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5/31/88

First Supplement to Memorandum 88-43

Subject: Study L-1036/1055 - Compensation of Estate Attorney and
Personal Representative (Preliminary Part to Tentative
Recommendation)

Attached is a staff draft of a preliminary part for the *Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative*. This goes with the draft statute attached to the basic memorandum (88-43).

Respectfully submitted,

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TENTATIVE RECOMMENDATION
relating to
COMPENSATION OF ESTATE ATTORNEY
AND PERSONAL REPRESENTATIVE

COMPENSATION OF THE ESTATE ATTORNEY

Background

In California, the compensation of the estate attorney for conducting "ordinary probate proceedings" is determined using a statutory fee schedule.¹ In addition to this statutory fee for ordinary services, the attorney is entitled to "such further amount as the court may deem just and reasonable for extraordinary services."²

1. Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code § 901). The fee schedule applies only where there is a formal probate proceeding. Where there is no formal probate proceeding, the fee is determined by agreement between the parties and is not subject to court approval.

Decedent's will may provide for compensation of the attorney and that shall be "a full compensation" for the attorney's services unless by written instrument, filed with the court, the attorney renounces the compensation provided for in the will. If the attorney renounces the compensation provided in the will, the attorney is entitled to receive compensation as provided by statute. See Prob. Code § 910 (incorporating provisions relating to compensation of personal representatives -- Prob. Code §§ 900, 901).

Usually the personal representative who is also an attorney may receive the personal representative's compensation but not the attorney fee. *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982). However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting in both capacities. *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958).

2. Prob. Code § 910.

The statutory fee schedule sets the attorney's fee as percentages of the "estate accounted for" by the personal representative,³ with higher percentages payable for smaller estates.⁴ The attorney is entitled to the statutory fee unless the attorney agrees to accept a lower fee.⁵

The following table shows the California statutory fee for ordinary services provided to estates of various sizes.

3. Prob. Code § 910 (incorporating Prob. Code § 901). The "estate accounted for" is based on the fair market value of the real and personal property of the estate without subtracting any encumbrances on the property. Prob. Code § 901 ("estate accounted for" is "the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate" whether or not a sale of property has taken place during probate). For a discussion of the property or values included in determining the "estate accounted for," see Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§ 20.16-20.24 (Cal. Cont. Ed. Bar 1986).

The setting of the attorney fee using the statutory rate schedule is within the "state action exemption" of the Sherman Antitrust Act and does not violate federal antitrust laws. Estate of Efron, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

4. See Prob. Code § 901.

5. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). See generally Estate of Efron, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981). The right to receive the statutory fee is subject to Probate Code Section 1025.5, which permits the court to reduce the fee if the time taken for administration of the estate exceeds the time set forth by statute or prescribed by the court and the court finds that the delay in closing the estate was caused by factors within the attorney's control and was not in the best interests of the estate.

Table 1. Statutory Attorney Fee For "Ordinary Services"

Amounts determined from statutory fee schedule under Probate Code Sections 901 and 910 and do not include additional amounts that may be allowed for extraordinary services.

<u>Size of Estate</u>	<u>Fee</u>	<u>Size of Estate</u>	<u>Fee</u>
\$10,000	\$ 400	\$ 150,000	4,150
20,000	750	200,000	5,150
30,000	1,050	250,000	6,150
40,000	1,350	300,000	7,150
50,000	1,650	400,000	9,150
60,000	1,950	500,000	11,150
70,000	2,250	800,000	17,150
80,000	2,550	1 million	21,150
90,000	2,850	2 million	31,150
100,000	3,150	5 million	61,150
		10 million	111,150

California is one of three states that use a statutory fee schedule to fix the fee of the estate attorney for ordinary services.⁶ Table 2, below, compares the California statutory fee for

6. The other two states are Hawaii and Wyoming. See Hawaii Rev. Stat. §§ 560:3-719, 560:3-721 (1985); Wyo. Stat. §§ 2-7-803, 2-7-804 (Supp. 1987).

a typical estate having real property⁷ with the statutory fee in the other two states.

