

4/28/88

First Supplement to Memorandum 88-32

Subject: Study L-1036/1055 - Personal Representative and Attorney Fees  
in Probate (State Bar & Collier letters)

Attached to this Supplement as Exhibits 1 and 2 are two letters from Charles Collier -- one for the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, and one for himself. Mr. Collier's problems with the staff draft (attached to basic memo) are similar to Valerie Merritt's (Exhibit 2, 3rd Supp., Memo 88-33). They both say Section 10810 (attorney fee is "matter of agreement" not to exceed statutory fee) is inconsistent with the Commission's decision to keep the statutory fee. The staff disagrees. The staff believes that Section 10810 continues existing law, states the obvious, is not inconsistent with a statutory fee, and is consistent with the Commission's decision to require the attorney to disclose to the personal representative that the fee is negotiable.

After protesting that Section 10810 is inconsistent with the Commission's decision, both Mr. Collier and Ms. Merritt propose an alternative: Mr. Collier would say in the statute that "an attorney may accept less than the statutory compensation." Ms. Merritt would say in the statute that "[a]n attorney may, but need not, agree to waive part or all of the statutory compensation." These alternatives are substantively the same as Section 10810 -- they simply state the rule from a different perspective.

The real issue is whether the statute should emphasize negotiability or the statutory formula. The staff draft emphasizes negotiability. Since we require disclosure of negotiability, it seems proper to make negotiability clear in the statute. Nevertheless, the staff will prepare a revised draft for the meeting, phrased more nearly as suggested by Mr. Collier and Ms. Merritt.

The last sentence of the basic memo is erroneous and should be disregarded. It refers to a subdivision that was deleted.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

EXHIBIT 1

IRELL & MANELLA

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1800 AVENUE OF THE STARS, SUITE 900

LOS ANGELES, CALIFORNIA 90067-4276

(213) 277-1010 AND 879-2600

CABLE ADDRESS IRELLA LSA

TELEX 181258 TELECOPIER (213) 203-7199

ORANGE COUNTY OFFICE  
840 NEWPORT CENTER DRIVE, SUITE 500  
NEWPORT BEACH, CALIFORNIA 92660-6324  
TELEPHONE (714) 760-0991

NORTHERN CALIFORNIA OFFICE  
545 MIDDLEFIELD ROAD, SUITE 200  
MENLO PARK, CALIFORNIA 94025-3471  
TELEPHONE (415) 327-7250

WRITER'S DIRECT DIAL NUMBER

April 26, 1988

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

VIA FEDERAL EXPRESS

Re: Memoranda 83-32 and 88-33

Dear John:

As indicated in a separate letter written on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, it is the feeling of the Executive Committee that Memoranda 88-32 and 88-33, and the supplements thereto, do not reflect the decision of the Commission to retain statutory fees in California, which decision was unanimous.

The following are personal comments and suggestions relating to compensation for the personal representative and attorneys:

Memorandum 88-32

1. Section 10804: The point raised by the Staff that existing Probate Code Section 902 is limited to tax experts and should be broadened is correct. I would suggest that there be added at the end of proposed Section 10804 the following additional language:

"and may employ and retain such other experts and technical advisors as may be required."

This language leaves open whether said services are to be paid for by the personal representative out of his or her own compensation or whether those services can be paid from estate funds.

The Comment, of course, has to be modified accordingly to reflect this change.

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2. Section 10810: This section should be deleted in its entirety. However, the last sentence of the section would be set forth in a separate section.

3. Section 10811: This section which defines compensation for ordinary services should be renumbered Section 10810; and, as such, the reference to Section 10810 in the first line should be deleted.

4. New Section 10811: I would suggest that a new Section 10811 be added which would provide essentially as follows:

"An agreement between the personal representative and the attorney for higher compensation for the attorney than that permitted under this chapter is void. While an attorney may accept less than the statutory compensation for services, the personal representative has no duty to negotiate attorney compensation less than the statutory compensation."

This would be followed by a Comment which would read at least in part as follows:

"Comment: Statutory compensation is the legal and standard compensation for ordinary services and constitutes reasonable compensation for those services. Nothing prevents the attorney from agreeing to take less than the statutory compensation, however."

5. Section 10813: The introductory clause "Subject to Section 10810" should be deleted.

6. Section 10816: It is suggested that this section be revised to read as follows:

"§ 10816. Contract to Perform Ministerial Functions of Personal Representative

10816. (a) 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 ministerial acts in the administration of the estate and to compensate such person out of the personal representative's own funds.

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(b) The employment referred to in subdivision (a) need not be approved by the court."

7. Section 10820: It is suggested that (a)(1) be modified by adding at the end thereof the following additional words: "or the attorney."

It is suggested (a)(2) be modified by providing at the beginning "The personal representative or the attorney for the personal representative."

It is also suggested that the final phrase in that section "and the personal representative shall pay the attorney that amount forthwith" be deleted, as there are situations where there are not sufficient assets available to pay such fees forthwith.

8. Section 10821: It is suggested that the final phrase in subsection (c) which reads "and the personal representative shall pay the attorney that amount forthwith" be deleted. It is also suggested that the Comment be shortened to simply state that final compensation is not to be paid until there is a final account or a final distribution and that that is in accord with the Probate Policy Memoranda in most counties.

