

Third Supplement to Memorandum 88-70

Subject: Study 1036/1055 - Personal Representative and Attorney Fees in Probate

Attached is a letter from James Quillinan forwarding Chuck Collier's report on Memorandum 88-70 and the First Supplement to Memorandum 88-70.

The report contains detailed personal comments by Chuck Collier concerning the staff draft of the tentative recommendation and also states the views of the Executive Committee concerning significant policy issues presented by the staff draft. This Supplement first considers the views of the Executive Committee and then considers some of the more significant comments of Chuck Collier.

Modification of Business and Professions Code Section 6148

The Executive Committee is of the view that Business and Professions Code Section 6148 can be modified easily to include provisions for fees fixed by court or by statute and that no separate section is required. A draft adopted by the Executive Committee in June 1988 and considered at the subsequent Commission meeting is attached as the last two pages of the Collier report.

The Commission considered this view and the Executive Committee draft at length at the last meeting. It was then noted that that draft covers attorney fees generally and that the Commission is not authorized to study attorney fees generally. In fact, the trial lawyers obtained an amendment to the 1988 resolution that authorized the study of shifting of attorney fees between the parties to make clear that this authorization did not include the study of attorney fees generally. Moreover, the Commission has not made a study of the statutory provisions that relates to attorney fees in particular situations. About 250 such statutes are listed in the CEB book California Attorney's Fees Award Practice (Cal. Cont. Ed. Bar 1982). This book also notes that more than 100 federal statutes authorizing attorney's fees were listed in the appendix to the dissenting opinion of Brennan, J., in *Marek v. Chesny*, 473 U.S. 1, 44 (1985).

In addition, the Executive Committee draft does not cover some matters that should be and are covered by the staff draft. Moreover, if we try to cover the subject adequately by amending Section 6148, the section would become so complex that it would be very difficult to understand. The staff draft follows the approach already taken by the Legislature in connection with the section that deals with the fee agreement for an action against a health care provider (the only other situation of which we are aware where maximum fees are fixed by statute). In that case, a separate section was enacted to cover the fee agreement. See Business and Professions Code Section 6147, which incidentally includes a disclosure requirement in the fee agreement that the statutory fee is subject to negotiation.

Statutory Fee a "Standard Fee" for Ordinary Services Rather Than a "Maximum Fee" for Ordinary Services

The Executive Committee is of the view that the concept of the statutory fee being the "maximum limit" should be deleted in its entirety from the Tentative Recommendation, recommended legislation, and comments, but instead the statutory fee should be referred to as a "standard fee." Commissioner Stodden wrote a letter to the Chairperson supporting this position of the Executive Committee.

The Commission no doubt is aware that consumer groups are very active in the area of attorney fees, primarily in connection with the insurance issues on the November 1988 ballot. In addition, consumer groups are active in urging the Board of Governors of the State Bar to permit nonlawyers to provide services that are now considered to be the practice of law. The study of the Probate Code was authorized primarily because consumer groups wanted to see the reasonable fee system of the Uniform Probate Code adopted in California. The Commission will recall that representatives of several consumer groups appeared at one or more Commission meetings to urge that a reasonable fee system be substituted for the existing statutory fee system. Their basic argument was that the statutory fee system fixed the fee without regard to the services actually provided in the particular case, and that California is one of few states (three or four) that continue to have a statutory fee system. Representatives of consumer groups have recently requested that they be advised of what action the Commission

has taken on their request and whether the Commission had approved a Tentative Recommendation. These circumstances should not be ignored in drafting the Commission's recommendation concerning probate attorney fees.

