

## First Supplement to Memorandum 89-83

Subject: Study L-1036/1055 - Compensation of Attorney and Personal Representative

We have received the comments of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar on Memorandum 89-83 relating to compensation of the estate attorney. The comments of the Executive Committee are attached as Exhibit 1 and are discussed below.

Section 9684

The Executive Committee points out that Section 9684 was written to enable a personal representative and an attorney to agree to a fee arrangement and then to obtain approval of the fee agreement prior to the performance of services. This is correct, although the section also permits an interested person to obtain a review of the reasonableness of the fee agreement after services have been performed.

The Executive Committee points out that the staff revision of the section is phrased to cover only the situation where the services have actually been performed, thereby casting doubt on whether the court can approve the agreement before any services have been performed. This objection has merit.

The staff recommends that subdivision (c) of Section 9864 as set out on page 7 of Memorandum 89-83 be revised to read:

(c) On hearing the petition, the court shall approve the agreed compensation unless the court determines that the agreed compensation is unreasonable in light of the work to be performed for the estate. If the work has already been performed and the court has not previously reviewed the agreed compensation, the court shall determine whether the agreed compensation is unreasonable in light of the work actually performed for the estate. In making the determination as to the reasonableness of the compensation in the case of the attorney for the personal representative, the court shall be guided by Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation.

In the interest of clarity, the staff also proposes that the introductory portion of Section 9684 be revised to make a reference to the provision of the independent administration statute that limits the right of a person who receives notice of proposed action to obtain court review of the proposed action (in this case the reasonableness of the agreed compensation). We recommend that the introductory portion of subdivision (a) of Section 9684 (page 6 of Memorandum 89-83) be revised to read:

9684. (a) On Subject to Section 10590, on petition of the personal representative or an interested person, the court shall review the following as requested in the petition:

The staff recommends that the Comment to Section 9684 be revised to read:

§ 9684. Court review of employment and compensation

Comment. Section 9684 continues Section 9684 of the repealed Probate Code without change. The section is drawn in part from Section 3-721 of the Uniform Probate Code (1987).

Section 9684 permits the personal representative and the person who will provide the services to the estate (such as an attorney) to make a fee arrangement and then to obtain approval of the fee agreement prior to the performance of services. If the fee agreement is approved by the court or by the beneficiaries (either expressly or under the independent administration procedure), the agreement itself sets the rules for determining the compensation to be paid.

Section 9684 also permits an interested person to obtain review of the reasonableness of the compensation paid or to be paid to a person who has been or is to be paid out of funds of the estate. However, this review may not be obtained if the court previously has either approved the fee agreement or fixed the reasonable compensation for the services provided or to be provided. The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person also may be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, 10580(b) (notice of proposed action permitted but not required); Sections 10585.5, 10590 (effect of giving notice of proposed action).

In determining whether the compensation for the estate attorney is reasonable, the court may consider any relevant factors, including but not limited to those set out in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). See subdivision (c).

Subdivision (e) (d) avoids the need for a separate action or proceeding to recover an excess payment of

compensation, thus providing a quick and efficient remedy. Where the person ordered to make the refund is the attorney for the personal representative, the court can order the refund at the same time it determines the agreed compensation is unreasonable. In other cases, the procedure in Section 9684.5 (reimbursement of excessive compensation) must be used but the hearing under Section 9684.5 can be combined with the hearing under Section 9684.

~~The right of an interested person to obtain court review of the reasonableness of the hiring and compensation of the person also may be limited by use of the notice of proposed action procedure under the Independent Administration of Estates Act. See Sections 10404.5, 10550, 10565, 10580(b) (notice of proposed action permitted but not required), Sections 10585.5, 10590 (effect of giving notice of proposed action).~~

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders), 1200-1230 (notice of hearing), 1250-1252 (request for special notice), 1260-1265 (proof of giving of notice).

