

Third Supplement to Memorandum 88-33

Subject: Study L-1036 - Attorney Fees in Probate

Written Contract Between Public Administrator and His or Her Attorney

Attached as Exhibit 1 is a letter from James R. Scannell, Public Administrator of the City and County of San Francisco. He has reviewed the Second Supplement to Memorandum 88-33 and suggests that new paragraph (5) of Section 6148 (set out in the Supplement) be revised to read in substance:

(5) Services provided to a public officer or employee by an attorney who is an officer or employee of the same public entity.

This revision would mean that where legal services are provided to an officer or employee of the public entity that employs the attorney, the written contract requirement would not apply. However, if an attorney (County Counsel) provides legal services to another public entity (independent water district), the written contract requirement would apply. The staff has no problem with the revision suggested by Mr. Scannell. It would be very unlikely that one public entity would hire another public entity to provide legal services without a written fee contract. The revised language makes clear, however, that one department or agency of a public entity need not have a written fee contract to use the legal services provided by another department or agency of the same public entity. That is the clarification sought by Mr. Scannell, and the revised language would make the clarification he seeks.

Comments of Valerie J. Merritt Concerning Memorandum 88-32 and
Memorandum 88-33 and Supplements Thereto

Attached as Exhibit 2 is a letter from Valerie J. Merritt. She writes as an individual and the views expressed are her own, not the official position of any bar committee or section.

The letter concerns (1) the statutory provisions drafted by the staff to implement the Commission's decision to require disclosure that

the probate attorney fee is subject to negotiation and (2) the statutory provisions drafted by the staff relating to the probate attorney fee.

The letter takes the position that the statutory provisions relating to the probate attorney fee should be essentially parallel to those governing the fee of the personal representative.

The provisions of the staff draft governing the fee of the personal representative have the following features:

(1) The personal representative is entitled to the statutory fee and an additional fee for extraordinary services.

(2) No contract is required and no disclosure of the fee system is required to heirs or beneficiaries, but any contract for a fee greater than the fee provided by statute is void.

(3) The personal representative may waive the fee.

The provisions of the staff draft governing the fee of the attorney have the following features:

(1) The attorney and the personal representative must have a fee contract as required by the recently enacted provisions of the Business and Professions Code. If they do not have a contract, the attorney is entitled to a reasonable fee, which may be less than the statutory fee.

(2) The attorney is required to disclose that the fee is a matter of negotiation between the attorney and client but may not exceed the fee provided by statute.

The difficulty in drafting the provisions relating to the fee of the probate attorney is created by the interrelationship between (1) the statutory requirement recently enacted that requires a written fee agreement between the attorney and client and (2) the statutory provisions that fix the fee for ordinary probate services and provide that a contract for a greater fee is void.

The disclosure requirement in the staff draft is limited to disclosure by the probate attorney. It does not deal with all other situations (nonprobate situations) where there is some statutory provision that applies to the amount of or the manner of fixing an attorney fee. A CEB publication lists well over 300 statutes that provide for the fixing of fees. But the only situation of which we are aware that is comparable to the probate attorney fee scheme is the

statutory fee schedule for legal services in connection with certain actions against health care providers. The Legislature has already dealt with the contract and disclosure requirement in connection with that situation: the statute requires that a disclosure be made that the statutory fee is a maximum fee and is subject to negotiation. (The relevant statutory provisions are attached to Memorandum 88-33.) The table in the CEB book indicates that the other statutes permit or require the court to fix a reasonable fee and do not provide a statutory fee schedule. To undertake to review all these statutes would be a substantial undertaking, and one that the Commission has not been authorized to make.

The phrasing of the disclosure requirement for probate attorney fees is probably the most important matter for review by the Commission. The staff has drafted a proposed section—Section 6148.5—in Exhibit 1 to Memorandum 88-33 for consideration by the Commission.

One alternative to the staff draft would be to provide for a disclosure along the lines of that provided by Section 6147(a)(5) of the Business and Professions Code (attached as Exhibit 2 to Memorandum 88-33). For example, a disclosure statement drawn along these lines might read:

6148.5. If the fee for legal services covered by a contract required by Section 6148 is subject to the provisions of [probate attorney fee statute], the contract shall include the substance of the following statement: "The fee schedule for ordinary probate services set forth in [relevant Probate Code section] sets the maximum limit for the fee for ordinary services, and the attorney and client may negotiate a lower fee."

This would alert the client to the fact that the fee is a matter that can be negotiated but would not provide as much information as the staff proposed provision in Exhibit 1 to Memorandum 88-33. For example, the statement does not deal with the fee for extraordinary services.