The staff believes that it is important that the Commission's recommendation be acceptable to the legislative committees that will consider it. A maximum fee system with a disclosure that the attorney and personal representative can agree to a lower fee is one that can be justified as a consumer protection measure, even though California is one of only four states that have a statutory fee that is not subject to being reduced by the court. The staff believes that it would be a serious mistake to change the terminology so that it becomes unclear that the Commission's recommendation does not take advantage of consumers, but instead protects them. We believe that adoption of the suggested "standard" fee scheme will make it almost certain that consumer groups will urge the legislative committees to adopt an amendment to the bill to provide for a "reasonable fee" system. And, given the emotionally charged situation with respect to attorneys and their fees, the staff believes that the legislative committees would overwhelmingly adopt the "reasonable fee" system. Accordingly, the staff recommends that the existing concept of the statutory fee being the "maximum limit" for the fee for ordinary services be retained. This is the concept of the existing statute, even though the practice of most lawyers is to charge the statutory fee.

In conclusion, the staff does not believe that rejection of the Executive Committee "standard fee" concept will affect the practice under the new statute, but we do believe that to adopt the Executive Committee concept may doom the proposal to keep the statutory fee system. Moreover, we would be concerned that we could not find an author for the bill based on the Executive Committee concept, given the anticipated consumer attacks that would be made on the bill.

The Commission should consider whether the disclosure statement suggested by Commissioner Walker should be revised in light of the concern of the Executive Committee. That statement might be revised to eliminate the reference to a "maximum limit" by revising the statement to read as follows:

(c) The agreement shall be in writing and shall include, but is not limited to, all of the following:

* * * *

(4) The following statement which shall be on a separate page and shall be separately signed by the personal representative:

DISCLOSURE STATEMENT CONCERNING ATTORNEY FEE

The California statutes govern the compensation of the estate attorney and require that this disclosure statement be provided to you and be signed by you.

For ordinary services, the Probate Code provides that the your attorney is entitled to compensation determined by a statutory fee schedule. This statutory fee schedule provides that the your attorney shall receive compensation upon the value of the estate, as follows:

- (1) Three percent on the first \$100,000.
- (2) Two percent on the next \$900,000.
- (3) One percent on the next 9 million dollars.
- (4) One-half of one percent on the next 15 million dollars.
- (5) For all above 25 million dollars, a reasonable amount to be determined by the court.

(The value of the estate is the fair market value of the property included in the decedent's probate estate as shown by an appraisal of the property, plus gains over the appraised value on sales, plus receipts, less losses from appraised value on sales.)

For extraordinary services, the statute provides that the your attorney shall receive additional compensation in the amount the court determines to be just and reasonable.

~~THE STATUTE SETS THE MAXIMUM LIMIT ON THE FEE OF THE ATTORNEY, BUT THE ATTORNEY AND CLIENT MAY NEGOTIATE A LOWER FEE.~~

THE COURT WILL USE THE STATUTORY FEE SCHEDULE SET OUT ABOVE TO COMPUTE THE FEE OF YOUR ATTORNEY FOR ORDINARY SERVICES. YOU AND YOUR ATTORNEY MAY AGREE TO A LOWER FEE BUT MAY NOT AGREE TO A HIGHER FEE. IF YOU AND YOUR ATTORNEY AGREE TO A LOWER FEE, THE COURT WILL NOT AWARD A HIGHER FEE THAN THE FEE PROVIDED IN YOUR AGREEMENT.

Date: _____

Personal Representative

Estate of Walker (Section 10852 on page 39 of Staff Draft)

The Executive Committee is of the view that the holding in *Estate of Walker* should not be codified. This case held that one of the

matters that may be considered in fixing what is just and reasonable compensation for extraordinary services is the amount of the statutory fee and whether it constitutes adequate compensation for all services rendered. Section 10852 uses the language of the Los Angeles County rule in stating the matters to be taken into consideration. See the Note under Section 10852 (pages 39-40 of the Staff Draft).

The Subcommittee at the last meeting decided to retain the rule of *Estate of Walker* in the list of matters that may be considered in fixing compensation for extraordinary service. A statement was added to the Comment to indicate that the court does not review the ordinary services provided in the particular case unless there is a controversy concerning the reasonableness of the fee for extraordinary services.

If we omit listing this matter, there might be an implication that it would not be proper to consider the matter. Moreover, what effect would the omission have on the court rules that now specifically list this matter? In any case, the staff considers the decision in *Estate of Walker* and the Los Angeles court rule to be sound, and we recommend that the staff draft not be changed.

