

#L-1036

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02/24/88

First Supplement to Memorandum 88-12

Subject: Study L-1036 - Attorney Fees in Probate

Attached as Exhibit 1 is a letter from the Estate Planning, Trust and Probate Law Section giving the views of its Executive Committee on the issues raised in Memorandum 88-12.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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February 19, 1988

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STATE BAR OF CALIFORNIA

FEB 24 1988

RECEIVED

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

Re: Memorandum 88-12 -
Attorney Fees in Probate

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, discussed at its February 6 meeting Memorandum 88-12 and the various proposals set forth therein. This letter summarizes the views of the Executive Committee on each of the issues raised in the memorandum.

1. Standards or Factors to be Taken into Consideration in Determining Amount of Attorney Fee: The Executive Committee supports the proposal to have a statutory statement of the factors to be taken into consideration in determining what constitutes a reasonable fee in situations where that fee is not a statutory fee. This should be based upon the various statutory statements and ABA criteria mentioned in Memorandum 87-100 at pages 46 through 53.

2. Minimum Fee for Small Estates: The Executive Committee opposes any minimum fee for a probate estate. Unless there are particular complications, when assets are under \$60,000, they will not be probated. Probate Code Section 13100 and subsequent provide for transfer without a formal probate of assets valued at \$60,000 or less. The minimum fee, for example, of \$750 would relate only to an estate of \$20,000; and unless there are unusual circumstances, an estate of that kind would not be probated. If it were, there would probably be a basis for extraordinary fees because of the complications.

3. Power of Attorney and Client to Agree to Higher Fee Than Statutory Fees in Small Estates: The Executive Committee opposes that proposal. One of the consumer benefits to a statutory fee system is to benefit the consumer in the handling of smaller estates where the fee may not be adequate. Most attorneys take smaller estates with the expectation that they can occasionally handle larger estates where the fee is more commensurate with the value of services. A provision, for example, allowing the attorney and client to negotiate for a fee in excess of this statutory fee for a specified amount not to exceed \$2,000, for example, really is meaningless. The statutory fee at \$60,000 would be \$1,900, for example. Once again, that size of estate normally would not be probated.

The Executive Committee does not support any change in Probate Code Section 903.

4. Using Net Rather Than Gross Estate as Basis for Computing Statutory Fee: The Executive Committee agrees with the Staff that this is not an appropriate change. If any such change were made, a whole readjustment of the statutory fee schedule would be necessary.

5. Modification of Statutory Fee Schedule: The Executive Committee supports the elimination of the 4% fee for the first \$15,000 of probate assets. As discussed above, it will be rare that there is a \$15,000 probate. The extra \$150 is not significant, and its elimination would simplify computation of fees and also allow an overall reduction of fees.

6. Power of Court to Award Less Than Statutory Fee: The Executive Committee strongly opposes the proposal to allow the court to reduce statutory fees. As a practical matter, statutory fees are a maximum for statutory services. As indicated elsewhere, in many cases the normal hourly time charge for these services would greatly exceed the statutory fee; but because only statutory services are involved, there is no way of being paid for that additional time.

A great many services rendered in a probate are not set forth in the petitions filed with the court, including various disputes among family members, efforts to locate assets, lack of records by the decedent, difficulty on certain creditor's claims as to proof of the claim, research done on miscellaneous matters, communications with beneficiaries, etc. If the court had the right to reduce statutory fees where "clearly excessive", "clearly unreasonable" or "unconscionable", it would likely result in the statutory fee in every estate, or at least in every larger estate, having to be justified on an hourly or other basis in great detail.

This would destroy the concept of statutory fees as a simple reasonable compensation. Even in large estates, there are often exceedingly complex property issues because of various joint ventures, limited partnership interests, general partnership interests, closely held corporations and other assets which require a great deal of additional work. The amount of work involved in determining values of these with or without a probate referee often is not reflected in court filings.

7. Statutory Fee on Estates Over \$10,000,000: The recent legislation providing for a reasonable fee in estates in excess of \$25,000,000, as Memorandum 88-12 indicates, provides a solution only in exceedingly rare cases. There are relatively few estates over \$10,000,000, and in most of those estates the asset valuation is very complex and a great deal of time is expended in determining values for inventory and tax purposes dealing with various business entities, etc. The Executive Committee strongly opposes any change in the existing fee structure which would reduce the statutory fee concept to an estate with a maximum of \$10,000,000. Estates of that size have very sophisticated tax and valuation problems. The statutory fee remains appropriate for estates under \$25,000,000.

8. Requirement of Written Fee Contract: The Executive Committee believes that the law should be clarified as to the applicability of Business and Profession Code Section 6148 to probate and other situations where attorney's fees are either fixed by statute or by court, such as workman's compensation cases, bankruptcy cases and others. The Executive Committee believes that a separate section dealing with probate fees is inappropriate.

