

Memorandum 89-3

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

BACKGROUND

The Commission's Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative (October 1988) was distributed to interested persons and organizations for review and comment. A copy of the Tentative Recommendation is attached. This memorandum reviews the comments sent to the Commission on the Tentative Recommendation. The comments received are set out on the attached yellow pages. This Memorandum collects under separate headings the comments relevant to each issue presented by the Tentative Recommendation.

THE BASIC AND CONTROVERSIAL POLICY ISSUE PRESENTED BY THE TENTATIVE RECOMMENDATION IS WHETHER THE STATUTORY FEE CONCEPT SHOULD BE RETAINED FOR THE ESTATE ATTORNEY FEE OR WHETHER A SCHEME (BASED ON THE UNIFORM PROBATE CODE) SHOULD BE SUBSTITUTED UNDER WHICH THE ATTORNEY AND PERSONAL REPRESENTATIVE WOULD AGREE TO A "REASONABLE FEE" THAT WOULD NOT BE REVIEWED BY THE COURT ABSENT AN OBJECTION BY AN INTERESTED PERSON. On the one side we have a consumers organization (HALT — San Diego) and a few probate lawyers (favoring a reasonable fee system); on the other side, we have the vast majority of probate lawyers (favoring a statutory fee schedule). The first portion of this memorandum sets out the comments (or portions of comments) that are relevant to this issue.

REACTION OF CONSUMER GROUPS

HALT — San Diego, a consumer group, submitted six single spaced pages of comments on the Tentative Recommendation. The letter from HALT, San Diego, is found at pages 87-93 of the Exhibits. You should read this letter with care, so you will understand the nature of the consumer opposition to the Commission's proposal. The conclusion from the letter (Exhibits, page 93) is set out below:

The Commission's Tentative Recommendation utterly fails to respond to the legitimate concerns of legal consumers. Rather than taking advantage of this opportunity to make legal services more affordable and accessible, the LRC appears to have chosen to protect lawyers' financial interests. One last time, HALT -- San Diego implores you to abolish the statutory percentage fee system, and all of the meaningless distinctions and loopholes that go with it, and replace it with a system that requires fees to be reasonable and based on documented time spent and work performed. At the very least, the statutory percentage fee system requires substantial revision to make it a little less unfair.

COMMENTS THAT APPROVE TENTATIVE RECOMMENDATION WITHOUT QUALIFICATION

The following approved the Tentative Recommendation without qualification:

William E. Fox, attorney, Paso Robles: ". . . during my 25 years of specializing in probate matters, I have had very little difficulty with any of my clients. However, this proposed legislation will be helpful and will eliminate the possibility of conflict between attorney and client in many instances. I recommend the proposed enactment of these laws." Exhibits, page 1.

Robert J. Berton, attorney, San Diego: "I support [the Tentative Recommendation]. I am particularly pleased that your research supports retention of the unfairly maligned statutory fee schedule for ordinary services. What once may have been a truism, i.e., profitable large probate estates offset unprofitable small probate estates, is probably no longer true. This is because most large estates now opt for probate avoidance by virtue of the use of living trusts. This is not so for small estates where the use of a living trust may not be the estate planning vehicle of usual choice." Exhibits, page 2.

Benjamin D. Frantz, Professor, McGeorge School of Law, Sacramento: "I approve [the Tentative Recommendation]." Exhibits, page 14.

Henry Angerbauer, CPA, Concord: "I agree with your recommendations and conclusions. . . ." Exhibits, page 30.

Ruth A. Phelps, attorney, Burbank: "I approve the tentative recommendation. I think it clarifies and simplifies existing law. I do not recommend any changes to it." Exhibits, page 49.

Russell P. Baldo and Paul H. Chamberlain, attorneys, Auburn: "Both of us agree that the use of a statutory schedule for fees and compensation of the representative is worthwhile as

it eliminates problems discussing those items with clients involved in probate and satisfies them that a standard schedule is being followed.

"The change of applying the 3% rate to the first \$100,000.00 of value really does not make that much difference monetarily and would be acceptable.

"The rates indicates as to 'ordinary probate proceedings' would appear to be in line with those of other states and the recommendation therefore generally meets our approval." Exhibits, page 51.

Robert C. Hays, attorney, San Francisco: "Your tentative recommendation is excellent, and we can only hope the Legislature will adopt it." This letter contains an extended discussion in support of the statutory fee system. Exhibits, pages 75-77.

Henry Melby, attorney, Glendale: "As a probate practitioner for thirty years, I concur one hundred percent with the well thought-out recommendations which you have published and urge you to propose and support the recommendations as published." Exhibits, page 97.

COMMENTS APPROVING TENTATIVE RECOMMENDATION WITH SUGGESTED REVISIONS

A number of persons who sent comments to the Commission approved the Tentative Recommendation but suggested one or more changes or clarifications in it. These comments are discussed in connection with the particular change or clarification. Examples of this type of comment are the following:

Jerome Sapiro, Lawyer, San Francisco: "I have reviewed your . . . tentative recommendation. Generally, I found same to be good." Exhibits, page 4.

Probate Section of the San Bernardino County Bar Association
"The [Section] generally supports the tentative recommendations of the California Law Revision Commission relating to compensation of estate attorney and personal representatives. The proposed revisions should simplify and clarify a number of situations." [The only revision suggested was that the court should be authorized to approve minimum fees for both the personal representative and estate attorney of not more than \$500 for a small estate.] Exhibits, page 66.

Yuba-Sutter Bar Association, John L. Guth, Yuba City: "I presented [your tentative recommendation to] the Yuba-Sutter Bar Association at its general meeting on November 10, 1988. There were approximately 30 members in attendance. The membership authorized me to advise you that there was no

objection to the tentative recommendation, except that the language in the disclosure statement [should be slightly revised]." Exhibits, page 15.

Peter D. Anderson, attorney, King City: "I generally concur with the recommendations. However, I do disagree with two (2) sections that were carried over from current law." Exhibits, page 21.

David W. Knapp, Sr., attorney, San Jose: "First and foremost let me state that I read each and every word of your Tentative Recommendations, sent to me faithfully by your Commission. I have nothing in my heart but praise for the efforts you have made and are making and I almost always totally agree with your endeavors. Keep up the good work, we certainly need it in California. [Objects to lowering attorney fees on small estates.]" Exhibits, page 28.

Harold S. Small, attorney, San Diego: "In general I must commend the Commission for the efforts expended and the results achieved. I concur in most of the recommendations made by the Commission. [Suggests slight increase in fees for smaller estate while maintaining the existing statutory scheme for larger estates.] Exhibits, page 36.

Thomas N. Stewart, Jr., attorney, Walnut Creek: "The specific proposals appear to be well thought out and in substance preserve the existing practice, although they do formalize and clarify some of the existing local policies. As a general proposition, I am in favor of the implementation of the Tentative Proposal. I have one negative thought but no particular suggestion as to how to remedy it. [The hourly rates allowed by the courts penalizes the experienced probate attorney.] Exhibits, page 68.

COMMENTS THAT GENERALLY OPPOSE ANY CHANGE IN EXISTING LAW

Generally, the comments received supported the Tentative Recommendation with suggestions for specific technical or substantive revisions. By way of contrast, the following comments may be considered as a general objection to changing existing law.

Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. This Committee made the following comment:

"This Committee supports the position of the State Bar. We support the historical statutory fee model as it presently exists since, to a large extent, it protects consumers and provides reasonable compensation to personal representatives and their counsel. Often, the personal representative is not the "real party in interest" in that the personal representative is not a primary beneficiary of the Estate.

Of course, this is always the case with respect to corporate fiduciary. The statutory fee system provides a method for compensating counsel which had been demonstrated, by the Commission's study, to be in line with the compensation earned by attorneys in other states.

"This Committee is of the opinion that the tentative Recommendation sets forth a scheme that constitutes a significant departure from the historical statutory fee model, and which this Committee cannot support. . . . Unless the Commission returns to the historical statutory fee model, this Committee has resolved to support an 'agreed fee' model [discussed further below under "Comments That Support a 'Reasonable Fee' System]." Exhibits, page 94.

William S. Johnstone, Jr., attorney, Pasadena, appears to object to generally to the Tentative Recommendation. He objects specifically to the statutory disclosure statement and to the concept of negotiated fees:

"First: I believe that your recommendation that the probate client's fee letter contain the statement "you and your attorney may agree to a lower fee but may not agree to a higher fee" will promote fee bartering. As I view the purpose of a statutory fee schedule, it is to reflect the from time-to-time judgment of our elected state officials as to the reasonable value of ordinary services to be performed by lawyers in probating decedents' estates, given a multitude of considerations. I am satisfied with the reasonableness to the public of our existing fee schedule, which opinion is confirmed by the statistics contained in your tentative recommendation and my personal experience with dealing with estate attorneys in Massachusetts, Connecticut, New York, Ohio, Pennsylvania, Colorado, Louisiana, Nevada, Texas, and Arizona. A collateral benefit of a statutory fee schedule is the elimination (or reduction) of fee bartering and fee disputes. I view your above-quoted "admonition" to clients as provocative of fee bartering, which has the potential of diminishing the quality and/or completeness of services to an estate, and thus prove to be a disservice to the public and probate bar, as well. Since our practice (shared by most competent probate lawyers) is to perform a significant portion of the personal representative's duties as well as our own, if we were to negotiate our fees downward, I suspect we would require the personal representative to compensate us for performing his/her responsibilities, or require him/her to perform them himself/herself or secure others to do so for him or her. No benefit is derived by the estate, and I believe a detriment in fact occurs.

"Representing a fiduciary is quite different from representing an individual. While a personal representative might also be the beneficiary, most often he or she is not the sole beneficiary, and quite often the fiduciary is not a beneficiary at all. Therefore, any fee reduction does not necessarily economically impact the Executor. This is stated for the purpose of indicating that the perceived benefit of

encouraging fee negotiation may not be as great (or warranted) as you might perceive. Encouragement of fee bartering raises an interesting collateral issue, and that is what, if any, duty exists in a personal representative to negotiate lower attorney's fees than set forth by statute. I don't know the answer but I think that publicly impliedly encouraging the negotiation of attorneys' fees will focus on this issue and increase the likelihood of acrimony, at the least, between personal representatives and estate beneficiaries." Exhibits, pages 11-12.

Richard L. Stack, attorney, Los Angeles:

"The right to negotiate a fee with an attorney at less than the statutory fee has been, and continues to be, a safety valve to permit the equitable adjustment of fees in those rare cases where the statutory fee is significantly disproportionate to the services and responsibilities of the attorney. To promote fee bargaining in every case would be tremendously disruptive and would no doubt hasten the demise of the statutory fee system altogether." Exhibits, page 99.

Henry C. Todd, attorney, San Francisco, also takes the position that the existing statutory fee system should be retained without change. He is concerned that the Commission is "trying to set up firm bargaining positions by an aggrieved widow as against an attorney." However, as the Commission is aware, the attorney fee is determined by agreement between the surviving spouse and the attorney when (as is the usual case) a petition under Section 13650 is used to determine or confirm property passing or belonging to surviving spouse. See Section 13660.

Mr. Todd (Exhibits, pages 104-105) states:

I feel that the Commission is completely missing the boat in trying to set up firm bargaining positions by an aggrieved widow as against an attorney who should be most solicitous about her well being and not concerned at that present time about negotiating with her about a proper fee eight or ten months after her spouse passed away.

I have practiced law for over fifty years in California, and I do believe that the training that I had with my father, Clarence E. Todd, who was admitted in 1909 and Peter Sommer, whom I believe was admitted about ten years later, in handling probates. R.W. Gillogley, who practiced for many years in San Francisco, insisted that his wife bring the estate of himself to my father and insisted that she agree to pay the full statutory fee informing her that the probate system in California was one of the few places where an attorney would be adequately compensated.

I believe that the perversion of the probate system with gimmicks, such as, inter vivos trusts, is one of the worst things that has occurred to the profession in the probate field.

Imagine if you will, and I believe that most of the commissioners would probably have been born after I was admitted to practice, a widow of the age of about 70 to 75 losing a spouse of forty or more years, having to negotiate through the feelings of loss and hurt which always come upon a spouse of long standing, and being informed by a lawyer who until this occurred, she had trusted, that the probate law required her to negotiate a fee, prior to any work being done, that was satisfactory to herself as well as to the attorney.

I read with interest the letter of Robert C. Hays, of December 6, 1988 concerning the use of other means for handling the property of persons during their lifetime. I think he is on the proper road, but has failed to include the personal feeling of a grief stricken widow who has been married for a long period of time and is thrust into a bargaining position with the attorney.

I firmly suggest that the present system of fixing fees by statutory methods be retained and that reversing the views of the Supreme Court of California concerning avoidance of statutory fees even in the largest estates, would not be proper.

COMMENTS THAT SUPPORT A "REASONABLE FEE" SYSTEM

COMMISSION TENTATIVE RECOMMENDATION. In its Tentative Recommendation, the Commission recommended that the statutory attorney fee for ordinary services be retained. The Tentative Recommendation pointed out that the statutory fee system has a number of advantages over a reasonable fee system.

COMMENTS SUPPORTING A "REASONABLE FEE" SYSTEM. As previously noted, HALT — San Diego, a consumer group "implores" the Commission "to abolish the statutory percentage fee system . . . and replace it with a system that requires fees to be reasonable and based on documented time spent and work performed." Exhibits, page 93.

Several lawyers wrote to support adoption of a "reasonable fee" system:

Paul Gordon Hoffman, attorney, Los Angeles, Exhibits, pages 16-18:

"The statutory fee schedule should be abolished in favor of a reasonable fee approach.

"The advertising pages of the Los Angeles newspapers are filled with ads trumpeting the "fact" that there are

substantial fees payable in a probate, which, the ads claim, can be eliminated through the use of a living trust. These ads are, of course, misleading, since they assume that full statutory fees will be awarded in every probate, and further assume that there will be no fees in a living trust. Naturally, the ads fail to take into account that family members routinely waive fees for serving as executor, and also ignore the fact that negotiated fee agreements are becoming the norm in large estates in the Los Angeles area.

"Nevertheless, these advertisements are apparently successful in separating prospective clients from substantial legal fees for the preparation of living trusts. While living trusts are indeed appropriate vehicles in some cases, I believe that they are being vastly oversold, and the existence of a statutory fee schedule is a major selling point.

"While I recognize that the Commission can do little to regulate this false and misleading advertising, I believe that the abolition of a statutory fee schedule will eliminate the principal specious claim made in the advertisements. While the proposed notice to representatives will prevent probate attorneys from falsely conveying the impression that statutory fees are automatic and nonnegotiable, they will still result in the type of advertising that I mentioned above.

"A second problem with the statutory fee schedule is that it generally provides inadequate fees in small estates. Roughly the same amount of work has to be done in any estate - preparing the petition for probate, order for probate, notice to representatives and letters testamentary, marshalling the assets, preparing creditors claims, and preparing the petition for distribution. There is probably a greater correlation between the number of assets or the number of beneficiaries in an estate and the amount of legal work required, than between the value of the estate and the work required.

"In your list of advantages of retaining a statutory fee schedule, you indicate that it makes legal services more affordable by shifting some of the cost to the administration of larger estates. This is absurd. First, the statutory fee schedule is such that most small estates are unprofitable for any attorney. An attorney has no obligation to take on unprofitable civil matters, and most probate lawyers will refuse to handle small estates. Thus, the statutory fee schedule deprives many people of access to counsel. Second, where a family member is named as the executor in a large estate, we find almost uniformly that the executor requests an hourly fee arrangement (but not more than the statutory fee schedule.) Thus, there is no statutory fee profit on the large estate to offset losses in small estates. Third, in Los Angeles County the Court will generally refuse to award extraordinary fees in large estates, on the assumption that the statutory fee is sufficient.

"I find the Commission's position in support of a statutory fee schedule especially problematical because within the same week, I received the Commission's Tentative Recommendation on Trustee's Fees, which endorses a reasonable fee approach. New York has statutory fees for estates and trusts. If the Commission is so enamored of statutory fee schedules, why not be consistent for estates and trusts?

"The Tentative Recommendation on Trustee's Fees apparently justifies its recommendation that fees be left to the parties to the trust on the basis that (a) under "modern trust administration . . . the interested parties are expected to take the initiative in protecting their rights"; and (b) "the settlor may take the trustee's fee schedule into account in selecting the trustee." I see no difference between an executor named in a will and a trustee under a living trust with regard to these justifications. Under Independent Administration of Estates, we expect estate beneficiaries to take the initiative in protecting their rights. When a testator selects an executor, he could (at least in the future) be expected to take into account the fees proposed to be charged.

"The Commission fears disputes over fees if a reasonable fee approach is adopted. Are the same concerns not also applicable to living trusts?

"I suggest that the Commission consider adopting a reasonable fee basis of compensation, perhaps with a rebuttable presumption that the statutory fee schedule provides for a reasonable fee.

Russell G. Allen, attorney, Newport Beach, Exhibits, pages 32-33:

"Scrap the statutory fee system, and adopt the reasonable fee system proposed by the Uniform Probate Code! As your recommendation with respect to trustees' fees says,

The appropriate level of fees for services should . . . be determined by the parties to the trust and not by statute or by requiring court approval of fees. This approach is consistent with modern trust administration under which the interested parties are expected to take the initiative in protecting their rights. The settlor [or testator] presumably may take the trustees' fees schedule into account in selecting the trustee."
[footnote omitted]

"Requiring a routine court involvement in the review of charges by the personal representative and counsel for the personal representative unnecessarily consumes judicial resources. If there is a dispute, the court can become involved. Otherwise, the court should not be involved. Requiring disclosure at the outset of a relationship -- whether between attorney and personal representative, or personal representative and beneficiaries, is appropriate. Beyond that, either a statutory system or mandatory judicial

involvement simply reduces price competition in the marketplace and unnecessarily consumes judicial resources.

One local bar association wrote stating that it could not support the tentative recommendation and that it wanted to retain existing law; otherwise, it would prefer an "agreed fee" model to the Commission's tentative recommendation:

Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association:

We are "of the opinion that the Tentative Recommendation sets forth a scheme which constitutes a significant departure from the historical statutory fee model, and which this Committee cannot support." Exhibits, page 94.

The Committee further states:

Unless the Commission returns to the historical statutory fee model, this Committee has resolved to support an "agreed fee" model which would provide for a private agreement between the personal representative and the Estate attorney for the compensation to be paid for legal services. The agreed fee would be subject to the review of the Probate Court upon the objection of an interested party; this would alleviate the necessity of Court involvement unless the agreement is ambiguous, or if there is no agreement. The Committee would also support the ability of the personal representative to petition, concurrently with the Petition for Probate, for approval of the fee agreement, which approval would be binding upon all interested parties given notice of the personal representative's request for approval of the fee agreement. This alternative method would protect both attorneys and beneficiaries; attorneys would know from the beginning the basis upon which they will be compensated, and beneficiaries would have the opportunity at the commencement of the proceedings to review the basis for the compensation of the Estate attorney (emphasis in original). [Exhibits, 95-96].

Two other lawyers indicate that they would prefer an agreed fee system to the disclosure that the fee is negotiable:

William S. Johnstone, attorney, Pasadena: "While I favor a statutory fee schedule as much for the benefit of the public as I do for the benefit of probate lawyers, if the law is going to establish a maximum fee and impliedly encourage bartering for a lower fee, I would favor no statutory fee schedule at all and permit lawyers and personal representatives to establish their own fee independent of governmental regulation." Exhibits, page 12.

Richard L. Stack, attorney, Los Angeles: "I believe your recommendations for change are ill-advised and should be abandoned. In the interest of brevity, I endorse the views expressed by William S. Johnstone, Jr. [set out immediately above] . . ." Exhibits, page 99.

COMMENTS THAT GENERALLY SUPPORT STATUTORY FEE SYSTEM. With a few exceptions, the persons who commented on the Tentative Recommendation were in support of retaining the statutory fee schedule.

For example, Thomas N. Stewart, Jr., attorney, Walnut Creek, Exhibits, page 68, justified the existing California system as follows:

I have specialized in probate for nearly 30 years, first in Oakland and since 1982 in Walnut Creek. In the course of that experience I have necessarily been exposed to the probate system of many other states. Unquestionably, the only adequate protection for the public is a probate system whereby the courts have a supervisory function over the whole process from beginning to end. I am pleased to see that the Tentative Recommendation preserves that principle.

Another example is the communication from Robert C. Hays, Exhibits, pages 75-77, who justified retaining the statutory fee schedule as follows:

I note that several other states have statutory probate fees substantially more generous to the attorney than California. (For some reason reformists who seek to increase the burdens on attorneys, e.g. mandatory insurance, mandatory continuing education, like to point to such requirements in other states but never mention the benefits there such as higher statutory compensation.)

As I understand it the presently underlying issue is whether our Legislature should do away with the statutory probate fee schedule and substitute a case-by-case "reasonable fee" compensation. I believe such a change would discard a system that has worked fairly and efficiently throughout the years in California and in other states, to substitute one having the potential for an infinite number of controversies between lawyers and clients, unnecessarily generating ill will between them, and vastly increasing the demands on the courts for adjudication of fee disputes.

Even more persuasive, a solution is already available to anyone who believes the statutory fees excessive--he or she can simply elect to use an inter vivos trust. Judging from the rapidly growing use of these trusts, any public dissatisfaction with the statutory fees may soon be effectively placated by the availability of the trust alternative.

But there remains the need to preserve a sound probate system for people who elect, voluntarily or not, to use probate, with its advantages and disadvantages. It is no service to those people to legislate a change which will discourage competent attorneys from staying in the probate practice and which will certainly create fee controversies for those who remain.

Any proposal to junk the present fee system implies that California probate attorneys are being over compensated. On some estates obviously we do come out very well; on others we come out badly, the consolation being that the good ones make up for the "losers." But if this balance is removed it is hard to see how we can continue to accept the small estate which may not pay even their overhead. Perhaps those clients will have to go to attorneys who can afford to do the work only to acquire experience. It is, I suggest, no service either to the public to lead them to believe that reducing compensation to attorneys is an unmitigated panacea. Several million Californians did, of course, indicate in their response to Prop 106 that they perceive a relationship between a lawyer's compensation and his level of competence.

Ironically, in this day of the incessant quest for a free--or cheap--lunch, the demand yet grows for increased competence in lawyers and their punishment for mistakes.

A statutory fee schedule does more than protect the client from arbitrary or unreasonable fees; it frees the conscientious but unsophisticated client from the dilemma of trying to resolve whether the fee is proper. And he can know the fee in advance, without going through a determination by a court to get the question answered.

Real estate brokers are also licensed professionals who work for a flat percentage. When they are lucky they can earn many thousands of dollars for a week's work; or they may labor many months and end up with nothing on the listing. How would it work if on court-approved sales the percentage basis was abolished in favor of requiring the brokers to tell the court their hours spend, work done, expertise, etc., to justify the amount of their compensation?

J. Mark Atlas, Attorney, Willows: "We agree entirely with the Commission's recommendation that the statutory fee schedule for ordinary services be retained. The reasons for doing so, listed on pages 10 and 11 of the Tentative Recommendation are a succinct and complete summary of the benefits of a statutory fee schedule, and they comport with our own experience in practice." Exhibits, page 70.

Howard Serbin, lawyer, Santa Ana: "I strongly support retention of the statutory fee system. I believe your description of the advantages of the system is compelling." Exhibits, page 72.

STAFF COMMENT. There was substantial opposition to the proposal to lowering the maximum fee rate from four percent to three percent. This issue is discussed later in this Memorandum. Many commentators took the position that the compensation for small estates is grossly inadequate and should be increased. A number of commentators do not agree that the generous compensation for large estates offsets the loss on small estates.

An examination of the various comments might lead one to believe that a "reasonable fee" system would be fairer to the consumer and to the lawyer than the existing system (which does not base the fee on the work actually provided). Nevertheless, the great majority of the commentators support the statutory fee system, and no doubt would oppose a reasonable fee system, especially if the system required court involvement in cases where there was no objection to the fee contracted for.

A number of commentators relied upon the comparative data provided by the Estate Planning, Trust and Probate Law Section, which shows that California probate fees are not out of line with those in other states having a large metropolitan area.

Commentators would be greatly concerned if a "reasonable fee system" were established that required the court to review and approve probate attorney fees in each case. By way of contrast, the UPC probate fee system permits the client and lawyer to agree on the fee and permits court involvement only if there is an objection to the fee. For example, under the UPC, no distinction made between ordinary and extraordinary services; absent a petition requesting court review of the fee, no court approval is required of the fee, even where the fee includes services that would be considered extraordinary services in California.

COMMENTS THAT SUGGEST CHANGES IN TENTATIVE RECOMMENDATION

Many of the commentators expressed general approval of the Commission proposed legislation but suggested one or more revisions. The suggested revisions are discussed below.

PROBATE CODE § 10830. COMPENSATION FOR ORDINARY SERVICES (ESTATE ATTORNEY (pages 29-30 of Tentative Recommendation)

COMMISSION TENTATIVE RECOMMENDATION. 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. The rate on the next \$85,000 is three percent, and the rate continues to decline on larger estates.

In its Tentative Recommendation, the Commission proposed 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 would make a modest reduction in the statutory fee (reducing the four percent rate to three percent would cost probate attorneys and personal representatives relatively little -- \$150 on estates of \$15,000 or more) and would make California rates compare more favorably with those in other states. The reduction also would simplify the fee calculation.

COMMENTS OBJECTING TO DECREASE IN STATUTORY FEE. A number of persons who commented on the Tentative Recommendation objected to decreasing the maximum fee from four percent to three percent.

The following Public Administrators objected to the decrease in the fee but made no other objection to the Tentative Recommendation:

Alameda County, Acting Public Administrator of Alameda County (Exhibits, page 25), and Office of County Counsel (Exhibits, page 26). "The proposed reduction would be unfair to County Public Administrators and their attorneys. Unlike private attorneys who can shift to larger, more profitable estates some of the overhead costs of administering smaller estates, the county administers mostly small estates unwanted by the private bar. Many of these small estates do not generate sufficient fees to cover the overhead costs of administration. A further reduction in the rate on the first \$15,000 would mean a reduction in the already stringent budgets and a likely increase in the Public Administrator's case load as private attorneys reject more and more smaller estates due to the rate reduction. We ask that the Commission reconsider the proposed rate reduction in light of the adverse effect it would have on the counties." Exhibits, page 26.

Contra Costa County, Office of County Counsel (Exhibits, page 52). "The Public Administrator's Office administers many small estates and very few large estates. Decreasing the statutory fee on the first \$15,000 of an estate would have a negative effect on the Public Administrator's ability to

operate his office without reliance on general fund revenue. Unlike private parties, the Public Administrator has responsibilities in numerous estates with no assets. Fees from the occasional large estate go toward subsidizing such activities. Therefore, it is imperative for us that solvent small estates pay the full cost of their administration."

