

Third Supplement to Memorandum 90-105

Subject: Study L-1036 - Probate Attorney Fees

Senator Lockyer is the primary roadblock to the enactment of Assembly Bill 831 (probate attorney fees). Memorandum 90-105 reports on one effort made to develop an amendment to the bill that would eliminate his opposition.

Barbara Miller has written to me strongly objecting that the memorandum is very misleading as indicating that she was the proponent of the amendment and also objecting to my labeling the amendment as the "Barbara Miller Amendment."

In preparing the memorandum I did not attach much importance to this effort to develop an amendment that would remove Senator Lockyer's opposition, since the effort was unsuccessful and I was not recommending to the Commission that any change be made in the bill. The amendment was going nowhere, since Senator Lockyer did not approve it and it was strongly opposed by the consumer groups and also the probate bar.

Nevertheless, upon rereading the memorandum, I find it is misleading as implying that Commissioner Miller was the source of the amendment, whereas she merely cooperated in an effort to prepare something that would deal with the concern she expressed. I have sent Commissioner Miller a letter of apology. The incident is unfortunate, especially since Commissioner Miller generously devoted her time and energy in an effort to help develop an amendment that would deal with the concern she and Senator Lockyer have expressed.

For your information, I attach a copy of the letter I have sent to Commissioner Miller as well as a copy of the letter she sent me.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335



July 13, 1990

Barbara J. Miller
Court Commissioner
Superior Court, County of Alameda
Court House
1225 Fallon Street
Oakland, California 94612

Dear Barbara:

I have reread my Memorandum 90-105 (probate attorney fees) in light of your letter of July 11. I must agree that the memorandum does not contain a discussion of the background that led to the amendment I labeled "the Barbara Miller amendment" and is misleading as a result. Also, upon reflection, I agree that I should not have labeled the amendment "the Barbara Miller amendment" since that label may imply that you are the source of the amendment, rather than that the amendment is designed to deal with the concern you expressed. I sincerely regret that I did not make the memorandum more complete so that it would not have been misleading.

This is the background I should have included in the memoranda. Senator Lockyer told me directly that he did not care that Assembly Bill 831 was generally supported by consumer groups and organizations representing the probate bar. He said: "I don't care what they think; I'm going by what my court commissioners tell me."

This is the reason I believe that your views have had considerable weight with Senator Lockyer. I believe that the reason that he opposes the bill is because you and other judges have advised him that the bill would increase probate attorney fees for small estates. (I am informed that several judges and court commissioners have written in opposition to the bill and the Los Angeles County Superior Court has also written a letter of opposition.)

Your concern has been that the bill would increase the probate attorney fee for small estates. I thought it was important that an effort be made to accommodate your views if possible, so we could remove the opposition of Senator Lockyer. It was my hope that something could be worked out that would deal with your concern and be generally acceptable to all groups, consumers, probate lawyers, and commissioners and judges. If something could be worked out that was generally acceptable, the bill could go forward with the support of Senator Lockyer. This is the reason I wanted to meet with you and Bill Hoisington.

I thought our discussion was useful and that the amendment we arrived at might have a change of satisfying Senator Lockyer and meeting the approval of all interested groups. If the amendment would remove the opposition of Senator Lockyer and satisfied other interested groups, I would have recommended the amendment to the Commission for approval.

The amendment never received any support. You will recall that you and I and Bill discussed the amendment with Senator Lockyer personally, but he was unwilling to approve the amendment. I told Senator Lockyer that the Commission favored the bill as drafted and did not recommend the amendment, and my recollection is that I told him specifically that I could not propose the amendment at the hearing even if he approved it. He said he wanted the advice of some persons (not identified) whose advice he valued.

After our meeting with Senator Lockyer, you will recall that you and Bill reviewed a draft I had prepared along the lines we discussed and that you and Bill suggested revisions. I incorporated your suggested revisions in the draft, and I assisted the counsel to the committee in preparing the amendment so that he could obtain the views of some unidentified persons. I told the counsel the Commission did not recommend the amendment, but that it was important that we know Senator Lockyer's feelings about it as soon as possible. (The great difficulty with this bill has been that we cannot determine what, if any, change can be made in the bill to remove the opposition of Senator Lockyer.)

