

Memorandum 86-37

Subject: Study L-1038 - Estate and Trust Code (Attorney's Fees)

The probate study was undertaken at the request of persons and organizations who advocate the enactment of the Uniform Probate Code in California. They believe that the enactment of the UPC would reduce the delay and expense of probate. They have followed the Commission's study and have supported its recommendations. However, there no longer appears to be a great pressure to enact the UPC in California. I believe that the persons and organizations that initiated the probate study have concluded that the Commission is making a careful study and recommending the improvements that are needed in California law.

In 1980, the Legislature directed the Commission to make the probate law study. Since then the developments on the state and federal level with respect to death taxes have substantially eliminated that source of delay in closing estates. But the question of the cost of probate is one that needs careful study by the Commission. We do not want our conclusions subject to attack on the ground that a careful study was not made.

The staff is of the belief that attorney fees in California probate are not out of line with the fees charged in other states. This belief is supported by the data shown in the attached background study: Stein and Fierstein, The Role of the Attorney in Estate Administration, 68 Minn. L. Rev. 1107 (1984). However, the background study uses data with respect to estates of person who died in 1972. The California statutory fee schedule was increased after 1972. And the Section 650 petition (surviving spouse) and Section 630 affidavit (transfer of personal property of small estate) procedures have been developed and expanded since 1972. We do not plan to discuss the

background study at the April meeting. We will delay discussing the study until after we have obtained more current information for California.

The staff believes that useful current information can be obtained if a questionnaire is sent out to the persons who have indicated an interest in the Commission's study. The questionnaire would gather information concerning the extent to which decedent's estates are now handled using methods other than probate administration and information concerning attorneys' fee and the fees of personal representatives. Use of the questionnaire would also permit the Commission to obtain the views of California lawyers as to whether any change should be made in the existing system for determining fees and compensation for the attorney and personal representative. In addition, information concerning other matters also would be obtained in the same questionnaire.

Attached is a staff draft of the questionnaire. We would include the questionnaire in the next mailing we make of tentative recommendations.

At the meeting, the staff suggests that the Commissioners and others present at the meeting take the time to answer the questionnaire. In that way we can determine about how long it takes to complete the questionnaire and whether any matters in the questionnaire need to be clarified.

The staff will prepare an analysis of the information obtained from the returned questionnaires. That analysis and the attached background study will be discussed at a future meeting. At that time, the Commission can determine whether any changes should be made in the existing method of fixing fees and compensation of attorneys and personal representatives.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

STATE OF CALIFORNIA

C A L I F O R N I A    L A W

R E V I S I O N    C O M M I S S I O N

QUESTIONNAIRE CONCERNING PROBATE PRACTICE

April 1986

This questionnaire is being distributed to lawyers, judges, probate referees, probate paralegals, and others. The questionnaire is designed primarily to obtain information from lawyers. Others who complete the questionnaire should ignore any question that calls for information that is not applicable to the type of work they do.

WE ESTIMATE THAT IT WILL TAKE YOU APPROXIMATELY        MINUTES TO ANSWER THIS QUESTIONNAIRE. YOUR ANSWERS SHOULD BE BASED ON YOUR EXPERIENCE DURING THE LAST 12 MONTHS. RETURN THE QUESTIONNAIRE TO THE COMMISSION NOT LATER THAN JUNE 1, 1986.

*If you are now receiving copies of the Commission's tentative recommendations relating to portions of the new Estate and Trust Code, you will continue to receive them if you complete and return this questionnaire and indicate that you want to receive the tentative recommendations.*

There is a space at the end of the questionnaire where you can indicate that you do not wish to have your name disclosed in connection with the answers you give in this questionnaire. If you so indicate, the tabulation of the answers to this questionnaire will be made in a manner that does not disclose your name.

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

YOUR NAME AND ADDRESS

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1. ROLE YOU PLAY IN PROBATE ADMINISTRATION

Check the box for the category that best describes you.

(If you are a practicing lawyer and a probate referee, please check both boxes.)

- (a) Practicing Probate Lawyer ☐
- (b) Judge..... ☐
- (c) Court Commissioner..... ☐
- (d) Probate Referee ..... ☐
- (e) Corporate Fiduciary..... ☐
- (f) Paralegal ..... ☐
- (g) Other (please describe) \_\_\_\_\_

2. YEARS PRACTICING IN ESTATE ADMINISTRATION

Check the box that indicates the number of years you have been engaged in estate planning, trust, and probate work.