County of Orange, Office of County Counsel (Exhibits, pages 72-73). The comment of this office makes with respect to the lowering the fee for the personal representative (from 4% to 3%) is relevant to the attorney fee issue: ". . . I would like to see the current four percent on the first \$15,000 retained. These has been such an increase in costs in recent years, such as the cost of office space, supplies and staff, that any decrease in the rate of compensation seems unwarranted. For the Office of the Orange County Public Administrator/Public guardian, any decrease in revenue would be especially difficult. I understand that the cost of running the operations, above and beyond compensation received and other income, will run close to \$1,000,000.00 this year. This, despite the fact that all County Counsel attorney fees in decedent's estates and probate code conservatorships are collected by and credited to our client. I do not know how much of this shortfall is due to operations of the Public Administrator vis-a-vis the Public Guardian, since both operate from the same budget, but I believe that neither function is at all close to being self-sufficient, especially the Public Administrator's. While the proposed change in the rate of compensation may appear small, given our client's case volume and budget problems, the detriment could be significant - especially since he is hit doubly hard when you take into account the proposed change in attorney fees under Section 10830."

Riverside County, Jacqueline Cannon, Chief Deputy Public Administrator (Exhibits, page 98):.

"I am opposed to any changes in the Statutory Commissions structure which would result in a decrease in fees to Attorneys and Public Administrators.

"Even though the decrease is a small percentage, Public Administrators throughout the state are dependent on the fees to offset our already dwindling budgets.

"I can appreciate the Commission's efforts to align the California Statutory Fees with attorneys and personal representatives nationwide; however, it does not appear as though the Commission considered the actual cost of labor, overhead, and filing fees, all of which have increased substantially since the present fee schedule was established. The current Statutory fee is too low, and does not begin to cover the cost of administering an estate.

"I hope the Commission will reconsider and increase the Statutory Fee."

Another attorney, **Richard L. Stack**, Los Angeles, objects to the lowering of the attorney fee:

Under our current system of compensation, it is becoming more and more difficult for practitioners to make a profit on smaller estates. In conversations with probate attorneys, I find that many are reluctant to administer estates under \$250,000.00. In some firms this minimum estate size is much higher. I believe that the tentative recommendations will serve only to make this problem greater. The tentative recommendations call for the reduction of compensation on the first \$15,000.00 of estate value from 4 percent to 3 percent. This is a reduction of \$150.00. This makes smaller estates even less desirable for practitioners. Although such a recommendation may appear as good public relations, in point of fact this will further shrink the pool of competent attorneys to service smaller estates. There is the belief in probate circles that the larger estates provide attorneys with compensation that will permit representation of smaller estate where the effective rate of compensation in terms of an hourly rate may be significantly lower. Although it has been my experience that larger estates do not provide a greater effective rate of compensation, promoting bartering of fees will no doubt be a disincentive for lawyers to take on smaller probates. [Exhibits, page 100.]

The following attorneys sent a form letter (with an attachment pointing out the services ordinarily required for all estates--both large and small) requesting "no revision of the current California Statutory Probate Fee Schedule for purposes of reduction" but making no other objection to the Tentative Recommendation other than that "increased fees for small estates is what is really needed in California":

Robert I Marder, San Dimas (Exhibits, pages 41-44)

Elizabeth F. Courtney, Montclair (Exhibits, pages 45-48)

John T. Borje, Claremont (Exhibits, pages 53-56)

Stephen M. Shirley, Pomona (Exhibits, pages 57-60)

Jimmy L. Gutierrez, Chino (Exhibits, pages 61-64)

Harold W. Wax, Los Angeles (Exhibits, pages 79-82)

Allen S. Remes, Upland (Exhibits 83-86)

Another attorney, **William G. Polley**, Sonora, writing on behalf of the Tuolumne County Bar Association, Exhibits, page 8, objected to lowering the fee from four to three percent and suggested as an alternative that the minimum requirement for the affidavit procedure be raised from \$60,000 to \$100,000. He states:

Removal of the 4% category for the first \$15,000. We disagree with your recommendation. Small probates are already uneconomical to handle. Further reducing the fees does not solve anything. It just makes them a greater nuisance. We recommend that the smaller estates be eliminated from probate by raising the minimum requirement to \$100,000.00 as opposed to reducing the fee for handling a small probate.

Another lawyer objected to the reduction of attorney's fees as proposed, taking the view that this reduction in probate attorney fees is inconsistent with the Commission's Tentative Recommendation on trustee's fees:

David W. Knapp, Sr., San Jose: "The reduction of attorney's fees on smaller estates as set forth in the Compensation, etc, recommendation is not in agreement with the recommendations of the Trustee's Fees, i.e. a lesser fee to the attorneys 'who can make it up on larger estates' (suppose these are none?) and 'increased cost of doing business' . . . 'such as inflation' (see page 2 of Trustee's fees) is in conflict. Do not the attorney's have an increase in the cost of doing business? . . . The statement that by reducing the statutory fees we would be more in line with the other statutory states is ridiculous. Look at the cost of living in those states!" Exhibits, page 28.

COMMENTS SUGGESTING INCREASE IN STATUTORY FEE. A number of lawyers suggested that the fee proposed by the Commission for small estates be increased. Under existing law, the 4 percent fee applies to the first \$15,000 of estate value. The rate on the next \$85,000 is three percent, and the rate continues to decline on larger estates. The Commission proposes to apply the 3% fee to the first \$100,000.

Commentators who propose a higher fee suggest that the three percent fee should be applied to a larger portion of the estate than existing law. Other commentators suggest that a four percent fee should be applied to a larger portion of the estate than under existing law.

Melvin C. Kerwin, Menlo Park (Exhibits, pages 9) recommends that the fee be 3 percent on the first \$300,000 and 2 percent on the next \$700,000. He states:

I applaud the recommendation insofar as it retains the statutory fees schedule, and makes the computation of fees simpler by reducing the percentage rate under the fee

schedule from 4% to 3%. However, myself and other attorneys whom I have spoken to about this matter agree that the recommendation should be that for ordinary services the attorney shall receive compensation on the value of the estate of 3% on the first \$300,000.00 and 2% on the next \$700,000.00 with the balance of your recommendation.

There are at least two reasons for suggesting that modest increase, rather than a decrease:

1. The overhead of California attorneys continues to increase dramatically, particularly in the areas of secretarial salaries and rents.

2. California lags behind the other states with large metropolitan areas which are comparable, to wit: Illinois, New York, and Pennsylvania, by far in the fees charged.

David H. Spencer, Los Altos (Exhibits, page 27) suggests that the fee be increased to four percent for the first \$100,000 value of the estate. In support of this suggestion, he states:

I very much oppose any reduction in the statutory fee of the compensation of an estate attorney and personal representative. Instead, I recommend that the fee be increased to four percent of the first \$100,000 value of the estate. The reasons for the increase are the existing recent changes in the Probate Code and the proposed changes in both the Probate Code and the Code of Civil Procedure. All of these changes increase the amount of time involved in the probate process and in the instance of the proposed Notice to Creditors will certainly delay the closing of an estate which in turn, means a longer time in receiving fees. Furthermore, any personal representative who is sued by a late claiming creditor will almost automatically file an indemnity action against his or her attorney.

All practicing attorneys know that especially in small estates it's the attorneys who do the work and that in many instances the time involved in probating a large estate is not much longer than in probating a small one. Any proposed change in fees should reflect this fact by increasing the fee on the first \$100,000 of an estate.

Harold S. Small, San Diego (Exhibits, pages 36-38) suggests that the fee be increased to four percent for the first \$50,000 estate value, three percent on the second \$50,000, and the existing schedule being maintained for estates in excess of \$100,000. He would lower the rate on estates in excess of \$300,000 if necessary to obtain this concept. In support of this suggestion, he states:

However, I suggest that changes be made to the statutory rate of compensation to provide a 4% rate on the first \$50,000.00 of the estate value, 3% rate on the second

\$50,000.00 of the estate value, and the existing statutory schedule being maintained for estates in excess of \$100,000.00. From our experience and the maintenance of time records with regard to estate Administration, we have found that the time involved in providing services to an estate, with very little complexity, and for the purpose of satisfying requirements associated with the estate administration where an individual has been named as the Executor of the estate is not less than \$3,000.00. In addition, although the legal complexity is not as great, the amount of time required for the handling of the small estate typically is equal to or greater than the handling of a significantly larger estate. Accordingly, the fees charged for the estate having a value of less than \$100,000.00 should address this problem and my recommendations set forth above would do so. It is important to note that many small estates involve a significantly larger amount of time for attorney services in order to provide the guidance and "hand holding" necessary for individual Executors. It is for this reason that I have suggested the percentage modification indicated above which would result in a slight increase in fees for the smaller estate while maintaining the existing statutory scheme for larger estates.

If there is significant objection to this concept, you may wish to look to a modified schedule of statutory fees for estates in excess of \$300,000.00 providing for a rate of 2% on the first \$1,000,000.00 of estate assets if the total value of the estate assets exceeds \$300,000.00 with the rate of 1% on the value of the estate assets between \$1,000,000.00 and \$10,000,000.00, one-half of 1% on the next \$15,000,000.00 and a reasonable amount to be determined by the Court for all amounts in excess of \$25,000,000.00.

It is also important to anticipate the effect of the significant use of inter vivos trusts. Through proper estate planning, attorneys have been causing clients to create inter vivos trusts to hold a substantial portion of assets in an estate. By doing so, the attorney's fees otherwise incurred in connection with a Probate Administration as well as commissions to the personal representative have been substantially diminished and reduced. However, even in these circumstances, a modest Probate Estate Administration is frequently required which still requires the same amount of work that would have been involved in an estate of significantly larger value. For example, we have assisted clients in the administration of estates having values for Probate Administration purposes of less than \$150,000.00, and in some cases less than \$50,000.00, where the total estate is in realty significantly greater than \$1,000,000.00. The significant difference in the value of assets is represented by assets that have been transferred into an inter vivos trust. The only reason for the Probate Administration is for the purpose of satisfying the creditor's claim period and noticing creditors with regard to the filing of claims in the estate for the purpose of protecting the estate assets and

the beneficiaries of the estate from future claims. The suggestions outlined above more closely align the fees with the services rendered and would take into account the significant planning opportunity (inter vivos trusts) that is utilized with some frequency in California.

It is also important to understand that certain types of services that might be ordinary if the estate is administered by an institutional executor and an experienced individual are different than the circumstances where an inexperienced executor acts for the estate. For example, in connection with the sale of real property, an individual executor will be unfamiliar with the requirements associated with same and significant additional services will be required of counsel to assist in the sale of real property which typically is handled by the Court as being part of the ordinary services, for the first sale or disposition of real property.

Robert A. Waddell, Torrance (Exhibits, page 50) suggests that the rate be four percent on the first \$50,000 and two percent on the next \$950,000. In support of this suggestion, he states:

Your recommendation that the four percent (4%) rate on the first \$15,000 of the estate be reduced to three percent (3%) is ill conceived.

Even under the present fee structure, it is nearly impossible to find an attorney to probate a small estate. Rather than reducing the rate on the first \$15,000, consideration should be given to increasing it. I suggest the following:

FOUR PERCENT (4%) OF THE FIRST \$50,000

TWO PERCENT (2%) OF THE NEXT \$950,000 ETC.

The above rates and your proposed rates result in the same fee for estates of \$100,000 or more. However, my rates provide an incentive for attorneys to accept the smaller estates.

The Probate Section of the San Bernardino County Bar Association (Exhibits, pages 66-67) approves the Commission's fee structure but suggests that "the court be authorized to approve [minimum] fees for both the personal representative and the attorney of not more than \$500 in all estates, regardless of size." In support of this suggestion, the Section states:

Although we generally agree with the reduction of the 4% rate to 3% on the first \$15,000 of estates, we suggest that the court be authorized to approve fees for both the personal representative and the attorney of not more than \$500 in all estates, regardless of size. If this is not done, attorneys will simply no accept the handling of small probates.

Probate Code Section 1143 adopts a similar approach as to county public administrators who are often compelled to

take small estates, and a \$350 minimum fee for the public administrator is established for the "summary probate" which the public administrator's office is authorized to undertake without formal administration. (This is restated in Probate Code Section 7666 pursuant to AB 2841 scheduled to go into effect July 1, 1989.)

We suggest that language like the following be added to proposed new Sections 10800 and 10830 (and that appropriate corresponding revisions be made in Business and Professions Code Section 6147.5):

(c) Notwithstanding subpart (a) above, the court may allow the attorney (personal representative) for ordinary services as much as \$500 compensation if the court finds that the services rendered justify a fee in excess of that calculated according to subpart (a) above.

Although recent legislation enables many small estates to be handled without probate (Probate Code Sections 13100, 13150, 13200, 13500, 13540, 13650; Vehicle Code Sections 5910 and 9916; and Health and Safety Code Section 18102) there nonetheless are situations in which a probate must be conducted as to very small estates in order to clear title or resolve heirship questions. The public may often be unable to engage an attorney in such cases unless there is some way in which the attorney can be reasonably compensated.

STAFF COMMENT. There are strong objections to lowering the fee from four to three percent because of the impact this would have on the small estates. At the same time, many of the commentators approved the Tentative Recommendation without objecting to the lowering of the fee. The Commission could retain the existing fee schedule and continue the four percent rate that now applies. This would not satisfy those who believe the existing fee is not adequate to provide legal services for a small estate. The suggestion of the Probate Section of the San Bernardino County Bar Association that a minimum fee of \$500 be allowed, without regard to the size of the estate, may be the solution to this problem. For example, the Delaware court rules provide a minimum attorney fee of \$250. But a fee of \$250 would not begin to compensate the lawyer for the minimum amount of legal work required to probate a small estate. In the background study prepared by the staff, the staff recommended that a minimum fee of \$750 might be appropriate. A minimum fee would also deal more adequately with the problem of public administrators who handle many small estates.

Almost one half (47%) of those who responded to the Commission's Questionnaire distributed several years ago believe that changes should

be made in the existing fee schedule. Many lawyers (73.5%) believe that the major defect in the existing statutory provisions is the inadequacy of the statutory fee for small estates.

ALLOWING COURT TO LOWER STATUTORY FEE WHEN THE STATUTORY FEE IS CLEARLY EXCESSIVE. HALT—San Diego recommends that the statute allow consumers to petition the court for lower fees when the statutory percentage is clearly excessive in relation to the work done. Exhibits, page 91. HALT--San Diego states in support of this recommendation:

Inherent in the statutory fee system is a presumption that the statutory percentage is reasonable. Allowing consumers to petition to lower the fee merely allows consumers to rebut this presumption. One would think this was just basic fairness. Judicial review should always be available when a dispute arises, especially over funds to be paid out of the estate. After all, resolving disputes is what courts are for. They resolve creditors' claims, will contests, and other disputes that arise in course of administering estates. Other than ensuring minimum lawyers' fees, there is simply no justification for denying persons interested in the estate the right to challenge a lawyer's fee. . . Yet, . . . this is precisely what the LRC decided to do, giving California the dubious honor of standing with two other states in the county that totally immunize percentage fees from legitimate challenge and court review.

BUSINESS AND PROFESSIONS CODE § 6147.5. AGREEMENT CONCERNING ATTORNEY FEES IN FORMAL PROBATE PROCEEDING (WRITTEN CONTRACT WITH DISCLOSURE TO CLIENT THAT FEE IS NEGOTIABLE) (pages 19-23 of Tentative Recommendation)

COMMISSION RECOMMENDATION: The Commission recommended that the existing requirement that there be a written contract between the attorney and the personal representative be supplemented by a requirement that there be a separate disclosure statement in the form prescribed by the statute, signed by the personal representative. The statutory form will include a statement that informs the personal representative that "You and your attorney may agree to a lower fee [than the statutory fee] but may not agree to a higher fee." See Business and Professions Code § 6147.5 (added), pages 19-23 of Tentative Recommendation.

REACTION OF COMMENTATORS TO THE DISCLOSURE REQUIREMENT: The disclosure requirement did not cause a significant amount of

opposition. There were only a few objections to the disclosure requirement. Some persons who submitted comments approved the requirement; most did not mention it. Some approved the requirement but suggested revisions (discussed below).

Objections to Disclosure Requirement. Those attorneys who objected to the concept of fee negotiation can be counted among those who object to any requirement of disclosure concerning statutory fees. See Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. (pages 4-5 of this Memorandum); William S. Johnstone, Jr. (pages 5-6 of this Memorandum); Richard L. Stack (page 6 of this Memorandum); Henry C. Todd (pages 6-7 of this Memorandum).

Support of Disclosure Requirement. HALT--San Diego (Exhibits, page 93) states:

The disclosure recommended by the LRC is barely adequate. Although it isn't as anti-consumer as the language proposed by the bar, it also fails to clearly state that the percentages are maximums or ceilings. Instead, it informs consumers that they have a right to agree to a lower fee, but not a higher one. The LRC squandered even this opportunity to protect consumers with meaningful disclosures about fees and other aspects of the attorney-client relationship. Compared to offering no disclosure, however, HALT supports it.

STAFF COMMENT: The revision of the disclosure statement suggested by the staff (below) should do much to meet the concern expressed by HALT.

SUGGESTIONS FOR REVISION OF LANGUAGE OF DISCLOSURE STATEMENT. Paul Gordon Hoffman, attorney, Los Angeles, believes that the "proposed disclosure statement is too difficult for the average layman to comprehend." Exhibits, pages 18-20. The staff believes that his statement is a definite improvement on the statement in the Tentative Recommendation.

STAFF RECOMMENDATION: The staff recommends that the following (which shows a revision in the Hoffman draft Exhibits, pages 18-19) be substituted for the statement in the Tentative Recommendation. (The language added by the revision is underscored).

LAWYERS' FEES

California law requires that you be given this statement and that you sign it.

The lawyer for an estate is entitled to be paid out of the estate for his or her work. For the kind of work required in almost every estate ("ordinary services"), the lawyer cannot be paid more than a certain percentage of the estate. The percentage is as follows:

- (1) 3% on the first \$100,000
- (2) 2% on the next \$900,000
- (3) 1% on the next \$9,000,000
- (4) 1/2 of 1% on the next \$15,000,000
- (5) a reasonable amount to be determined by the judge for larger estates.

The value of the estate is based on an appraisal of the estate property, plus profits from sales of estate property, plus income during the probate, minus losses on sales of estate property.

If your lawyer does extra work, your lawyer is entitled to be paid extra. The judge will set the fees for this extra work. You can ask your lawyer to tell you what services will be considered extra work.

Your lawyer will be paid based on the fee schedule set out above, unless you and your lawyer agree to a different way of setting the fee (such as an hourly rate or a different percentage). You and your lawyer may agree to a method that produces a lower fee, but your lawyer cannot be paid a higher fee.

If you and your lawyer agree to a lower fee, that is what your lawyer will be paid for ordinary services. The probate court may still allow your lawyer to be paid more if your lawyer does certain extra work.

Mr. Hoffman points out the need for his suggested substitution as follows:

The problem with the Commission's language is that it uses too many long or technical words, such as "statutory", "attorney", "additional", and "extraordinary." Unsophisticated clients often have equally unsophisticated vocabularies and reading abilities. You might also want to consider advising clients to inquire of their lawyers as to what services will be considered extraordinary. [Exhibits, pages 19-20.]

Substitution of "Income" for "Receipts." Irving Kellogg, attorney, Los Angeles, believes that confusion is caused by the use of the word "receipts" in the statement concerning the value of the estate to which the statutory percentage is applied. He believes that "receipts" is ambiguous. Substituting "income" for "receipts" will

make clear that only "income" receipts belong in the compensation value. He says that lay persons (CPA's etc.) include principal receipts. We note that the language suggested by Mr. Hoffman would make this suggested clarification. See Exhibits, pages 6-7.

Other Technical Revisions in Language of Disclosure Statement.

The Yuba-Sutter Bar Association suggests:

The membership authorized me to advise you that there was no objection to the tentative recommendation, except that the language in the disclosure statement regarding the ability to "agree to a lower fee" should be changed to read "agree to an alternative fee arrangement, which, in no event, would be higher than the fee established by statute." [Exhibits, page 15.]

The statement of Mr. Hoffman, set out above, will effectuate this suggestion.

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association suggests what they consider to be a technical matter:

B & P. Code §6147.5(c)(5): The last sentence of the disclosure statement which reads "the court may, however, award an additional amount for extraordinary services" would better read "the court may, however, award compensation for extraordinary services". The phrase "an additional amount" infers that the Court may award higher extraordinary compensation to "make-up" for the lower fee for ordinary services. [Exhibits, page 96.]

The statement of Mr. Hoffman, set out above, will deal adequately with the concern of the Beverly Hills Committee.

REQUIREMENT THAT STATEMENT BE ON SEPARATE SHEET. A few attorneys suggested that rather than having a separate sheet for the disclosure statement, it would be better to have it as a part of the fee and services agreement or that the statute should permit it to be included in the fee and services agreement:

Tuolumne County Bar Association: "Requirement for a separate disclosure statement regarding attorney's fees. We believe that the requirement of a separate paper is awkward and inconvenient. We believe that a more reasonable approach would be to require a minimum type size or other method to make the disclosure stand out as opposed to requiring one more piece of paper." Exhibits, page 8.

"Jerome Sapiro, attorney, San Francisco: "Rather than having a separate sheet for the disclosure statement, it would seem better to have same as a part of the fee and services agreement between the attorney and personal representative. The critical parts should be in 'CAPS'." Exhibits, page 4.

J. Mark Atlas, attorney, Willows: "While we have been using a written fee agreement in probate matters since Business and Professions Code Section 6148 was adopted, we believe a separate section relating to fee agreements in probates may be useful, and the recommended section would serve this purpose. Nevertheless, since we would still be required to have a written agreement with the personal representative, we would suggest that the section be revised to permit incorporation of the disclosures which otherwise would be required on a separate Disclosure Statement to be incorporated into the written fee agreement. Quite frankly, a fee agreement should be one of the first documents reviewed and discussed with a personal representative, but there are always so many other papers and matters to be handled at the commencement of a probate proceeding, often at a time of distress for many personal representatives, that it would be most helpful to minimize the number of separate papers." Exhibits, page 70.

STAFF RECOMMENDATION: The staff recommends that the requirement that the disclosure statement be on a separate sheet and be signed by the personal representative be retained. We want to be sure that the information on the statement is brought to the attention of the client. It does not seem to be burdensome to require the disclosure statement to be on a separate sheet, separately signed. On balance, the benefit of the separate statement outweighs any possible extra burden on the attorney that a separate statement might impose.

PERMIT ATTORNEY TO INCLUDE ONLY "APPLICABLE" PORTION OF STATEMENT IN STATEMENT PROVIDED TO CLIENT. William L. Coats, attorney, Poway (Exhibits, page 3) suggests that subdivision (c)(2)(A) of proposed Section 6147.5 (page 19 of the Tentative Recommendation) be revised to read:

(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 applicable substance of the following:

He gives the following justification for this suggested revision:

Adding the word applicable will provide for the agreement to be limited to the percent of the dollar value that relates to

the estimated value of the estate. When it is known an estate cannot possibly exceed \$100,000, the clients will not understand why the agreement covers the fee for a 25 million dollar estate.

THE DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE should also limit itself to not more than the fee for the next level above the estimated value of an estate.

STAFF RECOMMENDATION: The staff recommends against requiring only the "applicable" substance of the disclosure statement. We contemplate a printed statement that will be provided each client. We are concerned that questions will arise if the attorney is permitted to edit the statement for each case, depending of his estimate of the size of the estate. Moreover, we do not believe that the attorney should have the burden of determining which part of the statement is "applicable" in each case.

A separate issue is whether the word "applicable" should be substituted in the statute text in the introductory clause of paragraph (c)(2)(A) of Recommended Section 6147.5 of the Business and Professions Code as suggested by Mr. Coats and as set out above.

PROTECTING PERSONAL REPRESENTATIVE FROM SUITS BASED ON FAILURE TO NEGOTIATE A LOWER FEE. Several commentators expressed concern that the personal representative might be held liable for failing to negotiate a reasonable (lower) attorney fee:

Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association:
"Unless the personal representative is granted immunity from criticism for failing to negotiate a lower fee, this Committee is opposed to the proposed amendments to the Business and Professions Code requiring a separately signed disclosure statement advising the personal representative of the right to negotiate a lower fee. It is certain that such a disclosure statement will be, on occasion, used by the disgruntled beneficiary as support for a contention that the personal representative should have negotiated a lower fee. "In fact, the logical result is that the personal representative will be charged with the responsibility for negotiating a 'reasonable fee'; but this negotiation process will be artificially affected by the 'cap' of the statutory fee." Exhibits, pages 94 and 95.

Paul Gordon Hoffman, attorney, Los Angeles: "If the Commission elects to retain the statutory fee schedule, then the existence of the disclosure notice should not be deemed

to be a mandate for the negotiation of fees. I am concerned that beneficiaries may attempt to sue personal representatives who do not undertake negotiations with counsel as to the amount of fees." Exhibits, page 20.

STAFF RECOMMENDATION: At the October meeting, the Commission by a divided vote deleted subdivision (b) from the draft of Section 10832 which was intended to give the personal representative an express immunity for failure to negotiate attorney compensation less than the statutory compensation. The section prior to the deletion read:

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

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

This matter was discussed at length at the October meeting. Although the staff at that time recommended that the deleted provision be included in the statute, we believe that it was fully discussed and a decision made. We do not believe that this issue should again be given lengthy discussion.

RECOGNITION OF AGREEMENT SIGNED BEFORE PERSONAL REPRESENTATIVE APPOINTED. Jerome Sapiro, attorney, San Francisco, notes a possible technical improvement in the disclosure provision: "It should also be clarified that the fee-services agreement may be signed by the petitioning party seeking appointment as personal representative before appointment and qualification or by the personal representative after appointment and qualification. Your recommendation refers to agreement between attorney and personal representative, and normally the fee-services agreement is executed before appointment and qualification." Exhibits, page 4.

STAFF RECOMMENDATION: We recommend that the following sentence be added at the end of subdivision (b) of Section 6147.5: "The fee-services agreement may be entered into, and the disclosure statement required by this section may be signed, by (1) the

petitioning party seeking appointment as personal representative before appointment and qualification, the agreement to become operative upon appointment and qualification of the petitioner as personal representative, or (2) the personal representative after appointment and qualification."

TECHNICAL REVISION IN COMMENT. The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association makes the following suggestion concerning a technical change in the Comment to Section 10804:

The fifth paragraph of this Comment should be amended to conform with the provision of PC§10804(c) which allows the personal representative to employ "any qualified person, including a member of the State Bar of California..." The Comment refers only to an agreement "with the Estate attorney", instead of an agreement with "any qualified person, including the Estate attorney". [Exhibits, page 96.]