Section 11001 provides an alternative procedure to the procedure provided in Section 9684. Under Section 11001, the court may review, in a contest on settlement of the final account, the propriety of employment and reasonableness of compensation of any person employed under Section 9680, including the estate attorney. But see subdivision (e) (f) of Section 9684 (binding effect of determination under Section 9684) and Sections 10585.5, 10590 (effect of giving notice of proposed action). See also Section 10900 (report of administration to show hiring and payment of persons hired under Section 9680).

If the attorney is dissatisfied with the ruling of the court, the attorney may withdraw as estate attorney. See Section 9685 (right of attorney to decline to be the attorney for the personal representative; right of attorney to withdraw as the attorney for the personal representative).

As to the law applicable to a proceeding commenced before January 1, 1990 1991, see Section 9686. As to the application of any amendments made after that date, see Section 3.

#### Background on Section 9684 of Repealed Code

Section 9684 was added by 1990 Cal. Stat. ch. AB831. For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

#### Attorney Serving as Both Estate Attorney and Personal Representative (Sections 10801 and 10804)

The staff was under the impression that attorneys did not serve in the capacity of both estate attorney and personal representative in California. The Stein study found that a lawyer serves as personal

representative and estate attorney in California in 0.7 percent of testate estates and 0 percent of intestate estates. Presumably the will that authorizes the lawyer to serve in both capacities also will deal with the issue of compensation for service in both capacities.

Accordingly, the staff believed that it would be appropriate to deal with the concern that HALT expressed about what they call "double-dipping" where the attorney collects both the personal representative's statutory fee and also reasonable compensation as the estate attorney. To respond to that concern, the staff suggested a revision of the Comment to Section 10801 and a revision of Section 10804. The Executive Committee objects to both. It should be recognized that the decision on whether to approve or disapprove the staff suggestions is an important one. HALT considers this a matter of primary importance. We would like to avoid a controversy on this point when the Legislature considers our recommendation concerning attorney compensation in January 1990. The objections of the Executive Committee are discussed below.

Section 10804. The effect of Section 10804 as recommended by the Commission is that the personal representative cannot serve also as estate attorney unless authorized by the decedent's will or by a court order authorizing service in both capacities. The Stein study indicates that attorney in California does not now serve in both capacities in intestate estates and serves in both capacities in less than one percent of testate estates. Section 10804 as recommended by the Commission would have no effect where the will authorizes the attorney to serve in the both capacities. Accordingly, the staff believes that Section 10804 as proposed by the Commission would have no significant impact on existing practice and deals with a concern that HALT considers of primary importance.

Under existing law, the personal representative who is also an attorney may receive the personal representative's compensation but unless expressly authorized by the decedent's will may not receive compensation for legal services as estate attorney. The existing law is summarized in the Extract from the staff background study attached as Exhibit 2. Section 10804 (as recommended by the Commission) would liberalize existing law to permit service in both capacities if

authorized by the court. The revision proposed by the staff (bottom of page 3 and top of page 4 of Memorandum 89-83) would add a new subdivision (d) to Section 10804 to provide a standard to guide the court in determining whether to make an order authorizing service in both capacities: The added language provides that an order authorizing the personal representative to also serve as estate attorney may be made upon a determination that it is to the advantage of the estate and in the best interest of the persons interested in the estate. This appears to the staff to be a reasonable standard.

In place of Section 10804 (as recommended by the Commission and as proposed to be revised by the staff), the Executive Committee suggests a new Section 10804, to read:

10804. A personal representative who is an attorney may perform legal services for the estate and receive compensation for services as the estate attorney. The compensation paid the personal representative for legal services rendered to the estate shall be subject to approval and review by the court.

This proposal permits dual service without prior court authorization. This represents a significant and controversial change in existing law. The issue of the personal representative serving also as estate attorney is controversial. See the discussion from the Stein study attached as APPENDIX 5 (green pages) to Exhibit 2 to this Supplement. When the Commission previously considered this issue, the Commission decided to authorize service in both capacities only where a prior court order was obtained or where specifically authorized in the decedent's will.

