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Memorandum 87-107

Subject: Study L-1055 - Fees of Personal Representatives (Policy Issue Determination)

Attached to this Memorandum is a staff study of California personal representatives' fees. This study relies in part on information developed in the attorneys' fee study (Memo 87-100), and should be read together with that study.

Respectfully submitted,

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CALIFORNIA PERSONAL REPRESENTATIVES' FEES

December 3, 1987

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Copies of this study are furnished to interested persons solely to give the Commission the benefit of the views of such persons. This study should not be used for any other purpose at this time.

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INTRODUCTION

This study of personal representatives' fees in California is a companion to a Law Revision Commission study of California probate attorney fees.¹ This study draws on empirical information and analysis contained in the attorneys' fee study, which should be consulted for a more exhaustive analysis of the issues and policy alternatives.

FEE CHARGING APPROACHES

In the fifty states, the fees of personal representatives in estate administration are fixed by one of the following methods:²

--Twenty-four states use the reasonable fee method.

--Twelve states use the percentage fee method.

--Fourteen states use a hybrid of the percentage fee and reasonable fee methods.

The Reasonable Fee Method

Nine of the 24 reasonable fee states use the Uniform Probate Code system under which the personal representative determines his or her own fee.³ An interested person who objects to the fee may petition the court to have the reasonableness of the fee reviewed.⁴ If the court determines that the fee is excessive, the court may order the personal representative to make appropriate refunds.⁵

1. See Cal. L. Revision Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987).

2. See *infra* Appendix 1.

3. Uniform Probate Code §§ 3-719, 3-721. The nine states that use the Uniform Probate Code system of determining the personal representative's fee are: Alaska, Arizona, Colorado, Florida, Idaho, Maine, Minnesota, Nebraska, and North Dakota.

4. Uniform Probate Code § 3-721.

5. *Id.*

In the other reasonable fee states, the fee is fixed by the court, or sometimes by the probate commissioner or court clerk.⁶

In 18 of the 24 reasonable fee states, the fee must be "reasonable" (or sometimes "just and reasonable" or "just and proper") without further elaboration as to what constitutes reasonableness. However, six states⁷ specify factors to be considered in determining what is a reasonable fee. These factors include the following:

--The time and labor required, the novelty, complexity, and difficulty of the problems involved, and the skill needed to perform the service properly.

--The likelihood that serving as personal representative will preclude other employment by the person.

--The fee customarily charged in the locality for similar services.

--The amount involved, the extent of the responsibilities assumed, and the results obtained.

--The time limitations imposed by the circumstances.

--The nature and length of the professional relationship with the decedent.

--The experience, reputation, diligence, and ability of the personal representative.

The Percentage Fee Method

The percentage fee method usually fixes the personal representative's fee as a percentage of the value of the estate. The "estate" for this purpose may be the net or gross estate, and may be expressed variously as the "probate estate," the "estate accounted for," the "amount of the inventory," or the estate value for inheritance or estate tax purposes.

6. See *infra* Appendix 1.

7. These six states are Colorado, Florida, Maine, Minnesota, Nebraska, and Vermont. Colo. Rev. Stat. § 15-12-721 (1974); Fla. Stat. Ann. § 733.617 (West Supp. 1987); Me. Rev. Stat. Ann. tit. 18-A, § 3-721 (1981); Minn. Stat. Ann. § 524.3-719 (West Supp. 1987); Neb. Rev. Stat. § 30-2482 (1985); Vt. Code of Professional Responsibility, DR 2-106 (1986). See also *infra* Appendix 1.

In two states, the "estate" used to determine the fee includes assets owned by the decedent that are not part of the probate estate, although a lower percentage is applied to nonprobate assets than to probate assets.⁸ In some states, the percentage is applied to a limited portion of the estate, such as personal property only, or receipts and disbursements. Some states apply a higher percentage to "income" than to estate assets. Some states apply a lower percentage to cash or its equivalent, and to real property not sold during estate administration.

Eleven of the 12 percentage fee states permit the court to authorize fees for "extraordinary" services, in addition to the percentage fee. The California statute gives examples of extraordinary services: sales or mortgages of real or personal property, contested or litigated claims against the estate, good faith defense of a will after it is admitted to probate, successful defense of a will before it is admitted to probate, preparation of estate, inheritance, income, sales, or other tax returns, adjustment, litigation, or payment of taxes, litigation concerning estate property, carrying on decedent's business pursuant to court order, and other litigation or special services.⁹

In some percentage fee states, the court may reduce the percentage fee. New Mexico uses the statutory percentage unless the court orders otherwise.¹⁰ Ohio and Wisconsin permit the court to reduce or deny the fee for improper performance of duty by the personal representative.¹¹

8. The two states that include some nonprobate assets to determine the personal representative's percentage fee are Ohio and Oregon. Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1987); Or. Rev. Stat. § 116.173 (1983 & 1985 reprint).

9. Prob. Code § 902.

10. N.M. Stat. Ann. § 45-3-719 (1978).

11. Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1986); Wis. Stat. Ann. § 857.05 (West Supp. 1987).

The Hybrid Method

Fourteen states use a hybrid of the reasonable fee and percentage fee methods.¹² In these states, the statute usually prescribes a reasonable fee, but with percentage limits expressed as a maximum, minimum, or both.