STAFF RECOMMENDATION: The staff recommends against changing the Comment. The purpose of the statement in the Comment is to point out that it permits the attorney to make a contract to perform ordinary services of the personal representative without the need for court approval. The statute clearly provides that such a contract can be made with any other person, and there is no need to repeat this portion of the statute in the Comment.

SECTION 10800. COMPENSATION OF PERSONAL REPRESENTATIVE (pages 24 and 25 of Tentative Recommendation)

COMPENSATION GENERALLY. To a considerable extent, the comments objecting to the elimination of the four percent bracket for attorneys' fees are relevant to the fee schedule for the personal representative. Except for the comment of Howard Serbin set out below, we do not reproduce those comments again here.

Howard Serbin, Deputy County Counsel, Santa Ana, objects to elimination of the four percent bracket in the statutory fee schedule for the compensation of the personal representative:

While strongly supporting the main thrust of [Section 10800], I would like to see the current four percent on the first \$15,000 retained. There has been such an increase in costs in recent years, such as the cost of office space, supplies and staff, that any decrease in the rate of compensation seems unwarranted. For the Office of the Orange County

Public Administrator/Public guardian, any decrease in revenue would be especially difficult. I understand that the cost of running the operations, above and beyond compensation received and other income, will run close to \$1,000,000.00 this year. This, despite the fact that all County Counsel attorney fees in decedent's estates and probate code conservatorships are collected by and credited to our client. I do not know how much of this shortfall is due to operations of the Public Administrator vis-a-vis the Public Guardian, since both operate from the same budget, but I believe that neither function is at all close to being self-sufficient, especially the Public Administrator's. While the proposed change in the rate of compensation may appear small, given our client's case volume and budget problems, the detriment could be significant - especially since he is hit doubly hard when you take into account the proposed change in attorney fees under Section 10830. [Exhibits, page 72-73.]

William S. Johnstone, attorney, Pasadena, objects to the Commission's "failure to make any adjustment in the personal representative's compensation, given your position of attorney's fees." See Exhibits, page 12. He states: "My experience of some 30 plus years is that unless the personal representative is a trust company, personal representatives are nearly always ignorant of their responsibilities, and inexperienced, which results in probate lawyers performing the major portion of the personal representative's duties, as well as their own. Why shouldn't their fees be subject to negotiation, just as you contemplate for attorneys representing the personal representative?"

In fact, the Commission has made provision for the personal representative negotiating with the attorney to have the attorney perform duties of the personal representative and to pay the attorney from the funds of the personal representative.

The Commission could go further and adopt the UPC scheme which permits the personal representative to collect a reasonable fee, fixed by the personal representative, subject to court review on petition of any interested person. It should be noted, however, that a number of states retained the statutory fee schedule for personal representatives when they abolished the statutory fee schedule for the estate attorneys.

SECTION 10831. ADDITIONAL COMPENSATION FOR EXTRAORDINARY SERVICES

(pages 30-32 of Tentative Recommendation)

COMMISSION RECOMMENDATION: The Tentative Recommendation deletes from the statute text the existing incomplete list of services that constitute "extraordinary services" and includes in the Comment a nonexclusive list of services that are extraordinary services.

SHOULD LIST OF EXAMPLES BE IN STATUTE TEXT? Howard Serbin, Deputy County Counsel, Santa Ana, approved this scheme: "I believe it is wise to delete the list of examples of extraordinary services from the section and to put this in the comment instead." Exhibits, page 73.

William Fimmegan, attorney, Walnut Creek, takes the opposite view:

In addition, I believe the statute should include examples of what generally constitutes extraordinary services. A nonexclusive listing in the statute is more helpful than examples in the official comment. The factors recommended by the Commission would not prevent the Court from using its discretion in reviewing a petition for extraordinary fees, even for services included in such a nonexclusive listing. [Exhibits, page 78.]

HALT—San Diego also supports the concept of delineating what constitutes "ordinry" and "extraordinary" services. Exhibits, page 91.

AUTHORITY OF COURT TO AWARD AN ATTORNEY EXTRAORDINARY FEES FOR EXPENSES INCURRED IN PROSECUTING THE ATTORNEY'S PETITION FOR FEES.

Richard L. Stack, attorney, Los Angeles, brings to the attention of the Commission the recent decision of Estate of Esther Trynan, and he suggests that the Commission overrule this decision by statute (Exhibits, pages 100-101):

I wish to bring to the attention of the Commissioners a recent appellate court decision on the subject of attorney compensation. In the Estate of Esther Trynan, counsel was retained to represent the personal representative and to defend the estate in a Will contest which resulted in a judgment against the estate. An appeal was taken and second counsel was hired by contract to handle the appeal. When the Will contest was finally resolved, both counsel for the estate filed petitions for extraordinary attorneys' fees and costs. The personal representative objected to both petitions and litigation ensued. The Court determined the reasonable value of extraordinary services and entered judgment for counsel totaling in excess of \$55,000.00. Thereafter, counsel submitted a second petition for

extraordinary fees for attorney compensation and costs in litigating the initial petition for fees. The Court denied the petition on grounds that the Court "does not have the authority to award compensation for services which benefit only the attorneys for the estate and do not enhance the size of the estate available for distribution to the beneficiaries thereof". A copy of this decision is enclosed.

I believe the decision of the Court is inequitable and bad law. In almost any fee agreement between attorney and client provision is made for the payment of attorneys fees should it become necessary to bring an action to collect a fee from a client. Probate counsel must have a fee agreement with the personal representative but is precluded from having such a provision. If counsel performs services and must litigate with the personal representative to collect compensation for such services, then it is only fair and equitable that the law support such counsel in being compensated for the additional work to which counsel is put. In addition, the law is clear that the Court will allow attorney fees "as the Court may deem just and reasonable" (Probate Code § 910). It is only just and reasonable under the circumstances of the Estate of Trynan that counsel receive compensation for its services in pursuing to a successful conclusion its petition for compensation for extraordinary services.

As the Commission is now taking up the matter of attorney compensation, I believe it is appropriate for the Commissioners to propose legislation to make it clear that a Court may award compensation under the circumstances of the Estate of Trynan.

STAFF RECOMMENDATION: The staff recommends against trying to deal with the Estate of Ester Trynan in the recommendation on attorney fees to be submitted to the current session. This decision presents a significant policy issue. If the Commission wishes, the staff can prepare an analysis of the matter and present a Memorandum at a future meeting. If the Commission wishes to propose a change in the existing law, we can distribute a tentative recommendation to interested persons for review and comment and possibly submit a recommendation in 1990.

SECTION 10804, USE OF EXPERTS, TECHNICAL ADVISORS, AND OTHER ASSISTANTS (pages 26-27 of Tentative Recommendation)

GENERAL COMMENT CONCERNING THIS SECTION. At a prior meeting, the Commission requested that the staff prepare a memorandum concerning Section 3-715 of the Uniform Probate Code. This UPC provision relates to the employment of persons to assist the personal representative in

the performance of the administrative duties of the personal representative. This matter will be covered by Memorandum 88-19, prepared for the January 1989 meeting. We consider below the comments received on the Tentative Recommendation.

AUTHORIZING PERSONAL REPRESENTATIVE TO PAY ATTORNEY FOR PERFORMING ORDINARY SERVICES WHICH THE STATUTE ASSUMES WILL BE PERFORMED BY THE PERSONAL REPRESENTATIVE. The Tentative Recommendation codifies local court rules and case law that permits the personal representative to employ the estate attorney or others to help with ordinary services and to pay them out of the personal representative's own funds, not funds of the estate.

Paul Gordon Hoffman, attorney, Los Angeles, approved this provision:

I agree with the Commission's recommendation that the statute expressly authorize the representative to pay the attorney for performing ordinary services which the statute assumes will be performed by the representative. In dealing with individuals, it is quite common for the attorney to have to assume the burden of bookkeeping for the estate, and the attorney may also have to work with appraisers and assist in closing of the residence and disposing of property. Since statutory fees are often inadequate to cover such services, the only way in which the attorney can be made whole is by receiving an assignment of the portion of the personal representative fees. [Exhibits, page 20.]

EMPLOYMENT OF SPECIALISTS BY PERSONAL REPRESENTATIVE. With respect to Section 10804, Howard Serbin, Deputy County Counsel, Santa Ana, states: "I support your revisions to current law." See Exhibits, page 73.

Gerald F. Gerstenfeld, attorney, Beverly Hills, makes the following comments (Exhibits, pages 34-35) concerning the employment of "specialists to perform what would be in the category of extraordinary services":

I agree with your recommendation that the authority should be expanded but I disagree with the recommendation that the authority to pay the specialist out of estate funds should be subject to court review at the final account. The specialist who performs the service should be entitled to rely upon the contract entered into with the personal representative concerning such services and that the court will not modify the contract at a later time. Such would not affect the ability of the court to take such action as it may

deem appropriate vis a vis the personal representative if the court concluded that the contract entered into by the personal representative was inappropriate or illegal. Therefore, I believe that the second paragraph of section 902 should continue to read as same as presently stated but subject to the amendments to increase the kind of specialists whose services are covered thereby.

In the same context, if my recommendations are adopted, I believe that any such contracts entered into between the expert and the personal representative granted independent administration authority would be subject to the provisions of section 10551 pursuant to which such personal representative could enter into the contract without giving notice of proposed action. If any such contract were subject to court review at the final account, I question whether the personal representative having independent administration authority would have the power to enter into such a contract under the provisions of section 10551 and the provisions of section 10553 may be construed as being in conflict with the expand provisions of the second paragraph of section 902 to the extent that the same may relate to actions and proceedings referred to in section 10553.

STAFF RECOMMENDATION: The staff did not contemplate that the court review would affect the right of the expert to receive payment as provided in the contract. The personal representative would be surcharged if the contract was improper, just as would be the case with any other improper act. We would revise the second sentence of subdivision (d) of Section 10804 to read: "The employment and payment of a person under subdivision (c) need not be authorized or approved by the court AND IS NOT SUBJECT TO REVIEW BY THE COURT." (Material in all caps added.) We also would revise the relevant portion of the Comment to Section 10804 to read:

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. THE PERSONAL REPRESENTATIVE MAY BE SURCHARGED AT THE TIME OF THE FINAL ACCOUNT IF THE PERSONAL REPRESENTATIVE BREACHED A FIDUCIARY DUTY IN EMPLOYING THE PERSON UNDER SUBDIVISION (a) OR (b). 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. AND THE COURT DOES NOT REVIEW SUCH EMPLOYMENT.

SECTION 10805. APPORTIONMENT OF COMPENSATION (page 29 of Tentative Recommendation)

Howard Serbin, Deputy County Counsel, Santa Ana, suggests (Exhibits, page 73) a revision in the comment to this section:

C. Proposed Section 10805 - I have no objection here. I note, however, that the Public Administrator has had many cases in which he was successor administrator, and some in which he was the first of two administrators, in which we have faced the issue of dividing statutory compensation and attorney fees. In at least one case, I commented to the Court on the other administrator's request for extraordinary attorney fees. Opposing counsel complained that as attorney for a prior administrator, I had no standing to contest extraordinary fees. I responded that I was not contesting the fees; rather, I was pointing out that the extraordinary services claimed were so inclusive, including many services which were very ordinary, that if granted the attorney's share of statutory fees should be small, since he would have already been compensated for virtually every service he provided. The Court agreed with this point. This leads me to conclude that perhaps there should be a provision or a comment that one factor in apportioning statutory compensation would be to consider the extraordinary compensation a personal representative or attorney has been granted, and to be certain not to in effect credit him twice for the same service.

STAFF RECOMMENDATION: The staff recommends against revising the Comment. The one case to which the commentator refers reached the right result according to the commentator, and it seems unnecessary to advise the court not to credit the attorney twice for the same service.

SECTION 10833. COMPENSATION PROVIDED BY DECEDENT'S WILL (page 33 of Tentative Recommendation)

Section 10833 permits the attorney to renounce the compensation provided for in the will and to be compensated under the statutory provisions relating to compensation of the estate attorney. The section continues existing law.

Peter D. Anderson, attorney, King City, objects to the provision carried over from the existing law:

Sections 10802 and 10833 provide respectively that a personal representative and an estate attorney can renounce the compensation provided by decedent's Will and claim the full statutory fee. I believe the two (2) sections are unfair, and when applied, cause no end of hard feelings on

the part of the estate beneficiaries. I understand that a testator could be unfair or unrealistic in setting the fees but there could be alternative methods of determining fees in such an instance rather than simply denying the testator the right to specify the compensation. I submit that there is no good way to explain these statutes to an unhappy heir who sees the testator's wishes thwarted and the personal representative or attorney for the estate receiving an unwarranted windfall.

HALT—San Diego objects to the provision: "The Commission also attempts to justify percentage fees on the ground that they protect consumers by placing a ceiling on fees. Nothing could be further from the truth. Instead, they act as a floor, for several reasons. First, the LRC has recommended continuing the current law that allows lawyers to pick the highest fee. If the will dictates a lower fee, they can "renounce" it and opt for the higher statutory percentage; if the will provides for a fee higher than the percentage, the lawyer can collect that." Exhibits, page 90.

STAFF RECOMMENDATION: The staff recommends that 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 ordinarily given 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.

We also would revise the Comment to Section 10832 to point out that the section has been revised and to explain the revision.

SECTIONS 108850-10854. ALLOWANCE OF COMPENSATION BY COURT (pages 34-41 of Tentative Recommendation)

COMMISSION RECOMMENDATION: The existing statute provides for a partial allowance of compensation to the personal representative or estate attorney, but final compensation is governed by local court rules rather than by statute. The Tentative Recommendation includes statutory provisions governing the allowance of both partial and final compensation.

SECTION 10850. PARTIAL ALLOWANCE OF COMPENSATION. Howard Serbin, Deputy County Counsel, Santa Ana, states: "I strongly support this." Exhibits, page 73.

Andrew S Garb, attorney, Los Angeles, believes that there is a technical defect in Section 10851(d). Exhibits, pages 23-24. His belief there is a defect is based on his incorrect assumption that Section 10850 applies only to compensation for extraordinary services. The staff would deal with this matter by adding the following sentence to the Comment to Section 10850 to make clear that the section covers partial allowance of compensation for both ordinary and extraordinary services:

Section 10850 gives the court authority to allow partial compensation for both ordinary and extraordinary services. Where extraordinary services are required, the court may authorize payment for those services on a periodic basis or may wait until the particular extraordinary services have been completed and then authorize payment for those extraordinary services. Court rules generally limit the amount of the advance for ordinary services by reserving at least 25 percent of the statutory compensation until approval of the final account and the decree of distribution.

SECTION 10851. FINAL COMPENSATION (pages 35-38 of Tentative Recommendation). There were no comments on this section.

SECTION 10852. MATTERS TO BE CONSIDERED IN DETERMINING COMPENSATION FOR EXTRAORDINARY SERVICES (pages 38-40 of Tentative Recommendation). The Tentative Recommendation adds to the statute a list of factors to be considered in determining the amount of compensation to be awarded for extraordinary services. The provision is drawn from the attorney fee standard in Los Angeles County.

Howard Serbin, Deputy County Counsel, Santa Ana, states: "I believe this is well-written and a helpful addition to the Code." Exhibits, page 73.

CONSIDERATION OF "PROFESSIONAL STANDING". One lawyer objected to the court considering the professional standing of the attorney in fixing probate fees:

Wilbur L. Coats, attorney, Poway: "Delete 10852(e). In communities with populations over 30,000, I do not believe attorneys are in a position to evaluate their professional standing. With so many attorneys in each community I do not believe you will avoid 'puffing'. We do not need any appearance of self aggrandizement. The answer will be too subjective." [Exhibits, page 3.]

William Finnegan, attorney, Walnut Creek, fears that the lawyer may have to include a statement of the factors in his request for extraordinary fees and suggests that "professional standing" be omitted as a factor:

Although I do not object in general to the factors listed by the Commission, I believe that attorneys should not have to write a tome justifying requests for extraordinary fees. Factors such as expertise, experience and professional standing are themselves quite vague and subject to many different interpretations. In fact, I suggest that professional standing be eliminated because I have no idea what the Commission means by it and it may have no relevance to the services performed. [Exhibits, page 78.]

Thomas N. Stewart, Jr., attorney, Walnut Creek, takes the opposite view (Exhibits, pages 68-69):

I have one negative thought but no particular suggestion as to how to remedy it. Most courts have local "rules of thumb" as to the amount of hourly compensation the court will allow for extraordinary services. The Tentative Proposal permits the court in fixing compensation for extraordinary services to take into account the time spent on ordinary services. Implicit in that is that the hourly rate permitted by the particular court will be applied to the ordinary services in determining the amount, if any, of extraordinary compensation it will allow. This penalizes the experienced probate attorney who generally is able to handle the administration of an estate far more expeditiously than the inexperienced probate attorney. The obvious result is that on an estate of similar size, the inexperienced attorney can be expected to receive more compensation than the experienced lawyer simply because it took the former longer to perform his services than the latter.

One thought to correct this anomaly would be to build into the code a provision that the probate court should take into consideration the experience and professional standing of the attorney representing the estate in determining compensation to be allowed.

CODIFYING ESTATE OF WALKER; CONSIDERATION OF AMOUNT OF FEE FOR ORDINARY SERVICES. There were three comments on this issue.

Commission Recommendation: As one factor that may be taken into consideration in determining the amount of the fee for extraordinary services, the tentative recommendation includes "The amount of the fee provided by Section 10800 or 10830 [statutory fee schedule], and whether it constitutes adequate compensation for all services rendered." This factor is drawn almost verbatim from the rule set out in the Los Angeles Probate Policy Manual. It codifies the holding in *Estate of Walker*. Nevertheless, two commentators urged that the Commission overrule *Estate of Walker* and not permit consideration of this factor at all.

HALT—San Diego supports the proposal to allow additional compensation for "extraordinary services" only if the statutory fee for ordinary services doesn't yield "reasonable compensation. Exhibits, page 91.

Two attorneys took the opposite view on this issue:

Legislative Committee of the Probate, trust and Estate Planning Section of the Beverly Hills Bar Association (Exhibits, page 95) states:

"A. Section 10852(f): Providing that the Court, in determining just and reasonable compensation for extraordinary services, can consider the amount of the statutory fee and whether it constitutes adequate compensation for all services rendered. This provision creates a situation where the Estate attorney has no assurance that he or she will be compensated at all for the valuable extraordinary services he or she provides. For example, the Estate attorney may be in the best and most economical position to prepare the federal and estate tax returns. If the returns were prepared by an independent professional, there would be no question that the independent professional would receive full compensation for preparing the returns. If the returns are prepared, however, by the Estate attorney, then the Court may determine that the statutory fee was adequate compensation for the preparation, and order no compensation whatsoever. This will inevitable lead the Estate attorney to refer out the task of preparing the returns, notwithstanding the fact that it may be at a higher cost to the Estate.

"B. The Estate of Walker 221 Cal.App. 2d. 792, 795-796, 34 Cal.Rptr. 832 (1963) should be dealt with by providing in Section 10831 that the Court shall allow additional compensation for extraordinary services by the attorney in an amount the Court determines is just and reasonable."

Jerome Sapiro, attorney, San Francisco: "I do not believe that the amount of the fee or commission provided for ordinary services (statutory fee or commission) should be considered in awarding reasonable compensation for extraordinary services of attorney or personal representative. Statutory fees are allowed and authorized for ordinary services. I find that in most estates, even the smaller ones, that extra uncompensated work is rendered in helping the personal representative learn and do his or her job. Fees and commissions for extraordinary services are for doing other things beyond ordinary services. By statute what is provided for as compensation for ordinary services is deemed reasonable therefor. The attorney and the personal representative should be entitled to reasonable compensation for their extraordinary services, without regard to what is authorized to be paid for ordinary services. Hence, I recommend that proposed subdivision (f) of § 10852 be stricken." Exhibits, page 4.

REQUIRING LAWYERS TO KEEP TIME RECORDS. HALT--San Diego comments: "But, by not requiring lawyers to keep time and work records, consumers lack the ammunition they need to mount a credible challenge." Exhibits, page 92. The statute (Section 10852) requires a "detailed description of the services performed, demonstrating the productivity of the hours spent" and a statement of the "hours spent" as factors to be considered when relevant in awarding fees for extraordinary services.

SECTION 10853. SERVICES OF PARALEGAL PERFORMING EXTRAORDINARY SERVICES (page 40 of Tentative Recommendation). Section 10854 (page 40) of the Tentative Recommendation deals with the compensation of the attorney for extraordinary services where a paralegal is used. The third sentence of this section reads:

In determining the amount of compensation to be allowed [for extraordinary services], 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.

The relevant portion of the Comment states:

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.

The staff had thought that the third sentence was useful because it indicates that the court is not to award just a reasonable amount for the paralegal services but is to award in addition an amount to reflect that the attorney is responsible for the paralegal's work and that the work performed by the paralegal is under the direction and supervision of the attorney.

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association recommends deleting the third sentence of Section 10854 (Exhibits, pages 39-40):

We feel that the sentence as presently worded, and the corresponding comment, are at best unclear. It may mean either of the following:

1. In addition to receiving compensation for the paralegal's time expended under the attorney's supervision, the Court should allow compensation for attorney time spent in the direction and supervision of the paralegal, as well as compensation for the responsibility assumed for the paralegal's work. If this is the intended meaning, then the sentence and the corresponding sentence of the comment do not belong in Section 10853, because, as noted, that section applies to compensation for the paralegal's services and not to compensation for the attorney's services; or
2. The fees attributable to the paralegal's services should take into consideration how experienced the paralegal is, the amount of supervision required being an indication of how valuable the paralegal's services actually were. If that is the meaning intended, then the comment could be more specific in explaining that meaning.

Additionally, the general rule of drafting adopted by the Commission has been to not enact language which purports to give instructions to the Court on something that is within the Court's discretion. The Court is certainly free to take this and other factors into consideration in setting fees. We, therefore, recommend that the third sentence of proposed Section 10853 and the related sentence in the comment be deleted.

STAFF RECOMMENDATION: The staff recommends that the third sentence be continued in the statute. In addition, we recommend that the following language from the letter of the Beverly Hills Bar Association be added to the Comment (after the sentence of the Comment set out above):

Thus, in addition to receiving compensation for the paralegal's time expended under the attorney's supervision, the court should allow compensation for the attorney time spent in the direction and supervision of the paralegal, as well as compensation for the responsibility assumed for the paralegal's work.

SECTION 10854. LIMITATION ON ALLOWANCE OF COMPENSATION FOR EXTRAORDINARY SERVICES (pages 40-41 of Tentative Recommendation). Howard Serbin, Deputy County Counsel, Santa Ana, states: "I believe this too is a very good addition to the Code." Exhibits, page 74.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

LIST OF EXHIBITS

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1	William E. Fox, attorney, Paso Robles	1
2	Robert J. Berton, attorney, San Diego	2
3	Wilbur L. Coats, attorney, Poway	3
4	Jerome Sapiro, attorney, San Francisco	4
5	Irving Kellogg, attorney, Los Angeles	6
6	William G. Polley, attorney, Sonora	8
7	Melvin C. Kerwin, attorney, Menlo Park	9
8	William S. Johnstone, Jr., attorney, Pasadena	11
9	Benjamin D. Frantz, Professor of Law, Sacramento	14
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EXHIBIT 1

WILLIAM E. FOX

ATTORNEY AT LAW
819-12TH STREET
P. O. BOX 1756

PASO ROBLES, CALIFORNIA 93447

TELEPHONE (805) 238-9571

NOV 09 1988

RECEIVED

November 7, 1988

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

Re: Compensation of Estate Attorney and
Personal Representative

Gentlemen:

In reference to the proposed legislation regarding the above-captioned, you are advised that during my 25 years of specializing in probate matters, I have had very little difficulty with any of my clients.

However, this proposed legislation will be helpful and will eliminate the possibility of conflict between attorney and client in many instances.

I recommend the proposed enactment of these laws.

Very truly yours,


WILLIAM E. FOX

WEF/kat

EXHIBIT 2

NOV 09 1988

LAW OFFICES OF
PROCOPIO, CORY, HARGREAVES AND SAVITCH

RECEIVED

1900 CALIFORNIA FIRST BANK BUILDING
530 B STREET
SAN DIEGO, CALIFORNIA 92101-4469
TELEPHONE (619) 238-1900

TELECOPIER
(619) 235-0398

ALEC L. CORY	STEVEN M. STRAUSS
EMMANUEL SAVITCH	CRAIG R. SAPIN
GERALD E. OLSON	M. WAINWRIGHT FISHBURN, JR.
PAUL B. WELLS	ARTHUR M. WILCOX, JR.
TODD E. LEIGH	ROBERT K. BUTTERFIELD, JR.
JEFFREY ISAACS	MICHAEL J. KINKELAAR
ROBERT J. BERTON	VICKI L. BROACH
DENNIS HUGH MCKEE	KENNETH J. ROSE
JOHN C. MALUGEN	ERIC B. SHWISBERG
FREDERICK K. KUNZEL	GERALD R. KENNEDY
ROBERT G. RUSSELL, JR.	JILL T. AARON
GEORGE L. DAMOOSE	DAVID A. NIDDIE
KELLY M. EDWARDS	JEFFREY D. CAWDREY
ANTONIA E. MARTIN	LYNNE R. LASRY
RAYMOND G. WRIGHT	DAVID S. GORDON
JAMES G. SANDLER	KENNETH J. WITHERSPOON
MICHAEL J. RADFORD	JOSEPH A. HAYES
THOMAS R. LAUBE	EDWARD I. SILVERMAN
PHILIP J. GIACINTI, JR.	CYNDY DAY-WILSON
STEVEN J. UNTIEDT	

A. T. PROCOPIO
900-1874

HARRY HARGREAVES
RETIRED

JOHN H. BARRETT
RETIRED

November 7, 1988

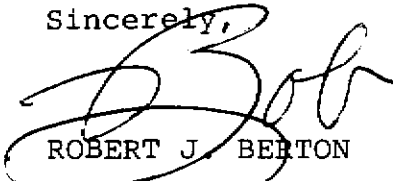
Mr. John Demoulley
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear John:

I support the October 26, 1988, Tentative Recommendation of the California Law Revision Commission relating to Compensation of Estate Attorney and Personal Representative.

I am particularly pleased that your research supports retention of the unfairly maligned statutory fee schedule for ordinary services. What once may have been a truism, i.e., profitable large probate estates offset unprofitable small probate estates, is probably no longer true. This is because most large estates now opt for probate avoidance by virtue of the use of living trusts. This is not so for small estates where the use of a living trust may not be the estate planning vehicle of usual choice.