**TABLE 2. COMPARISON OF ATTORNEY FEES
FIXED BY STATUTE FOR ORDINARY SERVICES**

<u>State</u>	<u>Fee</u>
California	\$7,750
Hawaii	\$7,650
Wyoming	\$6,950

Six additional states use a statutory fee as a basis for computing the attorney fee in a probate proceeding.⁸ In four of these states,

7. This typical estate is based on the following assumptions (all values are as of the date of death): There are no extraordinary services. Estate value is \$325,000 gross, and \$273,000 net. The home is valued at \$200,000, with an outstanding mortgage balance of \$50,000. Stocks valued at \$100,000 consist of \$50,000 common stock listed on the New York Stock Exchange and \$50,000 over-the-counter stock. A motor vehicle is valued at \$10,000, with an outstanding auto loan of \$2,000. Household goods and furnishings are valued at \$10,000. Savings accounts have a balance of \$5,000. Decedent's will devises equal shares of the estate to decedent's two children. Decedent's home is distributed (without sale) to the two children. Stocks listed on the New York Stock Exchange valued at \$30,000 are sold during estate administration at a net price of \$35,000--\$5,000 over the date of death value. (No additional compensation is awarded in connection with this sale.) The loan on the motor vehicle is paid off during administration. The motor vehicle is distributed to one child (\$10,000). The household goods and furnishings are distributed to the other child (\$10,000).

8. There are a number of different schemes used in these other states. Four other states compute the estate attorney's fee using what is essentially a reasonable fee system combined with a percentage fee schedule: Arkansas prescribes a "just and reasonable" fee, not to exceed a sliding percentage from three to ten percent of estate value. Ark. Stat. Ann. § 62-2208 (Supp. 1985). Iowa prescribes a reasonable fee, not to exceed a sliding percentage from two to six percent of the gross estate. Iowa Code Ann. §§ 633.197, 633.198 (West 1964). Missouri prescribes a sliding minimum percentage, but no maximum, from two to five percent of personal property and proceeds of real property sold. Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987). Montana prescribes a reasonable fee, not to exceed a sliding percentage from two to three percent of the estate, but not less than the smaller of \$100 or the value of the gross estate. Mont. Code Ann. § 72-3-631 (1985).

New Mexico prescribes a fee of not more than a sliding percentage from one to ten percent of the estate, unless otherwise ordered by the

the statute prescribes a reasonable fee, not to exceed the statutory percentage. One state uses a fee schedule, subject to increase or decrease by the court. One state uses the fee schedule to establish a minimum fee.⁹

Table 3, below, compares the statutory fee in the various states.¹⁰

TABLE 3. COMPARISON OF ATTORNEY FEES FOR STATES HAVING STATUTORY FEE SCHEDULES	
<u>State</u>	<u>Fee</u>
Delaware	\$10,400
Montana	\$10,350
Arkansas	\$9,488
California	\$7,750
Hawaii	\$7,650
Wyoming	\$6,950
New Mexico	\$6,650
Iowa	\$6,620
Missouri	\$4,125

court. N.M. Stat. Ann. §§ 45-3-719, 45-3-720 (1978). Delaware uses a fee schedule established by court rule, subject to increase or decrease by the court. Del. Ch. Ct. R. 192 (1981).

9. See *supra* note 8.

10. The same "typical estate" is used for Table 3 as was used for Table 2. See *supra* note 7.

Table 4, below, compares the statutory fees in the various states for a typical estate having no real property.¹¹

<u>State</u>	<u>Fee</u>
New Mexico	\$6,650
Montana	\$4,350
Missouri	\$4,125
Delaware	\$4,000
Arkansas	\$3,988
California	\$3,750
Hawaii	\$3,650
Wyoming	\$2,950
Iowa	\$2,620

The tables above demonstrate that California statutory fees are not out of line with those in other states having a statutory fee system. But how do California fees for estate attorneys compare to fees charged in other states with large metropolitan areas where a statutory fee system is not used? A study made for the Commission indicates that California fees are not excessive when compared with fees in other comparable states.