Most hybrid states prescribe a maximum percentage, but not a minimum. Alabama prescribes a fee that is "fair," but not to exceed two and a half percent of receipts and disbursements.¹³ Arkansas prescribes a fee that is "just and reasonable," not to exceed a sliding percentage from three to ten percent of the estate value, depending on the size of the estate.¹⁴ Iowa prescribes a reasonable fee not to exceed a sliding percentage from two to six percent of the gross estate, depending on the size of the estate.¹⁵ New Mexico prescribes a fee not to exceed a sliding percentage from five to ten percent of the personal estate, depending on the size of the estate, plus such amount as the court may allow on real property.¹⁶ Kentucky provides that the fee shall not exceed five percent of the sum of the value of the personal property and estate income.¹⁷ Maryland prescribes a reasonable fee, not to exceed a sliding percentage from four to ten percent, depending on the nature of the property and the size of the estate.¹⁸ North Carolina provides that, if the estate has a gross value larger than two thousand dollars, the fee shall not exceed five percent of receipts and expenditures.¹⁹

12. See *infra* Appendix 1.

13. Ala. Code § 43-2-680 (1982).

14. Ark. Stat. Ann. § 62-2208 (Supp. 1985).

15. Iowa Code Ann. § 633.197 (West 1964).

16. N.M. Stat. Ann. § 45-3-719 (1978).

17. Ky. Rev. Stat. Ann. § 395.150 (Baldwin 1978).

18. Md. Est. & Trusts Code Ann. § 7-601 (Supp. 1984).

19. N.C. Gen. Stat. § 28A-23-3 (1976 & Supp. 1983).

Montana prescribes a reasonable fee, not to exceed a sliding percentage from two to three percent depending on the size of the estate, but not less than the smaller of \$100 or the value of the gross estate.²⁰ South Carolina provides that the fee shall not exceed five percent of the sum of the value of the personal property, sale proceeds of real property, and estate income, but not less than fifty dollars.²¹

Georgia allows a percentage fee on money received and paid out by the personal representative, but allows reasonable compensation on property delivered in kind to distributees of the estate, not to exceed three percent of the value of the property.²²

Missouri is the only state that prescribes a minimum percentage, but no maximum -- a sliding percentage from two to five percent of personal property and proceeds of real property sold, depending on the size of the estate.²³ Mississippi prescribes both a maximum and a minimum percentage.²⁴

The statutes of some hybrid states specify factors to be considered in fixing the fee. In Alabama, the fee is fair compensation for the personal representative's "trouble, risk, and responsibility."²⁵ In Arkansas, the personal representative's fee for services in connection with real property is based on the "nature and extent of the services," the "extent and value of the real property," and "other relevant circumstances."²⁶ In North Carolina, the personal representative's fee is based on the "time, responsibility, trouble and skill involved in the management of the estate."²⁷ In Delaware, the

20. Mont. Code Ann. § 72-3-631 (1985).

21. S.C. Code Ann. § 62-3-719 (Law. Co-op. 1987).

22. Ga. Code Ann. §§ 53-6-140, 53-6-141, 53-6-143 (1982).

23. Mo. Ann. Stat. § 473.153 (Vernon Supp. 1987).

24. Miss. Code Ann. § 91-7-299 (1973).

25. Ala. Code § 43-2-680 (1982).

26. Ark. Stat. Ann. § 62-2208 (Supp. 1985).

27. N.C. Gen. Stat. § 28A-23-3 (1976 & Supp. 1983).

factors considered are comparable to those used in some reasonable fee states.²⁸

**COMPARISON OF PERSONAL REPRESENTATIVE'S
FEES WITH FEES OF ESTATE ATTORNEYS**

The methods of compensating the attorneys for the estate are closely similar to the methods for compensating the personal representative: Attorneys' fees are determined by using a reasonable fee method, a percentage fee method, or a hybrid of the two.²⁹

States are more likely to provide a percentage fee or hybrid for the personal representative than for the estate attorney. This is illustrated in the following table:

<u>Table 1. Comparison of States' Fee Systems for Attorney and Personal Representative</u>			
<u>Fee of:</u>	<u>No. of states providing reasonable fee</u>	<u>No. of states providing hybrid fee</u>	<u>No. of states providing percentage fee</u>
attorney	41	5	4
personal representative	24	14	12

The likely reason for this is that the personal representative is compensated for managing the estate. The larger the estate, the greater are the responsibilities assumed by the personal representative. The estate attorney, on the other hand, is compensated for professional expertise and other factors which bear a less direct relationship to the size of the estate.

28. See *supra* text accompanying note 7; Del. Ch. Ct. R. 192 (1981).

29. See Cal. L. Rev. Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987).

CALIFORNIA SYSTEM FOR FEE OF PERSONAL REPRESENTATIVE

California is one of 12 states that use a percentage fee system. When a decedent's estate is administered in a formal California probate proceeding, the personal representative is entitled to a fee based on the value of the estate accounted for by the personal representative, with higher percentages payable for smaller estates.³⁰ The court may also award additional fees for extraordinary services rendered by the personal representative.³¹ The personal representative's fee is determined in California by the same rules as the fee for the estate attorney.³² The following table shows the statutory fee of the personal representative in effect in California in 1987:

Table 2. Statutory Personal Representative Fee Schedule			
(Prob. Code § 901. Additional amounts may be allowed for extraordinary services. Prob. Code § 902.)			
Estate Accounted For		PR'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)

