

## Memorandum 88-12

Subject: Study L-1036 - Attorney Fees in Probate

At the January meeting, the Commission heard presentations from representatives of organizations representing consumers and from representatives of organizations representing probate lawyers. These presentations are set out in the Minutes of the January meeting.

This memorandum presents the various policy issues that are identified in the staff study on probate attorney fees. To facilitate discussion of these issues, they are outlined below.

**Should a Reasonable Fee Standard be Substituted for the Existing California Concept (Statutory Fee Schedule and Reasonable Fee for Extraordinary Services)?**

This is the basic issue. Four Commissioners were present when this issue was discussed at the January meeting. A decision on the issue was deferred until a time when more Commissioners are present to vote on the issue. However, I believe it is safe to say that all four of the Commissioners present at the January meeting were of the view that the existing California concept should be retained, although there was some indication that changes might be made in the details of the existing California provisions.

There is a great deal of information relevant to this issue in the background study (attached to Memorandum 87-100) and in the presentations made at the January meeting (see Minutes of meeting). You should read these presentations if you were unable to be present at the discussion at the January meeting. You may want to refresh your memory by reading them if you were present at the time the presentations were made.

The remainder of this memorandum is prepared on the assumption that the Commission will determine to retain the existing California

attorney fee concept (statutory fee schedule and reasonable fee approved by court for extraordinary services). If this is not the case, the next step in work on this area of law will be to prepare a staff draft of a reasonable fee statute.

**Standards or Factors to be Taken Into Consideration in Determining Amount of Attorney Fee**

At least nine states and the District of Columbia have statutory statements of the factors that are to be taken into consideration in determining what constitutes a reasonable attorney fee. See background study at pages 46-53 (attached to Memorandum 87-100).

The statutory statement of factors to be considered in determining whether a fee is reasonable would be applicable to a petition for extraordinary fees. The same standard also would apply if the Commission decides to give the court the power to award a fee less than the statutory fee in a case where the court determines that the statutory fee is clearly excessive under the circumstances of the particular case.

A statutory statement of the factors to be taken into consideration in determining what constitutes a reasonable fee might be useful to the courts and attorneys. Such a statement would list the various factors to be taken into consideration, thereby indicating that the court is not to fix an inadequate hourly rate but is to consider all the relevant factors listed in the statute. The statutory statement would, for example, indicate among the factors to be considered the fee customarily charged in the locality for similar services and the experience, reputation, and ability of the person performing the services.

The staff recommends that a statement be added to the California statute listing factors to be taken into consideration in fixing a reasonable fee. The statement would be drawn from the statutes and court rules discussed at pages 46-53 of the background study (attached to Memorandum 87-100). The inclusion of this statement in the statute should encourage the court to award a reasonable fee, rather than a fee

that does not provide fair and adequate compensation for the services rendered. Some of the representatives of the consumers present at the January meeting were strongly in favor of a statutory statement of the factors to be taken into consideration. The staff believes that the organizations representing probate lawyers also would support such a statutory statement.

### The Statutory Fee Schedule

Minimum fee for small estates: power of attorney and client to agree to fee higher than statutory fee. Almost one-half (47%) of those who responded to the Commission's Questionnaire believe that changes should be made in the existing provisions relating to attorney fees. Many lawyers (73.5%) believe that the major defect in the existing statutory provisions is that the statutory fee for estates is not adequate for estates of less than \$60,000.

Existing California law declares that an agreement for a fee in excess of the statutory fee is void. Only the court can award an additional amount and then only for extraordinary services.

But the fact is that the fee provided by the statutory fee schedule for the very small estate is grossly inadequate. For example, if the estate is \$5,000, the amount allowed is only \$200. On a \$10,000 estate, only \$400 is allowed. A lawyer who probates one of these estates will lose money. The claim that the fee schedule is designed to subsidize the small estate by imposing a more than reasonable fee on some large estates does not adequately deal with the problem. There is no assurance that a law firm will take a small estate and lose money merely because the law firm may make a more than reasonable fee on a large, simple estate that may come to the law firm.

One solution to this problem would be to provide a minimum attorney fee. The Delaware court rules take this approach and provide a minimum attorney fee of \$250. The background study (attached to Memorandum 87-100) recommends that an appropriate minimum statutory fee be provided and suggests that \$750 may be appropriate.

Another--and perhaps better--solution would be to relax for smaller estates the strict rule that the attorney and client cannot contract for a fee higher than the statutory fee. A provision could be added to the statute to authorize the attorney and client to provide by contract for a fee not exceeding a specified amount (\$1,000 or \$1,500 or \$2,000, whatever is reasonable) even though the contract fee exceeds the fee under the statutory fee schedule. This would permit the parties by contract to agree on an appropriate fee in excess of the fee schedule where the statutory fee will be inadequate under the circumstances of the particular small estate. Absent such a contract, the attorney would be entitled only to the statutory fee and such additional fee as is awarded by the court for extraordinary services. The fee for services where the affidavit procedure is used for an estate of less than \$60,000 is now determined by contract between the attorney and client. It does not make much sense to provide an unreasonable statutory limit on the fee where a formal probate is required for a small estate but to have no statutory limit on the fee when the affidavit procedure is used to collect or transfer property.