Revision of Portion of Comment to Section 10801. The Executive Committee also objects to the revision of the portion of the Comment to Section 10801 set out at the top of page 5. The staff believed that this was a clarifying, rather than substantive, revision.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

**LATHAM & WATKINS**

ATTORNEYS AT LAW

555 SOUTH FLOWER STREET  
LOS ANGELES, CALIFORNIA 90071-2466  
TELEPHONE (213) 485-1234  
FAX (213) 614-8763  
TLX 590773  
ELN 62793268  
CABLE ADDRESS LATHWAT

PAUL R. WATKINS (1899-1973)  
DANA LATHAM (1898-1974)

CHICAGO OFFICE

SEARS TOWER, SUITE 5800  
CHICAGO, ILLINOIS 60606  
TELEPHONE (312) 876-7700  
FAX (312) 993-9767

NEW YORK OFFICE

53RD AT THIRD, SUITE 1000  
885 THIRD AVENUE  
NEW YORK, NEW YORK 10022-4802  
TELEPHONE (212) 908-1200  
FAX (212) 751-4664

ORANGE COUNTY OFFICE

550 TOWN CENTER DRIVE  
TWENTIETH FLOOR  
COSTA MESA, CALIFORNIA 92626-1918  
TELEPHONE (714) 540-1235  
FAX (714) 755-8290

November 16, 1989

SAN DIEGO OFFICE

701 "B" STREET, SUITE 2100  
SAN DIEGO, CALIFORNIA 92101-6197  
TELEPHONE (619) 236-1234  
FAX (619) 696-7419

WASHINGTON, D.C. OFFICE

1001 PENNSYLVANIA AVE., N.W., SUITE 1300  
WASHINGTON, D.C. 20004-2508  
TELEPHONE (202) 637-2200  
FAX (202) 637-2201

BY FEDERAL EXPRESS

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

CA LAW REV. COMM'N

NOV 17 1989

RECEIVED

Re: Study L-1036/1055: Compensation of Attorneys and Personal Representatives

Dear Commissioners:

I am writing to you on behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association.

Section 9684.

We strongly oppose the Staff's proposed revision to Section 9684, as set forth in Memorandum 89-83. The Staff's proposal would change Section 9684 to permit the beneficiaries of a probate estate to file a petition that requires the court to determine whether the agreed compensation owed to the estate's attorney is unreasonable in light of the work actually performed for the estate. The proposed language is at odds with the entire structure of the new attorney compensation provisions so carefully crafted by the Staff and would doom this legislation.

Section 9684 was written to enable a personal representative and an attorney to agree to a fee arrangement and then to obtain approval of the fee agreement prior to the performance of services. This approach avoids surprises for either party. Under this approach, if the fee agreement is approved by the court or the beneficiaries, either expressly or by the notice procedure, the agreement itself sets the rules for determining whether the compensation eventually

Commissioners  
California Law Revision Commission  
November 16, 1989  
Page 2

paid is proper. The Staff's proposed revision would have the court ignore the fee agreement, and allow the beneficiaries to force the court to apply a standard of review to the fee contract which is arbitrary and in no way related to the agreement between the parties.

Under the new attorney compensation system, in an estate where the fee agreement has been approved, there can be only one standard: whether the fees have been earned under the terms of the agreement. Reinstating judicial review under any other standard except enforcement of the fee agreement itself, and thereby providing the beneficiaries an opportunity to renege on the contract and second guess the attorney's compensation based on hindsight, is not equitable or acceptable.

#### Section 10801.

We also oppose the Staff's proposed addition to the Comment to Section 10801, as set forth in Memorandum 89-83. The Staff's proposed addition would change the Comment to state that an attorney serving as personal representative may not receive compensation for "legal services" rendered by the personal representative except as authorized by the decedent's will or by court order.