30. Prob. Code § 901. If the decedent's will provides for the amount of the personal representative's compensation, the will controls; otherwise the statutory fee schedule is used. *Id.*

31. Prob. Code § 902.

32. Prob. Code § 910.

The following table shows the personal representative's statutory fee on estates of various sizes:

Table 3. Statutory Personal Representative's Fee on Various Size Estates			
Amounts determined from statutory fee schedule under Prob. Code § 901 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

The personal representative is entitled to the statutory fee without regard to whether it is reasonable for the particular estate.³³

CALIFORNIA STATUTORY FEE SCHEDULE COMPARED TO FEE SCHEDULES USED IN OTHER STATES

Twelve states use a rate schedule to compute the personal representative's fee for ordinary probate services.³⁴ The following

33. Estate of Getty, 143 Cal. App. 3d 455, 191 Cal. Rptr. 897 (1983). The personal representative's right to the statutory fee is qualified by Probate Code Section 1025.5, which permits the court to reduce the fee if the time taken for 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 personal representative's control and was not in the best interests of the estate.

34. See *infra* Appendix 1.

table compares the personal representative's fees computed for a typical estate using the 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 personal representative's fees for the various states.

Table 4. Comparison of Personal Representative's Fees Under Fee Schedules

<u>State</u>	<u>Fee</u>	<u>May Court Reduce Fee?</u>
New Jersey	16,475	Yes
New York	10,960	No
Oklahoma	9,825	No
California	8,850	No
Oregon	8,330	No
Wyoming	8,050	No
Hawaii	6,800	Yes
Louisiana	6,100	No
Ohio	5,770	Yes
Wisconsin	5,080	Yes
South Dakota	3,210	No
Nevada	2,620	No

Source: Appendix 2.

RESPONSES TO QUESTIONNAIRE

The Commission sent a questionnaire to California probate practitioners seeking information about the estate administration practice of each respondent, and the respondent's opinion concerning what changes should be made in the way fees are fixed in California probate proceedings.³⁵ The Questionnaire primarily concerned attorneys' fees, but two questions concerned fees of personal representatives.

35. See Cal. L. Revision Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987), at 2-3.

One question asked whether the respondent favored enactment in California of the substance of the Uniform Probate Code provision permitting an interested person to petition the court for review of the reasonableness of the compensation determined by the personal representative for his own services. More than three-quarters of those responding opposed enactment of the UPC provision.

A second question asked for the respondent's opinion concerning what changes should be made in the way fees of personal representatives are fixed. Thirty-one respondents answered this question. Many respondents said the existing California fee system overcompensates the personal representative, particularly one that is not a corporate fiduciary such as a bank or trust company, because most of the work is done by the attorney. Examples of such responses are the following:

Make [personal representatives' fees] three-quarters of attorneys' fees.

The commission awarded a personal representative should not be equivalent to the attorney fee. It is well established that the majority of the services rendered to an estate is performed by the attorney. The personal representative performs more of a perfunctory function.

In almost all cases where a non-professional personal rep is serving, the statutory fee is far too much. Personal reps should have to prove their right to fees by showing actual services provided, other than signing what the attorney puts in front of them. In general, \$500 would be more than adequate.

In many instances, the attorney performs services that are in the province of the personal representative. This is one of the reasons it is difficult [for the attorney] to be adequately compensated on an estate of \$100,000 or less. A reduction in the percentages set for personal representative's fees might be in order -- especially for individuals who are not professionals. Perhaps there might be a separate fee schedule for banks, trust companies and professional fiduciaries.

Where personal representative is not a corporate fiduciary, attorney usually performs many services supposed to be provided by personal representative. Court should have

authority to order portion of personal representative's fee paid to attorney for such services.

I feel that the personal representative is overpaid since the attorney does most of the work. The personal representative's fee schedule should be 70% of the attorney fee schedule.

The problem with personal representatives being paid by a statutory schedule is that some of the representatives earn their fee and other personal representatives are incapable of carrying out their duties and as a result attorneys and their staffs are required to do a great deal of the work normally performed by executors or administrators. I don't know that I have a recommended suggested solution but I think it is an issue that requires consideration.

Except in cases of a corporate fiduciary, executors should not be paid for preparing an accounting, because this is usually done by the lawyer or by an accountant.

In probate proceeding, individual executors or administrators often keep very inaccurate records and the attorney must reconstruct the accounting. This often requires several hours work. Perhaps there should be an allocation of the personal representative's fee to the attorney. Some attorneys refer to accountants who get paid. Reallocation of statutory fees would create a conflict of interest between attorney/client. It is a problem in some cases but perhaps there is no good solution.

Most personal representatives do nothing. Compensation should be on merits, not statutory.

Their [personal representatives'] fee should not be same as attorney fee.

Very few of our representatives earn their fee like the attorney does.

Representative who does very little work [is] overcompensated by statutory percentage; representative who does lot of work (e.g., continuing business, managing apartment houses) is undercompensated. Solution: Factors shown in survey paragraph 16 [time involved, complexity of estate, result achieved, PR's special qualifications] should be used, and declaration of work performed and fee requested should be submitted for court approval.

Attorney or staff should be compensated for representative's work performed.

