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APPENDIX C
LOS ANGELES SUPERIOR COURT GUIDELINES ON
ATTORNEY COMPENSATION AND COSTS IN DECEDENTS' ESTATES

PART A, ATTORNEY SERVICES NOT COMPENSABLE FROM ESTATE

1. NO ATTORNEYS COMPENSATION ALLOWED

1.1 Services Rendered - Not Legal

1.1.1 Duties of personal representative (to be paid by personal representative from own funds) Estate of Brignole, 133 C 162, 65 P 294 (1901) Accord, Estate of Parker, 200 C 132, 251 P 907 (1926)

1.1.2 Exception: Accounting for deceased, incompetent or absconding personal representative (Probate Code section 10953)

1.1.3 Exception: Separate Agreement. Personal representative may hire attorney to perform duties of representative and separately compensate attorney from his or her own funds (not estate's)
Estate of Parker, supra
Estate of Brignole, supra
Ethics Opinions of Los Angeles County Bar Association, Opinion No. 347 (April 24, 1975) (hereafter "Opinion 347")

1.1.3a Whenever compensation is to be charged directly to the client, must comply with the formality requirements of Bus. and Prof. Code Sec. 6148

1.1.3b If such a contract is entered into, attorney must comply with Rule 3-300 of California Rules of Professional Conduct

1.1.3c Written agreement, must set forth:
(a) basis of compensation
(b) consent of representative
(c) subject to Court approval
(d) compliance with Opinion 347 and Rule 3-300
(See sample form of agreement in PART 3, Sec. 12.1.)

1.1.3d File with court when first compensation petition filed; Court orders compensation to representative, less amount to attorney for doing representative's work

1.1.3e Compare Estate of Haviside, 102 CA3d 365; 162 CR 393 (1980), which

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does not bar a representative from rendering professional accounting services to the estate and being paid therefor. Allows "double compensation" in this limited instance.

- 1.1.4 If representative's compensation waived, no compensation payable to attorney for representative's work

1.2 Agreement Not to Charge

- 1.2.1 Post-death continuance of litigation at no cost as per agreement
In re Barreiro's Estate, 125 CA 752, 14 P2d 786 (1932)

Agreement of attorney before decedent died that payment already received for litigation was payment in full and there would be no further charges for that litigation.

- 1.2.2 Waiver of all or part of statutory compensation Estate of Carver, 123 C 102, 55 P 770 (1898). If representative waives compensation, he or she cannot later claim it unless waiver withdrawn with consent of court. By analogy, same rule should apply to attorney.

- 1.3. Agreement for performance of extraordinary services on contingent fee basis is subject to the following conditions:

- 1.3.1a The Agreement is in writing and complies with all requirements of § 6147 of the Business and Professions Code.

1.3.1b The Agreement is approved by the Court following a hearing noticed as provided in § 10812.

1.3.1c The Court determines that the proposed compensation is just and reasonable and that the Agreement is to the advantage of the estate and in the best interests of the persons who are interested in the estate. See Probate Code § 10811(c).

- 1.3.2 Prior case law obsolete. By reason of the 1991 legislative amendments to Probate Code § 10811(c), earlier cases holding that contingent fee contracts are not appropriate in probate cases no longer state the governing law. (See, e.g., Estate of Kerr, 63 C2d. 875, 48 CR 707 (1966); Estate of Hastings, 108 CA2d. 713, 239 P2d. 684 (1952).)

1.4 Services Rendered Before Probate Opened

- 1.4.1 In re Lagersen's Estate, 210 CA2d 788, 26 CR 783 (1963)

- 1.4.2 Estate of Tubbs, 82 C.A. 2d 305, 186 P2d 7 (1947)

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- 1.4.3 EXCEPTION: Successful defense of a will which is contested before it is admitted to probate (Probate Code sections 8004, 8250)
Estate of Schuster, 163 CA3d 337, 209 CR 289 (1984)
- 1.5 Unethical Conduct
 - 1.5.1 Violating the Rules of Professional Conduct and the State Bar Act, etc.
 - 1.5.2 Services adverse to estate
 - 1.5.3 Compensation taken in advance (unless with written consent of residuary beneficiaries, amount is reasonable, and benefits the estate)
Rule 10.131
- 1.6 Representatives and attorneys may not avoid the statutory restrictions by separately agreeing with the heirs and beneficiaries for their compensation. Such agreements are not binding on the Court and, to the extent they purport to authorize compensation higher than allowed by statute, they are void.
Probate Code sections 10803, 10813
See also Estate of Baum, 209 CA3d 744, 257 CR 566 (1989)
- 2. COMPENSABLE FROM INDIVIDUALS, NOT ESTATE
 - 2.1 Representing Personal Representative Individually
 - 2.1.1 Unsuccessful applicant for Letters or action brought for the benefit of the representative against the interests of other estate beneficiaries - no showing of benefit to estate, only to individuals.
Estate of Bloom, 107 CA3d 195, 165 CR 591 (1980)
Estate of Morinini, 252 CA2d 805, 60 CR 813 (1967)
Estate of Simmons, 43 C 543, 1 CU 682 (1872)
 - 2.2 Services for Individual Beneficiaries Not Benefiting Entire Estate
 - 2.2.1 Remainder beneficiary of testamentary trust denied compensation for services of his attorney in responding to trustee's petition for order determining if such beneficiary entitled to a trust share.
In re Myers' Estate, 230 CA2d 465, 41 CR 151 (1964)
 - 2.2.2 Attorney denied compensation for representing executor who participated actively in a proceeding to ascertain and determine succession to the estate.
In re Poisl's Estate, 153 CA2d 661, 315 P2d 98 (1957)
(Result might differ if direct benefit to estate shown; see Estate of Feldman, infra Sec. 9.8.1b)
 - 2.2.3 Attorney denied compensation in representing co-executrix who claimed an

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asset against the estate.