The Staff's proposed addition to the Comment fails to recognize that even where an attorney who is serving as personal representative does not serve as "attorney for the estate," most of the services provided by the attorney as personal representative can properly be called "legal services." Moreover, in all cases where an attorney serves as personal representative, the attorney will perform "legal services" in his capacity as personal representative.

Whether or not those services are extraordinary services and whether additional compensation for such services should be awarded, should be left to the discretion of the court when considering the attorney/personal representative's petition for fees. Obtaining prior court approval, which under the proposal would, as a practical matter, be necessary in every case where an attorney serves as personal representative, would be a pointless waste of time and money.

Commissioners  
California Law Revision Commission  
November 16, 1989  
Page 3

We also oppose the Staff's recommended changes to Section 10804. By the proposed changes, the Staff would provide for a new proceeding by which a personal representative who is an attorney could petition the court for authorization to receive compensation both as personal representative and as estate attorney.

Under the Staff's proposal, it is unclear whether such a petition and determination would be proper, or could even be allowed, after the services were rendered, such as when the court reviews and approves the attorney/personal representative's petition for compensation. Accordingly, in practice, every attorney serving as personal representative would need to begin the probate proceeding by filing such a petition, if only as a precautionary matter. The attorney/personal representative would not want to run the risk that his fees for services as personal representative in excess of the statutory amount could be challenged as "unauthorized" fees for legal services.

In addition to being virtually required in most cases involving an attorney/personal representative, the proceeding, as proposed, would be a waste of time in nearly every case. The proposal calls for the court to determine whether the dual compensation would be "to the advantage of the estate and in the best interest of the persons interested in the estate." Making such a determination at the initiation of a probate, which is apparently when the proceeding would have to occur, would be an exercise in guesswork, pure and simple. Again, as a practical matter, the standard supplied could not be applied because the facts of the particular probate proceeding would not yet have even begun to unfold.

We recommend that the Commission consider a new Section 10804, as follows:

Section 10804. A personal representative who is an attorney may perform legal services for the estate and receive compensation for services as the estate attorney. The compensation paid the personal representative for legal services rendered to the estate shall be subject to approval and review by the court.

Commissioners  
California Law Revision Commission  
November 16, 1989  
Page 4

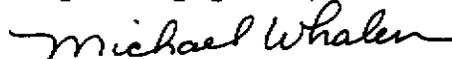
to the estate shall be subject to approval and review by the court.

This proposed Section 10804 is consistent with new Section 9680, which allows attorneys who serve as personal representative to hire attorneys associated or affiliated with them to serve as estate attorney. Our proposed Section 10804 places responsibility for reviewing the reasonableness of the attorney/personal representative's fees squarely in the lap of the court. Furthermore, the court would make its determination at the proper time, i.e., when the work has been completed, not before the probate has even started.

The presumptive prohibition forbidding an attorney/personal representative from receiving compensation as the estate attorney is an anachronism of the now abandoned statutory fee system, and should itself be abandoned by the Commission. To the extent the rule ever served a purpose, other than to set a trap for the unwary like the Staff's proposal, it no longer does so. Whether the attorney serving as personal representative should receive compensation both as personal representative and as estate attorney should be left to the discretion of the court when considering the attorney/personal representative's petition for fees.

Representatives of our Section will attend the meeting on November 30 to discuss these matters with the Commission.

Very truly yours,



Michael S. Whalen  
of LATHAM & WATKINS

cc: Members of the Executive Committee  
of the Los Angeles County Bar Association  
Probate and Trust Law Section

**PERSONAL REPRESENTATIVE SERVING ALSO AS ESTATE ATTORNEY**

(Extract from pages 94-95 of Staff Background Study)

Compensating attorney who serves as personal representative. The ABA Statement provides that an attorney who serves as personal representative is entitled to compensation for both legal services and for services as personal representative.<sup>192</sup>

California does not follow this rule. Under existing California law, a personal representative who is also an attorney may receive the personal representative's compensation but not compensation for legal services as estate attorney.<sup>193</sup> "One must hire a third party to perform such services or serve without compensation."<sup>194</sup> However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting both as attorney and as personal representative.<sup>195</sup>

The theory justifying the California rule is that the personal representative has a conflict of interest if he or she also serves as estate attorney.<sup>196</sup> By selecting himself to perform the duties of an

---

192. See text, *supra*, at note 14.

193. *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).