Subject to the recommended provision for small estates, the staff recommends against changing the rule that an agreement for a fee in excess of the statutory fee is void. See the discussion in the background study at pages 106-107 (attached to Memorandum 87-100).

Using net rather than gross estate as basis for computing statutory fee. Some states use the net rather than the gross estate as the basis for computing the statutory fee. At least one state excludes the value of real property entirely in computing the attorney fee. One lawyer wrote: "The equity in property should be the appraised value thereof. I see no reason why the personal representative's commission or the attorney's fee should be based upon a debt owed by the decedent." The staff recommends against going to the net estate as the basis for computing the attorney fee. The services with respect to real property are substantially the same whether or not there is a lien on the property. In fact, the existence of a lien on the property may create more work for the attorney rather than less.

Modification of statutory fee schedule. The staff strongly recommends that the existing fee schedule be modified to eliminate the 4 percent fee. Instead, the fee would be 3 percent on the first \$100,000 of the estate accounted for. See Table 1 on page 9 of the background study (attached to Memorandum 87-100) for the Attorney Fee Schedule now in effect.

The effect of the recommended change would be to reduce the fee by \$150. The maximum amount of the reduction for any size estate would be \$150, but a more adequate fee for legal services provided to a small estate would be provided if existing law were revised to specify a minimum fee to authorize the parties to make a contract for a fee not exceeding a specified amount (see staff recommendations set out above concerning proposals to provide a more adequate attorney fee for small estates).

The benefit of the recommended change--to reduce the maximum fee from four to three percent--is that it can then be said that the maximum percentage rate in California has been reduced from four percent to three percent. The change would have little, if any, significance for estates under \$60,000, since those estates ordinarily can be handled using the affidavit procedure.

Making the change from a maximum of four percent to a maximum of three percent would bring California more in line with other states with large metropolitan areas. See Table 1 below.

**TABLE 1**  
**COMPARISON OF PROBATE ATTORNEY FEES IN LARGE METROPOLITAN AREAS**

<u>State</u>	<u>Fee For Estate of Indicated Value</u>		
	<u>\$100,000</u>	<u>\$300,000</u>	<u>\$600,000</u>
California	\$3,150	\$7,150	\$13,150
Georgia	\$2,500	\$7,500	\$12,000
Virginia	\$3,000	\$7,000	\$9,000
Ohio	\$3,000	\$6,000	\$10,000
Texas	\$3,000	\$6,000	\$10,000
Michigan	\$3,000	\$7,000	\$10,000
Florida	\$2,000	\$7,500	\$18,000
Illinois	\$5,000	\$10,000	\$16,000
New York	\$5,000	\$13,000	\$22,000
Pennsylvania	\$5,000	\$13,000	\$22,000

Source: Information concerning fees in other states supplied by the Estate Planning, Trust and Probate Law Section of the State Bar of California. "Attorneys practicing in the probate and estate planning area were contacted directly and surveyed as to that state's fee structure, if any, and then asked . . . what attorney fees would be for estates valued at \$100,000, \$300,000 and \$600,000. The fees reflect probate of a relatively simple estate with no major valuation issues (i.e., closely held business) or disputes between persons interested in the estate. All attorneys contacted stated the fees would be higher if complexities arose during probate. To repeat, these are very rough fee approximations."

Table 2 (below) is a comparison of the attorney fees for a typical estate (not involving extraordinary services) in the states that have a statutory fee schedule. Note that the change from a four percent maximum rate to a three percent maximum rate would not change the relative positions of the states using a statutory fee schedule.

**TABLE 2**  
**COMPARISON OF ATTORNEY FEES UNDER FEE SCHEDULE**

<u>State</u>	<u>Fee</u>	<u>Court has Authority to Reduce Fee</u>
Delaware*	\$12,000	Yes
Montana	11,850	Yes
Arkansas	10,863	Yes
California	8,850 (4% maximum) 8,750 (3% maximum)	No
Hawaii	8,650	No
Wyoming	7,850	No
Iowa	7,620	Yes
New Mexico	4,900	Yes
Missouri	4,263	No

\*Fee schedule in Delaware is established by court rule, not statute. The court rule provides that the fee schedule is a ceiling on the attorney fee and is not to be charged in all cases.

Source: Appendix 2 of background study, except gross estate has been used for Montana and Hawaii, rather than the net estate used in Appendix 2.

