

Memorandum 88-70

Subject: Study L-1036/1055 - Personal Representative and Attorney Fees
in Probate

Attached is a revised staff draft of a Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative. In preparing the revised draft, the staff has incorporated the decisions of the Commission at the last meeting and has taken into account the comments of the State Bar Estate Planning, Trust and Probate Law Section and others on the previous staff draft.

The staff is hopeful that the Commission will be able to review the draft and approve it with any necessary revisions for distribution for review and comment to interested persons and organizations.

Respectfully submitted,

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Executive Secretary

STATE OF CALIFORNIA
California Law Revision Commission

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

COMPENSATION OF ESTATE ATTORNEY AND PERSONAL REPRESENTATIVE

October 1988

This staff draft of a tentative recommendation is being distributed so that interested persons will be advised of the draft that will be considered by the Commission at its October 1988 meeting and can make their views known to the Commission.

CALIFORNIA LAW REVISION COMMISSION
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LETTER OF TRANSMITTAL

This recommendation relates to the compensation of the estate attorney and the personal representative in a formal probate proceeding.

In California, compensation of the estate attorney for conducting "ordinary probate proceedings" is determined using a statutory fee schedule. In addition, the attorney is entitled to fair and reasonable compensation fixed by the court for "extraordinary services."

The Commission's study reveals that the California probate attorney fees are not out of line with those charged in other states having a statutory fee system and those charged in other states having a large metropolitan area but no statutory fee system.

The Commission has reviewed the existing California attorney fee scheme, primarily from the viewpoint of the consumer. The more important recommendations of the Commission include:

- (1) A modest reduction in the fee allowed under the statutory fee schedule.
- (2) A statutory clarification that the statutory fee is the maximum fee and that the attorney and client may agree to a lower fee.
- (3) A requirement that the attorney and client have a written contract that states the fee to be charged by the attorney and discloses that the California Probate Code provides a maximum fee and that the attorney and client may agree to a lower fee.

In addition to these recommendations, the recommended legislation will reorganize, clarify, and make substantive improvements in existing law and fill in a number of gaps in the existing law.

Staff Draft

TENTATIVE RECOMMENDATION

relating to

COMPENSATION OF ESTATE ATTORNEY AND PERSONAL REPRESENTATIVE

COMPENSATION OF THE ESTATE ATTORNEY

Background

In California, compensation of the estate attorney for conducting "ordinary probate proceedings" is determined using a statutory fee schedule.¹ In addition to this statutory fee for ordinary services, the attorney is entitled to "such further amount as the court may deem just and reasonable for extraordinary services."²

1. Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code § 901). The fee schedule applies only where there is a formal probate proceeding. Where there is no formal probate proceeding, the fee is determined by agreement between the parties and is not subject to court approval.

Decedent's will may provide for compensation of the attorney and that shall be "a full compensation" for the attorney's services unless by written instrument, filed with the court, the attorney renounces the compensation provided for in the will. If the attorney renounces the compensation provided in the will, the attorney is entitled to receive compensation as provided by statute. See Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code §§ 900, 901).

Usually the personal representative who is also an attorney may receive the personal representative's compensation but not the attorney fee. *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982). However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting in both capacities. *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958).

2. Prob. Code § 910.

The statutory fee schedule sets the attorney's fee as percentages of the "estate accounted for" by the personal representative,³ with higher percentages payable for smaller estates.⁴ The attorney is entitled to the statutory fee unless the attorney agrees to accept a lower fee.⁵

3. Prob. Code § 910 (incorporating Prob. Code § 901). The "estate accounted for" is based on the fair market value of the real and personal property of the estate without subtracting any encumbrances on the property. Prob. Code § 901 ("estate accounted for" is "the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate" whether or not a sale of property has taken place during probate). For a discussion of the property or values included in determining the "estate accounted for," see Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§ 20.16-20.24 (Cal. Cont. Ed. Bar 1986).

The setting of the attorney fee using the statutory rate schedule is within the "state action exemption" of the Sherman Antitrust Act and does not violate federal antitrust laws. *Estate of Effron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

4. See Prob. Code § 901. Section 901 provides that the attorney shall receive compensation upon the value of the estate accounted for, as follows:

- Four percent on the first \$15,000.
- Three percent on the next \$85,000.
- Two percent on the next \$900,000.
- One percent on the next 9 million dollars.
- One-half of one percent on the next 15 million dollars.
- For all above 25 million dollars, a reasonable amount to be determined by the court.

5. *Estate of Getty*, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). See generally *Estate of Effron*, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981). The right to receive the statutory fee is subject to Probate Code Section 12205 [AB2841], which permits the court to reduce the fee if the time taken for administration of the estate exceeds the time set forth by statute or prescribed by the court and the court finds that the delay in closing the estate was caused by factors within the attorney's control and was not in the best interests of the estate.

The following table shows the California statutory fee for ordinary services provided to estates of various sizes.

Table 1. Statutory Attorney Fee For "Ordinary Services"

Amounts determined from statutory fee schedule under Probate Code Sections 901 and 910 and do not include additional amounts that may be allowed for extraordinary services.

<u>Size of Estate</u>	<u>Fee</u>	<u>Size of Estate</u>	<u>Fee</u>
\$10,000	\$ 400	\$ 150,000	4,150
20,000	750	200,000	5,150
30,000	1,050	250,000	6,150
40,000	1,350	300,000	7,150
50,000	1,650	400,000	9,150
60,000	1,950	500,000	11,150
70,000	2,250	800,000	17,150
80,000	2,550	1 million	21,150
90,000	2,850	2 million	31,150
100,000	3,150	5 million	61,150
		10 million	111,150

California is one of three states that use a statutory fee schedule to fix the fee of the estate attorney for ordinary services without court discretion to vary the fee.⁶ Table 2, below, compares the California statutory fee for a typical estate having real property⁷ with the statutory fee in the other two states.

**TABLE 2. COMPARISON OF ATTORNEY FEES
FIXED BY STATUTE FOR ORDINARY SERVICES**

<u>State</u>	<u>Fee</u>
California	\$7,750
Hawaii	\$7,650
Wyoming	\$6,950

6. The other two states are Hawaii and Wyoming. See Hawaii Rev. Stat. §§ 560:3-719, 560:3-721 (1985); Wyo. Stat. §§ 2-7-803, 2-7-804 (Supp. 1987). Six states use a statutory fee schedule with considerable court discretion in fixing the fee. See *infra* note 8.

7. This typical estate is based on the following assumptions (all values are as of the date of death): There are no extraordinary services. Estate value is \$325,000 gross, and \$273,000 net. The home is valued at \$200,000, with an outstanding mortgage balance of \$50,000. Stocks valued at \$100,000 consist of \$50,000 common stock listed on the New York Stock Exchange and \$50,000 over-the-counter stock. A motor vehicle is valued at \$10,000, with an outstanding auto loan of \$2,000. Household goods and furnishings are valued at \$10,000. Savings accounts have a balance of \$5,000. Decedent's will devises equal shares of the estate to decedent's two children. Decedent's home is distributed (without sale) to the two children. Stocks listed on the New York Stock Exchange valued at \$30,000 are sold during estate administration at a net price of \$35,000—\$5,000 over the date of death value. (No additional compensation is awarded in connection with this sale.) The loan on the motor vehicle is paid off during administration. The motor vehicle is distributed to one child (\$10,000). The household goods and furnishings are distributed to the other child (\$10,000).

Six additional states use a statutory fee as a basis for computing the attorney fee in a probate proceeding.⁸ In four of these states, the statute prescribes a reasonable fee, not to exceed the statutory percentage. One state uses a fee schedule, subject to increase or decrease by the court. One state uses the fee schedule to establish a minimum fee.⁹

Table 3, below, compares the statutory fee in the various states for a typical estate having real property.¹⁰

8. There are a number of different schemes used in these other states. Four other states compute the estate attorney's fee using what is essentially a reasonable fee system combined with a percentage fee schedule: Arkansas prescribes a "just and reasonable" fee, not to exceed a sliding percentage from three to ten percent of estate value. Ark. Stat. Ann. § 62-2208 (Supp. 1985). Iowa prescribes a reasonable fee, not to exceed a sliding percentage from two to six percent of the gross estate. Iowa Code Ann. §§ 633.197, 633.198 (West 1964). Missouri prescribes a sliding minimum percentage, but no maximum, from two to five percent of personal property and proceeds of real property sold. Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987). Montana prescribes a reasonable fee, not to exceed a sliding percentage from two to three percent of the estate, but not less than the smaller of \$100 or the value of the gross estate. Mont. Code Ann. § 72-3-631 (1985).

New Mexico prescribes a fee of not more than a sliding percentage from one to ten percent of the estate, unless otherwise ordered by the court. N.M. Stat. Ann. §§ 45-3-719, 45-3-720 (1978). Delaware uses a fee schedule established by court rule, subject to increase or decrease by the court. Del. Ch. Ct. R. 192 (1981).

