

## Memorandum 88-33

Subject: Study L-1036 - Attorney Fees in Probate (Disclosure Requirement)

At the March meeting, the Commission determined that an attorney should be required to disclose to the client that the statutory probate fee is a maximum fee and that the attorney and client may negotiate a lower fee.

The Commission also decided that it should be made clear that the requirement that there be an attorney fee contract applies to all types of cases not specifically exempted from the requirement.

Attached as Exhibit 1 is a staff draft that would effectuate these decisions.

The staff draft amends Section 6148 of the Business and Professions Code to include a reference to new Section 6148.5 which provides for a disclosure requirement for probate legal fees.

The draft also adds a new sentence to Section 6148 to make clear that where a statute or court rule establishes the fee or a maximum fee for the legal services, the reasonable fee (to which the attorney is entitled where there is no fee agreement) shall not exceed, but may be lower than, the fee established by the statute or court rule. Section 6148 of the Business and Professions Code by its terms applies to all types of cases not specifically exempted from its requirements. There may, however, be lawyers who believe they can disregard the statute and nevertheless collect the statutory fee. The added sentence will clarify this matter. In this connection, it has been suggested that the probate estate attorney who consistently fails to comply with the written contract requirement is guilty of a breach of ethics and is subject to disciplinary action.

The staff draft adds Section 6148.5 to the Business and Professions Code. This section provides a specific disclosure provision for probate attorney fees. The Comment to the section includes language that might be used in the fee contract where the attorney and client use the statutory fee provisions to determine the fee.

Attached (Exhibit 2) for your information are two related sections of the Business and Professions Code: Section 6146 (maximum fee for legal services in connection with certain actions against health care providers) and Section 6147 (contingency fee contracts, including disclosure requirement for legal services covered by Section 6146).

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Memo 88-33

Exhibit 1

SEC. Section 6148 of the Business and Professions Code is amended to read:

6148. (a) In any case not coming within Section 6147 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 and other standard 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.

(4) The appropriate statement required by Section 6148.5 if the contract is for legal services described in that section.

(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, 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.

(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. Where a statute or court rule prescribes the fee or a maximum fee for the legal services, the reasonable fee under this subdivision shall not exceed, but may be lower than, the fee prescribed by the statute or court rule.

(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.

(e) This section applies prospectively only to fee agreements ~~following its operative date~~ entered into after January 1, 1987, except that paragraph (4) of subdivision (a) applies prospectively only to fee agreements entered into after January 1, 1990.

Comment. Paragraph (4) is added to subdivision (a) of Section 6148 to alert the statute user to the special disclosure requirement of Section 6148.5. See that section and the Comment to that section.

The second sentence is added to subdivision (c). In cases where the fee or a maximum fee for the legal services is established by statute or court rule, subdivision (c) makes clear that the reasonable fee under subdivision (c) may not exceed the fee or the maximum fee allowed by the statute or court rule and may be lower where a reasonable fee under the circumstances of the particular case would be less than the statutory fee.

SEC. Section 6148.5 is added to the Business and Professions Code, to read:

6148.5. (a) If the fee for legal services covered by a contract required by Section 6148 is subject to the provisions of [probate attorney fee statute], the contract shall include the substance of the following statement: "The fee for the legal services covered by this contract is a matter for agreement between the attorney and client. A maximum fee is set by law for ordinary probate services, but the attorney and client may agree to a lower fee. The law also provides that the court may award the attorney an additional fee for extraordinary probate services. This additional fee will be an amount that the court determines is just and reasonable for the extraordinary services, but the attorney and client may agree to a lower fee."

(e) This section applies prospectively only to fee agreements entered into after January 1, 1990.

Comment. Section 6148.5 is a new provision. The section applies only where Section 6148 requires a contract for the legal services. Although Section 6148 applies whether or not the fee or a maximum fee

for the legal services is set by statute or court rule, there are a number of exceptions to the application of Section 6148. Section 6148 does not apply to the cases listed in subdivision (d) of the section. For example, the section does not apply if the client is a corporate personal representative. In addition, the introductory portion of Section 6148 provides that the section applies only to a case in which it is reasonably foreseeable that the total expense to a client (including attorney fees) will exceed \$1,000.