Often the lawyer does all the work of the fiduciary. In such case, the fiduciary should not be paid full fee. On other hand, banks will not take work under \$200,000+ estates.

I feel that the personal representative is overly compensated in many instances. Many times they waive the fee and do the work anyway. There is no one clear way of lumping all these cases together. I think there should be an overall reduction in the amount awarded to the P.R.

Personal representatives should be paid at some reasonable hourly rate, depending on what they do. Many times the statutory fee is exorbitant for the executor, while the attorney is not adequately paid for his ordinary services.

The Commission has also received unsolicited letters expressing concern about the effects of corporate fiduciaries declining to take moderate and small estates, and the shifting of estate work from inexperienced personal representatives to the estate attorney:

Corporate fiduciaries are turning down probate work. Several times lately I have had to argue banks into taking cases, where obviously a corporate fiduciary would be better than the individuals available. If the estate or trust is under \$200,000, most corporate fiduciaries won't take the work. In a practical way, this proves that the "lid" on compensation under the present Probate Code is working.

The effect of this on probate administration is another matter. The usual "family member" is ordinarily not very good at fiduciary work. Sometimes attorneys have to scratch to find executors and trustees. We have come to know people, accountants, and individuals with some business experience, who will sometimes accept fiduciary work. From a practical standpoint this shifts additional burden onto the lawyers.³⁶

Another correspondent wrote:

Typically, preparation of the accounting is the responsibility of the personal representative, and is to be covered by the statutory commission payable to the personal representative. . . . [I]n the normal case, involving an individual executor or administrator, an accountant or an attorney will prepare the accounting, rather than the personal representative. In such situations, the attorney

36. Letter from Stephen I. Zetterberg to California Law Revision Commission (September 10, 1986).

should be entitled to additional compensation. On the other hand, why should the estate bear additional expense?³⁷

Two respondents expressed concern that the fee schedule may sometimes undercompensate the personal representative:

In complex cases, probate fees are too low. Awarding of extraordinary fees is arbitrary by courts and inconsistent.

There are fewer corporate fiduciaries now willing to deal with probate estates of less than \$500,000. This places a greater burden on the attorney's office to deal with mail, asset location and protection, bills, tax returns, insurance, etc.

There was some sentiment for a reasonable fee system like that in the Uniform Probate Code:

Probably should go to Uniform Probate Code system.

Believe reps should be compensated for services they actually render and not compensated if they are an heir receiving an amount greater than 10% of residual estate.

[The PR's fee should be the] same as for attorney, i.e., reasonable.

Private arrangement should be authorized, court approval abolished except on petition by interested party.

Make discretionary with court not to exceed those allowed for attorneys and depending on work effort. Allow added fees if attorney is also executor, not to exceed 1½ times total unless will allows for same.

The court should independently review [personal representatives'] fees on estate in excess of \$1,000,000.

In general, statutory fees provide an excessive level of compensation. In many cases involving adult beneficiaries with harmonious relationships, many time-consuming and expensive procedures can be omitted, e.g., (1) final account (by waiver with representative providing whatever info beneficiaries request), (2) appraisal by probate referee -- I almost never obtain appraisals by probate referees but

37. Letter from Kenneth M. Klug to California Law Revision Commission (April 1, 1985).

instead obtain waivers under Probate Code § 605(a)3). . . . All interested parties (beneficiaries & creditors) should be specifically informed of basis for determining fees and should be invited to make objections to proposed fees *informally* (by letter to judge) with the judge having discretion to set the matter for a formal hearing if he/she deems it necessary.

[Personal representatives' fees] should also be paid based on their time devoted at a new rate schedule, and allowed to hire bookkeepers, CPA's, etc.

Two respondents were skeptical about the UPC provision, one on the ground that it might increase litigation over fees, and the other on the ground that under the UPC the court reviews fees only on petition by an interested party:

[The UPC provision] could clog courts with de minimus litigation.

I think this is an important safeguard for both the personal representative and the beneficiaries to have court supervision of fee matters.

POLICY ISSUES AND RECOMMENDATIONS

Although more states use the reasonable fee method to determine the compensation of the personal representative than use either the percentage fee or hybrid methods, the fifty states are more likely to provide a percentage or hybrid fee for the personal representative than for the estate attorney.³⁸ This is probably because the percentage fee is more appropriate for the personal representative whose responsibility in managing the estate does bear some relationship to the size of the estate. All six reasonable fee states that specify factors to be considered in fixing a reasonable fee recognize estate size as an important factor: Four states specify the "amount involved" as a factor, a fifth specifies the "extent of the responsibilities

38. See Table 1 *supra* p. 6.

assumed" as a factor, and a sixth specifies the "risk or responsibility involved" as a factor.³⁹

In addition to being related to the extent of the responsibilities assumed, a percentage fee has the advantage of being determinable easily and with certainty.⁴⁰ One respondent noted that:

The statutory fee is a good method of establishing uniformity throughout the state. . . . The statutory fee is the great equalizer.

Another respondent pointed out that to change to a reasonable fee system in California "could clog the courts with de minimus litigation."

On the other hand, a percentage fee for the personal representative, like a percentage attorneys' fee,⁴¹ subsidizes the small estate by charging to the large estate fees that are often excessive in view of the service rendered. To change to the reasonable fee method would avoid the problem of the personal representative receiving the same percentage compensation as the estate attorney while the attorney does most of the work.