Duty of Personal Representative to Negotiate a Reasonable Fee

The Executive Committee is of the view that there should be no duty on the personal representative to seek a fee less than the statutory fee for ordinary services. Commissioner Walker takes the contrary view. This matter is discussed more fully in the First Supplement to Memorandum 88-70.

Significant Collier Concerns

Chuck Collier devotes about nine pages to an analysis of the staff draft of the Tentative Recommendation. We do not discuss below all of the matters he discusses in his letter, but we do discuss those matters we consider important.

Tables. The preliminary portion of the Tentative Recommendation contains several tables comparing California to other states. In connection with these tables, it must be recognized that California is one of three or four states that use a statutory fee that the court

cannot lower even though the court finds that the fee is not reasonable in light of the circumstances of the particular case. Other states have a statutory fee, but the court is authorized to award a lower fee if the statutory fee is not reasonable in light of the circumstance of the particular case. There is a significant difference between a statutory fee that cannot be lowered by the court and one that can be lowered. This is the reason that one table compares the fees in those states where the statutory fee cannot be lowered by the court, and another table compares the fees in all states having a statutory fee.

We believe that the preliminary portion of the Tentative Recommendation establishes that California probate fees under the fee schedule are not out of line with the fees in other states, and we are reluctant to abandon the distinction between those states where the fee is subject to court reduction and those where it is not. Whether the court should have authority to reduce the statutory fee in a particular case is the primary policy issue presented by Commissioner Walker in the First Supplement to Memorandum 88-70. We do not want to lose the table relevant to that issue because we believe that the table justifies the statutory fee schedule recommended by the Commission.

If we consider Missouri to be a state where the statutory fee is not subject to court reduction, the table for the four states having a nonreducible statutory fee would be as follows:

<u>TABLE 2. COMPARISON OF ATTORNEY FEES FIXED BY STATUTE FOR ORDINARY SERVICES</u> (Revised to add Missouri)	
<u>State</u>	<u>Fee</u>
California	\$7,750
Hawaii	\$7,650
Wyoming	\$6,950
Missouri	\$4,125

Note. Missouri prescribes a sliding minimum percentage, but no maximum, from two to five percent of personal and proceeds of real property sold.

Whether Statutory Fee is Subject to Negotiation. Mr. Collier summarizes his position concerning the issue of whether the existing

statutory fee is subject to negotiation under existing law as follows
(at page 4, item 11, of his letter):

In short, the basis for arguing a number of times that under existing law the statutory fee is negotiable seems rather weak. As a matter of practice, lawyers as well as personal representatives often waive a portion of the statutory fee where it appears reasonable to do so in light of the time expended, perhaps the family relations involved in the case of a personal representative, etc. Those are not negotiated transactions. They are simply waivers by the personal representative or attorney of fees. That waiver concept is more in keeping with actual practice and, we believe, the existing law rather than the concept of statutory fees being negotiable under existing law.

The staff views this matter as a play on words. We do not believe that a court would ever award the attorney a larger fee than the fee provided in the written agreement retaining the attorney. Adopting the "waiver" concept suggested by Mr. Collier would, we believe, result in proposed legislation that would be confusing to representatives of consumer groups, and adoption of the "waiver" concept probably would cause them to propose the reasonable fee system as a more desirable and understandable alternative.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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October 17, 1988

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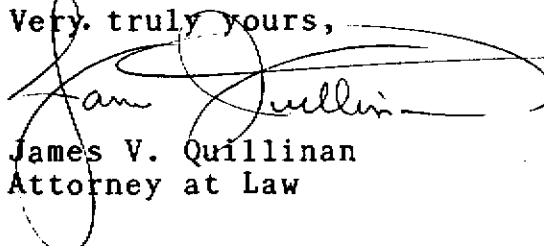
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California Law Revision Commission
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Re: LRC Memo 88-70 and First Supplement - Attorney's Fees

Dear John:

I have enclosed a copy of Chuck Collier's report on the Memo noted. The report represents the opinions and positions of Estate Planning, Trust and Probate Law Section as indicated. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,


James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Valerie Merritt
Terry Ross Irv Goldring

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Re: Memorandum 88-70 and First
Supplement Thereto

Dear John:

The following are comments with reference to Memorandum 88-70 and the First Supplement thereto.