In re Elftman's Estate, 160 CA2d 10, 324 P2d 1977 (1958)

2.2.4 Attorney denied compensation in successfully representing income beneficiaries to detriment of remainder trust beneficiaries.

In re Bullock's Estate, 133 CA2d 542, 284 P2d 960 (1955)

**PART B, ORDINARY ATTORNEY SERVICES COMPENSATED
BY STATUTORY COMPENSATION**

3. RIGHT TO COMPENSATION IS "ABSOLUTE"

3.1 Statutory Compensation for Ordinary Services is Absolute Right. Probate Code sections 10810 et seq.

Estate of Johnston, 47 C2d 265, 303 P2d 1 (1956)

Estate of Getty, 143 CA3d 455, 191 CR 897 (1983)

But right is subject to Prob. Code Sec. 12205
(see Paragraph 7.2 below)

3.2 Statutory Compensation Does Not Violate Federal Antitrust Laws

Estate of Effron, 117 CA3d 915, 173 CR 93 (1981)

3.3 Probate counsel may not be surcharged for damages due to negligence or misconduct for which the REPRESENTATIVE is held exclusively accountable to the estate (surcharge would be against the executor or administrator personally).

Estate of Lagios, 118 CA3d 459, 173 CR 506 (1981)

Goldberg v. Frye, 217 CA3d 1258, 266 CR 483 (1990)

3.4 Compensation is payable from state, not personally by personal representative

Estate of Lee, 124 CA3d 687, 177 CR 220 (1981)

3.4.1 If possible illiquidity of estate, a reserve may be created for payment of compensation, including advances by beneficiaries, to be paid to attorney upon later court order.

3.4.2 Creation of such a reserve should be disclosed to court in compensation petition.

4. SERVICES COMPENSABLE BY STATUTORY COMPENSATION

Definition: "Ordinary Services" (Probate Code section 10810)

4.1 Meeting with client to review will and related documents; discuss Petition for Probate, assets, heirs, notices, etc.

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- 4.2 Petition for Special Letters of Administration, if ex parte (if contested, extraordinary compensation to attorney for appointed special administrator, if beneficial to estate)
- 4.3 Preparation of Petition for Probate and other papers to appoint personal representative, including locating will and heirs/beneficiaries
- 4.4 Order publication and mailing of Notice of Death
- 4.5 Preparation and service of Notice of Death if:
 - 4.5.1 Additional beneficiaries discovered and supplement must be filed
 - 4.5.2 Counties other than Los Angeles where legal newspaper does not handle mailing
- 4.6 Preparation of supplements or declarations required
- 4.7 Separate Petition for Authority under The Independent Administration of Estates Act
- 4.8 Petition for Appointment of Successor Representative; order for limited republication
- 4.9 Preparation of Inventory/Inventories
- 4.10 Incidental expenses, including local telephone calls, postage, and secretarial services (but compare with Paragraphs 11.2 and 11.3 below)
- 4.11 Handling debts and claims, including acceptance, rejection and payment (unless disputes arise, necessitating compromise or litigation)
- 4.12 Family allowance
- 4.13 Status report (Probate Code Section 12200), unless multiple reports
- 4.14 Account and report current
- 4.15 First Petition for Preliminary Distribution with or without bond
Probate Code Secs. 11620-11623
If multiple reports, see also Paragraph 8.4 below and Prob. Code Sec. 11624 re possible extraordinary compensation
- 4.16 Petition for Compensation (but see Estate of Trynin, cited in Paragraph 9.9 below)
- 4.17 Final Report or Account and Petition for Compensation, Extraordinary Compensation, and Distribution
- 4.18 Supervising distribution and discharge

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4.19 Preparation of required notices

4.20 Preparation of required attorney orders

5. COMPUTATION OF STATUTORY COMPENSATION BASE - AMOUNT OF ESTATE ACCOUNTED FOR

Definition:

"Value of the estate accounted for", as defined in Probate Code section 10800, includes:

"the total amount of the appraisal value of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property."

This formula applies whether or not a sale has taken place during the probate of the estate.

5.1 Inventory and Appraisal (Without Reference to Encumbrances or Other Obligations), Including:

5.1.1 Full value of property subject to homestead declared during decedent's life

5.1.2 Gross value of stock in brokerage margin account
(Earlier case of Estate of Wittenberg, 202 CA2d 867, 21 CR 258 (1962) not controlling since 1965 amendment to Probate Code section 10800 re obligations on property.)

5.1.3 Assets received from distribution of another estate
Estate of Davis, 8 CA 355, 97 P 86 (1908)

5.1.4 Based on original appraised value (not reappraisal)

5.2 Plus Receipts of Income During Administration

5.2.1 Ordinary interest and dividends

5.2.2 Gross or net income

5.2.2a Only net income from operation of business during administration (but operation of business may entitle attorney and representative to extraordinary compensation)

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5.2.2b Treatment of rental property, ordinary rental (gross) vs. business (net)
Estate of Raphael 128 CA2d 92, 274 P2d 880 (1954)
Estate of Reinhertz 82 CA2d 156, 185 P2d 858 (1947)

In Los Angeles County, rental of 3 or more units is considered a business.

5.2.2c If accounting is waived, receipts, gains, and losses can be included in compensation calculation if schedules to substantiate are attached.