9. See *supra* note 8.

10. The same "typical estate" is used for Table 3 as was used for Table 2. See *supra* note 7.

**TABLE 3. COMPARISON OF ATTORNEY FEES
FOR STATES HAVING STATUTORY FEE SCHEDULES**

<u>State</u>	<u>Fee</u>
Delaware	\$10,400
Montana	\$10,350
Arkansas	\$9,488
California	\$7,750
Hawaii	\$7,650
Wyoming	\$6,950
New Mexico	\$6,650
Iowa	\$6,620
Missouri	\$4,125

Table 4, below, compares the statutory fees in the various states for a typical estate having no real property.¹¹

**TABLE 4. COMPARISON OF STATUTORY ATTORNEY
FEES FOR ESTATE HAVING NO REAL PROPERTY**

<u>State</u>	<u>Fee</u>
New Mexico	\$6,650
Montana	\$4,350
Missouri	\$4,125
Delaware	\$4,000
Arkansas	\$3,988
California	\$3,750
Hawaii	\$3,650
Wyoming	\$2,950
Iowa	\$2,620

The tables above demonstrate that California statutory fees are not out of line with those in other states having a statutory fee system. But how do California fees for estate attorneys compare to fees charged in other states with large metropolitan areas where a statutory fee system is not used? A study made for the Commission

11. Assume the same facts as in notes 7 and 11, *supra*, except assume that there is no real property.

indicates that California fees are not excessive when compared with fees in other comparable states.

Table 5 below compares California fees with those in nine states with large metropolitan areas for estates of \$100,000, \$300,000, and \$600,000, respectively.¹²

TABLE 5. PROBATE ATTORNEY FEES IN STATES WITH LARGE METROPOLITAN AREAS			
State	Fee for Estate of Indicated Value		
	\$100,000	\$300,000	\$600,000
California	\$3,150	\$7,150	\$13,150
Florida	\$2,000	\$7,500	\$18,000
Georgia	\$2,500	\$7,500	\$12,000
Illinois	\$5,000	\$10,000	\$16,000
Michigan	\$3,000	\$7,000	\$10,000
New York	\$5,000	\$13,000	\$22,000
Ohio	\$3,000	\$6,000	\$10,000
Pennsylvania	\$5,000	\$13,000	\$22,000
Texas	\$3,000	\$6,000	\$10,000
Virginia	\$3,000	\$7,000	\$9,000

12. The information in Table 5 was supplied by the Estate Planning, Trust and Probate Law Section of the State Bar of California, and is based on a telephone survey of probate practitioners in the states surveyed. The State Bar Section advised the Commission that Table 5 assumes probate of a relatively simple estate with no major valuation issues or disputes between persons interested in the estate. The attorneys surveyed reported that the estimated fees would be higher than shown in Table 5 if complexities arose during probate. The State Bar Section advised the Commission that the information in Table 5 is a "very rough" approximation of probate attorney fees in the states surveyed.

An important comparative study of probate attorney fees -- the *Stein Study*¹³ -- was published in 1984, and indicates that, for estates of persons dying in 1972, California fees were not out of line with those charged in other states. The *Stein Study* is based on data collected from a representative sample of estate administrations in five states: California, Florida, Maryland, Massachusetts, and Texas.¹⁴ "These states were selected because they have certain practices or procedures relating to estate administration that make them broadly representative of other states."¹⁵

The *Stein Study* draws the following conclusion from the data collected:¹⁶

Comparing the fees charged by California attorneys to those charged by attorneys in the other states is particularly revealing. Though set by statute as a percentage of inventoried assets in an estate, California fees were apparently comparable to fees charged in the other states not having fees set by statute, being neither the highest nor the lowest among the group.

13. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107 (1984).

14. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984).

15. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984). California was selected because it is a community property state and has a statutory probate fee schedule.

16. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1187-88 (1984). The California statutory fee schedule has been revised to increase the fees since the *Stein Study* was made. See 1986 Cal. Stat. ch. 961. But no doubt there has been a corresponding increase in hourly rates charged in other states since the *Stein Study*.

This conclusion is drawn from the data presented below (Table 6).

Table 6. Attorneys' Fees by Probate Estate Size* Listed in Order of Rank by State¹⁷

<i>All Estates</i>				<i>\$1 - 9,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Mass.	\$1,603	Cal.	3.0	Cal.	\$292	Cal.	7.2
Cal.	\$1,911	Tex.	4.1	Fla.	\$413	Md.	9.9
Md.	\$2,276	Md.	5.8	Md.	\$415	Mass.	12.7
Tex.	\$2,560	Mass.	7.8	Mass.	\$422	Tex.	16.0
Fla.	\$2,791	Fla.	8.4	Tex.	\$501	Fla.	18.5
<i>\$10,000 - 19,999</i>				<i>\$20,000 - 29,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Tex.	\$487	Tex.	3.5	Tex.	\$584	Tex.	2.4
Cal.	\$653	Cal.	4.4	Cal.	\$987	Cal.	4.0
Fla.	\$715	Fla.	5.0	Fla.	\$1,268	Fla.	5.4
Md.	\$878	Md.	6.1	Mass.	\$1,430	Mass.	5.8
Mass.	\$925	Mass.	6.1	Md.	\$1,796	Md.	7.0
<i>\$30,000 - 59,999</i>				<i>\$60,000 - 99,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Tex.	\$1,211	Tex.	2.8	Tex.	\$1,783	Tex.	2.4
Cal.	\$1,784	Md.	4.2	Md.	\$2,009	Md.	2.7
Md.	\$1,852	Cal.	4.4	Cal.	\$2,450	Cal.	3.1
Fla.	\$2,317	Fla.	5.2	Fla.	\$3,406	Mass.	4.4
Mass.	\$2,475	Mass.	6.2	Mass.	\$3,495	Fla.	4.6
<i>\$100,000 - 499,999</i>				<i>\$500,000+</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Mass.	\$3,937	Tex.	2.2	Cal.	\$20,614	Cal.	1.5
Tex.	\$4,127	Cal.	2.3	Mass.	\$20,880	Tex.	1.7
Cal.	\$4,627	Md.	2.6	Md.	\$29,258	Mass.	2.0
Md.	\$5,051	Mass.	2.8	Fla.	\$32,882	Fla.	2.6
Fla.	\$6,308	Fla.	3.2	Tex.	\$30,716	Md.	3.3

*Only estates having known, nonzero values are included.

17. This table is taken without change (except for the table number) from Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1186 (1984).

Recommendations

Retaining the statutory fee schedule for ordinary services. The Commission recommends that the statutory attorney fee for ordinary services be retained.¹⁸ The statutory fee system has a number of advantages:¹⁹

(1) It protects the consumer against excessive fees, because the attorney cannot charge more for ordinary services than the statutory fee.²⁰

(2) It makes legal services more affordable in small estates by shifting to larger, more profitable estates some of the overhead costs of administering smaller estates. It therefore benefits people of modest means.

(3) It is simple and courts can easily apply it: The extent and value of estate property is determined during administration, and courts can routinely apply the appropriate percentage to fix the fee. The court does not need to review attorney time records. It minimizes disputes over fees and court time required to resolve disputes.

(4) It reduces disputes about fees between the estate attorney, personal representative, and estate beneficiaries.

(5) The amount of attorney time required to administer an estate tends to correlate with estate size: Larger estates generally present more legal problems than smaller estates. In addition, the responsibility of the attorney and the attorney's risk of malpractice

18. The Commission recommends reducing the highest percentage rate under the fee schedule from four to three percent. See *infra* text accompanying notes 24-26.

19. See Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984).

20. See Prob. Code §§ 903, 910; Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar 1987). In a simple estate, the personal representative and attorney may negotiate a fee that is less than that provided by the statutory percentage. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897); *Estate of Morrison*, 68 Cal. App. 2d 280, 285, 156 P.2d 473 (1945); Feinfeld, *supra*. The consumer is also protected against excessive fees for extraordinary services because they are fixed by the court. Prob. Code § 910.

liability is greater with larger estates. The higher fee in larger estates under the percentage formula roughly compensates attorneys for the greater work performed and the increased responsibility and risk of liability assumed.

Under the influence of the Uniform Probate Code,²¹ a number of states have adopted the reasonable fee system for probate estates. Some reasonable fee states use the UPC procedure of allowing the personal representative and estate attorney to fix the attorney's fee, subject to court review on petition. Other reasonable fee states require the court to fix or approve the fee in every case. Whether the court reviews the fee in every case or only on petition, a significant amount of court time is required to review the attorney's time records and to evaluate results achieved, benefit to the estate, nature and difficulty of tasks performed, and other factors.²²

Under existing California law, the personal representative and the attorney may agree to a fee that is lower than the statutory fee.²³ If the personal representative understands this right, then a statutory percentage formula benefits all parties -- the estate attorney, personal representative, estate beneficiaries, and the probate court. The statutory fee becomes, in effect, a statutory maximum, and avoids clogging the probate calendar with fee disputes.

Reducing the statutory rate. Under existing law, the highest percentage rate for the fee of the estate attorney and personal representative is the four percent rate on the first \$15,000 of estate value.²⁴ The rate on the next \$85,000 is three percent, and the rate continues to decline on larger estates.²⁵

21. See Uniform Probate Code §§ 3-715, 3-721.

22. In Hawaii, for example, the reasonable fee system required so much judicial time to administer that it had to be replaced by a statutory fee schedule. Telephone interview with attorney Carroll S. Taylor, probate practitioner in Honolulu (Jan. 6, 1988).

23. See *supra* note 20. An agreement to pay more than the California statutory fee for ordinary services is void. See Prob. Code §§ 903, 910.

24. Prob. Code §§ 901, 910.

25. Prob. Code §§ 901, 910.

The Commission recommends that the four percent rate on the first \$15,000 of estate value be reduced to three percent, making the rate three percent on the first \$100,000 of estate value. This will make a modest reduction in the statutory fee²⁶ and make California rates compare more favorably with those in other states. The reduction also will simplify the fee calculation.

