

## Memorandum 89-37

Subject: Study L-1036 - Compensation of Attorney and Other Persons  
Hired by Personal Representative (AB 158)

Attached is a letter from the Executive Committee of the State Bar Section concerning the recommended legislation on compensation of the attorney and other persons hired by the personal representative. A copy of this Recommendation is attached to this Memorandum. The Committee raises two matters for Commission consideration in connection with the recommended legislation. These are discussed below.

Direction in Will That Personal Representative Hire a Particular Advisor

The Committee comments:

Section 9680 could be read to mandate the hiring of a particular advisor pursuant to the terms of a will. This would upset the rule that a direction to hire an attorney is not binding on the personal representative. See Estate of Ogier (1894) 101 C 381, 35 P. 900. The section, not the Comment, should be amended to make it clear that a direction to hire a particular advisor is only precatory and not binding on the PR.

This is a good point. The staff recommends that Section 9680 be revised to read:

9680. (a) Except as restricted or otherwise provided by the will or by court order and subject to subdivision (b) and to Section 10804, the personal representative, acting reasonably for the benefit of the estate and in the best interest of interested persons, may hire persons to advise or assist the personal representative in the administration of the estate, including attorneys, accountants, auditors, technical advisors, investment advisors, or other experts or agents, even if they are associated or affiliated with the personal representative.

(b) A provision in the will directing the personal representative to hire a particular person to advise or assist the personal representative in the administration of the estate is not binding on the personal representative, and the personal representative may, but is not required to, hire that person.

The staff would revise the Comment to this section to add the following:

Subdivision (b) codifies the case law rule that a direction in the will to hire an attorney or other advisor is precatory and not binding on the personal representative. See *In re Ogier*, 101 Cal. 381, 35 Pac. 900 (1894). The personal representative is responsible for the administration of the estate and is liable for failure to carry out the duties of the office. Accordingly, the personal representative must be free to select the attorney and other persons hired to advise or assist the personal representative in the administration of the estate.

#### Reimbursement of Excessive Compensation

Section 9684 provides for the review (on petition of any interested person) of the reasonableness of the compensation of a person hired by the personal representative. Subdivision (c) of Section 9684 provides:

(c) If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation and may order the person who has received excessive compensation to make an appropriate refund.

The provision giving the court authority to order the person who received excessive compensation to make an appropriate refund is taken from the Uniform Probate Code. The Committee expresses concern about this provision:

Section 9684(c) has a problem in that jurisdiction as to non lawyers is questionable. Ordering a stock broker to reimburse excessive compensation may be difficult. I bring to your attention to provisions of Probate Code Sections 20220 to 20225 which handle the same problem in the tax proration area for a solution.

At the last meeting, the Commission considered this problem and decided to retain subdivision (c) in its present form. The staff is satisfied with that decision. We assume that the court would issue a citation to the advisor to come before the court and, after giving the advisor an opportunity to be heard, would make a reimbursement order if appropriate. Nevertheless, if the problem is considered important enough the Commission could include in the recommended legislation a new provision drawn from the tax proration provisions. If this were done, we would revise Section 9684 to read:

9684. (a) On petition of the personal representative or an interested person, the court may review the following:

(1) The propriety of employment by the personal representative of any person under Section 9680 who has been or is to be paid out of funds of the estate.

(2) The reasonableness of the agreed compensation under subdivision (a) of Section 9681 of any person who has been or is to be paid out of funds of the estate.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following persons:

(1) The person whose employment or compensation is in question.

(2) Each person listed in Section 1220.

(3) Each known heir whose interest in the estate is affected by the petition.

(4) Each known devisee whose interest in the estate is affected by the petition.

(5) The Attorney General, by mail at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate is affected by the petition.

(c) If the court determines that the agreed compensation is unreasonable, the court shall fix a reasonable amount as compensation and may order the person who has received excessive compensation to make an appropriate refund. Unless the person ordered to make the refund is the attorney for the personal representative, the order for the refund may be obtained only in a proceeding under Section 9684.5.

