

First Supplement to Memorandum 87-100

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

BACKGROUND

The following organizations sent the Commission comments on Memorandum 87-100:

(1) Executive Committee of Estate Planning, Trust and Probate Law Section of State Bar (Exhibit 1) (referred to as State Bar Section).

(2) San Diego County Bar Association Legislative Subcommittee on Estate Planning, Trust and Probate Matters (Exhibit 2) (referred to as San Diego Subcommittee).

(3) Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association (Exhibit 3) (referred to as Los Angeles Bar Section).

(4) Beverly Hills Bar Association Probate Section (Exhibit 4) (referred to as Beverly Hills Bar Section).

The specific comments found in these letters are discussed below.

BASIC POLICY ISSUE

A basic policy issue is presented by the background study (attached to Memorandum 87-100) and is discussed in the comments on the memorandum: Should the existing California statutory fee schedule and additional compensation for extraordinary services be replaced by a reasonable fee concept? If so, should the Uniform Probate Code (UPC) scheme be adopted? Under the UPC, the fee agreed to by the attorney and the personal representative is not subject to court review except upon petition of an interested person. The staff recommends in the background study (pages 96-98) that the UPC scheme be implemented by adopting the reasonable fee standard and additional provisions (summarized below):

(1) A written fee contract should be required, and the written fee contract should contain an estimate of the total amount of the legal fees.

(2) The Independent Administration of Estates Act should be extended to cover attorney fee contracts. If there is an objection to the proposed action (attorney fee contract), the fee would be subject to court review to the extent indicated below.

(3) Where the fee exceeds the amount stated in the written fee contract, the fee would be subject to court review to extent indicated below.

(4) The persons who can waive an account should be permitted to waive court review of probate legal fees in the same manner as a waiver of account.

(5) Unless court review of probate legal fees has been waived in the same manner as a waiver of account, a person could obtain court review of the reasonableness of the attorney fee at the time of the final account or at the time of a petition for approval of fees. The right to obtain court review would be limited to those persons who have not waived that right by a failure to object to a notice of proposed action with respect to the fees.

(6) Where the court reviews the fees, one of the factors to be considered by the court in determining what constitutes a reasonable fee would be the written fee contract and the estimated total fee.

The staff does not believe that the substitution of a reasonable fee system for the existing California statutory fee schedule and extraordinary compensation scheme would reduce the cost of probate in California. Instead, the substitution of a reasonable fee system would require that each individual estate pay the reasonable cost of the legal services required for the administration of that estate. A \$400-\$600 per hour legal fee for a large, simple estate would no longer be justified as needed to subsidize small estates (where the statutory fee often is inadequate to cover the cost of the legal services required for the administration of that estate). (There is a question whether the existing statutory fee system in practice actually does subsidize small estates, since some attorneys and firms will handle only those estates on which they can earn a reasonable fee and ordinarily will not handle a small estate that is a money loser.) Accordingly, the effect of adopting a reasonable fee system would be to increase the cost of legal services for some estates and to reduce the

cost of legal services for others. The staff does not dispute the statement in the letter of the State Bar Section: "A strong majority of the Executive Committee felt that they, individually, would earn more fees for themselves with their firm by having a reasonable fee standard rather than the [existing California] statutory structure."

75 PERCENT OF CALIFORNIA PROBATE LAWYERS SUPPORT STATUTORY FEE CONCEPT

The concept of the statutory fee with court approval of additional compensation for extraordinary services is supported by the organizations representing probate attorneys:

- The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar.
- The San Diego County Bar Association Legislative Subcommittee on Estate Planning, Trust and Probate Matters.
- The Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association.
- The Beverly Hills Bar Association Probate Section.

In addition, as the background study reports, about three-fourths of the persons who responded to the Commission's questionnaire oppose substituting the reasonable fee concept of the Uniform Probate Code for the existing statutory fee and extraordinary compensation concept now used in California. This result is consistent with other available information concerning the views of California probate lawyers. As the State Bar Section notes, an earlier survey of the members of the State Bar Section obtained substantially same result as the Commission questionnaire. The Beverly Hills Bar Section reports that about 75% of the members present at the meeting where this subject was reviewed also support retaining the California statutory fee system.