- (a) Less than 5 years.....☐
- (b) 5 to 10 years.....☐
- (c) 10 to 15 years.....☐
- (d) 15 to 20 years.....☐
- (e) 20 to 25 years.....☐
- (f) More than 25 years....☐

3. ARE YOU A PROBATE SPECIALIST?

- (a) Do you consider yourself to be a probate specialist?

Yes ☐

No ☐

- (b) Do you devote more than one-half of your work time to estate planning, trust, and probate matters:

Yes ☐

No ☐

**4. SIZE OF LAW FIRM IN WHICH YOU PRACTICE**

- (a) Sole Practitioner.....[☐]  
(b) 2-9 Attorney Firm...[☐]  
(c) 10-30 Attorney Firm.[☐]  
(d) 30 + Attorney Firm..[☐]

**5. LOCALITY IN WHICH YOU PRACTICE**

Check the box that best describes the locality in which you practice:

**Southern California**

- (a) Los Angeles .....[☐]  
(b) San Diego .....[☐]  
(c) Riverside .....[☐]  
(d) San Bernardino.....[☐]  
(e) Orange County.....[☐]  
(f) Long Beach.....[☐]  
(g) Other city.....[☐] (name)\_\_\_\_\_  
(h) Rural area.....[☐] (county)\_\_\_\_\_

**Northern California**

- (i) Oakland .....[☐]  
(j) San Francisco .....[☐]  
(k) San Jose .....[☐]  
(l) Sacramento .....[☐]  
(m) Stockton .....[☐]  
(n) Santa Cruz.....[☐]  
(o) Other city.....[☐] (name)\_\_\_\_\_  
(p) Rural area.....[☐] (county)\_\_\_\_\_

**6. TYPES OF DECEDENT'S ESTATES YOU HANDLE**

*(For the purposes of this questionnaire, "probate assets" are assets that are subject to the jurisdiction of the probate court. "Probate assets" do NOT include assets governed after death by the terms of a living trust, joint tenancies, assets transferred upon death under a pay-on-death provision, assets transferred upon death under beneficiary designations in life insurance policies and employee benefit plans, and similar assets)*

Of all the financially solvent decedent's estates you handle, give your estimate of the percentage that have no or an insignificant amount of "probate assets":.....\_\_\_\_\_ per cent

**7. SIZES OF DECEDENT'S ESTATES YOU HANDLE**

Of the estates you handle that involve "probate assets," give your estimate of the percentage that fall in each category listed below:

*(Include only "probate" assets in determining the value of the estate. Include estates you handle using a Section 650 petition and/or a Section 630 affidavit. The total of the four boxes below should equal 100 percent)*

- (a) Estates less than \$20,000....\_\_\_\_\_ percent
- (b) Estates \$20,000 to \$60,000...\_\_\_\_\_ percent
- (c) Estates \$60,000 to \$150,000..\_\_\_\_\_ percent
- (d) Estates \$150,000 to \$350,000.\_\_\_\_\_ percent
- (e) Estates \$350,000 +.....\_\_\_\_\_ percent

**8. KEEPING TIME RECORDS**

(a) Do you keep a record of the time you work on each decedent's estate?

Yes ☐

No ☐

(b) If you keep a record of time worked, do you as a regular practice take into account the time worked in determining the fee you charge?

Yes ☐

No ☐

Explain your answer if necessary \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**9. USE OF PARALEGAL ASSISTANTS**

(a) Do you use a paralegal assistant to assist you in your probate practice?

Yes ☐

No ☐

(b) If you use a paralegal assistant, do you keep a record of the time he or she works on each estate?

Yes ☐

No ☐

**10. TESTATE OR INTESTATE ESTATES**

Of the estates you handle that involve "probate assets," give your estimate of the percentage that are:

*(Total of the two boxes below should equal 100 per cent.)*

- (a) Testate estates.....\_\_\_\_\_ per cent
- (b) Intestate estates...\_\_\_\_\_ per cent

**11. METHOD OF HANDLING ESTATES YOU HANDLE**

Of the decedent's estates you handle that involve "probate assets," give your estimate of the percentage you handle using each of the following methods:

*(Total of the four boxes below should equal 100 percent)*

- (a) Use Section 650 petition only.....\_\_\_\_\_ percent
- (b) Use Section 630 affidavit procedure only .....\_\_\_\_\_ percent
- (c) Use only Section 650 petition for surviving  
spouse and Section 630 affidavit for other  
persons who take portion of decedent's estate..\_\_\_\_\_ percent
- (d) Use regular probate administration.....\_\_\_\_\_ percent

**12. USE OF INDEPENDENT ADMINISTRATION AUTHORITY**

- (a) Of the estates that you handle using regular probate administration procedure, give your estimate of the percentage where you obtain independent administration authority? \_\_\_\_\_ percent
- (b) Of the estates where you obtain independent administration authority, give your estimate of the percentage where you exclude from independent administration authority the authority to sell or exchange real property .....\_\_\_\_\_ percent

### 13. SERVICES PROVIDED IN ESTATE ADMINISTRATION

(a) Listed below are some of the services that you may provide in connection with the probate administration of a decedent's estate.

