

Sixth Supplement to Memorandum 88-43

Subject: Study L-1036 - Probate Attorney Fees

The Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section has urged that the provisions governing the written attorney fee agreement for formal probate proceedings be compiled in the Business and Professions Code with the other provisions governing fee agreements.

Attached as Exhibit 1 is a draft of a section that could be added to the attorney fee agreement provisions of the Business and Professions Code. The staff continues to believe that it is better code organization to include all the provisions governing attorney fees in probate in one place, and we believe that the Probate Code is the appropriate place. Moreover, the section to be added in the Business and Professions Code is a long one and could be split into smaller, more easily understood sections if its substance were compiled with the other probate attorney fee provisions in the Probate Code. Nevertheless, the staff has prepared the attached draft in case the Commission decides that it wishes to compile the portion of the probate attorney fee provisions relating to fee agreements in the Business and Professions Code.

The attached draft reflects the Commission decision to include a provision that discloses to the client the fact that the fee is negotiable. This disclosure provision is comparable to the disclosure provision in Section 6147 of the Business and Professions Code. That disclosure provision applies to the only other case we are aware of where a statute fixes a maximum fee for legal services. (Section 6146 of the Business and Professions Code fixes a maximum fee schedule for legal services in connection with an action against a health care provider based on professional negligence.) The text of Sections 6146 and 6147 is attached as Exhibit 2.

Respectfully submitted,

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Executive Secretary

08/17/88

Business and Professions Code § 6147.5 (added). Agreement concerning attorney fees in formal probate proceeding

SEC. _____. Section 6147.5 is added to the Business and Professions Code, to read:

6147.5. (a) This section applies only where an attorney agrees to serve as the attorney for a personal representative and the fee for the attorney's services is subject to the limitations imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

(b) The attorney who agrees to serve as the attorney for the personal representative shall, at the time the agreement concerning the providing of legal services is entered into, provide a duplicate copy of the agreement, signed by both the attorney and the personal representative, to the personal representative.

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

(1) A statement of the general nature of the legal services to be provided pursuant to the agreement.

(2) A statement of the compensation the personal representative and attorney have agreed upon:

(A) If the compensation agreed upon is to be determined as provided in Sections 10830 and 10831 of the Probate Code, the agreement shall state the substance of the following:

"For ordinary services, the 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 total value of the property included in the decedent's probate estate, plus gains over appraisal value on sales, plus receipts, less losses on sales.)

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

In addition, the agreement may, but need not, include a statement of the hourly rates or other standard rates, fees, or charges for extraordinary services, including rates, fees, or charges for paralegal services; and, if the agreement includes such a statement, the court shall consider but is not bound by the statement in determining the amount to be allowed as compensation for extraordinary services.

(B) If the compensation agreed upon is not to be determined as provided in Sections 10830 and 10831, the agreement shall state the hourly rate or other standard rates, fees, or charges for the legal services to be provided pursuant to the agreement or other method of determining the compensation for those services, including rates, fees, or charges for paralegal services, but the compensation so provided shall not exceed the maximum limits imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(4) A statement that the California Probate Code sets the maximum limits on the fee of the attorney and that the attorney and client may negotiate a lower fee.

(d) Failure to comply with any provision of this section renders the agreement voidable at the option of the personal representative, and the attorney shall, upon the agreement being voided, be entitled to collect compensation in an amount determined by court to be reasonable for the services actually provided, but the compensation shall not exceed the maximum limits imposed by Chapter 2 (commencing with Section 10830) of Part 7 of the Probate Code.

(e) This section does not apply in any of the following cases:

(1) Where the total expense to the estate (including the compensation of the attorney) will not exceed one thousand dollars (\$1,000).

(2) Where the personal representative knowingly states in writing, after full disclosure of this section, that a writing concerning compensation of the attorney is not required.

(3) Where the personal representative is a corporation.

(4) Where the personal representative is a public officer or employee acting in the scope of the public office or employment.

(f) This section applies only to agreements described in subdivision (a) that are entered into after January 1, 1990, and Section 6148 does not apply to those agreements.

Comment. Section 6147.5 is a new provision drawn from Sections 6147 and 6148 of the Business and Professions Code.