VIEWS OF OTHER PERSONS AND ORGANIZATIONS

The Commission has obtained the views of organizations representing probate attorneys, but we had not obtained any written statement of views for persons or organizations representating consumers. At a recent meeting, Commissioner Marzec requested that the staff seek to obtain the views of all interested persons and organizations on the question of probate attorney fees. We have made

this effort, but we have received no written comments except from organizations representing probate lawyers. The staff has been informed, however, that one or more representatives of the American Association of Retired Persons plan to come to the January meeting when this subject is discussed.

REASONS GIVEN FOR SUPPORT OF STATUTORY FEE CONCEPT

You should read each of the attached exhibits for the reasons given in support of the view that the existing California statutory fee and extraordinary compensation concept should be retained. You should read the Background Study for an analysis of the reasons given in support or in opposition to the existing California scheme by the lawyers who responded to the Commission's Questionnaire.

The reasons given in support of the existing California scheme by the organizations that commented on the Background Study are summarized below.

The State Bar Section

The State Bar Section "feels that the retention of the statutory fee is justified for the simple reason that the consumer is protected by having a simple, understandable and nonadversary fee system established by legislative act. To the limited extent that such statutory fee occasionally results in very generous charges for substantial estates and, thus, helps subsidize small estates, the committee believes that such social policy is justified."

The State Bar Section further states that "costs of operation of law firms have increased very substantially and the margin of profitability has been reduced significantly over the past several years" and that "probate services are not nearly as profitable to the law firm as services performed in several other areas of law." Further, although the hourly rate charge commonly charged by attorneys has increased very substantially over the last several years, there has not been an increase in the statutory fee structure equivalent to that increase, nor necessarily in the value of assets to which such structure applies. "It is believed that the statutory fee, if not already true, will soon prove to be a less costly method of dealing with estate administration than the hourly fee structure and other factors determining such fee. The statutory fee will protect the consumer because that rate is a legislatively controlled rate."

The State Bar Section further states that in states that have a reasonable fee system, fees are nevertheless determined by a method largely akin to the statutory fee structure. "The Committee is aware of numerous states which have state or local rules which provide for a standard schedule determining the fee. Fees become fixed based upon such standard even without a statutory schedule. Such appears to be applied irrespective of the skill and effort required or the amount of time required. Thus, even the reasonable fee standard become a matter which is, in fact, largely predetermined. By the statutory schedule, the Legislature retains control rather than local courts or private agreement."

A strong majority of the Executive Committee of the State Bar Section believes that "they, individually, would earn more fees for themselves with their firm by having a reasonable fee standard rather than the statutory structure."

The State Bar Section "further endorses the retention of the statutory fee for the simple reason that any fee standard which involves a subjective standard, irrespective of how well articulated, would inevitability [sic] lead to significantly more disputes between attorneys and parties interested in the estate regarding such matter that will result in significantly increased court involvement resolving such conflicts."

"Finally, the statutory structure allows the attorney to perform the services that are necessary to do all the appropriate things in dealing with the client and the transfer of property without being required to make a value judgment as to the time required for each individual task that would be inherent in any reasonable fee standard which is based on time."

San Diego Subcommittee

The San Diego County Bar Association Legislative Subcommittee on Estate Planning, Trust and Probate matters twice met to consider the staff study on probate attorney fees. The following is a brief summary of the Subcommittee's view concerning the statutory fee system:

"It is certainly clear that the biggest problem facing the Probate Court on a regular basis is attorneys' fees . . .

"Our Subcommittee continues to be in favor of the present statutory fee system without Court discretion to reduce statutory fees for any reason other than those stated in Probate Code 1025.5. Our Subcommittee also opposes a reasonable fee system found under the Uniform Probate Code. It is our Subcommittee's feelings that negotiating with an Executor as to the size of a reasonable fee may be inappropriate because an independent Executor frequently has no vested interest in the outcome of a fee negotiation and it is the beneficiaries who would eventually suffer by an unreasonable fee. Under reasonable fees, however, if an attorney does reach a fee agreement with an Executor that agreement should be published to each beneficiary and each beneficiary should be told that he, she or it has a right to object to that fee. This system would allow beneficiaries to be aware of their rights at the beginning rather than the end of a probate.

"Finally, I would close by saying that our Subcommittee favors the statutory fee system to lessen the wide variation of fees charged by attorneys and the wide variation of judges sitting on the Probate bench. . . ."