It soon became apparent that representatives of consumer groups were strongly opposed to the amendment (they oppose any retention of the statutory fee schedule). Ultimately, the amendment generated counter proposals from HALT, a copy of which was sent to me by a representative of the American Association of Retired Persons. Specifically, these consumer groups proposed that if a statutory fee is to be retained, it should apply only to estates subject to the small estate affidavit procedure (\$60,000 or less), that the statutory fee schedule should be a flat one-percent in place of the varying percentage under existing law, and that there be a requirement for estates of all sizes that the attorney offer the client a choice of fee arrangements, including hourly fees and a disclosure statement of the total expense that will result from each arrangement. A copy of the counter proposal which was sent to me (and I understand to the representative of Senator Lockyer) is enclosed. The consumer groups advised me that they strongly supported AB 831 in its present form, and that they will not push the proposal outlined above if the bill remains in its present form.

Because the amendment we discussed with Senator Lockyer did not satisfy Senator Lockyer, I saw no reason to recommend the amendment to the Commission (or to pursue it with the State Bar Section). Nevertheless, the amendment became the subject of controversy (and generated letters of opposition to the Senate Judiciary Committee from the State Bar Section and Los Angeles Bar Section). Even worse, as you

stated in your letter, as a result of your bringing up the amendment (which I was not recommending for adoption) at the meeting of the Executive Committee, the members of the Executive Committee "were furious with you for exceeding your authority in a unilateral attempt to further your own interest in AB 831."

I believe that I have had a good relationship with the members of the Executive Committee. I think it is unfortunate that a consideration of the dead amendment when I was not present (and when no action of the Executive Committee was required or was appropriate) resulted in the committee being "furious" with me.

Likewise, I did not present the counter-proposal of the consumer groups to the Commission or the State Bar Section, because those proposals likewise were going nowhere and were not proposals that would make the bill generally acceptable to all interested groups. The groups that support those proposals are strongly in support of AB 831 in its present form.

There are other alternative proposals on probate attorney fees floating around. For example, the counsel to the Senate Judiciary Committee asked the other day whether a solution to the problem would be to fix the maximum hourly rate for the probate attorney. I told him that this would not be acceptable to the Commission and no doubt would be strongly opposed by the State Bar. I have not presented this suggestion to the Commission, although I did mention some of the alternatives that had been mentioned to me in Memorandum 90-105.

As the First Supplement to Memorandum 90-105 indicates, Assembly Bill 831 has wide general support in its present form. The primary opposition to the bill comes from court commissioners and judges who fear the bill will increase probate fees for small estates and cause more judicial hearings. As a result of this opposition, Senator Lockyer and one or more other members of the legislative committee are opposed to the bill because they believe it will increase probate attorney fees for small estates. Representatives of consumer groups, on the other hand, have made empirical studies that they believe show that the bill will reduce probate attorney fees for small estates. There is a possibility that the bill can obtain committee approval despite the opposition of Senator Lockyer. In Memorandum 90-105, I recommended that the bill be presented as recommended by the Commission. This is because there appears to be no general consensus as to any other acceptable alternative.

The legislative process is a complex process. When a matter is controversial, many ideas are tossed around as "trial balloons" in an effort find an acceptable draft that will eliminate opposition and obtain general support. I doubt that the Commission would want to take the time to discuss proposals that have been suggested but create rather than eliminate opposition and that are not going to be presented to the legislative committee and have no chance of legislative enactment. Accordingly, I feel it is unfortunate that the discussion of the amendment at the Executive Committee meeting created a hostility toward me.

In my own mind, the amendment we discussed with Senator Lockyer was one designed to deal with your (and his) concern. That is why I labeled it as the "Barbara Miller Amendment." I can see now that I should not have done that. I can understand your position as a public officer, and I can understand why I should not have indicated that you favored the amendment. Equally important, I should have spelled out what happened in much more detail so that the memorandum would not have been misleading as implying that you were the proponent of the amendment. This is especially unfortunate since you graciously took the time to meet with me and Bill and to go with us to Sacramento to sound out Senator Lockyer concerning his views. I thought that the State Bar Section and the Commission might find the amendment acceptable if it would remove the opposition of Senator Lockyer. Even though our effort was unsuccessful, I feel our effort to find an acceptable revision of the bill that would remove Senator Lockyer's opposition was useful.

I want to apologize for the fact that my memorandum gave the misleading impression that you were the moving force behind the amendment we discussed with Senator Lockyer. In fact, you were merely responding to my request for assistance in attempting to arrive at a consensus approach that would deal with your concern (and Senator Lockyer's concern) and not create opposition to the bill. I hope that you will be understanding and that you will accept this apology.

Sincerely,

John H. DeMouilly
Executive Secretary

Encl.