The comments which follow are individual comments except where it is noted that the views expressed are those of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar.

These comments are as follows:

Letter of Transmittal

1. The Letter of Transmittal states that the recommendation relates to the estate attorney and the personal representative. However, it does not make any further reference to the personal representative but only discusses attorney's fees. The Letter of Transmittal, therefore, should be rewritten to discuss the proposals as to the personal representative's compensation as well as attorney's fees.

2. The reference in the Letter of Transmittal, paragraphs (2) and (3), to the statutory attorney's fees being a "maximum fee" is inappropriate. The statutory fee will, in fact, be the normal, standard and usual fee in probably 90% or more of all probates. The nature of the statutory fee is that it is deemed a reasonable fee by act of Legislature and therefore should not be considered a "maximum fee."

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3. Paragraph (2) of the Letter of Transmittal might be rewritten to state "The statutory fee is the standard fee that the Legislature has determined to be a reasonable fee payable to the attorney. However, the attorney and client may agree to a lower fee."

4. Paragraph (3) similarly should be reworded to refer to the statutory fee as the standard fee fixed by the Legislature.

Tentative Recommendation

1. The existing law, Probate Code Sections 901 and 910, and the proposed new Sections 10800 and subsequent and 10830 and subsequent deal first with compensation for the personal representative and secondly with compensation to the attorney. Yet, the Tentative Recommendation reverses this. Pages 1 through 13 deal with attorney compensation. Page 14 deals rather summarily with personal representative compensation. To be consistent with the existing statutory scheme and that proposed in the recommended legislation, the discussion of appropriate personal representative compensation should be set forth first, and the attorney compensation issue should follow.

2. Page 4 states that California is one of three states having a statutory fee schedule for attorney compensation. Yet, Memorandum 87-100 at page 33 stated that "California and seven other states use a statutory fee schedule for determining compensation for ordinary services." While at page 5 the Tentative Recommendation makes reference to six additional states that use a statutory fee as a basis for computing attorney's fees, the effort is made at page 5 to differentiate those from a statutory fee. This fine tuning of what constitutes a statutory fee, it is submitted, is unnecessary and should be deleted. Certainly there are many different ways of computing, for example, a reasonable fee determined by the court based upon court schedules of what constitutes reasonable compensation, etc. Similarly, any private agreement as to reasonable compensation may have a vast majority of differences as to how those agreements are made.

3. The typical estate referred to in Footnote 7 at page 4 of the Tentative Recommendation is not typical. We are not sure where that example came from, but it is a complicated estate and simply confuses a comparison of fees.

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4. Tables 3 and 4 on page 6 are based upon the "average estate." Yet, Table 5 on page 7 is based upon the size of the estate for the fee basis. It is believed that both Tables 3 and 4 should be computed on the same basis, that is, estates of \$100,000, \$300,000 and \$600,000 with one table including those states where real property is subject to the fee and the second including those states where real property is not subject to the fee.

5. Page 10, paragraph (1): You might add a comment that, since the statutory fee is easy to apply, it saves court costs and court time in determining fees.

6. Page 10, Footnote 20: The sentence "In a simple estate, the personal representative and attorney may negotiate a fee that is less than that provided by the statutory percentage" should be deleted. It refers to "a simple estate." It is itself misleading. Further, the language which has been used elsewhere is that the attorney and personal representative may agree upon a fee less than the statutory fee. The concept of "negotiations" has been eliminated from some of the other provisions and should be eliminated here.

7. Page 11, second full paragraph: The sentence "The statutory fee becomes, in effect, a statutory maximum, and avoids clogging the probate calendar with fee disputes" should be deleted. The concept of the fee being a "maximum" is inappropriate. Instead, the statutory fee is the normal, usual and standard fee determined by the Legislature to be a reasonable fee, notwithstanding the parties do have a right to agree to a lesser fee. That has been fairly covered in the first two sentences of that paragraph.