Written contract with disclosure to client that fee is negotiable. Business and Profession Code Section 6148 requires a written contract in any case where "it is reasonably foreseeable that total expense to a client, including attorney fees" will exceed \$1,000.²⁷ This section went into effect on January 1, 1987.

Section 6148 requires that the written contract include all of the following:

- (1) The hourly rate or other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided.
- (3) The respective responsibilities of the attorney and the client.

Section 6148 includes provisions that may not be appropriate for a contract for probate legal services. For example, the fee for probate legal services ordinarily will be determined by the statutory fee schedule, and the agreement will not specify an hourly rate for probate legal services. The provisions of Section 6148 governing the form of the bill for legal services and requiring the attorney to provide a bill on request ordinarily are not appropriate for probate legal services.

26. Reducing the four percent rate to three percent will cost probate attorneys and personal representatives relatively little -- \$150 on estates of \$15,000 or more.

27. Section 6148 does not apply where the attorney contracts on a contingency fee basis. Contingent fee contracts are covered by Business and Professions Code Section 6147.

The Commission recommends that a written contract provision be included in the Business and Professions Code provisions governing probate legal services. This provision would be drawn from Section 6148, but would include appropriate modifications so that the contract for probate legal services will be consistent with the provisions governing probate legal fees.²⁸

The Commission further recommends an additional requirement for the contract for probate legal services. Since the probate attorney's fee is negotiable under existing law,²⁹ the contract should inform the client how the fee is determined, and should contain a statement that the "California Probate Code sets the maximum limits on the fee of the attorney, but the attorney and client may agree to a lower fee." This disclosure will ensure that unsophisticated personal representatives will be as fully advised of their rights concerning attorneys' fees as well-informed ones.

28. The Probate Code provision would recognize that the fee may be the fee provided for in the statutory fee schedule. The Probate Code provision would omit the provisions relating to the form of the bill, and would omit the provisions relating to the providing of a bill on request as inconsistent with the requirement that the court approve the fee before it is paid.

29. See *supra* note 20.

COMPENSATION OF PERSONAL REPRESENTATIVE

California is one of 26 states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the personal representative.³⁰ This contrasts with nine states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the estate attorney.³¹ Thus, states are more likely to provide a percentage or hybrid fee for the personal representative than for the estate attorney. The apparent reason for this is that the personal representative is compensated for managing the estate. The larger the estate, the greater are the responsibilities assumed by the personal representative. The statutory percentage fee system should be kept in California for the personal representative for this reason, and because it protects against excessive fees, it benefits smaller estates, and it is simple and easily applied.³²

30. Twelve states use a pure percentage formula to determine the fee of the personal representative. These are California, Hawaii, Louisiana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin, and Wyoming. See Cal. Prob. Code § 901 (West 1987); Hawaii Rev. Stat. § 560:3-719 (1985); La. Code Civ. Proc. Ann. art. 3351 (West Supp. 1987); Nev. Rev. Stat. § 150.020 (1986); N.J. Stat. Ann. §§ 3B:18-13, 3B:18-14 (West 1983 & Supp. 1987); N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1987); Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1987); Okla. Stat. Ann. tit. 58, § 527 (West 1965); Or. Rev. Stat. § 116.173 (1983 & 1985 reprint); S.D. Codified Laws Ann. § 30-25-7 (1984); Wis. Stat. Ann. § 857.05 (West Supp. 1987); Wyo. Stat. § 2-7-803 (Supp. 1987). Another 14 states use a hybrid of the percentage fee and reasonable fee methods. These are Alabama, Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, and Texas. Ala. Code § 43-2-680 (1982); Ark. Stat. Ann. § 62-2208 (Supp. 1985); Del. Ch. Ct. R. 192 (1981); Ga. Code Ann. §§ 53-6-140, 53-6-141, 53-6-143 (1982); Iowa Code Ann. § 633.197 (West 1964); Ky. Rev. Stat. Ann. § 395.150 (Baldwin 1978); Md. Est. & Trusts Code Ann. § 7-601 (Supp. 1984); Miss. Code Ann. § 91-7-299 (1973); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. § 72-3-631 (1985); N.M. Stat. Ann. § 45-3-719 (1978); N.C. Gen. Stat. § 28A-23-3 (1976 & Supp. 1983); S.C. Code Ann. § 62-3-719 (Law. Co-op. 1987); Tex. Prob. Code Ann. § 241 (Vernon 1980).

31. See *supra* text accompanying notes 6 and 8.

32. See *supra* text accompanying notes 19-20.

OTHER RECOMMENDATIONS

Factors in Fixing Extraordinary Fees

If the estate attorney or personal representative performs extraordinary services for the estate, he or she is entitled to a "just and reasonable" fee for such services.³³ However, the statute does not give the court any guidance as to what factors should be considered in fixing a just and reasonable fee. Local court rules often fill this gap by listing the factors the court should take into account in fixing a fee for extraordinary services.³⁴

The Commission recommends enactment of a statutory statement of the factors the court should take into account in fixing the fee for extraordinary services. The factors should include the nature and difficulty of the task performed, results achieved, benefit to the estate, hours spent, usual hourly rate of the person who performed the services, productivity of the hours spent, the expertise, experience, and professional standing of the person performing the services, whether the percentage fee for ordinary services is adequate compensation for all the legal services provided, the total amount requested, size of the estate, and length of administration.³⁵

The nonexclusive listing in the statute of examples of what constitutes extraordinary services³⁶ should be deleted, and examples should be given in the official comment to the section instead.

Authority of Personal Representative to Hire and Pay Specialists

Under existing law, the personal representative may employ tax counsel, tax auditors, accountants, or other tax experts, and pay them out of estate funds.³⁷ This appears to be because preparing tax

33. Prob. Code §§ 902, 910.

34. See, e.g., Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

35. E.g., Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

36. Prob. Code § 902.

37. Prob. Code § 902.

returns is an extraordinary service, and not part of the personal representative's statutory duties.³⁸ This authority should be expanded to allow the personal representative to employ any expert, technical advisor, or other qualified person when necessary to provide extraordinary services, and to pay them out of estate funds, subject to court review at the final account.

Under local court rules and case law, the personal representative may employ the estate attorney or others to help with ordinary services, but must pay them out of the personal representative's own funds, not funds of the estate.³⁹ This rule should be codified. Since no estate funds are involved, there should be no requirement of court approval.⁴⁰

The legislation proposed by the Commission also will make clear that necessary expenses in the care, management, preservation, and settlement of the estate are to be paid from the estate.

38. See Prob. Code § 902; *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970).

39. Fresno County Probate Policy Memoranda § 9.4(c), reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, reprinted in California Local Probate Rules, supra; Alameda County Probate Policy Manual § 1008, reprinted in California Local Probate Rules, supra (personal representative may not spend estate funds to hire another to perform ordinary duties of representative, for example, "ordinary accounting and bookkeeping services, including the preparation of the schedules for Court accountings"); *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (expenditure to compensate an investigator for locating estate assets not allowable because this is a statutory duty of the representative). See also Rules of Professional Conduct of the State Bar of California, Rule 5-101.

40. A provision that court approval is not required would invalidate the requirement of a Fresno County court rule that an agreement by the personal representative to hire an assistant to be paid out of the personal representative's own funds is subject to court approval and must be filed with the court when the first fee petition is filed. Fresno County Probate Policy Memoranda § 9.4, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

Dual Compensation

Under case law, a personal representative who is an attorney may receive the personal representative's compensation, but not compensation for services as estate attorney, unless expressly authorized by the decedent's will.⁴¹ The statute should codify this rule.

Allowance of Compensation by Court

The existing statute provides for a partial allowance of compensation to the personal representative or estate attorney,⁴² but final compensation is governed by local court rules rather than by statute.⁴³ The Commission recommends statutory provisions governing

41. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980); *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966); *Feinfield, Fees and Commissions*, in 2 California Decedent Estate Practice § 20.10 (Cal. Cont. Ed. Bar 1987). A representative-attorney may not circumvent this rule by failing to retain a separate attorney and then seeking extraordinary compensation for legal services. See *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); *Feinfield, supra*. However, it may be that, in allowing compensation for extraordinary services by the personal representative, the court can give some weight to the representative's services as an attorney in conserving and preserving the estate. *Id.*

42. Prob. Code §§ 904, 911.

43. Alameda County Probate Policy Manual § 1002; Contra Costa County Probate Policy Manual §§ 603, 605; Fresno County Probate Policy Memoranda § 9.3; Humboldt County Probate Rules § 12.15(c); Lake County Probate Rules § 13.4(g); Los Angeles County Probate Policy Memorandum §§ 15.02, 16.01; Madera County Probate Rules §§ 10.14, 10.19; Marin County Rules of Probate Practice § 1203; Merced County Probate Rules §§ 1103, 1104, 1108; Monterey County Probate Rules § 4.31; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual §§ 706, 707, 708; San Bernardino County Probate Policy Memorandum § 906; San Diego County Probate Rules §§ 4.110, 4.111; San Francisco Probate Manual §§ 13.03, 13.04; San Joaquin County Probate Rules §§ 4-705, 4-706, 4-1001; San Mateo County Probate Rules, Rules 486, 487; Santa Barbara County Probate Rules § 414(H); Santa Clara County Probate Rules §§ 5.6(c), 5.7(d); Santa Cruz County Probate Rules § 405; Solano County Probate Rules § 8.11(d); Stanislaus County Probate Policy Manual §§ 11003, 1004, 1008(b), 1102(e); Tuolumne County Probate Rules, Rules 12.11(e), 12.14; Ventura County Probate Rules § 11.12(c); Yolo County Probate Rules § 20.5; Probate Rules of Third District Superior Courts, Rules 12.12(E), 12.15.

the allowance of both partial and final compensation.