Several respondents mentioned problems caused by a non-professional personal representative receiving the same compensation as the estate attorney, even though the attorney does most of the work, and the problem of corporate fiduciaries declining to accept administration of small estates. Several respondents suggested

39. The four states that specify "amount involved" as a factor to be used in determining a reasonable fee are Colorado, Florida, Maine, and Nebraska. Colo. Rev. Stat. § 15-12-721 (1974); Fla. Stat. Ann. § 733.617 (West Supp. 1987); Me. Rev. Stat. Ann. tit. 18-A, § 3-721 (1981); Neb. Rev. Stat. § 30-2482 (1985). The state that specifies the "extent of the responsibilities assumed" as a factor is Minnesota. Minn. Stat. Ann. § 524.3-719 (West Supp. 1987). The state that specifies the "risk or responsibility involved" as a factor is Delaware. Del. Ch. Ct. R. 192 (1981).

40. See Cal. L. Revision Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987), at 73-76.

41. See Cal. L. Revision Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987), at 70.

having a lower percentage for the personal representative than for the estate attorney. One respondent suggested that the personal representative's fee be 70 percent of the attorney's fee; another suggested 75 percent.

If the percentage fee is to be retained for the personal representative, the policy issues discussed in the Law Revision Commission's study of California probate attorney fees should be considered.⁴² In addition, the Commission may want to consider the suggestions of respondents to the Questionnaire that:

(1) The personal representative should receive a lower statutory percentage than the estate attorney.

(2) A non-professional personal representative should receive a lower statutory percentage than a corporate fiduciary authorized to engage in the trust business.

42. Cal. L. Revision Comm'n, California Probate Attorney Fees, Parts I and II (Consolidated) (Nov. 11, 1987), at 61-108.

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APPENDIX 1. TABLES OF STATE LAWS CONCERNING PERSONAL REPRESENTATIVE'S FEE

FEE OF PERSONAL REPRESENTATIVE -- REASONABLE COMPENSATION STATES (24)

<u>STATE</u>	<u>Amount of Compensation</u>	<u>Compensation set by</u>	<u>Role of Court</u>	<u>Factors listed in statute?</u>	<u>Notes</u>
Alaska	reasonable	personal rep.	UPC	No	1
Arizona	reasonable	personal rep.	UPC	No	1
Colorado	reasonable	personal rep.	UPC	Yes	1
Connecticut	reasonable	court	fixes comp	No	
Florida	reasonable	personal rep.	UPC	Yes	1
Idaho	reasonable	personal rep.	UPC	No	1
Illinois	reasonable	court	fixes comp	No	
Indiana	just & rsnbl.	court	fixes comp	No	1
Kansas	just & proper	court	fixes comp	No	1
Maine	reasonable	personal rep.	UPC	Yes	1
Massachusetts	amount allowd	court	fixes comp	No	
Michigan	just & rsnbl.	court	fixes comp	No	1
Minnesota	reasonable	personal rep.	UPC	Yes	1
Nebraska	reasonable	personal rep.	UPC	Yes	1
New Hampshire	just	court	fixes comp	No	
North Dakota	reasonable	personal rep.	UPC	No	1
Pennsylvania	rsnbl. & just	court	fixes comp	No	2
Rhode Island	just	court	fixes comp	No	
Tennessee	reasonable	court clerk	appeals	No	
Utah	reasonable	personal rep.	UPC	No	1
Vermont	reasonable	court	fixes comp	Yes	1
Virginia	reasonable	commissioner	review	No	3, 11
Washington	just & rsnbl.	court	fixes comp	No	1
West Virginia	reasonable	commissioner	appeals	No	3, 4

FEE OF PERSONAL REPRESENTATIVE — PERCENTAGE FORMULA STATES (12)

<u>STATE</u>	<u>Percentage allowed</u>	<u>Extra- Ordinary Comp.</u>	<u>Can Court Award Less?</u>	<u>Notes</u>
California	½% to 4% of estate accounted for	Yes	No	1
Hawaii	1-4% of tax value of estate + 5-7% of income	Yes	Yes	
Louisiana	2½% of amount of inventory	Yes	No	1, 5
Nevada	2-6% of personal estate accounted for	Yes	No	1, 7
New Jersey	2-5% of estate value + 6% of income	Yes	Yes	8, 9
New York	2-5% of money paid & rec'd + 5% of rent of real prop.	Yes	No	1
Ohio	2-4% of est, 1% of real prop not sold & nonprobate prop	Yes	Yes	
Oklahoma	2½-5% of whole estate accounted for	Yes	No	1
Oregon	2-7% of probate estate, 1% of nonprobate prop less ins	Yes	No	1
South Dakota	2½-5% of personal prop & proceeds of real prop sold	No	No	1, 7, 10
Wisconsin	2% of net estate + gains	Yes	Yes	11
Wyoming	2-10% of probate estate accounted for	Yes	No	5

Note. Of the twelve percentage formula states, one (Hawaii) is a UPC state. Nevada and South Dakota are classed as percentage fee states, even though the personal representative may receive reasonable compensation for services performed in connection with real property. This contrasts with the treatment of Georgia as a hybrid state because the personal representative may receive reasonable compensation for delivering property in kind to distributees, not to exceed 3% of its value. This distinction is based on the assumption that in Nevada and South Dakota, the personal representative would not be entitled to a fee on real property if no services are rendered, making it possible to disregard this component of the fee in many cases, while in Georgia, most estates will involve delivery of property in kind.

