

Memorandum 87-49

Subject: Study L-1036 - Probate Attorney Fees (Policy Issue
Determination)

The most significant policy issue in the Probate Code study is whether the the California statutory fee schedule should be abandoned in favor of a reasonable fee scheme. This is the primary reason why the Commission was directed to study probate law and procedure. The persons who requested this study wanted to substitute the Uniform Probate Code attorney fee provisions for the California statutory fee schedule.

The Uniform Probate Code provides that the compensation of the attorney is determined by agreement with the personal representative. The court reviews the agreed compensation only if an interested person objects.

The staff is preparing a two part study on California Probate Attorney Fees. Attached is Part I of the study. This part presents a great deal of background material on probate attorney fees generally and also material especially relevant to the issue of whether a statutory fee schedule should be retained in California.

Part II of the study will be prepared for the November meeting. This part will deal with collateral matters in connection with attorney fees, including but not limited to matters that should be considered if the Commission decides to retain the concept of a statutory fee schedule.

We thought it important to send this study to you now so that you would have time to give it careful consideration before the October meeting. We have not had time to recheck the statutory references and the form and style of the study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

10/07/87

CALIFORNIA PROBATE ATTORNEY FEES

PART I

This study was prepared for the California Law Revision Commission by a member of the Commission's staff, John H. DeMouly. No part of this study may be published without written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefits of the views of such persons, and the study should not be used for any other purpose at this time.

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INTRODUCTION

The California Law Revision Commission has been directed to study "[w]hether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code."¹ The direction to study this topic was included in a resolution adopted by the California Legislature in 1980.² The resolution was introduced at the request of persons who believe that substantial revisions in California law are necessary to avoid the delay and expense of probate.³ These persons believe that the attorney in an estate administration proceeding should receive a reasonable fee rather than a fee determined by a percentage of the estate.⁴

This article has been prepared to present background information concerning two important policy issues:

(1) How should attorneys' fees be fixed in estate administration proceedings? Should the fees be a percentage of the estate, be

1. 1980 Cal. Stats. res. ch. 37.

2. Assembly Concurrent Resolution No. 107 (1979-80 Regular Session), introduced by Assembly Member Alister McAlister (the Assembly Member of the Commission).

3. Assembly Member McAlister determined to sponsor a resolution to authorize the study of probate law after meeting with representatives of the American Association of Retired Persons and others.

4. The author of this article was present at the meeting at which Assembly Member McAlister determined to sponsor the resolution that authorized the probate law study. The persons meeting with Assembly Member McAlister wanted the Uniform Probate Code to be enacted in California because they believed that it would significantly reduce probate fees of attorneys.

computed on an hourly rate based on the time spent by the attorney, be a reasonable fee, or be determined on some other basis?

(2) Should these fees be fixed or approved by the court in all cases or should they be subject to court review only in case of a controversy?

This article draws from information presented in the *Stein Study*.⁵ That study is based on data collected from a representative sample of estate administrations in five states: California, Florida, Maryland, Massachusetts, and Texas.⁶ The information presented in the *Stein Study* is used in this article to compare attorneys' fees for California estate administration proceedings with those charged in other states. Information collected in two other empirical studies of probate administration also is considered in this article.⁷

This article also draws on information contained in responses to a questionnaire distributed to California probate practitioners. This questionnaire (hereinafter referred to as "Questionnaire") was prepared by the California Law Revision Commission. The Questionnaire sought information concerning the estate administration practice of each respondent and his or her opinion concerning the changes, if any, that should be made in the way attorneys' fees are now fixed in California probate proceedings.

The Questionnaire was distributed to lawyers, judges, probate commissioners, probate referees, and others who had indicated an interest in the probate law study. Two hundred forty five persons responded to the Questionnaire. However, because of the manner of selection of the persons to whom the Questionnaire was sent, the

5. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107 (1984) (hereinafter referred to as "Stein Study").

6. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984).

7. Crapo, *The Uniform Probate Code--Does it Really Work?*, 1976 B.Y.U.L. Rev. 394 (1976); Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 40 N.D.L. Rev. 523 (1974).

responses may not represent a reliable sample of the probate bar or of California lawyers in general.⁸ Nevertheless, the responses are useful indications of California probate practices and of the opinions of California probate practitioners.

This article deals only with the fixing of attorneys' fees in formal probate proceedings. Where there is no formal probate proceeding, the fee charged by the California attorney is determined by agreement between the parties and is not subject to court approval. It is likely that in most cases where a person dies in California, the court does not fix or approve the attorney's fee because no formal probate proceeding is necessary.⁹

FEE CHARGING APPROACHES

Methods used to fix attorneys' fees in estate administration include:

- The percentage fee method.
- The hourly charge method.
- The multiple factor approach.

The Percentage Fee Method

The percentage fee method fixes the amount of the attorney's fee for probate administration work as a percentage of the value of the

8. Most respondents (88.2%) were lawyers in private practice. Appendix 1, Table A-1. More than one-fourth of the respondents had been engaged in probate practice for more than 25 years. Appendix 1, Table A-2. The location of their practice was almost equally divided between Northern (52.7%) and Southern (47.3%) California. Appendix 1, Table A-3. Of the respondents, 39.3% were sole practitioners, 36.3% practiced in firms from 2 to 9 attorneys, and 24.4% practiced in firms of 10 or more attorneys. Appendix 1, Table A-4. Almost three-fourths considered themselves to be probate specialists. Appendix 1, Table A-5. More than 70% devoted more than half of their work time to probate, trust, and estate planning matters. Appendix 1, Table A-6.

9. See discussion, *infra*, under "Attorneys' Fees Where No Formal Probate Proceeding."

estate. The advantages and disadvantages of percentage fee charging are well summarized in the *Stein Study*:¹⁰

[P]ercentage fee charging has the appeal of simplicity. Courts can easily apply it. The extent and value of estate property is determined during administration and courts can routinely apply the appropriate percentage to determine the reasonableness of attorneys' fees.

Percentage fee charging has other advantages. The amount of attorney time required to administer an estate does tend to correlate with the size of the estate. Larger estates generally present more extensive and intricate legal problems than smaller estates; thus the higher fees the percentage approach produces in larger estates do roughly compensate attorneys for the greater work performed. A percentage fee charging system also may make legal services more affordable in smaller estates by shifting to larger and more profitable estates some of the costs of administering smaller estates, as well as by shifting overhead expenses properly allocable to the smaller estates. Finally, other providers of services to the estate, such as real estate brokers and stockbrokers, charge for their services on a percentage basis--thus validating the concept.

Percentage charging by attorneys does, however, present difficulties. Two estates of the same size may require significantly different amounts of attorney work, depending on the nature of the assets held and the types of problems that exist. Moreover, the percentages set in any fee schedule may become established as the minimum fee charged, resulting in additional charges in complex estates and inflated charges in simple estates.

The Hourly Charge Method

For many other kinds of legal work it is a common practice to base the fee on the time the attorney works on the matter. The client is billed at the attorney's hourly rate for that kind of legal work. This "hourly charge" or "time spent" approach avoids the most significant problem created by percentage fee charging--the inadequate fee where the estate is a small estate and the windfall to the attorney where the estate is a large but simple estate.

10. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984) (footnotes omitted).

The *Stein Study* states the primary difficulty with this approach:¹¹

Rigid application of a time spent standard, however, may penalize more efficient and experienced attorneys while benefiting less competent attorneys who take longer to perform the same tasks. Although more experienced attorneys should command a higher hourly rate for their time, the probate court or other authority reviewing fees may be unwilling to approve hourly rates that fully distinguish the experienced attorney's expertise from that of other attorneys.

Some California attorneys share this concern that the probate courts in fixing fees do not allow a reasonable hourly rate that recognizes the experience of the attorney.¹² Two California attorneys express concern that billing on an hourly rate will cause disputes as to how much time was used and whether it was necessary to spend that amount of time on the matter.¹³ However, hourly rate charging is a method commonly used for billing for other legal services, and clients seem to understand and accept this method.

The Multiple Factor Approach

The Multiple Factor Approach is a method often used to fix attorneys' fees in nonprobate matters. The ABA's *Model Code of*

11. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175-76 (1984) (footnotes omitted). Use of the time spent standard also creates problems as to (1) whether to bill for time spent by secretaries, paralegals, and others who perform estate administration services and (2) if these services are to be billed, the hourly rate at which they are to be billed.

12. See discussion, *infra*, under "Policy Issues and Recommendations--Concern That Courts Will Not Allow Fair Reasonable Fees."

13. Attorneys responding to the Commission's questionnaire stated:
"Clients are suspicious enough of attorneys and would not trust an hourly or other rate where they would have no way to check the time actually expended."

"The current percentage method is easy for the client to understand. There can be no disputes as to how long it took to complete task (i.e., too many hours expended)."

Professional Responsibility (ABA Code) and the ABA's *Statement of Principles Regarding Probate Practices and Expenses (ABA Statement)* use this approach to fix attorneys' fees for probate of an estate.

The *Stein Study* contains an excellent summary of the ABA Code and ABA Statement:¹⁴

The ABA Code instructs attorneys to consider the time and labor required, the novelty and difficulty of the questions involved, the skill necessary to perform properly, the likelihood that acceptance of the particular employment will preclude other employment, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, the time limitations imposed by the client or by the circumstances, the nature and length of the professional relationship with the client, the experience, reputation, and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent. The ABA Statement specifically addresses attorney fee charging in the probate area, concluding that the overall costs of settlement of a decedent's estate should be fair and reasonable in the light of the circumstances of the particular estate and therefore that the attorney's fee should bear a reasonable relationship to the value of the services rendered and the responsibility assumed. The ABA Statement condemns rigid adherence to statutory or recommended commission or fee schedules as frequently unfair to beneficiaries of estates, to personal representatives, or to the attorney.

The ABA Statement further provides that attorneys who serve as personal representatives are entitled to compensation for both their legal services and their services as personal representative, and attorneys performing some or all of the normal duties of the personal representative should receive increased compensation for the additional work involved. Similarly, when an attorney delegates certain normal duties to be performed by others, the attorney's compensation should be commensurately lower. Finally, attorneys who perform services with regard to nonprobate property should be compensated reasonably for those services.

The *Stein Study* summarizes the advantages and disadvantages of the multiple factor approach:¹⁵

14. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 58 Minn. L. Rev. 1107, 1174 (1984) (footnotes omitted).

15. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1176-78 (1984) (footnote omitted; new footnote added).

[The multiple factor approach] is certainly more sensitive to all relevant considerations in an individual estate than percentage fee charging or even a time spent system would be. This multiple factor approach, however, may require a court to examine a great deal of evidence to determine what fees are reasonable, leading many probate judges to indicate a preference for percentage fee charging because it is more easily supervised. Indeed, no matter what approach is formally used, most judges probably begin with some variant of the percentage fee standard in determining the prima facie reasonableness of fees charged in estate administration. Only if the fee exceeds that standard would the judge closely scrutinize it.

At some point, attempts to regulate attorneys' fees may become self-defeating. If attorneys must, in every case, make special efforts to justify their fees, they will charge for the time these efforts entail as a required task in the estate administration. The net result of close court supervision may thus be little or no cost reduction to consumers of legal services. Furthermore, if courts approve requested attorneys' fees in estate administration only if they are less than those attorneys generally demand for their services, attorneys may seek compensation in a manner not subject to court review, such as through compensation directly from personal representatives or from the beneficiaries' own funds.¹⁶ Because such payments would not come from estate funds, they would not necessarily be included in the accounting for estate expenses submitted for court approval.

16. A California lawyer who believes that the statutory fee is inadequate may make a separate agreement with the beneficiary for an additional fee for work in connection with nonprobate assets, such as insurance, employee benefit plans, joint tenancies, and the like. This additional fee is not subject to court approval. On the other hand, the lawyer may do this additional work without an extra charge if the lawyer believes that the statutory fee is adequate to cover the additional work under the circumstances of the particular case. The responses to the Questionnaire indicate that most attorneys charge an additional fee for work in connection with nonprobate assets in not less than 10 percent of the estates they handle. About 30 percent of the respondents stated that they never charged an additional fee for work in connection with nonprobate assets. About 17 percent charge an additional fee in at least half of the estates they handle. See Appendix 1, Table B (Charging Additional Fee Not Approved by Court).

FEE CHARGING IN CALIFORNIA

Introduction

The California method of fixing attorneys' fees in estate administration is a combination of the percentage fee method and a reasonable fee method. The attorney's fee for ordinary services is determined using a statutory schedule.¹⁷ In addition to this statutory fee for ordinary services, the attorney is entitled to such amount as the court determines to be just and reasonable for extraordinary services.¹⁸

17. Prob. Code § 901. See discussion, *infra*, under "The Statutory Fee Schedule." The fee schedule applies only where there is a formal probate proceeding. Where there is no formal probate proceeding, the fee is determined by agreement between the parties and is not subject to court approval. See discussion, *infra*, under "Attorneys' Fees Where No Formal Probate Proceeding."

The decedent's will may make provision for compensation of the attorney and that shall be "a full compensation" for the attorney's services unless by written instrument, filed with the court, the attorney renounces the compensation provided for in the will. If the attorney renounces the compensation provided in the will, the attorney is entitled to receive compensation as provided by statute. See Prob. Code § 910 (incorporating the provisions relating to compensation of personal representatives).

Usually, the personal representative who is also an attorney may receive the personal representative's compensation but not the attorney fee. *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982). However, where expressly authorized by the decedent's will, dual compensation may be paid to one person acting in both capacities. *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958).

18. Prob. Code § 910. See discussion, *infra*, under "Additional Compensation for Extraordinary Services."

The Statutory Fee Schedule

The statutory fee schedule sets the attorney's fee as percentages of the "estate accounted for" by the personal representative,¹⁹ with higher percentages payable for smaller estates.²⁰ The statutory fee in effect during 1987 (Probate Code § 901) may be computed from the following table:

Table 1. Statutory Attorney Fee Schedule			
(Probate Code Sections 901 and 910. Additional amounts may be allowed for extraordinary services.)			
Estate Accounted For		Attorney's Fee	
(1) From	(2) To	(3) Fees on (1)	(4) Plus % on excess of (2) over (1)
\$ -0-	\$ 15,000	\$ -0-	4%
15,000	100,000	600	3%
100,000	1,000,000	3,150	2%
1,000,000	10,000,000	21,150	1%
10,000,000	25,000,000	111,150	1/2%
25,000,000+		186,150	Reasonable amount (determined by court)

19. Prob. Code § 910 (incorporating the provisions of Probate Code Section 901). The "estate accounted for" is based on the fair market value of the real and personal property of the estate without subtracting any encumbrances on the property. Prob. Code § 901 ("estate accounted for" is "the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate" whether or not a sale of property has taken place during probate). For a discussion of the property or values included in determining the "estate accounted for," see Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§ 20.16-20.24 (Cal. Cont. Ed. Bar 1986).

The setting of the attorney fee using the statutory rate schedule is within the "state action exemption" of the Sherman Antitrust Act and does not violate federal antitrust laws. Estate of Effron, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

20. See Prob. Code § 901.

The following table shows the statutory attorney fee on estates of various sizes.

Table 2. Statutory Attorney Fee on Various Size Estates			
Amounts determined from statutory fee schedule under Probate Code Sections 901 and 910 and do not include additional amounts that may be allowed for extraordinary services.			
<u>Size of Estate</u>	<u>Fee</u>	<u>Size of Estate</u>	<u>Fee</u>
\$10,000	\$ 400	\$ 150,000	4,150
20,000	750	200,000	5,150
30,000	1,050	250,000	6,150
40,000	1,350	300,000	7,150
50,000	1,650	400,000	9,150
60,000	1,950	500,000	11,150
70,000	2,250	800,000	17,150
80,000	2,550	1 million	21,150
90,000	2,850	2 million	31,150
100,000	3,150	5 million	61,150
		10 million	111,150

Absent a contractual agreement for a lower fee, the attorney has the absolute right to receive the amount of the statutory fee, without regard to whether that amount is reasonable under the circumstances of the particular case.²¹

21. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). See generally Estate of Efron, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981). The right to receive the statutory fee is subject to Probate Code Section 1025.5, which permits the court to reduce the fee if the time taken for the administration of the estate exceeds the time set forth by statute or prescribed by the court and the court finds that the delay in closing the estate was caused by factors within the attorney's control and was not in the best interests of the estate.

The statutory fee schedule has the same advantages as percentage fee charging. The fee for ordinary services can be determined easily and with certainty. The "estate accounted for" is determined using the inventory and appraisal of the estate property and certain transactions that occur during the administration of the estate.²² The statutory fee schedule is applied to that amount to determine the fee. The statutory fee is routinely allowed by the court; the attorney need not produce information for review by the court so that the court can determine that the fee is reasonable.²³

The obvious disadvantage to the client of using the statutory fee schedule is that the fee may be grossly excessive for a large, simple estate.²⁴ This disadvantage is a real one, since as a matter of practice the statutory fee is the minimum fee in California.²⁵ Responses to the Questionnaire indicate that the great majority (93.3%) of California probate attorneys "ordinarily charge the full statutory fee in a regular probate administration."²⁶ Most (53.9%) reported that they never charge less than the statutory fee. Eighty-five percent reported that they charge less than the statutory fee in 10 percent or less of the probate estates they handle. Table C (Charging Less Than Statutory Fee), Appendix 1, shows the extent to which the attorneys responding to the Questionnaire reported that they charged less than the statutory fee.

22. See note 19, *supra*.

23. The attorney must provide the court with information showing that the statutory fee was calculated in accordance with the statutory requirements. See text, *infra*, at notes 118-122.

24. See responses to Questionnaire. E.g., "Statutory fee structure is generally high in estate of \$100,000 or more if attorney is skilled probate attorney. Very frequently attorney receives an average of \$400-\$600 per hour for time spent."