The statute should codify a provision found in local court rules that a partial allowance of compensation may be allowed when it appears likely that administration of the estate will continue for an unusually long time, where present payment will benefit the estate or beneficiaries, or where other good cause is shown.⁴⁴

The statute should continue the provision of existing law that the estate attorney may be allowed compensation for a paralegal who performs extraordinary services under the attorney's direction.⁴⁵ The statute should make clear that compensation to the attorney for extraordinary services shall take into consideration the extent to which the services were performed by a paralegal and the extent of the attorney's direction and supervision of the paralegal.

44. Lake County Probate Rules § 13.4(g); Marin County Rules of Probate Practice § 1203; Merced County Probate Rules § 1108; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual § 708; San Bernardino County Probate Policy Memorandum § 906; San Francisco Probate Manual § 13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules § 5.7(d); Santa Cruz County Probate Rules § 405; Stanislaus County Probate Policy Manual § 1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).

45. Prob. Code § 910.

RECOMMENDED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the statutory provisions set out below.

WRITTEN AGREEMENT CONCERNING PROBATE ATTORNEY FEES

Business and Professions Code § 6147.5 (added). Agreement concerning attorney fees in formal probate proceeding

6147.5. (a) This section applies only where an attorney agrees to serve as the attorney for a personal representative and the fee for the attorney's services is subject to the limitations imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

(b) The attorney who agrees to serve as the attorney for the personal representative shall, at the time the agreement concerning the providing of legal services is entered into, provide a duplicate copy of the agreement, signed by both the attorney and the personal representative, to the personal representative.

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

(1) A statement of the general nature of the legal services to be provided pursuant to the agreement.

(2) A statement of the compensation the personal representative and attorney have agreed upon:

(A) If the compensation agreed upon is to be determined as provided in Sections 10830 and 10831 of the Probate Code, the agreement shall state the substance of the following:

"For ordinary services, the attorney shall receive compensation upon the value of the estate, as follows:

(1) Three percent on the first \$100,000.

(2) Two percent on the next \$900,000.

(3) One percent on the next 9 million dollars.

(4) One-half of one percent on the next 15 million dollars.

(5) For all above 25 million dollars, a reasonable amount to be determined by the court.

"(The value of the estate is the fair market value of the property included in the decedent's probate estate as shown by an appraisal of the property, plus gains over the appraised value on

sales, plus receipts, less loses from the appraised value on sales.)

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

In addition, the agreement may, but need not, include a statement of the hourly rates or other standard rates, fees, or charges for extraordinary services, including rates, fees, or charges for paralegal services; and, if the agreement includes such a statement, the court shall consider but is not bound by the statement in determining the amount to be allowed as compensation for extraordinary services.

(B) If the compensation agreed upon is not to be determined as provided in Sections 10830 and 10831 of the Probate Code, the agreement shall state the hourly rate or other standard rates, fees, or charges for the legal services to be provided pursuant to the agreement or other method of determining the compensation for those services, including rates, fees, or charges for paralegal services, but the compensation so provided shall not exceed the maximum limits imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

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

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

(d) Failure to comply with any provision of this section renders the agreement voidable at the option of the personal representative, and the attorney shall, upon the agreement being voided, be entitled to collect compensation in an amount determined by court to be reasonable for the services actually provided, but the compensation shall not exceed the maximum limits imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

(e) This section does not apply in any of the following cases:

(1) Where the personal representative knowingly states in writing, after full disclosure of this section, that a writing concerning compensation of the attorney is not required.

(2) Where the personal representative is a corporation.

(3) Where the personal representative is a public officer or employee acting in the scope of the public office or employment.

(f) This section applies only to agreements described in subdivision (a) that are entered into after January 1, 1990, and Section 6148 does not apply to those agreements.

Comment. Section 6147.5 is a new provision drawn from Sections 6147 and 6148 of the Business and Professions Code.

Subdivision (a) limits the application of the section. The section applies only to the written agreement concerning legal services to be provided to the personal representative in a formal probate proceeding. Section 6148 continues to govern legal services provided in connection with the estate of a decedent where there is no formal probate proceeding or where legal services are provided in connection with property that is not part of the probate estate or where legal services are provided to the estate by an attorney other than the estate attorney (as where an attorney is retained to bring an action to collect a debt owed to the estate). See Probate Code Sections 13157 (attorney fee determined by agreement between parties for proceeding to obtain a court order determining succession to real property of small estate), 13660 (attorney fee determined by agreement between parties for petition to obtain a court order determining or confirming property passing to or belonging to surviving spouse). See also Probate Code Sections 13100-13116 (affidavit procedure to collect or transfer personal property of small estate), 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries where small estate). See also the Comment to Probate Code Section 10804.

Subdivision (b) is drawn from the first sentence of Section 6147 (contingency fee contracts).

Subdivision (c) is drawn from subdivision (a) of Section 6148 and subdivision (a) of Section 6147. Paragraph (1) of subdivision (c) is comparable to paragraph (2) of subdivision (a) of Section 6148.

Paragraph (2) of subdivision (c) provides language that may be used in the agreement between the personal representative and estate attorney that satisfies the requirement that the agreement disclose the compensation of the attorney. Unlike Section 6148, the agreement need not set out the "hourly rate or other standard rates, fees, and charges applicable to the case" if the agreement is that the attorney is to receive the statutory compensation. Paragraph (2) permits the agreement to set out merely the statutory compensation schedule and a statement that the court will determine the amount of the compensation for extraordinary services. However, if the attorney's compensation is not determined using the statutory compensation schedule, then the agreement must set out the hourly rate or other standard rates, fees, and charges applicable to the case. In addition, if the attorney and personal representative so desire, they may set out an hourly rate or other standard rate for extraordinary services. This rate is not binding on the court, but the court will consider it in determining the allowance of compensation to the attorney for extraordinary services. See also Probate Code Sections 10832 (agreement for higher compensation void; no duty to negotiate for lower compensation), 10852 (factors to be considered in determining the amount of compensation for

extraordinary services), 10853 (services of paralegal performing extraordinary services).

Paragraph (3) of subdivision (c) is same as paragraph (3) of subdivision (a) of Section 6148.

Paragraph (4) of subdivision (c) is comparable to paragraph (5) of subdivision (a) of Section 6147 (contingency fee agreements). This paragraph contains the text of the statement that must be included in the agreement to disclosure to the client that the attorney and client may agree that the attorney's compensation will be lower than the statutory compensation. See also Probate Code Section 10832 (agreement for higher compensation void; no duty to negotiate for lower compensation).

Subdivision (d) is comparable to subdivision (c) of Section 6148, except that subdivision (c) of Section 6147.5 makes clear that the compensation allowed under that subdivision may not exceed the amount of the statutory compensation. If the estate attorney fails to comply with the requirements of Section 6147.5, the reasonable compensation fixed by the court is fixed in light of the reasonable value of the services actually provided in the particular case, and the attorney must establish the value of the services provided.

The exceptions stated in subdivision (e) are comparable to exceptions stated in paragraphs (3) and (4) of subdivision (d) of Section 6148, except that Section 6147.5 contains an additional exception for the case where the personal representative is a public officer or employee acting in the scope of the public office or employment (to make the section not applicable to the public administrator).

Subdivision (f) limits the application of Section 6147.5 to an agreement entered into after January 1, 1990. Prior to that time, the agreement is governed by the provisions of Section 6148.

COMPENSATION OF PERSONAL REPRESENTATIVE AND ESTATE ATTORNEY

The following new Part 7 would be added to the Probate Code.

PART 7. COMPENSATION OF PERSONAL REPRESENTATIVE AND ESTATE ATTORNEY

Outline of Proposed New Part 7 of Probate Code

CHAPTER 1. COMPENSATION OF PERSONAL REPRESENTATIVE

- § 10800. Compensation for ordinary services
- § 10801. Additional compensation for extraordinary services
- § 10802. Compensation provided by decedent's will
- § 10803. Agreement for higher compensation void
- § 10804. Use of experts, technical advisors, and other assistants
- § 10805. Apportionment of compensation

CHAPTER 2. COMPENSATION OF ESTATE ATTORNEY

- § 10830. Compensation for ordinary services
- § 10831. Additional compensation for extraordinary services

- § 10832. Agreement for higher compensation void; no duty to negotiate for lower compensation
- § 10833. Compensation provided by decedent's will
- § 10834. Personal representative may not receive dual compensation as estate attorney unless authorized by will
- § 10835. Apportionment of compensation

CHAPTER 3. ALLOWANCE OF COMPENSATION BY COURT

- § 10850. Partial allowance of compensation
- § 10851. Final compensation
- § 10852. Matters to be considered in determining compensation for extraordinary services
- § 10853. Services of paralegal performing extraordinary services
- § 10854. Limitation on allowance of compensation for extraordinary services

CHAPTER 1. COMPENSATION OF PERSONAL REPRESENTATIVE

§ 10800. Compensation for ordinary services

10800. (a) Subject to the provisions of this chapter, for ordinary services the personal representative shall receive compensation based on 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 appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

Comment. Subdivision (a) of Section 10800 supersedes the first sentence of former Section 901. The four percent rate on the first

\$15,000 in former Section 901 is not continued; the highest rate under Section 10800 is the three percent rate on the first \$100,000. Subdivision (b) restates the first sentence of the second paragraph of former Section 901 without substantive change.

