

First Supplement to Memorandum 88-70

Subject: Study L-1036/1055 - Personal Representative and Attorney Fees
in Probate (Commissioner Walker's Concerns)

Commissioner Walker called me a few days ago to advise me that he has serious concerns about the staff draft relating to attorney fees in probate. See Memorandum 88-70 (and attached staff draft). He asked that the staff prepare draft provisions that would revise the staff draft to deal with his concerns. This would permit the Commission to consider specific statutory language at the October meeting when it considers Commissioner Walker's proposals for revisions in the staff draft. The draft provisions in this supplement were reviewed by Commissioner Walker before this supplement was prepared.

Disclosure statement

The Commission some time ago decided that the written contract between the attorney and the personal representative should include a statement disclosing 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.

The staff draft prepared for the October meeting includes a disclosure statement that is required to be included in the agreement between the attorney and client. Commissioner Walker is concerned that this statement will be buried in a long and complex legal document and will not actually come to the attention of the personal representative.

There are at least two possible methods that might be used to provide more assurance that the personal representative will be aware of the information required to be disclosed.

First, the provision in Business and Professions Code Section 6147.5 of the staff draft relating to the disclosure statement (pages 19-21 of the staff draft) might be revised to read:

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

* * * *

(4) The following statement in not less than 10-point boldface type or a reasonable equivalent thereof if printed, or in all capital letters underlined if not printed: "The California Probate Code sets the maximum limits on the fee of the attorney, but the attorney and client may agree--to negotiate a lower fee." This statement shall be placed in the agreement immediately above the place where the personal representative signs the agreement.

Second, a separate, more detailed disclosure statement might be required. The staff draft considered at the September meeting included such a statement, but the staff did not include the statement in the most recent staff draft. The provision in Business and Professions Code Section 6147.5 of the staff draft relating to the disclosure statement might be revised to read:

(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: ~~"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."~~

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 attorney is entitled to compensation determined by a statutory fee schedule. This statutory fee schedule provides that 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 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 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.

Date: _____

Personal Representative

Immunity of personal representative from liability for failure to negotiate attorney fee; protection of persons interested in estate from unreasonable attorney fee

Commissioner Walker is concerned that the staff draft does not protect the persons interested in the estate from an unreasonable attorney fee.

Under Section 10832(b) of the draft statute:

(1) The personal representative has no duty to negotiate attorney compensation less than the statutory compensation.

(2) The personal representative is not liable for a refusal or failure to negotiate attorney compensation less than the statutory compensation.

At the September meeting, Commissioner Walker expressed serious reservations about this provision. The staff is not aware of any state that has a statutory provision that protects a personal representative from liability for refusal or failure to negotiate a reasonable attorney fee. Commissioner Walker believes that the immunity provision should be deleted from the staff draft. Not only does the personal representative have no duty to negotiate a reasonable attorney fee under the staff draft, but the persons interested in the estate are bound by the statutory attorney fee if the personal representative does not negotiate a lower fee, since they have no right to a judicial review of the reasonableness of the fee.

The staff does not believe that it is necessary to delete the provision that protects the personal representative against litigation based on the claim that the personal representative should have negotiated a lower attorney fee. If further protection is to be afforded to interested persons who have not signed the agreement with

the attorney, those persons could be given a right to have the court review the reasonableness of the fee. This is the approach taken in most of the states that have a statutory fee system.

Section 10851 of the staff draft (page 36) could be revised to add a new subdivision (d) and to reletter existing subdivision (d) to be subdivision (e). The new subdivision (d) might read as follows:

(d) Notwithstanding Section 10830 and the agreement between the attorney and the personal representative determining the compensation of the attorney for the personal representative, any person interested in the estate who did not sign the agreement may object to any petition for an order fixing and allowing the compensation of the attorney on the ground that the amount of the compensation requested is unreasonable.

Respectfully submitted,

John H. DeMouilly
Executive Secretary