8. Pages 12 and 13, the written contract: The Tentative Recommendation argues that Section 6148 as written may not apply to statutory attorney's fees and that it is preferable to have a separate provision in the Business and Professions Code dealing with attorney's fees in probate. The Executive Committee of the Section, as you will recall from prior communications, unanimously supports an amendment to Section 6148, Business and Professions Code, to refer to fees fixed by statute or by court and opposes a separate section dealing only with attorney's fees in probate. (See letter of June 14, 1988 attached to Third Supplement to Memorandum 88-43 as Exhibit 1 and Proposed Amendment to Section 6148 attached thereto. A copy of that Proposed Amendment is attached to this letter for reference.)

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9. The statement on page 13 of the Tentative Recommendation that the contract should contain a statement that the "California Probate Code sets the maximum limits on the fee of the attorney, but the attorney and client may agree to a lower fee" is objected to. Again, the concept of a statutory fee is that it is the standard, normal, usual and reasonable fee fixed by the Legislature. Almost all estates are going to be handled on a statutory fee basis. To state that the statutory fees are "maximum fees" indicates that a normal or reasonable fee is below the maximum fee. That is not the nature of a statutory fee, and the implication should be eliminated from the Tentative Recommendation. Further, that language, of course, only refers to fees for ordinary services and as quoted the Tentative Recommendation is misleading.

10. Page 13, Footnote 28: The word "would" is repeated in both the third and fourth lines of the footnote and should be deleted.

11. Page 13, Footnote 29: This note refers back to Note 20 as a basis for the statement that under existing law attorney's fees are negotiable. Note 20 refers to Probate Code Sections 903 and 910 which themselves do not refer to any negotiability or acceptance of any lesser fee. The reference to Feinfeld, Fees and Commissions, 2 California Decedent Estate Practice, § 20.5, is reference to a single statement which said: "A contract under which the representative received less than the statutory allowance is probably enforceable, however. See Estate of Marshall (1897), 118 Cal. 379, 50 P.2d 540 (statutory commission allowed when evidence of an alleged contract for lower compensation insufficient)."

In short, the basis for arguing a number of times that under existing law the statutory fee is negotiable seems rather weak. As a matter of practice, lawyers as well as personal representatives often waive a portion of the statutory fee where it appears reasonable to do so in light of the time expended, perhaps the family relations involved in the case of a personal representative, etc. Those are not negotiated transactions. They are simply waivers by the personal representative or attorney of fees. That waiver concept is more in keeping with actual practice and, we believe, the existing law than the concept of statutory fees being negotiable under existing law.

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12. Page 14, Footnote 30, deals with compensation for the personal representative. It was my understanding that New York had departed from a pure formula percentage in determining fees.

13. Under a category of Other Recommendations, this refers to factors fixing extraordinary "fees." Should this not refer to extraordinary "commissions" for personal representatives and extraordinary "fees" for attorneys? If the proper phrase is "compensation" for extraordinary services, that term should be used for both personal representatives and attorneys.

14. On page 15, second paragraph, the factors listed include "whether the percentage fee for ordinary services is adequate compensation for all legal services provided." While this is probably an accurate statement of Estate of Walker, there certainly is an implication in including this in the statute that no compensation for extraordinary services can be granted until the estate is closed and the adequacy of the statutory fee is determined. It also implies that the party is going to have to justify statutory fees before any extraordinary fees can be awarded. This undercuts the concept of a statutory fee whenever there is a request for extraordinary compensation. In short, I believe that particular concept should be left to development by case law and not codified.

15. On page 17 under the heading "Allowance of Compensation by Court," the second sentence states: "The Commission recommends statutory provisions governing the allowance of both partial and final compensation." This sentence and the rest of that paragraph are unclear as to whether the reference is to statutory compensation or compensation for extraordinary services. Sections 904 and 911 appear to refer to statutory compensation or fees and allowance on account. Local rules often specify the limit on a partial allowance that can be obtained before the estate is closed. Proposed Section 10854 is limited to compensation for extraordinary services. However, the language in the Tentative Recommendation at pages 17 and 18 does not seem to be so limited.