25. The attorney is entitled to the statutory fee unless the court approves a higher fee or the client negotiates a lower fee. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983).

26. See Appendix 1, Table F (Attorneys Who Ordinarily Charge Full Statutory Fee). The responses to the Questionnaire indicate that clients generally are not aware of their ability to negotiate a lower fee or, if they are aware, either do not request or are unable to negotiate a lower fee. See text, *infra*, at note 67.

Additional Compensation for Extraordinary Services

Introduction

The California lawyer is protected to some extent from the primary disadvantage to the attorney of percentage fee charging--the grossly inadequate fee. The lawyer may request the court to authorize a reasonable additional fee for "extraordinary services."²⁷

Section 910 of the Probate Code provides that the estate attorney is allowed out of the estate the amount determined by the statutory fee schedule for "conducting the ordinary probate proceedings" "and such further amount as the court may deem just and reasonable for extraordinary services."

There is a lack of clarity in the court rules and judicial decisions as to which legal services are ordinary and deemed to be fully compensated out of statutory fees and which legal services are not ordinary and for which extraordinary compensation may be allowed.²⁸ For example, Fresno County treats services in connection with a family allowance as ordinary probate services²⁹ but San Joaquin County allows additional compensation for a petition for a family allowance.³⁰

27. Prob. Code § 910 (court may allow such additional amount "as the court may deem just and reasonable for extraordinary services"). Courts in other states using a fee schedule for probate (whether by statute, court rule, or custom) usually permit larger legal fees where extraordinary work is involved. See Annot., 58 A.L.R.3d 317, 324 (19--).

28. See Report of Ad Hoc Committee on Attorney Fees in Probate (Los Angeles County, May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum in California Local Probate Rules* (8th ed. Cal. Cont. Ed. Bar 1987), at 19-89.

29. Fresno County Probate Policy Memorandum (effective as amended July 1, 1986), Paragraph 9.4(b). The great majority of attorneys who responded to the Questionnaire indicated that they are not awarded additional compensation for services in connection with a family allowance, but a few indicated that they had been awarded additional compensation for those services.

30. San Joaquin County Probate Rules (effective January 1, 1986), Rule 4-708(A)(8).

Distinction Between Ordinary Services and Extraordinary Services

Ordinary services. The Fresno County Probate Policy Memorandum contains a listing of ordinary services compensated by the statutory fee:³¹

The Court views the following services as coming within the definition of "conducting the ordinary probate proceedings" (Probate Code Section 910) and no extraordinary fee will be allowed:

- (1) Meeting with client to discuss Petition for Probate, assets, heirs, notices, review Will;
- (2) Petition for Special Letters of Administration;
- (3) Preparation of Petition for Probate and other papers to appoint personal representative, including locating Will and heirs/beneficiaries;
- (4) Order publication and mailing of Notice of Death;
- (5) Preparation and service of Notice of Death;
- (6) Preparation of supplements or declarations;
- (7) Separate Petition for Authority under Independent Administration of Estates Act;
- (8) Petition for Appointment of Successor Representative;
- (9) Preparation of inventory/inventories;
- (10) Incidental expenses, including local telephone calls, usual postage, photocopying, paralegal and secretarial services (but see Paragraph 8.2 [reimbursement for duplication, photocopying, postage, travel and telephone costs]);
- (11) Handling debts and claims, including acceptance, rejection and payment (unless disputes arise necessitating compromise or litigation);
- (12) Family allowance;
- (13) Preparation of Inheritance Tax Declaration (IT-22);
- (14) First status report under Probate Code Section 1015.5;
- (15) Account and Report Current;
- (16) Petition for Preliminary Distribution;
- (17) Petition for Statutory or Extraordinary Fees and Commissions, declarations and hearings thereon;
- (18) Final Report or Account and Petition for Distribution;
- (19) Supervising distribution and discharge;
- (20) Preparation of required notices and orders.

A study made by an ad hoc committee appointed in 1984 by the Presiding Judge of the Probate Department of the Los Angeles County

31. Fresno County Probate Policy Memorandum (effective as amended July 1, 1986) para. 9.4(b).

Superior Court identified ordinary probate services in a manner consistent with the Fresno County provision set out above.³²

Extraordinary services. Probate Code Section 902 lists certain services that are extraordinary services if rendered by a personal representative. The statute governing compensation of attorneys (Probate Code Section 910) states that additional compensation is allowed for extraordinary services but does not specify what constitutes extraordinary services. "However, any work done by either attorney or representative in connection with the services specified in PC § 902 is deserving of extraordinary compensation."³³ The following services are listed as extraordinary services in Section 902:

- Sales or mortgages of real or personal property.
- Contested or litigated claims against the estate.
- Good faith defense of a will which is contested after it is admitted to probate.
- Successful defense of a will which is contested before it is admitted to probate.
- Preparation of estate, inheritance, income, sales or other tax returns or adjustment, litigation, or payment of any of these taxes.

32. See Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum in California Local Probate Rules* (8th ed. Cal. Cont. Ed. Bar 1987), at 19-89, 19-94.

There are only a few minor differences from the Fresno County Probate Policy Memorandum in the listing of ordinary services in the ad hoc committee report:

(1) A Petition for Special Letters of Administration is considered an ordinary service by the ad hoc committee "if ex parte (if contested, extra fee to attorney for appointed special administrator, if beneficial to estate)."

(2) The Inheritance Tax Declaration is considered an ordinary service by the ad hoc committee "if death before June 8, 1982, except if dispute with Probate Referee or State Controller."

(3) The Petition for Preliminary Distribution is considered as an ordinary service by the ad hoc committee if "with or without bond (Probate Code Secs. 1000, 1004)."

33. 1 A. Marshall, *California Probate Procedure* § 1715, at 17-283 (1986).

--Litigation in regard to property of the estate.

--Carrying on the decedent's business pursuant to court order.

--Other litigation or special services necessary for the personal representative to prosecute, defend, or perform.

The following more comprehensive listing is drawn from the nonexclusive listing in the Los Angeles County Probate Policy Memorandum of extraordinary services for which additional fees may be allowed:³⁴

--Sale, lease, exchange, mortgage, or foreclosure of real property (including vacating same).

--Sales and leases under the Independent Administration of Estates Act.

--Sale or mortgage of personal property.

--Negotiation or litigation of claims against the estate.

--Preparation of tax returns for, or the adjustment, litigation or payment of, estate, income (individual or fiduciary), sales, or other taxes.

--Litigation in regard to the property of the estate, such as eminent domain, collection of funds, quiet title, petition to hire special counsel for litigation, and unlawful detainer.

--Carrying on decedent's business.

--Will contest.

--Other litigation or special services necessary for the personal representative to prosecute, defend, or perform, including but not limited to the following:

(a) Construction or interpretation of will.

(b) Defense of personal representative's account.

(c) Borrowing of money.

(d) Extraordinary efforts to locate estate assets.

(e) Heirship proceedings brought by a personal representative (personal representative has no duty to defend against such a petition by another).

(f) Petition for instructions with a showing of actual need for the instructions.

34. Los Angeles County Probate Policy Memorandum (effective July 1, 1986), § 15.08(3).

- (g) Petition for authority to give deed in lieu of foreclosure or condemnation.
- (h) Petition to complete a contract (Probate Code Sections 9860-9868, effective July 1, 1988).
- (i) Termination of joint tenancy of predeceased joint tenant.
- (j) Account on behalf of a deceased or disabled representative.
- (k) Establish fact of simultaneous death.
- (l) Proceedings under Probate Code Sections 613 and 615.

Extent to Which Attorneys Request Additional Compensation for Extraordinary Services

The responses to the Questionnaire reveal that some attorneys (14.3%) never request additional compensation for extraordinary services. A few (1.6%) request additional compensation in every estate proceeding. Some do not request additional compensation if the compensation under the statutory fee schedule covers the time worked on the estate. Most request additional compensation in at least 25 percent of their probate cases, and 80 percent request additional compensation in at least 10 percent of their probate cases. The responses are summarized in Appendix 1, Table D (Charging Extraordinary Fees).

Determining the Amount of Additional Compensation for Extraordinary Services

In determining the amount of additional compensation for extraordinary services, the court may consider not only the time spent but also such factors as the value of the estate, the skills exercised, the amount in dispute, and the results obtained.³⁵ Local court rules may provide a more detailed statement of the factors that will be taken into account in determining what constitutes reasonable compensation for extraordinary services.³⁶

The additional compensation awarded by the trial court will be upheld on appeal unless it appears so clearly out of proportion to the services performed as to be an abuse of discretion.³⁷

When evaluating requests for extraordinary compensation, many courts will take the statutory compensation into account in determining whether the lawyer has been compensated adequately for all services

35. Estate of Beach, 15 Cal. 3d 623, 645, 125 Cal. Rptr. 570, 542 P.2d 994 (1975). In this case, the Supreme Court upheld the trial court award of an additional attorney fee of \$14,500 for defending against a contest of the personal representative's account. The award was based not only on the trial court's observation of the contest proceedings but also upon an evidentiary hearing at which the attorneys submitted time records itemizing the services of their firm in the matter and showing that they would be entitled to compensation of over \$24,000 based on hourly rates of \$70 for the partner, \$40 for the associate, and \$15 for law student research clerks.

36. See text, *infra*, at notes 113-114.

37. Estate of Beach, 15 Cal. 3d 623, 645, 125 Cal. Rptr. 570, 542 P.2d 994 (1975).

rendered.³⁸ This is a good reason why the attorney should maintain a record of time worked for each estate in which there may be a request for additional compensation for extraordinary services.³⁹

38. E.g., Alameda County Probate Policy Manual (approved by court January 16, 1986), §§ 1006(7), 1007 (amount of statutory fee considered; but, in considering requests for extraordinary fees in connection with sales of real property, preparation of federal estate tax return, and other tax-related services, court ordinarily will not require extensive explanation of services performed where the amount requested is the amount specified in the manual as a reasonable amount for the service); Fresno County Probate Policy Memorandum (effective as amended July 1, 1986), para. 9.5(b)(10), (c) (amount of statutory fee considered; but, in considering requests for extraordinary fees in connection with sales of real property and preparation of federal estate tax return, court will not take into consideration amount of the statutory fee where amount requested is amount specified in the policy memorandum as a reasonable amount for the service); Los Angeles County Probate Policy Memorandum (effective July 1, 1986), § 15.08(1)(F); Marin County Rules of Probate Practice (effective January 1, 1984), Rule 1204 (application for extraordinary compensation "must be buttressed by representations as to time records which reflect the number of hours required for the completion of the ordinary services performed by the attorney . . . on behalf of the estate." However, requirement concerning time records does not apply where extraordinary fees are requested for preparation of state and federal income and estate tax returns and resolution of problems attendant upon them, or sales of real estate where attorney is able to demonstrate a significant contribution in the form of services usually furnished by a real estate broker); Santa Barbara County Probate Rules (effective September 1, 1985), Rule 414(H)(3) (where statutory fee is substantial, court will consider statutory fee in determining whether extraordinary fees are appropriate); Santa Cruz County Probate Rules (effective January 1, 1986), Rule 405 (in evaluating justification for award of fees for extraordinary services, court will consider the statutory fee and determine whether it is adequate compensation for all services rendered by attorney. But extraordinary compensation will be paid without considering statutory fee where service is (1) preparation of fiduciary tax returns and resolution of problems arising upon audit of such returns (payments made to accountants or other tax preparers for such services and charged to the estate must be set forth in the request for extraordinary compensation and subtracted from the amount requested) and (2) sales of real estate without a broker. See also Estate of Walker, 221 Cal. App. 2d 792, 34 Cal. Rptr. 832 (1963); Estate of Buchman, 138 Cal. App. 2d 228, 291 P.2d 547 (1955).

39. See discussion, *infra*, under "Keeping Time Records."

Lawyers who responded to the Questionnaire had different views concerning the adequacy of the additional fees allowed for extraordinary work. Some reported that the courts are reluctant to allow additional fees and that the fees allowed were inadequate; others indicated satisfaction with the additional fees awarded by the court.⁴⁰

Attorneys' Fees Where No Formal Probate Proceeding

In a significant number of cases, no probate proceeding is necessary in California because all of the decedent's property is governed after death by the terms of a living trust or consists of joint tenancies, assets transferred upon death under pay-on-death provisions or under beneficiary designations in life insurance policies

40. Lawyers responding to the Questionnaire commented:

"Statutory fee is of substantial benefit to smaller estates, where extraordinary fees normally are not recoverable and attorney's hourly rates for time expended often exceed recoverable fee."

". . . to the extent the statutory fee is inadequate, extraordinary compensation is available (although courts are increasingly reluctant to grant it)."

"I am tired of the prejudice against paying my fee from both the courts and the clients. The courts feel it's absolutely necessary to reduce extraordinary fees."

". . . the schedule for estates under \$100,000 is generally inadequate to compensate the attorney for his overhead and professional time."

On the other hand, one attorney commented: "I have handled estates where there has been real property of a value of \$500.00 or \$1,000.00 or \$2,000.00 or \$3,000.00, and obviously 4% of these values does not begin to pay for the work. Fortunately the courts have been generous in allowing extraordinary fees, but I would suggest a minimum of \$250.00 to \$300.00."

See also, the discussion, *infra*, under "Policy Issues and Recommendations--Concern That Courts Will Not Allow Fair Reasonable Fees."

and employee benefit plans, and similar assets.⁴¹ If the services of an attorney are used in connection with these nonprobate transfers, the fee is determined by agreement and is not approved or reviewed by a court.⁴²

41. For example, a living trust is often prepared as a part of the estate planning services provided to a wealthy client. Upon the death of the client, the disposition of the client's property is governed by the provisions of the trust. The trustee has authority to hire an attorney after the client's death; and the attorney's compensation is governed by agreement between the trustee and the attorney and is not subject to court approval but is subject to court review for abuse of the trustee's discretion. Prob. Code §§ 16247 (hiring), 17200 (court passing on acts of trustee, including the exercise of discretionary powers).

The fee of the attorney for services in connection with the transfer of title for joint tenancies, pay-on-death provisions, and the like, is governed by agreement between the parties and is not subject to court approval or review.

Approximately 30 percent of the attorneys who responded to the Questionnaire estimated that at least half of the decedent's estates they handled included no significant amount of probate assets. Approximately 56 percent reported that at least 20 percent of the decedent's estates they handled included no significant amount of probate assets. The results of the survey are presented in Appendix 1, Table B (Estates Having Insignificant "Probate Assets"). To some extent, the difference in the responses may be attributable to the extent to which the attorney engages in pre-death planning for his clients. One attorney reported: "A large portion of my practice is trusts." Another stated: "I always use living trusts for my wealthy clients . . ."

In addition, there are cases where no attorney is involved. If a decedent leaves only tangible personal property, the relatives of the decedent often pay the decedent's debts and divide the decedent's property among themselves without consulting an attorney. Even where there is a registered title to tangible personal property, the title may be transferred without the assistance of an attorney. For example, there is a simple affidavit procedure for transfer of registered title to a motor vehicle. See note 46, *infra*.

42. If an affidavit procedure is used in connection with these nonprobate transfers, the attorney's fee is determined by agreement between the attorney and client and is not subject to court approval.

Where one spouse dies and the surviving spouse takes all the property of the deceased spouse, no formal probate proceeding is required. A simple court procedure is available for the determination or confirmation of property passing or belonging to the surviving spouse.⁴³ The attorney's fee for services in connection with this procedure is determined by private agreement between the attorney and the client and is not subject to approval by the court.⁴⁴

Formal probate also can be avoided where the value of the decedent's real and personal property in this state does not exceed \$60,000.⁴⁵ Two simple procedures can be used for the estate of \$60,000 or less:

--An affidavit procedure can be used to collect or transfer the decedent's personal property.⁴⁶

43. Prob. Code §§ 13650-13660.

44. Prob. Code § 13660. If there is no fee agreement and there is a dispute concerning the reasonableness of the attorney's fee, the court may be requested to determine the reasonableness of the fee. *Id.*

45. The following property is excluded in determining the value of the property of the decedent: joint tenancy property, property in which the decedent had a life or other interest terminable upon the decedent's death, property which passed to the decedent's surviving spouse, multiple-party accounts to the extent sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary, certain vehicles, vessels, manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes, amounts due for services in armed forces of the United States, and not more than \$5,000 of earnings owed to the decedent for personal services. Prob. Code § 13050.

46. Prob. Code §§ 13100-13115. Special provisions permit transfer of registration of state registered property without probate if the decedent did not own other property that would require probate of the decedent's estate. See Health & Safety Code § 18102 (manufactured home, mobilehome, commercial coach, truck camper, or floating home); Veh. Code §§ 5910 (vehicle), 9916 (vessel). A special affidavit procedure permits the surviving spouse to collect compensation, not exceeding \$5,000, owed by an employer to the decedent, without regard to the value of the decedent's real and personal property in this state. Prob. Code § 13600.

--A summary procedure can be used to obtain a court order determining succession to real property.⁴⁷

When one of these procedures is used, the attorney's fee is determined by agreement between the attorney and client and is not subject to court approval.⁴⁸

Where the gross value of the decedent's real property in California does not exceed \$10,000, a simple procedure may be used to make the real property title records reflect the transfer of the property to the decedent's heirs or beneficiaries.⁴⁹ The attorney's fee for services in connection with this procedure is determined by agreement between the attorney and client and is not subject to approval by the court.

Keeping Time Records

Since the attorney is entitled to the statutory fee as a matter of right,⁵⁰ the attorney need not keep a record of time worked on the estate proceeding to justify the statutory fee. Nevertheless, some attorneys do maintain time records because they ordinarily charge the

47. Prob. Code §§ 13150-13157.

48. No court proceeding is involved when the affidavit procedure is used. Where a proceeding is brought to obtain a court order determining succession to real property, a specific statutory provision makes clear that the attorney's fee is determined by private agreement and is not subject to court approval. Prob. Code § 13157.

