

## Memorandum 88-41

Subject: Study L-1055 - Statutory Scheme for Attorney Fees in Probate

The Estate Planning, Trust and Probate Law Section opposes the staff prepared draft (attached to Memorandum 88-32) that seeks to combine the new written fee contract requirement concept with the statutory fee concept. The staff draft regards the written contract requirement as one that assumes that the parties will reach an agreement that will be reflected in the written contract. The Commission at the last meeting also decided that there should be a disclosure by the attorney that the parties may negotiate a lower fee than the statutory fee. The State Bar Section regards the statutory fee provisions as the standard fee for the usual case and would draft the new provisions on the assumption that the attorney and client will seldom actually negotiate a lesser fee. This view is consistent with existing practice as disclosed in the Questionnaire the Commission distributed to probate practitioners.

The staff has reviewed the staff draft provisions set out in Memorandum 88-32 with a view to making revisions that would make those provisions more acceptable to the State Bar. As a result of this review, the staff presents the statutory scheme outlined below for consideration by the Commission.

**Written Contract and Disclosure Requirement**

Although there are well over 300 statutes that provide for the court fixing attorney fees, those statutes (with two exceptions discussed below) provide for the court (or some other body) fixing "reasonable" attorney fees. The great majority of these statutes are ones that permit a prevailing party to recover attorney fees. The staff is aware of only two types of cases where the California statutes place statutory limits on the attorney fees that a client may negotiate with an attorney.

One of these is the statute that places a limit on the attorney fees in a action against a health care provider. For this type of

case, the Legislature has enacted a statutory fee schedule and has also enacted special provisions that require a written fee contract and a disclosure that the fee is a maximum fee and is subject to negotiation.

The other case is the probate attorney fee. The staff finds that the general written contract statute works poorly for probate attorney fees. For example, the general statute requires that the contract set out the "hourly rate and other standard rates, fees, and charges applicable to the case." It includes a provision for providing bills to the client within 10 days after request, the bill to "clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees." This provision is not appropriate for a probate proceeding. Some of the exceptions to the written fee contract requirement are not appropriate, and some new exceptions would be appropriate for a probate proceeding. Finally, limiting our consideration to probate fees will avoid any question whether the Commission has gone beyond the scope of its topics it has been authorized by the Legislature to study.

After considerable thought, the staff has concluded that a specially drafted written contract requirement with an appropriate disclosure should be included in the provisions relating to the probate attorney fee. An appropriate cross-reference to the probate provision would be added to the general written contract provision (Section 6148 of the Business and Professions Code).

The staff would divide the chapter on probate attorney fees into two articles. The first article would deal with the written contract requirement. The second article would contain the compensation provisions.

The basic provisions that would effectuate the staff scheme are set out below and are presented for Commission consideration.

The first section is a new provision relating to the written contract and disclosure requirement for probate attorney fees. (The general provision on this subject (B & P Code § 6148) is set out in Exhibit 1 of Memorandum 88-33. The special health care provider provision (B & P § 6147) is set out in Exhibit 2 of Memorandum 88-33. You may want to compare the first section set out below with the other provisions listed above.)

GENERAL STATUTORY SCHEME FOR ATTORNEY COMPENSATION PROVISIONS

CHAPTER 2. COMPENSATION OF ESTATE ATTORNEY

Article 1. Written Agreement Requirement

§ 10810 (new). Written contract and disclosure requirement

10810. (a) The attorney who agrees to serve as the attorney for the personal representative shall, at the time the agreement is entered into, provide a duplicate copy of the agreement, signed by both the attorney and the personal representative, to the personal representative.

(b) 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) The substance of the following statement: "A California statute governs the fee of the estate attorney and requires that this agreement contain the following statement. 'For ordinary services, the attorney is entitled to a fee determined by a statutory fee schedule. For extraordinary services, the attorney is entitled to an additional fee fixed by the court in an amount the court determines is just and reasonable. The attorney and client may agree to lower fees. No fee may be paid to the attorney unless the payment has first been authorized by a court order.'"