Table 5 below compares California fees with those in nine states with large metropolitan areas for estates of \$100,000, \$300,000, and \$600,000, respectively.¹²

11. Assume the same facts as in notes 7 and 11, *supra*, except assume that there is no real property.

12. The information in Table 5 was supplied by the Estate Planning, Trust and Probate Law Section of the State Bar of California, and is based on a telephone survey of probate practitioners in the states surveyed. The State Bar Section advised the Commission that Table 5 assumes probate of a relatively simple estate with no major valuation issues or disputes between persons interested in the estate. The attorneys surveyed reported that the estimated fees would be higher than shown in Table 5 if complexities arose during probate. The State Bar Section advised the Commission that the information in Table 5 is a "very rough" approximation of probate attorney fees in the states surveyed.

TABLE 5. PROBATE ATTORNEY FEES IN STATES WITH 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
Florida	\$2,000	\$7,500	\$18,000
Georgia	\$2,500	\$7,500	\$12,000
Illinois	\$5,000	\$10,000	\$16,000
Michigan	\$3,000	\$7,000	\$10,000
New York	\$5,000	\$13,000	\$22,000
Ohio	\$3,000	\$6,000	\$10,000
Pennsylvania	\$5,000	\$13,000	\$22,000
Texas	\$3,000	\$6,000	\$10,000
Virginia	\$3,000	\$7,000	\$9,000

An important comparative study of probate attorney fees -- the *Stein Study*¹³ -- was published in 1984, and indicates that, for

13. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107 (1984).

estates of persons dying in 1972, California fees were not out of line with those charged in other states. The *Stein Study* is based on data collected from a representative sample of estate administrations in five states: California, Florida, Maryland, Massachusetts, and Texas.¹⁴ "These states were selected because they have certain practices or procedures relating to estate administration that make them broadly representative of other states."¹⁵

The *Stein Study* draws the following conclusion from the data collected:¹⁶

Comparing the fees charged by California attorneys to those charged by attorneys in the other states is particularly revealing. Though set by statute as a percentage of inventoried assets in an estate, California fees were apparently comparable to fees charged in the other states not having fees set by statute, being neither the highest nor the lowest among the group.

14. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984).

15. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984). California was selected because it is a community property state and has a statutory probate fee schedule.

16. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1187-88 (1984). The California statutory fee schedule has been revised to increase the fees since the *Stein Study* was made. See 1986 Cal. Stat. ch. 961. But no doubt there has been a corresponding increase in hourly rates charged in other states since the *Stein Study*.

This conclusion is drawn from the data presented below (Table 6).

Table 6. Attorneys' Fees by Probate Estate Size* Listed in Order of Rank by State¹⁷

<i>All Estates</i>				<i>\$1 - 9,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Mass.	\$1,603	Cal.	3.0	Cal.	\$292	Cal.	7.2
Cal.	\$1,911	Tex.	4.1	Fla.	\$413	Md.	9.9
Md.	\$2,276	Md.	5.8	Md.	\$415	Mass.	12.7
Tex.	\$2,560	Mass.	7.8	Mass.	\$422	Tex.	16.0
Fla.	\$2,791	Fla.	8.4	Tex.	\$501	Fla.	18.5
<i>\$10,000 - 19,999</i>				<i>\$20,000 - 29,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Tex.	\$487	Tex.	3.5	Tex.	\$584	Tex.	2.4
Cal.	\$653	Cal.	4.4	Cal.	\$987	Cal.	4.0
Fla.	\$715	Fla.	5.0	Fla.	\$1,268	Fla.	5.4
Md.	\$878	Md.	6.1	Mass.	\$1,430	Mass.	5.8
Mass.	\$925	Mass.	6.1	Md.	\$1,796	Md.	7.0
<i>\$30,000 - 59,999</i>				<i>\$60,000 - 99,999</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Tex.	\$1,211	Tex.	2.8	Tex.	\$1,783	Tex.	2.4
Cal.	\$1,784	Md.	4.2	Md.	\$2,009	Md.	2.7
Md.	\$1,852	Cal.	4.4	Cal.	\$2,450	Cal.	3.1
Fla.	\$2,317	Fla.	5.2	Fla.	\$3,406	Mass.	4.4
Mass.	\$2,475	Mass.	6.2	Mass.	\$3,495	Fla.	4.6
<i>\$100,000 - 499,999</i>				<i>\$500,000+</i>			
<i>Amount</i>		<i>% Probate</i>		<i>Amount</i>		<i>% Probate</i>	
Mass.	\$3,937	Tex.	2.2	Cal.	\$20,614	Cal.	1.5
Tex.	\$4,127	Cal.	2.3	Mass.	\$20,880	Tex.	1.7
Cal.	\$4,627	Md.	2.6	Md.	\$29,258	Mass.	2.0
Md.	\$5,051	Mass.	2.8	Fla.	\$32,882	Fla.	2.6
Fla.	\$6,308	Fla.	3.2	Tex.	\$30,716	Md.	3.3