Power of court to award less than statutory fee. Absent a contractual agreement for a lower fee, the attorney has the absolute right under existing law to receive the amount of the California statutory fee, without regard to whether that amount is reasonable under the circumstances of the particular case. (Recent legislation

provides that the attorney can receive only a reasonable fee fixed by the court on that portion of an estate over \$25 million.)

The staff believes that the representatives of the consumer groups came to the conclusion at the January meeting that a reasonable statutory fee schedule is not contrary to the interests of consumers. However, the consumer representatives were strongly of the view that the court should have the power to reduce the statutory fee in a case where the fee is unreasonable under the circumstances of the particular case.

The California statutory fee places California among the half of the states that charge the highest fees under the fee schedule. See Table 2 above. Table 2 indicates whether the fee set by the fee schedule can be reduced by the court where the court determines that the fee under the fee schedule is unreasonable under the circumstances of the particular case. Of the four states that provide for the highest fees under the fee schedule, California is the only one where the court does not have authority to reduce the amount of the fee under the fee schedule. The court has authority to reduce the fee in five of the nine states.

There might be some increase in the burden on the courts if a petition to review whether the statutory fee is excessive were to be permitted. Concern about this possible burden is the primary reason the background study recommended against giving the court general authority to reduce the amount of the statutory fee in any case where the court determines the fee to be excessive. Nevertheless, this is an important issue that cannot be easily resolved, since the representatives of the consumer groups present at the January meeting were strongly of the view that court review should be permitted if the statutory fee schedule is retained. Perhaps a strict standard--such as the statutory fee is "clearly excessive [or "clearly unreasonable" or "unconscionable"] under the circumstances of the particular case" might be used.

Statutory fee on estates over \$10 million. Recent legislation provides for a reasonable fee fixed by the court on that portion of an estate over \$25 million. This provides a solution only in an exceedingly rare case.



The staff recommends that the fee on that portion of an estate over \$10 million be a reasonable amount determined by the court. This would mean that for an estate over \$10 million the statutory fee would be \$111,000 and such additional amount if the court determines that the reasonable fee for legal services exceeds \$111,000. This modification of the statutory fee schedule would impose no significant burden on the courts and would protect against an outrageous fee in a case where the major portion of the estate is liquid assets such as treasury bonds and stocks listed on the New York Stock Exchange.

Probate Code Section 609 imposes a much more drastic limitation on the fee of the probate referee. Under that section, the fee cannot exceed \$10,000 unless the court determines that the reasonable value of the referee's services exceeds that amount. And the Commission has proposed an additional limitation on the amount of the fee of the probate referee: The Commission proposes that the amount of compensation the probate referee may receive for the sale of listed stock be limited to \$250.

Attorneys who responded to the Commission's Questionnaire were almost evenly divided on the merits of this staff recommendation. The attorneys were asked whether they believe that the statutory fee for estates in excess of \$10 million is excessive. Few of the attorneys had ever probated an estate in excess of \$10 million. Of those answering the question (13.4% did not answer), 42.3 percent believe the statutory fee for an estate of \$10 million is excessive and 44.3 percent do not.

#### Should the Written Contract Requirement be Clarified and, If So, How?

Business and Professions Code Section 6148 requires a written fee contract in any case where "it is reasonably foreseeable that total expense to a client, including attorney fees" will exceed \$1,000. 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 fees applicable to the case (which, for probate, presumably could be based on a percentage of the estate).

- (2) The general nature of the legal services to be provided.
- (3) The respective responsibilities of the attorney and the client.

Section 6148 contains various exceptions to its application. There is no exception provided for probate of a decedent's estate. As one consumer representative pointed out at the January meeting, the required contents of the written contract are not limited to fee matters.

The written contract statute is discussed in some detail at pages 24-27 and pages 90-92 of the background study.

The staff recommends that it be made clear that Section 6148 applies to formal probate proceedings. Special provisions perhaps should be drafted to cover matters unique to probate. For example, the statute might specifically provide that the contract include the following:

- (1) If the statutory fee is to be charged, a statement that the fee will be the statutory fee, specifying the manner in which the statutory fee is computed, and such additional reasonable fee as is determined by the court for extraordinary services.

- (2) A statement that the rates set forth in the statute are the maximum limits for the attorney fee, and that the attorney and client may negotiate a lower fee. (The substance of this statement is taken from a recently enacted attorney fee statute discussed below.)

- (3) A statement of any additional services to be provided for assets not in the probate estate and the charge for such services.

Under existing California law, the attorney fee for probate is subject to negotiation. The statutory fee is the maximum fee. See the discussion on pages 104-106 of the background study.