The last sentence of former Section 901 is not continued. 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 the decedent's equity in the property was used. Under the 1965 revision to former Section 901, gross value was used, whether or not a sale had taken place. See Review of Selected 1965 Code Legislation, at 222 (Cal. Cont. Ed. Bar 1965). Section 10801 continues the substance of the 1965 provision. The last sentence of former Section 901 was included in 1965 to make clear that the former practice was being changed; it is no longer necessary to continue this sentence.

Compensation is computed using the total amount of the appraisal of property in the inventory (see Sections 8800-8802, 8850, 8900 [AB 2841]), plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Property is appraised at its fair market value at the time of the decedent's death. See Section 8802 [AB 2841]. The amount of any liens or encumbrances on the property is not subtracted from the fair market value used for the purpose of computing the compensation under this section.

A court order allowing the compensation to the personal representative is required before the compensation may be paid, and the compensation allowed is paid out of funds of the estate. See Sections 10850 and 10851. As to allowing a portion of the compensation of the personal representative (on account of services rendered up to the time of allowance), see Section 10850. See also Section 12205 [AB 2841] (reduction of compensation for delay in closing estate administration).

The personal representative may employ or retain experts, technical advisors, and others to assist in the performance of the duties of the office. As to when these persons may be paid out of funds of the estate and when they must be paid out of the personal representative's own funds, see Section 10804.

As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10834.

§ 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 an amount the court determines is just and reasonable.

Comment. Section 10801 restates the first sentence of former Section 902 without substantive change. See also Section 12205 [AB 2841] (reduction of compensation for delay in closing estate administration).

The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. Omission of the list is not intended to change the law, but rather to recognize that case law is well developed in this area. As to what services are extraordinary, see the Comment to Section 10831. See also Section 10852 (factors to be considered by court in allowing compensation for extraordinary services).

§ 10802. Compensation provided by decedent's will

10802. (a) Subject to subdivision (b), if the decedent's will makes provision for the compensation of the personal representative, the compensation provided by the will shall be the full and only compensation for the services of the personal representative.

(b) If the personal representative files with the court a written instrument renouncing the compensation provided for in the will, the personal representative shall be compensated as provided in this chapter.

Comment. Section 10802 restates the last portion of former Section 900 and a portion of the first sentence of former Section 901 without substantive change. Subdivision (a) of Section 10802 permits the personal representative to receive a greater amount of compensation than the statutory compensation if the decedent's will makes provision for the greater amount of compensation. If the compensation provided for in the will is less than the statutory compensation, subdivision (b) of Section 10802 permits the personal representative to renounce the compensation provided in the will and to be compensated as provided in this chapter.

§ 10803. Agreement for higher compensation void

10803. An agreement between the personal representative and an heir or devisee for higher compensation than that provided by this chapter is void.

Comment. Section 10803 restates former Section 903 without substantive change. This section applies to compensation for both ordinary and extraordinary services. Nothing prevents the personal representative from waiving all compensation or agreeing to take less than the statutory compensation. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897) (statutory compensation allowed when evidence of alleged agreement for lower compensation was insufficient). See also Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar 1987).

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

10804. (a) The personal representative may employ tax counsel, tax auditors, accountants, or other tax experts for the providing of services in the computation, reporting, or making of tax returns, or in negotiations which may be necessary for the final determination and payment of taxes, and may pay for such services out of funds of the estate.

(b) The personal representative may employ any expert, technical advisor, or other qualified person when necessary for the providing of extraordinary services to the estate, and may pay for the services of that person out of funds of the estate.

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

(d) If not previously authorized or approved by the court, the amounts paid out of funds of the estate pursuant to subdivisions (a) and (b) are subject to court review at the time of the final account. The employment and payment of a person under subdivision (c) need not be authorized or approved by the court.

(e) The employment of a person under this section does not relieve the personal representative from any liability arising out of the performance of, or the failure to perform, the duties of a personal representative.

Comment. Subdivision (a) of Section 10804 restates without substantive change the second sentence of former Section 902. The tax expert employed pursuant to Section 10804 is paid out of funds of the estate; the compensation to which the personal representative is entitled under Section 10800 is not reduced because the tax expert is employed to assist the personal representative to perform duties in connection with taxes. This is because the services in connection with the taxes are extraordinary services. See the Comment to Section 10831.

The attorney for the personal representative also is paid out of funds of the estate and the compensation under Section 10800 is not reduced because of such payment.

Subdivisions (b), (c), and (d) are new. If the personal representative hires another to assist in the performing of the duties of the personal representative, the person hired is paid out of the personal representative's own funds if the person is assisting the personal representative in performing ordinary services. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (expenditure to compensate an investigator for locating estate assets not allowable because this is a statutory duty of the representative). However, if the execution of the particular duty requires extraordinary services, then the personal representative may be allowed additional compensation for the extraordinary services (Section 10801) which could include an allowance to the personal representative to cover the cost of compensating another to assist in performing the extraordinary services or the person assisting in performing the extraordinary services could be paid out of estate funds and the allowance to the personal representative for performing the extraordinary service reduced accordingly. For example, a manager may be needed to run the decedent's business. The reasonable salary of the manager may be paid from estate funds, and the allowance to the personal representative for managing the business reduced to recognize the payment to the business manager from funds of the estate. On the other hand, the business may, for example, be managed by an employee of the personal representative, and the personal representative may request an allowance for the extraordinary management services that covers the entire cost of providing those services.

An expert employed under Section 10804 may include, for example, an attorney hired to bring a law suit to collect a debt owed by a third person to the estate or to handle litigation against the decedent or the estate, or to do other extraordinary legal services for the estate. Subdivision (b) permits the personal representative to retain this lawyer and to pay for the services rendered by the lawyer out of the estate. See the examples of litigation concerning the estate in the Comment to Section 10831. See also the Comment to Section 10854. If not previously authorized or approved by the court, the need for the lawyer and the fee of the lawyer are subject to review by the court at the time of the final account. See subdivision (d) of Section 10804. See also Sections 11001 and 11004 [AB 2841].

Subdivision (c) makes clear that the personal representative may make an agreement with the estate attorney that the estate attorney will assist the personal representative in performing the ordinary services of that office. This is consistent with existing practice. See Fresno County Probate Policy Memoranda § 9.4(c), *reprinted in California Local Probate Rules* (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, *reprinted in California Local Probate Rules, supra*; Rules of Professional Conduct of the State Bar of California, Rule 5-101. Court authorization or approval is not required when the attorney is paid by the personal representative from the personal representative's own funds. This changes the former practice in at least one court. See Fresno County Probate Policy Memoranda § 9.4(c), *reprinted in California Local Probate Rules, supra* (court approval of

contract required). Compare Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, reprinted in California Local Probate Rules, *supra*.

Subdivision (d) indicates when court authorization or approval is required. Amounts paid out of estate funds under subdivisions (a) and (b) are subject to court review. Payment may not be made to the estate attorney unless authorized by the court. See Sections 10831, 10850, 10851. But court authorization or approval is not required when an attorney or other person is hired under subdivision (c) to assist the personal representative in performing ordinary services.

Subdivision (e) makes clear that the personal representative may not avoid liability for failure to perform properly the duties of the office by hiring another to assist in the performance of the duty. See, for example, Section 9600 (duty to use ordinary care and diligence in management and control of the estate). See also Section 9612 (effect of court authorization or approval).

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

Note. The Commission requested that the staff prepare a memorandum concerning Section 3-715(21) of the Uniform Probate Code. This UPC provision relates to the employment of persons to advise or assist the personal representative in the performance of the administrative duties of the personal representative. If a provision were approved by the Commission based on this provision of the UPC, the provision would not be compiled in the compensation provisions of the new Probate Code. Probably it would be compiled in the provisions relating to the powers and duties of the personal representative. In any case, the study of this provision of UPC is not directly related to the compensation study and need not be considered in connection with that study, although some revision of Section 10804 may be necessary later to conform to the provision based on the UPC if one is approved by the Commission.

§ 10805. Apportionment of compensation

10805. If there are two or more personal representatives, the personal representative's compensation shall be apportioned among the personal representatives by the court according to the services actually rendered by each personal representative or as agreed to by the personal representatives.

Comment. Section 10805 restates the second sentence of former Section 901 without substantive change, with the addition of the reference to an agreement between the personal representatives concerning apportionment of their compensation. The added language is drawn from Section 8547 (division of compensation between special administrator and general personal representative) [AB 2841].

CHAPTER 2. COMPENSATION OF ESTATE ATTORNEY

§ 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 on 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 appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

Comment. Section 10830 supersedes the portion of the first sentence of former Section 910 which provided in substance that the attorney for the personal representative was allowed for ordinary services the same amounts as were allowed the personal representative for ordinary services under Section 901. The four percent rate on the first \$15,000 in former Section 901 is not continued. The highest rate under Section 10830 is the three percent rate on the first \$100,000. The statutory compensation schedule set out in Section 10830 does not preclude an agreement for a lower compensation. See Section 10832. See also Business and Professions Code Section 6147.5(c)(4) (written agreement between attorney and personal representative must disclose that the Probate Code sets the maximum limits on the fee of the attorney, but the attorney and client may agree to a lower fee). If the attorney fails to satisfy the requirements for a written agreement with the personal representative if such an agreement is required, the attorney is entitled to collect compensation in an amount determined by the court to be reasonable for the services actually provided, but the compensation may not exceed the compensation provided in Article 2 (commencing with Section 10830). See Business and Professions Code Section 6147.5(d).