49. Prob. Code §§ 13200-13209. If the gross value of all real property in the decedent's estate located in California does not exceed \$10,000, this procedure can be used without regard to the total value of the decedent's real and personal property. Prob. Code § 13200. Real property described in Probate Code Section 13050 (see note 46, *supra*) is excluded in determining the value of the real property. Prob. Code § 13200.

50. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983).

personal representative on a time worked basis if the fee computed on that basis would be less than the statutory fee.⁵¹ Other attorneys record the time worked so they can justify an additional fee for extraordinary services.⁵²

The Questionnaire requested information concerning whether the attorney kept a record of time worked.⁵³ About two-thirds of the attorneys reported that they keep a record of time worked for probate estates and use the record in determining fees. Since more than 90 percent of the attorneys ordinarily charge the full statutory fee,⁵⁴ the primary use of the time record appears to be to justify the award of an additional fee for extraordinary work.

For nonprobate administration, about 90 percent reported that they keep and use a record of time worked in determining their fees. For nonprobate administration, the fee is a matter of agreement between the attorney and client; there is no statutory fee schedule and the fee is not subject to approval by the court.⁵⁵ Presumably, the 10 percent who do not keep a record charge a flat fee for nonprobate tasks or use some other fee fixing method that does not require a record of the time worked.

51. One respondent to the Questionnaire states: "We're way off base now. My fee nearly always is based on hourly basis because I have ongoing business relationships with these people, who also are friends."

52. When evaluating requests for extraordinary compensation, many courts will consider whether the statutory compensation is in part or whole sufficient to compensate adequately for all services that have been rendered. This may require a record of time worked for all aspects of the estate proceeding, not just the extraordinary services.

One respondent to the Questionnaire states: "I always keep track of my time, and I only charge extraordinary fees to the extent the statutory fee doesn't cover my rates."

53. The responses are summarized in Appendix 1, Table I (Keeping "Time Worked" Record).

54. See Appendix 1, Table F (Attorneys Who Ordinarily Charge Full Statutory Fee).

55. See discussion, *supra*, under "Attorneys' Fees Where No Formal Probate Proceeding."

Use of Paralegal Assistants

The Questionnaire requested information concerning use of paralegal assistants in probate practice.⁵⁶ Half of the attorneys use a paralegal assistant, and more than 70 percent of the attorneys who use a paralegal assistant keep a record for each estate of the time the paralegal works on that estate. In claims for additional fees for extraordinary services, more than 60 percent of the attorneys show the cost for the services of the paralegal assistant at a paralegal's rate in justifying the additional fee.⁵⁷

Fee Agreements

Public concern about attorney fees is not limited to the probate area. Legislation requiring written attorney fee contracts for all types of legal services went into effect on January 1, 1987.⁵⁸ This new consumer protection statute expands the former provisions relating to contingency fee contracts to require written contracts when a contingency fee is not being used and there is a reasonable foreseeability that the total expense to the client will exceed \$1,000.⁵⁹

The contract must include all of the following: (1) the hourly rate and other standard fees applicable to the case, (2) the general nature of the legal services to be provided, and (3) the respective responsibilities of the attorney and the client.⁶⁰ In addition, all bills for services rendered must state the amount, rate, and basis for

56. The responses are summarized in Appendix 1, Table J (Paralegal Assistants).

57. For legislation enacted in 1987 concerning charging for paralegal services, see AB 1334 [Chapter 358].

58. 1986 Cal. Stat. ch. 475 §§ 6, 7 (codified as Bus. & Prof. Code §§ 6147, 6148).

59. Bus. & Prof. Code § 6148(a).

60. Bus. & Prof. Code § 6148(a).

calculation; and, upon the client's request, the attorney must, within 10 days, provide a bill.⁶¹ Failure to comply with any of these provisions renders the agreement voidable at the client's option, and the attorney is then entitled to collect a reasonable fee.⁶²

The new statute lists the following exceptions to the written contract requirement:⁶³ emergency services,⁶⁴ fee arrangements implied by previously performed services of a similar nature, written statements by the client stating that a written contract concerning fees is not required,⁶⁵ and agreements with corporate clients.

The new statute does not contain any exception for administration of a decedent's estate. Nevertheless, some attorneys believe that a written contract is unnecessary for probate administration. Under the new statute, the attorney may collect a reasonable fee if there is no written contract. Attorneys who think that a written fee contract is unnecessary believe that the statutory provisions governing the attorney fee for probate administration determine what constitutes a reasonable fee. Accordingly, without a written fee contract, they believe the probate attorney is entitled to the fee determined under the statutory fee schedule for ordinary services and any additional fee awarded by the court for extraordinary services. On the other hand, since the new statute provides that the attorney is entitled only to a "reasonable fee" where there is no written fee contract, the probate

61. Bus. & Prof. Code § 6148(b) (the client is entitled to request a bill every 30 days).

62. Bus. & Prof. Code § 6148(c).

63. Bus. & Prof. Code § 6148(d).

64. Bus. & Prof. Code § 6148(d) (services provided to avoid foreseeable prejudice to the client's rights or interests or where a writing is impractical).

65. Bus. & Prof. Code § 6148(d)(3) (given by client after full disclosure of the statutory requirements concerning written fee contracts).

court may be unwilling to rely on the statutory fee schedule and may require the probate attorney to show the fee charged is in fact reasonable under the circumstances of the particular case.

The Questionnaire requested information concerning the usual practice followed by probate practitioners concerning fee agreements.⁶⁶ The information obtained reflects the practice before enactment of the new statute requiring written fee agreements. More than one-third (37.4%) of the respondents reported that they usually have no fee agreement with their clients. Of the remaining respondents, two-thirds usually have only an oral fee agreement, and one third usually have a written fee agreement.

It is not surprising that attorneys ordinarily do not make fee agreements for probate of estates and that the agreements, if made, ordinarily merely adopt the statutory fee schedule to determine the amount of the attorney fee. Clients do not appear to be aware of their right to negotiate a lower fee or, if aware, either do not request or are unable to negotiate a lower fee.⁶⁷ And unless the client negotiates an agreement for a lower fee, the attorney is entitled to the statutory fee and an additional fee allowed by the court for extraordinary services.⁶⁸

The new statute that requires a written fee contract will make a dramatic change in the practice of probate practitioners if they comply with its requirements.⁶⁹ Responses to the Questionnaire reveal that more than two-thirds of the attorneys never have written fee contracts,

66. See Appendix 1, Tables K (Fee Agreements), L (Written Fee Agreement), and M (Oral Fee Agreement).

67. Most probate attorneys (53.9%) never charge less than the statutory fee. And 85 percent charge less than the statutory fee in 10 percent or less of the probate estates they handle. See text, *supra*, at notes 25-26.

68. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983).

69. For a sample written fee contract between the attorney and the personal representative, see "Sample Employment Agreement (Form 1:A)", in B. Ross & J. Swink, California Practice Guide Probate 1-67 (The Rutter Group rev. #1 1987). This form agreement adopts the statutory fee schedule for determining the fee for ordinary services rendered during estate administration. There is no indication in the agreement that the attorney and client are free to negotiate a lower fee.

and 80 percent of the attorneys have written fee contracts in not more than 10 percent of the estates they handle.⁷⁰ Whether or not probate practitioners will comply with the new statute probably will depend on whether the courts will review the reasonableness of the statutory probate fee in view of the services actually provided to the particular estate.

UNIFORM PROBATE CODE METHOD OF FIXING COMPENSATION OF ESTATE ATTORNEY

The method most commonly used in other states to fix the compensation of the estate attorney is the Uniform Probate Code (UPC) method.

The UPC gives the personal representative the power to employ attorneys and fix their compensation. The UPC also provides a procedure by which an interested person can obtain court review of the propriety of employment of the attorney and the reasonableness of the attorney's compensation.

Under Section 3-715 of the Uniform Probate Code:⁷¹

. . . a personal representative, acting reasonably for the benefit of the interested persons, may properly:

* * *

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary.

70. See Appendix 1, Table L (Written Fee Agreement). More than one-third of the attorneys did not have even an oral agreement. See Appendix 1, Table M (Oral Fee Agreement).

71. Unif. Prob. Code § 3-715(21) (6th ed. 1982). The personal representative has this power except "as restricted or otherwise provided by the will or by an order in a formal proceeding."

Section 3-721 of the Uniform Probate Code⁷² provides:

. . . the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, [and] the reasonableness of the compensation of any person so employed . . . may be reviewed by the Court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

The official comment to Section 3-721⁷³ reads:

In view of the broad jurisdiction conferred on the probate court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. But, the Code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure from much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

The UPC provisions have had a substantial and continuing influence on the development of the law governing the fees of estate attorneys in the various states. Most of the states that have adopted the UPC provisions substituted them for provisions that required the court to fix the attorney fees.⁷⁴ Listed below are the states that have

72. Unif. Prob. Code § 721 (6th ed. 1982).

73. Unif. Prob. Code § 3-721, Comment (6th ed 1982).

74. Unif. Prob. Code § 3-721, Comment (6th ed. 1982).

adopted the substance of the UPC provisions:

Utah	1987 Utah Laws ch. 32, § 1.
South Carolina	1986 S.C. Acts No. 539, § 1.
Maine	1979 Me. Laws ch. 540, § 1.
Florida	1974 Fla. Laws ch. 74-106, § 1.
Minnesota	1974 Minn. Laws ch. 442.
Montana	1974 Mont. Laws ch. 365, § 1.
Nebraska	1974 Neb. Laws, L.B. 354, § 160.
Arizona	1973 Ariz. Sess. Laws ch. 75, § 4.
Colorado	1973 Colo. Sess. Laws ch. 451.
North Dakota	1973 N.D. Sess. Laws ch. 257, § 1.
Alaska	1972 Alaska Sess. Laws ch. 78, § 1.
Idaho	1971 Idaho Sess. Laws ch. 111, § 1.

Several states have a rule, similar to but antedating the UPC, allowing the personal representative to agree on a reasonable fee with the estate attorney without mandatory court review:

Arkansas	1967 Ark. Stats. No. 287, § 5.
Connecticut	1969 Conn. Pub. Acts No. 827, § 5.
Nevada	1941 Nev. Stat., pp. 210, 227, 232.
North Carolina	Lightner v. Boone, 221 N.C. 78, 19 S.E.2d 144 (1942) (administrator must pay counsel fees as a personal expense and, if proper, will be allowed on settlement of accounts).

Wisconsin also has a UPC-type provision allowing the personal representative to agree on a reasonable fee with the estate attorney without mandatory court review. 1975 Wis. Laws ch. 329, § 1.

Does adoption of the UPC lower the probate fees charged by attorneys? The experience in states adopting the UPC is summarized in a 1984 magazine article:⁷⁵

In 1971, Idaho became the first state to adopt the Uniform Probate Code (UPC). . . . In the first year of its operation, it reduced the average probate fees Idaho attorneys charged from 3.5 percent of the gross estate to 1.8

75. Spelvin, *Of Wills and Probate*, Sylvia Porter's Personal Finance, June 1984, at 84.

percent--just about half. Fourteen other states have adopted that law entirely, or its principal provisions, but the benefits have, in large measure, been retained by the probate lawyers, who are getting the same high fees for a lot less work. For instance, Pennsylvania is considered a UPC state, yet its probate fees, according to HALT's probate manual, are among the highest in the country--as high as 7 percent in Philadelphia.

It is interesting to note that Pennsylvania has not enacted the UPC provisions governing attorney fees. Pennsylvania has no statutory provision governing probate attorney fees.

The information concerning Idaho in the 1984 magazine article appears to have been drawn from the *Kinsey Study*.⁷⁶ This study compared trends in administrative costs in decedents' estates in Idaho (a UPC state) and North Dakota (then not a UPC state). The study reveals that in North Dakota in 1971 the average attorney fee in a probate estate was \$1,164 and the average personal representative fee was \$1,093. These figures were virtually unchanged in 1972, being \$1,093 for attorney fees and \$1,097 for personal representative fees. By contrast, 1971 attorney and personal representative fees in Idaho were somewhat higher. The average attorney fee was \$1,441 (3.5 percent of gross estate) and the average personal representative fee was \$1,850; the median attorney fee was \$750 (3.15 percent of gross estate) and the median personal representative fee was \$860. Idaho adopted the UPC in 1972 and Kinsey found that in 1973 the average attorney fee had declined to \$1,130 (1.8 percent of gross estate) and the average personal representative fee had fallen to \$1,616; the median attorney fee was down to \$500 (2.3 percent of gross estate) and the median personal representative fee had fallen to \$800. During the same period, the average probate estate had increased from \$39,748 to \$62,723 and the median estate from \$27,708 to \$28,788.

North Dakota enacted the UPC in 1973, but no study has been found of North Dakota's experience under the UPC. However, the *Crapo Study*

76. Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D.L. Rev. 523 (1974) (hereinafter referred to as "Kinsey Study").

presents follow-up information for Idaho after four years under the UPC.⁷⁷ Crapo surveyed probate attorneys in Idaho to determine their experience under the UPC. Of those responding to the survey, about 60 percent felt that the UPC reduced the time they required to administer a probate estate (40 percent did not) and 68 percent felt the alternative administrative modes available under the UPC were beneficial to their clients (32 percent did not). Before enactment of the UPC, a statutory fee schedule was used for attorney fees. After enactment of the code, 23 percent of the responding attorneys billed on a strict hourly basis, 59 percent on a combination of hourly basis and size and complexity of estate, 14 percent on a percentage basis, and four percent on some other basis (e.g., flat fee). Reduced attorney fees were reported by 57.6 percent of the respondents (42.4 percent saw no reduction). Of those whose fees were reduced, the average reduction was 30 percent, consistent with the numbers reported in the *Kinsey Study*. Fees of major institutional personal representatives also were reported to have declined somewhat. When asked, however, whether adoption of the UPC improved the public image of probate attorneys or the public attitude toward probate procedure, 58 percent of the responding attorneys felt it did not (42 percent felt it did).

THE REASONABLE FEE FIXED OR APPROVED BY COURT METHOD OF FIXING FEES

The statutes of a number of states provide that the estate attorney is entitled to a reasonable fee and require that the fee be fixed or approved by the court.

77. Crapo, *The Uniform Probate Code--Does It Really Work?*, 1976 P.Y.U.L. Rev. 394 (1976).

In the following states, the court determines what constitutes reasonable compensation for the estate attorney:

Alabama	Ala. Code § 43-2-682 (1982).
Georgia (statute does not specifically state that compensation must be "reasonable")	Ga. Code Ann. § 53-7-10 (1982).
Illinois	Ill. Ann. Stat. ch. 110½, § 27-2 (Smith-Hurd 1978); <i>In re Estate of Grabow</i> , 74 Ill. App.3d 336, 392 N.E.2d 980 (1979) (determination of reasonable attorney fee solely within discretion of court).
Indiana	Ind. Code Ann. § 29-1-10-13 (West 1979).
Kansas	Kan. Stat. Ann. § 59-1717 (1983); <i>In re Estate of Murdock</i> , 213 Kan. 837, 519 P.2d 108 (1974) (reasonableness of attorney fee is for court determination).
Maryland	Md. Est. & Trusts Code Ann. § 7-602 (1974).
Massachusetts	Mass. Ann. Laws ch. 206, § 16 (Michie/Law Co-op. 1981); <i>id.</i> ch. 215, §§ 39-39B.
Michigan	Mich. Comp. Laws § 700.543 (19xx) (Mich. Stat. Ann. § 27.5543 (Callaghan 1980)); <i>In re Estate of Weaver</i> , 119 Mich. App. 796, 327 N.W.2d 366 (1982).
Mississippi	Miss. Code Ann. § 91-7-281 (1973).
New Jersey	<i>In re Read's Estate</i> , 24 N.J. Misc. 305, 49 A.2d 138 (1946).
New York	N.Y. Surr. Ct. Proc. Act § 2110 (McKinney 1967).
Ohio	<i>In re Hickok's Estate</i> , 159 Ohio St. 282, 111 N.E.2d 925 (1953) (judicial determination is required to fix reasonable attorney fee).
Oregon	Or. Rev. Stat. § 116.183 (1985).
Texas	<i>Morton's Estate v. Ferguson</i> , 45 S.W.2d 419 (1932) (reasonableness of attorney fee is for court to determine, not personal representative).

Under the Nevada statute, the court determines the amount of attorney's fees only where the personal representative and the attorney fail to reach agreement on the attorney's fees.⁷⁸

STATUTORY FEE SCHEDULE AS METHOD FOR FIXING ATTORNEY FEE

California⁷⁹ and seven other states⁸⁰ use a statutory fee schedule to compute the legal fee for ordinary probate services. The statutory fee schedule applies percentage rates to specified property of the decedent's estate to determine the amount of the attorney fee. The fee schedule usually covers only the fee for ordinary probate services, and the courts in the states having a fee schedule may vary in how liberal they are in allowing additional fees for extraordinary services.⁸¹

The California attorney is entitled to the fee computed under the statutory fee schedule; the court is not authorized to reduce the fee

78. Nev. Rev. Stat. § 150.060 (1986). The fees are "determined and allowed by the court" where there is no fee agreement, and notice and hearing are required with an opportunity for heirs or devisees to object to the fee contracted for.

79. For the California statutory rate schedule provisions, see Cal. Prob. Code §§ 901, 910 (West 1987). For a discussion of these provisions, see "Fee Charging in California," *supra*.