194. *Estate of Parker*, 200 Cal. 132, 137, 251 P. 907 (1926); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-369, 162 Cal. Rptr. 393, 395 (1980). Where the personal representative is a member of a law firm and the law firm acts as estate attorney, the estate may not be charged for the firm's legal services unless the attorney-personal representative will not receive any part of the fees paid by the estate to the law firm. *Estate of Parker*, *supra*.

195. *Estate of Thompson*, 50 Cal. 2d 613, 614-615, 328 P.2d 1, 2-3 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966).

196. *Estate of Lankershim*, 6 C.2d 568, 572, 58 P.2d 1282 (1936); *Estate of Haviside* 102 Cal. App. 3d 365, 369, 162 Cal. Rptr 393, 395 (1980).

attorney for the estate, the personal representative becomes his own employer and is thus under a temptation of self interest to defraud the estate. The denial of legal fees serves to curb the temptation and encourage the hiring of independent counsel.

It is doubtful that denying the personal representative compensation for the legal services he or she provides to the estate will curb the personal representative bent on defrauding the estate. Moreover, some take the view that more frequent service by attorneys as personal representatives would be a benefit to estates and should be encouraged. An article by a California probate practitioner strongly advocates this view.<sup>197</sup> The author of the article takes the position that no one is better qualified to serve as personal representative than a competent attorney.

The *Stein Study* contains an extensive discussion of this issue.<sup>198</sup> That discussion is attached as Appendix 5. This portion of the *Stein Study* discusses the advantages and disadvantages of the personal representative also serving as estate attorney. It also presents the views of practitioners concerning the issue and describes the practice in California and in some other states.

This issue is a significant one that merits serious consideration by the Commission. It should be kept in mind that a corporate trustee is not interested in serving as a personal representative for a relatively small estate. The staff makes no recommendation as to how the issue should be resolved.

---

197. Avery, *Fiduciary Role of the Lawyer: Do Lawyers Practice Like They Did in the 18th Century? A Glimpse into the Future*, 4 Prob. Law. 1 (1977).

198. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1163-1172 (1984).

**APPENDIX 5. EXTRACT FROM STEIN STUDY  
(COMPENSATING ATTORNEY WHO SERVES AS PERSONAL REPRESENTATIVE)**

Extract from Stein & Fierstein, *The Roll of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1163-1172 (1984)

1984] *THE ESTATE ADMINISTRATION ATTORNEY* 1163

**VI. THE ATTORNEY AS PERSONAL REPRESENTATIVE**

The attorney for an estate performs such a wide range of services that generalization is difficult.<sup>84</sup> In fact, an attorney

---

<sup>84</sup> See *supra* Section V.

1164 *MINNESOTA LAW REVIEW* [Vol. 68:1107

may frequently perform some services that do not, strictly speaking, represent work of a legal nature, such as operating a business or making investments. More prosaically, the attorney may personally have to inventory the decedent's property and pay creditors. Although these tasks are technically the responsibility of the estate's personal representative, the attorney as a matter of convenience or necessity may personally perform such tasks for the estate.

In some estate administrations, the attorney will formally assume responsibility for nonlegal tasks by officially serving as the personal representative of the estate. This arrangement is usually more efficient than the ordinary division of labor between a lay or corporate personal representative and the estate's attorney because an attorney also acting as sole personal representative will presumably have both authority to act and technical knowledge of the legal requirements. Potential communication difficulties are obviated. The attorney-representative is in a position to act quickly because it is unnecessary to wait for a lay representative to be informed and to participate.