5.3 Plus Gross Gains on Sales (based on original appraised value, not reappraisal)

5.4 Less Gross Losses on Sales (based on original appraised value, not reappraisal)

5.5 Treatment of Losses During Administration

5.5.1 Casualty loss - insurance proceeds are includible, but not in addition to the value of the property before the loss

Firebaugh v. Burbank, 121 C 186, 53 P 560 (1898)

5.5.2 As a result of litigation - property not included (but litigation may entitle attorney to extraordinary compensation)

Estate of Delaney, 110 C 563, 42 P 981 (1895)

5.5.3 Foreclosure - only loss of equity in property is deducted

Estate of Stein, 267 CA2d 631, 73 CR 324 (1968)

5.6 Assets Not Included in Compensation Base

5.6.1 Joint tenancy assets

Estate of Fritz, 140 CA 487, 35 P2d 643 (1934)

5.6.2 Community and quasi-community property assets

5.6.2a Passing outright to the surviving spouse (with or without proceeding under Probate Code section 13650)

5.6.2b Where no election to administer under Probate Code section 13502 has been filed

5.6.3 Other property not in the representative's possession

5.6.3a Assets held by the decedent subject to trust

Henderson v. Fisher, 260 CA2d 218, 66 CR 896 (1968)

However, if constructive trust imposed to enforce promise to make a will, then treated in same manner as a testamentary trust and assets are included.

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Ludwicki v. Guerin, 57 C2d 127, 132; 17 CR 823 (1961)
Estate of Turino, 8 CA3d 642, 646; 87 CR 581 (1970)

5.6.3b Property located outside California, unless it comes into possession of personal representative as when real property is sold and proceeds are distributed to the representative

Estate of Johnston, 47 C2d 265, 303 P2d 1 (1956)

Estate of Hendrix, 77 CA2d 647, 176 P2d 398 (1947)

Court may inquire into necessity for bringing asset into California, or whether distribution could have been made through ancillary proceedings.

5.6.4 Unrealized gain or loss

5.6.5 Decedent's pro-rata share of partnership assets, (unless actually received by representative in settlement of decedent's interest in partnership). However, inventory value of decedent's partnership interest is included.

Estate of Grivel, 10 C2d 454, 74 P2d 759 (1937)

Estate of Lux, 100 C 609, 35 P 395 (1893)

5.6.6 Stock splits after death

5.6.7 Insurance or other contractual payments to a named beneficiary other than estate

6. APPORTIONMENT

6.1 General Rule: One Statutory Compensation Per Estate
Estate of Morgan, 94 CA 617, 271 P. 762 (1928)
Probate Code sections 10800, 10810

6.1.1 One statutory compensation for representative(s)

6.1.2 One statutory compensation for attorney(s)

6.2 Court has equitable power notwithstanding statute to apportion statutory compensation between multiple, successive, and concurrent attorneys.

Estate of Reade, 31 C2d 669, 672; 191 P2d 745, 746 (1948), as cited in
Hutchinson v. Gertsch, 97 CA3d 605, 159 CR 40 (1979)

6.3 Basis: Work Performed

If there are two or more executors or administrators, the compensation SHALL be apportioned among them by the court according to the services actually rendered by each.

Estate of Downing, 134 CA3d 256, 184 CR 511 (1982)

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6.4 Multiple Representatives

6.4.1 Example: two representatives, one attorney

6.4.1a Attorney only entitled to one statutory compensation

6.4.1b Representatives apportion statutory compensation per agreement

6.4.2 Example: two representatives, two attorneys (each represents one of the representatives)

Ordinary compensation cannot exceed total compensation had the two representatives been represented by one attorney

(See sample forms of allegations in PART E, Secs. 11.2 and 11.3.)

6.5 One Representative With Successive Attorneys

6.5.1 In the absence of any evidence or agreement, the Court may divide the compensation equally.

See Ford v. Freeman, 40 CA 221, 180 P 545 (1919)

Cf. Estate of Gonzales, 93 CA2d 440, 209 P2d 21 (1949)

6.5.2 Written agreement between attorneys

6.5.3 Request by either attorney, showing proposed apportionment, with notice and copy of petition to other attorney; nonappearance by other attorney after notice may be construed by the Court as a waiver.

6.5.4 Written waiver of share

6.5.5 Consent to proposed apportionment

6.6 Court's Resolution

6.6.1 General rule: Look to statute and cases for formula on allocating the compensation between counsel

6.6.2 Review services rendered when both attorneys request allocation

6.6.3 Award ordinary compensation on basis of services actually performed and other elements used in determining extraordinary compensation

6.6.4 Allocate award in an equitable manner

7. SPECIAL CIRCUMSTANCES

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7.1 Attorney Acts as Personal Representative

No double compensation absent court order:

7.1.1 Notwithstanding any provisions in will, compensation for services as estate attorney not allowed unless right to such compensation is approved by court in advance pursuant to Probate Code section 10804. Generally compensation as representative only (See Estate of Parker, 200 C 132, 251, P.907 (1926) and Estate of Hart, 205 CA2d 631, 22 CR 462 (1962)). (Representative can't waive commissions and be paid as attorney.)

7.1.1a Exception: If representative enters into express agreement not to participate in law firm's profits from the compensation, law firm may receive attorney's compensation.

(Estate of Parker), supra

In re Anderson's Estate, 166 CA2d 39, 332 P2d 785 (1959)

(Agreement was not required because representative wasn't partner with attorneys, although there was some association.)

7.2 Reduction Under Probate Code section 12205

7.2.1 Applies to reduce statutory compensation if:

7.2.1a Estate of person dying after December 31, 1976;

7.2.1b Administration takes more than 12 months from issuance of Letters (18 months if federal estate tax return is required);

7.2.1c Delay caused by factors within the control of the attorney; and

7.2.1d Delay not in the best interests of the estate

7.2.2 If no report filed with court within time period (with notice and copy of petition to all interested persons), stating either that delay was beyond control or in best interests of the estate, this fact may be considered by the court in determining whether to reduce the compensation.