Sincerely,



ROBERT J. BERTON

RJB:jb

EXHIBIT 3

NOV 10 1988

RECEIVED

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

November 7, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca 94303-4739Recommendation relating to COMPENSATION OF ESTATE ATTORNEY
AND PERSONAL REPRESENTATIVE

Gentlemen:

The following changes to your tentative submission are suggested:

Proposed Section 10852

Delete 10852(e) In communities with populations over 30,000 I do not believe attorneys are in a position to evaluate their professional standing. With so many attorneys in each community I do not believe you will avoid "puffing". We do not need any appearance of self aggrandizement. The answer will be too subjective.

Revise 6147.5 to add the word applicable. "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 applicable substance of the following:"

Adding the word applicable will provide for the agreement to be limited to the percent of the dollar value that relates to the estimated value of the estate. When it is known an estate cannot possibly exceed \$100,000, clients will not understand why the agreement covers the fee for a 25 million dollar estate.

THE DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE should also limit itself to not more than the fee for the next level above the estimated value of an estate.

Very truly yours,



Wilbur L. Coats

EXHIBIT 4

JEROME SAPIRO
 ATTORNEY AT LAW
 SUTTER PLAZA, SUITE 608
 1388 SUTTER STREET
 SAN FRANCISCO, CA. 94109-5416
 (415) 928-1515

CA LAW REV. COMM'N

NOV 10 1988**RECEIVED**

Nov. 9, 1988

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

Re: Tentative Recommendation
 Relating to Compensation of
 Estate Attorney and Personal
 Representative
#L-1036-1055 Oct. 26, 1988

Hon. Commissioners:

I have reviewed your above-mentioned tentative recommendation.

Generally, I found same to be good.

However, two parts of the recommendation raise the following questions:

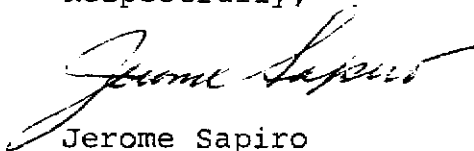
1. Rather than having a separate sheet for the disclosure statement, it would seem better to have same as a part of the fee and services agreement between the attorney and personal representative. The critical parts should be in "CAPS". It should also be clarified that the fee-services agreement may be signed by the petitioning party seeking appointment as personal representative before appointment and qualification or by the personal representative after appointment and qualification. Your recommendation refers to agreement between attorney and personal representative, and normally the fee-services agreement is executed before appointment and qualification.

2. I do not believe that the amount of the fee or commission provided for ordinary services (statutory fee or commission) should be considered in awarding reasonable compensation for extraordinary services of attorney or personal representative. Statutory fees are allowed and authorized for ordinary services. I find that in most estates, even the smaller ones, that extra uncompensated work is rendered in helping the personal representative learn and do his or her job. Fees and commissions for extraordinary services are for doing other things beyond ordinary services. By statute what is provided for as compensation for ordinary services is deemed reasonable therefor. The attorney and the personal representative should be entitled to reasonable compensation for their extraordinary services, without regard to what is authorized to be paid for ordinary services. Hence, I recommend that proposed subdivision (f) of §10852 be stricken.

Ltr. to California Law Revision Commission,
dated Nov. 9, 1988, re Tentative Recommendation
#L-1036-1055, contd.

Thank you for the opportunity to participate.

Respectfully,



Jerome Sapiro

JS:mes

RECOMMENDED LEGISLATION

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

WRITTEN AGREEMENT CONCERNING PROBATE ATTORNEY FEESBusiness 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.)

income

*make change everywhere
because "Receipts" is ambiguous*

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

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

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

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

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

Date: _____

Personal Representative

(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 amount allowed under 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.

income
↑
add
then to
clarify
that
only
"income"
Receipts
belong
in
the
Computation
Lay persons
CPA etc.
include
Principal
Receipts

EXHIBIT 6

LAW OFFICES OF

William G. Polley

A PROFESSIONAL CORPORATION

32 N. WASHINGTON STREET

SONORA, CALIFORNIA 95370

PHONE (209) 532-1424

UTAIR 537
8861 71 A88
MAY 1988

WILLIAM G. POLLEY
CYNTHIA R. FAULSTICH
PRISCILLA I. DAVIS

November 10, 1988

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

Re: Compensation of Estate Attorney and Personal Representative

Dear Committee Members:

I have received a copy of your tentative recommendation from John A. Gromala, directed to the Tuolumne County Bar Association. We have the following comments.

1. Removal of the 4% category for the first \$15,000.00. We disagree with your recommendation. Small probates are already uneconomical to handle. Further deducing the fees does not solve anything. It just makes them a greater nuisance. We recommend that the smaller estates be eliminated from probate by raising the minimum requirement to \$100,000.00, as opposed to reducing the fee for handling a small probate.

2. Requirement for a separate disclosure statement regarding attorney's fees. We believe that the requirement of a separate paper is awkward and inconvenient. We believe that a more reasonable approach would be to require a minimum type size or other method to make the disclosure stand out as opposed to requiring one more piece of paper.

Thank you for the opportunity to comment on the proposed revisions.

Yours truly,

LAW OFFICES OF
WILLIAM G. POLLEY
A Professional Corporation

By:

William G. Polley
WILLIAM G. POLLEY

WGP:pt

cc: John A. Gromala

CA LAW REV. COMM'N

KERWIN LAW OFFICES

~~886L 5 6 AON~~

NOV 14 1988

545 MIDDLEFIELD ROAD

SUITE 150

~~CA LAW REV. COMM'N~~

RECEIVED

MENLO PARK, CALIFORNIA 94025

(415) 327-8080

~~NOV 25 1988
RECEIVED~~

MELVIN CURTIS KERWIN
PATRICK CANNON KERWIN

November 9, 1988

California Law Revision Commission
4000 Middlefield Rd., #D-2
Palo Alto, CA 94303-4739

Re: Compensation of Estate Attorney and Personal Representative

Gentlemen:

I have read and reviewed your Tentative Recommendation relating to the above subject matter and my comments are as follows: I applaud the recommendation insofar as it retains the statutory fees schedule, and makes the computation of fees simpler by reducing the percentage rate under the fee schedule from 4% to 3%. However, myself and other attorneys whom I have spoken to about this matter agree that the recommendation should be that for ordinary services the attorney shall receive compensation on the value of the estate of 3% on the first \$300,000.00 and 2% on the next \$700,000.00 with the balance of your recommendation.

There are at least two reasons for suggesting that modest increase, rather than a decrease:

1. The overhead of California attorneys continues to increase dramatically, particularly in the areas of secretarial salaries and rents.
2. California lags behind the other states with large metropolitan areas which are comparable, to wit: Illinois, New York, and Pennsylvania, by far in fees charged.

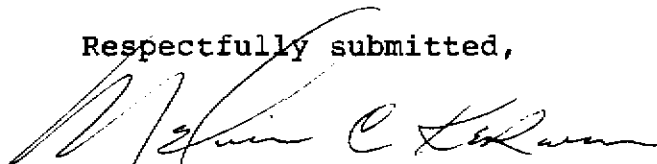
The balance of the recommendation makes sense.

In regard to another subject matter, to wit: the time for filing Inventory and Appraisal, the attorneys that I have discussed this matter with do not understand why this recommendation is made. Whether it's three months for four months required for filing the Inventory and Appraisal at the present time is largely irrelevant because it is observed more in the breach than the observance. Sometimes it take

three or four months just to get together the information to file the inventory let alone to complete the appraisal and why it would make any sense to have two documents, that is an Inventory and an Appraisal is not clear. The attorneys I spoke to regarding this matter were more interested in less paperwork, rather than additional paperwork and the concept of having an Inventory and Appraisal form that attorneys are familiar with, rather than two new forms and two new time limits, is not enthusiastically embraced.

In the same vein, our breakfast group of probate attorneys would like to see the Probate Code left alone for awhile so that we can learn it and work with it and have some stability.

Respectfully submitted,



Melvin C. Kerwin

MCK:ymp

EXHIBIT 8**HAHN & HAHN**

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS
 NINTH FLOOR
 301 EAST COLORADO BOULEVARD
 PASADENA, CALIFORNIA 91101-1977

November 11, 1988

STANLEY L. HAHN *
 DAVID K. ROBINSON *
 LOREN H. RUSSELL *
 LEONARD M. MARANGI *
 WILLIAM S. JOHNSTONE, JR. *
 GEORGE R. BAFFA *
 DON MIKE ANTHONY *
 ROBERT W. ANDERSON
 WILLIAM K. HENLEY *
 CLARK R. BYAM *
 RICHARD L. HALL *
 SUSAN T. HOUSE *
 CARL J. WEST *
 DIANNE H. BUKATA
 GENE E. GREGG, JR.
 R. SCOTT JENKINS *
 CHARLES J. GREAVES
 DALE R. PELCH
 RIKI M. ICHIMO
 WILLIAM S. GARR
 JUDITH A. MUSTILLE
 SCOTT J. MOORE

*PROFESSIONAL CORPORATION

CA LAW REV. COMM'N

NOV 14 1988

RECEIVED

BENJAMIN W. HAHN. 1868-1932
 EDWIN F. HAHN. 1872-1951
 HERBERT L. HAHN. 1893-1982

OF COUNSEL

GEORGE E. ZILLGITT

RETIRED PARTNERS

EDWIN F. HAHN, JR.

A. HALE DINSMOOR

RICHARD G. HAHN

TELEPHONES

(818) 796-9123

(213) 681-6948

CABLE ADDRESS

HAHNLAW

FACSIMILE

(818) 449-7357

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

Re: Response to Tentative Recommendation Relating to
 Compensation of Estate Attorney and Personal
 Representative

Dear Commission Members:

This letter is written to you in response to your invitation for comments on your Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative. Speaking for myself alone, I find your proposed recommendations objectionable on two points.

First: I believe that your recommendation that the probate client's fee letter contain the statement "you and your attorney may agree to a lower fee but may not agree to a higher fee" will promote fee bartering. As I view the purpose of a statutory fee schedule, it is to reflect the from time-to-time judgment of our elected state officials as to the reasonable value of ordinary services to be performed by lawyers in probating decedents' estates, given a multitude of considerations. I am satisfied with the reasonableness to the public of our existing fee schedule, which opinion is confirmed by the statistics contained in your tentative recommendation and my personal experience with dealing with estate attorneys in Massachusetts, Connecticut, New York, Ohio, Pennsylvania, Colorado, Louisiana, Nevada, Texas, and Arizona. A collateral benefit of a statutory fee schedule is the elimination (or reduction) of fee bartering and fee disputes. I view your above-quoted "admonition" to clients as provocative of fee bartering, which has the potential of diminishing the quality and/or completeness of services to an estate, and thus prove to be a disservice to the public and probate bar, as well. Since our practice (shared by most competent probate lawyers) is to perform a significant portion of the personal representative's duties as well as our own, if we were to negotiate our fees downward, I suspect

we would require the personal representative to compensate us for performing his/her responsibilities, or require him/her to perform them himself/herself or secure others to do so for him or her. No benefit is derived by the estate, and I believe a detriment in fact occurs.

Representing a fiduciary is quite different from representing an individual. While a personal representative might also be the beneficiary, most often he or she is not the sole beneficiary, and quite often the fiduciary is not a beneficiary at all. Therefore, any fee reduction does not necessarily economically impact the Executor. This is stated for the purpose of indicating that the perceived benefit of encouraging fee negotiation may not be as great (or warranted) as you might perceive. Encouragement of fee bartering raises an interesting collateral issue, and that is what, if any, duty exists in a personal representative to negotiate lower attorney's fees than set forth by statute. I don't know the answer but I think that publicly impliedly encouraging the negotiation of attorneys' fees will focus on this issue and increase the likelihood of acrimony, at the least, between personal representatives and estate beneficiaries.

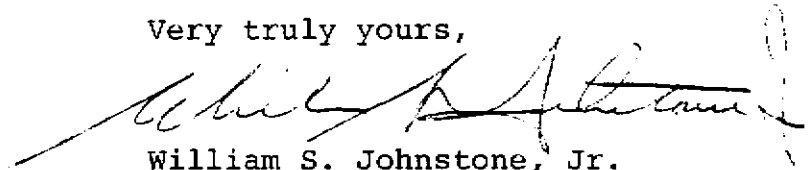
While I favor a statutory fee schedule as much for the benefit of the public as I do for the benefit of probate lawyers, if the law is going to establish a maximum fee and impliably encourage bartering for a lower fee, I would favor no statutory fee schedule at all and permit lawyers and personal representatives to establish their own fee independent of governmental regulation.

Second: My second objection addresses your failure to make any adjustment in the personal representative's compensation, given your position on attorneys' fees. The reasons expressed on Page 14 of your Tentative Recommendation are cursory at best, and apply equally to that of lawyers' fees. My experience of some 30 plus years is that unless the personal representative is a trust company, personal representatives are nearly always ignorant of their responsibilities, and inexperienced, which results in probate lawyers performing the major portion of the personal representative's duties, as well as their own. Why shouldn't their fee be subject to negotiation, just as you contemplate for attorneys representing the personal representative? If anyone doesn't "earn" his/her fees, it's the individual personal representative. Given the duty which the law is imposing on estate attorneys to estate beneficiaries, perhaps the estate lawyer, when hired, should negotiate the personal representative's fees on behalf

California Law Revision Commission
Page 3
November 11, 1988

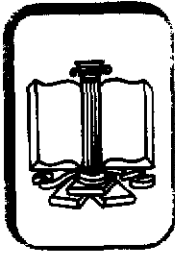
of the estate beneficiaries! I point this out primarily for the inconsistency in your positions and to encourage you to reconsider your proposed Tentative Recommendation.

Very truly yours,

A handwritten signature in cursive script, appearing to read "William S. Johnstone, Jr.", written in dark ink.

William S. Johnstone, Jr.
of HAHN & HAHN

WSJ:g



McGEORGE SCHOOL OF LAW

NOV 17 1988

RECEIVED

UNIVERSITY OF THE PACIFIC 3209 Fifth Avenue, Sacramento, California 95817

November 15, 1988

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, California 94303-4739

Attention: Mr. John H. DeMouilly, Executive Secretary

Dear Mr. DeMouilly:

I approve the recommendation for Compensation of Estate
Attorney and Personal Representative.

Very truly yours,

Benjamin D. Frantz
Professor of Law

BDF:sd

EXHIBIT 10

CA LAW REV. COMMISSION

NOV 17 1988

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JOHN L. GUTH

ATTORNEY AT LAW

November 15, 1988

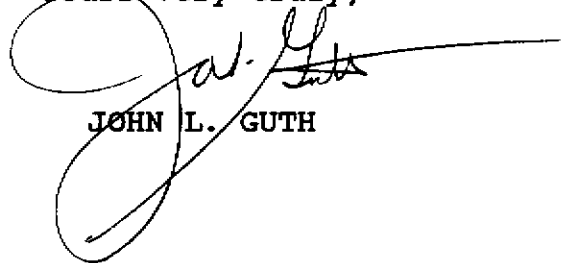
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Commission Members,

I received the October 26, 1988 tentative recommendation relating to compensation of estate attorneys and personal representatives. I presented it to a member of the Yuba-Sutter Bar Association at its general meeting on November 10, 1988. There were approximately 30 members in attendance.

The membership authorized me to advise you that there was no objection to the tentative recommendation, except that the language in the disclosure statement regarding the ability to "agree to a lower fee" should be changed to read "agree to an alternative fee arrangement, which, in no event, would be higher than the fee established by statute."

Yours very truly,



JOHN L. GUTH

JLG/sg

cc: John A. Gromala
HUMBOLDT GROUP
P.O. Box 690
Fortuna, CA 95540

Joel Guthrie, President
Yuba-Sutter Bar Association

EXHIBIT 11

**HOFFMAN
SABBAN &
BRUCKER**

CA LAW REV. COMMISSION

NOV 18 1988**RECEIVED**

LAWYERS

10880 Wilshire
Boulevard
Suite 1200
Los Angeles
California 90024
(213) 470-6010
FAX (213) 470-6735

November 16, 1988

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

Re: Tentative Recommendation Relating to Compensation
of Estate Attorney and Personal Representative
Study No. L-1036/1055

Ladies and Gentlemen:

I have a number of comments on the above-referenced
Tentative Recommendation.

I. Statutory Fee Schedule v. Reasonable Fees

The statutory fee schedule should be abolished in
favor of a reasonable fee approach.

The advertising pages of the Los Angeles newspapers
are filled with ads trumpeting the "fact" that there are
substantial fees payable in a probate, which, the ads claim,
can be eliminated through the use of a living trust. These
ads are, of course, misleading, since they assume that full
statutory fees will be awarded in every probate, and further
assume that there will be no fees in a living trust.
Naturally, the ads fail to take into account that family
members routinely waive fees for serving as executor, and
also ignore the fact that negotiated fee agreements are
becoming the norm in large estates in the Los Angeles area.

Nevertheless, these advertisements are apparently
successful in separating prospective clients from substantial
legal fees for the preparation of living trusts. While
living trusts are indeed appropriate vehicles in some cases,
I believe that they are being vastly oversold, and the
existence of a statutory fee schedule is a major selling
point.

California Law Revision Commission
November 16, 1988
Page 2

While I recognize that the Commission can do little to regulate this false and misleading advertising, I believe that the abolition of a statutory fee schedule will eliminate the principal specious claim made in the advertisements. While the proposed notice to representatives will prevent probate attorneys from falsely conveying the impression that statutory fees are automatic and nonnegotiable, they will still result in the type of advertising that I mentioned above.

A second problem with the statutory fee schedule is that it generally provides inadequate fees in small estates. Roughly the same amount of work has to be done in any estate - preparing the petition for probate, order for probate, notice to representatives and letters testamentary, marshalling the assets, preparing creditors claims, and preparing the petition for distribution. There is probably a greater correlation between the number of assets or the number of beneficiaries in an estate and the amount of legal work required, than between the value of the estate and the work required.

In your list of advantages of retaining a statutory fee schedule, you indicate that it makes legal services more affordable by shifting some of the cost to the administration of larger estates. This is absurd. First, the statutory fee schedule is such that most small estates are unprofitable for any attorney. An attorney has no obligation to take on unprofitable civil matters, and most probate lawyers will refuse to handle small estates. Thus, the statutory fee schedule deprives many people of access to counsel. Second, where a family member is named as the executor in a large estate, we find almost uniformly that the executor requests an hourly fee arrangement (but not more than the statutory fee schedule.) Thus, there is no statutory fee profit on the large estate to offset losses in small estates. Third, in Los Angeles County the Court will generally refuse to award extraordinary fees in large estates, on the assumption that the statutory fee is sufficient.

I find the Commission's position in support of a statutory fee schedule especially problematical because within the same week, I received the Commission's Tentative

California Law Revision Commission
November 16, 1988
Page 3

Recommendation on Trustee's Fees, which endorses a reasonable fee approach. New York has statutory fees for estates and trusts. If the Commission is so enamored of statutory fee schedules, why not be consistent for estates and trusts?

The Tentative Recommendation on Trustee's Fees apparently justifies its recommendation that fees be left to the parties to the trust on the basis that (a) under "modern trust administration . . . the interested parties are expected to take the initiative in protecting their rights"; and (b) "the settlor may take the trustee's fee schedule into account in selecting the trustee." I see no difference between an executor named in a will and a trustee under a living trust with regard to these justifications. Under Independent Administration of Estates, we expect estate beneficiaries to take the initiative in protecting their rights. When a testator selects an executor, he could (at least in the future) be expected to take into account the fees proposed to be charged.

The Commission fears disputes over fees if a reasonable fee approach is adopted. Are the same concerns not also applicable to living trusts?

I suggest that the Commission consider adopting a reasonable fee basis of compensation, perhaps with a rebuttable presumption that the statutory fee schedule provides for a reasonable fee.

II. Disclosure Statement

The proposed disclosure statement is too difficult for the average layman to comprehend. I suggest you use the following in its place:

Lawyers' Fees

California law requires that you be given this statement and that you sign it.

The lawyer for an estate is entitled to be paid out of the estate for his or her work. For the kind of work required in almost every estate

California Law Revision Commission
November 16, 1988
Page 4

("ordinary services"), the lawyer cannot be paid more than a certain percentage of the estate. The percentage is as follows:

- (1) 3% on the first \$100,000
- (2) 2% on the next \$900,000
- (3) 1% on the next \$9,000,000
- (4) $\frac{1}{2}$ of 1% on the next \$15,000,000
- (5) a reasonable amount to be determined by the judge for larger estates.

The value of the estate is based on an appraisal of the estate property, plus profits from sales of estate property, plus income during the probate, minus losses on sales of estate property.

If your lawyer does extra work, your lawyer is entitled to be paid extra. The judge will set the fees for this extra work.

Your lawyer will be paid based on the fee schedule set out above, unless you and your lawyer agree to a different way of setting the fee (such as an hourly rate or a different percentage). You and your lawyer may agree to a method that produces a lower fee, but your lawyer cannot be paid a higher fee.

If you and your lawyer agree to a lower fee, that is what your lawyer will be paid for ordinary services. The probate court may still allow your lawyer to be paid more if your lawyer does certain extra work.

The problem with the Commission's language is that it uses too many long or technical words, such as "statutory", "attorney", "additional" and "extraordinary." Unsophisticated clients often have equally unsophisticated vocabularies and reading abilities. You might also want to consider advising



California Law Revision Commission
November 16, 1988
Page 5

clients to inquire of their lawyers as to what services will be considered extraordinary.

If the Commission elects to retain the statutory fee schedule, then the existence of the disclosure notice should not be deemed to be a mandate for the negotiation of fees. I am concerned that beneficiaries may attempt to sue personal representatives who do not undertake negotiations with counsel as to the amount of fees.

III. Extraordinary Services

I agree with the Commission's recommendation that the statute expressly authorize the representative to pay the attorney for performing ordinary services which the statute assumes will be performed by the representative. In dealing with individuals, it is quite common for the attorney to have to assume the burden of bookkeeping for the estate, and the attorney may also have to work with appraisers and assist in closing of the residence and disposing of property. Since statutory fees are often inadequate to cover such services, the only way in which the attorney can be made whole is by receiving an assignment of the portion of the personal representative fees.

Very truly yours,

Paul Gordon Hoffman

PGH:9

EXHIBIT 12

JOHN W. HUTTON
 EDWARD J. FOLEY
 PETER D. ANDERSON
 DONALD S. BOLLES

HUTTON, FOLEY, ANDERSON & BOLLES, INC.
 ATTORNEYS AT LAW
 P.O. BOX 26
 510 BROADWAY
 KING CITY, CALIFORNIA 93930

TELEPHONE
 (408) 385-5428

November 18, 1988

CA LAW REV. COMM'N
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California Law Revision
 Commission
 Suite D-2
 4000 Middlefield Road
 Palo Alto, California 94303-4739

Re: Tentative recommendation relating to
 compensation of estate attorney and
 personal representative

Gentlemen:

I have reviewed the tentative recommendation dated October 26, 1988, and I would like to say that I generally concur with the recommendations. However, I do disagree on two (2) sections that were carried over from current law.

Sections 10802 and 10833 provide respectively that a personal representative and an estate attorney can renounce the compensation provided by decedent's Will and claim the full statutory fee. I believe the two (2) sections are unfair, and when applied, cause no end of hard feelings on the part of the estate beneficiaries. I understand that a testator could be unfair or unrealistic in setting the fees but there could be alternative methods of determining fees in such an instance rather than simply denying the testator the right to specify the compensation. I submit that there is no good way to explain these statutes to an unhappy heir who sees the testator's wishes thwarted and the personal representative or attorney for the estate receiving an unwarranted windfall.

Yours very truly,

HUTTON, FOLEY, ANDERSON & BOLLES, INC.

By *Peter D. Anderson*

PDA:jaa

cc: Mr. John A. Gromala

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

Chair D. KEITH BILTER, San Francisco

Vice-Chair IRWIN D. GOLDRING, Los Angeles

Advisors KATHRYN A. BALLSUN, Los Angeles HERMIONE K. BROWN, Los Angeles THEODORE J. CRANSTON, La Jolla LLOYD W. HOMER, Campbell KENNETH M. KLUG, Fresno JAMES C. OPEL, Los Angeles LEONARD W. POLLARD, II, San Diego JAMES V. QUILLINAN, Mountain View WILLIAM V. SCHMIDT, Costa Mesa HUGH NEAL WELLS, III, Los Angeles JAMES A. WILLETT, Sacramento

Section Administrator PRES ZABLAN-SOBERON, San Francisco



555 FRANKLIN STREET SAN FRANCISCO, CA 94102 (415) 561-8200

Executive Committee D. KEITH BILTER, San Francisco IRWIN D. GOLDRING, Los Angeles JOHN A. GROMALA, Eureka LYNN P. HART, San Francisco ANNE K. HILKER, Los Angeles WILLIAM L. HOBSINGTON, San Francisco BEATRICE LAIDLAY-LAWSON, Los Angeles JAY BOSS MacMAHON, San Rafael VALERIE J. MERRITT, Los Angeles BARBARA J. MILLER, Oakland BRUCE S. BOSS, Los Angeles STERLING L. BOSS, JR., Mill Valley ANN E. STODDEN, Los Angeles MICHAEL V. VOLLMER, Irvine JANET L. WRIGHT, Fresno

CA LAW REV. COMM'N

NOV 21 1988

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November 18, 1988

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

Re: LRC TR - Compensation of Estate Attorney

Dear John:

I have enclosed a copy of Andy Garb's technical report on the section noted. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

[Handwritten signature of James V. Quillinan]

James V. Quillinan Attorney at Law

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

LAW OFFICES OF
LOEB AND LOEB
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1000 WILSHIRE BOULEVARD, SUITE 1800
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 688-3400
TELECOPIER (213) 688-3460
CABLE ADDRESS "LOBAND"
TELEX 67-3106

JOSEPH P. LOEB
(1983-1974)
EDWIN J. LOEB
(1988-1970)
MORTIMER H. HESS
(1988-1968)

WRITER'S DIRECT DIAL NUMBER:

(213) 688-3406

NEW YORK OFFICE
230 PARK AVENUE
NEW YORK, N. Y. 10169
(212) 692-4800
TELECOPIER (212) 692-4990
TELEX 127400

CENTURY CITY OFFICE
10100 SANTA MONICA BOULEVARD
LOS ANGELES, CALIFORNIA 90067
(213) 282-2000
TELECOPIER (213) 282-2192
TELEX 67-3106

November 14, 1988

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

Re: Tentative Recommendation re Compensation of Estate
Attorney and Personal Representative

Dear Jim:

One comment from a rookie EPTPLS member:

Proposed Probate Code § 10851(d) contains an erroneous clause. That Section provides that on final distribution the representative is to charge the estate for the full amount of compensation allowed "less any amount previously charged against the estate pursuant to Section 10850." It further provides that the attorney is to be paid the fees allowed "less any amount previously paid to the attorney out of the estate pursuant to Section 10850."

The comments to § 10850 make it clear that that section allows extraordinary compensation and fees prior to final distribution. Obviously, any extraordinary compensation or fee (as distinguished from statutory compensation or fee) paid before final distribution should not be deducted from the allowance made at the time of final distribution. Yet a literal reading of § 10851(d) requires a reduction for all previous fees allowed.