(1) In the column designated "Rank", please rank each of the services listed in order of the amount of time required in average of all the estates you handle. Use "1" for the service that requires the most time, "2" for the service that requires the next greatest amount of time, etc.

(2) In the column designated "Average Percentage of Time Consumed", please give your estimate of the average percentage of the total time spend on all estates that is devoted to each of the services listed.

<u>Service</u>	<u>Rank</u>	<u>Average Percentage of Time Consumed</u>
(1) Initial Conferences .....	_____	_____
(2) Initial Petition and Hearing.....	_____	_____
(3) Inventory Preparation .....	_____	_____
(4) Communication With Beneficiaries.....	_____	_____
(5) Creditor's Claims.....	_____	_____
(6) Family Allowance.....	_____	_____
(7) Real Property Sales.....	_____	_____
(8) Transfer/Reregister Assets.....	_____	_____
(9) Preliminary Distribution.....	_____	_____
(10) Final Account.....	_____	_____
(11) Final Decree and Distribution...	_____	_____
(12) Tax Planning.....	_____	_____

(b) Of the decedent's estates you handle, give your estimate of the percentage of cases where you provide the following services?

(1) Family Allowance.....	_____ percent
(2) Qualify Testamentary Trustee.....	_____ percent
(3) Probate Homestead.....	_____ percent
(4) Disclaimers.....	_____ percent
(5) Powers of Appointment.....	_____ percent
(6) Small Estate Set-Aside.....	_____ percent
(7) Exempt Property Set-Aside.....	_____ percent
(8) Tax Planning.....	_____ percent



14. ATTORNEY FEE WHEN SECTION 630 AFFIDAVIT USED

(a) What do you consider important in determining your fee in a case where you handle the disposition of the decedent's estate using the affidavit procedure under Section 630 of the Probate Code (transfer of personal property of estate of not more than \$60,000 by use of affidavit)?

(Please rank in order of importance each of the five bases listed below for determination of your fee. Use "1" for the basis you consider the most important, "2" for the basis that you consider next most important, etc.)

<u>Basis for Fee</u>	<u>Rank of Importance</u>
(1) Fee Schedule (percentage of probate estate) ..	[ ]
(2) Time Involved.....	[ ]
(3) Complexity of the Estate.....	[ ]
(4) Result Achieved.....	[ ]
(5) Your Special Qualifications.....	[ ]
(6) Other (list) _____	[ ]

(b) For cases where you handle the disposition of the decedent's estate using the affidavit procedure under Section 630, please check the box below that best states your view as to the adequacy of the fee you generally receive:

(1) Lost Money.....[ ]  
(2) Broke Even .....[ ]  
(3) Adequately Compensated.....[ ]  
(4) More than Adequately Compensated...[ ]

(c) What is your typical fee in a case where you handle disposition of the decedent's estate using the affidavit procedure under Section 630? \$\_\_\_\_\_.

(d) For cases where you use the affidavit procedure under Section 630, give your estimate of the percentage of cases where an interested person complains to you about your fee? \_\_\_\_\_ percent.

**15. ATTORNEY'S FEE WHEN SECTION 650 PETITION USED**

(a) What do you consider important in determining your fee in a case where you handle the disposition of the decedent's estate using a petition under Section 650 of the Probate Code (petition for order determining or confirming property passing or belonging to surviving spouse)?

(Please rank in order of importance each of the five bases listed below for determination of your fee. Use "1" for the basis you consider the most important, "2" for the basis that you consider next most important, etc.)

<u>Basis for Fee</u>	<u>Rank of Importance</u>
(1) Fee Schedule (percentage of probate estate) ..	[ ]
(2) Time Involved.....	[ ]
(3) Complexity of the Estate.....	[ ]
(4) Result Achieved.....	[ ]
(5) Your Special Qualifications.....	[ ]
(6) Other (list) _____	[ ]

(b) In cases where you handle the disposition of the decedent's estate using a petition under Section 650, is you fee:

(Check the one box that best describes your situation.)