7.2.3 If delay due to representative and not attorney, it is outside control of attorney

7.2.4 If attorney is negligent, compensation should be reduced. Amount of reduction in Court's discretion

7.2.5 Court must consider any previous action under Probate Code section 12202

7.3 Allowances on Account - See LASCER, rule 10.132

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- 7.3.1 In proportion to work performed and described in petition, also showing work still to be performed
See LASCER, rule 10.132.
- 7.3.2 Maximum: 70% of statutory compensation until final account/report settled
See LASCER, rule 10.132.
- 7.3.3 Allowed only in conjunction with a preliminary distribution, unless special circumstances
See LASCER, rule 10.132.
- 7.3.4 If apportionment necessary, usually not allowed until final account
See LASCER, rule 10.134.
- 7.4 Compensation Set by Will
 - 7.4.1 Will governs compensation unless court makes order granting relief from will's provisions
Probate Code sections 10802, 10812
 - 7.4.2 Statute controls in case of dual role
See Paragraph 7.1.1 above
- 7.5 Lien for Compensation, Upon Court Order

PART C, EXTRAORDINARY ATTORNEY SERVICES COMPENSATED BY
EXTRAORDINARY COMPENSATION

8. CALIFORNIA PROBATE CODE

- 8.1 Probate Code sections 10801, 10811 - Allowance of additional compensation for "extraordinary services . . . in an amount the court determines is just and reasonable."
 - 8.1.1 Sales or mortgages of real or personal property
 - 8.1.2 Contested or litigated claims against the estate
 - 8.1.3 The defense of a will contested after its admission to probate
In a post-probate contest, the estate may be required to pay the cost of defense even if the defense is NOT successful, i.e., Section 10801 expenses and Section 10811 expenses can be awarded against and made payable from the estate so long as the representative's defense was in GOOD FAITH.
 - 8.1.4 The successful defense of a will contested before its admission to probate
Although expenses in preprobate contests require a "successful defense",

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the term is construed broadly. It matters not whether the "success" was by judgment after trial OR BY PRETRIAL SETTLEMENT, or whether the representative fails to "win" on all issues. So long as the defense BENEFITTED the estate -- in the sense of preserving decedent's desires and intentions as expressed in the will -- it is "successful".

See Estate of Schuster, 163 CA3d 337, 209 CR 289 (1984) -- compensation payable by estate where contest settled by dismissal with prejudice; immaterial that estate did not prevail on challenge to contestant's standing.

8.1.5 Preparation of estate, inheritance, income, sales or other tax returns or the adjustment, litigation, or payment of any of said taxes

8.1.6 Litigation involving estate property

8.1.7 Carrying on of the decedent's business pursuant to COURT ORDER

If not pursuant to Court order, there is no "guarantee" that extraordinary compensation will be approved; the result will likely turn on the circumstances involved and whether continuing the business was profitable to the estate.

Estate of Scherer, 58 CA2d 133, 136 P2d 103 (1943)

Estate of King, 19 C2d 354, 121 P2d 716 (1943)

8.1.8 "Other litigation or special services that are necessary for the executor or administrator to prosecute, defend or perform."

8.2 Probate Code section 8547 - Allowance of compensation to an attorney out of estate funds for extraordinary services to a special administrator

8.3 Probate Code section 10953 - Allowance of compensation for the extraordinary service of filing an accounting for the administration of a deceased, incompetent or absconding representative by his attorney, or the attorney of record for the estate, when such an accounting is required

8.4 Probate Code section 11003 - Recovery of compensation and expenses for "bad faith" contest or opposition to contest

8.4.1 If the court determines that a contest to the representative's account was brought "WITHOUT REASONABLE CAUSE AND IN BAD FAITH", the court may award against the contestant the compensation, and costs of the personal representative, as well as other expenses and costs of litigation, including attorney compensation, incurred to defend the account. The amount so awarded is a charge against the contestant's interest in the estate, and the contestant is personally liable for any amount remaining unsatisfied. (Emphasis added)

8.4.2 Conversely, upon determining that the REPRESENTATIVE'S OPPOSITION to a

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contest was "WITHOUT REASONABLE CAUSE AND IN BAD FAITH", the court may award the CONTESTANT the costs and other expenses, including attorney compensation, incurred to contest the account. The award is a charge against the compensation or other interest of the personal representative in the estate, and the representative is personally liable and on the bond (if any) for any amount that remains unsatisfied. (Emphasis added)

8.5 Probate Code section 11624 - Costs of preliminary distribution paid by distributee or estate in proportions determined by Court

8.6 Paralegal Services. The above sections (except sections 11003 and 11624) provide that extraordinary compensation for probate counsel may also include compensation for extraordinary services performed by the attorney's PARALEGAL under the direction and supervision of the attorney. The application for such compensation must set forth the "hours spent and services performed by the paralegal."

8.6.1 It is doubtful that the Legislature intended to equate "legal secretary" work with work performed by a "paralegal" (the Legislature expressly chose the term "paralegal" rather than "legal secretary.") Thus, to justify payment for paralegal services, counsel should set forth IN DETAIL, the paralegal's EXPERIENCE AND CREDENTIALS.

See Rule 10.140.

Probate Code sections 10811, 8547(d), and 10953(d).

8.6.2 The amount requested for the extraordinary services of the attorney and paralegal COMBINED must not exceed the amount that would be appropriate if the attorney had provided the services WITHOUT paralegal assistance.