80. Ark. Stat. Ann. § 62-2208 (Supp. 1985); Hawaii Rev. Stat. §§ 560:3-719, 560:3-721 (1985); Iowa Code Ann. §§ 633.197, 633.198 (West 1964); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. §§ 72-3-631, 72-3-633 (1985); N.M. Stat. Ann. §§ 45-3-719, 45-3-720 (1978); Wyo. Stat. §§ 2-7-803, 2-7-804 (Supp. 1987). At least one state has adopted a fee schedule by court rule. Del. Ch. Ct. R. 192 (1981). The attorneys and the courts in some other states may use an informal rate schedule for fixing or approving attorney fees. However, use of a nonstatutory schedule may create antitrust problems. See *Estate of Effron*, 117 Cal. App. 3d 915, 923, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

81. California allows additional compensation for extraordinary services. Prob. Code § 910. Except for New Mexico, all of the other states having a statutory or court rule fee schedule allow additional compensation for extraordinary services: Ark. Stat. Ann. § 62-2208 (Supp. 1985); Del. Ch. Ct. R. 192 (1981) (court rule); Hawaii Rev Stat. § 560:3-721 (1985); Iowa Code Ann. § 633.199 (West 1964); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. § 72-3-633 (1985); Wyo. Stat. § 2-7-804 (Supp. 1987).

on the ground that the fee is unreasonably high.⁸² By way of contrast, in five of the other eight states having a statutory fee schedule, the court has authority to award a reasonable fee that is less than the statutory fee.⁸³

The American Bar Association has condemned rigid adherence to statutory fee schedules for attorneys.⁸⁴ Consumer groups have urged adoption of the Uniform Probate Code, primarily because it provides a reasonable fee method for fixing legal fees for probate services.⁸⁵ As a result, during recent years a number of states have abandoned the statutory rate schedule in favor of a reasonable fee method.⁸⁶

For a comparison of the statutory fees in California with the fees in other states using a statutory fee schedule, see Table 6 in the text, *infra*, under "California Statutory Fee Schedule Compared to Fee Schedules Used in Other States."

82. Estate of Getty, 143 Cal. App.3d 455, 191 Cal. Rptr. 897 (1983). See generally Estate of Efron, 117 Cal. App. 3d 915, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981). The attorney may contract with the personal representative for a fee less than the statutory fee. In re Estate of Goodrich, 6 Cal. App. 730, 734, 93 P. 121 (1907); Cf. Morrison v. Kaufman, 68 Cal. App. 2d 280, 156 P.2d 473 (1945) (additional fees). However, contracts for fees lower than the statutory fee are rare. See discussion, *supra*, under "Fee Charging In California--Fee Agreements."

83. See Table 6, *infra*, under "Comparison of California Fees with Fees Charged in Other States--California Statutory Fee Schedule Compared to Fee Schedules Used in Other States."

84. See quotation from the Stein Study, *supra*, under "Fee Charging Approaches--The Multiple Factor Approach."

85. See text, *supra*, at note 4. See also discussion in Estate of Efron, 117 Cal. App.3d 915, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981). In *In re Estate of Painter*, 39 Colo. App. 506, 567 P.2d 820, 822 (1977), the court referred to "the public outcry over antiquated and expensive probate laws" and criticized the percentage fee system as unnecessary and expensive. The court commended the Legislature for enacting the Uniform Probate Code with the addition of a provision listing numerous factors to be considered in determining the reasonableness of the compensation of the estate attorney, only one of which is the monetary value of the estate.

86. See discussion, *supra*, under "Uniform Probate Code Method of Fixing Compensation of Estate Attorney."

COMPARISON OF CALIFORNIA FEES WITH FEES CHARGED IN OTHER STATES

Introduction

How do fees charged by California attorneys for probating estates compare to those charged by attorneys in other states? It is not possible to answer this question with any certainty. Current empirical data is not available. The best available information is reviewed below.

Analysis of Stein Study Data

Comparison of Typical Fee Charged

The *Stein Study*⁸⁷ indicates that, for estates of persons dying in 1972, California fees were not out of line with those charged in other states.

The *Stein Study* is based on data collected from a representative sample of estate administrations in five states: California, Florida, Maryland, Massachusetts, and Texas.⁸⁸ "These states were selected because they have certain practices or procedures relating to estate administration that make them broadly representative of other states."⁸⁹

The *Stein Study* draws the following conclusion from the data collected:⁹⁰

Comparing the fees charged by California attorneys to those charged by attorneys in the other states is

87. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107 (1984).

88. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984).

89. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1110 (1984). California was selected because it is a community property state and has a statutory probate fee schedule.

90. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1187 (1984).

The data presented in the *Stein Study* is the most recent available. However, that data was collected for estates of persons dying in 1972. The statutory fee schedule in California has been revised several times since then. Table 4 compares the statutory fee schedule in effect in 1972 with the statutory fee schedule in effect in 1987.

Table 4. 1972 Fee Schedule Compared to 1987 Fee Schedule			
Percentage determined from statutory fee schedule under Probate Code Sections 901 and 910 and does not include additional amounts that may be allowed for extraordinary services.			
<u>1972 Fee Schedule</u> (1965 ch. 115)		<u>1987 Fee Schedule</u> (1986 ch. 961)	
\$1 - \$1,000	7%		
\$1,001 - \$10,000	4%	\$1 - \$15,000	4%
\$10,001 - \$50,000	3%	\$15,001 - \$100,000	3%
\$50,001 - \$150,000	2%	\$100,001 - \$1 million	2%
\$150,001 - \$500,000	1.5%	\$1,000,001 - \$10 million	1%
Above \$500,000	1%	\$10,000,001 - \$25 million	0.5%
		Above \$25 Million	reasonable amount determined by court

Table 5 shows the effect of the revised statutory fee schedule for various size estates. The table shows that California statutory fees in 1987 are substantially higher than in 1972 for estates over \$100,000.

**Table 5. 1972 Attorney Fee Compared to 1987 Attorney Fee
on Various Size Estates**

Amounts determined from statutory fee schedule under Probate Code Sections 901 and 910 and do not include additional amounts that may be allowed for extraordinary services.

<u>Size of Estate</u>	<u>1972 Fee</u>	<u>1987 Fee</u>	<u>% Increase</u>
\$10,000	\$ 430	\$ 400	-7.5
20,000	730	750	2.7
30,000	1,030	1,050	2
40,000	1,330	1,350	1.5
50,000	1,630	1,650	1.2
60,000	1,830	1,950	6.6
70,000	2,030	2,250	10.8
80,000	2,230	2,550	14.3
90,000	2,430	2,850	17.3
100,000	2,630	3,150	19.8
150,000	3,630	4,150	14.3
200,000	4,380	5,150	17.6
250,000	5,130	6,150	19.8
300,000	5,880	7,150	21.6
400,000	7,380	9,150	24.0
500,000	8,880	11,150	25.6
800,000	11,880	17,150	44.4
1 million	13,880	21,150	52.4
2 million	23,880	31,150	30.4
5 million	53,880	61,150	13.5
10 million	103,880	111,150	6.9

The 1972 California attorneys' fees for estates in the \$100,000 - 499,999 range ranked higher than the fees in Massachusetts and Texas and lower than the fees in Maryland and Florida.⁹² The California fee increase since 1972 may be offset in whole or in part by a

92. See Table 3, *supra*, in text. The fees shown in Table 5 do not exclude any extraordinary fees allowed by the court; the fees shown in Table 3 do include extraordinary fees allowed by the court. Accordingly, the fees shown in Table 5 would need to be increased to include extraordinary fees to make them comparable to the fees shown in Table 3.

corresponding attorney fee increase in the other states. The other four states use a reasonable fee standard for fixing attorneys' fees in estate administration. The hourly rates in these other states no doubt have significantly increased since the information concerning fees in other states was collected. At the same time, inflation since 1972 has greatly increased the size of the average California estate and the amount of the statutory fee for that estate.

Comparison of How Attorneys Set Fees in Estate Administration

The *Stein Study* makes the following analysis of the data collected in the five states:⁹³

Attorneys in California were closely guided by the statutory fee system. Attorneys in the four other states, however, were free to set their fees subject only to the general requirement that the probate court ultimately determine them to be reasonable.

Attorneys in the five study states clearly considered the most important bases for determining attorneys' fees in estate administration to be the "fee schedule" (percentage of estate) and "time involved". The relative importance of these two factors varied among the states, however. As expected, statutory considerations in California made "fee schedule" the predominant mode for setting attorneys' fees there. In the other states, fee schedules were not nearly as important; attorneys in Texas, Florida, and Maryland considered "time involved" to be more important than "fee schedule" in determining attorneys' fees. The relative importance attributed to "fee schedule" and "time involved" did not change with either the size of the firm or the size of the estates.

Attorneys who kept time records were more likely to emphasize "time involved" than attorneys who did not keep time records. Except in Florida, attorneys who kept time records were also less likely to emphasize the "fee schedule" in setting estate administration fees than attorneys who did not keep time records.

93. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1184 (1984) (footnotes and references to tables tabulating data omitted).

Moreover, in view of the still-developing trend toward using paralegals in the administration of an estate, it is revealing to compare the relative importance placed on "time involved" as a basis for setting fees by attorneys in firms using paralegals in estate administration and by those whose firms do not. In each of the study states except Maryland, "time involved" is emphasized to a greater extent by attorneys in firms with paralegals than by others.

California attorneys more often considered "extraordinary services" to be a significant factor in determining attorneys' fees than did attorneys in the other states. Very likely this is because the California statute permits a fee in excess of the statutory percentage if the attorney performs extraordinary services. Consequently, in California the phrase "extraordinary" services has presumably assumed a well-defined meaning and saliency beyond that in other states.

* * *

The two factors most determinative of attorneys' fees were the size of the estate and attorney time. And of these two factors, estate size was significantly more important than attorney time, especially in California and Florida. Such variables as testacy, use of paralegals, and attorneys' specialization were relatively unimportant.

A comparison of the attorney responses with the factors actually influencing fee charging is revealing. California attorneys reported significantly greater reliance on fee schedules in setting attorneys' fees in estate administration than did attorneys in other states. Estate size significantly influenced attorneys' fees in every study jurisdiction; indeed, Florida attorneys' fees appear to have been determined by probate estate size to the same extent as in California. This comparison suggests that attorneys in states other than California may have relied more on fee schedules than they were disposed to admit.

Complaints Regarding Administration of Estate

As a part of the *Stein Study*, attorneys were interviewed concerning complaints regarding the administration of the estate. The information received is summarized in the published study:⁹⁴

94. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1208 (1984) (reference to table tabulating data omitted).

Generally, however, attorneys reported relatively few complaints. Texas, Massachusetts, and Florida attorneys reported receiving complaints from representatives in only 5% to 8% of estates, Maryland attorneys in 10% of estates, and California attorneys in 17% of estates. Attorneys reported a similar pattern of frequency of complaints from other beneficiaries. Texas and Massachusetts attorneys reported the fewest complaints from beneficiaries; California attorneys reported the most.

The *Stein Study* reports information concerning the types of complaints.⁹⁵ For the entire sample, the California attorneys reported that 45 percent of the complaints were that the proceeding takes too long and 15 percent that the proceeding costs too much. The remainder of the complaints (40%) concerned other matters.

For estates over \$60,000 with an individual representative, 50 percent of the California complaints were that the proceeding takes too long and 44 percent that the proceeding costs too much. Six percent concerned other matters. For estates in this category, percentage of complaints concerning the cost of the proceeding was higher in California than in any of the other four states covered by the *Stein Study*.⁹⁶

The Questionnaire distributed by the Commission sought information concerning complaints about the cost of probate proceedings generally and complaints that the attorney's fee was too high. More than one-third (38.4%) of the respondents reported they had received no complaints about the cost of probate proceedings. More than half (57.6%) received complaints in five percent or less of the estates they handled concerning the cost of probate proceedings. Twenty percent reported receiving complaints concerning the cost of probate proceedings in more than 20 percent of the estates they handled. See Appendix 1, Table G (Complaints Regarding Cost of Probate Proceedings).

95. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1208 (1984).

96. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1211 (1984). The percentages of complaints in other states that concerned cost of the proceeding were Florida 0%, Maryland 28%, Massachusetts 33%, and Texas 0%.

Complaints specifically directed to the attorney's fees were less frequent. More than half (56.7%) reported they had received no complaints that the attorney fee was too high. More than 75 percent received complaints concerning the attorney fee in five percent or less of the estates they handled. On the other hand, two respondents reported that they received complaints that the attorney fee was too high in half their estate cases, and 13 attorneys received complaints about the legal fee in 25 percent or more of their estate cases. See Appendix 1, Table H (Complaints That Attorney's Fee Too High).

Conclusions Drawn From Stein Study

Because of the increase in the California statutory fee since 1972, the information collected in the *Stein Study* is not very useful in comparing California fees with fees in other states. More useful is the finding of the *Stein Study* that California attorneys reported a greater frequency of complaints than did attorneys in the other states covered by the *Stein Study*. For estates over \$60,000, attorneys in California reported a greater percentage than in the other states of complaints about the cost of the proceedings. This might be attributable in part to use of a statutory fee schedule to fix the attorney's fee in California as contrasted to use of the combined "size of estate" and "time worked" standard used to fix a reasonable fee in the other states covered by the *Stein Study*. For a simple, large estate, the statutory fee schedule yields a fee that is greatly in

excess of that fixed using the attorney's regular hourly rate.⁹⁷ This may explain why there are more objections to attorney fees in California than in the other states, the fee charged in the other states being based in part on time worked. Nevertheless, it should be recognized that in the other states the size of the estate is an important factor in fixing the attorneys' fee. In addition, the cost of a probate proceeding in California includes not only the compensation of the attorney and the personal representative, but also may include other costs such as the compensation of the probate referee, newspaper publications, and the bond of the personal representative. Some of these extra costs may not be incurred in the other states covered by the *Stein Study*.

97. One California attorney sent the following comment regarding the statutory fee to the Law Revision Commission: "Statutory fee structure is generally high in estate of \$100,000 or more if attorney is skilled probate attorney. Very frequently attorney receives an average of \$400-600 per hour for time spent. Size of estate is generally not related to work involved." (emphasis in original).

Another attorney, who reports that she charges less than the full statutory fee in 60 percent of the probate estates she handles, states that her fee nearly always is based on an hourly rate. She states: "In today's inflationary times, the statutory fee is excessive. We (lawyers) already have a reputation for gouging and I'd like to turn that around."

Other typical comments from California attorneys as to the effect of the statutory fee system:

"Fee schedule is capricious -- frequently overcompensates."

"Current statutory fee as a % is not fair to estate -- too high in most cases; too low in others (few)."

"Present practice in general results in a fee too high for the nature and extent of services rendered."

By way of contrast, one lawyer commented: "Fees invariably equal time invested in case." Another: "The correlation of the values of work performed and the statutory fee schedule is satisfactory and fair."

Most lawyers sent comments along the following lines:

"In most estates you are overcompensated (using the statutory fee schedule), but this allows you to do a quality job for the small estate where you will never be fully compensated for your time."

"We generally lose money on the smaller estate that is less able to pay the full hourly. However, we break even on the larger estates to offset the losses on the smaller estate. An hourly rate would shift fees to the smaller estate."

"[If the statutory fee schedule is eliminated, we] will then do all probate work on an hourly basis. Some big estates will pay considerably less. Most small estates (\$100,000 or less) will pay more."

California Statutory Fee Schedule Compared to
Fee Schedules Used in Other States

Nine states use a rate schedule to compute the legal fee for ordinary probate services.⁹⁸ It is difficult to compare the results under the rate schedules used in these states.⁹⁹ Nevertheless, the

98. The following states use a rate schedule: Arkansas, California, Delaware (court rule), Hawaii, Iowa, Missouri, Montana, New Mexico, and Wyoming. Ark. Stat. Ann. § 62-2208 (Supp. 1985); Cal. Prob. Code §§ 901, 910 (West 1987); Del. Ch. Ct. R. 192 (1981); Hawaii Rev. Stat. §§ 560:3-719, 560:3-721 (1985); Iowa Code Ann. §§ 633.197, 633.198 (West 1964); Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987); Mont. Code Ann. §§ 72-3-631, 72-3-633 (1985); N.M. Stat. Ann. §§ 45-3-719, 45-3-720 (1978); Wyo. Stat. §§ 2-7-803, 2-7-804 (Supp. 1987). In addition to these states, the attorneys and the courts in some states may use an informal rate schedule for fixing or approving attorney fees. However, use of a nonstatutory schedule may create antitrust problems. See *Estate of Effron*, 117 Cal. App. 3d 915, 923, 173 Cal. Rptr. 93, *appeal dismissed*, 454 U.S. 1070 (1981).

99. In most other states, but not in California, the court may award a reasonable fee that is less than the fee determined using the fee schedule. Absent an agreement between the attorney and the client for a lower fee, the California attorney is entitled to the fee computed under the statutory rate schedule, without regard to whether the fee is reasonable under the circumstances of the particular estate. See note 21, *supra*.

California allows additional compensation for extraordinary services. New Mexico does not allow additional compensation for extraordinary services. The remaining states may vary in how liberal they are in allowing additional compensation for extraordinary services. See note 81, *supra*.

California applies its statutory rate schedule to the gross estate; liens and encumbrances are not subtracted in determining the value of the estate for the purpose of applying the fee schedule. Cal. Prob. Code §§ 901, 910. It is difficult to determine whether liens and encumbrances are subtracted in determining the value of the estate for fee schedule purposes in some of the other states.

following table compares the attorneys' fees computed for a typical estate using the attorney fee schedules in the various states. See Appendix 2 for the property assumed to be included in the typical estate and the calculations of the attorneys' fees for the various states.