- (1) Always approved by the probate court ...[ ]  
(2) Usually approved by the probate court ..[ ]  
(3) Seldom approved by the probate court....[ ]  
(4) Never approved by the probate court.....[ ]

(c) When your fee is approved by the probate court for the Section 650 proceeding, do you charge an additional fee for other services (such as nonprobate transfers, joint tenancy terminations, tax matters, and the like)?

Yes [ ]

No [ ]

(d) What is your typical fee in a case where you handle disposition of the decedent's estate using a petition under Section 650?

\$\_\_\_\_\_.

(e) For cases where you handle the disposition of the decedent's estate using a petition under Section 650, please check the box below that best states your view as to the adequacy of the fee you generally receive:

- (1) Lost Money.....[\_\_\_]
- (2) Broke Even .....[\_\_\_]
- (3) Adequately Compensated.....[\_\_\_]
- (4) More than Adequately Compensated...[\_\_\_]

(f) For cases where you handle the disposition of the decedent's estate using a petition under Section 650, give your estimate of the percentage of cases where an interested person complains to you about your fee?..... \_\_\_\_\_ percent.

**16. ATTORNEY'S FEE WHEN REGULAR PROBATE ADMINISTRATION USED**

(a) What do you consider important in determining your attorney's fee in a case where you handle the disposition of the decedent's estate using ordinary probate administration (administration under Division 3 of the Probate Code, with or without independent administration authority)?

(Please rank in order of importance each of the five bases listed below for determination of your fee. Use "1" for the basis you consider the most important, "2" for the basis that you consider next most important, etc.)

<u>Basis for Fee</u>	<u>Rank of Importance</u>
(1) Fee Schedule (percentage of probate estate) ..	[___]
(2) Time Involved.....	[___]
(3) Complexity of the Estate.....	[___]
(4) Result Achieved.....	[___]
(5) Your Special Qualifications.....	[___]
(6) Other (list) _____	[___]

(b) Do you ordinarily charge the full statutory fee in an ordinary probate administration?

Yes [\_\_\_]

No [\_\_\_]

If your answer is "No," how do you determine your fee? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.  
(c) Of the cases where you use ordinary probate administration, give your estimate of the percentage of cases where:

(The total of the three items below should equal 100 percent.)

- (1) You charge less than the full statutory fee .... percent.
- (2) You charge not more than the full statutory fee \_\_\_\_\_ percent.
- (3) The court allows you "extraordinary compensation" \_\_\_\_\_ percent.

(d) Of the cases where you use ordinary probate administration, please give your estimate of the percentage of cases where:

- (1) You have a written agreement with the client  
concerning the amount of your fee..... percent.
- (2) You have an oral agreement with the client  
concerning the amount of your fee..... percent.
- (3) The court reduces the fee you want to charge  
even though no interested person objects to the  
fee..... percent.
- (4) An interested person objects to your fee at the  
court hearing on the approval of the fee..... percent.
- (5) Your fee is reduced by the court as a result of  
an objection made by an interested person..... percent.
- (6) You charge an additional fee (not approved by the  
court) for other services (such as nonprobate  
transfers, joint tenancy terminations, tax matters,  
and the like)..... percent

(e) For cases where you handle the disposition of the decedent's estate using ordinary probate administration, please check the box below that best states your view as to the adequacy of the fee you generally receive:

- (1) Lost Money.....[ ]
- (2) Broke Even .....[ ]
- (3) Adequately Compensated.....[ ]
- (4) More than Adequately Compensated.....[ ]

(f) For cases where you handle the disposition of the decedent's estate using ordinary probate administration, give your estimate of the percentage of cases where an interested person complains to you concerning:

- (1) The cost of the probate proceeding generally \_\_\_\_\_ percent.
- (2) Your fee..... \_\_\_\_\_ percent.