9. CASE AUTHORITY

9.1 General Considerations

9.1.1 Propriety of allowance - "just and reasonable" considerations. The court has broad discretion in determining whether and what amount of extraordinary compensation should be allowed. Generally, the court takes into account the value of the estate, the nature and difficulty of the tasks performed and the time spent, the RESULTS ACHIEVED and whether those results benefitted the estate as a whole (rather than simply furthering the interests of a particular distributee). The court will also evaluate these factors against the amount of statutory (ordinary) compensation payable, and the extent to which the amount of statutory compensation itself provides reasonable compensation.

Estate of Fulton, 23 CA2d 563, 73 P2d 664 (1937)

Estate of Harvey, 103 CA2d 192, 229 P2d 68 (1951)

See Rule 10.142.

9.2 Need for Substantiation

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9.2.1 Estate of Fulcher, 234 CA2d 710, 44 CR 861 (1965)

Reversed probate court's allowance of extraordinary compensation on the grounds that the petition for such compensation was "completely lacking in particularity sufficient to inform as to the nature of the services performed." The court found insufficient the attorneys' statement that "they had reasonably expended approximately 400 hours of their time on legal matters concerning the estate which was . . . of a nature to qualify said services as extraordinary," since such statement failed to disclose the time involved in performing each individual item of service and was therefore "insufficient as the basis for determination by the trial court of the amount to be awarded".

9.2.2 Estate of Lundell, 95 CA2d 352, 212 P2d 914 (1949)

Award of extraordinary attorneys' compensation reversed where the court found that the evidence demonstrating that the necessity for, or nature of, the extraordinary services claimed to have been performed was inadequate. Further, the attorney failed to provide any detailed statement of precisely what extraordinary services had been rendered.

9.3 Sales or Mortgages of Real or Personal Property

9.3.1 Compensation Allowed

9.3.1a Estate of Fraysher, 47 C2d 131, 301 P2d 848 (1956) Allowance of extraordinary attorneys' compensation for commencement of proceedings for sale of real property.

9.3.1b Estate of Raphael, 128 CA2d 92, 274 P2d 880 (1954)

Allowance of extraordinary compensation to attorneys for services in connection with sale of stock to comply with court order for such sale to discharge attorneys' lien on share of distributee.

9.3.1c Estate of McSweeney, 123 CA2d 787, 268 P2d 80 (1954)

No abuse of discretion in allowing attorneys' compensation for extraordinary services in selling three parcels of real property even though "the amount of extra work was not impressive".

9.3.2 Compensation Denied

Estate of Coberly, 90 CA2d 46, 202 P2d 306 (1949). Where attorney for estate rendered services in negotiating sale of promissory note, an asset of the estate, to another and himself as trustees, the probate court did not abuse its discretion in refusing extraordinary compensation for selling note even though attorney took title as trustee.

9.4 Contested or Litigated Claims Against the Estate

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9.4.1 Estate of Walden, 174 C 776, 164 P 639 (1917); Estate of Bullock, 133 CA2d 542, 284 P2d 960 (1955). Extraordinary compensation denied for litigation commenced between persons claiming a share in the estate to determine their own shares.

9.4.2 Estate of Stuttmeister, 75 C 346, 17 P 223 (1888). Extraordinary compensation denied where litigation made necessary by the improper acts of the personal representative.

9.5 Preparation of Certain Tax Returns or the Adjustment, Litigation, or Payment of any of said Taxes

9.5.1 Compensation Allowed

Estate of Bray, 230 CA2d 136, 40 CR 750 (1964). No abuse of discretion nor error in probate Court's order allowing both attorney's and accountant's extraordinary compensation for the same tax services where each rendered extraordinary services and was entitled to compensation, the amount of which was discretionary with the Court.

9.5.2 Compensation Denied

Estate of Walker, 221 CA2d 792, 34 CR 832 (1963). Upheld trial Court's dispensation of the case, finding that the language of Probate Code Section 902 was clear, that the allowance for extraordinary services rendered (including the preparation and filing of federal estate tax return) was discretionary with the probate court, and that it was not mandatory upon the lower court to award extraordinary compensation where extraordinary services were performed. The court may take size of estate (and therefore the amount of statutory compensation) into account in exercising its discretion with respect to extraordinary compensation.

(See also Estate of Fulcher, 234 CA2d 710, 44 CR 861 (1965), discussed in Section 9.2.1 above.)

9.6 Litigation in Regard to the Property of the Estate

9.6.1 Compensation Allowed

9.6.1a Estate of Blair, 127 CA2d 130, 273 P2d 349 (1954) Award of compensation for extraordinary services was not an abuse of discretion where extraordinary services were rendered in preparing for the defense of an eminent domain proceeding, which did not go to trial but was eventually settled through lengthy negotiations. Compare Estate of Baum, (supra, Sec. 1.6)

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9.6.1b Estate of Keith, 16 CA2d 67, 60 P2d 171 (1936) Extraordinary compensation awarded for attorney involvement in three disputes regarding estate assets: the settlement of a creditor's claim, the disposition of an oil lease, and collection of funds due the estate. The court held that since the services consumed a great deal of time and required a court appearance, a number of conferences and extensive correspondence, the attorney's services were "extraordinary and beneficial."

9.6.1c Estate of Turino, 8 CA3d 642, 87 CR 581 (1970) Extraordinary compensation for litigation to defend the estate against imposition of a constructive trust on estate assets.

9.6.2 Compensation Denied

Estate of Tubbs, 82 CA2d 305, 186 P2d 7 (1947)

Extraordinary attorneys' compensation denied where the Court found the taking of a deposition unnecessary, particularly where the deposition was taken before probate proceedings commenced.