FEE OF PERSONAL REPRESENTATIVE — HYBRID STATES (14)

<u>STATE</u>	<u>Reason- able Comp.</u>	<u>Set by</u>	<u>Role of Court</u>	<u>Percentage Formula</u>	<u>Basis of Formula</u>	<u>Extra- Ordinary Comp.</u>	<u>Can Court Award Less?</u>	<u>Notes</u>
Alabama	X	Ct.	fixes comp	2½% max.	recpts & dsbrsmnts	Yes	Yes	
Arkansas	X	Ct.	fixes comp	10% max.	value of pers prop	see n.13		11, 13
Delaware		P.R.	add'tl cmp	% maximum	see note 14	Yes	Yes	14, 15
Georgia	note 12	Ct.	fixes comp	2½% on money	see note 12	Yes	note 12	12
Iowa	X	Ct.	fixes comp	6% max.	gross estate	Yes	Yes	
Kentucky		Ct.	fixes comp	5% max.	pers prop + income	Yes	Yes	
Maryland	X	Ct.	fixes comp	4% to 10%	personal property	No	Yes	16
Mississippi		Ct.	fixes comp	1% to 7%	estate adminstrd.	No	No	
Missouri	X	Ct.	fixes comp	minimum %	pers prop & sales	N/A	No	1
Montana	X	P.R.	UPC	min & max	tax value of est.	Yes	Yes	1, 17
New Mexico		Ct.	fixes comp	1%-10% max	estate property	No	Yes	20
North Carolina	X	clerk	appeals	5% maximum	receipts & expend.	No	Yes	11, 15, 18
South Carolina	X	P.R.	UPC	5% maximum	p.prop+sales+inc.	No	\$50 min.	1, 11
Texas	note 19	Ct.	fixes comp	5%	recpts & dsbrsmnts	Yes	note 19	19

Note. Of the fourteen hybrid states, two (Montana and New Mexico) are UPC states.

Notes:

1. The fee provided by law is used when no compensation is provided by the will or the personal representative renounces it. (Some of these statutes also specify that there shall be no contract concerning fees with the decedent. The Louisiana statute makes no reference to renunciation of compensation provided in the will, but Louisiana apparently permits renunciation.)
2. The court may calculate reasonable compensation using a graduated percentage.
3. The commissioner may allow reasonable compensation in the form of a commission on receipts, or otherwise.
4. By case law, 5% of receipts is the ordinary measure of the personal representative's compensation.
5. The court may award more than the statutory percentage. In Louisiana, the 2½% statutory percentage must be shown to be "inadequate." In Wyoming, the court must determine that because of "unusual circumstances" the percentage fee "is not equitable after considering the time and effort reasonably expended and the responsibility with which the personal representative was charged."
6. In addition to the percentage fee, the personal representative is entitled to such further allowances as the court deems just and reasonable for services performed in connection with sales, leases, management of real estate, handling contested or litigated claims against the estate, preparing, adjusting, and paying estate, inheritance, and income taxes and preparing returns, carrying on decedent's business, litigating or settling disputes, and other special services.
7. In addition to the percentage fee on personal property, the court has discretion to award compensation for services with regard to real property.
8. In addition to the percentage fee, the court may allow reasonable compensation for services the personal representative is required by law to render in connection with nonprobate assets.
9. The maximum percentage on the excess over one million dollars is 2% or such other percentage as the court may determine.

Notes, cont'd.

10. In South Dakota, the personal representative is entitled to just and reasonable compensation for services performed in connection with real property in the estate, in addition to the percentage fee on personal property.

11. Compensation may (or shall) be reduced or denied if personal representative fails to perform duties properly.

12. When property is delivered in kind, the court may allow reasonable compensation not to exceed 3% of the value. If land is worked by the personal representative for the benefit of parties in interest, the court may allow additional compensation not to exceed 10% of the annual income of the property. If the personal representative fails to make annual returns as required by law, the personal representative shall forfeit compensation for transactions during the year within which no return is made unless the court orders otherwise.

13. If the personal representative performs substantial duties with respect to real property, the court may allow reasonable compensation for such services, considering the nature and extent of the services, the extent and value of the real property, and other relevant circumstances.

14. To determine the fee, the percentage is applied to the inventory and appraisal, plus half of jointly owned personal property and half of real property not sold, plus the additional assets received into the estate as reported in the accounts.

15. The statute specifies the factors to be taken into account in fixing the fee.

16. If the will provides compensation for the personal representative, the court shall allow additional compensation if the will provision is insufficient in the judgment of the court.

17. In proceedings to terminate a joint tenancy, the compensation of the personal representative shall not exceed 2% of the interest passing. In proceedings to terminate a life estate, the compensation of the personal representative shall not exceed 2% of the life estate.

Notes, cont'd.

18. When the gross value of the estate is \$2,000 or less, the clerk of the superior court may fix the fee of the personal representative in such amount as the clerk deems just and adequate,

19. If the personal representative manages a farm, ranch, factory, or business, or if the 5% fee is unreasonably low, the court may allow the personal representative reasonable compensation, but in no event more than 5% of the gross fair market value of the estate subject to administration.

