Estate of Rowe, 66 Cal. App. 2d 594, 152 P.2d 765 (1944); *In re Estate of McDonald*, 37 Cal. App. 2d 521, 99 P.2d 1115 (1940); Feinfeld, *supra*, § 20.5. Such a contract is against public policy. Estate of Hastings, *supra* at 717.

Instead, the attorney should petition for fees for extraordinary services. In fixing the amount of the award for extraordinary services, the court may consider the difficulty of the tasks performed and results achieved. Feinfeld, *supra*, § 20.31. If the attorney recovers property for the estate and seeks fees for extraordinary services, the award may approximate the amount the attorney would have

earned under an invalid contingent fee contract. See *Estate of Hastings, supra*.

In view of the foregoing, the staff recommends against changing existing law by authorizing contingent fee contracts between the personal representative and estate attorney.

Attorney Fees in Will Contests

Mr. Avery (Exhibit 2) says the "law should make clear whether an attorney for a will contested can recover fees from the estate and, if yes, under what circumstances." In all cases, including will contests, the probate court has broad discretion to order attorney fees to be paid "out of the assets of the estate, as justice may require." Prob. Code § 1282; *Feinfield, supra*, § 20.46. Under Section 1282 (formerly Section 1232), the court has

discretion to order costs to appointed executors when there is a successful contest after probate [citation omitted] and to unsuccessful proponents where there is a successful contest before probate and the legatees or executors acted in good faith and upon probable cause in proposing the will for probate. [Citation omitted.] The discretionary power extends to and includes the case of an unsuccessful contestant, but such cases are limited to rare instances of great hardship in which the contestant acted in the utmost good faith throughout the proceeding.

Estate of Bloom, 107 Cal. App. 3d 195, 201, 165 Cal. Rptr. 591 (1980). Perhaps we should make a cross-reference to Section 1282 and to the *Bloom* case in one or more Comments in the staff draft.

When the estate attorney defends against a will contest, the attorney may be entitled to compensation for extraordinary services. Extraordinary services include "good faith defense of a will which is contested after the will is admitted to probate," and "successful defense of a will which is contested before the will is admitted to probate." Prob. Code § 902. Section 902 is superseded in the staff draft by proposed Section 10831. Section 10831 does not continue the examples in Section 902 of what constitutes extraordinary services. Instead, examples are given in the Comment.

The Comment refers to "[s]uccessful defense of a will contest" as an example of an extraordinary service, citing *In re Estate of Dunton*, 15 Cal. App. 2d 729, 731-33, 60 P.2d 159 (1936). The *Dunton* case involved a will contest after the will was admitted to probate. The

Comment does not mention a will contest before probate. This should be corrected by adding to the Comment a citation to Estate of Schuster, 163 Cal. App. 3d 337, 209 Cal. Rptr. 289 (1984) (defense of will contest before probate).

It may be risky to rely on cases decided under Section 902 after it is repealed and replaced by Section 10831. Several attorneys have urged us to keep in the statute examples of extraordinary services. In an analogous context, the Commission decided to codify matters to be considered by the court in fixing reasonable compensation for extraordinary services (proposed Section 10852). Does the Commission want to reconsider its decision not to codify examples of extraordinary services?

Reduction of Four Percent Rate to Three Percent

As decided by the Commission, the staff draft reduces the four percent fee on the first \$15,000 to three percent. The effect is to simplify the fee calculation, and to reduce the fee of the personal representative and estate attorney by \$150 on estates of \$15,000 or more.

Attorney David Adelson (Exhibit 4) objects to this change. He says it "will increase the burdens that already exist on practitioners who handle small estates." He would either keep the present four percent rate on the first \$15,000 of estate assets, or would adopt a minimum fee of perhaps \$750. Does the Commission want to reconsider its decision on this point?