9.7 Carrying on of the Decedent's Business

9.7.1 Estate of Scherer, 58 CA2d 133, 136 P2d 103 (1943)

The failure to obtain prior court authorization to operate a business will not preclude the court from ratifying the executor's operation of a business, especially where such action was necessary to preserve the estate. Accordingly, extraordinary compensation for the executor (and presumably extraordinary compensation for the attorney) can be obtained under such circumstances.

9.7.2 Estate of King, 19 C2d 354, 121 P2d 716 (1942)

Extraordinary compensation awarded for carrying on a decedent's business where the will created the power in the executor to do so, or if necessary to preserve the estate. However, where there is no prior court order, extraordinary compensation may be denied unless the business has been profitable to the estate. Same rules should apply to extraordinary compensation for the executor's attorney.

9.7.3 Estate of Allen, 42 CA2d 346, 108 P2d 973 (1941)

The unsuccessful operation of a business is not determinative as to the award of representative's compensation, especially where a good faith effort is shown. Generally compensation should be based upon the amount of extra work required. Same considerations should apply for extraordinary attorney's compensation.

9.7.4 NOTE: Although the cases do not enumerate specific services that would entitle an attorney to extraordinary compensation, it would appear that absent authorization in a will for the personal representative to carry on the business

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and absent a court order granting prior authority to do so, compensation may be denied in the event the operation of a business turns out to be unsuccessful or not in the best interests of the estate. It would also appear that the reasonable value of extraordinary services would be based, INTER ALIA, upon the amount of time necessarily expended, as well as partially upon the results of the operation of the business.

9.8 Such Other Litigation or Special Services as may be Necessary for the Executor or Administrator to Prosecute, Defend, or Perform

9.8.1 Compensation Allowed

9.8.1a Will Contest (see also Secs. 8.1.3 and 8.1.4 above) Estate of Dunton, 15 CA2d 729, 60 P2d 159 (1936) Compensation was awarded in the successful defense of a will contest after the will had been duly admitted to probate. The court found that it was the duty of the executor to defend the will and, accordingly, he was entitled to retain counsel to do so. It should be noted that the court stressed the importance of an itemized account of those services rendered so that the nature of the services could be readily ascertained.

Estate of Stokely, 108 CA3rd 461, 166 CR 587 (1980)
Litigation was necessary for the defense of an attack on a codicil.

9.8.1b Construction or Interpretation of Will

Estate of Halsell, 138 CA2d 680, 292 P2d 300 (1966)
Extraordinary compensation awarded to administrator's attorneys involved in litigation over the construction of a will. The court held that the administrator/beneficiary, in his representative capacity, had the duty to represent the estate, and that a determination of interests in estate was a benefit to the estate regardless of the outcome, such that the litigation performed by the attorneys was properly considered extraordinary.

Estate of Feldman, 78 CA2d 778, 178 P2d 498 (1947) Extraordinary compensation awarded for obtaining an order for interpretation of a complicated will.

9.8.1c Defense of Executor's Account

Estate of Beirach, 240 CA2d 864, 50 CR 5 (1966) Extraordinary attorneys' compensation awarded for defense of the executor's first account, which services

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included trial preparation, seven days actually spent in trial, and time spent with respect to an appeal.

Estate of Raphael, 128 CA2d 92, 274 P2d 880 (1954) Defense of the personal representative's account entitled attorneys to extraordinary compensation. However, other legal services deemed to have been rendered to the administrator in his individual capacity, and not in his capacity as personal representative, were chargeable directly to the individual and were not to be paid out of estate funds.

Estate of Beach, 15 C3d 623, 125 CR 570 (1975) Extraordinary compensation allowed for services in defense of an executor's account.

See also Paragraph 8.4 above.

9.8.1d Borrow Money

Estate of O'Connor, 200 C 646, 254 P 269 (1927) Extraordinary compensation awarded for services rendered in securing a loan to pay debts of the estate.

9.8.1e Extraordinary Efforts to Locate Estate Assets

Estate of LaMotta, 7 CA3d 960, 964, 86 CR 880, 882 (dictum) (1970) Extraordinary compensation awarded for extraordinary efforts to locate estate assets.

9.8.1f Heirship Proceedings

Hutchinson v. Gertsch, 97 CA3d 605, 614, 159 CR 40, 45 (1979) Extraordinary attorneys' compensation allowed for services rendered to decedent's widow as sole heir of the estate before she was appointed as administrator-with-will-annexed. The Court held that under "special circumstances," attorneys' compensation

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may be allowed against a person other than the person who employed the attorney. One of those special circumstances is the situation in which a fund is preserved or increased to the benefit of that person (the "common fund" theory.) See also, e.g., Copley v. Copley, 126 CA3d 248, 293; 178 CR 842, 870 (1981); and Estate of Gump, 128 CA3d 111, 180 CR 219 (1982).

Estate of Harvey, 103 CA2d 192, 229 P2d 68 (1951) Extraordinary compensation awarded in heirship proceedings brought by the personal representative.

CAVEAT: Personal representative has no duty to defend against such a petition, and, in doing so, may violate his duty to treat all beneficiaries without favoritism.

9.8.2 Compensation Denied For Lack of Showing Benefit to Estate

9.8.2a Estate of Coberly, 90 CA2d 46, 202 P2d 306 (1949) No extraordinary compensation was awarded where mistake of executrix necessitated the filing of a supplementary inventory and a second final account.

9.8.2b Estate of Tubbs, 82 CA2d 305, 186 P2d 7 (1947) No extraordinary compensation allowed where a casual examination of a digest was all that was required to determine whether a promissory note was barred by the statute of limitations. Also, services were rendered prior to the initiation of probate proceedings.