Recommended Legislation

1. Proposed Section 6147.5: The resolution of the Executive Committee which is attached hereto and which was previously submitted to the Commission opposes a separate section dealing with probate attorney's fees and believes that the existing language of Section 6148, Business and Professions Code, can be modified as shown in that resolution to include fees which are either set by the court or which are statutory in nature.

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2. Proposed Section 6147.5: I believe it is the position of the Staff that Business and Professions Code Section 6148 already includes compensation of a guardian or conservator and attorney (Probate Code Sections 2640 and subsequent), and compensation for a trustee (fixed by the court) (Probate Code Section 17200(b)(9)). Presumably, it would also as now worded include attorney's fees for the estate set aside (Probate Code Sections 6600 and subsequent; Section 6613 in particular), the spousal set aside or confirmation procedures (Sections 13500 and subsequent; Section 13660 in particular), etc. The implication of Section 6147.5 as written is that statutory fees are somehow unfair and that the personal representative should be clearly advised that he or she has the right to seek lower fees. Applying the same logic to all other matters, it would appear that anyone entering into a written fee agreement with an attorney should be advised that the attorney's hourly rates may be negotiable or that other lawyers may charge a lower hourly rate for the same services. Certainly the existing statute makes no such requirement of disclosure that some other lawyer might handle the matter on an hourly charge for less.

3. With specific reference to proposed Section 6147.5, paragraph (b)(2)(B) provides that, if the compensation is not determined under the statutory structure, "the compensation so provided shall not exceed the maximum limits imposed by Chapter 2 . . ." This paragraph is unclear as to whether it is referring to statutory services where compensation is determined by another method or whether it refers to non-statutory services. Clearly, as to non-statutory services, the statutory amounts are inapplicable. We again object to the concept in the language "shall not exceed the maximum limits." We believe that should simply state that the compensation "shall not exceed the statutory compensation imposed by Chapter 2."

In paragraph (c)(4), we believe that statement should be reworded to read as follows: "The California Probate Code sets the standard fee for the attorney for ordinary services. The attorney and client may agree to a lower fee but may not agree to a higher fee."

Paragraph (d), we believe, should be reworded starting with the fourth line of paragraph (d) as follows: "collect compensation in an amount determined by the court to be reasonable for the services actually provided. The statutory compensation is presumed to constitute reasonable compensation. The compensation shall not exceed the statutory compensation imposed by Chapter 2."

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4. Proposed Section 10830: The comment again refers to the "maximum limits on the fee." This language again could be changed to refer to the fact that for ordinary services the compensation shall not exceed the statutory fees. An additional sentence might be added at the end of the comment just before the reference to proposed Section 6147.5(d) to state that "the statutory fee is presumed to be reasonable compensation."

5. Proposed Section 10832: The Note at the bottom raises a question of whether the personal representative should have a duty to negotiate a lower attorney fee in appropriate cases. This will be discussed further with reference to the First Supplement to Memorandum 88-70. If a duty is imposed on the personal representative to negotiate a lower fee, it essentially destroys the statutory fee concept as being the fee, the standard fee or the reasonable fee. It, in effect, converts it to a maximum fee and would subject the personal representative to potential liability if he or she were not able to negotiate a lower fee. As commented earlier, most estates are fairly small and attorneys are going to charge a statutory fee in the vast majority of those estates. Most attorneys indicate they in fact either break even or lose money on smaller estates but feel that over a period of time their compensation averages out because on some larger estates they are able to collect fees in excess of straight time charges.

6. Proposed Section 10833: The Note proposes alternate language for subdivision (b). The language does not seem clear. Presumably, the personal representative and an attorney could either agree to the statutory compensation or they could agree to some compensation more than that provided in the will but less than a full statutory compensation. It is suggested that, if the alternate wording of paragraph (b) is utilized, the language be clarified.