Los Angeles Bar Section

The Los Angeles Bar Section recommends that the statutory fee schedule be retained. The letter from the section states:

This recommendation primarily reflects our awareness that many nonprobate specialists handle estate administrations, and they and their clients frequently need the protection or guidance of a statutory fee schedule that puts the caps on the cost of ordinary services and includes court review.

We are also concerned that absent some fee schedule on which clients may rely, they may shop for cut-rate hourly fees and suffer poorer services as a result. Relatively few attorneys or clients are really aware of the amount of work a well-run probate requires.

The Los Angeles Bar Section believes "that the present system works fairly well."

We base our conclusions on our own experiences, as well as the experiences reflected in the responses received to the Staff's "Probate Practice Survey Questionnaire." The statistics derived from the questionnaire do not reflect a troubled system. [Discussion of statistics omitted.]

These statistics do not suggest or support that the current system is broken or needs fixing. Rather, they seem to show that experienced probate lawyers handling primarily "not insignificant" estates are able to charge only the statutory fee in most of their probates and handle their matters without disputes with their clients. It is little wonder, therefore, that about 75% of the attorneys responding oppose the proposed UPC scheme for determining fees.

In reaching our position, we also rely on our own experiences with non-California probates and discussions with lawyers practicing both within and outside California. The experience of members of our Executive Committee in states using the reasonable fee method is that the reasonable fee approach produces, in an average situation, a total attorney fee of about 5% of the value of the estate, a much higher fee than would be awarded in California under the current system.

It is our view, based on conversations with probate attorneys practicing in such states as New York and Illinois, that California probate fees are in fact low, in comparison to the fees charged in such comparable jurisdictions. Further, we know that California probate practitioners are not the wealthy members of the Bar. Rather, because of the marginal economic nature of the practice area, larger firms are committing fewer resources to that practice area. This is the reality of the situation, which is not at all reflected in the information presented in the Staff memorandum.

Beverly Hills Bar Section

By a three to one margin, the Beverly Hills Bar Association Probate Section supports the concept of the statutory fee schedule and opposes the concept of the reasonable fee such as under the Uniform Probate Code. The letter from the Beverly Hills Bar Section (attached as Exhibit 4) contains a detailed statement of the reasons why the Section has taken this position. You should read the letter.

METHODS OF DETERMINING PROBATE ATTORNEY FEES IN VARIOUS STATES

There was insufficient time to allow for the editing of the background study before it was distributed to interested persons for review and comment. Time did not permit us to include a table summarizing the attorney fee provisions in effect in the various states. One of our law student assistants is now checking a table showing these provisions. We hope to be able to provide you with a copy of this table prior to the time of the meeting.

The background study includes a table showing a comparison of attorney fees computed under the fee schedules in effect in the eight states that have a statutory fee schedule and one that has adopted a fee schedule by court rule. See Table 6 on page 45 of the study. A difficulty in comparing fees is that it is difficult to determine whether liens on real property are deducted in determining the value of the base upon which the fee is calculated. It is unclear whether Arkansas, Delaware, New Mexico and Wyoming subtract liens in determining the value of the estate. In computing the fee for these states, the gross value of the estate (liens not subtracted) was used. For Montana and Hawaii, liens were excluded in determining the value of the estate, based on the staff's reading of the relevant statutory provision. The State Bar Section "has determined that such is not accurate," taking the position that in these two states, liens are not subtracted.

The staff has checked with Jack Miller, a former member of the Law Revision Commission, concerning the practice in Montana. He referred us to a probate attorney in Montana. That attorney stated that there is no consistent practice in Montana. He personally prefers to use the net estate, rather than the gross estate, because clients complain less. However, whether the fee must be based on the gross or net estate has never been litigated, and courts will approve a fee based on either the gross or net estate.

We are seeking to obtain information concerning the practice in Hawaii, and we will report on that practice at the meeting if we obtain the information.

Nevertheless, assuming that the State Bar Section determination of the practice in Montana and Hawaii is correct, Table 6 should be corrected to read as follows:

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
Montana	11,850	Yes
Arkansas	10,863	Yes
California	8,850	No
Hawaii	8,650	No
Wyoming	7,850	No
Iowa	7,620	Yes
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 [to be revised].

Note that in five of the nine states, the court has authority to reduce the statutory fee where the court determines the fee is excessive in light of the circumstances of the particular estate. The three states where the fee is higher than in California give the court authority to reduce the fee where excessive.