Business and Professions Code Section 6146 provides a statutory percentage fee schedule of the maximum contingent attorney fee that can be charged the client in an action for injury or damage against a health care provider based upon such person's alleged professional negligence:

- 40 percent of the first \$50,000 recovered.
- 33 1/3 percent of the next \$50,000 recovered.
- 25 percent of the next \$500,000 recovered.
- 15 percent of any amount of the recovery that exceeds \$600,000.

If a fee is on a contingency fee basis, a written contract is required. See Business and Professions Code Section 6147. Section 6147 lists various matters that must be covered by the contract. If the fee is subject to the provisions of Section 6146 (statutory fee schedule of maximum fee for action against health care provider for malpractice), Section 6147 requires that the contract include "a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate."

The background study notes that a similar disclosure is required in a printed or form agreement for the compensation to be paid to a real estate licensee for a sale of residential property (not more than four units) or a mobile home.

The representatives of consumer groups at the January meeting were strongly of the view that this type of disclosure is necessary to protect uninformed consumers of their right to seek to negotiate the attorney fee for probate.

#### Compensation for Services in Regard to Nonprobate Property

The American Bar Association takes the position that attorneys who provide services in regard to nonprobate property should be compensated reasonably for those services. The staff recommends that this right be recognized by an express statutory statement. If the estate is a probate estate, compensation for services in regard to nonprobate property should be allowed only if provided for in a written contract between the personal representative and the attorney.

#### Effect of Provision in Will Concerning Attorney Compensation

The existing California statute deals with the effect of provisions in the will concerning the compensation of the personal representative. Presumably these provisions apply to the estate attorney since the attorney compensation statute incorporates by reference the provisions relating to compensation of the personal representative. See the discussion on pages 95-96 for discussion of existing law.

The staff recommends that the substance of the existing law be continued without change.

Attorney Performing Some or All of Normal Duties of Personal Representative

Compensating attorney who performs some of normal duties of personal representative. The staff recommends that the statute spell out the requirements for an agreement between attorney and client pursuant to which the attorney will perform some of the duties of the personal representative. To reduce the burden on the courts and the expense to the parties, the staff would not require that the agreement be disclosed to the court and be approved by the court, but any interested person should be permitted to obtain court review of the agreement upon petition to the court. Should the statute include a provision that the attorney charge for performing functions of the personal representative be at an hourly rate appropriate for clerical services rather than the usual professional fee for the attorney? For further discussion, see pages 92 and 93 of the background study.

Compensating attorney who serves as personal representative. The American Bar Association takes the position that an attorney who serves as personal representative is entitled to compensation both for legal services and for services as personal representative. The existing California rule is that the attorney who serves as personal representative is entitled to compensation as personal representative but not compensation for services as estate attorney.

The staff recommends that the statute provide that the attorney who serves as personal representative is entitled to compensation both for legal services and for services as personal representative where the estate value is less than \$300,000. It is difficult to find a trust company that will serve as personal representative on an estate under \$300,000, but there may be circumstances where the selection of the estate attorney as the personal representative is necessary. Providing adequate compensation where the estate value is less than \$300,000 will make it more likely that the estate attorney will be willing to serve in the dual capacity as estate attorney and personal representative for one of these relatively small estates.

This matter is discussed in the background study at pages 94-95. The policy issue is a difficult one. The Stein Study (attached as Appendix 5 to Memorandum 87-100) discusses the advantages and disadvantages of the personal representative also serving as estate attorney. See pages 1163-1172 of the Stein Study.

#### Statutory Statement of What Constitutes "Extraordinary Services"

Organizations representing probate lawyers and representatives of consumers appear to be in agreement that it would be desirable to have a statutory statement of what constitutes "ordinary services" and what constitutes "extraordinary services." See background study at pages 12-16 and 107-108.

The staff recommends that such a statutory statement be provided. If the Commission agrees, the staff will prepare such a statement for consideration at a future meeting.

Should the statutory statement be subject to the power of the Judicial Council (but not local court rules?) to establish flat amounts for such services as real property sales or federal estate tax returns? Should such amounts be allowed without consideration of the compensation provided for "ordinary services" under the statutory fee schedule and the ordinary services actually rendered?

#### Consideration of Statutory Compensation in Determining Whether to Allow Additional Compensation for Extraordinary Services

The staff recommends that the statute contain an express statement that additional compensation for extraordinary services is to be allowed only to the extent that the statutory compensation does not provide reasonable compensation for all the services provided. This is consistent with existing court rules and decisions. See discussion in background study at pages 17-19 and page 108.

#### Allowance for Use of Paralegal Assistants

The staff recommends that the statute include a clear statement that on a petition for additional compensation for extraordinary services, the compensation to be allowed includes compensation for

services rendered by a paralegal and the compensation in such a case is to be allowed at a reasonable paralegal rate. This is consistent with legislation enacted in 1987. For further discussion, see the background study at pages 108-109.

Respectfully submitted,

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