*Only estates having known, nonzero values are included.

Recommendations

Retaining the statutory fee schedule for ordinary services. The Commission recommends that the statutory attorney fee for ordinary

17. This table is taken without change (except for the table number) from Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1186 (1984).

services be retained.¹⁸ The statutory fee system has a number of advantages:¹⁹

(1) It protects the consumer against excessive fees, because the attorney cannot charge more for ordinary services than the statutory fee.²⁰

(2) It makes legal services more affordable in small estates by shifting to larger, more profitable estates some of the overhead costs of administering smaller estates. It therefore benefits people of modest means.

(3) It is simple and courts can easily apply it: The extent and value of estate property is determined during administration, and courts can routinely apply the appropriate percentage to fix the fee. The court does not need to review attorney time records. It minimizes disputes over fees and court time required to resolve disputes.

(4) The amount of attorney time required to administer an estate tends to correlate with estate size: Larger estates generally present more legal problems than smaller estates. The higher fee in larger estates under the percentage formula roughly compensates attorneys for the greater work performed and responsibility assumed.

Under the influence of the Uniform Probate Code,²¹ a number of states have adopted the reasonable fee system for probate estates. Some reasonable fee states use the UPC procedure of allowing the

18. The Commission recommends reducing the highest percentage rate under the fee schedule from four to three percent. See *infra* text accompanying notes 24-26.

19. See Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984).

20. See Prob. Code §§ 903, 910; Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar 1987). In a simple estate, the personal representative and attorney may negotiate a fee that is less than that provided by the statutory percentage. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897); *Estate of Morrison*, 68 Cal. App. 2d 280, 285, 156 P.2d 473 (1945); Feinfeld, *supra*. The consumer is also protected against excessive fees for extraordinary services because they are fixed by the court. Prob. Code § 910.

21. See Uniform Probate Code §§ 3-715, 3-721.

personal representative and estate attorney to fix the attorney's fee, subject to court review on petition. Other reasonable fee states require the court to fix or approve the fee in every case. Whether the court reviews the fee in every case or only on petition, a significant amount of court time is required to review the attorney's time records and to evaluate results achieved, benefit to the estate, nature and difficulty of tasks performed, and other factors.²²

Under existing California law, the personal representative and the attorney may agree to a fee that is lower than the statutory fee.²³ If the personal representative understands this right, then a statutory percentage formula benefits all parties -- the estate attorney, personal representative, estate beneficiaries, and the probate court. The statutory fee becomes, in effect, a statutory maximum, and avoids clogging the probate calendar with fee disputes.

Reducing the statutory rate. Under existing law, the highest percentage rate for the fee of the estate attorney and personal representative is the four percent rate on the first \$15,000 of estate value.²⁴ The rate on the next \$85,000 is three percent, and the rate continues to decline on larger estates.²⁵

The Commission recommends that the four percent rate on the first \$15,000 of estate value be reduced to three percent, making the rate three percent on the first \$100,000 of estate value. This will make a modest reduction in the statutory fee²⁶ and make California rates compare more favorably with those in other states. The reduction also will simplify the fee calculation.