OTHER MATTERS

The comments on the background study include comments on particular matters discussed in the background study.

Fee Agreements

The State Bar Section agrees that it would be useful to make clear in the statute whether the requirement that there be a written fee agreement applies in formal probate proceedings.

Multiple Factors Approach

The comments received agree that the statute should contain a multiple factors approach standard for fixing attorney fees (to apply

to fees generally if a reasonable fee standard is adopted or to apply to additional fees for extraordinary services if the existing statutory scheme is continued).

Statutory Statement of What Services are Extraordinary Services

The comments received agree that the statute should contain a statement of what services are extraordinary services.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

ChairD. KEITH BILTER, *San Francisco***Vice-Chair**IRWIN D. GOLDRING, *Los Angeles***Advisors**

KATHRYN A. BALLSUN, *Los Angeles*
 HERMIONE K. BROWN, *Los Angeles*
 THEODORE J. CRANSTON, *La Jolla*
 LLOYD W. HOMER, *Campbell*
 KENNETH M. KLUG, *Fresno*
 JAMES C. OPEL, *Los Angeles*
 LEONARD W. POLLARD, II, *San Diego*
 JAMES V. QUILLINAN, *Mountain View*
 WILLIAM V. SCHMIDT, *Costa Mesa*
 HUGH NEAL WELLS, III, *Irvine*
 JAMES A. WILLETT, *Sacramento*

Section AdministratorPRES ZABLAN-SOBERON, *San Francisco*

555 FRANKLIN STREET
 SAN FRANCISCO, CA 94102-4498
 (415) 561-8200

Executive Committee

D. KEITH BILTER, *San Francisco*
 OWEN G. FIORE, *San Jose*
 IRWIN D. GOLDRING, *Los Angeles*
 JOHN A. GROMALA, *Eureka*
 LYNN P. HART, *San Francisco*
 ANNE K. HILKER, *Los Angeles*
 WILLIAM L. HOISINGTON, *San Francisco*
 BEATRICE LAIDLEY-LAWSON, *Los Angeles*
 JAY ROSS MACMAHON, *San Rafael*
 VALERIE J. MERRITT, *Los Angeles*
 BARBARA J. MILLER, *Oakland*
 BRUCE S. ROSS, *Los Angeles*
 STERLING L. ROSS, JR., *Mill Valley*
 ANN E. STODDEN, *Los Angeles*
 JANET L. WRIGHT, *Fresno*

555 Capitol Mall, 10th Floor
 Sacramento, California 95814
 Telephone: (916) 441-0131

December 14, 1987

CALIF. LAW REV. COMMISSION

DEC 16 1987

RECEIVED

**CALIFORNIA LAW REVISION
 COMMISSION**

4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94303-4739

Re: Probate Attorneys' Fees
Memorandum 87-100

Gentlemen:

A special committee of the Estate Planning, Trust and Probate Law Section of the Executive Committee has studied Memorandum 87-100 concerning probate attorneys' fees and this letter is its analysis of such memo. This Committee report is the consensus of the Executive Committee respecting such memorandum and the policy issues described therein which have been discussed at length in the Executive Committee.

It is intended by this report to comment upon the staff memorandum. We have attempted to organize our comments in a fashion to deal with the entire memorandum by various sub-topics.

General Comments

At the outset, it must be noted that the memorandum itself is 109 pages in length and contains several appendices resulting in a substantial volume of material to review. Thus,

this is not a page by page review. It also should be noted that this Committee report involves a consensus of committee members whose experience in the entire field of estate planning, trust and probate law is diverse and varied.

The staff apparently chose not to include any reference to a poll of all members of the Estate Planning, Trust and Probate Law Section dealing with a number of probate law subjects including compensation in probate matters which was completed and reviewed in 1984. Such poll conducted by the Section was presented to the staff at that time and was the subject of an article in the newsletter published by the Executive Committee in 1985.

The Estate Planning, Trust and Probate Law Section has maintained a membership of State Bar members for the last several years in excess of 3,500. The total number of persons who responded to such poll was over 1,300. In response to the question "do you favor retaining the statutory fee," the membership responded 84% in favor of such retention of the statutory fee. Similarly, reasonable fees fixed by court or by the personal representative were disfavored about 3 or 4 to 1. Thus, there can be little doubt that the statutory fee is favored by a strong majority of the practicing attorneys who have sufficient interest and knowledge of probate matters to maintain a membership in the Section.