Compensation for Extraordinary Services Before Final Distribution

Mr. Jeffrey Dennis-Strathmeyer (Exhibit 3) still has a problem with proposed Section 10854, which permits the court to award compensation for extraordinary services before final distribution only (1) when likely that administration will continue for an unusually long time, (2) when present payment will benefit the estate or beneficiaries (e.g., for tax reasons), or (3) when other good cause is shown. He has written before on this section (Exhibit 1 to Second Supplement). In the Second Supplement, the staff said that it found Section 10854 satisfactory.

In his present letter, Mr. Dennis-Strathmeyer says the policy of discouraging an early award of compensation for extraordinary services is because the court can consider whether the fee for ordinary services

is adequate compensation for all services, both ordinary and extraordinary. Estate of Walker, 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832 (1963). The Walker case said that in allowing or disallowing compensation for extraordinary services:

the court may take into consideration all matters relating to the administration of the particular estate, such as the value of the estate, the kind and character of the assets, the effort involved in the care and preservation of estate property, and such other factors as bear upon the labor of and effort of the executor, administrator and attorney in the routine administration of the estate. Finally, the amount of the ordinary fees to which such persons are entitled under the provisions of Sections 901 and 910 may be considered, and if, under all the facts and circumstances bearing upon the administration of the estate, the sum allowed by law as ordinary compensation appears to be adequate, just and reasonable compensation for all services rendered, even though some extraordinary services may have in fact been performed, the probate court may, in the exercise of the discretion conferred upon it by the statute, disallow all claims for extraordinary compensation.

It is apparent that the court can only make this determination at the end of estate administration.

Mr. Dennis-Strathmeyer wants to say in the statute that there is good cause for an early award if the estate attorney shows that the claim for compensation for extraordinary services will not be affected by the fee for ordinary services. The problem with this suggestion is that the Walker rule is potentially applicable in every estate proceeding. Normally, only at the end of administration is it possible to know the Walker rule will not apply. Nonetheless, there may be a rare case where the estate, and therefore the percentage fee for ordinary services, is so small that the percentage fee cannot possibly be adequate compensation for extraordinary services.

If the Commission wants to adopt Mr. Dennis-Strathmeyer's suggestion, the staff would include it in the Comment rather than the statute. We cannot anticipate all the possible variations of the good cause requirement, so any such statement cannot be exhaustive. The staff suggests the following for possible inclusion in the Comment to Section 10854:

The policy of discouraging an early award of compensation for extraordinary services is because the court may consider

whether the statutory percentage fee for ordinary services is adequate compensation for all services, both ordinary and extraordinary. Estate of Walker, 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832 (1963). If the estate attorney can show that the claim for compensation for extraordinary services will not be affected by the fee for ordinary services, such as, for example, where the value of the estate is small and the extraordinary services are extensive, the attorney will have shown the requisite good cause under Section 10854.

Does the Commission want to include such a statement in the Comment?

Mr. Collier (Exhibit 5) would make clear in the statute that an early award of extraordinary compensation may be made "when a particular matter is completed." The staff's problem with this is the same as with Mr. Dennis-Strathmeyer's suggestion -- normally the court should wait until the end of administration to award fees for extraordinary services, because only then can the court consider whether the statutory fee is adequate to cover extraordinary services.

It may be that Section 10854 causes more problems than it solves. If so, the section should be deleted from the staff draft. Does the Commission want to delete proposed Section 10854?

Matters to be Considered by Court in Determining Compensation for Extraordinary Services

Proposed Section 10852 lists matters to be considered by the court in fixing compensation for extraordinary services. One of these is whether the fee for ordinary services is adequate to cover both ordinary and extraordinary services (subdivision (f)). Subdivision (f) comes from Los Angeles County probate rules, and codifies the Walker case, *supra*.

Mr. Collier (Exhibit 5) proposes alternate language which omits subdivision (f). The staff thinks it would be a mistake to omit subdivision (f). It states existing law, and Section 10852 purports to be a complete list of the matters to be considered by the court. The staff sees no justification for omitting this one important element.