22. In Hawaii, for example, the reasonable fee system required so much judicial time to administer that it had to be replaced by a statutory fee schedule. Telephone interview with attorney Carroll S. Taylor, probate practitioner in Honolulu (Jan. 6, 1988).

23. See *supra* note 20. An agreement to pay more than the California statutory fee for ordinary services is void. See Prob. Code §§ 903, 910.

24. Prob. Code §§ 901, 910.

25. Prob. Code §§ 901, 910.

26. Reducing the four percent rate to three percent will cost probate attorneys and personal representatives relatively little -- \$150 on estates of \$15,000 or more.

Written contract with disclosure to client that fee is negotiable. Business and Profession Code Section 6148 requires a written contract in any case where "it is reasonably foreseeable that total expense to a client, including attorney fees" will exceed \$1,000.²⁷ 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 rates, fees, and charges applicable to the case.

(2) The general nature of the legal services to be provided.

(3) The respective responsibilities of the attorney and the client.

Section 6148 includes provisions that may not be appropriate for a contract for probate legal services. For example, the fee for probate legal services ordinarily will be determined by the statutory fee schedule, and the agreement will not specify an hourly rate for probate legal services. The provisions of Section 6148 governing the form of the bill for legal services and requiring the attorney to provide a bill on request ordinarily are not appropriate for probate legal services.

The Commission recommends that a written contract provision be included in the Probate Code provisions governing probate legal services. This provision would be drawn from Section 6148 of the Business and Professions Code, but would include appropriate modifications so that the contract for probate legal services will be consistent with the provisions governing probate legal fees.²⁸

The Commission further recommends an additional requirement for the contract for probate legal services. Since the probate attorney's

27. Section 6148 does not apply where the attorney contracts on a contingency fee basis. Contingent fee contracts are covered by Business and Professions Code Section 6147.

28. The Probate Code provision would recognize that the fee may be the fee provided for in the statutory fee schedule. The Probate Code provision would omit the provisions relating to the form of the bill, and would omit the provisions relating to the providing of a bill on request as inconsistent with the requirement that the court approve the fee before it is paid.

fee is negotiable under existing law,²⁹ the contract should inform the client how the fee is determined, and should contain a statement that the fee is negotiable and that the personal representative and estate attorney may agree to a lower fee. The Commission recommends the following statement be included in the contract retaining the attorney:

IMPORTANT INFORMATION. The California Probate Code governs the compensation of the estate attorney and requires that this agreement contain the following informational statement. For ordinary services, the attorney is entitled to compensation to be determined by a statutory fee schedule. For extraordinary services, the attorney is entitled to additional compensation to be fixed by the court in an amount the court determines is just and reasonable. The attorney and client may agree that the attorney will receive less than the statutory compensation. No compensation may be paid to the attorney unless the payment has first been authorized by a court order.

This disclosure will ensure that unsophisticated personal representatives will be as fully advised of their rights concerning attorneys' fees as well-informed ones.

COMPENSATION OF PERSONAL REPRESENTATIVE

California is one of 26 states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the personal representative.³⁰ This

29. See *supra* note 20.

30. Twelve states use a pure percentage formula to determine the fee of the personal representative. These are California, Hawaii, Louisiana, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, South Dakota, Wisconsin, and Wyoming. See Cal. Prob. Code § 901 (West 1987); Hawaii Rev. Stat. § 560:3-719 (1985); La. Code Civ. Proc. Ann. art. 3351 (West Supp. 1987); Nev. Rev. Stat. § 150.020 (1986); N.J. Stat. Ann. §§ 3B:18-13, 3B:18-14 (West 1983 & Supp. 1987); N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1987); Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1987); Okla. Stat. Ann. tit. 58, § 527 (West 1965); Or. Rev. Stat. § 116.173 (1983 & 1985 reprint); S.D. Codified Laws Ann. § 30-25-7 (1984); Wis. Stat. Ann. § 857.05 (West Supp. 1987); Wyo. Stat. § 2-7-803 (Supp. 1987). Another 14 states use a hybrid of the percentage fee and reasonable fee methods. These are Alabama, Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Mississippi, Missouri, Montana, New Mexico, North Carolina, South Carolina, and Texas. Ala. Code § 43-2-680 (1982); Ark. Stat. Ann. § 62-2208 (Supp. 1985); Del. Ch. Ct. R. 192 (1981); Ga. Code Ann. §§ 53-6-140, 53-6-141, 53-6-143 (1982); Iowa Code Ann. § 633.197 (West 1964); Ky. Rev. Stat. Ann. § 395.150 (Baldwin 1978); Md. Est. & Trusts Code Ann. § 7-601 (Supp. 1984); Miss. Code Ann. § 91-7-299 (1973); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. § 72-3-631 (1985); N.M. Stat. Ann. § 45-3-719 (1978); N.C. Gen. Stat.