In order to have updated data, D. Keith Bilter, the current Chair, has forwarded to all members of the Section a letter and poll as attached hereto as Exhibit A. Such poll will determine the response of the practicing probate bar to several of the proposals discussed in the staff memorandum. Not all of the responses have been tabulated, nor a complete analysis completed of them. However, from the nearly 1,000 responses received to date, the statutory fee is favored by approximately three-quarters of the attorneys responding.

It is noted in the staff memorandum that one of the principal reasons for commencing the study of the Probate Code in 1980 was concerns of representatives of certain retired citizens groups expressed to then Assemblyman McAlister. In general, it was felt that potential adoption of the Uniform Probate Code (UPC) would result in less procedures and, thus, the reasonable fee concept embodied in the UPC might well result in substantially less attorneys' fees in such proceedings. Irrespective of the merit of such conclusion (which is not demonstrable in any meaningful way), the Law Revision Commission concluded long ago that the UPC should not be recommended to the California

Legislature. Numerous refinements, reforms, clarifications and improvements in probate procedures of the law have been recommended and many are still pending. Some concepts have been drawn from the UPC, but basically the work product is California Probate Code revised with court supervised probate being retained and clarified Independent Administration of Estates Act. Thus, the premise regarding the UPC being adopted in California being the basis for a reasonable fee standard has substantial less validity than had such code been adopted.

A statutory system of compensation for attorneys and for executors has been the law in California since at least the 1880's. Despite the concerns that prompted the review of the UPC in California and the staff memorandum concerning statutory fees, the Committee believes that the statutory fee has served the public and the Bar well for many years. We do not feel that such well-established, well-understood and generally well-accepted system should be lightly discarded.

Concern Re Objectivity of Memo

There are several comments in the staff memo discussing the statutory fee system which refer to the "large but simple estate" (e.g., pages 4 and 11). One attorney was quoted three times (in responding to a staff questionnaire) "very frequently attorneys receive an average of \$400-\$600 per hour for time spent" in discussing statutory fees. (See footnote 24, footnote 97 and page 71.) We do not know the source of that particular statement. The implication of the memorandum is that there are many occasions when there are "large but simple estates" which result in attorneys earning \$400-\$600 or sums less than that but still excessive. Obviously, statistics on that are practically impossible to obtain. However, examples of such "large but simple estates" are few and far between which earn the hourly rate suggested. It has never occurred for most of the attorneys on our Executive Committee and has so rarely occurred in the experience of others to suggest that such premise should not be a basis for abolition of the statutory fee. The emphasis on such unidentified and not sustainable statement is misplaced. The statement that such examples occur "very frequently" is not accurate, particularly with the recent statutory changes limiting fees in very large estates.

The staff used the word "most" in characterizing the responses that the staff received from its survey upon which it relies so heavily. Such a generic term would suggest that "most" is not merely a slight majority but, in fact, would be nearly all. However, the term "most" is used when the attorneys who

comprise the group described as "most" is slightly more than one-half. For example, the last paragraph of page 16 ("most" equals 52.7% in such instance) and the last full paragraph of page 77 use "most" in describing attorneys who charge extraordinary fees in the specified number of cases.

There is little purpose to be served to continually point out the selective use of statistical data or how such data is presented. Many members of the Executive Committee commented on numerous examples within the memorandum in which results were characterized and commented upon which Executive Committee members found to be offensive. Emphasis is given to certain aspects of the admittedly small and probably not very representative sample of lawyers and others who responded to the staff questionnaire. Other studies were ignored or disregarded since they didn't support what the Committee feels is the staff preconception of opposition to the statutory fee. In short, the staff memorandum is believed by the Committee to not be the objective analysis of available data which the LRC is entitled to receive from the staff. The entire Committee believes the report to be redundant, incomplete and not a fair picture. We will explain our conclusions.