**17. ADDITIONAL FEES FOR "EXTRAORDINARY SERVICES"**

(a) For the services listed below, please check those for which you ordinarily receive an additional fee allowed by the court for "extraordinary services" when independent administration authority is used for the transaction:

- (1) First real property sale (real estate broker used).....[☐]
- (2) First real property sale (real estate broker not used)...[☐]
- (3) Subsequent real property sale (broker used).....[☐]
- (4) Subsequent real property sale (broker not used).....[☐]
- (5) Operating a business or farm.....[☐]
- (6) Selling a business or farm.....[☐]
- (7) Lease.....[☐]

(b) For the services listed below, please check those for which you ordinarily receive an additional fee allowed by the court for "extraordinary services" when independent administration authority is NOT used for the transaction:

- (1) First real property sale (real estate broker used).....[☐]
- (2) First real property sale (real estate broker not used)...[☐]
- (3) Subsequent real property sale (broker used).....[☐]
- (4) Subsequent real property sale (broker not used).....[☐]
- (5) Operating a business or farm.....[☐]
- (6) Selling a business or farm.....[☐]
- (7) Lease.....[☐]

(c) When you provide a service listed below, check the box to indicate those for which you ordinarily receive an additional fee allowed by the court for "extraordinary services":

- (1) Preparation of Federal Estate Tax Return .....[ ]
- (2) Other tax matters.....[ ]
- (4) Defense of will contest after probate .....[ ]
- (5) Pending litigation against decedent .....[ ]
- (6) Contested or litigated claims against estate.....[ ]
- (6) Representing estate in other litigation outside the  
regular administration of the estate.....[ ]
- (7) Preliminary distribution to residuary beneficiaries  
and trustees.....[ ]
- (8) Petition for authority to carry out decedent contract....[ ]
- (9) Petition to borrow money.....[ ]
- (10) Heirship proceeding.....[ ]
- (11) Petition for family allowance.....[ ]
- (12) Petition for probate homestead.....[ ]
- (13) Opposition to petitions of the type listed above.....[ ]

(d) Please list any other services you provide for which you ordinarily receive a fee allowed by the court for "extraordinary services":

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**18. YOUR VIEW AS TO POSSIBLE CHANGE IN EXISTING LAW RELATING TO THE  
FEE OR COMPENSATION OF THE ATTORNEY AND PERSONAL REPRESENTATIVE**

The Law Revision Commission has not determined to propose any change in the existing California provisions governing fees or compensation in estate proceedings. However, the Commission solicits your view as to whether you approve or disapprove of the substance of the following provision. A number of states have a comparable provision.

On petition of an interested person, the propriety of employment of any person by a personal representative, including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his or her own services, 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.

Under this provision the personal representative may fix his or her own fee and those of the estate attorney. Adoption of this provision in California would mark an important departure from existing practice under which fees must be approved by the court in an ordinary probate administration and a statutory fee schedule is used and additional fees may be allowed for extraordinary services. Under the provision set out above, the fee is determined by agreement between the personal representative and the attorney, and the court is not involved in fixing the fee of the personal representative or the attorney unless an interested person files a petition for review of the fee.

Your view: Would you favor the substitution of the scheme outlined above for the existing California provisions on fees?

Approve..... ☐

Disapprove.. ☐

Explain your answer if you desire to do so.

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**19. ATTORNEY AS EXECUTOR OR TRUSTEE**

Do you believe that the law should be changed to permit an attorney who receives a commission as personal representative or a fee as a trustee to also receive a fee as attorney for the probate or trust estate or to share in an attorney's fee paid to that attorney's law firm?

Yes ☐

No ☐

Explain your answer if you desire to do so.

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**20. YOUR SUGGESTIONS FOR CHANGES IN EXISTING ATTORNEY FEE PROVISIONS**

(a) Should any change be made in the existing California provisions governing the manner of determining the attorney's fee for services provided in connection with a decedent's estate?

Yes ☐

No ☐

If you have suggestions for changes, please attach a separate sheet indicating the problems you believe now exist and the changes that should be made to deal with those problems.

(b) Do you believe the existing statutory fee is inadequate for estates of less than \$60,000?

Yes ☐

No ☐

(c) Do you believe that the existing statutory fee is excessive for estates over \$1 million?

Yes ☐

No ☐

**21. YOUR SUGGESTIONS FOR CHANGES IN EXISTING PROVISIONS GOVERNING FEES OF PERSONAL REPRESENTATIVES**

If you have any suggestions for changes in the existing California provisions governing fees for personal representatives, please attach a separate sheet indicating the problems you believe now exist and the changes that should be made to deal with those problems.

**CONFIDENTIALITY**

Do you object to the disclosure of your name in connection with the answers you have given in this questionnaire?

*(If you object, your answers will be tabulated so that your name will not be disclosed in connection with the answers you gave)*

Yes ☐

No ☐

**TENTATIVE RECOMMENDATIONS**

Mark the box if you want to receive tentative recommendations relating to the Estate and Trust Code being drafted by the Commission. ☐