Subdivision (a) limits the application of the section. The section applies only to the written agreement concerning legal services to be provided to the personal representative in a formal probate proceeding. Section 6148 continues to govern legal services provided in connection with the estate of a decedent where there is no formal probate proceeding or where legal services are provided in connection with property that is not part of the probate estate. See Probate Code Sections 13157 (attorney fee determined by agreement between parties for proceeding to obtain a court order determining succession to real property of small estate), 13660 (attorney fee determined by agreement between parties for petition to obtain a court order determining or confirming property passing to or belonging to surviving spouse). See also Probate Code Sections 13100-13116 (affidavit procedure to collect or transfer personal property of small estate), 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries where small estate).

Subdivision (b) is drawn from the first sentence of Section 6147 (contingency fee contracts).

Subdivision (c) is drawn from subdivision (a) of Section 6148 and subdivision (a) of Section 6147. Paragraph (1) of subdivision (c) is comparable to paragraph (2) of subdivision (a) of Section 6148.

Paragraph (2) of subdivision (c) provides language that may be used in the agreement between the personal representative and estate attorney that satisfies the requirement that the agreement disclose the compensation of the attorney. Unlike Section 6148, the agreement need not set out the "hourly rate or other standard rates, fees, and charges applicable to the case" if the agreement is that the attorney is to receive the statutory compensation. Paragraph (2) permits the agreement to set out merely the statutory compensation schedule and a statement that the court will determine the amount of the compensation for extraordinary services. However, if the attorney's compensation is not determined using the statutory compensation schedule, then the agreement must set out the hourly rate or other standard rates, fees, and charges applicable to the case. In addition, if the attorney and personal representative so desire, they may set out an hourly rate or other standard rate for extraordinary services. This rate is not binding on the court, but the court will consider it in determining the allowance of compensation to the attorney for extraordinary services. See also Probate Code Sections 10832 (agreement for higher compensation void; no duty to negotiate for lower compensation), 10852 (factors to be considered in determining the amount of compensation for extraordinary services), 10853 (services of paralegal performing extraordinary services).

Paragraph (3) of subdivision (c) is same as paragraph (3) of subdivision (a) of Section 6148.

Paragraph (4) of subdivision (c) is comparable to paragraph (5) of subdivision (a) of Section 6147 (contingency fee agreements). This paragraph requires a disclosure to the client that the attorney and client may negotiate for the attorney's compensation to be lower than the statutory compensation. See also Probate Code Section 10832 (agreement for higher compensation void; no duty to negotiate for lower compensation).

Subdivision (d) is comparable to subdivision (c) of Section 6148, except that subdivision (c) of Section 6147.5 makes clear that the compensation allowed under that subdivision may not exceed the amount of the statutory compensation. If the estate attorney fails to comply with the requirements of Section 6147.5, the reasonable compensation fixed by the court is fixed in light of the reasonable value of the services actually provided in the particular case, and the attorney must establish the value of the services provided.

The exceptions stated in subdivision (e) are comparable to those stated in subdivision (d) of Section 6148 except that Section 6147.5 contains an additional exception for the case where the personal representative is a public officer or employee acting in the scope of the public office or employment (to make the section not applicable to the public administrator) and omits the exception provided in Section 6148 for the case where services are rendered in an emergency or where a writing is otherwise impractical. Paragraph (1) of subdivision (e) is consistent with a provision of the introductory clause of subdivision (a) of Section 6148.

Subdivision (f) limits the application of Section 6147.5 to an agreement entered into after January 1, 1990. Prior to that time, the agreement is governed by the provisions of Section 6148.

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

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

(a) In any case not coming within Section 6147 or 6147.5 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.

(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.

(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.

Comment. The introductory clause of Section 6148 is amended to add the reference to Section 6147.5. Section 6147.5 covers legal services provided to the personal representative in a formal probate proceeding. Section 6148 continues to govern legal services provided in connection with the estate of a decedent where there is no formal probate proceeding or where there are legal services provided with respect to the portion of the estate that is not subject to probate. See Probate Code Sections 13157 (attorney fee determined by agreement between parties for proceeding to obtain a court order determining succession to real property of small estate), 13660 (attorney fee determined by agreement between parties for petition to obtain a court order determining or confirming property passing to or belonging to surviving spouse). See also Probate Code Sections 13100-13116 (affidavit procedure to collect or transfer personal property of small estate), 13200-13209 (procedure to make real property title records reflect transfer of property to decedent's heirs or beneficiaries where small estate).

§ 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.

§ 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.