

First Supplement to Memorandum 88-52

Subject: Study L-1058 - Probate Filing Fees (Comments on draft of tentative recommendation)

Attached to this supplement are comments concerning the draft *Tentative Recommendation Relating to Filing Fees in Probate* which is attached to Memorandum 88-52. We have received reports from the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (see letter from Phyllis Cardoza in Exhibit 1) and from Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (see report from William V. Schmidt in Exhibit 2). The State Bar team finds the project a "more difficult one as we dig deeper into the subject matter" but feels that we are making progress.

First Paper

Both the Beverly Hills Bar committee and the State Bar team approve defining first paper to mean the first petition in draft Section 26727. However, the State Bar team has misgivings about using the concept of "appearance" without defining it. The advantage of using appearance as a condition for imposing a fee is that it solves a drafting problem. However, if it is not clear enough, it should be abandoned. Accordingly, if this general approach is approved, the staff suggests that draft Section 26827(a) be revised to read as follows:

26827. (a) As used in this section, "first paper" means the first petition filed by a person in a proceeding or the first paper filed by a person in opposition to a petition. "First paper" does not include a paper that does not require a hearing.

Is this language sufficient to describe all opposition papers that should be subject to a filing fee?

Meaning of "Proceeding"

The memorandum raised the issue of what is included in "proceeding" under existing law. We assume that all matters arising in connection with a decedent's estate from opening to closing are one proceeding. We assume that all matters arising during the existence of a guardianship or conservatorship are within one proceeding. On the other hand, each trust petition would seem to start a new proceeding. The memorandum questioned the logic of this state of affairs, but we did not attempt to make sense of it. The State Bar team states that "proceeding" needs to be defined or further clarified as "all petitions and matters filed with the County Clerk bearing the number and the name of that particular proceeding." This language would make more specific what we have assumed to be a proceeding under the Probate Code. It would implement the suggestion in the memorandum that the fees could be based on creation of a file and addition of papers to a file. But we are concerned that it may be too rigid and that proceeding is best left undefined. In addition, this language does not respond to the policy issue raised in the memorandum concerning the difference between trust proceedings, on the one hand, and probate, guardianship, and conservatorship proceedings, on the other.

Papers that "Require a Hearing"

The State Bar team suggests that the concept of a paper that "does not require a hearing" be eliminated or clarified. (It is interesting to note, however, that the team uses the phrase "requires a hearing" in its suggested draft.) The team argues that an objection to a petition does not technically require a hearing. Hence, it seems that the team feels that the exclusionary provision in the last sentence of draft Section 26827(a) is too broad. As indicated in the comment to the draft section, the purpose of this language is to avoid assessing a first paper fee for filing notices, consents, and the like. The phrase "require a hearing" comes from existing Section 26827.4 relating to subsequent papers.

The State Bar team suggests defining "first paper" as a petition or other document that requires a court hearing or the first paper filed by a person in response thereto (other than a paper that merely

consents). The staff has no objection to this approach. An alternate draft incorporating this approach is set out below. We continue, however, to have some residual concern about the significance of the language "requires a court hearing." Can we be sure that this language is clear and that it covers what should be covered? Are there papers that are filed, such as an accounting or a report, that do not "require" a hearing until an objection is made?

Amount of Fee for Opposition Paper

Both bar groups recommend setting a lower fee for the first paper filed in opposition to a petition. They support this suggestion by the argument that the file already exists and so processing costs are lower, and that a lower fee is consistent with civil practice. Compare Gov't Code § 26820.4 (\$86 first paper fee in civil case) with Gov't Code § 26826 (\$63 fee for defendant, intervenor, respondent, or adverse party) (these sections are set out in Exhibit 3 attached to Memorandum 88-52). The State Bar team recognizes that this approach "could have serious revenue considerations and might therefore be objectionable to the County Clerks." (See Exhibit 2, at 3.)

The two-tier approach to first paper fees could be very easily implemented by simply repealing the special probate fee statutes and leaving the matter to be governed by the general language of Government Code Sections 26820.4 and 26826, which set filing fees in civil actions and proceedings in the superior court. (For the relevant language of these sections, see Exhibit 3 attached to Memorandum 88-52.)

Consider also the alternate draft set out below.

Alternative Draft

Because of the interest shown in a two-tier first paper fee, the staff suggests consideration of the following draft to replace Section 26827 in the draft statute attached to Memorandum 88-52:

Government Code § 26827 (added). Probate first paper fee

26827. The total fee for filing the first petition [, or other paper that requires a hearing,] in a proceeding under the Probate Code, whether filed separately or jointly, is the sum fixed by resolution pursuant to Section 68090, which shall not exceed the following maximum amounts:

(a) In any county where a fee is collected for the court

reporter fund, the total fees shall not exceed eighty-six dollars (\$86).