7. Proposed Section 10850: In the second paragraph of the comment, seventh line, there is a typographical error where the words "of for" are used in the same sentence. One or the other should be deleted.

8. Proposed Section 10852: Paragraph (c) perhaps should be clarified because the benefit may be for a particular beneficiary without detriment to the interests of other beneficiaries or may benefit the estate as a whole. Perhaps some rewording is appropriate. Paragraph (f) again raises a question of whether the Estate of Walker should be codified and again suggests that

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the statutory compensation would have to be justified before asking for any type of extraordinary type of compensation. This raises the risk that an attorney asking for extraordinary compensation would have to outline in great detail the statutory services, time expended, etc., before asking for extraordinary services. This seems unjustified, and we believe existing law works satisfactorily and that Estate of Walker should not be codified.

In the Comment, second line, fourth paragraph, there is a typographical error which should refer to "(f)."

First Supplement to Memorandum 88-70

1. This Memorandum apparently results from the views of Commissioner Von Walker and does not necessarily reflect the views of any of the other Commissioners.
2. Commissioner Walker apparently wants to highlight the statement in a written fee agreement that the attorney's fees for ordinary services cannot exceed the statutory fees.
3. We again object to the proposed language in the first alternative that the Probate Code "sets the maximum limits on the fee of the attorney, but the attorney and client may negotiate a lower fee." The statutory fee is intended to be a standard, normal and usual fee for statutory services. There is no need to stress that it is a "maximum limit" on fees. Further, the statement is misleading in that it does not refer to statutory fees being limited to ordinary services. Clearly, there are many estates where there are requests for extraordinary fees for probate work. There are also situations where the attorney will represent the persons individually in transferrirng joint tenancy, in transferring insurance proceeds, pension rights, etc., and will bill for those separately. This concept of a "maximum limit" is therefore confusing to the consumer. Further, the reintroduction of the word "negotiate" a lower fee suggests something different than agreeing to a lower fee. The word "negotiate" in its dictionary definition includes "to confer with another so as to arrive at the settlement of some matter" or "to arrange for or bring about through . . . compromise." The words suggest an affirmative duty on the personal representative to seek to compromise or settle a statutory compensation at some amount different than the statutory compensation. The word "agree" to a lower compensation is a more appropriate choice of words.

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4. As to the second alternative dealing with a disclosure statement on a separate page to be signed by the personal representative, the language "THE STATUTE SETS THE MAXIMUM LIMIT ON THE FEE OF THE ATTORNEY AND THAT THE ATTORNEY AND CLIENT MAY NEGOTIATE A LOWER FEE" is inappropriate. It clearly does not refer to ordinary services. It is confusing to the consumer as to whether it applies to ordinary or extraordinary services. It suggests that the statutory fee is not the normal fee but rather a statutory maximum, and it invites negotiation to reach a settlement or compromise of the fee. None of these implications are appropriate under a statutory fee system.

5. Requiring a disclosure statement either in 10 point bold face type (Alternative No. 1) or in a separate page to be signed by the personal representative are both entirely inconsistent with the concept of a written fee agreement under Business and Professions Code Section 6148. That section does not require any such bold face type or separate agreements signed by the client that hourly rates, for example, are negotiable or that there is a duty to negotiate hourly rates or that some other attorney might work for less. There is no reason to single out probate attorneys as ones who must make much different and fuller disclosures than those required by attorneys in any other area of practice. Again, the implication is that the fees charged in probate are not reasonable. That implication is unjustified and for the vast majority of estates the fees charged on a statutory basis based upon studies done by the Executive Committee of this Section would be higher than the statutory fee. The statutory fee itself provides consumer protection, and the elaborate language suggested in proposed Section 6147.5 is inappropriate.

6. Commissioner Walker further expresses a view that the staff draft does not protect persons interested from an unreasonable attorney fee. He apparently does not want to provide immunity to the personal representative if he or she does not negotiate attorney compensation less than the statutory compensation. To expose a personal representative to personal liability for his or her failure to negotiate fees lower than statutory fees is unjustified. In many cases, the attorney has been the attorney for the family for many years, has prepared the estate planning documents, etc. To force a personal representative to "shop" for an attorney who will handle the matter for less is a disservice to the legal profession and to the consumer. The mere fact that an attorney charges less for services does not mean that the services are of equal quality or that services are rendered efficiently and expeditiously.