Gross Value Used Whether or Not Sale Has Taken Place

Mr. Collier (Exhibit 5) thinks the meaning of and need for the last sentence of subdivision (b) of Section 10830 above (subdivision applies whether or not sale has taken place) is unclear. This sentence continues the last sentence of existing Section 901, and was added to Section 901 in 1965. Before 1965, the usual practice was to use gross

value of real property to calculate the statutory fee unless the property was sold during probate, in which case only decedent's equity in the property was used. Under the 1965 revision, gross value is used whether or not a sale has taken place. Review of Selected 1965 Code Legislation, at 222 (Cal. Cont. Ed. Bar 1965). The last sentence of Section 901 was to make this clear, particularly since the law was being changed. For this reason, this provision should be kept.

Personal Representative's Compensation Provided by Will

Mr. Collier (Exhibit 5) asks whether under proposed Section 10802 the decedent's will may allow more than the statutory compensation for the personal representative. It seems clear that the answer is yes. Proposed Section 10802 continues existing law. Under existing law, if the personal representative is an attorney, the will may override the general policy against compensation in both capacities. See cases cited in Comment to Section 10834. Testator's intent controls over the general policy. Feinfield, *supra*, § 20.10. If the will may allow dual compensation (ordinarily prohibited), it follows that the will may authorize more than the statutory compensation.

Attorney's Compensation Provided by Will

Subdivision (b) of proposed Section 10833 allows the attorney unilaterally to renounce compensation provided by will, and to take the statutory fee instead. It appears the attorney may do this over the objection of the personal representative. A staff note after Section 10833 asks whether subdivision (b) should be replaced by a provision authorizing the personal representative and attorney to agree that the attorney will receive greater compensation than provided in the will (but not necessarily as great as the statutory compensation).

Mr. Collier (Exhibit 5) says the language in the staff note is inadequate because it fails to provide that the statutory fee is an upper limit on such a negotiated fee. However, the proposed introductory clause ("Subject to Section 10832") makes clear that the negotiated fee is subject to the statutory limit in Section 10832.

The policy question remains whether the Commission wants to substitute the language in the staff note for subdivision (b) of Section 10833.

Compensation of Assistants

Mr. Collier (Exhibit 5) is concerned that proposed Section 10804 may restrict the rule that expenses of administration are paid out of

the estate. This section allows the personal representative to hire assistants, but provides for payment out of the estate only if the assistant performs extraordinary services. Mr. Collier says probate courts normally charge the estate for expenses for gardening, pool maintenance, and maintenance of the property pending sale or distribution, even though these are not considered extraordinary services.

The law supports Mr. Collier's view. Expenses of administration are paid out of the estate. Prob Code §§ 11420-11421. Expenses of administration include charges "necessary and proper to preserve the estate." Estate of Sharp, 18 Cal. App. 3d 565, 580-81, 95 Cal. Rptr. 816 (1971). Expenses for gardening, pool maintenance, and maintenance of the property pending sale or distribution, all seem to be charges necessary and proper to preserve the estate, and therefore payable out of the estate.

The staff proposes to make this clear by adding the following to the Comment to Section 10804:

Nothing in Section 10804 changes the rule that expenses necessary and proper to preserve the estate are chargeable against the estate as expenses of administration. Estate of Sharp, 18 Cal. App. 3d 565, 580-81, 95 Cal. Rptr. 816 (1971). This would include such expenses as gardening, pool maintenance, and maintenance of the property pending sale or distribution.

A staff note after Section 10804 asks whether UPC language should be adopted, giving the personal representative broad authority to hire assistants without distinguishing between ordinary and extraordinary services. Mr. Collier (Exhibit 5) thinks the UPC language is unnecessary.