20. In New Mexico, the personal representative is entitled to "not more than" the specified percentages unless otherwise ordered by the court. Also, no compensation is allowed for real property, "except such amount as may be allowed by the court." So these rules are merely guidelines, with broad discretion in the court to set the fee.

**APPENDIX 2. COMPARISON OF FEES UNDER FEE SCHEDULES
USED IN VARIOUS STATES**

Note. It is unclear whether Nevada, New Jersey, Oklahoma, Oregon, South Dakota, and Wyoming subtract liens on estate property to determine the value of the estate to compute the representative's fee. This Appendix assumes that these six states use gross value (liens not subtracted). If this assumption is incorrect for any of these states, the estate value shown will be incorrect.

"TYPICAL" ESTATE

In order to make a comparison of the fees computed under the fee schedules used in the various states, the fee in each of the states using a fee schedule is computed for the case described below. The assumptions concerning this "typical" estate are drawn so there are no extraordinary services, such as a sale of real property.¹

Property in decedent's estate (nonprobate transfers excluded):

Home - value at date of death \$250,000; outstanding balance on mortgage on home at date of death \$125,000.

Stocks and bonds - value at date of death \$100,000; \$50,000 in U.S. Government bonds; \$50,000 in N.Y. Stock Exchange listed stock).

Motor vehicle - value at date of death \$10,000; loan on car \$6,000.

Household goods and furnishings - value at date of death \$10,000.

Savings accounts - value at date of death \$5,000.

Decedent's will devised equal shares of the decedent's estate to the decedent's two children.

The decedent's home is distributed (without sale) to the two children. Stocks and bonds (valued at date of death at \$30,000) are sold during administration of the estate at a net price of \$40,000 (\$10,000 in excess of the value at date of death). For the purposes of this example, it is assumed

1. It is assumed for the purpose of computing the fee that no additional compensation would be allowed for the sale of stocks and bonds. In California and most of the other states, additional compensation is allowed for extraordinary services, and additional compensation might be allowed in California for sale of the stocks and bonds.

that no additional compensation is awarded for services in connection with this sale. The loan on the motor vehicle is paid off during administration and the motor vehicle is distributed to one child (\$10,000) and the household goods and furnishings are distributed to the other child (\$10,000).

COMPUTATION OF FEE ON TYPICAL ESTATE

CALIFORNIA

California uses gross value to determine the personal representative's fee, and does not subtract liens. Cal. Prob. Code § 901 (commission "based upon 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, if any"); Estate of Stein, 267 Cal. App. 2d 631, 73 Cal. Rptr. 324 (1968).

Value of estate for purpose of computing representative's fee

Home	\$250,000
Stocks and bonds	100,000
Motor vehicle	10,000
Household goods and furnishings	10,000
Savings accounts	5,000
Gain over appraised value on sale	<u>10,000</u>
Total	\$385,000

Computation of representative's fee:

First \$15,000 (4%)	\$ 600
Next \$85,000 (3%)	2,550
Remaining \$285,000 (2%)	<u>5,700</u>
Total	\$ 8,850

Personal representative is entitled to this statutory fee and court is not authorized to reduce it because it results in "excessive" compensation.

HAWAII

Value of estate for purpose of computing representative's fee

Hawaii appears to use net value: Rate computed "on the value of the probate assets as of the date of the death of the decedent as finally determined for federal estate tax purposes or, if none, for state inheritance tax purposes." Hawaii Rev. Stat. § 560:3-719 (1985). Federal estate tax based on taxable estate (26 U.S.C. § 2051), determined by deducting debts and mortgages from gross estate (26 U.S.C. § 2053). Hawaii repealed its inheritance tax in 1983. 1983 Hawaii Sess. Laws ch. 217, § 10. Hawaii appears to treat gains on sales as income on which a percentage fee is allowed. See Hawaii Rev. Stat. § 560:3-719 (1985). Net value plus income: \$254,000.

Computation of representative's fee:

First \$15,000 of assets (4%)	\$600
Next \$85,000 of assets (3%)	2,550
Remaining \$154,000 of assets (2%)	3,080
First \$5,000 of income (7%)	350
Remaining \$5,000 of income (5%)	<u>250</u>
Total	\$6,800

LOUISIANA

Value of estate for purpose of computing representative's fee:

Computed on "the amount of the inventory." La. Code Civ. Proc. Ann. art. 3351 (West Supp. 1987). Inventory shows "fair market value." La. Code Civ. Proc. Ann. art. 3133 (West 1961). Louisiana appears to compute the personal representative's fee on the net estate. See Succession of Benton, 354 So.2d 721, 723 (1978). This illustration assumes Louisiana uses net value and excludes gains on sales: \$244,000.

Computation of representative's fee:

\$244,000 (2.5%)	\$6,100
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NEVADA

Value of estate for purposes of computing attorney fee:

Fee is computed on "the whole amount of the personal estate accounted for." Nev. Rev. Stat. § 150.020 (1986). This illustration assumes Nevada uses the gross value of personal property and includes gains on sales: \$125,000.