James V. Quillinan, Esq.
November 14, 1988
Page 2

If I am not being too much of a nit picker, this could be corrected by adding the words "as ordinary compensation" after the word "charged" on line 6 and adding "as ordinary fees" after the word "attorney" on line 9.

I'll see you December 3.

Cordially,



Andrew S. Garb
of Loeb and Loeb

ASG:rk
ASG0795
LPC40



COUNTY OF ALAMEDA

OFFICE OF

GEORGE COMTE

CORONER-PUBLIC ADMINISTRATOR-PUBLIC GUARDIAN
CONSERVATOR
480 - 4TH STREET
OAKLAND, CALIFORNIA 94607

PUBLIC ADMINISTRATOR
PHONE: (415) 268-7330

PUBLIC GUARDIAN-CONSERVATOR
PHONE: (415) 268-7330

CORONER'S DIVISION
PHONE: (415) 268-7300

CA LAW REV. COMM'N

NOV 22 1988

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November 21, 1988

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

Gentlemen:

I understand the Commission is recommending that the statutory fee on the first \$100,000.00 of estate value be reduced to a flat 3%.

As Acting Public Administrator of Alameda County, I oppose the recommendation since most of my estates are quite small, and any proposed reduction in the percentage rate would strike where it really hurts - my department's rather stringent budget.

Very truly yours,

Donald W. Hanley
Acting Public Administrator

DWH:lg

cc: Grace Tam, Esq.



C O U N T Y C O U N S E L

FOURTH FLOOR, ADMINISTRATION BUILDING, 1221 OAK STREET
OAKLAND, CALIFORNIA 94612 • TELEPHONE 272-6700

RICHARD J. MOORE
COUNTY COUNSEL

November 21, 1988

CA LAW REV. COMM'N

NOV 23 1988

RECEIVED

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

Re: Tentative Recommendation Relating to Compensation of Estate Attorney
and Personal Representative

To the Commission:

Our office represents the Alameda County Public Administrator in the administration of decedents' estates. We wish to state our opposition to the tentative recommendation reducing the statutory rate on the first \$15,000 from 4% to 3% for both the personal representative and the attorney representing the personal representative.


The proposed reduction would be unfair to County Public Administrators and their attorneys. Unlike private attorneys who can shift to larger, more profitable estates some of the overhead costs of administering smaller estates, the county administers mostly small estates unwanted by the private bar. Many of these small estates do not generate sufficient fees to cover the overhead costs of administration. A further reduction in the rate on the first \$15,000 would mean a reduction in the already stringent budgets and a likely increase in the Public Administrator's case load as private attorneys reject more and more smaller estates due to the rate reduction.

We ask that the Commission reconsider the proposed rate reduction in light of the adverse effect it would have on the counties.

Very truly yours,

RICHARD J. MOORE
County Counsel

By


GRACE TAM,
Deputy County Counsel

GT/me: 8988J
cc: Lynn Suter (enc.)
Don Hanley

EXHIBIT 16

DAVID H. SPENCER
ATTORNEY AT LAW
220 STATE STREET, SUITE A
LOS ALTOS, CALIFORNIA 94022
(415) 949-1660

CA LAW REV. COMM'N

NOV 23 1988

RECEIVED

November 22, 1988

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

Dear Commissioners:

I very much oppose any reduction in the statutory fee of the compensation of an estate attorney and personal representative. Instead, I recommend that the fee be increased to four percent for the first \$100,000 value of the estate. The reasons for the increase are the existing recent changes in the Probate Code and the proposed changes in both the Probate Code and the Code of Civil Procedure. All of these changes increase the amount of time involved in the probate process and in the instance of the proposed Notice to Creditors will certainly delay the closing of an estate which in turn, means a longer time in receiving fees. Furthermore, any personal representative who is sued by a late claiming creditor will almost automatically file an indemnity action against his or her attorney.

All practicing attorneys know that especially in small estates its the attorneys who do the work and that in many instances the time involved in probating a large estate is not much longer than in probating a small one. Any proposed change in fees should reflect this fact by increasing the fee on the first \$100,000 of an estate.

Very truly yours,



DAVID H. SPENCER

DHS: jk

EXHIBIT 17

LAW OFFICES

KNAPP & KNAPP

1093 LINCOLN AVENUE

SAN JOSE, CALIFORNIA 95125

TELEPHONE (408) 298-3636

November 22, 1988

CA LAW REV. COMM'N

NOV 23 1988**RECEIVED**DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

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

Honorable Commissioners:

First and foremost let me state that I read each and every word of your Tentative Recommendations, sent to me faithfully by your Commission. I have nothing in my heart but praise for the efforts you have made and are making and I almost always totally agree with your endeavors. Keep up the good work, we certainly need it in California.

I have practiced law in California since 1953 and prior to that was Clerk of the Superior Court in Santa Clara County for years. I have watched "probate" evolve to its present status and must say, sometimes the "changes" have been confusing to me as I felt that in certain cases the same were not warranted and did not improve the procedures.

I have read the following which have recently been sent to me: "Compensation Of Estate Attorney and Personal Representative", "Notice To Creditors", and "Trustee's Fees", with interest.

Simply stated: The Notice To Creditors is not only confusing but I think unmanageable as proposed. Probate has always been a procedure with a set "finality" to it. Now we will leave the beneficiaries and, yes, the attorneys, hanging in the air as to what will happen in the limitations period? There has to be a better way and "going overboard" just can't be it!

The reduction of attorney's fees on smaller estates as set forth in the Compensation, etc, recommendation is not in agreement with the recommendations of the Trustee's Fees, i. e. a lesser fee to the attorneys "who can make it up on larger estates" (suppose there are none?) and "increased cost of doing business"...."such as inflation" (see page 2 of Trustee's fees) is in conflict. Do not the attorney's have a increase in cost of doing business?

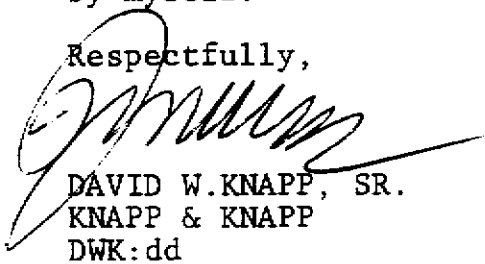
The statement that by reducing the statutory fees we would be more in line with the other statutory states is ridiculous. Look at the cost of living in those states!

I know nothing will come of this statement of mine, however have always been a believer of the old saying "He who accepts evil without protesting against it is really cooperating with it!" I

Page Two
California Law Revision Commission
November 22, 1988

certainly do not herein mean to imply that your commission is the doer of "evil" and would not want you to think so. I have stated heretofore that I admire the work you have produced in the many fields, however felt that the foregoing needed stating by myself.

Respectfully,

A handwritten signature in black ink, appearing to read "David W. Knapp, Sr.", with a long, sweeping underline.

DAVID W. KNAPP, SR.
KNAPP & KNAPP
DWK:dd

COMM

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

NOV 28 1988

RECEIVED

11/23/88

California Law Revision Commission:

I have read your tentative recommendations related
to Trustees' fees and Compensation of Estate

Attorney and Personal Representative. I agree with

Your recommendations and conclusions

and suggest you propose them to the

Legislature to be implemented until law.

Thank you for permitting me to help

you in connection with these issues.

Sincerely,
H.A.

EXHIBIT 19

SUITE 1700
 610 NEWPORT CENTER DRIVE
 NEWPORT BEACH, CALIFORNIA 92660

CA LAW REV. COMMISSION

NOV 28 1988

RECEIVED

November 23, 1988

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

Dear Ladies and Gentlemen:

I have comments about several recently-issued tentative recommendations that I wish to submit for your consideration.

Multiple-Party Accounts and Financial Institutions

I have one observation and one suggestion with respect to this recommendation. First, the observation: I believe footnote 8 to the introduction dated October 25, 1988 is incorrect. It states that the California Supreme Court has denied the petition for hearing in the Propst case. I am informed by the clerk of the Supreme Court, however, that on October 27, 1988, the court granted the petition for hearing. Second, the suggestion: Apply a survivorship feature only to an account explicitly designated as a "joint tenancy" account.

Although I have performed no empirical study, I have the impression that tenancy-in-common accounts are often used by siblings, business partners or others who may have no intent to have a survivorship feature. They also are used occasionally by married persons who want to let either spouse manage, but provide assets to persons other than the surviving spouse at the first death. Because the traditional distinction in California law that survivors own all of a joint tenancy account while a decedent's interest in an account that is dominated as tenancy-in-common or community property is subject to disposition by the decedent's will (in the case of community property) or automatically becomes part of the decedent's estate (in the case of a tenancy in common) is familiar to many of my clients, adding an "automatic" survivorship feature will lead to at least some confusion and misunderstanding. It likely will reduce the property subject

~~is more often true with individual trustees than with corporate trustees, that has not always been the case.~~

~~I oppose enactment of the proposed Section 16443 allowing a liability for exemplary damages limited to three times the amount of actual damages. In any particular instance, policy decisions of corporate fiduciaries and the exercise of discretionary decisions with respect to the administration of individual trusts by corporate fiduciaries is not likely to be affected dramatically by the potential award of exemplary damages in addition to an award of actual damages plus the unfavorable publicity that often attends a breach of trust finding. Overall, however, trustees likely will (and I would argue should) seek (depending on the competitive pressures of the marketplace) higher fees because of the greater financial risk involved. As for individual trustees, I think it is much more likely that we will discourage persons from serving (or continuing to serve) as trustee of "difficult" or "messy" situations if they risk an award of exemplary damages. Notwithstanding the Vale and Werschull pension plan cases, I think amending the Code to admit the possibility of exemplary damages for breach of trust is a serious mistake. Deletion of the proposed section by the legislature during its consideration of the trust law -- though perhaps motivated by concern about the limit on liability on the part of some members of the plaintiffs' bar -- was the most beneficial change to the proposed law made during the course of the legislative process.~~

Compensation of Estate Attorney and Personal Representative


Scrap the statutory fee system, and adopt the reasonable fee system proposed by the Uniform Probate Code! As your recommendation with respect to trustees' fees says,

"The appropriate level of fees for services should . . . be determined by the parties to the trust and not by statute or by requiring court approval of fees. This approach is consistent with modern trust administration under which the interested parties are expected to take the initiative in protecting their rights. The settlor [or testator] presumably may take the trustees' fees schedule into account in selecting the trustee." [footnote amended]

Requiring a routine court involvement in the review of charges by the personal representative and counsel for the personal representative unnecessarily consumes judicial resources. If

there is a dispute, the court can become involved. Otherwise, the court should not be involved. Requiring disclosure at the outset of a relationship -- whether between attorney and personal representative, or personal representative and beneficiaries, is appropriate. Beyond that, either a statutory system or mandatory judicial involvement simply reduces price competition in the marketplace and unnecessarily consumes judicial resources.

Very truly yours,



Russell G. Allen

RGA/br

8861 8 2 AOM
NOV 22 1988

LAW OFFICES

TURNER, GERSTENFELD, WILK & TIGERMAN

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

8383 WILSHIRE BOULEVARD, SUITE 510
BEVERLY HILLS, CALIFORNIA 90211-2486

AREA CODE 213
TELEPHONE 657-3100
TELECOPIER 653-3021

RUBIN M. TURNER
GERALD F. GERSTENFELD
BARRY R. WILK
BERT Z. TIGERMAN*
STEVEN E. YOUNG*
EDWARD FRIEDMAN
DORTHA LARENE PYLES
LINDA WIGHT MAZUR

November 22, 1988

* A PROFESSIONAL CORPORATION

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

Re: Tentative Recommendation Relating to Compensation
of Estate Attorney and Personal Representative

Dear Ladies and Gentlemen:

This letter is with respect to the portion of the subject recommendation relating to the authority of the personal representative to employ specialists to perform what would be in the category of extraordinary services.

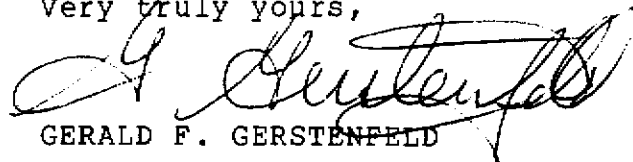
All references herein to any sections are to the Probate Code.

I agree with your recommendation that the authority should be expanded but I disagree with the recommendation that the authority to pay the specialist out of estate funds should be subject to court review at the final account. The specialist who performs the service should be entitled to rely upon the contract entered into with the personal representative concerning such services and that the court will not modify the contract at a later time. Such would not affect the ability of the court to take such action as it may deem appropriate vis a vis the personal representative if the court concluded that the contract entered into by the personal representative was inappropriate or illegal. Therefore, I believe that the second paragraph of section 902 should continue to read as same as presently stated but subject to the amendments to increase the kind of specialists whose services are covered thereby.

California Law Review Commission
November 22, 1988
Page Two

In the same context, if my recommendations are adopted, I believe that any such contracts entered into between the expert and the personal representative granted independent administration authority would be subject to the provisions of section 10551 pursuant to which such personal representative could enter into the contract without giving notice of proposed action. If any such contract were subject to court review at the final account, I question whether the personal representative having independent administration authority would have the power to enter into such a contract under the provisions of section 10551 and the provisions of section 10553 may be construed as being in conflict with the expanded provisions of the second paragraph of section 902 to the extent that the same may relate to actions and proceedings referred to in section 10553.

Very truly yours,



GERALD F. GERSTENFELD

GFG:11

NOV 28 1988

RECEIVED

LAW OFFICES OF

HAROLD S. SMALL

A PROFESSIONAL CORPORATION

THE CHAMBER BUILDING
110 WEST C STREET, SUITE 2112
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 231-8847
TELECOPIER (619) 231-6724

November 23, 1988

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

Gentlemen:

I have had the opportunity to review your Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative, and desire to make comments regarding same. This letter is being sent to you for that purpose. In general I must commend the Commission for the efforts expended and the results achieved. I concur in most of the recommendations made by the Commission.

However, I suggest that changes be made to the statutory rate of compensation to provide a 4% rate on the first \$50,000.00 of the estate value, 3% rate on the second \$50,000.00 of the estate value, and the existing statutory schedule being maintained for estates in excess of \$100,000.00. From our experience and the maintenance of time records with regard to estate Administration, we have found that the time involved in providing services to an estate, with very little complexity, and for the purpose of satisfying requirements associated with the estate administration where an individual has been named as the Executor of the estate is not less than \$3,000.00. In addition, although the legal complexity is not as great, the amount of time required for the handling of the small estate typically is equal to or greater than the handling of a significantly larger estate. Accordingly, the fees charged for the estate having a value of less than \$100,000.00 should address this problem and my recommendations set forth above would do so. It is important to note that many small estates involve a significantly larger amount of time for attorney services in order to provide the guidance and "hand holding" necessary for individual Executors. It is for this reason that I have suggested the percentage modification indicated above which would result in a slight increase in fees for the smaller estate while maintaining the existing statutory scheme for larger estates.

If there is significant objection to this concept, you may wish to look to a modified schedule of statutory fees for estates in excess of \$300,000.00 providing for a rate of 2% on the first \$1,000,000.00 of estate assets if the total value of the estate assets exceeds \$300,000.00 with the rate of 1% on the value of the estate assets between \$1,000,000.00 and \$10,000,000.00, one-half of 1% on the next \$15,000,000.00, and a reasonable amount to be determined by the Court for all amounts in excess of \$25,000,000.00.

It is also important to anticipate the effect of the significant use of inter vivos trusts. Through proper estate planning, attorneys have been causing clients to create inter vivos trusts to hold a substantial portion of assets in an estate. By doing so, the attorney's fees otherwise incurred in connection with a Probate Administration as well as commissions to the personal representative have been substantially diminished and reduced. However, even in these circumstances, a modest Probate Estate Administration is frequently required which still requires the same amount of work that would have been involved in an estate of significantly larger value. For example, we have assisted clients in the administration of estates having values for Probate Administration purposes of less than \$150,000.00, and in some cases less than \$50,000.00, where the total estate is in realty significantly greater than \$1,000,000.00. The significant difference in the value of assets is represented by assets that have been transferred into an inter vivos trust. The only reason for the Probate Administration is for the purpose of satisfying the creditor's claim period and noticing creditors with regard to the filing of claims in the estate for the purpose of protecting the estate assets and the beneficiaries of the estate from future claims. The suggestions outlined above more closely align the fees with the services rendered and would take into account the significant planning opportunity (inter vivos trusts) that is utilized with some frequency in California.

It is also important to understand that certain types of services that might be ordinary if the estate is administered by an institutional executor and an experienced individual are different than the circumstances where an inexperienced executor acts for the estate. For example, in connection with the sale of real property, an individual executor will be unfamiliar with the requirements associated with same and significant additional services will be required of counsel to assist in the sale of real property which typically is handled by the Court as being part of the ordinary services, for the first sale or disposition of real property.

California Law Revision Commission
November 23, 1988
Page Three


I hope that the foregoing comments are of assistance to you in reaching your final recommendations regarding legislation in this area.

Please contact the undersigned if you have any questions or if I can be of additional assistance.

Very truly yours,

HAROLD S. SMALL,
a Professional Corporation

By



Harold S. Small

HSS:ekp

EXHIBIT 22**ABBITT, BENNETT, LEHMAN & JACOBS**

A PROFESSIONAL CORPORATION

SUITE 1100

12121 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90025

AREA CODE 213
824-0471

FAX 213 820-5960

DIANE ABBITT
ROBERTA BENNETT*
MARK E. LEHMAN
MITCHELL A. JACOBS*
MARK H. EVANS
JEFFREY G. GIBSON
NEAL R. SAFRANOF COUNSEL
KENNETH G. PETRULIS*CERTIFIED SPECIALIST IN FAMILY LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

CLAW

DEC 05 1988

RECEIVED

December 2, 1988

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

Re: Study L-1036/1055, Compensation of Attorney
and PR
Memorandum 88-70 dated 9/14/88;
Tentative Recommendation Section 10853,
Services of Paralegal, etc.

Dear John:

I am writing on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. Proposed Section 10853 deals with the compensation of the attorney for paralegal services. We recommend deleting from that section the third sentence thereof, which reads:

"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."

We feel that the sentence as presently worded, and the corresponding comment, are at best unclear. It may mean either of the following:

1. In addition to receiving compensation for the paralegal's time expended under the attorney's supervision, the Court should allow compensation for attorney time spent in the direction and supervision of the paralegal, as well as compensation for the responsibility assumed for the paralegal's work. If this is the intended meaning, then the sentence and the corresponding sentence of the comment do not belong in Section 10853, because, as noted, that section applies to compensation for the paralegal's services and not to compensation for the attorney's services; or

2. The fees attributable to the paralegal's services should take into consideration how experienced the paralegal is, the amount of supervision required being an indication of how valuable the paralegal's services actually were. If that is the meaning intended, then the comment could be more specific in explaining that meaning.

Additionally, the general rule of drafting adopted by the Commission has been to not enact language which purports to give instructions to the Court on something that is within the Court's discretion. The Court is certainly free to take this and other factors into consideration in setting fees.

We, therefore, recommend that the third sentence of proposed Section 10853 and the related sentence in the comment be deleted.

Sincerely,



KENNETH G. PETRULIS
Former Chair
BEVERLY HILLS BAR ASSOCIATION
Probate, Trust and Estate Planning
Legislative Committee

cc: David E. Lich
Barbara J. Bailey
Bruce D. Sires
Phyllis Cardoza

Robert I. Marder
 PROFESSIONAL CORPORATION
 ATTORNEY AND COUNSELOR AT LAW
 554 EAST FOOTHILL BLVD., SUITE 115
 SAN DIMAS, CALIFORNIA 91773-0835
 (714) 599-0971

CA LAW REV. COMM'N
 DEC 05 1988
 RECEIVED

November 27, 1988

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

Re: Proposed Reduction of California
 Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I respectfully request no revision of the current California Statutory Probate Fee Schedule for purposes of reduction.

Very truly yours,

Robert I. Marder
 ROBERT I. MARDER

RIM:rim
 Enclosure

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

Re: Proposed Revision of California
Statutory Probate Fee Schedule
For Purposes of Reduction

Gentlemen:

The schedule of representative and attorney fees allowed under California Probate Code §901 and §910 should not be revised for reduction, and the following is offered for your consideration:

Current Fee Schedule:

1st	\$15,000.00	of estate at 4%	=	600.00
Next	85,000.00	of estate at 3%	=	2,550.00
Total Fee				<u>\$3,150.00</u>

Your Proposed Reduction

1st	\$100,000.00	of estate at 3%	=	3,000.00
-----	--------------	-----------------	---	----------

The current rate of experienced California attorneys is \$150.00 per hour because of the high cost of living in this state [\$150.00 x 20 hours = \$3,000.00]. Even the smallest of estates cannot be opened and closed in 20 hours, and your survey fails to mention the cost-of-living in the states compared to California.

I direct your attention to the following documentation required in California probate estates:

Petition for Probate

With list of all heirs-at-law, beneficiaries, and named Executors if decedent left a Will.

Certificate of Assignment

In counties requiring same; most do to show residence of the deceased.

Publication of Notice of Death & Petition to Administer Estate

In counties other than Los Angeles serviced by the L.A. Daily Journal and Metropolitan News, the attorneys are required to deliver a copy of the Notice of Death to the small local newspapers specified for publication WHO DO NOT FILE the Proof of Publication but send it to the attorney to file, and it is the attorney who must serve copies of this notice to all persons listed in Attachment 8 of the Petition for Probate. In the case of large families, this requires an inordinate amount of paperwork and postage.

Proof of Subscribing Witness to Will

If Will is not self-proving, attorney must prepare this form, obtain the signature of at least one witness to the Will, and file with the court before the hearing.

The Order for Probate

Submitted in duplicate to the court with S.S.A.E. for return of a conformed copy.

Form 204 - General Advice to Estate Representative

Required in Los Angeles County only, but attorney must complete and file before Letters will issue.

Bond of Representative

If applicable, bond must be ordered, the application completed, executed and returned to bonding company. In the alternative, waivers of bond are prepared by the attorney unless a Will specifically waives bond.

Form SS-4 - Application for Federal [Estate] I.D. Number

Form must be completed and mailed by attorney to I.R.S.

Inventory and Appraisalment.

A lengthy listing of all estate assets and forwarded to Referee. When real property is involved, a Preliminary Change of Title Report must also be prepared by the attorney and served on the County Assessor of the county wherein the real property lies.

Written Notice to Creditors

Effective 7/1/88 written Notice to Creditors must be prepared, filed and served on all known creditors of the decedent, including the State Department of Health Services with a certified copy of the Certificate of Death.

Written Notice of Allowance or Rejection of Creditor Claims.

Must be prepared and served on all creditors presenting claims in the estate.

Advice of Proposed Action

Under I.A.E.A., if you plan to sell or otherwise dispose of estate assets, etc., you must serve all beneficiaries of the estate with this written notice.

Sales of Estate Assets

Most require court petitions and appearance for an order; some are, of course, ex parte.

The Final Account.

This document alone requires 10 to 20 hours of preparation and typing, to say nothing of time expended in obtaining probate clearance and/or court appearance if required.

Order for Distribution of Estate

As far as I know, only Los Angeles County will prepare this decree for \$50.00, otherwise it is prepared by the attorney, and recordation of certified copies effected when required.

Receipts for Distribution

Are prepared by attorney for signature of each distributee of the estate, together with receipts for the fees paid, and the originals are required to be filed with the court.

Application for Final Discharge and Order

Attorney must prepare and file in duplicate to obtain closing of the estate.

Tax Returns

Even if prepared by accounting personnel other than attorneys, problems with the Internal Revenue Service are common and require the expenditure of additional time and effort in obtaining proper releases.

The foregoing does not include the time and additional postage incurred by the requirement of Los Angeles County that all documents filed be bluebacked and labeled for ease of court personnel. Filing by mail and return postage is costly.

You are laboring under a misconception that small estates do not require "much" work -- it depends on the type of assets involved, the number of beneficiaries, and the problems incurred. It does not depend on the value of the assets.

Postage is excessive, telephone expense disproportionate to value with "local calls" limited to a very small area, to say nothing of the overhead expense of premium rent, wages and office supplies. If this commission consisted of working probate attorneys, the idea of reduction would be out of the question, and you would be quickly informed that the documentation required by current California law cannot profitably be accomplished under the existing schedule of fees. Increased fees for small estates is what is really needed in California.

ELIZABETH F. COURTNEY
ATTORNEY AT LAW
10126 CENTRAL AVENUE, SUITE "B"
MONTCLAIR, CALIFORNIA 91763
(714) 625-0761

CA LAW REV. COMMISSION
DEC 05 1988
RECEIVED

December 1, 1988

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

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I request that you do not revise the current California Probate Fee Schedule to reduce statutory fees.

Very truly yours,
Elizabeth F. Courtney
ELIZABETH F. COURTNEY

EFC:lhb
Enclosure

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

Re: Proposed Revision of California
Statutory Probate Fee Schedule
For Purposes of Reduction

Gentlemen:

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The current rate of experienced California attorneys is \$150.00 per hour because of the high cost of living in this state [\$150.00 x 20 hours = \$3,000.00]. Even the smallest of estates cannot be opened and closed in 20 hours, and your survey fails to mention the cost-of-living in the states compared to California.

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If Will is not self-proving, attorney must prepare this form, obtain the signature of at least one witness to the Will, and file with the court before the hearing.

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Must be prepared and served on all creditors presenting claims in the estate.

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MacCARLEY, PHELPS & ROSEN
A PROFESSIONAL LAW CORPORATION

DEC 05 1988

3800 ALAMEDA AVENUE, SUITE 1150
BURBANK, CALIFORNIA 91505

RECEIVED
(818) 841-2900
(213) 384-1234
TELECOPIER
(818) 841-9712

MARK MacCARLEY
EDWARD M. PHELPS
WALTER K. ROSEN
RUTH A. PHELPS
DEBORAH BALLINS SCHWARZ
THOMAS J. MILHAUPT
KEN MILES KAPLAN

November 29, 1988

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

Re: Tentative Recommendation to Compensation of
Estate Attorney and Personal Representative
No: L-1036/1055

Dear Sir/Madame:

I have read the Tentative Recommendation
Relating to the Compensation of Estate Attorney and
Personal Representative dated October 26, 1988.

I approve the tentative recommendation. I
think it clarifies and simplifies existing law. I do
not recommend any changes to it.