FAX TRANSMITTAL FORM

TO: John DeMouly DATE: 6/8/90

COMPANY: Calif. Law Revision Commission

NO. OF PAGES: 4 (includes cover sheet)

FROM: David Cunningham

AARP State Legislation Department
1909 K Street, N.W.
Washington, DC 20049

Phone: (202) 662-4160

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COMMENTS: Attached are the possible
compromise positions suggested by HACT.
These are provided for your review
and consideration.

David
P.S. Thanks for the article by Bob Miller.

Alternative Amendments to AB 831

1. Caps fees by marking-up Amendment 3

On page 7, between lines 35 and 36, insert:

9681.5. (a) If the value of the estate accounted for does not exceed \$60,000 (sixty thousand dollars), the agreement between the personal representative and the attorney for the personal representative may not result in compensation to the attorney in an amount greater than one percent of the estate value.

(b) For purposes of this section, the estate value accounted for by the personal representative shall be defined in accordance with Prob. Code § 131__.

2. Caps fees by clarifying meaning of "reasonableness" vis-a-vis small estates

On page 14, line 37, before "If" insert:

For small estates, as defined by Prob. Code § 131__, the compensation agreed to by or awarded to the estate attorney shall not exceed one percent of the value of the small estate. [Or, "For small estates, as defined by Prob. Code § 131__, the compensation to be paid to the estate attorney shall be determined to be unreasonable if it exceeds one percent of the value of the small estate."]

3. Keeps fees low by requiring lawyers to give clients a choice of fee arrangements

On page 12, between lines 28 and 29, insert:

(b) Prior to commencing representation of a personal representative as a client, an attorney shall:

(1) offer the client a choice of fee arrangements, which shall at least include fees based on a percentage of the value of the estate and hourly fees, and disclose the attorney's estimate of the total expense that will result from each arrangement; and

(2) execute a written contract with the client affirming that the choice was offered, and stating which fee arrangement the client selected.

On page 12, line 37, delete "(b)" and substitute "(c)".

On page 13, line 8, delete "(c)" and substitute "(d)".



**Superior Court
State of California**

COUNTY OF ALAMEDA

BARBARA J. MILLER
COURT COMMISSIONER

July 11, 1990

CA LAW REV. COMMITTEE

JUL 12 1990

RECEIVED

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1225 FALLON STREET
OAKLAND, CALIFORNIA 94612
415/272-6173

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303

Dear Mr. DeMouilly:

Re: Memorandum 90-105
(Probate Attorney Fees)

I was appalled to read the outrageous misrepresentations contained in your memo. I can only assume that your reason for resorting to such conduct is an attempt to salvage some credibility with the Law Revision Commission and the State Bar Probate Executive Committee for your role in this matter.

As you and I both know, the proposed amendment to AB 831 was and is "the John DeMouilly amendment", and not "the Barbara Miller amendment".

According to your version of the facts, I "suggested" this amendment and you merely "assisted" by having it drafted and submitted to the Senate Judiciary Committee.

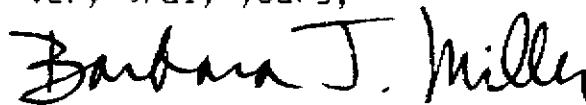
You and I and Bill Hoisington know the real story: you became frustrated in your long-standing quest to eliminate statutory attorneys fees when you realized that AB 831 might be defeated in the Senate Judiciary Committee; because I had previously furnished data to the Committee at their request, you became convinced that I wielded "considerable influence" with the Committee; and by putting my name on a proposal, you hoped to gain the support of the Committee on an amended version of AB 831.

At a meeting you and I had in April with Bill Hoisington to discuss the status of AB 831, you were clearly the moving force behind what became "the John DeMouilly amendment". I simply concurred that it addressed my major concern with AB 831, which was the same concern I had previously expressed to the Senate Judiciary Committee.

John H. DeMouilly
July 11, 1990
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I am sending copies of this letter to the persons I have dealt with on AB 831 in order to correct your very misleading memo.

Very truly yours,

A handwritten signature in black ink that reads "Barbara J. Miller". The signature is written in a cursive, flowing style.

Barbara J. Miller
Court Commissioner

BJM:dm

cc: James V. Quillinan,
Chair of Probate Executive Committee
(for distribution to all Members and Advisors)

The Honorable Ann E. Stodden,
Advisor to Probate Executive Committee and
Commissioner on California Law Revision Commission

Valerie J. Merritt,
Member of Probate Executive Committee

William L. Hoisington,
Advisor to Probate Executive Committee

Senator Bill Lockyer,
Chair, Senate Judiciary Committee