(b) In any county where a fee is not collected for the court reporter fund, the total fee shall not exceed sixty-one dollars (\$61).

Government Code § 26827.2 (added). Probate opposition paper fee

26827.2. The total fee for filing the first paper in a proceeding under the Probate Code on behalf of a respondent or adverse party, whether filing separately or jointly, is the sum fixed by resolution pursuant to Section 68090, which shall not exceed the following maximum amounts:

(a) In any county where a fee is collected for the court reporter fund, the total fees shall not exceed sixty-three dollars (\$63).

(b) In any county where a fee is not collected for the court reporter fund, the total fee shall not exceed thirty-five dollars (\$35).

This scheme would, on the face of it, result in a reduction of revenue. However, the staff believes that revenue may increase because fees would be charged for some opposition papers that are not subject to fees under existing law.

Eliminate Subsequent Paper Fee?

As to draft Section 26827.4, the State Bar team recommends that no filing fee be charged for matters listed in Probate Code Section 10501, whether or not the personal representative has independent administration authority. Phrased differently, the State Bar team would not charge a fee for any subsequent paper that the personal representative is required by law to file with the court.

More generally, the State Bar team suggests that collection of the \$14 subsequent paper fee is more burdensome than beneficial. The team suggests that the Commission consider increasing the first paper fee and eliminate subsequent paper filing fees. The staff believes that the draft statute would probably increase total revenue, due to the imposition of fees on all first papers filed in opposition. Thus, it might be appropriate to eliminate the subsequent filing fees. It should be noted, however, that there is a \$14 filing fee for a notice of motion, or other subsequent paper requiring a hearing, in civil actions generally (subject to a number of exceptions). See Gov't Code § 26830. What does the Commission wish to do?

Policy

Again it might be worth considering the philosophy (if we can so dignify this matter) behind the filing fee structure. As discussed briefly in the memorandum, fees could be based on the work of the court clerk in opening a new file or adding a name or paper to a file. Fees may also reflect the cost to the court system when a paper is the sort that "requires a hearing."

Another approach would focus on the parties and what they seek or stand to lose in the procedure. This would charge each person who appears an initial fee for entering the judicial process. The combatants, the petitioners and respondents, would pay the big fees. Those playing lesser roles, the spectators and fellow travelers, would pay a token fee or nothing. This approach is reflected in the draft statute attached to the memorandum.

A third approach assesses fees for a number of activities that are considered to be significant, on a more or less ad hoc basis. Hence, commencing a proceeding and opposing a petition are subject to a significant fee. But the same fee is charged for a petition or opposition regardless of whether one person files it or several persons join in it. This is apparently the approach of existing law.

Cutting across all of these approaches would be any overriding policies of reducing or excusing fees for certain types of papers.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

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August 31, 1988

CA LAW REV. COMM'N

SEP 02 1988

RECEIVED

Stan G. Ulrich, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-1058, Filing Fees in Probate
Memorandum 88-52 dated 8-2-88

Dear Stan,

I am writing on behalf of the Legislative Committee of the Probate, Trust, & Estate Planning Section of the Beverly Hills Bar Association.

We have the following comment(s) about the above study:

1. We agree with the staff recommendation that the highest filing fee be charged for the first petition filed by a person.
2. However, we suggest that the fee for a first paper filed in opposition to a petition (in your language, a filing that constitutes an appearance of a person) be lower than the initial fee because this paper does not require opening a new file. Thus, the person filing the paper should not bear the cost of the setup on the computer, the new docket sheet, etc. occasioned by the opening petition in the probate matter.

This plan would accord with present practice in civil court.

Sincerely,



PHYLLIS CARDOZA

PC:pk

cc: James J. Stewart, Esq. (attendee at 9/8 - 9/9/88 meeting of LRC)
Kenneth G. Petrulis, Esq., Chair, Legislative Committee
David E. Lich, Esq., Chair-Elect, Legislative Committee
Melinda J. Tooch, Esq., Chair, Probate Section, BHBA

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REPORT

TO: JAMES V. QUILLINAN
D. KEITH BILTER
IRWIN D. GOLDRING
JAMES D. DEVINE
JAMES C. OPEL
CHARLES A. COLLIER, JR.
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, STUDY TEAM NO. 1

DATE: September 2, 1988

SUBJECT: IRC MEMORANDUM 88-52 (Filing Fees in Probate)

Study Team No. 1 held a telephone conference on September 1, 1988. Charles A. Collier, Jr., Richard S. Kinyon, Sterling L. Ross, Jr., Lynn P. Hart, and William V. Schmidt participated. Michael V. Vollmer did not participate. We have the following comments:

This subject matter is not an easy one with which to work. Our experience is that many fine minds have struggled with it over a period of time and seem to continue to struggle with it. The easy answer that at first seems to be apparent becomes a more difficult one as we dig deeper into the subject matter. However, we feel that we are making progress.