Noncontroversial Technical Revisions

Mr. Collier (Exhibit 5) suggests technical revisions to the staff draft. The staff proposes to make these as indicated in the attachment to this Supplement.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

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



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June 14, 1988

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Section Administrator

PRES ZABLAN-SOBERON

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

Re: Memorandum 88-43 - Personal Representative's
and Attorney's Fees in Probate

Dear Commissioners:

Reference is made to Memorandum 88-43 and, in particular, the portions thereof dealing with compensation of the estate attorney.

The general concept of this Memorandum was discussed at the Executive Committee meeting on May 21. It is the understanding of the Executive Committee that the vote of the Commission was to make reference in the Business and Professions Code to the requirement of a written agreement and that an attorney could accept less than statutory fees for statutory services. Memorandum 88-43 does not reflect that vote, as the provisions relating to a written agreement and acceptance of less than the statutory fee for statutory services is included in proposed Probate Code Sections 10820 through 10823.

Attached hereto is a resolution adopted unanimously by the Executive Committee at its May 21 meeting, which the Executive Committee believes is consistent with the vote of the Commission.

Sincerely,

Charles A. Collier, Jr.
For the Executive Committee

CAC:vjd
Enclosure

cc: D. Keith Bilter, Esq. (w/encl.)
Irwin D. Goldring, Esq. (w/encl.)
James C. Opel, Esq. (w/encl.)
James D. Devine, Esq. (w/encl.)
Valerie J. Merritt, Esq. (w/encl.)
James V. Quillinan, Esq. (w/encl.)

CA LAW REV. COMMISSION

JUN 16 1988

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RESOLUTION ADOPTED UNANIMOUSLY BY
THE EXECUTIVE COMMITTEE, ESTATE
PLANNING, TRUST AND PROBATE LAW
SECTION, AT ITS MEETING ON JUNE
21, 1988

RESOLVED that proposed Part 7 of Division 7 of the Probate Code, Part 7 being entitled "Compensation of Personal Representative and Estate Attorney," be modified as follows:

1. Chapter 2, Article 1, Written Agreement Concerning Legal Fees, Sections 10820-10823 as proposed be deleted in its entirety.

2. That the subheading "Article 2, Compensation to Estate Attorney" be deleted as no longer necessary.

3. That Chapter 2, Compensation of Estate Attorney, commence with Section 10830.

4. That Business and Professions Code Section 6148 be amended to read as follows:

"Business and Professions Code § 6148 (technical amendment). Attorney fees

(a) In any case not coming within Section 6147, including those where the fee is determined by the court or by statute, of this code or Section 10820 of the Probate Code in which it is reasonably foreseeable that total expense to a client, (including attorney fees), will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing and shall contain all of the following:

(1) The hourly rate ^{or} and other standard or statutory rates, fees and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) If the attorney's compensation is set by statute, the attorney may agree with the client to a lower fee than the statutory fee. The client, if a fiduciary, has no duty to agree to attorney compensation less than statutory compensation.

^c
(b) All bills for services rendered by an attorney to a client shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees; and, upon request by the client, where the fee is not determined by the court or by statute, the attorney shall provide a bill to the client no later than 10 days following the request. The client is entitled to similar requests at intervals of no less than 30 days following the initial request.

^d
(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee. If there is a statutory fee, the amount set by statute shall be presumed to be reasonable for statutory services.

^e
(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

^f
(e) This section applies prospectively only to fee agreements followings its operative date.

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&
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May 31, 1988

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JUN 02 1988

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

Dear Mr. DeMouilly:

Thank you for your letter of May 12, 1988.

Could you please have someone send me the following
memoranda:

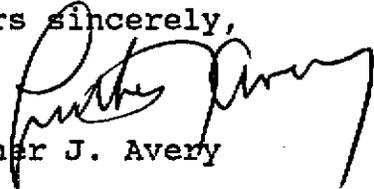
Memorandum 88-11	No Contest Clause
Memorandum 88-22	Confidential Relationship in Will Contests
Memorandum 88-50	Probate Code (Payment of Debts)
Memorandum 88-44	Commercial Lease Law (Assignment and Sublease)
Memorandum 88-47	Limitations on Disposition of Community Property

In reviewing Memo 88-43 and proposed Probate Code, I see a problem that should be addressed. The statute precludes "higher compensation" than that permitted under the chapter. Nowhere does the chapter address contingent fees. It should be made clear that an estate can hire an attorney on a fee arrangement contingent on the value of the recovery of assets for the estate.