An attorney serving as personal representative does, however, have some disadvantages. Although there will be no communication problems between attorney and representative, the problems of communication with other interested parties remain. The process of keeping numerous beneficiaries informed may be time-consuming, yet it requires little technical expertise and thus may be better left to a lay representative. Other tasks that personal representatives must perform fall into this same category.

A personal representative is entitled to a fee or commission for services to the estate. A personal representative who is also a beneficiary may waive the commission—either as a favor to other familial beneficiaries or, because such commissions are taxable income, to receive the amount as a nonincome-taxable inheritance.

Attorneys receive a fee for their legal services to the estate. Should an attorney serving as personal representative also receive additional fees for services as representative?

A survey of prominent estate administration attorneys throughout the United States conducted by the American College of Probate Counsel revealed that knowledgeable attorneys disagree about the propriety of attorneys serving as fiducia-

ries.<sup>85</sup> The survey asked whether it is appropriate for an attorney to serve as coexecutor or cotrustee with a corporate representative. Of the forty-five attorneys who expressed an opinion, seven had no hesitancy about serving, nine would refuse to serve in any case, and twenty-nine generally had negative feelings about serving except in extraordinary situations. Of the fifty-one attorneys surveyed, twenty-two had in fact served as a coexecutor or a cotrustee.<sup>86</sup>

The estate attorney's conscience will of course influence the decision whether to serve as a personal representative. Equally important, however, may be whether state law permits the attorney-personal representative to be compensated separately for both services. The study states have adopted various positions on this issue through both statutory and case law.

California, by statute, sets personal representatives' fees as a percentage of the estate<sup>87</sup> and also sets attorneys' fees at the same percentage.<sup>88</sup> Although no statute prohibits an attorney from being compensated in both capacities, California case law establishes the general rule that an attorney-personal representative is not entitled to a fee for legal services unless the decedent's will names a practicing attorney as executor and specifically provides for compensation in both capacities.<sup>89</sup>

Texas sets representatives',<sup>90</sup> but not attorneys',<sup>91</sup> fees by statute. Although neither Texas statutory law nor case law prohibits an attorney from acting and receiving fees in both capacities for the same estate,<sup>92</sup> Texas case law suggests that a "better practice" is for the order appointing the attorney as personal representative to specify that the heirs have consented to both the attorney's dual appointment and payment of reasonable attorneys' fees in addition to the statutory representatives' fees.<sup>93</sup>

On the other hand, attorneys in Florida, Maryland, and

85. Reichert, *Attorney Serving as Co-Executor or Co-Trustee with a Bank*, 4 PROB. NOTES, No. 4, Summer 1978, at 19, 20.

86. *Id.* at 19.

87. CAL. PROB. CODE § 901 (West 1981).

88. *Id.* § 910.

89. See, e.g., *In re Estate of Thompson*, 50 Cal. 2d 613, 614-15, 328 P.2d 1, 2-3 (1958).

90. TEX. PROB. CODE ANN. §§ 241(a), 242 (Vernon 1980).

91. *Id.* Section 242 states simply that personal representatives are entitled to reimbursement for "all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court." *Id.* § 242.

92. See, e.g., *Burton v. Bean*, 549 S.W.2d 48, 50-51 (Tex. Civ. App. 1977).

93. *Id.* at 51-52.

Massachusetts are clearly authorized to serve in both capacities and to collect reasonable fees for each. In Florida, such dual fees are specifically authorized by statute.<sup>94</sup> The Maryland Probate Code, at the comment to section 7-602, states that attorneys may act in both capacities and collect reasonable fees for each,<sup>95</sup> with the supervision of the court and the provisions of Canon 12 of the ABA Code of Professional Ethics protecting the estate from unreasonable fees.<sup>96</sup> Massachusetts case law apparently authorizes the attorney serving as personal representative to receive reasonable fees for services in both capacities.<sup>97</sup> Indeed, the former minimum fee schedule of the Massachusetts Bar Association explicitly authorized the attorney to collect fees in both capacities<sup>98</sup>—despite the potential conflict of interest, beneficiaries are deemed to be adequately protected by the safeguard that the court must review and approve attorneys' fees.<sup>99</sup>