We have the following comments in connection with the proposed Government Code Section 26827:

In Subsection (a), the word "proceeding" is used. The meaning of this word is also discussed on page 3 of the Memorandum. Study Team No. 1 feels that the word "proceeding" should include not only a probate proceeding but also a conservatorship and a guardianship proceeding. We also feel that any paper which is filed with the County Clerk bearing the

number and the name of the decedent, conservatee or ward, is a paper which should be considered to be filed in that same proceeding. A will contest or a petition to determine title would not be a new proceeding because it would bear the same name and case number, and be filed by the County Clerk in the same probate file as any other paper filed therein. The Staff may wish to consider defining the word "proceeding" in the statute or in a comment thereto; however, our Study Team was unanimous in its support of the general concept of a single probate, conservatorship, or guardianship proceeding as one which includes and embraces all petitions and matters filed with the County Clerk bearing the number and name of that particular proceeding.

We support the "first paper" concept. We believe it is a good idea to define a "first paper" as the first petition filed by a person, but we are concerned about the use of the word "appearance." If the word "appearance" is used, it should be defined. We feel that it means different things to various people, and one of our objectives here is to achieve simplicity and uniformity throughout the State of California.

We are also concerned about the second sentence in Sub-section (a) which states that the first paper does not include a paper that does not require a hearing. It seems to us, for example, that an objection to a petition does not technically require a hearing (it is the petition which requires a hearing), but an objection to a petition has traditionally been considered as a paper for which a filing fee is, and should be, charged.

We feel that it might make sense to define a "first paper" as the first petition or other document which requires a court hearing, or one which responds to a first paper which requires a court hearing, with the exception of consenting thereto. Our

Study Team also felt that although a filing fee should be required from the person who files a "first paper" requiring a court hearing as well as from the person who files a "first paper" responding to the original paper, that the filing fee for the responsive "first paper" should be less than the filing fee for the initiating "first paper." The concept here is the same as the concept on the Civil side. Normally, a person who files a complaint is charged a higher filing fee than a person who files an answer in response thereto. We realize that the introduction of this concept could have serious revenue considerations and might therefore be objectionable to the County Clerks. We further realize that this concept of a lesser filing fee for a first paper which is responsive in nature is something that has heretofore not been given serious consideration by the County Clerks. Nevertheless, we set it forth for the consideration of the Staff and the Commission.

In summary, we feel that the word "proceeding" needs to be defined or further clarified, that the word "appearance" should be eliminated unless it can be clearly defined and clarified, that the statement that a first paper does not include a paper that does not require a hearing should either be eliminated or clarified because an objection to a petition does not technically require a hearing, and that consideration be given to defining a "first paper" as one which means the first petition or other document which requires a court hearing filed by a person in a proceeding or the first paper filed by a person in response to such petition or document other than a paper which merely consents thereto. Hopefully, this would include all of those petitions, objections and other matters for which most people feel a filing fee should be charged and would eliminate all of those papers for which most people feel a filing fee


should not be charged, such as those set forth in the second paragraph of the Comment to Government Code Section 26827.

In regard to proposed Government Code Section 26827.4, our Study Team had two primary thoughts. One was that there should be no filing fee charged for those matters set forth in Probate Code Section 10501, whether or not the petitioner held the power to administer under The Independent Administration of Estates Act. We share the concern expressed by William W. Johnson, Probate Examiner in Sacramento County, as stated in his letter of April 15, 1988. We believe that various counties are interpreting this Government Code Section in different ways. We believe that all personal representatives should be treated the same way whether or not they have independent powers, and that no filing fee should be required for any petition for which petitioner is required by law to file with the court.

Our second thought in regard to Government Code Section 26827.4 is that this Section necessarily causes more work and sometimes confusion to both County Clerks as well as attorneys and their staff. We wonder whether the extra revenue is really worth it. In the interest of simplicity and conformity, and ease of administration, all of which, we feel, are worthwhile objectives, we would like to see consideration given to the imposition of a slightly higher filing fee for the first paper filed by any party, and the complete elimination of any filing fee or any subsequent paper filed by the same party.

Respectfully submitted,
STUDY TEAM NO. 1

By:



William V. Schmidt,
Captain