contrasts with nine states that use either a percentage formula, or a hybrid of the percentage formula and reasonable fee systems, to determine the fee of the estate attorney.³¹ Thus, states are more likely to provide a percentage or hybrid fee for the personal representative than for the estate attorney. The apparent reason for this is that the personal representative is compensated for managing the estate. The larger the estate, the greater are the responsibilities assumed by the personal representative.³² The statutory percentage fee system should be kept in California for the personal representative for this reason, and because it protects against excessive fees, it benefits smaller estates, and it is simple and easily applied.³³

OTHER RECOMMENDATIONS

Factors in Fixing Extraordinary Fees

If the estate attorney performs extraordinary services for the estate, the attorney is entitled to a "just and reasonable" fee for such services.³⁴ However, the statute does not give the court any guidance as to what factors should be considered in fixing a just and reasonable fee. Local court rules often fill this gap by listing the

§ 28A-23-3 (1976 & Supp. 1983); S.C. Code Ann. § 62-3-719 (Law. Co-op. 1987); Tex. Prob. Code Ann. § 241 (Vernon 1980).

31. See *supra* text accompanying notes 6 and 8.

32. The estate attorney, on the other hand, is compensated for professional expertise and other factors which bear a less direct relationship to the size of the estate.

33. See *supra* text accompanying notes 19-20.

34. Prob. Code § 910.

factors the court should take into account in fixing a fee for extraordinary services.³⁵

The Commission recommends enactment of a statutory statement of the factors the court should take into account in fixing the fee for extraordinary services. The factors should include the nature and difficulty of the task performed, results achieved, benefit to the estate, hours spent, usual hourly rate of the person who performed the services, productivity of the hours spent, the expertise, experience, and professional standing of the person performing the services, whether the percentage fee for ordinary services is adequate compensation for both ordinary and extraordinary services, the total amount requested, size of the estate, and length of administration.³⁶

The nonexclusive listing in the statute of examples of what constitutes extraordinary services³⁷ should be deleted, and examples should be given in the official comment to the section instead.

Authority of Personal Representative to Hire and Pay Specialists

Under existing law, the personal representative may employ tax counsel, tax auditors, accountants, or other tax experts, and pay them out of estate funds.³⁸ This appears to be because preparing tax returns is an extraordinary service, and not part of the personal representative's statutory duties.³⁹ This authority should be expanded to allow the personal representative to employ any expert, technical advisor, or other qualified person when necessary to provide

35. See, e.g., Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

36. E.g., Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee).

37. Prob. Code § 902.

38. Prob. Code § 902.

39. See Prob. Code § 902; Estate of LaMotta, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970).

extraordinary services, and to pay them out of estate funds, subject to court review at the final account.

Under local court rules and case law, the personal representative may employ the estate attorney or others to help with ordinary services, but must pay them out of the personal representative's own funds, not funds of the estate.⁴⁰ This rule should be codified. Since no estate funds are involved, there should be no requirement of court approval.⁴¹

Dual Compensation

Under case law, a personal representative who is an attorney may receive the personal representative's compensation, but not compensation for services as estate attorney, unless expressly

40. Fresno County Probate Policy Memoranda § 9.4(c), reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, reprinted in California Local Probate Rules, *supra*; Alameda County Probate Policy Manual § 1008, reprinted in California Local Probate Rules, *supra* (personal representative may not spend estate funds to hire another to perform ordinary duties of representative, for example, "ordinary accounting and bookkeeping services, including the preparation of the schedules for Court accountings"); Estate of LaMotta, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (expenditure to compensate an investigator for locating estate assets not allowable because this is a statutory duty of the representative). See also Rules of Professional Conduct of the State Bar of California, Rule 5-101.