Mr. John H. DeMouilly
May 31, 1988
Page 2.

In addition, the law should make clear whether an attorney for a will contested can recover fees from the estate and, if yes, under what circumstances.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Luther J. Avery". The signature is stylized and cursive, with a long, sweeping underline that extends to the right.

Luther J. Avery

LJA:bal
841.1.law



CALIFORNIA CONTINUING EDUCATION OF THE BAR

2300 Shattuck Avenue, Berkeley, CA 94704
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June 10, 1988

EA LAW REV. COMM'N

JUN 13 1988

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

Re: Study L-1036/1055: Memorandum 88-43
 Proposed Prob C 10854

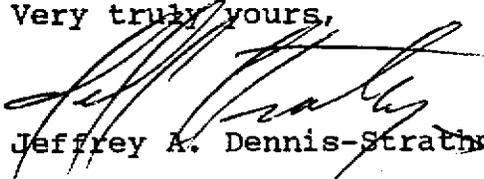
Sirs:

The proposed code section attempts to delay payment of extraordinary compensation. It is drawn from local court rules. In response to my prior letter, CLRC staff indicated, "The staff has no problem with codifying a rule that compensation for extraordinary services should ordinarily wait until final distribution, subject to court discretion to award it earlier for good cause."

The proposed solution accomplishes nothing without an indication of what "good cause" is. In order to answer that question, it is necessary to get back to the reason behind the rationale of the court rules from which this is drawn. The presumed basis for denying attorneys prompt compensation for is not to bash attorneys. Rather, the court rules arise because courts are permitted to take into account the amount of work done to earn the statutory fee in deciding the appropriate amount of extraordinary compensation. Estate of Walker (1963) 221 CA2d 792, 34 CR 832. This can be difficult to evaluate when the attorney seeks extraordinary compensation at an early stage of administration. If the administration is easy and the extraordinary services modest, there is even the possibility that the attorney is not entitled to extraordinary fees.

With that background, it appears that the appropriate "good cause" is a showing that the amount of compensation will not be effected by the rule in Estate of Walker. Unless that is made clear in the statute, the proposed statute gives the impression that it is public policy to not pay attorneys promptly, which I hope is not the case.

Very truly yours,


 Jeffrey A. Dennis-Strathmeyer

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CA LAW REV. COMM'N

JUN 24 1988

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June 21, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Sirs:

I am writing to comment on the March 10, 1988 decisions of the Commission as summarized in the article by Charles A. Collier, Jr., Esq., which appeared in Vol. 8, No. 3, Spring, 1988 issue of Estate Planning, Trust & Probate News.

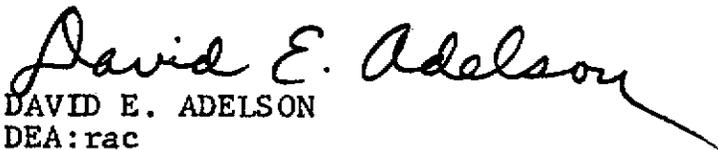
The elimination of the 4% commission on the first \$15,000.00 of probate assets will increase the burdens that already exist on practitioners who handle small estates. There are many small estates of less than \$60,000 which are not amenable to the setting aside procedures of the Probate Code. The new probate creditor claims law increases this non-amenability. For example, many decedents in this category have been on Medi-Cal or have used county hospital facilities and this will give rise to creditor claims from the California Department of Health Services and from counties. An equitable solution would be to adopt the recommendation of the staff for a \$750 minimum fee for such small estates or to retain the present 4% formula.