Computation of representative's fee:

First \$1,000 (6%)	\$ 60
Next \$4,000 (4%)	160
Remaining \$120,000 (2%)	<u>2,400</u>
Total	\$2,620

NEW JERSEY

Value of estate for purposes of computing representative's fee:

Unclear whether gross or net value used. Fee based on "all corpus received by the fiduciary." N.J. Stat. Ann. § 3B:18-14 (West Supp. 1987). New Jersey also allows a fee on "all income received by the fiduciary." N.J. Stat. Ann. § 3B:18-13 (West 1983). This illustration assumes New Jersey uses gross value including gains on sales. See Lyon v. Bird, 79 N.J. Eq. 157, 80 A. 450 (1911) (installments on contract of sale of land part of corpus). Value of corpus: \$385,000.

Computation of representative's fee:

First \$200,000 of corpus (5%)	\$10,000
Next \$185,000 of corpus (3½%)	<u>6,475</u>
Total	\$16,475

NEW YORK

Value of estate for purposes of computing representative's fee:

Fee based on value of all property "and the increment thereof" received, distributed, or delivered, exclusive of specific devises, and rent from real property. N.Y. Surr. Ct. Proc. Act § 2307 (McKinney 1967 & Supp. 1987). According to the practice commentary, the New York fee is "based on the concept of 'receiving and paying out.' The amounts received should be determined and one-half of the applicable percentage applied, and the amounts paid out should be determined and the same percentage applied to it. The amounts received and paid out will be different where the assets have appreciated or depreciated in value." This illustration assumes New York uses net value and includes half of the gain on sales: \$249,000.

Computation of representative's fee:

First \$100,000 (5%)	\$5,000
Next \$149,000 (4%)	5,960
Total	\$10,960

OHIO

Value of estate for purposes of computing representative's fee:

Fee based on value for Ohio estate tax purposes of personal estate, including income, plus gross proceeds of real estate sales authorized by will, plus value of real estate not sold, plus certain nonprobate property. Ohio Rev. Code Ann. § 2113.35 (Page Supp. 1987). Ohio estate tax is levied on the taxable estate (*id.* § 5731.02) which excludes mortgages on real property and indebtedness "in respect of" personal property (*id.* § 5731.16). This illustration assumes Ohio uses net value and excludes gain on sales: \$244,000.

Computation of representative's fee:

First \$100,000 of personal estate (4%)	\$4,000
Remaining \$19,000 of personal estate (3%)	520
Net value of real estate not sold, \$125,000 (1%)	1,250
Total	\$ 5,770

OKLAHOMA

Value of estate for purposes of computing representative's fee:

Unclear whether gross or net value is used. Fee based on "the amount of the whole estate accounted for." Okla. Stat. Ann. tit. 58, § 527 (West 1965). This illustration assumes Oklahoma uses gross value (same as California). Gains on sales are included. Gross value: \$385,000

Computation of representative's fee:

First \$1,000 (5%)	\$50
Next \$5,000 (4%)	200
Remaining \$379,000 (2½%)	9,575
Total	\$9,825

OREGON

Value of estate for purposes of computing representative's fee:

Unclear whether gross or net value is used. Fee based on "the whole estate" subject to the jurisdiction of the court, including income and realized gains, plus certain nonprobate property. Or. Rev. Stat. § 116.173 (1983 & 1985 reprint). This illustration assumes Oregon uses gross value (same as California). Gains on sales are included. Gross value: \$385,000.

Computation of representative's fee:

First \$1,000 (7%)	\$70
Next \$9,000 (4%)	360
Next \$40,000 (3%)	1,200
Remaining \$335,000 (2%)	6,700
Total	\$8,330

SOUTH DAKOTA

Value of estate for purposes of computing representative's fee:

South Dakota allows a percentage fee on the "amount of the personal property accounted for" and on real estate sold during administration. S.D. Codified Laws Ann. § 30-25-7 (1984). Unclear whether gross or net value is used. This illustration assumes South Dakota uses gross value for personal property (same as California). Gains on sales appear to be excluded. Cf. Woodcock v. Reilly, 16 S.D. 198, 92 N.W.2d 10 (1902) (uncollectible judgment valued at face amount). The court may allow reasonable compensation for services performed on real property. This illustration assumes there is no compensation for services performed on the real property. Gross value of personal property (excluding gain on sale): \$125,000.

Computation of representative's fee:

First \$1,000 (5%)	\$50
Next \$4,000 (4%)	160
Remaining \$120,000 (2½%)	<u>3,000</u>
Total	\$3,210

WISCONSIN

Value of estate for purposes of computing representative's fee:

Wisconsin uses net value. Fee based on "the inventory value of the property for which the personal representative is accountable less any mortgages or liens plus net principal gains." Wis. Stat. Ann. § 857.05 (West Supp. 1987). Net value plus gain on sale: \$254,000.

Computation of representative's fee:

Net estate of \$254,000 (2%)	\$5,080
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WYOMING

Value of estate for purposes of computing representative's fee:

Unclear whether gross or net value is used. Fee is computed on the "amount of the decedent's probate estate accounted for" using the inventory value, including gains on sales. Wyo. Stat. §§ 2-7-803 (Supp. 1987). Unclear whether inventory lists gross or net value. See *id.* § 2-7-404. This illustration assumes Wyoming uses gross value (same as California). Gains on sales are included. *Id.* § 2-7-803(c). Gross value: \$385,000.

Computation of representative's fee:

First \$1,000 (10%)	\$100
Next \$4,000 (5%)	200
Next \$15,000 (3%)	450
Remaining \$365,000 (2%)	<u>7,300</u>
Total	8,050