(d) Except as provided in subdivision (e), nothing in this section limits the right to contest the account of the personal representative under Chapter 3 (commencing with Section 11000) of Part 8.

(e) The petitioner and all persons to whom notice of the hearing on the petition was given pursuant to subdivision (b) are bound by the determination of the court under this section.

A new section, Section 9684.5, would be added to the recommended legislation to read:

9684.5. (a) Any interested person may commence a proceeding under this section to obtain an order that a person determined by the court to have received excessive compensation make an appropriate refund. The proceeding under this section may be combined with the proceeding to determine whether the compensation is excessive. There shall be no additional filing fee if the petition under this section is combined with the other proceeding.

(b) A proceeding under this section shall be commenced by filing a petition requesting that an order be made under this section and referring to the other proceeding to determine whether the compensation is excessive.

(c) Not less than 30 days before the hearing, the petitioner shall do both of the following:

(1) Cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to any other petitioner in the other proceeding to determine whether the compensation is excessive.

(2) Cause a summons and a copy of the petition to be served on the person whose compensation is claimed to be excessive. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

(d) If the court determines that the person who received excessive compensation should make an appropriate refund, the court shall so order. The order is a judgment that may be enforced against the person ordered to make the refund.

(e) An order that the attorney for the personal representative make an appropriate refund may be made without compliance with the requirements of this section.

Comment. Section 9684.5 is a new provision that provides a procedure for obtaining an order that a person who received excessive compensation make an appropriate refund. Since the attorney for the personal representative already is subject to court orders, the procedure provided in this section need not be followed in order to obtain an enforceable order that the attorney refund any excess compensation the attorney has received.

#### Will Registry

The attached letter also refers to the will registry provisions adopted by the Conference of State Bar Delegates. The staff recommends that these provisions not be included in legislation this session. The staff has put the provision in draft form. We suggest that the State Bar Section and other interested bar groups be requested to submit their comments on this draft to the Commission by June 1. The staff will then prepare a memorandum concerning the provisions.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

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March 6, 1989

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Re: LRC Recommendation re Attorney's Compensation and AB 158.

Dear John:

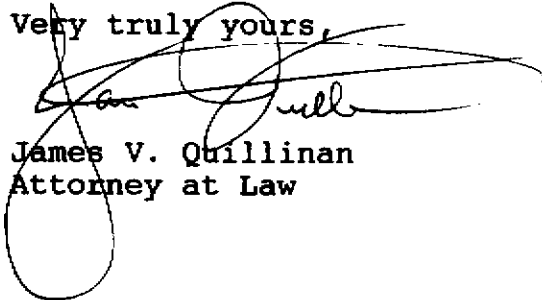
The Executive Committee has quickly reviewed the Recommendation re Attorney's Compensation and generally agrees with the staff. We are doing a more thorough review and will have more comments in the near future. Preliminarily we see two problems. Section 9680 could be read to mandate the hiring of a particular advisor pursuant to the terms of a will. This would upset the rule that a direction to hire an attorney is not binding on the personal representative. See Estate of Ogier (1894) 101 C 381, 35 P. 900. The section, not the Comment, should be amended to make it clear that a direction to hire a particular advisor is only precatory and not binding on the PR. Section 9684 (c) has a problem in that jurisdiction as to non-lawyers is questionable. Ordering a stock broker to reimburse excessive compensation may be difficult. I bring to your attention the provisions of Probate Code Sections 20220 to 20225 which handle the same problem in the tax proration area for a solution.

The proposed Amendments to AB 158 to provide for a Will Registry have been referred back to us by the Board of Governors. Our Section can now oppose the provisions relating to the Will Registry. We strongly urge the Commission to delete the Will Registry provisions from the AB 158 and to undertake a formal review of the proposal. Our Section wants an adequate opportunity to review the proposal.

John H. DeMouilly  
Executive Director  
California Law Revision Commission

Thank you for your attention to this matter. If you have any questions, please feel free to call.

Very truly yours,



James V. Quillinan  
Attorney at Law

JVQ/hl

Encls.

cc: Valerie Merritt

Terry Ross

Irv Goldring