The proposed requirement that the written fee agreement disclose to the personal representative that statutory fees are negotiable is an unnecessary thrust in the direction of more consumerism. A substantial majority of California estates is less than \$200,000, a level at which trust departments of banks decline to serve as personal representatives. In these cases the personal representatives are individuals (often family members) who have little or no experience in record keeping. Data submitted by them to the practitioners for purposes of preparing inventories or accountings are usually in the form of bills or statements, bank statements, cancelled checks, deeds, notes, etc. More often than not, the practitioner winds up doing substantially all of the work of the individual personal representative. Local probate rules often recognize this in fee situations involving conservatorships and guardianships and will adjust fees and commissions accordingly. This type of adjustment is not available in

the case of statutory commissions and fees for personal representatives of estates and attorneys as fixed by the Probate Code.

I urge you to remove from your decision the requirement that the written fee agreement disclose to the personal representative that statutory fees are negotiable. Attorneys should compete on the basis of the quality and timeliness of their professional work in handling estates rather than on the price cutting phenomena of the market place.

Very truly yours,


DAVID E. ADELSON
DEA:rac

cc:

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THE STATE BAR OF CALIFORNIA**

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June 22, 1988

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

Re: Memorandum 88-43 - Personal
Representative's and Attorney's
Fees in Probate

Dear John:

The following are some technical comments on the proposed sections of the Probate Code contained in Memorandum 88-43. These comments are based upon comments which I have received from two members of the Executive Committee of the Section, Jim Willett and Bruce Ross, and my own comments. We hope that these technical comments will be of assistance to the Commission. The comments are by section number and are as follows:

1. Section 10800: In subsection (a), third line, the word "based" should be added after the word "compensation" for clarity. In paragraph (b) the language at the beginning of the fourth line should read "less losses from appraisal values on sales," so that the language will be consistent with the language on the third line of paragraph (b) dealing with gains over appraised value. However, both of these perhaps create some ambiguity where an asset is, for example, acquired after date of death and therefore does not normally have an appraised value and is later sold at a gain or loss.
2. Section 10801: In the fourth line, the first "the" could be replaced with the word "an" for clarity.
3. Section 10802: Does subsection (a) allow a greater compensation than the statutory compensation if provided in the will?

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4. Section 10804: Subsection (b) refers to employing various qualified persons for providing "extraordinary services." In many estates, the personal representative will employ, for example, gardeners, pool maintenance persons, and others who are paid for their services in maintaining the property pending sale or pending distribution. These are not extraordinary services and are normally allowed by the court to be charged against the estate, not against the personal representative's compensation. Perhaps some clarification is needed in subparagraph (b). The Note at the end of the section suggests possible adoption of a certain portion of the Uniform Probate Code, namely, subpart (21) of Section 3-715. That section of the Uniform Probate Code contains some 27 separate types of transactions authorized for the personal representative. It is believed that Section 10804 is broad enough to meet the needs of probate administration in California and that paragraph (21) need not be adopted.

5. Sections 10820-10823: A separate letter has been sent to the Commission based upon a unanimously adopted resolution of the Executive Committee that these sections be deleted in their entirety, and the reference to a written agreement and any disclosure be included in Business and Professions Code Section 6148.

6. Section 10830: It is submitted that in subsection (a), the word "based" be inserted after the word "compensation" on the third line. Also, see the Comment relating to 10800, subsection (b), relating to appraisal value on gains and losses on sales which would also apply to this section. The meaning of and need for the last sentence in subsection (b) is unclear.

7. Section 10831: In the fourth line, the first use of the word "the" could be replaced with the word "an" for clarity. This is consistent with the suggestion above as to Section 10801.

8. Section 10832: It is suggested that the last sentence be modified to read "The personal representative has no duty to negotiate attorney compensation less than the statutory compensation."