TABLE 6. COMPARISON OF ATTORNEY FEES UNDER FEE SCHEDULES

<u>State</u>	<u>Fee</u>	<u>Court has Authority to Reduce Fee</u>
Delaware*	\$12,000	Yes
Arkansas	10,863	Yes
California	8,850	No
Montana	8,050	Yes
Wyoming	7,850	No
Iowa	7,620	Yes
Hawaii	6,030	No
New Mexico	4,900	Yes
Missouri	4,263	No

*Fee schedule in Delaware is established by court rule, not statute. The court rule provides that the fee schedule is a ceiling on the attorney fee and is not to be charged in all cases.

Source: Appendix 2.

**STANDARDS OR FACTORS TO BE TAKEN INTO CONSIDERATION IN DETERMINING
AMOUNT OF ATTORNEY FEE**

Statutory Statements

At least 10 states and the District of Columbia have statutory statements of the standard or factors that are to be taken into consideration in determining what constitutes a reasonable attorney fee.¹⁰⁰

Maryland has a very general standard that "compensation shall be fair and reasonable in light of all the circumstances to be considered in fixing the fee of an attorney."¹⁰¹ Massachusetts has a somewhat similar general standard: "the compensation shall be awarded on an equitable basis in accordance with the size, importance, complexity and difficulty of the matters involved and the time spent thereon."¹⁰²

The other states have more detailed standards that use the Multiple Factor Approach suggested by the American Bar

100. E.g., Colo. Rev. Stat. § 15-12-721 (19--); D.C. Code Ann. § 20-751 (19--); Fla. Stat. Ann. § 733.617 (West 19--); Me. Rev. Stat. Ann. § 3-721 (19--); Md. Est. & Trusts Code Ann. § 7-602 (1974); Mass. Gen. Laws Ann. ch 215, § 39A (West 19--), Paone v. Gerig, 362 Mass. 757, 291 N.E.2d 426 (1973); Minn. Stat. Ann. § 524.3-719 (West 19--); Neb. Rev. Stat. § 30-2482 (19--); Or. Rev. Stat. § 116.183 (19--); Wis. Stat. Ann. § 851.27 (19--).

Nevada (§ 150.060) requires specific and detailed information supporting the attorney's fee where the fee is not fixed by agreement between the attorney and the personal representative. This information includes the following:

- (a) Reference to time and hours.
- (b) Nature and extent of services rendered.
- (c) Claimed ordinary and extraordinary services.
- (d) Complexity of the work required.
- (e) Other information considered to be relevant to a determination of entitlement.

101. Md. Est. & Trusts Code Ann. § 7-602 (1974).

102. Mass. Gen. Laws Ann. ch 215, § 39A (West 19--).

Association.¹⁰³ The Colorado provision¹⁰⁴--which applies not only to the attorney but also to any other specialized agent or assistant employed by the personal representative--is typical of the provisions in the states that provide a more detailed standard:

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(b) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;

(c) The fee customarily charged in the locality for similar services;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the personal representative or by the circumstances;

(f) The nature and length of the relationship between the personal representative and the person performing the services;

(g) The experience, reputation, and ability of the person performing the services.

The Delaware provision, like provisions in some other states,¹⁰⁵ specifically requires consideration of the "risk or responsibility involved" in serving as the attorney for the decedent's estate. Consideration of the risk or responsibility would appear to require consideration of the potential malpractice liability, and the potential malpractice liability does increase as the size of the estate increases.

103. The Multiple Factor Approach is discussed in the text, *supra*, at notes 14-16.

104. Colo. Rev. Stat. § 15-12-721 (19--). Referring to "the public outcry over antiquated and expensive probate laws" criticizing the percentage fee system as unnecessary and expensive, an appellate court in Colorado commended the Legislature in that state for passing a law which authorizes payment to the attorney for the personal representative on the basis of numerous factors, only one of which is the monetary value of the estate. See *In re Estate of Painter*, 39 Colo. App. 506, 567 P.2d 820, 822 (1977).

105. E.g., Minn. Stat. Ann. § 524.3-715 (West, 19--) ("the extent of the responsibilities assumed").

The District of Columbia statute¹⁰⁶ includes the following additional factor:

a statement by any attorney employed by the personal representative that as soon as feasible the attorney gave to the personal representative an estimate of costs and any change in costs for work to be performed with respect to administration of the estate.

The Oregon statute lists "any agreement as to fees which may exist between the personal representative and his counsel" as a factor to be considered among other relevant factors.¹⁰⁷

The Wisconsin statute¹⁰⁸ lists among the various factors to be taken into consideration the "sufficiency of assets properly available to pay for the services, except that the value of the estate may not be the controlling factor."

Court Rules

By court rule,¹⁰⁹ Delaware has adopted a fee schedule to determine the lawyer's fee for ordinary services in probate administration. However, the court rule states that the fee determined under the fee schedule is not intended to be applicable in every case, and in some cases a lower fee may be appropriate. The court rule includes a statement of factors to be considered in fixing the fee of the estate attorney:

The factors to be considered by the personal representative and the attorney in determining the commission or fee include, but are not limited to, the following:

106. D.C. Code Ann. § 20-751(c) (19--). This provision phrases the "time spent" factor in the following language: "the reasonableness of the time spent, including the number of hours spent and the usual hourly compensation for the work performed."

107. Or. Rev. Stat. § 116.183 (19--). The statute adopts a multiple factor approach to determining reasonable attorney fees and provides: "No single factor shall be controlling."

108. Wis. Stat. Ann. § 851.40. (West 19--).

109. Del. Ch. Ct. R. 192 (1981).

- (1) The time spent.
- (2) The risk or responsibility involved.
- (3) The novelty and difficulty of the questions presented.
- (4) The skill and experience of the personal representative or the attorney.
- (5) The comparable rates for similar services in the locality.
- (6) The character of the estate property.
- (7) The benefits obtained for the estate by the administration.
- (8) The loss of other business necessitated by the acceptance of the administration.
- (9) The time limitations labored under.

Judicial Decisions

The multiple factor approach has been adopted by judicial decision in some states that do not have a statutory provision governing what constitutes a reasonable fee.¹¹⁰

California

California does not have a statutory statement of the standard or factors to be considered in determining what constitutes a reasonable attorney fee.

Rule 2-107 of the Rules of Professional Conduct of the State Bar of California governs fees for legal services generally. The rule adopts the multiple factor approach. It reads:

(A) A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee.

(B) A fee is unconscionable when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community. Reasonableness shall be determined on

110. E.g., *In re Weaver's Estate*, 119 Mich. App. 796, 327 N.W.2d 366 (1982); *In re Weber's Estate*, 59 Ill. App. 3d 274, 375 N.E.2d 569 (1978); *Kansas First National Bank of Topeka v. United States*, 233 F. Supp. 19, 30 (). See Annot., 58 A.L.R.3d 317, 321 (19--).

the basis of circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the reasonableness of a fee are the following:

(1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The amount involved and the results obtained.

(4) The time limitations imposed by the client or by the circumstances.

(5) The nature and length of the professional relationship with the client.

(6) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(7) Whether the fee is fixed or contingent.

(8) The time and labor required.

(9) The informed consent of the client to the fee agreement.

This rule does not prohibit the estate attorney from charging the statutory fee for services in connection with the administration of a decedent's estate; and, without regard to the reasonableness of the statutory fee, the attorney who charges the statutory fee does not engage in unethical conduct.¹¹¹ However, a reasonable fee is allowed where additional compensation for extraordinary services are sought, and the courts take an approach that is generally consistent with Rule 2-107 in determining what is a reasonable fee for extraordinary services.¹¹²

111. Estate of Efron, 117 Cal. App. 3d 915, 926, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981).

112. See text, *supra*, at notes 35-36. No cases have been found where the informed consent of the client to a fee agreement was considered or relied on in fixing additional compensation for extraordinary services, presumably because such fee agreements are rare.

The Los Angeles County Probate Policy Memorandum states that the court will take into consideration the following in evaluating the justification for an award for fees for extraordinary services:¹¹³

- A. Nature and difficulty of the task performed.
- B. Results achieved.
- C. Benefit to the estate as a whole rather than the interests of particular beneficiaries.
- D. Detailed description of services performed demonstrating productivity of hours spent.
- E. Expertise, experience and professional standing of the attorney in the community.
- F. The statutory fee and whether it constitutes adequate compensation for all the services rendered by the attorney.
- G. Hours spent.
- H. Hourly rate of person performing services.
- I. Total amount requested.
- J. Size of the estate and length of administration.

The Fresno County Probate Policy Memorandum includes a more detailed statement of the matters taken into consideration in determining the amount of extraordinary compensation:¹¹⁴

b. Determination of Amount

It is the policy of the Court to allow compensation which would be paid by persons competent to contract for themselves and as are reasonable and customary in the community for such services. In order to assist the Court in its determination, each item that constitutes an extraordinary service shall be individually stated in the petition with a specific fee request for each such service. Following are suggested, but not exclusive guidelines of the Court to be used in making its determination:

(1) The benefits which inured to the estate. It is recognized that the representative or his or her attorney may occasionally be under a duty to pursue certain matters which do not enjoy a successful conclusion. Such services may nevertheless be compensable, but a successful conclusion is clearly of relevance.

(2) Amount of money or value of property involved in the transaction. This is relevant to the degree of responsibility assumed and the care that must be given to the matter.

113. Los Angeles County Probate Policy Memorandum (effective July 1, 1986) § 15.08(1).

114. Fresno County Probate Policy Memorandum (effective as amended July 1, 1986) para. 9.5.

(3) Whether the matter was routine or involved a unique matter of substantial legal or practical difficulty.

(4) Knowledge and experience of personal representative or attorney. The Court is often unaware of the experience or background of the petitioning party. A description of the party's years of practice and expertise should be provided the Court.

(5) Whether an expert was retained in connection with the rendering of particular services, such as a broker or certified public accountant. In that event, the Court should be advised of the comparative roles and responsibilities assumed by the expert and the petitioning party.

(6) Duration of the probate administration. Although it is the policy of the law to close an estate as promptly as possible, it occasionally is necessary that estates remain open for lengthy periods of time. In that event, delay in compensation and the time value of money is relevant.

(7) Detailed description of services. For example, if a real property sale involves dealing with numerous buyers, evaluation of exchanges, clearing title, exposure to potential litigation, the items should be listed in detail. Similarly, if the preparation of a Federal Estate Tax Return involves such other matters as elections under Sections 303, 2032A, 6166, or 2056, each service should be separately described.

(8) Fees for legal research. Legal research will be compensable as extraordinary services only when it relates to unusual, unique or difficult problems. If extraordinary fees are sought for time expended in research, the purpose of the research should be specified and its extraordinary nature clearly described.

(9) Time devoted to the matter. The Court shall be advised of the time devoted to the matter and the petitioner's hourly rate customarily charged for such services, if applicable. The Court must also be provided with sufficient information in order to enable it to analyze the reasonableness of the rate and of the amount of time devoted to the matter.

(10) Amount of the statutory fee and the time required to administer all matters pertaining to the estate. In certain cases, it may be that the statutory fee is a reasonable compensation for all services rendered.

c. Sales of Real Property and Preparation of Federal Estate Tax Return

(1) Sales of real property. The Court will ordinarily consider as just and reasonable compensation for all services of both the personal representative and the attorney in the sale of real property the total sum of \$450.00 on the first \$20,000.00 of the sales price

and 1% of the sales price in excess of \$20,000.00. If greater compensation is requested, all services shall be treated as extraordinary and described in detail by declarations as provided in Paragraph 9.5.

(2) Preparation of federal estate tax return. The Court will ordinarily consider \$1,000.00 as being just and reasonable compensation for the preparation of a federal estate tax return. If greater compensation is requested, all services shall be treated as extraordinary and described in detail by declarations as provided in Paragraph 9.5.

FIXING, APPROVAL, OR REVIEW OF FEES BY COURT

California

In California, there is no statutory authority to pay the fee of the estate attorney in advance of a court order, not even the statutory fee. Even if the estate is administered under the Independent Administration of Estates Act, "court supervision" (a court order) is required for payment of the fee of the estate attorney.¹¹⁵ If the fee is paid without a prior court order, interest or a surcharge may be imposed.¹¹⁶

Section 911 of the Probate Code permits the attorney to petition the court for an advance on fees for work actually completed. Court rules generally limit the amount of the advance for ordinary services

115. Prob. Code § 10501(a)(2).

116. See, e.g., Alameda County Probate Policy Manual (approved by the court January 16, 1986) § 1001; Fresno County Probate Policy Memorandum (effective as amended July 1, 1986) § 9.2(a); Los Angeles County Probate Policy Memorandum (effective July 1, 1986) § 15.01; Madera County Probate Rules (effective July 15, 1985) Rule 10.13(A); Merced County Probate Rules Rule 1104(a); Sacramento County Probate Policy Manual (effective August 1, 1986) § 709; San Diego County Probate Rules (effective July 1, 1985) Rule 4.109(1); San Francisco County Probate Manual (revised October 1982) § 13.03(c); San Joaquin County Probate Rules (effective January 1 1986) Rule 4-706; San Mateo County Probate Rules (effective January 1, 1987) Rule 486(c); Santa Clara County Probate Rules (effective October 1, 1982; supplement effective June 1, 1984) Rule 5.6; Stanislaus County Probate Policy Manual (effective February 1985) § 1004(a); Tuolumne County Probate Rules (effective August 1, 1985) Rule 12.11(a), (c); Probate Rules of the Third District Superior Courts (effective December 1981) Rule 12.12.

by reserving the last 25 percent of the statutory fee until approval of the final account and the decree of distribution.¹¹⁷

The order authorizing the payment of the fee of the estate attorney is normally obtained in conjunction with an interim or final accounting and petition for settlement of the account. Even where an

117. See, e.g., Alameda County Probate Policy Manual (approved by the court January 16, 1986) § 1003; Contra Costa County Probate Policy Manual (effective January 1, 1987) § 605; Fresno County Probate Policy Memorandum (effective July 1, 1986) § 9.3; Los Angeles County Probate Policy Memorandum (effective July 1, 1986) § 15.02 (last 30% of statutory fee reserved until approval of final account and decree of distribution); Madera County Probate Rules (effective July 15, 1985) Rule 10.14; Marin County Rules of Probate Practice (effective January 1, 1984) Rule 1202; Merced County Probate Rules Rule 1104(b) (ordinarily last 30% of statutory fee reserved until approval of final account and decree of distribution, but the 30% reserve may be substantially reduced or dispensed with upon a showing that it would be beneficial to the estate or to the distribution, such as reduction of income taxes in a given fiscal period); Orange County Probate Policy Memorandum (effective October 1, 1985) Rule 8.04; Riverside County Probate Policy Memorandum (effective August 1986) Rule 6.1004(C); Sacramento County Probate Policy Manual (effective August 1, 1986) § 707; San Diego County Probate Rules (effective July 1, 1985) Rule 3.110; San Francisco County Probate Manual (revised October 1982) § 13.03(c); San Joaquin County Probate Rules (effective January 1, 1986) Rule 4-706(B) (ordinarily last 30% of statutory fee reserved until approval of final account and decree of distribution, but the 30% reserve may be substantially reduced or dispensed with upon a showing that it would be beneficial to the estate or to the distribution, such as reduction of income taxes in a given fiscal period); San Mateo County Probate Rules (effective January 1, 1987) Rule 486(a); Santa Barbara County Probate Rules (effective September 1, 1985) Rule 414(H)(2); Santa Clara County Probate Rules (effective October 1, 1982; supplement effective June 1, 1984) Rule 5.6(d); Solano County Probate Rules (effective March 1, 1972) Rule 8.11(d) (the last 33% of statutory fees will not be allowed prior to approval of final account and the granting of a petition for final distribution); Stanislaus County Probate Policy Manual (effective February 1985) § 1004(b) (ordinarily last 30% of statutory fee reserved until approval of final accounting, but the 30% reserve may be substantially reduced or dispensed with upon a showing that it would be beneficial to the estate or to the distribution, such as reduction of income taxes in a given fiscal period); Tuolumne County Probate Rules (effective August 1, 1985) (allowance on account of ordinary fees shall not exceed 70% of statutory fees); Ventura County Probate Rules (effective January 1, 1986) Rule 11.12(c); Probate Rules of Third District Superior Courts (effective December 1981) Rule 12.12(E) (allowance on account of ordinary fees shall not exceed 70% of statutory fees).

account is waived, the petition and report must state the amount of the attorney fee and set forth the basis for calculating the statutory attorney fee.¹¹⁸

Local court rules often prescribe how the computation of the statutory fees must be shown in the petition.¹¹⁹ Typical of these local rules is the Contra Costa County Probate Policy Manual rule,¹²⁰ which provides:

603. STATUTORY FEES.

A. Pursuant to Probate Code § 901, the basis for computation of statutory commissions payable to the executor or administrator and statutory fees payable to attorneys shall be set forth in the body of the petition, in substantially the following form:

	FEE BASE
Inventory and Appraisalment	\$ _____
Receipts	_____
Gains on Sales	_____
Losses on Sales	(_____)
Income during Administration	_____
	Fee Base \$ _____

118. Prob. Code § 933(c) ("Notwithstanding waiver of the account, the executor or administrator shall file a report at the time the account would otherwise have been required showing the amount of the fees or commission paid or payable to the executor or administrator and to the attorneys and setting forth the basis for determining such amount").

119. See, e.g., Contra Costa County Probate Policy Manual (effective January 1, 1987) § 603; Merced County Probate Rules Rule 1103; Monterey County Probate Rules (effective January 1, 1987) Rule 4.27; Orange County Probate Policy Memorandum (effective October 1, 1985) § 8.04; Riverside County Probate Policy Memorandum (effective August 1986) Rule 6.1004(A); Sacramento County Probate Policy Manual (effective August 1, 1986) § 706(b); San Bernardino County Probate Policy Memorandum (revised August 13, 1985) § 906; San Francisco County Probate Manual (revised October 1982) § 13.01; San Joaquin County Probate Rules (effective January 1, 1986) Rule 4-705; San Mateo County Probate Rules (effective January 1, 1987) Rule 483; Santa Clara County Probate Rules (effective October 1, 1982; supplement effective June 1, 1984) Rule 5.1 "Statement of Commission"; Stanislaus County Probate Policy Manual (effective February 1985) § 1003.