Subject to any limitations imposed by Business and Profession Code Sections 6068(e) and 6149 and Evidence Code Section 952, dealing with confidentiality, the Executive Committee believes that Section 6148 should be modified by changing subsection (a) to read "in any case not coming within Section 6147, including cases where the fee is set by statute or by court, in which it is reasonably foreseeable that the total expense to a client, including attorney's 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:".

9. Compensation for Services in Regard to Non-Probate Matters: The third sentence in Memorandum 88-12 under this heading refers to an agreement between the attorney and the "personal representative". Since the personal representative only is involved in the probate proceedings, any such written agreement for services relating to non-probate matters would not be with the personal representative but would rather be with the individual client. It is the view of the Executive

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Committee that no specific statute is required to recognize this right in making fee agreements with clients for services which are not part of the probate procedure.

10. Effective Provision in Will Concerning Attorney Compensation: The Executive Committee agrees with the Staff that the existing law should be retained, although it may be appropriate to put a cross-reference in the Comment that the right of a personal representative to waive compensation under the will and take the statutory compensation also applies to the attorney.

11. Compensating Attorney Who Performed Some of Normal Duties of the Personal Representative: A personal representative can hire anyone he or she wishes to perform the duties of the personal representative, including accountants, bookkeepers or others. Payment for those services should be by private agreement between the personal representative and the person employed. Any compensation for those services would be paid by the personal representative from his or her statutory compensation or from personal funds. No statute recognizing this is deemed necessary. The existing law works satisfactorily.

12. Compensating Attorney Who Serves as Personal Representative: The Executive Committee opposes the staff recommendation that the statute allow the attorney who serves as personal representative to double compensation, that is, for legal services and as personal representative, where the estate is less than \$300,000. The statutory fee concept is based upon an averaging of compensation over all estates handled in the course of a year, for example. The Executive Committee is not aware of clients having difficulty in finding attorneys to handle estates under \$300,000, even though the attorneys indicate that in many cases they do not cover their normal time charges in handling such an estate. A will, of course, can provide that an attorney who is named as personal representative can act in both capacities and receive both fees. Absent such a specific agreement with the testator, no change in law is deemed appropriate.

13. Statutory Statement of What Constitutes "Extraordinary Services": While some elaboration on this statute might be appropriate as to what constitutes fees for extraordinary services, any attempt to make the list all inclusive is opposed. In a given estate, what may be ordinary services can in other estates because of undue complexity become at least in part subject to extraordinary services. Any effort to delineate what is ordinary and what is extraordinary on a statutory basis

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in great detail is likely to result in unfairness in given situations. Therefore, the Executive Committee opposes the Staff developing a detailed statement in the statute of what constitutes "ordinary services" and what constitutes "extraordinary services." At most, the statute should offer suggestions or guidelines as to the type of things that fall into either category.

The Executive Committee strongly opposes the Judicial Council establishing flat amounts for services, such as real property sales or federal estate tax returns. The complexity, for example, on a federal estate tax return can vary tremendously when the return, for example, lists three assets subject to tax or when it lists 50 assets subject to tax. Similarly, the complexity can vary greatly where there are three debts or 50 debts. The complexity further can vary greatly depending upon whether there are closely held business interests, partnership interests or other assets which are difficult to value for tax purposes as opposed to listed securities. Also, the risk factor for the attorney varies substantially in preparing the return depending upon the size and nature of the assets subject to tax. Similarly, in real property sales, there can be a great variance in the nature of the negotiations, the tax issues, the title problems, etc., that may develop. Any standard fee would be inappropriate.

14. Consideration of Statutory Compensation in Determining Whether to Allow Additional Compensation for Extraordinary Services: The Executive Committee opposes the staff recommendation 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 services provided. Estate of Walker, 221 Cal.App.2d 792, 34 Cal.Rptr. 832 (1963), referred to in Memorandum 87-100, Note 38, is well known and need not be codified. Further, that case simply pointed out the fact that under Section 910 the allowance of fees for extraordinary services is in "such further amount as the court may deem just and reasonable," thereby making the allowance discretionary with the court as to extraordinary services. The Executive Committee believes that existing case law is adequate in this area and no specific statute should be added covering this point. Further, to suggest, as the Staff does, that the proposed statute would allow additional compensation for extraordinary services "only to the extent statutory compensation does not provide reasonable compensation" would involve a justification of the statutory compensation in every estate where extraordinary fees were sought, including presumably complexities of the matters,

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hours spent and other multiple factors. Such an approach would substantially undermine the concept of statutory compensation for statutory services.

15. Allowance for Use of Paralegal Assistants: The Executive Committee supports the recommendation of the Staff that the statute include a clear statement that in a petition for additional compensation for extraordinary services the compensation to be allowed includes compensation for services rendered by a paralegal. This proposal was enacted based upon a conference of delegates' resolution at the State Bar Convention. The conference resolution, however, did not single out hours as a required criteria in seeking compensation for paralegal services. The Executive Committee feels that that single factor is not appropriate and the general factors relating to determining reasonable compensation for attorneys for extraordinary fees should also apply to paralegals.

Respectfully submitted,



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for the Executive Committee,
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CAC:vjd

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