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7. The Staff's suggestion that the personal representative should be immuned from any liability for failure to negotiate a fee but that the fee would be subject to court review by any interested party is similarly inappropriate in a statutory fee system. The statutory fee is the fee. It is the standard fee, the usual fee and the normal fee. It should not be subject to attack by any interested party. Therefore, the language under proposed Section 10832(b) should not be changed to either impose any liability on the personal representative to negotiate lower fees or to give interested parties any right to have the court review the statutory fee.

8. The concept of a statutory fee is that it is an average fee, taking into account a number of estates over a period of time. In any given estate, the ordinary services may substantially exceed the statutory fee. In other estates, the statutory fee may be approximately the same as the hourly charge if billed on a hourly basis. In other estates, the statutory fee may exceed the services on an hourly basis.

9. As pointed out in the letter attached to the Sixth Supplement to 87-100, a percentage compensation is normal for real estate brokers, for stock brokers and many others.

In General

1. The views of the Executive Committee of the Estate Planning, Trust and Probate Section, State Bar, included in this letter are:

a. That Business and Professions Code Section 6148 can be modified easily to include provisions for fees fixed by court or by statute and that no separate section is required.

b. That the concept of the statutory fee being the "maximum limit" should be deleted in its entirety from the Tentative Recommendation, recommendation legislation and comments, but instead the statutory fee should be referred to as a standard fee.

c. That Estate of Walker should not be codified but left to development by case law.

d. That there should be no duty on the personal representative to seek a fee less than the statutory fee for ordinary services.

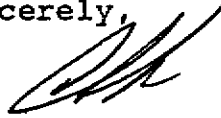
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2. The remainder of the comments in this letter are either those of the writer individually or those of one or two other members of the Executive Committee who have communicated with the writer with individual comments.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd
Enclosure

cc: James Quillinan, Esq.
Sterling Ross, Esq.
Valerie Merritt, Esq.
Irwin Goldring, Esq.

RESOLUTION ADOPTED UNANIMOUSLY BY
THE EXECUTIVE COMMITTEE, ESTATE
PLANNING, TRUST AND PROBATE LAW
SECTION, AT ITS MEETING ON JUNE
21, 1988

RESOLVED that proposed Part 7 of Division 7 of the Probate Code, Part 7 being entitled "Compensation of Personal Representative and Estate Attorney," be modified as follows:

1. Chapter 2, Article 1, Written Agreement Concerning Legal Fees, Sections 10820-10823 as proposed be deleted in its entirety.
2. That the subheading "Article 2, Compensation to Estate Attorney" be deleted as no longer necessary.
3. That Chapter 2, Compensation of Estate Attorney, commence with Section 10830.
4. That Business and Professions Code Section 6148 be amended to read as follows:

"Business and Professions Code § 6148 (technical amendment). Attorney fees

(a) In any case not coming within Section 6147, including those where the fee is determined by the court or by statute, of this code or Section 10820 of the Probate Code in which it is reasonably foreseeable that total expense to a client, (including attorney 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:

- (1) The hourly rate ^{or} and other standard or statutory rates, fees and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) If the attorney's compensation is set by statute, the attorney may agree with the client to a lower fee than the statutory fee. The client, if a fiduciary, has no duty to agree to attorney compensation less than statutory compensation.

^c
(b) All bills for services rendered by an attorney to a client shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees; and, upon request by the client, where the fee is not determined by the court or by statute, the attorney shall provide a bill to the client no later than 10 days following the request. The client is entitled to similar requests at intervals of no less than 30 days following the initial request.

^d
(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee. If there is a statutory fee, the amount set by statute shall be presumed to be reasonable for statutory services.

^e
(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

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(e) This section applies prospectively only to fee agreements followings its operative date.