Another possible way to phrase the disclosure requirement is set out below:

"The fee for ordinary probate legal services is fixed by statute, but the attorney and client may agree to a lower fee."

This short statement may be sufficient, although it does not give the client the information about the statutory fee that would be given by the staff proposed statement set out in Exhibit 1 to Memorandum 88-33. The statement is somewhat misleading. It does not recognize that the client and attorney can agree, for example, to a fee computed on an hourly basis and can agree that the hourly contract fee will cover both ordinary and extraordinary services so long as it does not exceed the maximum fee allowed by the statute.

Valerie J. Merritt would phrase the disclosure statement to state that the "attorney may, but need not, agree to waive part or all of the statutory compensation." This "waiver" concept would seem to make the disclosure confusing to the average personal representative, and it does not recognize the recently enacted requirement of existing law that the attorney and client make a fee agreement that states the fees and charges, the nature of the legal services, and the respective responsibilities of the attorney and the client.

There are a number of other suggestions in the letter from Valerie J. Merritt. These go to the manner in which the statute should be phrased and to various details of the statute. They can be discussed at the meeting in connection with the relevant provisions of the staff draft.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

City and County of San Francisco

PUBLIC ADMINISTRATOR

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April 22, 1988

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CA LAW REV. COMM'N

APR 25 1988

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Re: Second Supplement to 88-33IN REPLY REFER
TO OUR FILE NO

Dear Mr. DeMouilly:

Thank you very much for the changes made in 6148
 (5) "Services provided to a public officer or
 employee by an attorney who is a public officer or
 employee."

Is it possible that by using the term "employee"
 that the question of the personal representative
 (Public Administrator) sharing in the fees paid to his
 attorney would be raised? (Est of Parker, 1926-200
 Cal 132).

It might avoid future litigation by adding "of the
 public entity" at the end of the sentence, following
 the word "employee."

If the attorney was not employed by the public
 entity, then there should be negotiations and
 contractual agreement of fees.

Very truly yours,

JAMES R. SCANNELL
 Public Administrator/
 Public Guardian/
 Public Conservator

JRS:lca

cc: Joanne Ringstrom
 President
 PA/PG/PC Association

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April 18, 1988

CA LAW REV. COMM'N

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

Re: Memorandum 88-32 and Memorandum 88-33
 and First Supplement to It

Dear Commissioners:

I am writing this letter as an individual and the views expressed in this letter are my own. They are not an official position of any bar committee or section, and should not be so attributed. Specifically, I wish to point out that they are not the official views of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California.

I attended a meeting of the Commission on March 11, 1988, and heard the discussion at that meeting regarding attorneys' fees in probate proceedings, together with the informal report of the Commission, its staff, and others as to what was decided on March 10, 1988. When I received the minutes of the March 10-11, 1988 meeting, I found them to be a fair reflection upon what had happened. However, I found Memorandum 88-32 and Memorandum 88-33 to be greatly inconsistent with the decisions of the Commission and in need of major revision.

Memorandum 88-32

The Commission unanimously decided to retain the statutory fee concept. Memorandum 88-32 implements this decision with regard to the compensation of the personal representative, but does not implement the decision with regard to the compensation of the estate attorney. Since the same system was decided upon by the Commission for both the representative and

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the attorney, the sections to implement the Commission's decision should be essentially parallel, if not identical in many respects. Such is not the case. Some specific comments follow.

1. Section 10810 should read virtually the same as Section 10800. Such is not the case. The proposed Section 10810 should be deleted and Section 10811 should be renumbered 10810. A conforming technical change would then be to delete the reference to 10810 in that section and to add a cross-reference to Business and Professions Code Section 6148. The comment for the section needs to be completely rewritten. In the process, the comment should indicate that this is a restatement of existing law, and that the statutory fee system is the standard compensation for the estate attorney.

2. Proposed Section 10812 should be numbered 10811. The cross-reference to 10810 should be removed; the cross-reference to 10811 should be changed to 10810, and the cross-reference to 10813 should be changed to 10812, Section 10813 should be renumbered to 10812, and the cross-reference within it altered.

3. There should be a new Section 10813 entitled "Agreement for Higher Compensation Void; Agreement for Lower Compensation Valid." There should be a new Section 10813 to read 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. An attorney may, but need not, agree to waive part or all of the statutory compensation. The personal representative shall have no duty to seek any compensation of the estate attorney other than that permitted under this chapter.

The reason for the insertion of these revisions in this place is to parallel the provisions governing the compensation of personal representatives, as was decided by the Commission. My proposed language contains a second sentence which is not currently part of the statutory scheme for personal representatives. If representatives and estate attorneys are both subject to the statutory compensation system, I recommend that either the second sentence be present in both 10803 and 10813 or omitted from both.