Very truly yours,

MacCARLEY, PHELPS & ROSEN
A Professional Law Corporation

By: Ruth A. Phelps
Ruth A. Phelps

RAP:mr
3354m

ROBERT A. WADDELL
ATTORNEY AT LAW
22930 CRENSHAW BOULEVARD
SUITE E
TORRANCE, CALIFORNIA 90505
(213) 328-8912

COMMUNITY COMMISSION
DEC 05 1988
RECEIVED

December 1, 1988

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

RE: Tentative Recommendation
relating to
COMPENSATION OF ESTATE ATTORNEY
AND PERSONAL REPRESENTATIVE

Dear Staff:

Your recommendation that the four percent (4%) rate on the first \$15,000 of the estate be reduced to three percent (3%) is ill conceived.

Even under the present fee structure, it is nearly impossible to find an attorney to probate a small estate. Rather than reducing the rate of the first \$15,000, consideration should be given to increasing it. I suggest the following:

FOUR PERCENT (4%) OF THE FIRST \$50,000

TWO PERCENT (2%) OF THE NEXT \$950,000 ETC.

The above rates and your proposed rates result in the same fee for estates of \$100,000 or more. However, my rates provide an incentive for attorneys to accept the smaller estates.

Thank you for your consideration.

Very truly yours,


Robert A. Waddell

RAW:dlf

CHAMBERLAIN, CHAMBERLAIN & BALDO

ATTORNEYS AT LAW

BANK OF CALIFORNIA BUILDING

P. O. BOX 32

AUBURN, CALIFORNIA 95604-0032

(916) 885-4523

PAUL H. CHAMBERLAIN
RUSSELL P. BALDO

L. L. CHAMBERLAIN, 1888-1913
T. L. CHAMBERLAIN, 1913-1975
T. L. CHAMBERLAIN, JR., 1950-1984

December 2, 1988

CA LAW REV. COMM'N

DEC 05 1988

R E C E I V E D

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

Re: Memorandum - Probate Code Amendments

Gentlemen:

Russ and I have now reviewed the "tentative recommendations" which you transmitted to us with your letter of November 16 outlining possible changes in the Probate Code, particularly as it relates to compensation of attorneys and personal representatives in probate matters generally.

Both of us agree that the use of a statutory schedule for fees and compensation of the representative is worthwhile as it eliminates problems discussing those items with clients involved in probate and satisfies them that a standard schedule is being followed.

The change of applying a 3% rate to the first \$100,000.00 of value really does not make that much difference monetarily and would be acceptable.

The rates indicated as to "ordinary probate proceedings" would appear to be in line with those of other states and the recommendation therefore generally meets with our approval.

Sincerely yours,

CHAMBERLAIN, CHAMBERLAIN & BALDO

By: Russell P Baldo

By: Paul H Chamberlain

PHC kt

VICTOR J. WESTMAN
COUNTY COUNSEL

SILVANO B. MARCHESI
ARTHUR W. WALENTA, JR.
ASSISTANTS

MICHAEL D. FARR
EDWARD V. LANE, JR.
PRINCIPAL DEPUTIES

OFFICE OF COUNTY COUNSEL
CONTRA COSTA COUNTY

COUNTY ADMINISTRATION BUILDING
P.O. BOX 69
MARTINEZ, CALIFORNIA 94553-0006
PHONE (415) 646-2074

December 5, 1988

~~RECEIVED~~
DEPUTIES:
SHARON L. ANDERSON
DANA A. BAKER
ANDREA W. CASSIDY
VICKIE L. DAWES
LILLIAN T. FUJII
DENNIS C. GRAVES
KEVIN T. KERR
MARY ANN MCNETT
PAUL R. MURIZ
GALERIE J. RANCHE
DAVID F. SCHMIDT
DIANA J. SILVER

EX LAW REV. COMM.
DEC 06 1988
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Law Revision Commission
4000 Middlefield Rd., Rm. D-2
Palo Alto, CA 94303-4739

Re: Law Revision Commission Tentative Recommendation regarding attorney's fees in probate.

This office represents the Contra Costa County Public Administrator. The Public Administrator's Office administers many small estates and very few large estates. Decreasing the statutory fee on the first \$15,000 of an estate would have a negative effect on the Public Administrator's ability to operate his office without reliance on general fund revenue. Unlike private parties, the Public Administrator has responsibilities in numerous estates with no assets. Fees from the occasional large estate go towards subsidizing such activities. Therefore, it is imperative for us that solvent small estates pay the full cost of their administration. Thank you.

Very truly yours,

Victor J. Westman
County Counsel

Lillian T. Fujii
By: Lillian T. Fujii
Deputy County Counsel

LTF:df

cc: James B. Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041

Gary T. Yancey, Public Administrator
Attn: J. F. Miller, Chief Deputy

JOHN T. BORJE
ATTORNEY AT LAW
250 WEST FIRST STREET, SUITE 314
POST OFFICE BOX 545
CLAREMONT, CALIFORNIA 91711
(714) 626-8505

CA LAW REV. COMM'N
DEC 07 1988
RECEIVED

November 27, 1988

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

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I respectfully request no revision of the current California Statutory Probate Fee Schedule for purposes of reduction.

Very truly yours,

John T. Borje
JOHN T. BORJE

JTB:jtb
Enclosure

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

Re: Proposed Revision of California
Statutory Probate Fee Schedule
For Purposes of Reduction

Gentlemen:

The schedule of representative and attorney fees allowed under California Probate Code §901 and §910 should not be revised for reduction, and the following is offered for your consideration:

Current Fee Schedule:

1st	\$15,000.00 of estate at 4% =	600.00
Next	85,000.00 of estate at 3% =	2,550.00
Total Fee		<u>\$3,150.00</u>

Your Proposed Reduction

1st	\$100,000.00 of estate at 3% =	3,000.00
-----	--------------------------------	----------

The current rate of experienced California attorneys is \$150.00 per hour because of the high cost of living in this state [\$150.00 x 20 hours = \$3,000.00]. Even the smallest of estates cannot be opened and closed in 20 hours, and your survey fails to mention the cost-of-living in the states compared to California.

I direct your attention to the following documentation required in California probate estates:

Petition for Probate

With list of all heirs-at-law, beneficiaries, and named Executors if decedent left a Will.

Certificate of Assignment

In counties requiring same; most do to show residence of the deceased.

Publication of Notice of Death & Petition to Administer Estate

In counties other than Los Angeles serviced by the L.A. Daily Journal and Metropolitan News, the attorneys are required to deliver a copy of the Notice of Death to the small local newspapers specified for publication WHO DO NOT FILE the Proof of Publication but send it to the attorney to file, and it is the attorney who must serve copies of this notice to all persons listed in Attachment 8 of the Petition for Probate. In the case of large families, this requires an inordinate amount of paperwork and postage.

Proof of Subscribing Witness to Will

If Will is not self-proving, attorney must prepare this form, obtain the signature of at least one witness to the Will, and file with the court before the hearing.

The Order for Probate

Submitted in duplicate to the court with S.S.A.E. for return of a conformed copy.

Form 204 - General Advice to Estate Representative

Required in Los Angeles County only, but attorney must complete and file before Letters will issue.

Bond of Representative

If applicable, bond must be ordered, the application completed, executed and returned to bonding company. In the alternative, waivers of bond are prepared by the attorney unless a Will specifically waives bond.

Form SS-4 - Application for Federal [Estate] I.D. Number

Form must be completed and mailed by attorney to I.R.S.

Inventory and Appraisement.

A lengthy listing of all estate assets and forwarded to Referee. When real property is involved, a Preliminary Change of Title Report must also be prepared by the attorney and served on the County Assessor of the county wherein the real property lies.

Written Notice to Creditors

Effective 7/1/88 written Notice to Creditors must be prepared, filed and served on all known creditors of the decedent, including the State Department of Health Services with a certified copy of the Certificate of Death.

Written Notice of Allowance or Rejection of Creditor Claims.

Must be prepared and served on all creditors presenting claims in the estate.

Advice of Proposed Action

Under I.A.E.A., if you plan to sell or otherwise dispose of estate assets, etc., you must serve all beneficiaries of the estate with this written notice.

Sales of Estate Assets

Most require court petitions and appearance for an order; some are, of course, ex parte.

The Final Account.

This document alone requires 10 to 20 hours of preparation and typing, to say nothing of time expended in obtaining probate clearance and/or court appearance if required.

Order for Distribution of Estate

As far as I know, only Los Angeles County will prepare this decree for \$50.00, otherwise it is prepared by the attorney, and recordation of certified copies effected when required.

Receipts for Distribution

Are prepared by attorney for signature of each distributee of the estate, together with receipts for the fees paid, and the originals are required to be filed with the court.

Application for Final Discharge and Order

Attorney must prepare and file in duplicate to obtain closing of the estate.

Tax Returns

Even if prepared by accounting personnel other than attorneys, problems with the Internal Revenue Service are common and require the expenditure of additional time and effort in obtaining proper releases.

The foregoing does not include the time and additional postage incurred by the requirement of Los Angeles County that all documents filed be bluebacked and labeled for ease of court personnel. Filing by mail and return postage is costly.

You are laboring under a misconception that small estates do not require "much" work -- it depends on the type of assets involved, the number of beneficiaries, and the problems incurred. It does not depend on the value of the assets.

Postage is excessive, telephone expense disproportionate to value with "local calls" limited to a very small area, to say nothing of the overhead expense of premium rent, wages and office supplies. If this commission consisted of working probate attorneys, the idea of reduction would be out of the question, and you would be quickly informed that the documentation required by current California law cannot profitably be accomplished under the existing schedule of fees. Increased fees for small estates is what is really needed in California.

SHIRLEY & SHIRLEY

A PROFESSIONAL CORPORATION

SUITE 202, POMONA CIVIC PLAZA
435 WEST MISSION BOULEVARD
POMONA, CALIFORNIA 91766-1609

AREA CODE 714
TELEPHONE 623-3511

STEPHEN M. SHIRLEY*
MARLIN H. SHIRLEY
*CERTIFIED SPECIALIST-FAMILY LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

November 27, 1988

CA LAW REV. COMM'N

DEC 07 1988

RECEIVED

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

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I respectfully request no revision of the current California Statutory Probate Fee Schedule for purposes of reduction.

Very truly yours,

LAW OFFICES OF SHIRLEY & SHIRLEY

By:  STEPHEN M. SHIRLEY

STM:stm
Enclosure

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

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For Purposes of Reduction

Gentlemen:

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Total Fee		\$3,150.00

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1st	\$100,000.00 of estate at 3%	=	3,000.00
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JIMMY L. GUTIERREZ

LAW OFFICES OF
JIMMY L. GUTIERREZ
A PROFESSIONAL CORPORATION
12616 CENTRAL AVENUE
EL CENTRAL REAL PLAZA
CHINO, CALIFORNIA 91710

TELEPHONE (714) 591-6336
FAX: (714) 628-9803

December 1, 1988

CA LAW REV. COMM'N

DEC 07 1988

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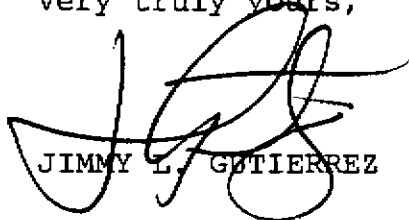
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road - Suite D-2
Palo Alto, California 94303-4739

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I request that you do not revise the current California Probate Fee Schedule to reduce statutory fees.

Very truly yours,



JIMMY L. GUTIERREZ

JLG:jl
Enclosure

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

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Statutory Probate Fee Schedule
For Purposes of Reduction

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

Chair IRWIN D. GOLDRING, Los Angeles Vice-Chair JAMES V. QUILLINAN, Mountain View

Advisors KATHRYN A. BALLSUN, Los Angeles D. KEITH BILTER, San Francisco HERMIONE K. BROWN, Los Angeles LLOYD W. HOMER, Campbell KENNETH M. KLUG, Fresno JAY ROSS MacMAHON, San Rafael LEONARD W. POLLARD, II, San Diego WILLIAM V. SCHMIDT, Costa Mesa ANN E. STODDEN, Los Angeles JAMES A. WILLETT, Sacramento JANET L. WRIGHT, Fresno

Technical Advisor MATTHEW B. BAE, Jr., Los Angeles

Section Administrator PRES ZABLAN SOBERON, San Francisco



555 FRANKLIN STREET SAN FRANCISCO, CA 94102 (415) 561-8200

Executive Committee CLARK R. BYAM, Pasadena MICHAEL G. DESMARAIS, San Jose ANDREW S. GARB, Los Angeles IRWIN D. GOLDRING, Los Angeles JOHN A. GROMALA, Eureka LYNN P. HART, San Francisco ANNE K. HILKER, Los Angeles WILLIAM L. HOISINGTON, San Francisco BEATRICE LAIDLAY-LAWSON, Los Angeles VALERIE J. MERRITT, Los Angeles BARBARA J. MILLER, Oakland JAMES V. QUILLINAN, Mountain View BRUCE S. ROSS, Los Angeles STERLING L. ROSS, JR., Mill Valley MICHAEL V. VOLLMER, Irvine

REPLY TO:

December 6, 1988

REPLY COMM'N

DEC 07 1988

RECEIVED

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

Re: LRC TR-Attorney Fees

Dear John:

I have enclosed copies of three reports from other organizations on the Attorneys' Fees TR that were sent to me rather than to the LRC.

Very truly yours,

[Handwritten signature of James V. Quillinan]

James V. Quillinan Attorney at Law

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

SAN BERNARDINO COUNTY BAR ASSOCIATION

150 WEST FIFTH STREET, SUITE 108 • SAN BERNARDINO, CALIFORNIA 92401 • TELEPHONE (714) 885-1986

ORGANIZED, DECEMBER 11, 1875

BETTY A. HAIGHT — PRESIDENT
JOHN W. FURNESS — PRESIDENT-ELECT
KENNETH H. GLUBE — VICE PRESIDENT
LAWRENCE J. WINKING — SECRETARY-TREASURER

LOWELL R. "BARNEY" JAMESON — EXECUTIVE DIRECTOR

—DIRECTORS—

DEBORAH A. DANIEL JULES E. FLEURET
HAROLD J. LANCE KENNETH W. NYDAM
JOSEPH PETRASEK SCOTT D. SHOWLER
RONALD G. SKIPPER

November 29, 1988

Mr. James V. Quillinan
Coordinator of LRC Studies
444 Castro Street, Suite 900
Mountain View, California 94041

Re: LRC TR - Attorney's Fees, etc.

Dear Mr. Quillinan:

The Probate Section of the San Bernardino County Bar Association generally supports the tentative recommendations of the California Law Revision Commission relating to compensation of estate attorney and personal representatives. The proposed revisions should simplify and clarify a number of situations.

Although we generally agree with the reduction of the 4% rate to 3% on the first \$15,000 of estates, we suggest that the court be authorized to approve fees for both the personal representative and the attorney of not more than \$500 in all estates, regardless of size. If this is not done, attorneys will simply not accept the handling of small probates.

Probate Code Section 1143 adopts a similar approach as to county public administrators who are often compelled to take small estates, and a \$350 minimum fee for the public administrator is established for the "summary probate" which the public administrator's office is authorized to undertake without formal administration. (This is restated in Probate Code Section 7666 pursuant to AB 2841 scheduled to go into effect July 1, 1989.)

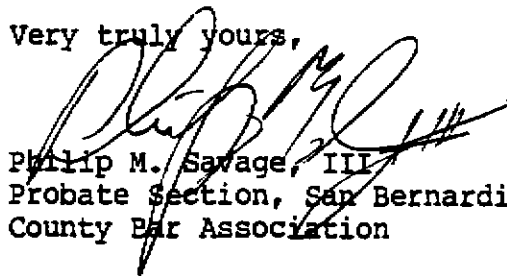
We suggest that language like the following be added to proposed new Sections 10800 and 10830 (and that appropriate corresponding revisions be made in Business and Professions Code Section 6147.5):

(c) Notwithstanding subpart (a) above, the court may allow the attorney (personal representative) for ordinary services as much as \$500 compensation if the

court finds that the services rendered justify a fee in excess of that calculated according to subpart (a) above.

Although recent legislation enables many small estates to be handled without probate (Probate Code Sections 13100, 13150, 13200, 13500, 13540, 13650; Vehicle Code Sections 5910 and 9916; and Health and Safety Code Section 18102) there nonetheless are situations in which a probate must be conducted as to very small estates in order to clear title or resolve heirship questions. The public may often be unable to engage an attorney in such cases unless there is some way in which the attorney can be reasonably compensated.

Very truly yours,



Philip M. Savage, III
Probate Section, San Bernardino
County Bar Association

PMS:eb

STEWART, STEWART & BRESLOW

THOMAS N. STEWART, JR.
THOMAS N. STEWART, III
JORDAN J. BRESLOW

ATTORNEYS AT LAW
1225 ALPINE ROAD, SUITE 200
WALNUT CREEK, CALIFORNIA 94596
(415) 932-4828 (415) 932-8000

RETIRED:
T. NELSON STEWART
RICHARD M. SCHULZE
FAX (415) 932-4681
MCI MAIL 261-9512
TELEX 6502619512

November 30, 1988

James V. Quillinan
Coordinator of LRC Studies
444 Castro Street, Suite 900
Mountain View, CA 94041

Dear Mr. Quillinan:

I have reviewed the Tentative Recommendation of the California Law Revision Commission on the subject of attorney's fees in probate. These are my comments.

I have specialized in probate for nearly 30 years, first in Oakland and since 1982 in Walnut Creek. In the course of that experience I have necessarily been exposed to the probate system of many of the other states. Unquestionably, the only adequate protection for the public is a probate system whereby the courts have a supervisory function over the whole process from beginning to end. I am pleased to see that the Tentative Recommendation preserves that principle.

The specific proposals appear to be well thought out and in substance preserve the existing practice, although they do formalize and clarify some of the existing local policies. As a general proposition, I am in favor of the implementation of the Tentative Proposal.

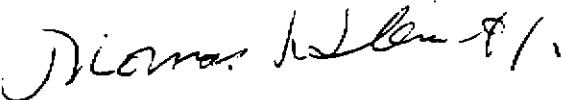
I have one negative thought but no particular suggestion as to how to remedy it. Most courts have local "rules of thumb" as to the amount of hourly compensation the court will allow for extraordinary services. The Tentative Proposal permits the court in fixing compensation for extraordinary services to take into account the time spent on ordinary services. Implicit in that is that the hourly rate permitted by the particular court will be applied to the ordinary services in determining the amount, if any, of extraordinary compensation it will allow. This penalizes the experienced probate attorney who generally is able to handle the administration of an estate far more expeditiously than the inexperienced probate attorney. The obvious result is that on an

James V. Quillinan
Coordinatory of LRC Studies
November 30, 1988
Page -2-

estate of similar size, the inexperienced attorney can be expected to receive more compensation than the experienced lawyer simply because it took the former longer to perform his services than the latter.

One thought to correct this anomaly would be to build into the code a provision that the probate court should take into consideration the experience and professional standing of the attorney representing the estate in determining compensation to be allowed.

Very truly yours,



THOMAS N. STEWART, JR.

TNS:j
LELRC.N30

LAW OFFICES
FROST, KRUP AND ATLAS

TELEPHONE (916) 934-5416

CHARLES H. FROST
LEONARD G. KRUP
J. MARK ATLAS,
LAW CORPORATION

PROFESSIONAL BUILDING
134 WEST SYCAMORE STREET
WILLOWS, CALIFORNIA 95988

November 28, 1988

Mr. James V. Quillinan
444 Castro Street, Suite 900
San Francisco, CA 94041

Dear Mr. Quillinan:

This letter is in response to yours of November 12, 1988, regarding the California Law Revision Commission (LRC) recommendations regarding attorneys' fees in probate proceedings. We have been following this matter for some time now, as we have received previous drafts of the studies and recommendations regarding these fees. Moreover, all three of the lawyers in this office have handled probate matters for nearly all of their respective periods in practice. For Mr. Frost, the most senior of us, this dates back to the mid-1930s.

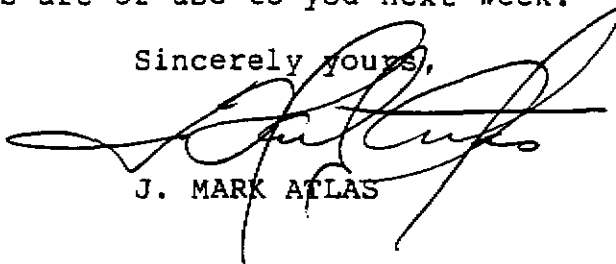
We agree entirely with the Commission's recommendation that the statutory fee schedule for ordinary services be retained. The reasons for doing so, listed on pages 10 and 11 of the Tentative Recommendation are a succinct and complete summary of the benefits of a statutory fee schedule, and they comport with our own experience in practice.

While we have been using a written fee agreement in probate matters since Business and Professions Code Section 6148 was adopted, we believe a separate section relating to fee agreements in probates may be useful, and the recommended section would serve this purpose. Nevertheless, since we would still be required to have a written agreement with the personal representative, we would suggest that the section be revised to permit incorporation of the disclosures which otherwise would be required on a separate Disclosure Statement to be incorporated into the written fee agreement. Quite frankly, a fee agreement should be one of the first documents reviewed and discussed with a personal representative, but there are always so many other papers and matters to be handled at the commencement of a probate proceeding, often at a time of distress for many personal representatives, that it would be most helpful to minimize the number of separate papers.

Mr. James V. Quillinan
November 28, 1988
Page 2

We hope these comments are of use to you next week.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "J. Mark Atlas", written over a horizontal line.

J. MARK ATLAS

JMA:eb

REV. COPY



Writer's Direct Dial Number

DEC 08 1988

OFFICES OF THE COUNTY COUNSEL RECEIVED COUNTY OF ORANGE

10 CIVIC CENTER PLAZA MAILING ADDRESS: P.O. BOX 1379 SANTA ANA, CALIFORNIA 92702-1379

714/834-3300

ADRIAN KUYPER COUNTY COUNSEL WILLIAM J. McCOURT CHIEF ASSISTANT ARTHUR C. WAHLSTEDT, JR. LAURENCE M. WATSON ASSISTANTS

714/

834-2002

December 5, 1988

VICTOR T. BELLERUE JOHN R. GRISET EDWARD N. DURAN IRYNE C. BLACK RICHARD D. OVIEDO BENJAMIN P. DE MAYO HOWARD SERBIN DANIEL J. DIDIER GENE AXELROD ROBERT L. AUSTIN DONALD H. RUBIN DAVID R. CHAFFEE CAROL D. BROWN BARBARA L. STOCKER JAMES F. MEADE STEFEN H. WEISS SUSAN STROM DAVID BEALES TERRY C. ANDRUS CLAUDIA L. COWAN JAMES L. TURNER PETER L. COHON NICHOLAS S. CHRISOS DAVID G. EPSTEIN THOMAS F. MORSE WANDA S. FLORENCE HOPE E. SNYDER THOMAS C. AGIN SHERIE A. CHRISTENSEN SUSAN M. NILSEN SARA L. PARKER ADRIENNE K. SAURO KARYN J. DRIESSEN

DEPUTIES

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

Ladies and Gentlemen:

Thank you for sending me your tentative recommendation relating to compensation of estate attorneys and personal representatives.

As with my previous comments to you, please note that the opinions expressed are my individual views. I do not write here as a representative of the Orange County Counsel, the Orange County Public Administrator/Public Guardian, or the County of Orange. I have only chosen to comment on the proposals of most concern to me; please do not construe failure to comment on any particular proposal as an indication of support or opposition.

I strongly support retention of the statutory fee system. I believe your description of the advantages of the system is compelling. I address particular proposals as follows:

A. Proposed Section 10800 - While strongly supporting the main thrust of the section, I would like to see the current four percent on the first \$15,000.00 retained. There has been such an increase in costs in recent years, such as cost of office space, supplies and staff, that any decrease in the rate of compensation seems unwarranted. For the Office of the Orange County Public Administrator/Public Guardian, any decrease in revenue would be especially difficult. I understand that the cost of running the operations, above and beyond compensation received and other income, will run close to \$1,000,000.00 this year. This, despite the fact that all County Counsel attorney fees in decedents' estates and probate code conservatorships are collected by and credited to our client. I do not know how much of this shortfall is due to operations of the Public Administrator vis-a-vis the Public Guardian, since both operate from the same budget, but I believe that neither function is at all close to being

self-sufficient, especially the Public Administrator's. While the proposed change in the rate of compensation may appear small, given our client's case volume and budget problems, the detriment could be significant - especially since he is hit doubly hard when you take into account the proposed change in attorney fees under Section 10830.

B. Proposed Section 10804 - I support your revisions to current law.

C. Proposed Section 10805 - I have no objection here. I note, however, that the Public Administrator has had many cases in which he was successor administrator, and some in which he was the first of two administrators, in which we have faced the issue of dividing statutory compensation and attorney fees. In at least one case, I commented to the Court on the other administrator's request for extraordinary attorney fees. Opposing counsel complained that as attorney for a prior administrator, I had no standing to contest extraordinary fees. I responded that I was not contesting the fees; rather, I was pointing out that the extraordinary services claimed were so inclusive, including many services which were very ordinary, that if granted the attorney's share of statutory fees should be small, since he would have already been compensated for virtually every service he provided. The Court agreed with this point. This leads me to conclude that perhaps there should be a provision or a comment that one factor in apportioning statutory compensation would be to consider the extraordinary compensation a personal representative or attorney has been granted, and to be certain not to in effect credit him twice for the same service.

D. Proposed Section 10830 - My comments in "A" are relevant here.

E. Proposed Section 10831 - I believe it is wise to delete the list of examples of extraordinary services from the section and to put this in the comment instead.

F. Proposed Section 10835 - My comments in "C" are relevant here.

G. Proposed Section 10850 - I strongly support this.

H. Proposed Section 10852 - I believe this is well-written and a helpful addition to the Code.

California State Law Revision Commission
December 5, 1988
Page Three

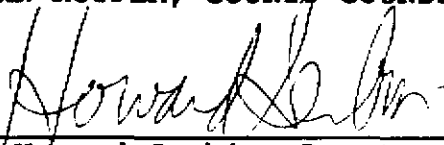
I. Proposed Section 10854 - I believe this too is a very good addition to the Code.

Thank you.

Very truly yours,

ADRIAN KUYPER, COUNTY COUNSEL

By


Howard Serbin, Deputy

HS:jp

cc: William A. Baker, Public Administrator/Guardian
Carol Gandy, Assistant Public Administrator/Guardian
James F. Meade, Deputy County Counsel
Hope E. Snyder, Deputy County Counsel

ROBERT C. HAYS
ATTORNEY AT LAW
685 MARKET STREET, SUITE 830
SAN FRANCISCO, CALIFORNIA 94105
TELEPHONE: (415) 978-9962

CA LAW REV. COMM'N
DEC 08 1988
R E C E I V E D

December 6, 1988

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-3739

Re: Tentative Recommendation
Relating to Compensation
of Estate Attorney and
Personal Representative
#L-1036-1055 Oct. 26, 1988

Hon. Commissioners:

Your tentative recommendation is excellent, and we can only hope the Legislature will adopt it.