9. Section 10833: The Note suggests a modification of the language of subsection (b). As written, that has no limit on the amount that could be negotiated for greater compensation and, as such is inappropriate. The Comment to Section 10832 that indicates that an attorney can accept less than the statutory compensation would seem to give sufficient flexibility. Therefore, the language for subsection (b) rather than that proposed in the Note seems appropriate.

10. Section 10835: The language could be simplified by having this section read as follows:

"If there are two or more attorneys for the personal representative, the attorneys' compensation shall be apportioned among them by the court according to the services actually rendered by each or as agreed to by the attorneys."

11. Section 10850: The last sentence in subsection (c) would be clearer if it read "In the case of an allowance to the attorney, the order shall require the personal representative to pay the amount allowed to the attorney out of the estate."

12. Section 10851: In subsection (a)(1), it is suggested that the words "his or her compensation" be replaced with the words "the personal representative's compensation."

13. Section 10852: The Note indicates that this is derived principally from Section 15.08 of the Los Angeles Probate Policy Memorandum. That same Memorandum in Section 16.02 has more generalized language which we believe is more consistent with the Rules of Professional Conduct and other measures of determining compensation that is applicable to conservatorships, guardianships, trusts and spousal property petitions and, it is submitted, would also reasonably apply to probates. That list includes the following: "1. The nature and difficulty of the services; 2. Results achieved; 3. Benefit to the estate, conservatee or ward; 4. Productivity of the time spent in performing the services; 5. Expertise and experience of the person requesting fee; 6. Hourly rate for person performing services; 7. Total amount requested in relation to size and income of estate." That more abbreviated version from Section 16.02 would seem adequate.

14. Section 10853: The first sentence could be clarified to read "The attorney for the personal representative may be allowed compensation for extraordinary services performed by a paralegal under the direction and supervision of the attorney."

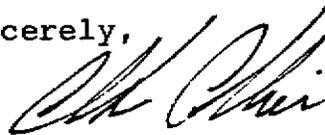
15. Section 10854: The word "when" in the third line might be replaced with the word "if." Although subsection (c) referring to "other good cause" is obviously broad in its scope, it is often appropriate to have an award of fees for extraordinary services when a particular matter is completed, although the total overall administration of the estate may continue for a number of years. For example, on

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completion of a will contest, it would seem appropriate to allow fees if they are charged against the estate. Similarly, on completion of a litigated creditor's claim, allowance of fees for those services would seem appropriate. Perhaps this section should make reference in one of the subsections allowing fees where a matter is completed.

The above are technical comments, as noted, made by Jim Willett, Bruce Ross and myself. They reflect our individual comments and not all of us necessarily join in each of the technical comments. However, we hope this will be helpful to the Staff.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Bruce Ross, Esq.
James Willett, Esq.
D. Keith Bilter, Esq.
Irwin Goldring, Esq.
James Opel, Esq.
James Quillinan, Esq.
James Devine, Esq.

The following technical revisions are suggested by Charles Collier (Exhibit 5) after consultation with Jim Willett and Bruce Ross. If there is no objection, the staff proposes to make these revisions.

§ 10800. Compensation for ordinary services

10800. (a) Subject to the provisions of this chapter, for ordinary services the personal representative shall receive compensation based upon the value of the estate accounted for by the personal representative, as follows:

(1) Three percent on the first one hundred thousand dollars (\$100,000).

(2) Two percent on the next nine hundred thousand dollars (\$900,000).

(3) One percent on the next nine million dollars (\$9,000,000).

(4) One-half of one percent on the next fifteen million dollars (\$15,000,000).

(5) For all above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the inventory, plus gains over appraisal value on sales, plus receipts, less losses from appraisal values on sales, without reference to encumbrances or other obligations on estate property. This subdivision applies whether or not a sale of property has taken place during the probate of the estate.