9.8.2c Estate of Roscelli, 245 CA2d 188, 53 CR 866, 869 (1966)
Burden was on the attorney to show attorney's intervention effected reduction of a claim against estate.

9.9 Defense of Request for Extraordinary Compensation

9.9.1 In an appropriate case, extraordinary attorney compensation may even be allowed for probate counsel compensation incurred in ESTABLISHING AND DEFENDING A REQUEST FOR EXTRAORDINARY COMPENSATION (e.g., compensation incurred in defending against the representative's attack on a compensation request related to estate litigation.) A contrary rule would be deleterious to decedents' estates and heirs because "attorneys would be reluctant to perform services necessary to the proper administration of decedents' estates

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if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending against unjustified objections to their compensation claims."

Estate of Trynin, 49 C3d 868, 871; 264 CR 93, 94 (1989)

9.9.2 But recovery of "fee-related compensation" is not "invariably required" and need not be awarded if the court determines that prior compensation awards are adequate compensation under the circumstances.

Estate of Trynin, supra, 49 C3d at 879, 264 CR at 100

PART D, COSTS

10. ATTORNEY INCURRED COSTS, REIMBURSED OR ABSORBED IN COMPENSATION

10.1 Reimbursed

10.1.1 Court clerk's fees

10.1.2 Newspaper publication fees

10.1.3 Surety bond premiums

10.1.4 Appraisal fees

10.1.5 Prior Court permission for payment of above costs not necessary; in fact, must be paid before final distribution

See Rule 10.108.

10.2 Absorbed as Part of Statutory Compensation

10.2.1 Photocopies and postage

See Rule 10.109.

10.2.2 Secretarial and word processing time

10.2.3 Paralegal time for ordinary services

See Rule 10.140.

10.2.4 Computer time for ordinary services

10.2.5 Local telephone calls

See Rule 10.109.

10.2.6 Local travel, mileage, and parking

See Rule 10.109.

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- 10.3 Reimbursed Only in Court's Discretion, Depending on Circumstances Disclosed
 - 10.3.1 Substitutes for U.S. Postal Service (air courier, United Parcel Service, local messenger services)
 - 10.3.2 Long distance telephone
 - 10.3.3 Long distance travel
 - 10.3.4 Extraordinary postage and copying (e.g., over 10 beneficiaries)
- 10.4 If attorney's compensation waived (as when attorney is also representative), show details of costs in first accounting covering period of disbursement.
- 10.5 Obtain prior court permission if amounts are unusually large
- 10.6 Legal authorities re reimbursement for costs:
 - 10.6.1 Prob. Code Secs. 1002 and 11004 and annotations
 - 10.6.2 Rule 10.109.
 - 10.6.3 Summary of California Law, Wills and Probate,
12 Witkin, (Ninth Edition 1990), Sec. 499

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PART E, FORMS

11.1 FORM: AGREEMENT RE PERFORMANCE OF AND COMPENSATION FOR DUTIES OF EXECUTOR(S) (SEE SECTION 1.1.3b)

		[Title of Court]
Estate of)	No. BP _____
)	
JOHN DOE)	AGREEMENT RE PERFORMANCE OF AND
)	COMPENSATION FOR DUTIES OF EXECUTOR
Deceased.)	
_____)	

1. MARIA DOE is the Executor of the will of JOHN DOE, deceased.
2. MARY ROE is the Attorney for MARIA DOE as said Executor.
3. The Executor lives outside the State of California, and finds it difficult to perform some of her duties as Executor, including collecting the decedent's bank accounts and other assets, depositing income checks, preparing checks to pay debts and administration expenses, maintaining books for court accounting and income tax purposes, preparing accountings, etc.
4. The Executor desires that her attorney, MARY ROE, and her attorney's staff, perform these duties for the Executor.
5. To compensate her attorney, the Executor will, from her own funds, pay Attorney MARY ROE when billed, at the hourly rate for the person performing the services disclosed on the bills.
6. To compensate herself for this expense, the Executor is entitled to statutory compensation as approved by the Court in this matter.
7. The Executor has been advised to consult with another attorney before signing this agreement.

Dated: _____

MARIA DOE,
Executor of the will of JOHN DOE

MARY ROE, Attorney for Executor

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11.2 Form: ALLEGATION IN PETITION FOR STATUTORY ATTORNEY COMPENSATION WHEN THERE ARE CO-EXECUTORS, EACH REPRESENTED BY SEPARATE COUNSEL (SEE SECTION 6.4)

MARY ROE, A Professional Corporation, and JOHN SMITH, A Professional Corporation, attorneys for the co-executors, have rendered ordinary legal services to the petitioners, and are entitled to statutory compensation in the combined sum of \$X,XXX.XX. A statement of the computation of the statutory compensation, based upon the amount of the estate accounted for, is attached hereto, marked EXHIBIT H, and made a part hereof.

Said attorneys have agreed that the following is a reasonable and just allocation of the statutory compensation for their representation of their respective clients in this proceeding:

MARY ROE, A Professional Corporation, should receive the sum of \$X,XXX.XX for its representation of MARIA DOE;

JOHN SMITH, A Professional Corporation, should receive the sum of \$X,XXX.XX for its representation of BILL HENRY.

By their signatures to this petition, MARY ROE, A Professional Corporation, by MARY ROE, and JOHN SMITH, A Professional Corporation, by JOHN SMITH, confirm their agreement to the allocation of the statutory compensation.