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4. The comment to new Section 10813 should indicate that this continues in substance the principle of former Section 903, which may have been made applicable to estate attorneys may by the first sentence of former Section 910. It makes it clear that while the attorney may agree to waive part or all of the compensation, this is not required and a representative is not violating any duty to the estate or its beneficiaries by failing to seek or obtain such an agreement.

5. There should be an addition to Section 10820(a)(2) to indicate that "The personal representative or the attorney for the personal representative may file . . ."

6. While it is present in current law, both Sections 10820 and 10821 should have the final clause "and the personal representative shall pay the attorney that amount forthwith" deleted. This clause adds nothing to the court order requiring the personal representative to pay the attorney, and has led to disputes of when the amount should be paid in estates which do not have sufficient cash on hand to comply with the court order.

7. The comment to Section 10820 should be revised to cross-reference the provisions regarding the priorities for payment of expenses of administration and other claims against the estate. The same should be done in the comment to Section 10821.

8. The comment to 10821 is unnecessarily long. Rather than quoting the probate rules of virtually every county, it ought to be sufficient to say that the overwhelming majority of counties have similar rules.

9. Section 10822 should have the introductory language changed to read as follows: "In determining what is just and reasonable compensation for extraordinary services, the court shall consider all the relevant circumstances, which may include the following:". The categories listed in (a) through (j) are fine, so far as they go. However, the listing of factors to be considered should be altered to either more closely parallel the canons of ethics or the case law. This will avoid the implication that this new language is a change in the law.

Memorandum 88-33

Memorandum 88-33 goes far beyond the mandate given for revising Section 6148 in the Business and Professions Code. The decision of the Commission was to amend Section 6148 in two ways. One was to clarify that fees set by statute or by court are

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subject to the requirements of Section 6148. A second was to require attorneys to let clients know that they may negotiate a lower fee than the statutory fees. My recollection is that in both cases there was to be no singling out of probate attorneys per se.

The changes to Section 6148 are not objectionable, insofar as they go. However, new Section 6148.5 is very objectionable because it singles out attorneys who render services to a personal representative for special treatment. The special treatment is unwarranted. Thus, I strongly recommend that Section 6148.5 not be adopted and that Section 6148 be further amended to implement the Commission's decisions.

I recommend adding to subdivision (1) of 6148(a) to indicate that the attorney must include a statement to the effect that an attorney may agree to accept less than the standard rates or fees which may be set by statute or court rule. The proposed Subsection (4) should be deleted and in its place could be a proposed Subsection (4) which would address the problems of public administrators and county counsel discussed in the first supplement.

There is language in both Memorandum 88-33 and in the exhibit which is not appropriate. I do not believe it is appropriate to talk of lawyers disregarding statutes. There may be disagreements as to what the law now requires, but I believe that most lawyers do not disregard statutes. Similarly, while I believe it's appropriate to clarify that reasonable fees (which are awarded when the statute had not been complied with) shall not exceed the fee prescribed by statute or court rule, the words "but may be lower than" are unnecessary since the whole point of the provision is to create a maximum. If a reasonable fee is determined by the court to be lower, that is the penalty on the attorney who failed to comply with the statute.

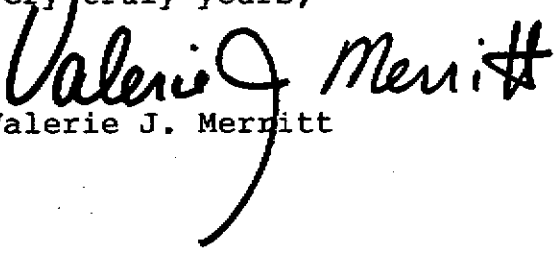
Furthermore, when Section 6148 is altered and 6148.5 is removed, the comment to Section 6148.5 should not be added to the comment to Section 6148. Once again, the comment is way too long. If the language is generalized, much of the comment is inapplicable. The provisions of the sample employment agreement were found in a text which is reviewed and updated annually, and should not be in part of a comment to a statute which will not be subject to future revision. The most that needs to be said is that where an attorney's fees are set by court or by statute, an attorney is obligated to tell the client that the attorney may

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agree to fees which are computed on a different basis. Thus, an attorney can agree to a reasonable fee which is less than the statutory amount.

I have no problem with special provisions exempting the public administrator and the county counsel from the language of Section 6148. However, once again, I think it would be desirable to broaden the language so that it includes any county public agency contracting with county counsel.

Very truly yours,


Valerie J. Merritt

VJM:db