

Memorandum 88-13

Subject: Study L-1055 - Fees of Personal Representative

A staff study of California personal representatives' fees is attached to Memorandum 87-107. The study draws heavily on the attorneys' fee study attached to Memorandum 87-100. Under California law, the personal representative receives the same statutory percentage as the estate attorney. Prob. Code §§ 901-902, 910.

In the fifty states, the fees of personal representatives are determined by one of the following methods:

--Twenty-four states use the reasonable fee method.

--Twelve states, including California, use the percentage fee method.

--Fourteen states use a hybrid of the percentage fee and reasonable fee methods.

Table 1 on page 6 of the staff study shows that the states are more likely to provide a percentage fee for the personal representative than for the estate attorney. This is probably because the personal representative is paid to manage the estate, and the responsibility is greater in large estates. The attorney, on the other hand, is paid for professional expertise and other factors less directly related to estate size. Thus the argument seems weaker for abandoning the California percentage fee in favor of a reasonable fee for the personal representative than for the estate attorney.

At the last meeting, the Commission seemed to favor keeping the percentage fee for the estate attorney. If the percentage fee is kept for the estate attorney, the staff thinks it should also be kept for the personal representative.

Improving Percentage Fee System

Memorandum 88-12 (attorney fees) suggests improvements in the percentage fee system for estate attorneys. These suggestions also apply to the personal representative:

(1) Like the estate attorney, the personal representative may be awarded additional compensation for extraordinary services. Prob. Code

§ 902. The staff recommends a statutory statement of factors to be considered in fixing a reasonable fee for extraordinary services of the personal representative, e.g., the fee customarily charged in the locality for similar services, and the experience, reputation, and ability of the personal representative.

(2) Provide a statutory statement of what constitutes ordinary services and what constitutes extraordinary services of the personal representative.

(3) Provide that the court may allow additional compensation for extraordinary services only if the percentage fee for ordinary services is not a reasonable amount for all services rendered.

(4) Provide a minimum statutory fee for the personal representative.

(5) Reduce the percentage fee in the lowest bracket from four percent to three percent. This would be a cosmetic change, and does not address the problem of overcompensation in large estates and undercompensation in small estates.

(6) Authorize the court to award less than the statutory percentage fee when it would be clearly excessive, or perhaps "unconscionable." There may be cases where the statutory percentage fee is clearly excessive. See discussion on page 3 *infra* under "Lower Fee for Personal Representative Than for Estate Attorney?"

(7) For estates above 25 million dollars, the statute provides a reasonable fee. Prob. Code § 901. The staff recommends the 25 million dollar amount be reduced to 10 million dollars to avoid excessive fees in estates of from 10 to 25 million dollars.

(8) Keep existing law that, if the decedent's will specifies the compensation of the personal representative, the will governs unless the personal representative renounces the compensation provided in the will, in which case the personal representative is entitled to the statutory percentage fee. Prob. Code § 900.

#### No Written Contract for Personal Representative

Memorandum 88-12 (attorney fees) recommends making clear that recent legislation requiring written contracts for attorney fees over \$1,000 applies to attorney fees in probate. The legislation does not apply to personal representatives. See Bus. & Prof. Code § 6148. The

staff does not recommend requiring a written contract for the personal representative's fee. The purpose of the attorney fee contract is to alert the personal representative that the fee is negotiable, that there may be fees for extraordinary services, and that nonprobate services are compensated separately. There is no corresponding benefit from a written contract with the personal representative. The personal representative can only negotiate and contract with other estate beneficiaries, and the procedure for doing so would necessarily be cumbersome.

Lower Fee for Personal Representative Than for Estate Attorney?

Several attorneys who responded to the Commission's probate questionnaire objected to a non-professional personal representative receiving the same compensation as the estate attorney on the ground that the attorney usually does most of the work. Several attorneys suggested a lower fee for the personal representative than for the attorney, e.g., 70 or 75 percent of the attorney's fee. Should the personal representative receive a lower percentage than the estate attorney?

Higher Fee for Corporate Fiduciary Than for Nonprofessional PR?

Several attorneys said corporate fiduciaries often decline to take small estates. Should there be two rates of compensation, with a higher rate for a corporate fiduciary authorized to engage in the trust business and a lower rate for a nonprofessional personal representative? Such a two-tiered system may be justified on the ground that a corporate fiduciary has more expertise than a nonprofessional.

Attorney Performing Duties of Personal Representative

Memorandum 88-12 (attorney fees) recommends permitting the estate attorney to be compensated both as attorney and as personal representative for estates of less than \$300,000. This may partially address the problem of corporate fiduciaries declining to accept small estates.

Respectfully submitted,

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