Compensation is computed using the total amount of the appraisal of property in the inventory (see Sections 8800-8802, 8850, 8900 [AB 2841]), plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Property is appraised at its fair market value at the time of the decedent's death. See Section 8802 [AB 2841]. The amount of any liens or encumbrances on the property is not subtracted from the fair market value used for the purpose of computing the compensation under this section.

A court order allowing the compensation to the attorney is required before the compensation may be paid, and the compensation allowed is paid out of funds of the estate. See Sections 10850 and 10851. As to allowing a portion of the compensation of the attorney (on account of services rendered up to the time of allowance), see Section 10850. See also Section 12205 [AB 2841] (reduction of compensation for delay in closing estate administration). As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10834.

§ 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 an amount the court determines is just and reasonable.

Comment. Section 10831 continues the last portion of the first sentence of former Section 910 without substantive change. Even though services are extraordinary, the court still has discretion whether or not to award compensation for them. Estate of Walker, 221 Cal. App. 2d 792, 795-96, 34 Cal. Rptr. 832 (1963). As to the factors to be considered by the court in allowing additional compensation for extraordinary services, see Section 10852. See also Section 12205 [AB 2841] (reduction of compensation for delay in closing estate administration).

The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. See Estate of Buchman, 138 Cal. App. 2d 228, 291 P.2d 547 (1955). Omission of the list is not intended to change the law, but rather to recognize that the case law is well developed in this area. Under Sections 10831 and 10832, the following services are extraordinary:

(1) Sales or mortgages of real or personal property. Estate of Fraysher, 47 Cal. 2d 131, 301 P.2d 848 (1956); Estate of McSweeney, 123 Cal. App. 2d 787, 798, 268 P.2d 107 (1954).

(2) Contested or litigated claims against the estate. *In re Estate of Keith*, 16 Cal. App. 2d 67, 68-69, 60 P.2d 171 (1936); *In re Estate of Dunton*, 15 Cal. App. 2d 729, 734, 60 P.2d 159 (1936).

(3) Tax services. Estate of Bray, 230 Cal. App. 2d 136, 144, 40 Cal. Rptr. 750 (1964).

(4) Defense of eminent domain proceeding involving estate property. Estate of Blair, 127 Cal. App. 2d 130, 273 P.2d 349 (1954).

(5) Litigation to defend the estate against imposition of a constructive trust on estate assets. Estate of Turino, 8 Cal. App. 3d 642, 87 Cal. Rptr. 581 (1970).

(6) Other litigation concerning estate property. *In re Estate of Keith*, 16 Cal. App. 2d 67, 70, 60 P.2d 171 (1936) (shareholders' liability suit).

(7) Carrying on decedent's business. Estate of Scherer, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); Estate of King, 19 Cal. 2d 354, 358-60, 121 P.2d 716 (1942); *In re Estate of Allen*, 42 Cal. App. 2d 346, 353, 108 P.2d 973 (1941).

(8) Will contest under some circumstances. *In re Estate of Dunton*, 15 Cal. App. 2d 729, 731-33, 60 P.2d 159 (1936) (will contest after will admitted to probate); Estate of Schuster, 163 Cal. App. 2d 337, 209 Cal. Rptr. 289 (1984) (defense of will contest before probate).

(9) Litigation to construe or interpret a will. Estate of Halsell, 138 Cal. App. 2d 680, 292 P.2d 300 (1956); Estate of Feldman, 78 Cal. App. 2d 778, 793-94, 178 P.2d 498 (1947).

(10) Defense of personal representative's account. Estate of Beach, 15 Cal. 3d 623, 644, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); Estate of Beirach, 240 Cal. App. 2d 864, 866-68, 50 Cal. Rptr. 5 (1966); Estate of Raphael, 128 Cal. App. 2d 92, 97, 274 P.2d 880 (1954).

(11) Securing a loan to pay debts of the estate. *In re Estate of O'Connor*, 200 Cal. 646, 651, 254 P. 269 (1927).

(12) Heirship proceedings. Estate of Harvey, 103 Cal. App. 2d 192, 195, 199, 229 P.2d 68 (1951).

(13) Legal services in connection with authorized sale of bonds in the estate. Estate of Neff, 56 Cal. App. 2d 728, 133 P.2d 413 (1943).

(14) Appeal from a judgment adverse to the estate. *Ludwig v. Superior Court*, 217 Cal. 499, 19 P.2d 984 (1933).

(15) Successful defense of personal representative in removal proceeding. Estate of Fraysher, 47 Cal. 2d 131, 136, 301 P.2d 848 (1956).

(16) Unlawful detainer action for the estate. Estate of Isenberg, 63 Cal. App. 2d 214, 217-18, 146 P.2d 424 (1944).

The foregoing is not an exhaustive list. Other extraordinary services may be added to this list by case law or court rule. See generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.28 (Cal. Cont. Ed. Bar 1987); Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

Extraordinary services for which the attorney may apply to the court for compensation include extraordinary services performed by a paralegal under the direction and supervision of the attorney. See Section 10853.

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

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

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

Comment. Subdivision (a) of Section 10832 makes an agreement for higher than statutory compensation void. This continues the substance of the principle of former Probate Code Section 903 which may have been made applicable to estate attorneys by the first sentence of former Probate Code Section 910. See Feinfield, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar 1987) ("principle of Prob C §903 should apply to contracts between an attorney and the decedent, even though §903 is not expressly applicable"). Notwithstanding that the agreement between the attorney and the personal representative provides for higher compensation, the attorney is entitled only to the amount of compensation provided for in this chapter.

The compensation provided under this article is considered to be reasonable compensation if the requirements of Business and Professions Code Section 6147.5 (written agreement) are satisfied. But that section and Section 10832 recognize that the personal representative and the estate attorney can make an agreement for lower compensation than that provided for in this article. This continues prior law. See *Estate of Morrison*, 68 Cal. App. 2d 280, 285, 156 P.2d 473 (1945); Feinfield, *supra*.

Subdivision (b) of Section 10832 is a new provision that protects the personal representative against any possible liability for failing to negotiate a lower attorney fee. This provision recognizes that the personal representative has no duty to negotiate with the attorney for a lower attorney fee, even where the particular estate is one that will require only minimal legal services.

This chapter does not limit compensation of the attorney for legal services provided in connection with property that is not part of the probate estate. For example, this chapter does not limit the fee the attorney may charge for assisting the beneficiary in collecting life insurance benefits or other property that is not part of the probate estate. See also Probate Code Sections 13157 (attorney fee determined by agreement between parties for proceeding to obtain a court order determining succession to real property of small estate), 13660 (attorney fee determined by agreement between parties for petition to obtain a court order determining or confirming property passing to or belonging to surviving spouse). See also Probate Code Sections 13100-13116 (affidavit procedure to collect or transfer personal property of small estate), 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries where small estate).

Note. Should the personal representative have no duty to negotiate a lower attorney fee in an appropriate case? The second

sentence includes a provision that relieves the personal representative from this duty and from any liability for failing to negotiate a lower attorney fee.

§ 10833. Compensation provided by decedent's will

10833. (a) Subject to subdivision (b), if the decedent's will makes provision for the compensation of the attorney for the personal representative, the compensation provided by the will shall be the full and only compensation for the services of the attorney for the personal representative.

(b) If the attorney files with the court a written instrument renouncing the compensation provided for in the will, the attorney shall be compensated as provided in this chapter.

Comment. Section 10833 continues the substance of the last portion of former Section 900 and a portion of the first sentence of former Section 901 insofar as those provisions were made applicable to estate attorneys by the first sentence of former Section 910.

Subdivision (a) of Section 10833 permits the attorney for the personal representative to receive a greater amount of compensation than the statutory compensation if the decedent's will makes provision for the greater amount of compensation. See Estate of Van Every, 67 Cal. App. 2d 164, 153 P.2d 614 (1944) (\$4,000 bequest to attorney in lieu of \$1,696.33 statutory fee). If the compensation provided for in the will is less than the statutory compensation, subdivision (b) of Section 10802 permits the attorney to renounce the compensation provided in the will and to be compensated as provided in this chapter.

Note. Should the following be substituted for subdivision (b) of Section 10833:

(b) Subject to Section 10832, the personal representative and the attorney may make an agreement that the attorney will receive greater compensation than that provided for in the will.

The justification for departing from the compensation provided in the will is that higher compensation is necessary in order that legal services may be obtained. The inadequacy of the compensation provided in the will probably is the result of the passage of time since the will was prepared and executed. However, the fact that the compensation in the will is inadequate is no justification for substituting the statutory compensation. It would be an odd result to deprive the personal representative of the opportunity to negotiate concerning the increased compensation when the will specified a compensation lower than the statutory compensation and it is now necessary to deviate from the testator's desires in order to increase that compensation.

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

10834. Unless expressly authorized by the decedent's will, a personal representative who is an attorney may receive the personal representative's compensation but not compensation for services as the estate attorney.