[SIGNATURES]

11.3 Form: ALLEGATION WHEN PRIOR ATTORNEY AND SUCCESSOR ATTORNEY CANNOT AGREE AS TO ALLOCATION OF STATUTORY COMPENSATION (SEE SECTION 6.5.3)

In its order of February 3, 1984, this Honorable Court authorized your Petitioner, the executor herein, to reserve the right to petition the Court for statutory and extraordinary executor's compensation and attorney's compensation when said executor filed her final account and report of administration. A statement of the computation of the statutory compensation and attorney compensation, based upon the amount of the estate accounted for, is attached hereto as EXHIBIT F and made a part hereof.

Petitioner is entitled to statutory compensation for ordinary services rendered herein as executor in the sum of \$6,807.99. Petitioner has received no payment on account for said ordinary services.

MARY ROE, A Professional Corporation, attorney for petitioner, has rendered ordinary services to petitioner, and is entitled to a share of not less than \$5,537.99 of the statutory attorney compensation. JOE SMITH, former counsel for the executor, is entitled to a share of not more than \$1,270.00 of the statutory attorney compensation. Neither of the attorneys for the estate has received any payment on account of statutory compensation for the ordinary services they have rendered as attorneys for the estate; Petitioner therefore requests that this Court authorize her to pay the statutory attorney compensation as allocated in this paragraph.

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11.4 Form: ALLEGATION WHEN EXTRAORDINARY ATTORNEY SERVICES HAS BEEN PERFORMED BY SEPARATE COUNSEL FOR EACH CO-EXECUTOR

MARY ROE, A Professional Corporation, attorney for petitioner MARIE DOE, and JOHN SMITH, a Professional Corporation, attorney for petitioner BILL HENRY, have rendered extraordinary services to the estate which are described in EXHIBITS I and J attached hereto and made a part of this petition. The value of said services is \$X,XXX, and is reasonable in light of the complexities of the estate, the tax savings to the estate, the increase in distribution to the beneficiaries of the estate, and the special circumstances, all as described in EXHIBITS I and J.

Extensive hours were incurred, in excess of the amount requested as extraordinary attorney compensation, to resolve the numerous problems concerning the estate and the probate of the "lost will" and the subsequent will proffered for probate by petitioner BILL HENRY.

The services performed by the above two professional corporations did not duplicate services to the petitioners. The following allocation of the \$X,XXX compensation requested is proposed:

MARY ROE, A Professional Corporation, Attorneys for petitioner MARIA DOE	\$X,XXX
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JOHN SMITH, a Professional Corporation, Attorneys for petitioner BILL HENRY	\$X,XXX
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11.5 Form: FORMAT FOR PETITION FOR EXTRAORDINARY ATTORNEY COMPENSATION

ESTATE OF JOHN DOE
EXHIBIT -- EXTRAORDINARY SERVICES OF ATTORNEYS

Federal Estate Tax Return (Form 706)

The value of the gross estate was \$945,000. The assets consisted of 3 pieces of real property, 60 issues of stock, 17 bonds, 32 pieces of precious jewelry, and a stamp collection, and were valued as of the date of death and also the alternate valuation date. The attorneys' paralegal expended time in gathering the information for such valuations, including review of stock market reports, discussions with persons in the jewelry and stamp collection business, etc. The paralegal encountered special difficulties because many corporations were no longer active, so that information had to be sought from the states of incorporation as to their continued existence.

The attorney determined that valuing the property as of the alternate valuation date resulted in a considerable tax savings to the estate. After final preparation of the Form 706, and after discussing it with petitioners, the attorneys filed the return with the IRS. The return was accepted as filed, without audit.

<u>Hours</u>	<u>Rate</u>	<u>Amount</u>	<u>Total</u>
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Attorney time	xx	\$xxx	\$x,xxx
Paralegal time	xx	xx	\$x,xxx
Total			\$x,xxx

Fiduciary Income Tax Returns (Forms 1041 and 541)

Petitioner's attorneys prepared the fiduciary returns for 1984, and filed them after petitioners reviewed and signed them.

	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>	<u>Total</u>
Attorney time	x		\$xxx	\$xxx
Total				\$x,xxx

Sale of Real Property

The decedent owned an undivided one-half interest in 3 different pieces of real property. It was necessary to sell one of the parcels in order to pay costs of administration and to provide funds for a family allowance for decedent's minor children by a prior marriage.

An analysis was made to determine which property it would be most advantageous to sell. Since a portion of the estate was separate property, consideration had to be given to the needs and desires of the spouse. It was decided that the commercial property would be sold.

Petitioners' attorneys interviewed a broker for the sale, and reviewed 4 different offers. An offer was accepted, and petitioners' attorneys prepared and filed all the necessary documentation, appeared in Court at the confirmation hearing, and handled the escrow.

	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>	<u>Total</u>
Attorney time	xx		\$xxx	\$x,xxx
Total				\$x,xxx

Litigated Claims Against the Estate

A creditor's claim was filed by decedent's brother in the sum of \$150,000, alleging a promissory note. After extensive investigation of decedent's records and interview of witnesses, it was determined that there was sufficient evidence decedent had repaid this amount. The claim was rejected, and the claimant filed suit against the estate.

The attorneys for petitioners filed a petition with the Court for authority to hire outside counsel to defend the estate, which was granted.

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	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>	<u>Total</u>
Attorney time to date xx			\$xxx	\$x,xxx
Total				\$x,xxx

Summary

Service	Amount
Tax Work	
Form 706	\$x,xxx
Form 1041	\$x,xxx
Sale of Real Property	\$x,xxx
Litigated Claims Against the Estate	\$x,xxx

**TOTAL ATTORNEY COMPENSATION REQUESTED
FOR EXTRAORDINARY SERVICES \$x,xxx**