120. Contra Costa County Probate Policy Manual (effective January 1, 1987) § 603.

FEE COMPUTATION		
4% on first \$15,000	(_____)	\$ _____
3% on next \$85,000	(_____)	_____
2% on next \$900,000	(_____)	_____
1% on balance above \$1,000,000	(_____)	_____
Total		\$ _____

B. The above computation must be made even though accounting is waived. Contracts for higher than statutory fees are void.

A request for additional compensation for extraordinary services must be supported by detailed information of the nature of the services, the time spent, the necessity for the services, and other supporting information.¹²¹ Some local court rules require that the supporting information be provided in a particular format.¹²²

121. Estate of Fulcher, 234 Cal. App. 2d 710, 44 Cal. Rptr. 861 (1965); Estate of Lundell, 95 Cal. App. 2d 352, 212 P.2d 914 (1949).

122. See, e.g., Alameda County Probate Policy Manual (effective January 1, 1986) § 1006; Contra Costa County Probate Policy Manual (effective January 1, 1987) § 604 ("Records of time spent, without more, are not adequate"); Fresno County Probate Policy Memorandum (effective July 1, 1986) § 9.5; Lake County Probate Rules (effective July 1, 1986) Rule 13.4; Los Angeles County Probate Policy Memorandum (effective July 1, 1986) §§ 15.07 - 15.09; Madera County Probate Rules (effective July 1, 1985) Rule 10.16; Marin County Rules of Probate Practice (effective January 1, 1984) Rule 1204; Merced County Probate Rules Rule 1108; Monterey County Probate Rules (effective January 1, 1987) Rule 4.28; Orange County Probate Policy Memorandum (effective October 1, 1985) § 8.04; Riverside County Probate Policy Memorandum (effective August 1986) Rule 6.1004(B); Sacramento County Probate Policy Manual (effective August 1, 1986) § 708; San Joaquin County Probate Rules (effective January 1, 1986) Rule 4-708; San Mateo County Probate Rules (effective January 1, 1987) Rule 484; Santa Barbara County Probate Rules (effective September 1, 1985) Rule 414(H)(3); Santa Clara County Probate Rules (effective October 1, 1982; supplement effective June 1, 1984) Rule 5.7; Santa Cruz County Probate Rules (effective January 1, 1986) Rule 405; Solano County Probate Rules (effective March 1, 1972) Rule 8.12; Stanislaus County Probate Policy Manual (effective February 1985) § 1008; Tulare County Probate Rules (effective June 1, 1983) § 8(b); Tuolumne County Probate Rules (effective August 1, 1985) Rule 12.11(f); Probate Rules of Third District Superior Courts (effective December 1981) Rule 12.12(F).

To what extent do interested persons object to the fee sought by the attorney in California probate proceedings? The Questionnaire sought information concerning objections to the lawyers's fee by an interested person at the court hearing on approval of the fee.¹²³ There were few objections to the fee. More than three-fourths (78.8%) of the lawyers who responded to the Questionnaire reported that there were never any objections to their fee. Less than three percent reported that they had objections to their fee in five percent or more of their probate cases. One reason why there may be so few objections is that the court has no authority in California to reduce the statutory fee, even where the statutory fee may be unreasonable in view of the legal services actually provided. This also may explain why the court rarely reduces the legal fee as a result of an objection. More than 90 percent of the attorneys reported that in less than one percent of their cases was the fee reduced as a result of an objection by an interested person.¹²⁴

It is clear that review of probate attorney fees (whether or not there are objections to the fee) consumes a significant amount of our judicial resources.¹²⁵ The Questionnaire sought information concerning the extent to which this review actually results in a reduction in probate legal fees.¹²⁶ Almost two-thirds (64.5%) of the attorneys reported that the probate court never reduces the fees they request. More than 83 percent reported that the court reduces their fees in five percent or less of their cases. Less than one percent reported that the court reduces their fees in more than 10 percent of

123. See Appendix 1, Table R (Interested Person Objects to Attorney Fee at Court Hearing).

124. See Appendix 1, Table S (Fee Reduced by Court Because of Objection).

125. See Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum in California Local Probate Rules* (8th ed. Cal. Cont. Ed. Bar. 1987), at 19-89 ("tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees").

126. See Appendix 1, Table T (Fee Reduced by Court Where No Objection Made to Fee). See also Appendix 1, Table S (Fee Reduced by Court Because of Objection).

their cases. Since the probate court must fix the attorney fee for extraordinary services, it is surprising that the court so seldom reduces the requested fee. Perhaps the attorney requests a modest fee because the attorney knows that the requested fee will be reviewed by the court.¹²⁷

It is important to recognize that there are important exceptions to the court fixing or approving attorney fees in connection with decedents' estates. These exceptions have been previously discussed.¹²⁸ But one exception that applies on and after July 1, 1987,¹²⁹ merits mention again. Ordinarily, formal probate is unnecessary if a surviving spouse takes all the property of the deceased spouse. A court order determining or confirming property passing to or belonging to the surviving spouse is all that is needed. The attorney fee for obtaining the court order is determined by private

127. Some local court rules provide flat amounts that will automatically be allowed for federal estate tax returns and real estate sales. See, e.g., Alameda County Probate Policy Manual (effective January 1, 1986) § 1007 (real estate sale - corporate fiduciary \$450, individual fiduciary \$650; federal estate tax return - \$750 if no tax due, \$1000 when tax is due); Fresno County Probate Policy Memorandum (effective July 1, 1986) § 9.5(c) (sale of real property - \$450 on the first \$20,000 of the sales price and 1% of the sales price in excess of \$20,000; federal estate tax return - \$1,000); Lake County Probate Rules (effective July 1, 1986), Rule 13.4(f) (estate tax return with no tax liability - \$600, estate tax return with tax liability - \$500 plus amount equal to 1/5 of 1% the estate over the exemption equivalent; sale of real or personal property requiring noticed hearing on the personal representative's return and an order of confirmation - 1% of the sale price or \$250, whichever is greater; sale of perishable or depreciating personal property or securities on ex parte order - \$150); San Joaquin County Probate Rules (effective January 1, 1986) Rule 4-708(C) (routine court supervised sale - \$350 when sales price is under \$10,000, \$500 when sales price is between \$10,000 and \$100,000, and \$750 when sales price is over \$100,000); Santa Cruz County Probate Rules (effective January 1, 1986) Rule 405 (sale of real or personal property (other than listed securities) - under \$2,000, \$50, and if in excess of \$2,000, \$50 plus 1% of excess over \$2,000; federal estate tax return with no tax - \$500; federal estate return with tax - \$500 plus 1/5 of 1% estate over exemption equivalent).

128. See discussion, *supra*, under "Fee Charging in California--Attorneys' Fees Where No Formal Probate Proceeding."

129. Prob. Code § 13666 (added by 1986 Cal. Stats. ch. 783, § 24).

agreement between the attorney and the client and is not subject to approval by the court. The court reviews the reasonableness of the fee only if there is no agreement between the attorney and client and there is a dispute as to the reasonableness of the fee. The policy reflected in these provisions rejects the argument frequently made that the aged widow can be protected from the greedy attorney only if the court fixes or approves the attorney fee.

To summarize, in a formal California probate, the court must approve any attorney fee before it can be paid, whether the amount of the fee is determined by the statutory fee schedule or the fee is an additional fee for an extraordinary service. This is required even though there is no dispute over the fee. The review and approval of the statutory fee should require little court time. But a "tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees."¹³⁰ This is because there may be disagreement as to what constitutes an extraordinary service and the amount to be awarded for extraordinary services. And the "dispute" may be the result of a difference of view between the court and the attorney as to what constitutes a reasonable fee, even though there is no objection to the requested fee by persons interested in the estate. Nevertheless, the fee requested by the attorney is seldom reduced.

Other States

States Using Uniform Probate Code Method. At least 15 states use the Uniform Probate Code (UPC) method to determine the extent of judicial review of probate attorney fees.¹³¹ Under the UPC, the

130. In 1984, the Presiding Judge of the Probate Department of the Los Angeles County Superior Court appointed an ad hoc Committee to help deal with the problem, "A tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees." Report of Ad Hoc Committee on Attorney Fees (May 15, 1985), reprinted as appendix to Los Angeles County Probate Policy Memorandum in California Local Probate Rules (8th ed. Cal. Cont. Ed. Bar 1987), at 19-89.

131. See discussion, *supra*, under heading "Uniform Probate Code Method of Fixing Compensation of Estate Attorney."

personal representative, acting reasonably for the benefit of the persons interested in the estate, may hire the attorney and fix the attorney fee.¹³² The court is not involved in fixing or approving the fee, but any interested person can get the court to review the fee.¹³³ The review may be obtained upon petition or motion of the person who is dissatisfied.¹³⁴ The UPC method -- the one most commonly used in other states -- saves judicial resources by limiting review to cases where there is a dispute concerning the fee.

States Where Reasonable Fee is Fixed or Approved by Court. The statutes of a number of states provide that the estate attorney is entitled to a reasonable fee and require that the fee be fixed or approved by the court.¹³⁵ Apparently, in these states, the court must fix or approve a reasonable fee in each case.

Most states that have a statutory fee schedule allow the estate attorney to request an additional reasonable fee for extraordinary services.¹³⁶ Apparently, the court must fix or approve a reasonable fee in each case where an additional fee is requested. In addition, the court must determine whether the services for which the additional fee is requested are ordinary services (for which no additional fee is allowed) or extraordinary services (for which an additional fee may be allowed).

132. Unif. Prob. Code § 3-715.

133. See discussion, *supra*, under heading "Uniform Probate Code Method of Fixing Compensation of Estate Attorney."

134. Unif. Prob. Code § 3-721.

135. See discussion, *supra*, under "The Reasonable Fee Fixed or Approved by Court Method of Fixing Fees."

136. See discussion, *supra*, under "The Statutory Fee Schedule as Method for Fixing Attorney Fee."

POLICY ISSUES AND RECOMMENDATIONS

Should California Abandon the Statutory Fee Schedule?

Introduction

The statutory fee schedule is the primary target of those who initiated the study of the California Probate Code.¹³⁷ They believe the statutory fees in California are too high and propose to solve the problem by substituting the reasonable fee provisions of the Uniform Probate Code.

This view is well stated by a lawyer in a letter to the Commission:

I am sure that you will receive many criticisms of the fee schedule which essentially point out that the fee schedule is damaging to the public's purse. The consumer is in a no-win situation. If the estate is exceptionally easy, there is no discount. But if the estate is exceptionally difficult, the attorney is entitled to more. The exceptionally easy estate is now the rule because of the abolition of the inheritance tax and the increase in the unified credit for federal estate tax.

A 1981 California case quoted from an article in the Washington Post as follows:¹³⁸

Percentage fees . . . for settling estates . . . are generally a ripoff. Some lawyers, to be sure, can't stomach them; but most, . . . think they are just dandy. There is little chance that this Legislature [Maryland], or any other, will do anything about this situation this year. But sooner or later lawyers are going to have to accept, or have imposed on them, the revolutionary idea that how much they charge a client should be related to how much work they do.

137. See text, *supra*, at notes 3 and 4.

138. Estate of Efron, 117 Cal. App. 3d 915, 926, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981), quoting from an article in the Washington Post as quoted in L.A. Daily J., Mar. 27, 1981, at 4.

Criticism of percentage fee charging continues unabated. An October 1987 article in *Money Magazine*¹³⁹ advocates use of a living trust to avoid the expense, delay, and other disadvantages of probate. The article discusses the cost of having a living trust drafted and the cost of administration of the trust after death by an institutional trustee. The article, using the California statutory fees as an example of unreasonable fees, then states:¹⁴⁰

Even [the fees for a living trust] seem reasonable compared to the expense of probate. Traditionally, attorneys' fees have been based on the size of an estate or dictated by local custom. Only 13 states have set fee schedules, usually 1% to 11% of an estate's gross value. Generally, fees consume greater percentages of smaller estates. In California, for example, a lawyer handling a \$100,000 estate would earn at least \$3,150, or 3%, and \$61,150, or 2%, for probating a \$3 million estate. The attorney would charge additional fees for selling assets, preparing an estate tax return or defending the estate against claims by creditors or disgruntled survivors. Says John McCabe, the legislative director for the National Conference of Commissioners on Uniform State Laws: "The probate process has been a cash cow for attorneys. Small law firms pay their basic office expenses with probate fees."

139. Topolnicki, *Planning a Hassle-Free Legacy*, *Money Magazine*, Oct. 1987 at 82.

140. Topolnicki, *Planning a Hassle-Free Legacy*, *Money Magazine*, Oct. 1987, at 84. There are several factual errors in the quoted material. There are only eight -- not 13 -- states that have statutory fee schedules. See note 80, *supra*. The statutory fee for probate of a \$3 million estate in California is \$41,150, not \$61,150 as stated in the quoted material. See Table 1, *supra*, under "Fee Charging in California--The Statutory Fee Schedule." Despite these errors, the quoted material is typical of the public reaction to the statutory fee schedule system for fixing probate fees.

The fact is that California statutory fees are high compared to the statutory fees in other states.¹⁴¹ Only one state (Arkansas) has higher statutory fees; and, unlike California, the court in that state can reduce a statutory fee that is excessive.¹⁴² The statutory fees in the other six states are less than the California fee.¹⁴³ The fee in Missouri is about half the California fee.¹⁴⁴ The carefully prepared *Stein Study* compared California probate fees to those in other typical states not having a statutory fee schedule. The *Stien Study* found that the California fees in 1972 were not out of line with those

141. The statutory fees are compared in Table 6, *supra*, under "Comparison of California Fees With Fees Charged in Other States." The comparison is made using what is considered a typical case not involving extraordinary services. See Appendix 2.

Despite evidence to the contrary, some California lawyers believe that California probate fees are among the lowest in the nation. Responses to the Questionnaire included the following:

California has about the fastest probate and lowest fees in the U.S.

Virtually every matter we are aware of in states with [the UPC attorney fee provisions] generates larger fees than under our current system. . .

The statutory fees, which are lower than fees charged by lawyers in many states back East, are reasonable . . .

142. In most states having a statutory fee schedule, the court can reduce the statutory fee where it would be excessive under the circumstances of the particular estate. See Table 6, *supra*, under "Comparison of California Fees With Fees Charged in Other States." As Table 6 indicates, a Delaware court rule establishes a probate fee schedule that is higher than California, but the court rule provides that the fee schedule is a ceiling on the attorney fee and is not to be charged in all cases.

143. See Table 6, *supra*, under "Comparison of California Fees With Fees Charged in Other States."

144. See Table 6, *supra*, under "Comparison of California Fees With Fees Charged in Other States."

in the other states,¹⁴⁵ but since then the California statutory fees have been substantially increased.¹⁴⁶

It is not just the California statutory probate fees that concern the general public. The image of California lawyers has sunk to a new low in recent years, according to the State Bar's new president, Terry Anderlini. The general public, he said, "is displaying a profound and growing distrust of the legal system and the participants in that system, especially the lawyers."¹⁴⁷ During recent years, the attorney discipline system has been under attack, and efforts have been made to move lawyer discipline from the State Bar to another state agency.¹⁴⁸

One result of this growing distrust is a new California law that into effect on January 1, 1987. The new law is designed to protect against excessive attorney fees by requiring that there be a written fee agreement between the lawyer and the client.¹⁴⁹

145. See Table 3, *supra*, under "Comparison of California Fees With Fees Charged in Other States."

146. The California statutory fees have been increased 19.8 percent on an estate of \$100,000, 24 percent on an estate of \$400,000, 44.4 percent on an estate of \$800,000, and 52.4 percent on an estate of \$1 million. See Table 5, *supra*, under "Comparision of California Fees Wtih Fees Charged in Other States."

147. Quoted in *The Daily Recorder*, Sacramento, Monday, Sept. 21, 1987, Volume 76, Number 188, at 1, 4.

148. See, e.g., Bascue Confirmed as the First State Bar Chief Trial Counsel, *The Daily Recorder*, Sacramento, Tuesday, Sept. 22, 1987, Volume 76, Number 189 at 2.

149. The new law is discussed, *supra*, under "Fee Charging in California--Fee Agreements."

Most California probate lawyers support the concept of a statutory fee schedule. The Questionnaire asked whether the lawyer favored adoption of the Uniform Probate Code scheme for fixing the fees of the personal representative and estate attorney. Only 24 percent want the UPC scheme.¹⁵⁰ Other lawyers, who did not favor the UPC scheme, have no problem with the elimination of the statutory fee schedule, but they wish to retain the requirement of court approval before fees can be paid. The lawyers were given an opportunity to explain why they were for or against the UPC scheme. Their comments are set out in Appendix 3. Relevant comments are set out in various portions of this text.

Probate lawyers seem to be unaware of the public dissatisfaction with lawyers and their fees. Few feel that the statutory schedule for probate fees is a source of resentment against attorneys and the California probate system.¹⁵¹

150. See Appendix 1, Table O (Uniform Probate Code Scheme for Fixing Fees).

151. A few lawyers responding to the Questionnaire felt that the existing fee setting system creates hostility toward probate attorneys and the probate system:

In today's inflationary times, the statutory fee is excessive. We (lawyers) already have a reputation for gouging and I'd like to turn that around.

[Adoption of the UPC provisions] would defuse resentment against attorneys, the court system and probate procedures.

More typical comments are:

[Adoption of the UPC provisions] will further put the profession in disrepute -- the present statutory plan is generally fair and certain.

I have heard no objection to the current procedures [for fixing attorney fees] which provide for a system of judicial review and approval.