Section 6148.5 gives the parties flexibility in making a fee agreement. For example, the attorney and client may agree that the fee will be computed on a specified hourly rate not to exceed the statutory fee. Or the attorney and client may agree to use the statutory fee provisions as the basis for determining the fee. If this second alternative is used, the fee provisions of the contract for legal services might be phrased along the following lines:

The fee for the legal services covered by this contract is a matter for agreement between the attorney and client. A maximum fee is set by law for ordinary probate services, but the attorney and client may agree to a lower fee. The law also provides that the court may award the attorney an additional fee for extraordinary probate services. This additional fee will be an amount that the court determines is just and reasonable for the extraordinary services, but the attorney and client may agree to a lower fee.

For "ordinary services" rendered during estate administration, our fee will be determined by the statutory fee schedule. That fee schedule, based on the size of the estate probated, is as follows:

3% on the first	\$100,000
2% on the next	\$900,000
1% on the next	\$9 million
1/2% on the next	\$15 million

A "reasonable" fee fixed by the court on the excess over \$25 million.

In addition, the California Probate Code empowers the court to authorize payment of additional fees to the estate attorneys for "extraordinary services" rendered to the estate. These services include, by way of example only, sales of real property, preparation of the Federal Estate Tax Return, and estate litigation. Our fees for extraordinary services are based primarily on our hourly rates from time to time prevailing (taking into account such considerations as the nature and difficulty of the task performed, the results achieved, the benefits ultimately conferred on the estate, and the responsibility assumed). Our hourly rates vary from \$150-\$200 per hour for partners, \$90-140 for associates, and \$40-75 for paralegals. We will periodically consult with you regarding the probable fees to be incurred as matters calling for such "extraordinary services" arise. Of course, all extraordinary fees must ultimately be approved by the court after a noticed hearing.

The above provision is drawn from a Sample Employment Agreement found in B. Ross & J. Swink, California Practice Guide Probate 1-67 (The

Rutter Group rev. #1 1987)). Note that subdivision (a)(1) of Section 6148 also requires that the contract state the other fees and charges applicable to the case. To comply with this provision, the contract should include a schedule of miscellaneous expected disbursements (filing fees, copying charges, and the like) if those are to be charged to the client. The attorney fee contract also may provide for a fee for legal services in connection with property not in the probate estate (such as termination of joint tenancies, collection of life insurance and employee benefit plan benefits, and the like).

Business and Professions Code Sections 6146 and 6147

Section

- 6146. Limitations; periodic payments.
- 6147. Contingency fee contracts; duplicate copy; contents; effect of noncompliance; recovery of workers' compensation benefits.
- 6148. Contracts for services in cases not coming within § 6147; bills for services rendered; contents; effect of noncompliance.
- 6149. Written fee contract as confidential communication.

*Article 8.5 was added by Stats.1975, 2d Ex.Sess., c. 1, p. 3967, § 24.2.*

*Heading of Article 8.5, "Contingent Fee Agreements: Medical Injury Claims", was amended by Stats.1982, c. 415, § 1, to read "Contingency Fee Agreements", and was amended by Stats.1986, c. 475, § 5, to read as it now appears.*

§ 6146. Limitations; periodic payments

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(Added by Stats.1975, 2nd Ex.Sess., c. 1, p. 3967, § 24.2. Amended by Stats.1975, 2nd Ex.Sess., c. 2, p. 3989, § 1.185, urgency, eff. Sept. 24, 1975, operative Dec. 12, 1975; Stats.1981, c. 714, p. 2580, § 23; Stats.1987, c. 1498, § 2.)

**§ 6147. Contingency fee contracts; duplicate copy; contents; effect of noncompliance; recovery of workers' compensation benefits**

(a) An attorney who contracts to represent a plaintiff on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the plaintiff, or his guardian or representative, to the plaintiff, or to the plaintiff's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

- (1) A statement of the contingency fee rate which the client and attorney have agreed upon.
- (2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.
- (3) A statement as to what extent, if any, the plaintiff could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.
- (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.
- (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

(Added by Stats.1982, c. 415, p. 1761, § 2. Amended by Stats.1986, c. 475, § 6.)