§ 10801. Additional compensation for extraordinary services

10801. Subject to the provisions of this chapter, in addition to the compensation provided by Section 10800, the court may allow additional compensation for extraordinary services by the personal representative in ~~the~~ an amount the court determines is just and reasonable.

§ 10830. Compensation for ordinary services

10830. (a) Subject to the provisions of this chapter, for ordinary services the attorney for the personal representative shall receive compensation based upon the value of the estate accounted for by the personal representative, as follows:

(1) Three percent on the first one hundred thousand dollars (\$100,000).

(2) Two percent on the next nine hundred thousand dollars (\$900,000).

(3) One percent on the next nine million dollars (\$9,000,000).

(4) One-half of one percent on the next fifteen million dollars (\$15,000,000).

(5) For all above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the inventory, plus gains over appraisal value on sales, plus receipts, less losses from appraisal values on sales, without reference to encumbrances or other obligations on estate property. This subdivision applies whether or not a sale of property has taken place during the probate of the estate.

§ 10831. Additional compensation for extraordinary services

10831. Subject to the provisions of this chapter, in addition to the compensation provided by Section 10830, the court may allow additional compensation for extraordinary services by the attorney for the personal representative in the an amount the court determines is just and reasonable.

§ 10835. Apportionment of compensation

10835. If there are two or more attorneys for the personal representative, the attorney's compensation provided for the ~~attorney~~ shall be apportioned among them by the court according to the services actually rendered by each or as agreed to by ~~them~~ the attorneys.

§ 10850. Partial allowance of compensation

10850. (a) At any time after four months from the issuance of letters:

(1) The personal representative may file a petition requesting an allowance on the compensation of the personal representative.

(2) The personal representative or the attorney for the personal representative may file a petition requesting an allowance on the compensation of the attorney for the personal representative.

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

(1) Each person listed in subdivision (c) of Section 1220.

(2) Each known heir whose interest in the estate is affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate is affected by the payment of the compensation.

(4) The State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the payment of the compensation.

(c) On the hearing, the court may make an order allowing the portion of the compensation of the personal representative or attorney, on account of services rendered up to that time, that the court determines is proper. In the case of an allowance to the personal representative, the order shall authorize the personal representative to charge against the estate the amount allowed. In the case of an allowance to the attorney, the order shall require the personal representative to pay the amount allowed to the attorney out of the estate ~~the amount allowed~~.

§ 10851. Final compensation

10851. (a) At the time of the filing of the final account and petition for an order for final distribution:

(1) The personal representative may petition the court for an order fixing and allowing his or her the personal representative's compensation for all services rendered in the estate proceeding.

(2) The personal representative or the attorney who has rendered services to the personal representative may petition the court for an

order fixing and allowing the compensation of the attorney for all services rendered in the estate proceeding.

(b) The request for compensation may be included in the final account or the petition for final distribution or may be made in a separate petition.

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

(1) Each person listed in subdivision (c) of Section 1220.

(2) Each known heir whose interest in the estate is affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate is affected by the payment of the compensation.

(4) The State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the payment of the compensation.

(d) On the hearing, the court shall make an order fixing and allowing the compensation for all services rendered in the estate proceeding. In the case of an allowance to the personal representative, the order shall authorize the personal representative to charge against the estate the amount allowed, less any amount previously charged against the estate pursuant to Section 10850. In the case of the attorney's compensation, the order shall require the personal representative to pay the attorney out of the estate the amount allowed, less any amount previously paid to the attorney out of the estate pursuant to Section 10850.

§ 10853. Services of paralegal performing extraordinary services

10853. The attorney for the personal representative may be allowed compensation for extraordinary services performed by a paralegal performing the extraordinary services under the direction and supervision of an the attorney. The petition for allowance of compensation for extraordinary services shall include a statement of the hours spent and services performed by the paralegal. In determining the amount of compensation to be allowed, the court shall take into consideration the extent to which the services were provided by the paralegal and the extent of the direction, supervision, and responsibility of the attorney.