The Studies

Staff notes that the Stein Study done for decedents dying in 1972 characterized California attorneys' fees as not out of line (see page 35) with those charged in other states should not be relied upon because of the change in the California statutory fee structure subsequent to the data being collected. The statutory fee in California has been raised significantly for a medium-size estate since 1972, but it has also been reduced substantially in very large estates by recent legislation. Data is not given as to how the other states have fared since the Stein Study data was gathered. In 1972, there were no community property set aside statutes and all community property was subject to probate administration on the death of the husband even if all was left to the surviving wife. (Equal management of community property and set aside statutes were both adopted to become effective in 1975.) Thus, a very substantial, different, and much smaller asset base is present today than what existed in 1972.

Even the Stein Study, which characterized California to be in the middle of the rank of states studied in such study, is a mild overstatement. California was the lowest in the five states studied as to all estates and was either lowest or next

lowest in six out of the eight categories of estates discussed.
(See Table 3, page 36.)

The staff study at page 27 states that the method most commonly used in other states is the UPC method with court review only of those in dispute. Twelve UPC states are listed on page 29 and four others are characterized as having a similar rule. All of the UPC statutes were adopted in the 1970's except two recent enactments in Utah and South Carolina. With the exception of Florida and Minnesota, all of the states that have adopted the UPC have relatively small populations. One state (Arkansas) relied upon by staff as having a reasonable fee statute is now one of those included in the statutory fee list discussed at page 33. (See footnote 80.)

We believe that the comparison of the results of the UPC with the prior results for North Dakota and Idaho demonstrate negligible actual differences and are of such short duration following the adoption of the UPC and on such limited scale to be of no particular value in forming any significant conclusion (see page 30). The Stein Study, now 15 years out of date on its data, remains the only significant study. One can't disregard its conclusion -- "California is not out of line" -- because of changes in California law without determining what has happened in other states.

The staff has noted a number of states where the court determines reasonable compensation (see page 32). There are 15 listed. They involve a number of the principal heavily populated states (Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas).

The study points out that there are a total of 8 states with statutory fee structures. An analysis of the statutory fee and comparisons made between the various terms and rates is made. California is listed as the third highest in Table 6 on page 45. The typical estate was created in Appendix 2 to make such comparison.

The staff indicates considerable difficulty of attempting to compare statutory structures in the various states because of differences in the statutes and items that are included or not included. One issue deals with the question as to whether liens on real property are deducted to determine the value of the base upon which the fee is calculated. The staff assumes in the appendix that Arkansas, Delaware, New Mexico, Wyoming, and probably Missouri, as well as California, do not deduct the lien. The staff assumes that Montana and Hawaii

exclude the lien from the base upon which the fee is calculated on the assumption that the statute reads that the fee is calculated on the value of the estate as reported for federal estate tax or state inheritance tax purposes, etc. The staff has assumed, therefore, that the net value is all that is used in calculating the basis. The Committee has determined that such is not accurate, at least in the cases of Hawaii and Montana cited. Such conclusion obviously affects the statement of where California stands in relation to other states that have a statutory structure.

A study not mentioned or discussed by staff is one entitled "Legal Fees in Probate" appearing in Trusts and Estates magazine several years ago (December, 1966) which analyzed all states. At that time, California was ranked 41st with the highest being number 1. Even if the statutory rate presently utilized in California was used rather than the rate then applicable, California would be 31st among the states listed and the base upon which such fees are calculated is much smaller than when the survey was completed. This conclusion, of course, makes the assumption that no other states have changed their rates in either direction. The staff has not presented any demonstrable data which would conclude that standard fees for such matters in other states have been reduced substantially since such data was collected. In fact, the Committee feels that California will continue to fare well in relation to the other major industrial states. The Committee intends to supplement this report with such data as it is able to develop within the next couple of weeks on other states.

There are a number of states which are not cited at all by staff as to what method is used in determining such matters. Attempting to make a state-by-state analysis would result in data which is undoubtedly confusing and conflicting. Nevertheless, it must be noted that the total states reported in the staff memorandum is by no means complete. It would appear, based upon the states that are presented, that there is more population governed by statutes which require court approval than any other method discussed. (See states listed at page 32.) However, it would be simplistic to assume that court approval is, thus, a method that works best in California for the obvious reason that the probate process is a process of state law and state laws vary considerably. (Pennsylvania apparently has no fee statute and fees may be as much as 7% of the estate (see page 30).) While comparison to other states may be interesting and give us solace because of California being relatively low in relation to other industrial states, it does not answer the policy question. Such comparison does show, however, that the

last thorough analysis showed that California was not out of line with its statutory structure in comparison to other states without such structure and generally in the lower half of all states.