(3) A statement of the fee for ordinary services. If the fee for ordinary services is to be determined under Section 10810, the agreement shall set out the fee schedule provided in that section. If the fee is not to be determined under Section 10810, the agreement shall state the hourly rate or other standard rates, fees, or charges for ordinary services or other method of determining the fee for ordinary services.

(4) A statement concerning the fee for extraordinary services. The following statement is sufficient: "The fee for extraordinary

services will be in the amount the court determines to be just and reasonable." The agreement may, but need not, include a statement of the hourly rate or other standard rates, fee, or charges for extraordinary services or other method of determining the fee for extraordinary services.

(5) A statement of the respective responsibilities of the attorney and the personal representative.

(c) 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 a fee in an amount determined by court to be reasonable for the services actually provided, but the fee shall not exceed the compensation provided for in Article 2 (commencing with Section 10820).

(c) This section does not apply in any of the following cases:

(1) Where the total expense to the estate (including the attorney fee) will not exceed one thousand dollars (\$1,000).

(2) Where the personal representative knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(3) Where the personal representative is a corporation.

(4) Where the personal representative is a public officer or employee acting in the scope of the public office or employment.

(d) This section applies prospectively only to fee agreements entered into after January 1, 1990, and Section 6148 of the Business of Professions Code does not apply to those agreements.

## Article 2. Compensation

§ 10810 (Memo 88-32). Compensation a matter of agreement between estate attorney and personal representative; limitation on amount of compensation

Delete this section.

## § 10820. Compensation for ordinary services

Renumber Section 10811 (Memo 88-32) as Section 10820 and rephrase introductory portion of subdivision (a) to read:

~~10811~~ 10820. (a) Subject to ~~Sections 10810, 10813, and 10814~~ the provisions of this chapter, for ordinary services the attorney for the personal representative shall receive compensation upon the value of the estate accounted for by the personal representative, as follows:

[No change in remainder of staff draft section]

**§ 10821. Additional compensation for extraordinary services**

Renumber Section 10812 (Memo 88-32) as Section 10821 and revise the section to read:

~~10812~~ 10821. Subject to ~~Sections 10810, 10813, and 10814~~ the provisions of this chapter, in addition to the compensation provided by Section ~~10811~~ 10810, the court may allow additional compensation for extraordinary services by the attorney for the personal representative in the amount the court determines is just and reasonable.

**§ 10822. Agreement for higher compensation void; no duty to negotiate for lower compensation**

Add a new section (not included in Memo 88-32), to read:

10822. 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 agree to accept less than the statutory compensation for services, the personal representative has no duty to negotiate attorney compensation less than the statutory compensation.

Comment. The first sentence of Section 10822 makes an agreement for higher than statutory compensation void. This continues the substance of former Probate Code Section 903 insofar as that section was made applicable to probate attorney fees by former Probate Code Section 910. Notwithstanding that the agreement provides for higher compensation, the attorney is entitled only to the amount of compensation provided for in this chapter.

The compensation provided under this chapter is considered to be reasonable compensation if the requirements of Section 10810 (written contract requirement) are satisfied. The second sentence of Section 10822 is a new provision that protects the personal representative against any possible liability for failing to negotiate a lower attorney fee. This provision recognizes that personal representative has no duty to negotiate with the attorney for a lower attorney fee,

even where the particular estate is one that will require only minimal legal services.

If the Commission can approve this approach or some other approach to the drafting of the statute, the staff will prepare a revised version of the statute for the next meeting. In preparing the revised statute, we will review the other suggestions of Mr. Collier. We will attempt to get the revised draft out soon after the meeting so that we can receive the comments from the State Bar Section and others in sufficient time before the next meeting so we can prepare an analysis of the Comments in time for the Commission to review before the next meeting.

Respectfully submitted,

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Executive Secretary