Comment. Section 10834 codifies case law. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980). The provision that dual compensation may be paid if expressly authorized by the decedent's will also codifies case law. See *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966).

An attorney who serves as personal representative may not become entitled to compensation as attorney by waiving compensation as personal representative. *Estate of Hart*, 204 Cal. App. 2d 634, 22 Cal. Rptr. 495 (1962). See generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.10-20.12 (Cal. Cont. Ed. Bar 1987).

§ 10835. Apportionment of compensation

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

Comment. Section 10835 continues the substance of the second sentence of former Section 901 as it was applied to estate attorneys by the first sentence of former Section 910, with the addition of the reference to an agreement between the attorneys concerning apportionment of their compensation. The added language is drawn from Section 8547 (division of compensation between attorneys for special administrator and general personal representative) [AB 2841].

CHAPTER 3. ALLOWANCE OF COMPENSATION BY COURT

§ 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.

Comment. Section 10850 continues the substance of former Sections 904 and 911 with the omission of the requirement of former Section 911 that the "payment shall be made forthwith." There are situations where there are not sufficient funds available to pay the amount allowed forthwith. As to the priority for payment, see Section 11420. See also Section 11424 (liability of personal representative for failure to pay).

The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10850. See Section 1220(f). Nothing in Section 10850 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time of for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. For the matters to be considered in determining the amount of compensation for extraordinary services, see Section 10852. If extraordinary services are performed by a paralegal, the petition for compensation must include additional information. See Section 10853. For a limitation on the court's authority to award a partial allowance of fees for extraordinary services, see Section

10854. See also Sections 8547 [AB 2841] (compensation of special administrator and attorney for special administrator), 10954(c) [AB 2841] (final report to show compensation), and 12205 [AB 2841] (reduction of compensation for delay in closing estate administration). See also Section 52 (defining "letters").

§ 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 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.

Comment. Section 10851 is a new provision drawn from Section 10850. Final compensation is not to be paid until there is a final account or a final distribution. As to the priority for payment, see Section 11420. See also Section 11424 (liability of personal representative for failure to pay). Section 10851 is in accord with existing practice. See Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.34 (Cal. Cont. Ed. Bar 1987).

The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10851. See Section 1220(f). Nothing in Section 10851 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time of for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. For the matters to be considered in determining the amount of compensation for extraordinary services, see Section 10852. See also Sections 8547 [AB 2841] (compensation of special administrator and attorney for special administrator), 10954(c) [AB 2841] (final report to show compensation), and 12205 [AB 2841] (reduction of compensation for delay in closing estate administration). If extraordinary services are performed by a paralegal, the petition for compensation must include additional information. See Section 10853.

Note. As to local court rules, see Alameda County Probate Policy Manual § 1002 (fees must be stated in petitions for distribution); Contra Costa County Probate Policy Manual §§ 603 (petition for distribution must show computation of fees), 605 (total fees not allowed before approval of final account and decree of distribution); Fresno County Probate Policy Memoranda § 9.3 (total fees ordinarily not allowed before approval of final account and decree of distribution); Humboldt County Probate Rules § 12.15(c) (petition for final distribution must show computation of fees requested); Lake County Probate Rules § 13.4(g) (extraordinary fees ordinarily not allowed before court approval of final accounting); Los Angeles County Probate Policy Memorandum §§ 15.02, 16.01 (total fees not fixed until approval of final account and decree of distribution); Madera County Probate Rules §§ 10.14 (total fees not allowed until approval of final account and decree of distribution), 10.19 (petition for final distribution must contain computation of fees requested); Marin County Rules of Probate Practice § 1203 (extraordinary fees usually not allowed before court approval of final accounting; partial allowance of fees not allowed before filing of inventory); Merced County Probate Rules §§ 1103 (petition for distribution must show calculation of fees), 1104 (total fees ordinarily not allowed until approval of final accounting), 1108 (court prefers to consider extra compensation at time of final account); Monterey County Probate Rules § 4.31 (total fees normally not allowed until approval of final account and decree of distribution); Orange County Probate Policy Memorandum § 8.04 (court prefers to fix fees when an account is considered; total fees not allowed before

approval of final account and decree of distribution; court prefers to consider extraordinary fees at time of final distribution); Riverside County Probate Policy Memoranda § 6.1004 (accounts or petitions for distribution must show computation of fees requested; total fees ordinarily not allowed before approval of final account and judgment of distribution; court prefers to consider extraordinary fees at time of final distribution); Sacramento County Probate Policy Manual §§ 706 (petition for distribution must show calculation of fees), 707 (total fees normally not fixed before approval of final account and judgment of distribution), 708 (court prefers to consider extra fees with final account); San Bernardino County Probate Policy Memorandum § 906 (petition for distribution must show calculation of fees; extraordinary fees ordinarily requested with petition for final distribution)); San Diego County Probate Rules §§ 4.110, 4.111 (no partial allowance of fees before first accounting; total fees not allowed before approval of final account and decree of distribution); San Francisco Probate Manual §§ 13.03 (total fees generally not allowed before final distribution), 13.04 (application for fees may be included in petition for settlement of account or for distribution, or in separate petition); San Joaquin County Probate Rules §§ 4-705 (petition for distribution must show calculation of fees), 4-706 (total fees ordinarily not allowed before approval of final accounting), 4-1001 (petition for final distribution must contain computation of fees or waiver); San Mateo County Probate Rules, Rules 486 (total fees generally not allowed before final distribution), 487 (application for fees may be included in petition for settlement of account or for distribution, or in separate petition); Santa Barbara County Probate Rules § 414(H) (petition for distribution must state fees requested; total fees normally not allowed before approval of final account and decree of distribution); Santa Clara County Probate Rules §§ 5.6(c) (unless waived, computation of fees must be included in petition for final distribution), 5.7(d) (allowances on extraordinary fees ordinarily not allowed); Santa Cruz County Probate Rules § 405 (ordinarily extraordinary fees not allowed before approval of final accounting); Solano County Probate Rules § 8.11(d) (partial payment of fees ordinarily disallowed until first accounting and showing of need for additional administration; total fees not allowed before approval of final account and final distribution); Stanislaus County Probate Policy Manual §§ 1003 (petition for distribution must show calculation of fees), 1004 (total fees ordinarily not allowed before approval of final accounting), 1008(b) (court prefers to consider extraordinary fees at time of final account), 1102(e) (petition for final distribution must contain computation of fees requested or waiver); Tuolumne County Probate Rules, Rules 12.11(e) (no allowance of extraordinary fees will be made except for good cause shown), 12.14 (final account or petition for final distribution must contain computation of fees requested); Ventura County Probate Rules § 11.12(c) (account or petition for distribution must show fees paid and calculation; total fees ordinarily not allowed before approval of final accounting and decree of distribution); Yolo County Probate Rules § 20.5 (petition for distribution seeking approval of fees must show calculation); Probate Rules of Third District Superior Courts, Rules 12.12(E) (no allowance of extraordinary fees made except for good cause shown), 12.15 (petition for final distribution shall contain computation of fees requested).

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

10852. In determining what is just and reasonable compensation for extraordinary services, the court shall consider all of the relevant circumstances, which may include but are not limited to the following:

- (a) The nature and difficulty of the task performed.
- (b) The results achieved.
- (c) The benefit to the estate as a whole rather than the interests of particular beneficiaries.
- (d) A detailed description of the services performed, demonstrating the productivity of the hours spent.
- (e) The expertise, experience, and professional standing in the community of the person performing the services.
- (f) The amount of the fee provided by Section 10800 or 10830, and whether it constitutes adequate compensation for all services rendered.
- (g) The hours spent.
- (h) The usual hourly rate of the person who performed the services.
- (i) The total amount requested.
- (j) The size of the estate and the length of administration.

Comment. Section 10852 is a new provision drawn from the attorney fee standard in Los Angeles County. See Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

Even though services are extraordinary, the court still has discretion whether or not to award compensation for them. Estate of Walker, 221 Cal. App. 2d 792, 34 Cal. Rptr. 832 (1963). It is not anticipated that the court will require a showing under subdivision (f) of the ordinary services provided to the estate unless there is some objection to the request for the additional fee for the extraordinary services. See also Business and Professions Code Section 6147.5 (court to consider but not bound by provision in agreement retaining attorney as to hourly rates or other standard rates).

As to what constitutes an extraordinary service, see the Comment to Section 10831. See also 10853 (paralegal performing extraordinary services).

Note. Section 10852 closely follows the language of Section 15.08 of the Los Angeles Probate Policy Manual, the relevant part of which reads:

1. In evaluating the justification for an award of fees for extraordinary services, the court will take into consideration:

- A. Nature and difficulty of the task performed.
- B. Results achieved.
- C. Benefit to the estate as a whole rather than the interests of particular beneficiaries.
- D. Detailed description of services performed demonstrating productivity of hours spent.
- E. Expertise, experience and professional standing of the attorney in the community.
- F. The statutory fee and whether it constitutes adequate compensation for all the services rendered by the attorney.
- G. Hours spent.
- H. Hourly rate per person performing services.
- I. Total amount requested.
- J. Size of the estate and length of administration.

§ 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 under the direction and supervision of an 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.

Comment. The first two sentences of Section 10853 restate without substantive change the second and third sentences of former Section 910. The third sentence, which is new, makes clear that the compensation awarded to the attorney for extraordinary services is to take into consideration the extent to which the services were performed by the paralegal and the fact that the attorney is responsible for directing and supervising the paralegal and for the work produced by the paralegal.