41. A provision that court approval is not required would invalidate the requirement of a Fresno County court rule that an agreement by the personal representative to hire an assistant to be paid out of the personal representative's own funds is subject to court approval and must be filed with the court when the first fee petition is filed. Fresno County Probate Policy Memoranda § 9.4, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

authorized by the decedent's will.⁴² The statute should codify this rule.

Allowance of Compensation by Court

The existing statute provides for a partial allowance of compensation to the personal representative or estate attorney,⁴³ but final compensation is governed by local court rules rather than by

42. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980); *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966); *Feinfield, Fees and Commissions*, in 2 California Decedent Estate Practice § 20.10 (Cal. Cont. Ed. Bar 1987). A representative-attorney may not circumvent this rule by failing to retain a separate attorney and then seeking extraordinary compensation for legal services. See *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); *Feinfield, supra*. However, it may be that, in allowing compensation for extraordinary services by the personal representative, the court can give some weight to the representative's services as an attorney in conserving and preserving the estate. *Id.*

43. Prob. Code §§ 904, 911.

statute.⁴⁴ The Commission recommends codifying a complete statutory scheme for both partial and final compensation.

The statute should codify a provision found in local court rules that a partial allowance of compensation may be allowed only when it appears likely that administration of the estate will continue for an unusually long time, where present payment will benefit the estate or beneficiaries, or where other good cause is shown.⁴⁵

The statute should continue the provision of existing law that the estate attorney may be allowed compensation for a paralegal who performs extraordinary services under the attorney's direction.⁴⁶ The statute should make clear that compensation to the attorney for

44. Alameda County Probate Policy Manual § 1002; Contra Costa County Probate Policy Manual §§ 603, 605; Fresno County Probate Policy Memoranda § 9.3; Humboldt County Probate Rules § 12.15(c); Lake County Probate Rules § 13.4(g); Los Angeles County Probate Policy Memorandum §§ 15.02, 16.01; Madera County Probate Rules §§ 10.14, 10.19; Marin County Rules of Probate Practice § 1203; Merced County Probate Rules §§ 1103, 1104, 1108; Monterey County Probate Rules § 4.31; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual §§ 706, 707, 708; San Bernardino County Probate Policy Memorandum § 906; San Diego County Probate Rules §§ 4.110, 4.111; San Francisco Probate Manual §§ 13.03, 13.04; San Joaquin County Probate Rules §§ 4-705, 4-706, 4-1001; San Mateo County Probate Rules, Rules 486, 487; Santa Barbara County Probate Rules § 414(H); Santa Clara County Probate Rules §§ 5.6(c), 5.7(d); Santa Cruz County Probate Rules § 405; Solano County Probate Rules § 8.11(d); Stanislaus County Probate Policy Manual §§ 11003, 1004, 1008(b), 1102(e); Tuolumne County Probate Rules, Rules 12.11(e), 12.14; Ventura County Probate Rules § 11.12(c); Yolo County Probate Rules § 20.5; Probate Rules of Third District Superior Courts, Rules 12.12(E), 12.15.

45. Lake County Probate Rules § 13.4(g); Marin County Rules of Probate Practice § 1203; Merced County Probate Rules § 1108; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual § 708; San Bernardino County Probate Policy Memorandum § 906; San Francisco Probate Manual § 13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules § 5.7(d); Santa Cruz County Probate Rules § 405; Stanislaus County Probate Policy Manual § 1008(b); Tuolumne County Probate Rules, Rule 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).

46. Prob. Code § 910.

extraordinary services shall take into consideration the extent to which the services were performed by a paralegal and the extent of the attorney's direction and supervision of the paralegal.