Why fix something that isn't broken?

I think clients are comfortable with the concept of court supervision and approval of compensation.

I'm getting old -- I resent change -- I think the old system works well.

The American Bar Association has condemned rigid adherence to statutory fee schedules as frequently unfair to beneficiaries of estates, to personal representatives, or to the attorney.¹⁵² The California fee schedule can result in inflated charges in simple estates and additional charges in complex estates. There is no relief from inflated charges, since the court cannot reduce the statutory fee when it is unreasonably high. But the attorney is protected where the statutory fee is inadequate because he may get an additional fee if he provides more than ordinary probate services.

Lawyer Self-Interest and Lawyer Distrust

The *Effron* case states that many view the probate fee system "as having been forged through an amalgam of lawyer self-interest and lawyer mistrust."¹⁵³ Responses to the Questionnaire reflect both lawyer self-interest and lawyer distrust.

Lawyer self-interest. Responses reflecting lawyer self-interest in preserving the statutory fee schedule include the following:

[The statutory fee system] protects lawyers like me who are shy about money.

Survivors should not be forced to shop around for prices.

[Adoption of the UPC provisions] would induce "shopping" & improper advertising. . . . I think adoption of the [UPC provisions] would just promote rabid competition by some offices, with heirs going from office to office to check out the lowest bids.

Fee schedule reduces arguments with clients.

Adoption [of the UPC provisions] would set in motion a search for cut-rate fees and probably services not well rendered.

152. See text, *supra*, at note 14.

153. Estate of *Effron*, 117 Cal. App. 3d 915, 926, 173 Cal. Rptr. 93, appeal dismissed, 454 U.S. 1070 (1981).

Clients seem to accept the fees if the code sets them. I feel they might start complaining if we set our own.

Statutory fee avoids fee shopping.

Clients are more likely to accept a statutory fee. The [UPC provisions] would lead to litigation, fee cutting, and difficulty in attorney-client relations.

Present system works. Do not have to spend a lot of time negotiating fees. All know where they stand in the beginning.

I would not be able to meet my overhead if the clients could dictate the amount of the fees. I would probably go out of business.

The self-interest of one lawyer caused him to take a contrary view:

Believe that level of competition among lawyers would act to lower prevailing fee for probate if negotiated fees were the norm, and therefore our business would increase since our firm can compete on price.

Conflict of interest. The statutory fee schedule also presents the estate planning attorney with a conflict of interest:

But the fact that the schedule results in inappropriate fees is only part of the problem. Of greater concern to me is that the fee schedule results in poor legal services being rendered to the public by 1) encouraging attorneys to attempt to practice in this area when they are not competent to do so, and 2) by presenting estate planning attorneys with a conflict of interest with respect to such problems as: A) whether to plan to avoid probate, and B) asset valuation.¹⁵⁴

If the attorney prepares a trust for the client, the statutory fee schedule will not govern the legal fee for work in connection with the trust after the client's death, and the fee for the trust work almost certainly will be far less than the statutory probate fee. The attorney also has a conflict of interest in valuing the assets of the estate. The higher the value the greater the attorney fee (and the greater the federal estate tax if the estate is subject to that tax).

There is another possible conflict of interest created by the statutory fee schedule. The fee for ordinary probate services is fixed

154. Ltr. on file with California Law Revision Commission.

by the statutory fee schedule. The attorney gets the statutory fee without regard to the quality and amount of services provided. The lawyer can obtain the highest per hour fee by doing the minimum amount of work needed to complete the probate of the estate.¹⁵⁵ Under a reasonable fee standard, the lawyer's fee should depend on the quality and amount of service provided.

Distrust of lawyers. Many of the responses to the Questionnaire reflect public distrust of lawyers. Typical of these responses are the following objections to adopting the UPC attorney fee provisions:

This would lead to blatant abuses.

The statutory fee schedule keeps attorneys & executors from depleting an estate by excessive fees.

I believe a significant number of clients would be harmed by unethical attorneys.

Too many elderly widows, etc., would be susceptible to overcharge with few actual objections.

Best policy is current policy because it avoids overreaching.

Subject to abuse and excessive charges.

Lead to collusion between attorney & representative.

Clients are suspicious enough of attorneys and would not trust an hourly or other rate where they would have no way to check the time actually expended.

Too many unaware persons could be overcharged.

155. A few lawyers take the view that the statutory fee permits them to provide quality services that the client would otherwise not obtain because the client would be unwilling to pay a sufficient fee:

Adoption [of a reasonable fee system] would set in motion a search for cut-rate fees and probably services not well rendered.

Negotiation between the personal representative and attorney would encourage extensive fee shopping and encourage minimum work or services to be performed by cut rate attorneys.

I see no benefit to the public by eliminating the statutory fee for work actually performed in probate. I think it would cause a decline in services and an increase in complaints.

I believe it will give rise to abuses and excessive attorneys fees.

Distrust of lawyers was the major concern that had to be overcome in the effort to substitute the UPC fee provisions for the statutory fee schedule in Utah. Some legislators were concerned that the UPC provisions might permit lawyers to charge unreasonably high probate fees. But Utah enacted the UPC provisions in 1987 after it was explained to the concerned legislators that the fees under the Utah statutory fee schedule had in effect become minimum fees and that the fees often were unreasonably high.¹⁵⁶

Consumer groups and others have sought to obtain enactment of the Uniform Probate Code in order to reduce the delay and expense of probate. An important goal of these groups is to substitute the UPC fee provisions for statutory fee schedules. They believe that the UPC provisions avoid the excessive fees that can result under statutory fee schedules. They feel that this benefit far outweighs the possibility that lawyers will charge excessive fees under the UPC provisions.

Consumer groups have been able to achieve their goal in a number of states. The UPC provisions have replaced statutory fee schedules in a number of states.¹⁵⁷ The UPC method is now the one most commonly used in other states to fix the compensation of the estate attorney.¹⁵⁸ There is no showing that enactment of these provisions has resulted in higher fees. In fact, several studies collected empirical evidence showing that fees may decline somewhat under the

156. The author of the Utah legislation was a lawyer member of the Utah Legislature. He was concerned about the unreasonably high fees that were charged in some cases under the statutory fee schedule. Information concerning the Utah legislation was obtained by telephone from Susan Cleager, Office of Legislative Research and General Counsel, Utah.

157. See discussion, *supra*, under "The Uniform Probate Code Method of Fixing Compensation of Estate Attorney."

158. See discussion, *supra*, under "The Uniform Probate Code Method of Fixing Compensation of Estate Attorney."

UPC.¹⁵⁹ Accordingly, distrust of lawyers and fear of higher fees is not a justification for keeping the statutory fee schedule.

Subsidizing the Small Estate

The statutory fee schedule provides a fee for conducting the ordinary probate proceedings. "Ordinary services" are those likely to be required for almost every estate.¹⁶⁰ Where "extraordinary services" are required, the attorney is entitled to reasonable compensation, the amount of which is determined by the court.¹⁶¹

One attorney who responded to the Questionnaire commented:

Two justifications I know of for the present statutory fee system are (1) that the amount of attorney effort required corresponds to the appraised value of the assets and (2) that the attorney will be overpaid in as many estates as he is underpaid. In my experience, the first justification is not true and the second, if true, results in some clients subsidizing work done for others.

Although a number of lawyers justified the statutory fee schedule on the ground that it is "fair" or "reasonable," the overwhelming majority did not seek to justify the statutory fee schedule as providing a fee that is closely related to the value of the services provided. Instead, many lawyers view the statutory fee schedule system as one that subsidizes the small estate by charging to the large estate fees that often will be excessive in view of the services rendered.

Relevant comments of respondents to the Questionnaire are set out below:

Statutory fee structure is generally high in estate of \$100,000 or more if attorney is skilled probate

159. See discussion in text, *supra*, at notes 75-77. A recent magazine article states, however, that benefits of adopting the UPC in most states "have, in large measure, been retained by the probate lawyers, who are getting the same high fees for a lot less work." Spelvin, *Of Wills and Probate*, Sylvia Porter's Personal Finance, June 1984, at 84.

160. See discussion in text, *supra*, at note 31.

161. See discussion in text, *supra*, at notes 33 and 34.

attorney. Very frequently attorney receives an average of \$400-\$600 per hour for time spent. Size of estate is generally not related to work involved. (Emphasis in original.)

Far too often, the statutory scheme is completely unrelated to the amount of work involved; a percentage scheme misallocates cost of providing legal services.

Clients in larger estates often require [a negotiated lower fee] now. The larger estates no longer cover the smaller estates and they must now start paying their own way or more and more attorneys will refuse to handle them.

Small estates run up a bill that is never paid while large estates feel the attorney is over compensated.

Most attorneys . . . are forced to adopt a "on some you make extra" / "on some you lose your shirt" attitude because the fee is not necessarily related to the actual work required.

For 30 years I have accepted all probate matters even if the fee was \$2,000 or less before \$630 became \$60,000. The correlation of values of work performed and statutory fee schedule is satisfactory and fair.

Statutory fee is of substantial benefit to smaller estates, where extraordinary fees normally are not recoverable and attorneys' hourly rates for time expended often exceed recoverable fee.

We generally lose money on the smaller estate that is less able to pay the full hourly. However, we break even on the larger estates to offset the losses on the smaller estate. An hourly rate would shift fees to the smaller estates.

[Adoption of the UPC provisions] would preclude effective representation of smaller estates.

[Adoption of UPC provisions would] probably end windfalls on large estates, but would end losses on small ones.

Those of us fortunate enough to handle large estates can afford to be generous; but if you try to provide all necessary services including tax planning in smaller estates you probably will lose your shirt.

The fees we collect, especially in small estates of under \$150,000 just cover our services, so we are doing okay--not great but okay. I think [adoption of the UPC

provisions] would result in a traumatic increase in fees in small estates.

I believe that in many cases the statutory fee produces an excessive attorney fee. Often, a large estate with few beneficiaries and primarily liquid assets results in a windfall [for the attorney].

I think I can predict the result [of adopting the UPC provisions]. We will then do all probate work on a hourly basis. Some big estates will pay considerably less. Most small estates (\$100,000.00 or less) will pay more.

Only one attorney sought to justify the existing California fee structure on the ground that it subsidized other legal services provided as a "loss leader:"¹⁶²

The existing fee schedule helps compensate for many services to older people (particularly, in planning their wills, bank accounts, powers of attorney, etc.) for which an attorney cannot charge adequate fees. Probate fees are vital to help maintain an expensive law office for the good of the public we serve.

The important policy issue is whether California should continue to subsidize the small estate at the expense of the large estate.

The *Stein Study*¹⁶³ has a good statement of this effect of percentage fee charging:

A percentage fee charging system also may make legal services more affordable in smaller estates by shifting to larger and more profitable estates some of the costs of administering smaller estates, as well as by shifting overhead expenses properly allocable to the smaller estates.

The Commission has decided that the probate referee system can be retained only if some estates subsidize others. The Commission

162. This is consistent with the conclusion of the *Stein Study* that "it is unlikely that estate planning work can now be done as a 'loss leader,' if that was ever the case." See Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1193 (1984).

163. Stein & Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107, 1175 (1984).

proposes a system where the fee charged has no relation to the difficulty of appraising the particular property in the estate. For example, the fee for appraising \$250,000 of stock listed on the New York Stock Exchange is the same as the fee for a difficult appraisal of improved real property of the same value. The result is that the estate that contains the easy-to-appraise listed stock pays a fee that subsidizes the estate with the difficult-to-appraise real property. This result is justified on the ground that otherwise the probate referee system could not be retained. If only the most difficult property were to be appraised by the probate referee, there would not be enough business to have qualified referees available to make the appraisals, and a complex fee structure would be necessary.

The vast majority of states have adopted the policy of having each estate pay a reasonable fee for the legal services required to administer that estate. In these states, one estate is not required to subsidize another, and the size of the estate is only one consideration in determining the legal fee.¹⁶⁴ The policy issue is whether small estates should be subsidized at the expense of the large, easy-to-administer estate.¹⁶⁵

Simplicity and Certainty

One benefit of a statutory fee schedule is that it permits the fee for ordinary services to be determined easily and with certainty. The statutory fee schedule is applied to the "estate accounted for" to determine the fee.¹⁶⁶ Although the statutory fee is easy to compute,

164. The risk or responsibility assumed should be considered in determining what constitutes a reasonable fee. The size of the estate is a significant factor in determining the risk or responsibility assumed.

165. The statutory fee schedule is used to compute the legal fee for ordinary probate services. If the large estate requires more than ordinary probate services, the attorney is entitled to an additional fee for the extraordinary services. See text, *supra*, at notes 17 and 18.

166. See discussion, *supra*, under "Fee Charging in California--The Statutory Fee Schedule."

most probate courts require the lawyer to provide the details on computation of the statutory fee so that the court can check the accuracy of the attorney's computation before making an order approving the fee.¹⁶⁷

Some of the responses to the Questionnaire mention this advantage of the statutory fee schedule:

[The UPC fee scheme] creates another area of possible dispute. For better or for worse the statutory fee provides some guidance and certainty.

Fees are . . . easily understood by the client and the attorney.

Do not need to spend a lot of time negotiating fees. All know where they stand in the beginning.

[The UPC fee scheme] would create uncertainty, resulting in the increased likelihood of litigation.

System minimizes fee disputes.

Present system minimizes controversy.

The statutory fee schedule . . . provides a readily determined fee for probate services.

. . . the present statutory plan is generally fair and certain.

. . . everyone knows in advance what the fee will be.

The current percentage method is easy for the client to understand.

Statutory fees are uniform and understood clearly by client.

As it now is, the ordinary fee is ascertainable by an independent standard (fee schedule). Clients are suspicious enough of attorneys and would not trust an hourly or other rate where they would have no way to check the time actually expended.

167. Local court rules generally require that the manner in which the statutory fees are computed be shown in the petition for approval of the fees. See discussion in text, *supra*, at notes 119-120.

The statutory fee schedule does provide certainty where the estate is one that requires only ordinary probate legal services. But this certainty comes at a high cost. The statutory fee is not related to the legal work required for the particular estate. The statutory fee for legal services provided to a large, simple estate results in a windfall to the attorney.¹⁶⁸ And the court cannot provide relief against this windfall; California is one of only four states where the court cannot reduce a statutory fee that is clearly excessive under the circumstances of the particular case.¹⁶⁹

If California were to follow the lead of the majority of other states¹⁷⁰ using a fee schedule and permit the court to reduce the statutory fee where clearly excessive, the certainty now provided by the fee schedule would be somewhat limited. This is because the persons interested in the estate would have a right to court review of the reasonableness of the statutory fee; and, notwithstanding the statutory fee schedule, the court would have to determine the reasonableness of the fee under the circumstances of the particular estate.

Where the estate requires more than ordinary probate legal services, the California fee system does not provide certainty. The attorney is entitled to an additional fee for the extraordinary services, and the court must fix the reasonable value of those services.¹⁷¹ The responses to the Questionnaire indicate that the majority of lawyers request additional compensation in at least 25 percent of the estates they handle.¹⁷² In addition, there is some uncertainty in what constitutes an extraordinary service, and court time may be required to determine whether the particular service rendered is one for which the attorney is entitled to additional

168. See, *supra*, note 97.

169. See Table 6, *supra*, under "Comparison of California Fees With Fees Charged in Other States."

170. See Table 6, *supra*, under "Comparision of California Fees With Fees Charged in Other States."

171. See discussion in text, *supra*, at notes 27-40.

172. See Appendix 1, Table D (Charging Extraordinary Fees).

compensation.¹⁷³ Moreover, some probate courts review all the legal services provided to determine whether the statutory fee is sufficient to cover those services, including the extraordinary services.¹⁷⁴ As a result, court review of probate legal fees consumes a significant amount of our judicial resources.¹⁷⁵

For these reasons, the advantage of simplicity and certainty provided by a statutory fee schedule is achieved only to a limited extent in California and then only at the cost of a windfall to the attorney under some circumstances.

Increased Litigation Over Fees

Some attorneys view the advantage of simplicity and certainty in a different way. They believe that to substitute a reasonable fee system for the statutory fee system would result in disputes as to what constitutes a reasonable fee and would require more court involvement in fee disputes. The following responses to the Questionnaire take this view:

[The reasonable fee] creates another area for dispute.

[A reasonable fee system] Breeds litigation.

. . . additional litigation over fees.

[Statutory fee schedule] prevents a lot of potential disputes over nothing.

[Reasonable fee system would cause] increased fee disputes.

[Reasonable fee system] would create disputes.

173. See discussion in text, *supra*, at notes 28-34.

174. See text, *supra*, at notes 38 and 39.

175. See Report of Ad Hoc Committee on Attorney Fees in Probate (May 15, 1985), reprinted as appendix to *Los Angeles County Probate Policy Memorandum in California Local Probate Rules* (8th ed. Cal. Cont. Ed. Bar 1987), at 19-89 ("A tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees").

[Reasonable fee system] invites litigation whether merited or not.

Too much time wasted fighting over fees.

[Present California] System minimizes fee disputes.

Present system minimizes controversy.

[Reasonable fee system --] Too much trouble, and too much opportunity for dissension.

[Reasonable fee system] would result in more litigation regarding fees.

[Reasonable fee system] would create too many fee arguments.

Without [the statutory fee schedule] more attorney and court time is spent fixing fees than handling the clients problems.

[Under reasonable fee system] Lots more time would go into recording time & litigating fees.

The California probate courts now devote a substantial amount of time to probate attorney fees.¹⁷⁶ The court is required to review the fees, and fix reasonable fees for extraordinary services, even where the persons interested the estate have no objection to the amount of the attorney fee. As to the extent to which attorneys request reasonable additional compensation for extraordinary services, see Appendix 1, Table D (Changing Extraordinary Fees). That table indicates that about 14 percent of probate lawyers never request additional compensation for extraordinary services. The majority of lawyers request additional compensation for at least 25 percent of the estates they handle.