I note that several other states have statutory probate fees substantially more generous to the attorney than California. (For some reason reformists who seek to increase the burdens on attorneys, e.g. mandatory insurance, mandatory continuing education, like to point to such requirements in other states but never mention the benefits there such as higher statutory compensation.)

As I understand it the presently underlying issue is whether our Legislature should do away with the statutory probate fee schedule and substitute a case-by-case "reasonable fee" compensation. I believe such a change would discard a system that has worked fairly and efficiently throughout the years in California and in other states, to substitute one having the potential for an infinite number of controversies between lawyers and clients, unnecessarily generating ill will between them,

and vastly increasing the demands on the courts for adjudication of fee disputes.

Even more persuasive, a solution is already available for anyone who believes the statutory fees excessive-- he or she can simply elect to use an inter vivos trust. Judging from the rapidly growing use of these trusts, any public dissatisfaction with the statutory fees may soon be effectively placated by the availability of the trust alternative.

But there remains the need to preserve a sound probate system for people who elect, voluntarily or not, to use probate, with its advantages and disadvantages. It is no service to those people to legislate a change which will discourage competent attorneys from staying in the probate practice and which will certainly create fee controversies for those who remain.

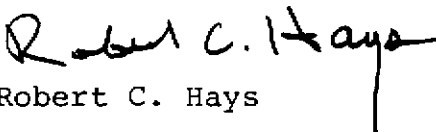
Any proposal to junk the present fee system implies that California probate attorneys are being over-compensated. On some estates obviously we do come out very well; on others we come out badly, the consolation being that the good ones make up for the "losers." But if this balance is removed it is hard to see how we can continue to accept the small estates which may not pay even their overhead. Perhaps those clients will have to go to attorneys who can afford to do the work only to acquire experience. It is, I suggest, no service either to the public to lead them to believe that reducing compensation to attorneys is an unmitigated panacea. Several million Californians did, of course, indicate in their response to Prop 106 that they perceive a relationship between a lawyer's compensation and his level of competence.

Ironically, in this day of the incessant quest for a free--or cheap--lunch, the demand yet grows for increased competence in lawyers and their punishment for mistakes becomes heavier.

A statutory fee schedule does more than protect the client from arbitrary or unreasonable fees; it frees the conscientious but unsophisticated client from the dilemma of trying to resolve whether the fee is proper. And he can know the fee in advance, without going through a determination by a court to get the question answered.

Real estate brokers are also licensed professionals who work for a flat percentage. When they are lucky they can earn many thousands of dollars for a week's work; or they may labor many months and end up with nothing on the listing. How would it work if on court-approved sales the percentage basis was abolished in favor of requiring the brokers to tell the court their hours spent, work done, expertise, etc., to justify the amount of their compensation?

Sincerely yours,


Robert C. Hays

RCH:lh

cc: James V. Quillinan, Esq.
444 Castro St.
Mountain View, CA 94041

RAYMOND N. BOLTON

LAW CORPORATION

1033 N. CALIFORNIA BLVD., SUITE 580
WALNUT CREEK, CA 94596
TELEPHONE (415) 945-0123
TELECOPIER (415) 945-1937RAYMOND N. BOLTON
WILLIAM FINNEGAN

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

FROM: William Finnegan

DATE: December 8, 1988

RE: Tentative Recommendations Relating To Compensation
Of Estate Attorney And Personal Representative

LAW REV. COMMISSION

DEC 09 1988

RECEIVED

These comments are directed solely to recommendations regarding extraordinary fees summarized on page 15 of Tentative Recommendations dated October 26, 1988.

Although I do not object in general to the factors listed by the Commission, I believe that attorneys should not have to write a tome justifying requests for extraordinary fees. Factors such as expertise, experience and professional standing are themselves quite vague and subject to many different interpretations. In fact, I suggest that professional standing be eliminated because I have no idea what the Commission means by it and it may have no relevance to the services performed.

In addition, I believe the statute should include examples of what generally constitutes extraordinary services. A nonexclusive listing in the statute is more helpful than examples in the official comment. The factors recommended by the Commission would not prevent the Court from using its discretion in reviewing a petition for extraordinary fees, even for services included in such a nonexclusive listing.

cc: James V. Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041
FAX (415) 969-6953

LAW OFFICES

WAX & WAX

HAROLD W. WAX
ALAN J. WAX
NEIL F. SCHWARTZ
JON M. WAX
LEGAL ASSISTANT

SUITE 1210 WM. FOX BUILDING
608 SOUTH HILL STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (213) 489-5222
(805) 253-2003

November 27, 1988

CA LAW REV. COMM'N

DEC 09 1988

RECEIVED

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

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I respectfully request no revision of the current California Statutory Probate Fee Schedule for purposes of reduction.

Very truly yours,

LAW OFFICES OF WAX AND WAX



By: HAROLD W. WAX

hww;hww
Enclosure

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

Re: Proposed Revision of California
Statutory Probate Fee Schedule
For Purposes of Reduction

Gentlemen:

The schedule of representative and attorney fees allowed under California Probate Code §901 and §910 should not be revised for reduction, and the following is offered for your consideration:

Current Fee Schedule:

1st \$15,000.00 of estate at 4% =	600.00
Next 85,000.00 of estate at 3% =	2,550.00
Total Fee	<u>\$3,150.00</u>

Your Proposed Reduction

1st \$100,000.00 of estate at 3% =	3,000.00
------------------------------------	----------

The current rate of experienced California attorneys is \$150.00 per hour because of the high cost of living in this state [\$150.00 x 20 hours = \$3,000.00]. Even the smallest of estates cannot be opened and closed in 20 hours, and your survey fails to mention the cost-of-living in the states compared to California.

I direct your attention to the following documentation required in California probate estates:

Petition for Probate

With list of all heirs-at-law, beneficiaries, and named Executors if decedent left a Will.

Certificate of Assignment

In counties requiring same; most do to show residence of the deceased.

Publication of Notice of Death & Petition to Administer Estate

In counties other than Los Angeles serviced by the L.A. Daily Journal and Metropolitan News, the attorneys are required to deliver a copy of the Notice of Death to the small local newspapers specified for publication WHO DO NOT FILE the Proof of Publication but send it to the attorney to file, and it is the attorney who must serve copies of this notice to all persons listed in Attachment 8 of the Petition for Probate. In the case of large families, this requires an inordinate amount of paperwork and postage.

Proof of Subscribing Witness to Will

If Will is not self-proving, attorney must prepare this form, obtain the signature of at least one witness to the Will, and file with the court before the hearing.

The Order for Probate

Submitted in duplicate to the court with S.S.A.E. for return of a conformed copy.

Form 204 - General Advice to Estate Representative

Required in Los Angeles County only, but attorney must complete and file before Letters will issue.

Bond of Representative

If applicable, bond must be ordered, the application completed, executed and returned to bonding company. In the alternative, waivers of bond are prepared by the attorney unless a Will specifically waives bond.

Form SS-4 - Application for Federal [Estate] I.D. Number

Form must be completed and mailed by attorney to I.R.S.

Inventory and Appraisement.

A lengthy listing of all estate assets and forwarded to Referee. When real property is involved, a Preliminary Change of Title Report must also be prepared by the attorney and served on the County Assessor of the county wherein the real property lies.

Written Notice to Creditors

Effective 7/1/88 written Notice to Creditors must be prepared, filed and served on all known creditors of the decedent, including the State Department of Health Services with a certified copy of the Certificate of Death.

Written Notice of Allowance or Rejection of Creditor Claims.

Must be prepared and served on all creditors presenting claims in the estate.

Advice of Proposed Action

Under I.A.E.A., if you plan to sell or otherwise dispose of estate assets, etc., you must serve all beneficiaries of the estate with this written notice.

Sales of Estate Assets

Most require court petitions and appearance for an order; some are, of course, ex parte.

The Final Account.

This document alone requires 10 to 20 hours of preparation and typing, to say nothing of time expended in obtaining probate clearance and/or court appearance if required.

Order for Distribution of Estate

As far as I know, only Los Angeles County will prepare this decree for \$50.00, otherwise it is prepared by the attorney, and recordation of certified copies effected when required.

Receipts for Distribution

Are prepared by attorney for signature of each distributee of the estate, together with receipts for the fees paid, and the originals are required to be filed with the court.

Application for Final Discharge and Order

Attorney must prepare and file in duplicate to obtain closing of the estate.

Tax Returns

Even if prepared by accounting personnel other than attorneys, problems with the Internal Revenue Service are common and require the expenditure of additional time and effort in obtaining proper releases.

The foregoing does not include the time and additional postage incurred by the requirement of Los Angeles County that all documents filed be bluebacked and labeled for ease of court personnel. Filing by mail and return postage is costly.

You are laboring under a misconception that small estates do not require "much" work -- it depends on the type of assets involved, the number of beneficiaries, and the problems incurred. It does not depend on the value of the assets.

Postage is excessive, telephone expense disproportionate to value with "local calls" limited to a very small area, to say nothing of the overhead expense of premium rent, wages and office supplies. If this commission consisted of working probate attorneys, the idea of reduction would be out of the question, and you would be quickly informed that the documentation required by current California law cannot profitably be accomplished under the existing schedule of fees. Increased fees for small estates is what is really needed in California.

ALLEN S. REMES
ATTORNEY AT LAW
1332-A WEST NINTH STREET
UPLAND, CALIFORNIA 91786
(714) 946-4401

CA LAW REV. COMM'N
DEC 12 1988
RECEIVED

November 27, 1988

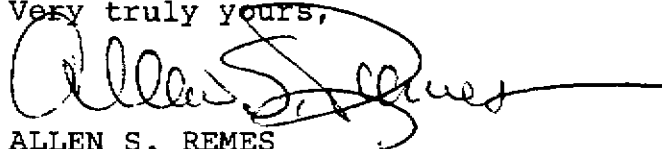
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road - Suite D-2
Palo Alto, California 94303-4739

Re: Proposed Reduction of California
Statutory Probate Fees

Gentlemen:

For the reasons stated in the attached documentation, I
request that you do not revise the current California
Probate Fee Schedule to reduce statutory fees.

Very truly yours,


ALLEN S. REMES

ASR:lhb
Enclosure

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

Re: Proposed Revision of California
Statutory Probate Fee Schedule
For Purposes of Reduction

Gentlemen:

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CA LAW REV. COMM'N

DEC 12 1988

RECEIVED

December 8, 1988

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

Dear Commissioners:

We appreciate being given the opportunity to comment on your Tentative Recommendation concerning the legal fees associated with probate. Enclosed are our comments.

Thank you for giving our views serious consideration.

Sincerely,



Charles Mosse
 Representative, HALT — San Diego

cc: The Hon. Elihu Harris
 The Hon. Bill Lockyer
 The Hon. Robert Presley
 American Association of Retired Persons
 CALJustice
 Consumers Union
 Nolo Press
 Consumer Federation of California

Comments of
HALT — San Diego
Regarding

CA LAW REV. COMMISSION
DEC 12 1988
RECEIVED

Tentative Recommendation on Compensation of
Estate Attorneys and Personal Representatives

Submitted to
California Law Revision Commission

December 10, 1988

Summary of Comments

HALT — San Diego appreciates the opportunity to submit its comments on the Law Revision Commission's Tentative Recommendation.¹ As the Commission (LRC) is well aware from our previous two statements on this matter,² HALT — San Diego is a chapter of HALT — An Organization of Americans for Legal Reform, the only national public interest organization working to make the legal system more simple, affordable, and equitable for legal consumers. HALT has more than 35,000 members in the state of California and more than 180,000 members nationwide.

HALT — San Diego is appalled that, after years of study and work on the question of probate fees, essentially the Commission's only recommendation is to provide personal representatives with a written disclosure, informing them they have a right to negotiate a fee lower than the statutory percentage. Although HALT supports this recommendation, the context in which it has emerged makes it a measly one indeed.

The relative inaction of the Commission on reforming probate fee laws is especially appalling in light of what motivated the study in the first place: strong consumer dissatisfaction, especially among senior citizens' groups, with the

¹ *Tentative Recommendation relating to Compensation of Estate Attorney and Personal Representative*, adopted by California Law Revision Commission (Oct. 26, 1988)[hereinafter cited as TR].

² See, *Comments of Charles Mosse, HALT — San Diego* (presented to California Law Revision Commission) (Mar. 10 and Jan. 15, 1988) [hereinafter cited as *March Comments of HALT* and *January Comments of HALT*].

unfairness of lawyers' probate fees.³ In recommending only one, relatively trivial change, the Commission has ignored the context in which its directive arose.

Moreover, it has squandered its chance to replace the current lawyer-welfare system of statutory entitlement to unearned profits with a system that empowers consumers to control their legal affairs and reduces unjustified expense. At each step of the way, from the systemic questions of "what's fair" to the more mechanical questions of attorney-client relations, the Commission has blown nearly every opportunity presented to it to make pro-consumer recommendations, instead bowing to pressure from the organized probate bar to keep their status quo — lucrative fees with virtually no accountability — intact.

The LRC's Tentative Recommendation — what it contains and what it doesn't — is a slap in the face to consumers of legal services. We strongly urge you to revise it *substantially* before forwarding it to the Legislature.

Reasonable Fees vs. Percentage Fees

The statutory percentage fee system is a consumer rip-off. It is more oriented to protecting lawyers' profits from competition than to charging clients a fair price for the work done. Because it is based on a faulty premise — the value of the estate is an accurate, fair, and reasonable basis for setting fees — it produces unfair results: unreasonably high fees.

The LRC justifies its decision to retain percentage fees on several grounds. First, it states that California's fees are "not out of line"⁴ with the fees charged in other states. This "market rate" rationale, however, begs the question because it presumes that the fees in other states are, in fact, fair and reasonable. The question is: "reasonable" according to whom and what?

From *consumers'* perspective, legal fees for probate work are unreasonable in comparison to the time and work required to do the job. As we've already pointed out, the bulk of the work for most estates consists of routine administrative tasks, not tasks requiring any special legal expertise. Most California attorneys delegate this work to legal secretaries and paralegals. Moreover, LRC conclusions to the contrary,⁵ the value of the estate is not a reliable proxy for the amount of work

³ "The direction to study this topic was included in a resolution ... introduced at the request of persons who believe that substantial revisions in California law are necessary to avoid the delay and expense of probate." *California Probate Attorney Fees*, Study #L-1036, Memorandum 87-100, prepared by staff of California Law Revision Comm'n (Nov. 13, 1987) at 1. Legislation was even introduced around the same time to replace California's percentage fee system with the "reasonable fee" approach of the Uniform Probate Code. *Id.* at n.4.

⁴ *TR* at 6.

⁵ *Id.* at 10.

required. In fact, the larger the estate, the more likely it is that the decedent has done extensive pre-death estate planning, which minimizes the time and complexity of administration.⁶

The Commission also attempts to justify percentage fees on the grounds that they protect consumers by placing a ceiling on fees.⁷ Nothing could be further from the truth. Instead, they act as a floor, for several reasons. First, the LRC has recommended continuing the current law that allows lawyers to pick the highest fee. If the will dictates a lower fee, they can "renounce" it and opt for the higher statutory percentage; if the will provides a fee higher than the percentage, the lawyer can collect that.⁸

In addition, the ostensible "ceiling" only applies to fees for "ordinary" services. Lawyers remain free under the LRC's recommendations to ask for and receive additional fees for performing "extraordinary" services. Finally, the percentage "ceilings" in the statute only apply to the property that goes through probate.⁹ Life insurance proceeds, property held in joint tenancy with right of survivorship, and property held in trust, for example, are not part of the "probate" estate. Lawyers can charge still more for doing work related to these assets. The Commission never even considered abolishing the meaningless distinction, in this context, between probate and non-probate property.¹⁰

With a particularly ironic twist, the LRC also attempts to justify percentage fees as benefiting low-income people.¹¹ This is highly dubious, in light of the regressive nature of the percentage table. Besides, small estates can already be independently administered and shouldn't require *any* legal assistance.

Finally, the LRC rationalizes keeping percentage fees based on the ease with which the fee can be computed, thereby saving everyone time and minimizing disputes.¹² It is true that a percentage fee which needn't be justified and is insulated from challenge saves time, but this is its *only* virtue. And this benefit comes at a

⁶ See *January Comments of HALT* at 2.

⁷ *TR* at 10.

⁸ See § 10833, *Id.* at 33

⁹ See Comment to § 10832, *TR* at 32-33.

¹⁰ But see *March Comments of HALT* at 5.

¹¹ *TR* at 10.

¹² *Id.*

price: no consumer choice, no competition, artificially high fees, and no right to challenge excesses. The LRC's recommendation may minimize disputes, but it should not simultaneously cut off consumers' rights to dispute fees and then equate the absence of dispute with consumer contentment. Obviously, it needn't be all or nothing — there are several other regulatory options in between that can respond to consumers' interests and still save judicial time, many of which have already been recommended by the LRC staff.

By voting to keep the percentage fee system and not to adopt a "reasonable fee" system of the sort HALT and others have advocated, the LRC opts for a system that, from consumers' perspective, is unfair, arbitrary, and expensive.

From here, the LRC simply adds insult to injury. When it became clear that the LRC was leaning toward keeping the statutory percentage fee system, the LRC staff recommended allowing consumers to petition the court for lower fees when the statutory percentage was clearly excessive in relation to the work done. HALT supported this recommendation.¹³

Inherent in the statutory fee system is a presumption that the statutory percentage is reasonable. Allowing consumers to petition to lower the fee merely allows consumers to rebut this presumption. One would think this was just basic fairness. Judicial review should always be available when a dispute arises, especially over funds to be paid out of the estate. After all, resolving disputes is what courts are for. They resolve creditors' claims, will contests, and other disputes that arise in course of administering estates. Other than ensuring minimum lawyers' fees, there is simply no justification for denying persons interested in the estate the right to challenge a lawyer's fee.

Yet, by deciding not to adopt this staff recommendation, this is precisely what the LRC decided to do, giving California the dubious honor of standing with two other states in the country that totally immunize percentage fees from legitimate challenge and court review.

Having decided to keep minimum percentage fees for "ordinary services" and insulate them from objection, one would think the Commission would give favorable consideration to its own staff's recommendation to 1) delineate what constituted "ordinary" and "extraordinary" services, and 2) to allow additional compensation for "extraordinary services" only if the statutory fee for ordinary services didn't yield "reasonable" compensation. Again, HALT supported these pro-consumer proposals.¹⁴

¹³ *March Comments of HALT* at 2-4.

¹⁴ *Id.* at 4-5.

The Commission voted down both proposals, agreeing with the bar that both proposals would be "unfair." Since the proposals clearly aren't unfair to consumers, one can only conclude the unfairness would be to attorneys from not getting paid for performing a service not on the "extraordinary" list. All of a sudden, the size of an estate wasn't such a good proxy for how much time and work was required, and lawyers didn't want to have to justify the extra fees they get on top of an arbitrary and unfairly high percentage.

Presumably, because extra fees for "extraordinary services" are discretionary, persons interested in the estate may, in theory, challenge them as excessive. In reality, however, this "right" is empty. The Commission's recommendation¹⁵ appears to incorporate some of HALT's concerns about the ABA's laundry list approach by eliminating the especially subjective and irrelevant factors. But, by not requiring lawyers to keep time and work records, consumers lack the ammunition they need to mount a credible challenge.¹⁶

Attorney Client Relations — Contracts and Disclosures

In response to massive resistance on the part of probate attorneys to § 6148, the new law requiring lawyers to execute written contracts with their clients, the LRC staff recommended amending the law to clarify that probate attorneys weren't exempt. There was nothing in either the statutory language or the legislative history to indicate the Legislature had any intent to exclude probate attorneys from the written contract requirement.

The LRC decided that § 6148 is inappropriate to formal probate proceedings¹⁷ and has therefore recommended adding an entirely new section just for probate lawyers. Although HALT doesn't agree that § 6148 is inappropriate, this turns out to be virtually the only LRC recommendation that actually gives consumers a benefit they didn't have before because, unlike existing law, it would require written contracts for cases in which the expense to the client is expected to be below \$1000.

Finally, the LRC staff urged that, at a minimum, the LRC must adopt requirements for decent consumer disclosures if the entire system was being retained. Even this, however, was bitterly fought by the bar, and the LRC largely gave in.

The staff proposed a disclosure which sought to characterize the percentages as "maximum fees" subject to reduction through bargaining. The bar, on the other

¹⁵ See § 10852, TR at 38-39.

¹⁶ For an explanation of what additional reforms would be necessary to give consumers a meaningful right to challenge requests for extra fees, see *March Comments of HALT* at 3-4.

¹⁷ TR at 12-13.

hand, maintained that the percentages were "standard" fees, reducible only if attorneys agreed to "waive" part of their fee. Clearly, the language urged by the staff more accurately reflects consumer concerns, while that urged by the bar attempt to paint the statutory percentages as entitlements which can be lowered only by a lawyer's good graces.

The disclosure recommended by the LRC is barely adequate. Although it isn't as anti-consumer as the language proposed by the bar, it also fails to clearly state that the percentages are maximums or ceilings. Instead, it informs consumers that they have a right to agree to a lower fee, but not a higher one. The LRC squandered even this opportunity to protect consumers with meaningful disclosures about fees and other aspects of the attorney-client relationship. Compared to offering no disclosure, however, HALT supports it.

Conclusion

The Commission's Tentative Recommendation utterly fails to respond to the legitimate concerns of legal consumers. Rather than taking advantage of this opportunity to make legal services more affordable and accessible, the LRC appears to have chosen to protect lawyers' financial interests. One last time, HALT — San Diego implores you to abolish the statutory percentage fee system, and all of the meaningless distinctions and loopholes that go with it, and replace it with a system that requires fees be reasonable and based on documented time spent and work performed. At the very least, the statutory percentage fee system requires substantial revision to make it a little less unfair.

LAW OFFICES
DAVID E. LICH
A PROFESSIONAL CORPORATION

CA LAW REV. COMM'N

DEC 12 1988

R E C E I V E D

SUITE 900, WILSHIRE BRENTWOOD PLAZA
2400 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025
TELEPHONE (213) 820-4500
(TELECOPIER (213) 826-0683)

OUR REF. NO.

December 9, 1988

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

Re: Tentative Recommendation Relating to Compensation
of Estate Attorney & Personal Representative

Dear Commissioners & Staff:

I write as the Chairman of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. Our Committee has met and considered the Tentative Recommendation referenced above. In addition, I attended the meeting of the Executive Committee of the Probate, Trust and Estate Planning Section of the State Bar of California, held Saturday, December 3, 1988 in San Francisco.

This Committee supports the position of the State Bar. We support the historical statutory fee model as it presently exists since, to a large extent, it protects consumers and provides reasonable compensation to personal representatives and their counsel. Often, the personal representative is not the "real party in interest" in that the personal representative is not a primary beneficiary of the Estate. Of course, this is always the case with respect to corporate fiduciary. The statutory fee system provides a method for compensating counsel which has been demonstrated, by the Commission's study, to be in line with the compensation earned by attorneys in other states.

This Committee is of the opinion that the Tentative Recommendation sets forth a scheme which constitutes a significant departure from the historical statutory fee model, and which this Committee cannot support.

Unless the personal representative is granted immunity from criticism for failing to negotiate a lower fee, this Committee is opposed to the proposed amendments to the Business and Professions Code requiring a separately signed disclosure statement advising the personal representative of the right to negotiate a lower fee. It is certain that such a disclosure statement will be, on

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California Law Revision Commission
December 9, 1988

occasion, used by the disgruntled beneficiary as support for a contention that the personal representative should have negotiated a lower fee. In fact, the logical result is that the personal representative will be charged with the responsibility for negotiating a "reasonable fee"; but this negotiation process will be artificially affected by the "cap" of the statutory fee.

Other provisions of the Tentative Recommendation with which this Committee disagrees are:

A. Section 10852(f): Providing that the Court, in determining just and reasonable compensation for extraordinary services, can consider the amount of the statutory fee and whether it constitutes adequate compensation for all services rendered. This provision creates a situation where the Estate attorney has no assurance that he or she will be compensated at all for the valuable extraordinary services he or she provides. For example, the Estate attorney may be in the best and most economical position to prepare the federal and estate tax returns. If the returns were prepared by an independent professional, there would be no question that the independent professional would receive full compensation for preparing the returns. If the returns are prepared, however, by the Estate attorney, then the Court may determine that the statutory fee was adequate compensation for the preparation, and order no compensation whatsoever. This will inevitably lead the Estate attorney to refer out the task of preparing the returns, notwithstanding the fact that it may be at a higher cost to the Estate.

B. The Estate of Walker 221 Cal.App. 2d. 792, 795-796, 34 Cal.Rptr. 832 (1963) should be dealt with by providing in Section 10831 that the Court shall allow additional compensation for extraordinary services by the attorney in an amount the Court determines is just and reasonable.

Unless the Commission returns to the historical statutory fee model, this Committee has resolved to support an "agreed fee" model which would provide for a private agreement between the personal representative and the Estate attorney for the compensation to be paid for legal services. The agreed fee would be subject to the review of the Probate Court upon the objection of an interested party; this would alleviate the necessity of Court involvement unless the agreement is ambiguous, or if there is no agreement. The Committee would also support the ability of the personal representative to petition, concurrently with the Petition for Probate, for approval of the fee agreement, which approval would be binding upon all interested parties given notice of the personal representative's request for approval of the fee agreement. This

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alternative method would protect both attorneys and beneficiaries; attorneys would know from the beginning the basis upon which they will be compensated, and beneficiaries would have the opportunity at the commencement of the proceedings to review the basis for the compensation of the Estate attorney.

C. Technical Matters: In reviewing the tentative recommendations, this committee discovered the following technical matters which require clarification:

1) B & P Code §6147.5(c)(5): The last sentence of the disclosure statement which reads "the Court may, however, award an additional amount for extraordinary services" would better read "the Court may, however, award compensation for extraordinary services". The phrase "an additional amount" infers that the Court may award higher extraordinary compensation to "make-up" for the lower fee for ordinary services.

2) PC §10804 - Comment: The fifth paragraph of this Comment should be amended to conform with the provision of PC §10804(c) which allows the personal representative to employ "any qualified person, including a member of the State Bar of California..." The Comment refers only to an agreement "with the Estate attorney", instead of to an agreement with "any qualified person, including the Estate attorney".

Thank you for your consideration of these matters.

Very truly yours,



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

DEL/smt

cc: Phyllis Cardoza, Admin. Vice Chair
[CMPNATTY.LTR:s]

MELBY & ANDERSON

ATTORNEYS AT LAW

121 WEST LEXINGTON AVENUE

FIFTH FLOOR

POST OFFICE BOX 10310

GLENDALE, CALIFORNIA 91209-3310

HENRY MELBY
JARRETT S. ANDERSON
DAVID S. PARKIN
RANDALL MELBY
PATRICK A. LIDDELL
WILLIAM R. FONNET
MICHAEL W. DEAKTOR

(818) 246-5644
(213) 245-2606

CA LAW REV. COMM'N

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December 9th, 1988

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

Gentlemen:

I have reviewed your tentative recommendations relating to compensation of estate attorney and personal representative published in the Los Angeles Daily Journal on November 18th, 1988.