9. Section 10822: It is suggested that this section be rewritten to either follow closely the language from the Los Angeles County Probate Policy Memorandum 16.02 or be based on California Rules of Professional Conduct, Rule 2-107. The introductory clause might read as follows:

"In determining what is just and reasonable compensation for extraordinary services, the court shall consider all of the relevant circumstances, which may include the following:"

Subdivision (f) appears to require detailed justification of a statutory fee involving time spent, results achieved, nature and size of the estate, etc., as a basis for asking for extraordinary fees. While the court is given discretion to determine what is appropriate for extraordinary fees requiring an attorney by statute to justify the statutory fees as a basis for asking for extraordinary fees seems inappropriate and contrary to the concept of statutory fees being reasonable fees for statutory services. This section, I believe, needs to be rewritten in its entirety.

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10. Section 10824: Subparagraph (b) should be reworded to state "Present payment will benefit the estate or the beneficiaries of the estate." In many cases, compensation is allowed for tax purposes at the end of a tax year to absorb estate income so that it will not be taxable, and the section should reflect that.

Memorandum 88-33  
and Supplements

1. Section 6148: It is suggested that in subsection (a) the first line be modified to read as follows:

"In any case not coming within Section 6147, including cases where the attorney's compensation is determined by the court or by statute, in which it".

It is further suggested that (a)(1) be modified to read as follows:

"(1) The hourly rate and other standard rates, fees and charges applicable to the case and where the compensation is determined by statute a statement that lesser compensation may, but not need, be agreed to by the attorney, and where so provided, that the compensation will be determined by the court."

It is suggested that (a)(4) be deleted in its entirety.

It is suggested that in (c) the second sentence be modified by deleting the words in the third line of that second sentence "but may be lower than."

The proposed additional language in (d)(5) relating to the public officers set forth in the Second Supplement is satisfactory.

2. Section 6148.5: This section should be deleted in its entirety, as there is no reason to single out probate fees from other fees that may be set by the court or by statute. Statutory fees by definition are legislatively determined reasonable fees, and there should be no implication that they represent other than the usual, legal and standard fee for services.

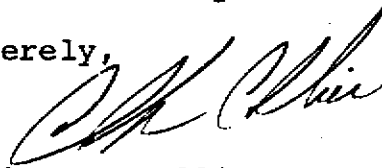
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As noted above, these are personal comments and suggestions relating to the above-mentioned memoranda. It is believed that they are consistent with the vote of the Commission to retain statutory fees, which vote was unanimous, the vote of the Commission to require written agreement for fees even though otherwise fixed by statute, and the vote of the Commission on a four-to-three vote to require some type of disclosure that an attorney could perform services for less than the statutory fee.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: D. Keith Bilter, Esq.  
James V. Quillinan, Esq.  
James D. Devine, Esq.  
James Opel, Esq.  
Irwin D. Goldring, Esq.  
Valerie Merritt, Esq.

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



555 FRANKLIN STREET  
SAN FRANCISCO, CA 94102-4498  
(415) 561-8200

April 26, 1988

*Chair*  
LLOYD W. HOMER, Campbell  
*Vice-Chair*  
D. KEITH BILTER, San Francisco

*Advisors*  
HERMIONE K. BROWN, Los Angeles  
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JAMES A. WILLETT, Sacramento  
JANET L. WRIGHT, Fresno  
DIANE C. YU, Oakland

VIA FEDERAL EXPRESS

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

Re: Memoranda 88-32 and 88-33

Dear Commissioners:

The Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar of California, has reviewed the staff proposals contained in Memoranda 88-32 and 88-33 as supplemented. The Executive Committee believes that the staff draft does not reflect the decisions of the Law Revision Commission to retain statutory fees in California. That decision by the Commission was unanimous. The staff draft essentially creates a negotiable fee in California with the statutory amounts being a cap or maximum fee that could be charged. For example, proposed Section 10810 states that "the compensation of the attorney for the personal representative is a matter of agreement between the attorney and the personal representative, but the compensation shall not exceed the amount allowed under this chapter." That language effectively makes the fee a negotiated fee (presumably a reasonable fee) and eliminates the statutory compensation as the fee for services. Instead, it becomes a cap on negotiated or reasonable fees.

The Executive Committee believes that the staff draft does not reflect the decisions of the Commission and that the matter should be referred back to the Staff to redraft the provisions relating to statutory attorney's fees, the written agreement and the disclosure.

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Since the approach taken on the staff draft is not consistent with the Commission's decisions, the Executive Committee has taken no position as to specific changes which should be made in the draft itself since this material relating to attorney's fees should be reworked and redrafted by the Staff.

Sincerely,



Charles A. Collier, Jr.  
For the Executive Committee,  
Estate Planning, Trust and  
Probate Law Section, State  
Bar of California

CAC:vjd

cc: D. Keith Bilter, Esq.  
James V. Quillinan, Esq.  
James D. Devine, Esq.  
James Opel, Esq.  
Irwin D. Goldring, Esq.  
Valerie Merritt, Esq.