The UPC provisions on attorney fees restrict court involvement to cases where there is a dispute concerning the fees. One attorney has suggested that a reasonable fee system be adopted and that the Independent Administration of Estates Act be extended to cover attorney

176. See note 175, *supra*.

fee contracts. He believes that this would minimize the need for the court to determine fee disputes.

Litigation on fees might be reduced rather than increased if a reasonable fee system were adopted in California and the review of the fees were limited to cases where there is an objection from an interested person. The distinct trend in other states is to abandon the statutory fee schedule in favor of the UPC provisions concerning fees. It is doubtful that this trend would continue if the adoption of the UPC fee provisions in other states resulted in a burdensome amount of litigation concerning fees.

Concern That Courts Will Not Allow Fair Reasonable Fees

A matter of serious concern to some attorneys is their belief that the courts are not qualified to or will not take the time to make a fair decision as to what constitutes a reasonable fee. This view is based on experience in requesting additional reasonable fees for extraordinary services. Some lawyers take this view but nevertheless desire to keep the statutory fee schedule. Others who share this view would adopt the UPC fee provisions in California.

The following responses to the Questionnaire reveal this concern:

Many probate judges lack experience (or the time to become informed) in technical matters, e.g., tax, and make fast, rule-of-thumb decisions on fees.

Judges have no idea of how expensive it is to practice.

. . . to the extent the statutory fee is inadequate, extraordinary compensation is available (although courts are increasingly reluctant to grant it).

Most judges reduce fees because they never worked in private practice before being on the bench.

[A reasonable fee system] would (1) create uncertainty, resulting in the increased likelihood of litigation, and (2) would be practically unworkable since many probate judges, with little or no experience, would rely on the repealed statutory fees as a standard.

I'm tired of the prejudice against paying my fee from both the courts and the clients. The courts feel its absolutely necessary to reduce extraordinary fees. In some difficult estates due to the time involved and the

risk of getting no benefit to the estate and thus disapproval of your fee, the cases are essentially becoming contingency cases with no contingency benefit.

Some probate judges are unaware of the cost of law practice when it comes to awarding fees. One judge I have appeared before does not give more than \$85.00 per hour for extraordinary services and another gives \$100. This is regardless of the quality of the work performed, the skills of the attorney performing it, and the general overhead we encounter. Under no circumstances would I want to make our fees completely discretionary with the court as I find some judges to be arbitrary.

Courts often unreasonable regarding allowable hourly rates for experienced counsel.

Courts are out-of-touch with what it costs to run a law office and they uniformly view our fee requests with an unnecessarily jaundiced eye. I have no such problems with most of my clients.

[The UPC fee provisions] would eliminate local court prejudice against out of town attorneys.

Our probate courts and commissioners are excessively involved and inadequately qualified in many aspects of the work--and most often in matters involving fees and tax questions.

Also, the recent display of arbitrariness by our local court on the subject of extraordinary fees shows how the current system can jeopardize one's livelihood.

There is also concern among practitioners that low paid court bureaucracies and modestly (depending on the point of view) paid judges will not be reasonable in determining fees. I share the concern, but the practitioner is in a far better position to protect himself from judicial caprice than the heirs are to protect themselves from a fee schedule that overcompensates low quality work.

The concern of these lawyers is a reason why many of them favor the statutory fee schedule or would favor adoption of the UPC fee provisions. They fear that under a system where the court is required to fix a reasonable fee, the fee fixed by the court will not actually be a reasonable fee. Under the UPC fee provisions, the court becomes involved only if some interested person objects to the fee. In addition, at least 10 states and the District of Columbia have statutory statement of the standard or factors that are to be taken

into consideration in determining what constitutes a reasonable attorney fee.¹⁷⁷ Some of these states are UPC states. The addition of such a statement to California law might provide a better standard for California probate courts in determining what constitutes a reasonable fee.

Personal Representative Not Qualified to Make Fee Agreement

Some of the lawyers who responded to the Questionnaire favor the statutory fee schedule because they believe that the personal representative lacks the qualifications to determine what constitutes a reasonable fee or will be emotionally unable to deal with the fee question:

Lay persons have no rational conception of the complexity of modern day probate proceedings.

Without court supervision in my opinion there would be an abuse of the fee charged, because of lack of knowledge on both the attorney and the inexperienced personal representative except for the probate specialist.

Most clients do not understand the complexity of probate and the amount of time it takes.

Statutory fee is preferable in that otherwise a fee agreement must be reached at outset and that is a difficult (emotional) time for the family to consider such.

Probate proceedings come at a difficult time for many families. Not having to negotiate a fee at that time is one less burden we place on them. Clients do not understand probate or the ancillary services (transfers, tax planning, etc.). . .

Probate is often a matter a person gets involved in once in a lifetime. They don't know what is a reasonable fee . . .

Personal representatives and heirs generally have no idea what an adequate fee should be.

177. See discussion, *supra*, under "Standards or Factors to be Taken Into Consideration in Determining Amount of Attorney Fee."

The court should set the fee to protect the unsophisticated beneficiary. The statutory fee works--but even if it were repealed, the court should still have the power to review fees in all cases.

Few clients have any understanding of an "appropriate" fee.

Present system is more fair and acceptable to unsophisticated persons who are representatives or heirs of estate.

At time of death, the prospective client is often an heir/legatee, & not in position to bargain.

I do not think personal representatives as a general rule have the experience of knowledge to know what the fee should be.

Client would be at unfair disadvantage due to ignorance in negotiating a fee agreement for the handling of the probate.

There are some other reasons [for abandoning the statutory fee schedule], but they were so poorly addressed by the old system that there is no need to fear that a new system would do worse. For example, there is some concern that grieving heirs are in no condition to argue about fees, but the current system actually aggravates this problem--because the opportunity to negotiate the fee disappears within a few days of death. (Most heirs I've dealt with were plenty capable of discussing fees by the time the probate process was over--and I think most would do so in cases of overreaching if the attorney did not have a law of the State of California backing up his outrageous fee demand.)

The concern is often expressed that the grieving widow is unable to negotiate the fee for the legal services to probate her spouse's estate. However, probably in the great majority of cases, the estate of the deceased spouse is handled under Probate Code Sections 13650-1366 (petition for order for determination or confirmation of property passing or belonging to surviving spouse). The attorney's fee for services in connection with this procedure is determined by private

agreement between the attorney and client and is not subject to approval by the court.¹⁷⁸

In a significant number of additional cases, the decedent's estate is governed after death by the terms of a living trust. In these cases, the fee for legal services is determined by agreement and is not approved or reviewed by the court.¹⁷⁹

Where the value of the decedent's real and personal property does not exceed \$60,000, an informal procedure can be used and a formal probate proceeding can be avoided.¹⁸⁰ The attorney's fee for services in connection with the informal procedure is determined by agreement between the attorney and client and is not subject to approval by the court.

In the remaining cases, there is a need for a formal probate proceeding, and the attorney fee is fixed by the court using the statutory fee schedule and additional fees fixed by the court for extraordinary services.¹⁸¹ The question is whether in these remaining cases, the attorney fee should be fixed by agreement between the attorney and client as for nonprobate decedent's estates and other legal matters.

Fee Schedule Subject to Negotiation

A few attorneys pointed out that the fee schedule is subject to negotiation and suggested that this feature of the existing system protects against excessive fees for ordinary services. A few attorneys suggested that the public needs to be educated to the fact that the fee is negotiable. The following comments concerned this matter:

However, client/public need to be educated to the fact that fee for ordinary services is negotiable.

178. See note 44, *supra*.

179. See note 41, *supra*.

180. See discussion, *supra*, under "Fee Charging in California--Attorneys' Fees Where No Formal Probate Proceeding."

181. See discussion, *supra*, under "Fee Charging in California."

It is already possible for personal representative [to contract] for less than statutory fee.

Statutory fees are important safeguards for the client since they set a maximum rate. There is no prohibition against reducing the statutory fee & many attorneys do so.

I do not think personal representative as a general rule would have the experience or knowledge to know what the fee should be. . . . In any event, an experienced personal representative has the ability to negotiate the fees downward under the current probate scheme. They just can't have the ability to adjust the fees upward.

The fact is that as a matter of practice the statutory fee is the minimum fee in California.¹⁸² There is no reason to believe that clients are informed that the statutory fee is negotiable. More than half of the lawyers never charge less than the statutory fee for ordinary probate services. More than 90 per cent ordinarily charge the statutory fee.

Comments Supporting Adoption of UPC Fee Provisions

A number of lawyers who responded to the Questionnaire gave reasons supporting their view that California should adopt the UPC provisions governing fees of the personal representative and the estate attorney:

This would make probate work fit in better with the overall economics of law practice.

Statutory fees do not benefit client when paralegal services are utilized; only the attorney benefits.

Most non-probate services are subject to private contract between attorney and client. I see no reason to continue the antiquated practice of involving the court in fee determinations if nobody objects. Indeed there are some extraordinary probate-related services which should not be placed on public record to support a fee award. Examples of this may be settling a tax fraud case for a well-known person who may not want the accusation to be public; or negotiating a settlement by someone claiming to be an illegitimate child. The lawyer is placed in the position of trying to protect

182. See discussion in text, *supra*, at notes 25-26.

the client's privacy and trying to justify to a court the amount of the fee, when the client already approves the fee. If a superb result is obtained as a result of settlement negotiations, it would be foolhardy for the client or the lawyer to flaunt the result on the public record to support the fee. The probate court should be involved only if there is a dispute as to the fee.

Corporate fiduciaries provide more services which would otherwise be performed by attorney; estate should benefit from decreased attorney involvement.

We're way off base now. My fee nearly always is based on hourly basis because I have ongoing business relationships with these people, who also are friends. Other reasons:

- 1) Usually I've prepared the will/trust/whatever & paved the way for orderly probate.
- 2) In today's inflationary times, the statutory fee is excessive. We (lawyers) already have a reputation for gouging and I'd like to turn that around.
- 3) Monthly bills paid are more appreciated by my bookkeeper than pay-when-done bills. Also, they're predictable cash-flow-wise.

Under present provisions there is overcompensation in some estates and under compensation in others. Fees should be determined as in other matters by agreement with the client.

This would defuse resentment against attorneys, the court system and probate procedures.

This would cause administration of estates to be charged as are other legal services; Problems could arise, but the "fixed schedule syndrome" resented by the public would be eliminated.

In small estates, we can't handle because fees too low. Allow charging for paralegal time in extraordinary fee matters!

Statutory fees are often exorbitant where there is a corporate executor who does most of the work. Fees for extraordinary services are often claimed without regard to the adequacy or inadequacy of statutory fees.

My clients are financially sophisticated and thus the court's involvement in the executor, trust and attorney's fee determination is not usually needed or desirable.

Fee schedule is capricious--frequently over compensates.

Current statutory fee as a % is not fair to estate--too high in most cases; too low in others (few).

It would be fairer and avoid windfalls to attorneys. If a case justifies a large fee, presumably the attorney will obtain an adequate fee by demanding such to take the case, as we do in any other litigation or legal matter.

A large portion of my practice is trusts. A primary client consideration is large attorney court costs for probate.

I always keep track of my time, and I only charge extraordinary fees to the extent the statutory fee doesn't cover my rates. It's only fair. While I long for that \$10 million probate estate, I always use living trusts for my wealthy clients; a percentage fee on same estate is not reasonable. The [UPC fee provisions] provides for services according to effort expended.

I approve because this would make fees reasonable in relation to services performed in probate cases, just as they now are in non-probate cases (emphasis in original).

Time and effort would be rewarded rather than simple gross value.

The courts are too much involved in the probate process. Where there is no disagreement among the beneficiaries or creditors, it should be a summary process.

Clients should be free to select their own attorneys and agree to a basis for fees. So long as all interested parties have notice, the court should not be involved. Better lawyers should charge more.

A reasonable fee will be more likely to heirs.

Present practice in general results in a fee too high for the nature and extent of services rendered.

It seems to me to be a waste of the court's time to review and approve fees when no dispute or objection to fee request, but potential for abuse.

I think charging for probate work on a time basis (hourly rate) is fair and would be preferable to the existing schedule.

It would bring probate practice under the fairer guideline of time involved in accomplishing the desired result. Most estate would wind up paying less in fees.

A well planned estate should only be liable for the time and effort to wind it up. But a "deferred maintenance" estate ought to pay now for what it didn't pay then, without the attorney footing the bill.

I believe that the attorney's fee should be primarily based on time, with weight given to the complexity of the estate and efficiency and qualifications of counsel. In short, why shouldn't probate fees for attorneys be determined in the same way as other fees.

Summary

The policy issue is whether a reasonable fee provision should be substituted for the statutory fee schedule in California. The views of probate attorneys differ on this issue. About 25 percent of the attorneys believe that probate fees should be fixed by agreement between the personal representative and the attorney with an appropriate provision for review by the court if an interested party objects. They believe that this would avoid the windfalls that result under the statutory fee schedule and minimize the involvement of the courts in probate fees. They believe that the existing fee system frequently overcompensates the attorney. They believe that a system providing for a reasonable fee and court review only upon objection would reduce the amount of court involvement in attorney fee matters. Other attorneys would substitute a reasonable fee system for the statutory fee system but would require court review of the fees in every case, not just when an interested person objects.

A clear majority of the attorneys favor continuation of the existing statutory fee schedule system. The most significant objection they make to the adoption of a reasonable fee system is that it would require each estate to pay a reasonable fee based on the legal services provided to that estate. The objectors point out that under the existing California scheme, the excessive fee charged to the large estate with liquid assets subsidizes the small estate. The policy issue is whether this policy should be continued in California.

Another question is whether the adoption of the reasonable fee scheme would increase the litigation concerning attorney fees. The UPC method of fixing the lawyer fee permits the personal representative and the attorney to make an agreement fixing a reasonable fee and avoids

the need to devote court time to the fixing of the fee unless an interested person requests the court to review the fee. Under existing California law, the attorney is entitled to the statutory fee unless the client and attorney make an agreement for a lower fee. Replacing the statutory fee schedule with a reasonable fee fixed by contract would permits the large, simple estate to avoid paying an exorbitant fee. Permitting an interested person to obtain review of the fee would tend to restrain agreements for excessive fees. The primary difficulty with the UPC method is that it imposes on the person seeking to obtain court review of the fee the burden of taking appropriate action to obtain court review the fee. Under existing California law, court review of the fee is automatic.

One lawyer has suggested adoption of the UPC scheme with the following additional features designed to fit the UPC scheme into the California probate system:

I would suggest however that the determination of fee be kept out of the court system to the maximum extent possible:

A. Court review should be waived in the same manner as a waiver of account.

B. For independently administered estates, the fiduciary should be able to pay the fee by following the advice of proposed action procedure. The statute could require specific statutory language advising the heirs of the right to have the matter referred to the court.

C. For the presumably small percentage of cases not removed from the system by the foregoing procedures, court review will be necessary. We already do this for extraordinary fees and there is a considerable body of law pertaining to court set fees in general.

The trend nationwide has been to abandon a system involving a fee schedule with additional compensation for extraordinary services in favor of the UPC fee scheme. There is no evidence that the substitution of the UPC fee scheme has increased fee litigation in other states. In fact, adoption of the UPC method of fixing attorney fees in California with the review provisions outlined above probably would reduce the amount of court time devoted to the fixing of attorney fees. The Ad Hoc Committee on Attorney Fees in Probate, appointed by the Presiding Judge, Probate, of the Los Angeles Superior Court in

1984, states the problem that caused the Presiding Judge to appoint the ad hoc committee: "A tremendous amount of the Probate Court's time is spent dealing with disputes over attorney's fees."

Under the existing California procedure, not only does the court review the attorney's calculation of the statutory fee but in a significant number of cases the court must also review a request for additional fees for extraordinary services and fix a reasonable fee for those services. And the disputes concerning attorneys' fees are often between the court and the attorney, not between persons interested in the estate and the attorney; court determination of fees is required in California even if no interested party objects to the fee requested by the attorney. A system for review only if an interested person objects to the fee would tend to reduce the burden on the court of reviewing the reasonableness of probate attorney fees.

There is a risk if court review of the attorney fee is limited to cases where there is an objection to the fee. The personal representative or heirs or beneficiaries may be unaware of what is a reasonable fee, and the attorney may take advantage of this by charging an unreasonably high fee. A number of attorneys who responded to the Questionnaire expressed concern that some attorneys might charge unreasonably high fees if the fees did not require court approval. Under existing law, the attorney cannot charge more than the statutory fee unless the court reviews and approves the additional fee. But the existing law does not provide a satisfactory solution. The existing law does not protect the estate. The statutory fee schedule may impose on the estate a fee that is unreasonably high under the circumstances of the particular estate, and the court is not authorized to reduce the fee to a reasonable fee even where there is an objection to the fee. The existing law does not protect the attorney who provides high quality extraordinary services. The attorney may not receive a reasonable fee for those services even if the client has no objection to the fee. This is because the court must review every claim for additional fees for extraordinary services, and the court either may not take the time to determine fairly what constitutes a reasonable fee under the circumstances or may not award a reasonable fee because the court is unaware of what constitutes a reasonable fee. Numerous

attorneys who responded to the Questionnaire expressed concern about the inadequacy of the fees awarded by the court for extraordinary services.

There is always the risk that the personal representative and the attorney will enter into an agreement that provides the attorney with an unreasonably high fee, and no person interested in the estate objects to the fee. But the persons who requested the California Probate Code study and those who have secured adoption of the UPC method in other states are willing to take this risk. They prefer the UPC scheme (a fee agreement with the attorney with a right to have court review if a person interested in the estate believes the fee is unreasonable) to the existing statutory fee schedule.