§ 10854. Limitation on allowance of compensation for extraordinary services

10854. Notwithstanding Sections 10850 and 10851, the court may allow compensation for extraordinary services before final distribution when any of the following requirements is satisfied:

(a) It appears likely that administration of the estate will continue, whether due to litigation or otherwise, for an unusually long time.

(b) Present payment will benefit the estate or the beneficiaries of the estate.

(c) Other good cause is shown.

Comment. Section 10854 is a new provision drawn from local court rules. In many cases, present payment will benefit the estate; compensation will be allowed near the end of a tax year to absorb estate income so that the income will not be taxable.

Section 10854 applies only to compensation for extraordinary services of the personal representative and estate attorney, not to compensation of experts employed under Section 10804 (including, for example, an attorney hired to bring a law suit to collect a debt owed by a third person to the estate or to handle litigation against the decedent or the estate, to do tax returns, and the like). An attorney hired under Section 10804 may be paid periodically or upon completion of the work, but the need for the attorney and the fee paid is subject to court review on the final account if not previously authorized or approved by the court. See the Comment to Section 10804.

Note. For the local court rules from which Section 10854 is drawn, see Lake County Probate Rules § 13.4(g); Marin County Rules of Probate Practice § 1203; Merced County Probate Rules § 1108; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual § 708; San Bernardino County Probate Policy Memorandum § 906; San Francisco Probate Manual § 13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules § 5.7(d); Santa Cruz County Probate Rules § 405; Stanislaus County Probate Policy Manual § 1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).

CONFORMING REVISIONS

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

6148. (a) ~~In~~ Except as otherwise provided in subdivision (d), in any case ~~not coming within Section 6147~~ 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 and other standard 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) 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, 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.

(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.

(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.

(5) A case coming within Section 6147 or 6147.5.

(e) This section applies prospectively only to fee agreements following its operative date.

Comment. Section 6148 is amended to add paragraph (5) of subdivision (d). This paragraph reflects the addition of Section 6147.5 and includes a reference to Section 6147 as a substitute for the reference to Section 6147 which formerly appeared in the introductory portion of subdivision (a).

Section 6147.5 covers legal services provided to the personal representative in a formal probate proceeding. See Section 6147.5(a). Section 6148 continues to govern legal services provided in connection with the estate of a decedent where there is no formal probate proceeding or where there are legal services provided with respect to the portion of the estate that is not subject to probate or where legal services are provided to the estate by an attorney other than the estate attorney (as where an attorney is retained to bring an action to collect a debt owed to the estate). See Probate Code Sections 13157 (attorney fee determined by agreement between parties for proceeding to obtain a court order determining succession to real property of small estate), 13660 (attorney fee determined by agreement between parties for petition to obtain a court order determining or confirming property passing to or belonging to surviving spouse). See also Probate Code Sections 13100-13116 (affidavit procedure to collect or transfer personal property of small estate), 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries where small estate). See also the Comment to Probate Code Section 10804.

Probate Code § 8547 [added by AB 2841] (technical amendment).
Compensation

8547. (a) Subject to the limitations of this section, the court shall fix the ~~emmission~~ and ~~allowancees~~ compensation of the special administrator and the ~~fees~~ compensation of the attorney of the special administrator.

(b) The ~~emmission~~ compensation of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's ~~emmission~~ compensation or the court in its discretion so allows. ~~Extra-allowancees~~ Compensation for extraordinary services of a special administrator may be allowed on settlement of the final account of the special administrator. The total ~~emmission~~ compensation paid and ~~extra allowancees~~ made to the special administrator and general personal representative shall not, together,

exceed the sums provided in ~~this code~~ Part 7 (commencing with Section 10800) of Division 7 for ~~commission and extra allowances~~ compensation for the ordinary and extraordinary services of a personal representative. If the same person does not act as both special administrator and general personal representative, the ~~commission and allowances~~ compensation shall be divided in such proportions as the court deems determines to be just or as may be agreed to by the special administrator and general personal representative.

(c) The total ~~fees~~ compensation paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in ~~this code~~ Part 7 (commencing with Section 10800) of Division 7 as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the ~~fees~~ compensation shall be divided between the attorneys in such proportions as the court deems determines to be just or as may be agreed to by the attorneys.

(d) Fees Compensation of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of ~~fees~~ compensation to the attorney for extraordinary services to the special administrator may be made on settlement of the final account of the special administrator.

Comment. Section 8547 is amended to change "commission and allowances" and "fees" to "compensation", consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney) and to make other nonsubstantive, clarifying revisions.

Probate Code § 10954 [added by AB 2841] (technical amendment), When account not required

10954. (a) Notwithstanding any other provision of this part, the personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate:

(1) The person has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied.

(2) Adequate provision has been made for satisfaction in full of the person's interest. This paragraph does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

(b) A waiver or acknowledgment under subdivision (a) shall be executed as follows:

(1) If the person entitled to distribution is an adult and competent, by that person.

(2) If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver or acknowledgment is executed by a guardian of the estate of the minor, the waiver or acknowledgment may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court. In the case of a trust that is subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9, the waiver or acknowledgment may be executed without the need to obtain approval of the court.

(5) If the person entitled to distribution is an estate, by the personal representative of the estate. The waiver or acknowledgment may be executed without the need to obtain approval of the court in which the estate is being administered.

(6) If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to

represent the person entitled to distribution, by the guardian ad litem.

(c) Notwithstanding subdivision (a):

(1) The personal representative shall file a final report of administration at the time the final account would otherwise have been required. The final report shall include the amount of ~~fees and commissions~~ compensation paid or payable to the personal representative and to the attorney and shall set forth the basis for determining the amount.

(2) A creditor whose interest has not been satisfied may petition under Section 10950 for an account.

Comment. Section 10954 is amended to change "fees and commissions" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney).

Probate Code § 12205 [added by AB 2841] (technical amendment). Sanction for failure to timely close estate

12205. If the time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court, the court may, on the hearing for final distribution or for an allowance on the ~~commissions~~ compensation of the personal representative or ~~on the fees~~ of the attorney, reduce the ~~commissions or fees~~ compensation by an amount the court ~~deems~~ determines to be appropriate, regardless of whether the ~~commissions or fees~~ compensation otherwise allowable under ~~the provisions of Sections 901 and 910~~ Part 7 (commencing with Section 10800) would be reasonable compensation for the services rendered, if the court determines that the time taken was within the control of the personal representative or attorney and was not in the best interest of the estate or interested persons. In making a determination under this section, the court shall take into account any action taken under Section 12202 as a result of a previous delay.

Comment. Section 12205 is amended to change "commissions" and "fees" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney) and to substitute a reference to that part which superseded former Sections 901 and 910.

Other Conforming Revisions

There may be other code sections that refer to Probate Code Section 901 or 910. These other sections will need to be conformed to the renumbering and revision of these sections. There may be other sections that provide for reducing compensation of the personal representative as a sanction. We will need to add references to these other sections wherever we make a reference to Section 12205 in a Comment.

COMMENTS TO REPEALED PROBATE CODE SECTIONS

§ 900 (repealed). Personal representative's expenses and compensation; renunciation of compensation provided by will

Comment. The first portion of former Section 900 is continued in Section []. The last portion of former Section 900 is restated in Section 10802 without substantive change. See also Section 10833 and the Comment to that section.

§ 901 (repealed). Percentage compensation; apportionment

Comment. The first sentence of former Section 901 is superseded by subdivision (a) of Section 10800 and by Section 10802. See also Section 10833 and the Comment to that section. The second sentence is restated in Section 10805 without substantive change. See also Section 10835 and the Comment to that section. The third sentence is restated in subdivision (b) of Section 10800 without substantive change.

The last sentence of former Section 901 is not continued. 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 the decedent's equity in the property was used. Under the 1965 revision to former Section 901, gross value was used, whether or not a sale had taken place. See Review of Selected 1965 Code Legislation, at 222 (Cal. Cont. Ed. Bar 1965). The last sentence of former Section 901 was included in 1965 to make clear that the former practice was being changed; it is no longer necessary to continue this sentence.

§ 902 (repealed). Extraordinary services; employment of tax specialists

Comment. The first sentence of former Section 902 is restated in Section 10801 without substantive change. The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. See Estate of Buchman, 138 Cal. App. 2d 228, 291 P.2d 547 (1955). Omission of the list is not intended to change the law, but rather to recognize that case law is well developed in this area. See the Comment to Section 10831.

The second sentence of former Section 902 is restated in Section 10804 without substantive change.

§ 903 (repealed). Contract for higher compensation void

Comment. Former Section 903 is restated in Section 10803 without substantive change. See also Section 10832 and the Comment to that section.

§ 904 (repealed). Petition for allowance on compensation; notice

Comment. Former Section 904 is continued in substance in Section 10850. The authority in former Section 904 for the court to require further or additional notice is superseded by Section 1202.

§ 910 (repealed). Attorney's compensation; services by paralegal

Comment. The first sentence of former Section 901 is superseded by Sections 10830 and 10831. See also Sections 10832, 10833, and 10835 and the Comments to those sections. The second and third sentences are restated in the first two sentences of Section 10853 without substantive change.

§ 911 (repealed). Petition for allowance on compensation; notice

Comment. Former Section 911 is continued in substance in Section 10850.