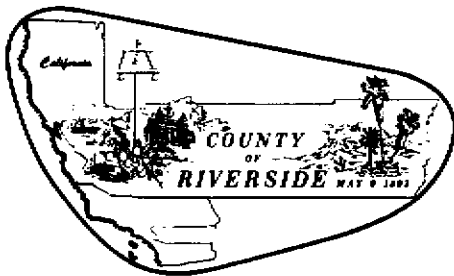
As a probate practitioner for thirty years, I concur one hundred percent with the well thought-out recommendations which you have published and urge you to propose and support the recommendations as published.

Yours very truly,

MELBY & ANDERSON

By 
Henry Melby

HM:d



OFFICE OF
PUBLIC ADMINISTRATOR
1420 Citrus Avenue
Riverside, California 92507
(714) 369-0450

LA LAW REV. COMM'N
DEC 14 1988
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RAYMOND L. CARRILLO
Coroner & Public Administrator

December 9, 1988

JACQUELINE CANNON
Chief Deputy Public
Administrator

REPLY TO: Jacqueline Cannon

Mr. Nathaniel Sterling
Executive Secretary
Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94393-4739

Re: COMPENSATION OF ESTATE ATTORNEY AND PERSONAL REPRESENTATIVE

Dear Mr. Sterling:

I am opposed to any changes in the Statutory Commissions structure which would result in a decrease in fees to Attorneys and Public Administrators.

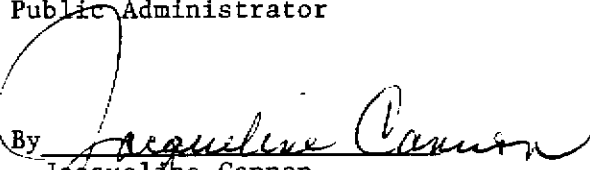
Even though the decrease is a small percentage, Public Administrators throughout the state are dependent on the fees to offset our already dwindling budgets.

I can appreciate the Commission's efforts to align the California Statutory Fees with attorneys and personal representatives nationwide; however, it does not appear as though the Commission considered the actual cost of labor, overhead, and filing fees, all of which have increased substantially since the present fee schedule was established. The current Statutory Fee is too low, and does not begin to cover the cost of administering an estate.

I hope the Commission will reconsider and increase the Statutory Fee.

Sincerely,

RAYMOND L. CARRILLO
Public Administrator

By 
Jacqueline Cannon
Chief Deputy Public Administrator

JC:jj

cc: Raymond L. Carrillo
Coroner/Public Administrator

MATTHEW S. RAE, JR.
RICHARD L. STACK
JOHN L. FLOWERS
WM. JOHN KENNEDY
THOMAS M. BANKS
OF COUNSEL

LAW OFFICES
DARLING, HALL & RAE
550 SOUTH FLOWER STREET, SIXTH FLOOR
LOS ANGELES, CALIFORNIA 90071-2508
(213) 627-8104

DEC 14 1988

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HUGH W. DARLING
(901-1986)
DONALD KEITH HALL
(916-1984)

CABLE ADDRESS "OLAP"
TELEX: 67-4920
TELECOPIER (213) 627-7795

WRITER'S DIRECT DIAL NUMBER

December 9, 1988

(213) 683-5281

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

Re: Tentative recommendation regarding
compensation of probate attorneys and
personal representatives

Dear Commission Members:

I am the current Chair of the Probate and Trust Law Section of the Los Angeles County Bar Association, however, the following comments are made in my individual capacity as a probate and trust lawyer for the past 15 years.

I have followed the issue of attorney compensation in probate matters and I have reviewed your tentative recommendations. I believe your recommendations for change are ill-advised and should be abandoned. In the interest of brevity, I endorse the views expressed by William S. Johnstone, Jr. of Hahn & Hahn in his letter to you of November 11, 1988 with the following additions.

The right to negotiate a fee with an attorney at less than the statutory fee has been, and continues to be, a safety valve to permit the equitable adjustment of fees in those rare cases where the statutory fee is significantly disproportionate to the services and responsibilities of the attorney. To promote fee bargaining in every case would be tremendously disruptive and would no doubt hasten the demise of the statutory fee system altogether.

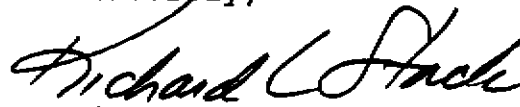
Under our current system of compensation, it is becoming more and more difficult for practitioners to make a profit on smaller estates. In conversations with probate attorneys, I find that many are reluctant to administer estates under \$250,000.00. In some firms this minimum estate size is much higher. I believe that the tentative recommendations will serve only to make this problem greater. The tentative recommendations call for the reduction of compensation on the first \$15,000.00 of estate value from 4 percent to 3 percent. This is a reduction of \$150.00. This makes smaller estates even less desirable for practitioners. Although such a recommendation may appear as good public relations, in point of fact this will further shrink the pool of competent attorneys to service smaller estates. There is the belief in probate circles that the larger estates provide attorneys with compensation that will permit representation of smaller estate where the effective rate of compensation in terms of an hourly rate may be significantly lower. Although it has been my experience that larger estates do not provide a greater effective rate of compensation, promoting bartering of fees will no doubt be a disincentive for lawyers to take on smaller probates.

I wish to bring to the attention of the Commissioners a recent appellate court decision on the subject of attorney compensation. In the Estate of Esther Trynan, counsel was retained to represent the personal representative and to defend the estate in a Will contest which resulted in a judgment against the estate. An appeal was taken and second counsel was hired by contract to handle the appeal. When the Will contest was finally resolved, both counsel for the estate filed petitions for extraordinary attorneys' fees and costs. The personal representative objected to both petitions and litigation ensued. The Court determined the reasonable value of extraordinary services and entered judgment for counsel totaling in excess of \$55,000.00. Thereafter, counsel submitted a second petition for extraordinary fees for attorney compensation and costs in litigating the initial petition for fees. The Court denied the petition on grounds that the Court "does not have the authority to award compensation for services which benefit only the attorneys for the estate and do not enhance the size of the estate available for distribution to the beneficiaries thereof". A copy of this decision is enclosed.

I believe the decision of the Court is inequitable and bad law. In almost any fee agreement between attorney and client provision is made for the payment of attorneys fees should it become necessary to bring an action to collect a fee from a client. Probate counsel must have a fee agreement with the personal representative but is precluded from having such a provision. If counsel performs services and must litigate with the personal representative to collect compensation for such services, then it is only fair and equitable that the law support such counsel in being compensated for the additional work to which counsel is put. In addition, the law is clear that the Court will allow attorney fees "as the Court may deem just and reasonable" (Probate Code §910). It is only just and reasonable under the circumstances of the Estate of Trynan that counsel receive compensation for its services in pursuing to a successful conclusion its petition for compensation for extraordinary services.

As the Commission is now taking up the matter of attorney compensation, I believe it is appropriate for the Commissioners to propose legislation to make it clear that a Court may award compensation under the circumstances of the Estate of Trynan.

Sincerely,



Richard L. Stack

RLS:lgc
Enclosure

crimes charged against defendant.

In that colloquy the trial court referred to the decision in *People v. Hall* (1986) 41 Cal.3d 836, stating that Hall involved "discovery" and that he was "bound by it." The trial judge misread Hall. Hall is not a discovery case. The questions decided in Hall were raised in an offer of proof. Hall does not deal with the privilege against self-incrimination. Hall relates to the admissibility of evidence of third party culpability. In Hall our Supreme Court ruled that:

"[I]t is always proper to defend against criminal charges by showing that a third person, and not the defendant, committed the crime charged." (*People v. Hall*, supra, 41 Cal.3d at p. 832.) "To be admissible, the third party evidence . . . need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however, remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Id. at p. 833.) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evidence Code] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (§ 353)." (Id. at 834.)

The sense of Hall is that evidence of third party culpability, when admissible, is essentially exculpatory in nature. Therefore evidence of third party culpability could not possibly have a tendency to incriminate the accused. (See *Prudhomme v. Superior Court*, supra, 3 Cal.3d 328, 326.)

The crime reports which defendant sought to discover in these proceedings were discoverable, since they are not privileged,¹⁹ they probably meet the minimum degree of plausible justification that should be required by a court, and might lead to the discovery of evidence which might assist him in preparing his defense (see *Ballard v. Superior Court*, supra, 64 Cal.3d 159, 167). Nevertheless, the discovery motion should have been regularly served, noticed, and litigated. The search for evidence of third party culpability does not require or justify *in camera* procedure.

The Trial Court Erred In Citing and Relying on An Unpublished Opinion

Rule 977(a), California Rules of Court, provides: "An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)." The exceptions provided in subdivision (b) do not apply in this case.

At the hearing of the discovery motion on February 11, 1988, the trial court stated: "The record should reflect that I have been provided copies of an opinion and order for a peremptory writ of mandate in the matter of Richard Ramirez . . . out of Division VII of our Second Appellate District. There's also an order modifying that opinion that was filed January the 21st that I'm in receipt of. I have read and considered the document."²⁰

Later, during the same hearing, the court inquired of counsel: "How much weight can I give to the opinion and order for peremptory writ of mandate that was filed January the 6th with modifications January the 21st in the case of Richard Ramirez, which is a pending case in [a different department of] our court? . . . How much weight can I give that, if any?"

Defense counsel replied: "Your Honor, I think you can certainly use that opinion as a guide. I don't believe it is published. So, it is not binding on you and, accordingly, under the rules of court it is not properly cited as authority. But it certainly serves as persuasive authority similar to a well-reasoned and compelled timely law review article on the subject."

Near the close of that day's hearing, as the court was about to

make its ruling, the court stated: ". . . and I have to give great weight to what happened in — as to our court insofar as that peremptory writ was issued to our very court in the matter of Richard Ramirez . . . as [defense counsel] indicated is not a published report."

Defense counsel violated Rule 977(a) by citing the Ramirez opinion and by not informing the court, in response to the court's question, that neither counsel nor the court could cite or rely on it. Defense counsel knew that the unpublished opinion could not properly be cited as authority.

It was error for the trial court to have received and to have read and considered that unpublished opinion, let alone to have given it "great weight" in arriving at its ruling on the discovery motion. The trial court, *ses a parte*, should have ordered that the unpublished opinion, and all references to it, be deemed stricken from the file and counsel should have been admonished not to make further references to it.

The Requested Discovery Was Described With Adequate Specificity

Petitioner goes to some length arguing that defendant failed to describe the information sought with adequate specificity to justify the discovery order. That argument is without merit. The descriptions of the reports sought by the defendant are models of specificity. (See *fn. 6, ante.*) There is no ambiguity whatsoever.

DANIELSON, J.

PROBATE AND TRUSTS

Probate Court Can't Award Legal Fees For Costs in Prosecuting Fee Request

Cite as 88 Daily Journal D.A.R. 14290

Estate of

ESTHER TRYNN,

Deceased.

RICHARD W. ECKARDT and
PACHTER, GOLD & SCHAEFFER,
Appellants,

v.

MARCIA D'ESOPP and
SONIA MEYERHOF, Co-Administrators
of the Estate of ESTHER TRYNN,
Respondents.

No. B030315

Super. Ct. No. P663940-

California Court of Appeal

Second Appellate District

Division Five

Filed November 8, 1988

APPEALS from orders of the Superior Court of Los Angeles County. Timothy Whitehouse, Temporary Judge,* Affirmed.

Eckardt and Ruonala and Richard W. Eckardt and Kenneth R. Ruonala; Pachter, Gold & Schaeffer and Arnold H. Gold, in pro. per., for Appellants.

Marcia D'Esopo, in pro. per., for Respondents.

In this opinion we conclude that the probate court cannot award an attorney extraordinary fees under the Probate Code for expenses incurred in prosecuting the attorney's petition to recover fees.

FACTS

The law firm of Pachter, Gold & Schaffer (Pachter) was retained as the probate counsel for the Estate of Esther Trynin. In this position, Pachter defended the estate in a will contest which resulted in a judgment against the estate. Subsequently, attorney Richard W. Eckardt (Eckardt) was hired by contract to handle the appeal emanating from the will contest. When the will contest was finally resolved, Pachter and Eckardt both filed petitions for extraordinary attorney fees and costs. Following the co-administrators' objection to both petitions, the petitions were litigated. After seven half-day trial sessions, the court determined the reasonable value of extraordinary services and entered judgment for Pachter in the sum of \$49,900.54 and for Eckardt in the sum of \$5,364.00.

Pachter then submitted a second petition for extraordinary fees requesting \$81,300.25 claiming it was entitled to attorney fees and costs expended in litigating its first petition for fees. Eckardt filed a similar petition, claiming \$23,210. The court denied both petitions indicating that "the Court does not have the authority to award compensation for services which benefit only the attorneys for the estate and do not enhance the size of the estate available for distribution to the beneficiaries thereof . . ."

Pachter and Eckardt separately appeal. The co-administrators of the estate are respondents.

DISCUSSION

Pachter and Eckardt both appeal contending they are entitled to extraordinary fees for expenses incurred in prosecuting their respective petitions to recover fees. In essence, they claim that under the Probate Code they are entitled to "fees on fees." We disagree.

The general rule is that counsel fees are not recoverable unless authorized by statute or enforceable agreement. (Code Civ. Proc., § 1631; *Serrano v. Urruh* (1962) 23 Cal.3d 631, 637.)¹ Probate Code sections 901 and 910 specify the amount an attorney earns for conducting ordinary probate proceedings. Probate Code section 910 also discusses, in conjunction with Probate Code section 902, attorney fees expended for extraordinary services.

Probate Code section 910 reads as follows: "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as [allowed to the executor or administrator] and such further amount as the court may deem just and reasonable for extraordinary services."

Extraordinary services which the attorney may apply to the court for compensation include those services by any paralegal performing the extraordinary services under the direction and supervision of any attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal."

Probate Code section 902 in pertinent part reads as follows: "Such further allowances may be made as the court may deem just and reasonable for any extraordinary services such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the good faith defense of a will which is contested after the will is admitted to probate, the successful defense of a will which is contested before the will is admitted to probate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any said taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform."

In applying these fee statutes applicable to extraordinary services, attorneys have been compensated for rendering ser-

vices in many different situations such as: to recover trustee fees (e.g., *Estate of Griffith* (1950) 97 Cal.App.2d 651, 656), to prosecute a guardian application (e.g., *Riley v. Superior Court* (1967) 49 Cal.2d 305, 311-312), to defend an executor or an administrator's accounting (e.g., *Estate of Beirach* (1966) 240 Cal.App.2d 864, 867-868), and to defend a will contest (e.g., *Estate of Beach* (1975) 15 Cal.3d 623, 644). In all of these examples, attorney fees were appropriate because the representation "benefitted the estate in the sense of representing the decedent's desires and intentions as expressed in the will." (*Estate of Schuster* (1964) 163 Cal.App.3d 357, 343.) The estate was "benefitted," not necessarily because the estate monetarily increased, but because the actions determined what was proper under the will. (*Estate of Halseell* (1956) 138 Cal.App.2d 689, 693.)

In contrast, the petitions brought by Pachter and Eckardt which are in issue, requested attorney fees and costs for services performed in trying to collect their own respective attorney fees. These claims would not "benefit" the estate and thus would not be compensable pursuant to the probate statutes. Different from cases in which an attorney is serving to protect a matter of public concern (e.g., *Serrano v. Urruh*, supra, 23 Cal.3d 631), Pachter and Eckardt are acting only to serve their own interests.

The probate statutes allow attorney fees "as the court may deem just and reasonable." Contrary to the suggestions of Pachter and Eckardt, the clear intent of this statutory language is to allow a court to award attorney fees when services are rendered in situations not specifically delineated in Probate Code section 902, but which services are required to "benefit" the estate in its proper administration. (Cf. *Estate of Gilmaker* (1964) 228 Cal.App.2d 658, 662-663.)

Pachter and Eckardt also suggest that attorney fees were appropriate because the co-administrators engaged in conduct which was meant to "punish" and thus constituted nothing more than "stonewalling." Pachter and Eckardt claim the co-administrators engaged in numerous activities which unnecessarily prolonged the litigation of their initial petitions for fees. Such accusations must be addressed to the court pursuant to Code of Civil Procedure section 128.5 which authorizes all superior courts to impose sanctions incurred as a result of "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5; *In re Marriage of Laurens & Fogarty* (1968) 197 Cal.App.3d 1082, 1086.) The probate court, absent a properly noticed motion pursuant to Code of Civil Procedure section 128.5, did not have the authority to consider such accusations. The parties on appeal did not raise the propriety of an award under this section, but limited the issues to those relating to the Probate Code.

The claims of Pachter and Eckardt while not convincing, are not frivolous. Thus, we decline to award sanctions as requested by the co-administrators.

The orders are affirmed.

ASHBY, J.

We concur:

LUCAS, P. J.

BOREN, J.

¹Pursuant to Cal. Const., art. VI, § 21.

1. The four exceptions to the general rule, the common fund theory (e.g., *Quinn v. State of California* (1970) 18 Cal.3d 152, 167-168; the substantial benefit or common benefit theory, (e.g., *Keele v. City Etc. of San Francisco* (1969) 1 Cal.App.3d 124, 289-294), the private attorney general theory now codified in Code of Civil Procedure section 1812.5 (*Woodland Hills Residents Ass'n, Inc. v. City Council* (Woodland Hills ID (1970) 23 Cal.3d 617, 633; *Serrano v. Priest* (Serrano ID (1977) 20 Cal.3d 25, 49-57), and the "tort of another" doctrine (*Gray v. Don Miller & Associates, Inc.* (1966) 38 Cal.3d 498, 504-505) are not applicable to the instant matter.

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ATTORNEYS PROBATE ASSOCIATION

388 PINE STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94104
362-0520

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-3739

Re: Tentative Recommendation Relating to Compensation of
Estate Attorney and Personal Representative, No.
L-1036-1055, October 26, 1988.

Honorable Commissioners:

I, the undersigned, have been the President of the Attorneys Probate Association for approximately the past 15 or 16 years.

James V. Quillinan presented most ably the position of the Tentative Recommendation before our organization in regular meeting dated December 1, 1988.

Prior to this, and subsequent to it, I have had a number of comments, some in letter form and some in telephone conversations over the last few days.

I would like to draw your attention to the fact that among the attorneys in some of the larger states, the probate attorney in California is less well treated than almost anyone else.

A few years ago, I was astounded to find that in Nevada a million dollar estate would bring in attorneys fees of \$50,000.00. I believe our statutory compensation at that time was about \$13,800. Of course, some attorneys would make up the difference or a portion of it by having extraordinary service fees granted by the probate judge.

I feel that the Commission is completely missing the boat in trying to set up firm bargaining positions by an aggrieved widow as against an attorney who should be most solicitous about her well being and not concerned at that present time about negotiating with her about a proper fee eight or ten months after her spouse passed away.

I have practiced law for over fifty years in California, and I do believe that the training that I had with my father, Clarence E. Todd, who was admitted in 1909 and Peter Sommer, whom I believe was admitted about ten years later, in handling probates. R. W. Gillogley, who practiced for many years in San Francisco, insisted that his wife bring the estate of himself to my father and insisted that she agree to pay the full statutory fee informing her that the probate system in California was one of the few places where an attorney would be adequately compensated.

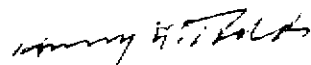
I believe that the perversion of the probate system with gimmicks, such as, intervivos trusts, is one of the worst things that has occurred to the profession in the probate field.

Imagine if you will, and I believe that most of the commissioners would probably have been born after I was admitted to practice, a widow of the age of about 70 to 75 losing a spouse of forty or more years, having to negotiate through the feelings of loss and hurt which always come upon a spouse of long standing, and being informed by a lawyer who until this occurred, she had trusted, that the probate law required her to negotiate a fee, prior to any work being done, that was satisfactory to herself as well as to the attorney.

I read with interest the letter of Robert C. Hays, of December 6, 1988 concerning the use of other means for handling the property of persons during their lifetime. I think he is on the proper road, but has failed to include the personal feeling of a grief stricken widow who has been married for a long period of time and is thrust into a bargaining position with the attorney.

I firmly suggest that the present system of fixing fees by statutory methods be retained and that reversing the views of the Supreme Court of California concerning avoidance of statutory fees even in the largest estates, would not be proper.

Yours very truly,


Henry C. Todd

HCT/je

cc: James Quillinan
Robert Hays
Jerome Sapiro
Phil Hudner

October 26, 1988

STATE OF CALIFORNIA
California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

COMPENSATION OF ESTATE ATTORNEY AND PERSONAL REPRESENTATIVE

October 1988

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1989. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN DECEMBER 10, 1988.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

**LETTER OF TRANSMITTAL**

In 1980, the Legislature directed the Law Revision Commission to study California probate law. This direction was in response to persons who wanted the Commission to make a study primarily to determine whether the existing provisions relating to the compensation of the estate attorney are in need of revision.

In California, the 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 same statutory scheme is used to determine the compensation of the personal representative.

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 more important recommendations of the Commission include:

(1) The statutory fee schedule that is used for compensating the attorney and personal representative for "ordinary services" should be retained, but a modest reduction should be made in the fee allowed under the schedule.

(2) The existing requirement that the attorney and client have a written contract that states the fee to be charged by the attorney should be continued and be clarified by a specific provision that will apply to formal probate proceedings. The written contract requirement should be supplemented by the requirement that there be a separate disclosure statement prescribed by statute, signed by the personal representative, that informs the personal representative that the personal representative and the attorney may agree to a lower fee than the statutory fee but may not agree to a higher 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.

THIS TENTATIVE RECOMMENDATION CONTAINS REFERENCES TO STATUTE SECTIONS ENACTED BY 1988 CAL. STAT. CH. 1199 (AB 2841). FOR STATUTORY PROVISIONS YOU CANNOT FIND IN YOUR CURRENT CODE PUBLICATION, PLEASE REFER TO THE 1988 ENACTMENT.

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 Efron*, 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 Efron*, 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, 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 saves court costs and court time in determining fees. This is because the statutory fee system 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

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). If the estate requires only minimal services, the personal representative and attorney may contract for a fee that is less than that provided by the statutory fee schedule. 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.

more legal problems than smaller estates. In addition, the responsibility of the attorney and the attorney's risk of malpractice 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.

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 new section be added to the Business and Professions Code to deal with the written agreement between the attorney and the personal representative in a formal probate proceeding. A separate section is recommended because much of Section 6148 of the Business and Professions Code should not apply to a formal probate proceeding and additional provisions are needed so that the written contract requirement will be consistent with the statutory provisions that govern probate legal fees.²⁸

The Commission further recommends that in a formal probate proceeding the personal representative be provided a disclosure statement. To assure that the personal representative will actually be aware of the content of the statement, the recommended legislation requires that the statement be on a separate sheet and be signed by the personal representative. This disclosure statement will inform the personal representative how the statutory fee is computed and that additional compensation may be allowed by the court for extraordinary services. In addition, it will include the following statement:²⁹

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

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

This disclosure will inform the personal representative that the personal representative and the attorney may contract for a lower fee. It will ensure that unsophisticated personal representatives will be as fully advised of their rights concerning attorneys' fees as well-informed ones.

28. The new Business and Professions Code provision would recognize that ordinarily the fee contracted for will be the fee provided for in the statutory fee schedule. The new provision would omit the provisions found in Business and Professions Code Section 6148 relating to (1) the form of the bill for services of the attorney and (2) the requirement that a bill be provided on request. Those provisions are inconsistent with the requirement that the court approve the fee before it is paid. The new provision also would include only those exceptions to the written contract requirement that are appropriate for formal probate proceedings.

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 Compensation for Extraordinary Services

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

The Commission recommends enactment of a statutory statement of the factors the court should take into account in fixing compensation 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

White

The Commission's recommendations would be effectua
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 for the services described in Sections 10830 and 10831 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 amount allowed under 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 which shall be on a separate page and shall be separately signed by the personal representative:

DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE

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

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

- (1) Three percent on the first \$100,000.
- (2) Two percent on the next \$900,000.
- (3) One percent on the next 9 million dollars.
- (4) One-half of one percent on the next 15 million dollars.

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

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

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

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

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

Date: _____

Personal Representative

(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 amount allowed under 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), 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) serves the same purpose as paragraph (5) of subdivision (a) of Section 6147 (contingency fee agreements). This paragraph contains the text of a disclosure statement that must be on a separate sheet and be signed by the personal representative. The purpose of the statement is to disclose to the client that the attorney and client may agree that the attorney's compensation for ordinary services will be lower than the statutory compensation. See also Probate Code Section 10832 (agreement for higher compensation for ordinary services void).

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
- § 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), 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. 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 (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 (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 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 *Feinfield, 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.

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.

§ 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).

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) (separately signed disclosure statement informing personal representative that the personal representative and the attorney may make an agreement for a lower fee for ordinary services). If the attorney fails to satisfy the requirements for a written agreement with the personal representative and separate disclosure statement where the agreement and statement are 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), 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. 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 (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 (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

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

Comment. 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 Feinfeld, *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 and disclosure statement) are satisfied. But nothing in Section 10832 precludes the personal representative and the estate attorney from making an agreement for lower compensation than that provided for in this article. See Estate of Morrison, 68 Cal. App. 2d 280, 285, 156 P.2d 473 (1945); Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar 1987). If an agreement for lower compensation is made, the court will not award a higher fee for ordinary services than the fee provided for ordinary services in the agreement. See Business and Professions Code Section 6147.5 (written agreement and disclosure statement).

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). The personal representative may employ the estate attorney to perform nonlegal services that constitute ordinary services of the personal representative, and may pay the attorney out of the personal representative's own funds. See Section 10804(c).

§ 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 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.

§ 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).

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 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 (compensation of special administrator and attorney for special administrator), 10954(c) (final report to show compensation), and 12205 (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 Feinfield, *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 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 (compensation of special administrator and attorney for special administrator), 10954(c) (final report to show compensation), and 12205 (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

Pink

Business and Professions Code § 6148 (technical amendment)
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 [enacted 1988] (technical amendment). Compensation

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

(b) The ~~commission~~ 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 ~~commission~~ compensation or the court in its discretion so allows. ~~Extra-allowances~~ Compensation for extraordinary services of a special administrator may be allowed on settlement of the final account of the special administrator. The total ~~commission~~ compensation paid and ~~extra allowances~~ 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 [enacted 1988] (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 [enacted 1988] (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.

COMMENTS TO REPEALED PROBATE CODE SECTIONS

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

Comment. 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.