*A Statement of Principles Regarding Probate Practices and Expenses*, promulgated by the ABA, addresses the issue of attorneys' fees in the probate area in some detail.<sup>100</sup> The statement specifies that attorneys who serve as sole personal representatives are entitled to compensation in both capacities and attorneys performing part or all of the normal duties of the personal representative should receive increased compensation for the additional work.<sup>101</sup>

Given the divergence of opinion as to the propriety of the

94. FLA. STAT. ANN. § 733.617(3) (West Supp. 1983); see *In re Estate of Melcher*, 319 So. 2d 192 (Fla. Dist. Ct. App. 1975) (attorney appealed the fee award; court upheld lower court's determination of "reasonable fees").

95. MD. EST. & TRUSTS CODE ANN. § 7-602 (1974) (comment).

96. *Id.* The comment states:

This Section is not intended to limit an attorney from acting both as a personal representative or copersonal representative as well as an attorney. It is expected that if an attorney is named as a personal representative or copersonal representative, he may well perform some if not all of the legal services which need to be rendered for the benefit of the estate during the course of administration. How, or whether, he renders services to the estate in two capacities is immaterial since his request for and acceptance of compensation for services in either or both capacities must be determined in accordance with the provision of Canon 12 of the Code of Professional Ethics of the American Bar Association.

*Id.*

97. *First National Bank v. Brink*, 372 Mass. 257, 264-66, 361 N.E.2d 406, 410-11 (1977); *Lembo v. Casaly*, 5 Mass. App. Ct. 240, 244, 361 N.E.2d 1314, 1317 (1977).

98. See *Proposed Minimum Fee Schedule*, 51 MASS. L.Q. 161, 187 (1966).

99. See MASS. ANN. LAWS ch. 215, § 39A (Michie/Law Co-op. 1974).

100. *Statement of Principles Regarding Probate Practices and Expenses*, 8 REAL PROP., PROB. & TR. J. 293 (1973) [hereinafter cited as *ABA Statement*].

101. *Id.* at 296.

## First Supplement to Memorandum 89-83

Subject: Study L-1036/1055 - Compensation of Attorney and Personal Representative

We have received the comments of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar on Memorandum 89-83 relating to compensation of the estate attorney. The comments of the Executive Committee are attached as Exhibit 1 and are discussed below.

Section 9684

The Executive Committee points out that Section 9684 was written to enable a personal representative and an attorney to agree to a fee arrangement and then to obtain approval of the fee agreement prior to the performance of services. This is correct, although the section also permits an interested person to obtain a review of the reasonableness of the fee agreement after services have been performed.

The Executive Committee points out that the staff revision of the section is phrased to cover only the situation where the services have actually been performed, thereby casting doubt on whether the court can approve the agreement before any services have been performed. This objection has merit.

The staff recommends that subdivision (c) of Section 9864 as set out on page 7 of Memorandum 89-83 be revised to read:

(c) On hearing the petition, the court shall approve the agreed compensation unless the court determines that the agreed compensation is unreasonable in light of the work to be performed for the estate. If the work has already been performed and the court has not previously reviewed the agreed compensation, the court shall determine whether the agreed compensation is unreasonable in light of the work actually performed for the estate. In making the determination as to the reasonableness of the compensation in the case of the attorney for the personal representative, the court shall be guided by Rule 4-200 of the Rules of Professional Conduct of the State Bar of California (fees for legal services). If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation.

estate's attorney also serving as a personal representative, it is perhaps surprising that attorneys serve as representatives as frequently as they do. An attorney served as personal representative, either alone or as co-representative, in 8% of Florida estates, 14% of Maryland estates, and 12% of Massachusetts estates (Table 6.1). By contrast, an attorney served as personal representative in only 2% of Texas estates and in less than 1% of California estates (Table 6.1).