

Second Supplement to Memorandum 89-3

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

Memorandum 89-3 states that the basic and controversial policy issue presented by the Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative (October 1988) is "whether the statutory fee concept should be retained for the estate attorney fee or whether a scheme (based on the Uniform Probate Code) should be substituted under which the attorney and the personal representative would agree to a "reasonable fee" that would not be reviewed by the court absent an objection by an interested person."

Attached is a letter from Irwin D. Goldring presenting the views of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. The Executive Committee voted to oppose the Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative. The Executive Committee supports the statutory fee system in its present form without any changes, including changes to the Business and Professions Code. (The Executive Committee does not oppose elimination of the four percent bracket for statutory fees. It should be noted that there is, however, substantial opposition to the elimination of the four percent bracket. See Memorandum 89-3, pages 14-22.)

If the foregoing is not acceptable, the Executive Committee will support a negotiated fee between the personal representative and the attorney which is not subject to court approval except upon petition for review by an interested party.

To effectuate the policy under the second alternative, the Executive Committee proposes the enactment of the following provision:

The attorney's fee for services performed in connection with the proceedings under this division shall be determined by agreement between the attorney and the personal representative and is not subject to approval by the court in the absence of an objection by an interested person. If an

interested person objects to the attorney's fees for those services, the court shall determine the reasonableness of the attorney's fees for those services. If there is no agreement between the attorney and the personal representative concerning the attorney's fees for those services, the court shall determine a reasonable fee for those services.

The Executive Committee would also permit the use of the Independent Administration of Estates Act for an agreement concerning attorney's fees. Presumably this would be a matter for which notice of proposed action would not be required, since the attorney fee agreement would ordinarily be entered into by the petitioner for appointment as personal representative before the petitioner has been appointed. However, notice of proposed action could be given if the personal representative desired, and the independent administration procedure would then bind all persons given notice of proposed action (i.e., the attorney fee agreement).

Now that we have received the letter from the Executive Committee, the staff can discern that there are other prestigious persons and organizations that would support the second alternative of the Executive Committee. HALT--San Diego urges the Commission to abolish the statutory fee system and substitute a reasonable fee concept. See Memorandum 89-3, page 2 (top of page). The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association supports the position of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. See Memorandum 89-3, pages 4-5 and 10. William S. Johnstone, Pasadena lawyer, also supports the position of the Executive Committee. See Memorandum 89-3, pages 10-11. Richard L. Stack, Los Angeles lawyer, is of the same view. See Memorandum 89-3, page 11 (top of page). Two other lawyers (Paul Gordon Hoffman, Los Angeles, and Russell G. Allen, Newport Beach) wrote long letters in support of a reasonable fee system. And Commissioner Walker, in the First Supplement to Memorandum 89-3, urges the Commission to withdraw its tentative recommendation and to propose a reasonable fee system.

Should the Commission decide to adopt a reasonable fee system for the estate attorney, a second issue arises: Should a reasonable fee system also be adopted for the personal representative. The Uniform Probate Code adopts the reasonable fee concept for both the attorney

and the personal representative. However, some states that dropped the statutory fee schedule for the attorney retained the schedule for the personal representative.

If the Commission decides to adopt the second alternative, the staff will prepare a draft of a Recommendation for consideration at the next Commission meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

CA LAW REV. COMM

DEC 27 1988**RECEIVED***Chair*

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December 22, 1988

REPLY TO:

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Re: Study L-1036

Dear John:

The TR on attorneys' fees as proposed by the Law Revision Commission was discussed at great length at the December 3, 1988 meeting of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California. At that meeting there were also present a representative of the Los Angeles County Bar Association Probate Section and of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association.

The Executive Committee voted to oppose the tentative recommendation of the Law Revision Commission and in connection therewith passed two Resolutions as are set forth on the attachment to this letter. These Resolutions say the following:

First, that the Executive Committee supports the statutory fee system in its present form without any changes, including changes to the Business and Professions Code. (The elimination of the 4% bracket is not opposed, however.)

John H. DeMouilly
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Second, if the foregoing is not acceptable then the Bar will support a negotiated fee between the personal representative and the attorney which is not subject to Court approval except upon petition for review by an interested party.

Very truly yours,



IRWIN D. GOLDRING

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December 3, 1988 Meeting:

RESOLVED: That the Estate Planning Trust and Probate Law Section of the State Bar of California ("EPTPLS") supports retaining the existing law for compensation of attorneys in probate matters (except for the deletion of the 4% fee bracket) and opposes proposed changes in the Business and Professions Code requirements for attorney fee contracts as presently proposed by the California Law Revision Commission ("CLRC").

RESOLVED FURTHER: That if the CLRC proposes legislation different from the foregoing the EPTPLS will support legislation which repeals current Probate Code Sections 910, 911 and 10501(a)(2) and substitutes therefor the following:

"The attorney's fee for services performed in connection with the proceedings under this division shall be determined by agreement between the attorney and the personal representative and is not subject to approval by the Court in the absence of an objection by an interested person. If an interested person objects to the attorney's fees for those services, the Court shall determine the reasonableness of the attorney's fees for those services. If there is no agreement between the attorney and the personal representative concerning the attorney's fees for those services, the Court shall determine a reasonable fee for those services.