

Seventh Supplement to Memorandum 87-100

Subject: Study L-1036 - Probate Attorney Fees (Policy Issue
Determination)
Study L-1055 - Fees of Personal Representative (Policy
Determination)

Attached as Exhibit 1 is a letter from Ralph Warner of Nolo Press,
a publisher of self-help law books. The letter recommends the
elimination of California statutory fees and states the reasons for
that recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Nolo**P R E S S**

self-help law books

January 5, 1988

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CALIFORNIA LAW REVISION COMMISSION

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Re: California statutory probate fees

Dear Mr. DeMouilly:

Delores Bonner of CalJustice recently forwarded to us a copy of your letter soliciting comments on California's statutory probate fees. We at Nolo Press have been interested in this issue for some time and welcome the opportunity to give you our perspective; our comments are enclosed.

Our conclusions are drawn from years of working with the probate law (we publish several self-help legal books on aspects of the subject) and, more important, hearing from people who must deal with the probate system. As our comments explain, we think elimination of statutory probate fees is long overdue.

We would like to receive any written report or recommendations the Commission issues on the question of probate fees. If you are compiling a mailing list, could you please add Nolo, or let us know how to find out what action the Commission takes? Thank you.

Sincerely,



Ralph Warner

PROBATE FEES: SUGGESTIONS FOR REFORM

Presented to the California Law Revision Commission
by Nolo Press, Berkeley, California.

January 14, 1988

California's statutory probate fees are, to put it simply, a scandal. Nolo Press strongly urges the Law Revision Commission to recommend their long-overdue removal from the law.

Nolo Press is a publisher of self-help law books and software, including *How to Probate an Estate* by Julia Nissley and *Plan Your Estate* by Denis Clifford. Our experience has convinced us that 1) the majority of California decedents' estates can be probated by family members or friends without paying a lawyer thousands of dollars, and 2) the statutory fees are grossly inflated and unfair.

We discuss our specific objections below, but they can be summarized briefly as follows:

- The basis for the statutory fees, gross value of the estate, often bears no reasonable relation to the attorney's services required; millions of consumers are grossly overcharged.
- Such price-fixing discourages competition and limits consumers' choices.

- Codification of these fees gives consumers the misleading impressions that the fees are reasonable and that attorneys have no choice about how much to charge.
- The artificially high statutory fees are a windfall for many probate lawyers, who perform little work (supervisory or direct) on most probate cases. Indeed, the paperwork has become so simplified and standardized over the years (through extensive use of printed forms) that many law firms turn it over to free-lance or in-house paralegals. The statutory fees reward lawyers so well that they can farm out the work and still profit handsomely.

Statutory Fees Are Not Related to Services Needed

The amount of legal work needed to probate an estate varies tremendously. Most estates are relatively simple. They contain common assets such as a house, car, securities and miscellaneous personal property; often virtually everything is left to the surviving spouse or close family members. Such a probate may require a total of only a few days' of legal work, even if the assets have a substantial dollar value. Of course, the occasional messy case—one with fighting heirs, muddled ownership or too many debts—can drag on for years.

This variation is ignored by the current statutory system. The fee schedule is based on one singularly inappropriate factor: gross value of the probate estate. It doesn't make

sense for the lawyer, and it certainly doesn't make sense for the client. Take one simple example: an apartment building, worth \$400,000, in a probate estate. Under California law, the lawyer's fee is the same whether the decedent owned the building outright or had a \$300,000 mortgage on it.

Price-Fixing Discourages Competition

This proposition is self-evident, and we won't belabor the point. But as long as high fees are given a legislative blessing, and the profession happily sticks to them, lawyers have no incentive to lower them. Indeed, they cling tightly to this high-profit area as competition in other areas (from the ever-growing number of lawyers and from independent paralegals) intensifies.

The profession's very stubbornness, however, leaves itself-like any artificially protected industry-vulnerable to eventual challenge from more efficient and affordable competitors. There are already signs of a developing "gray market" of non-lawyers, some of them the very free-lance paralegals lawyers rely on, who help consumers with probate paperwork and charge thousands less than lawyers.

Statutory Fees Mislead Consumers

Consumers, told by lawyers that attorneys' probate fees are "set by statute," are understandably led to believe that neither they nor the attorney has any choice in the matter. Unfamiliar with the probate system and forced to act quickly

when a loved one dies, they are extremely unlikely to shop for a better deal.

Similar abuses led to a major dose of government regulation in the funeral business, something that will surely happen to lawyers if voluntary change isn't forthcoming.

Statutory Fees Are a Windfall for Lawyers

An open secret among the legal community is the fact that more and more of the actual paperwork of a probate is never touched by an attorney unless it has to be signed by someone with a bar card. Instead, it is given to a paralegal—often, a free-lance paralegal who handles probates for several firms and has his own office.

This practice is a quite logical consequence of the recent simplification and standardization of the probate process. Printed forms, provided by the Judicial Council and local courts, can be used almost exclusively. In most routine cases, the only form that is typed from scratch is the petition for final distribution. Until that point, all that a lawyer (or personal representative acting on his own) need do is check boxes and fill in blanks on printed forms. The current system, which uses trained non-attorneys for these tasks, works well. The only problem is that the client doesn't know (and it isn't in the attorney's financial interest to explain) that a much lower paid employee (or independent businessperson) is the one doing the work. With

the fees already enshrined in statute, the result is that the attorney is a very well-paid middleman.

What if the attorney does the work herself? It still doesn't justify the fees set out by the Probate Code. Very rarely is sophisticated legal advice necessary in the probate process. It is simply an overly complicated maze; anyone who has been through it a few times can show others the way.

Summary

As the Commission is aware from its ongoing study of California probate law and procedure, the system has many defects. One of the most glaring, and at the same time easiest to correct, is the statutory fee schedule. Doing away with it would enable consumers to pay attorneys for the work they do. Surely even attorneys can't argue with that.

A second, related reform is to remove the vague and counterproductive unauthorized practice of law rules that discourage non-lawyers from offering probate form preparation services directly to the public. If lawyers compete in an honest market, their prices will come down and the quality of services will go up.