Fee Agreements

The staff memorandum seems to assume that the recent enactment of the Business & Professions Code sections dealing with the necessity of having written contracts for any attorney compensation requires a written contract when the statutory compensation is expected to exceed \$1,000.00 (see page 24). The Committee believes that the law is by no means clear on such point. There are at least two reasons why the statutory fee structure should still apply without a written contract. First, it is a specific statute dealing with compensation and, thus, simply may not be within the scope of the Business and Professions Code section. Second, statutory fees are legislatively specified and, thus, such are automatically a reasonable fee. Thus, such should be enforceable irrespective of a written agreement or not. It seems illogical that it could be argued that the legislatively specified fee rate is unreasonable and oral contracts for legal fees are enforceable if the fees are reasonable. The Committee feels, however, that it would be useful to have a legislative determination of such issue because the question is not as clear as it should be.

The Reasonable Fee Standard

The staff has suggested consideration of a reasonable fee standard being adopted to replace the statutory fee and suggests that there are several alternatives in dealing with the reasonable fee: (1) it is a matter of private agreement between the personal representative and the attorney with no court involvement unless an interested party objects in which case the court would review the fees, or (2) all such reasonable fees must be fixed by the court administering the estate, or (3) that notice of proposed action be given respecting the fee agreement at the beginning of the proceedings and the fee agreement would be approved unless objections were filed. If objections are filed, then such would be fixed by court.

Court Review

Substantial discussion is had in the memo concerning the pros and cons that are involved in the role of the courts

respecting review of fees in general. The Committee feels most strongly that automatic court review in all instances of what constitutes a reasonable fee without any statutory underpinning necessarily creates more court involvement than is justified. There are 58 counties in California. The level and sophistication of review of probate matters varies considerably within those counties. Without any standard being enacted, the results of "reasonable fees being awarded by court" would vary considerably and without factual justification to support such variation. It is no secret that the courts are, from time to time, quite reluctant to award fees at hourly rates which compensate attorneys for time spent consistent with billing rates they enjoy for nonprobate court approved fee matters.

In the comparable field of conservatorships, it's quite common for attorneys to decline to handle such matters and do everything possible to avoid conservatorships because of the ponderous legal procedures that have evolved in such matters and the generally undercompensated nature of the work. The Committee knows a number of attorneys who consistently decline to handle any conservatorship matters because of the inadequacy of the compensation.

The multiple factors approach suggested by staff for a reasonable fee standard (similar to Los Angeles County rules for extraordinary fee requests) is preferable to no standards at all being provided. It is common that courts in awarding fees almost always look principally if not solely at the amount of time expended. The Committee concurs in the staff analysis of time being only one of several factors in determining what is appropriate compensation. Thus, if a reasonable fee standard is to replace statutory fees, the multiple factors described should be added by statute to assist all parties in arriving at such reasonable fee.

The staff has alluded to but does not quantify or emphasize the trends that are apparent in compensation for at death transfers. The fact is that a majority of deaths do not, in fact, have a formal probate proceeding, because of the nature of holding title to property jointly or subject to inter vivos trusts with beneficiary designations or summary probate proceedings or spousal property proceedings. The statutory fee only applies to a minority of cases. Often those involve transfers other than to spouses and often involve transfers to persons other than lineal descendants, to charities and the like. Intestate estates and confused holographics are common in the probate court. Thus, it is quite likely the fact that the

standard probate case involves assets and facts which are more difficult to deal with than the average.

It is further a fact that negotiation of statutory fees is a trend which is growing. It certainly applies in many estates of substantial size and even in medium size estates, and consumers are becoming more sophisticated about such matters.

There has been substantial emphasis in recent times upon transferring assets pursuant to inter vivos trusts. It's not the purpose of this Committee to attempt to resolve the continuing debate about the advisability of inter vivos trust transfer planning. It is not true, as staff has suggested, that costs of transfer at death pursuant to inter vivos trusts are routinely negligible in relation to that by a probate. It's true that a different standard applies -- probably, an hourly rate standard rather than a statutory fee. It is also true that such may frequently result in less costs at death with inter vivos trust planning. However, such planning must account for the fact that establishment and funding of an inter vivos trust is frequently significantly more expensive than testamentary document preparation.

It is a regrettable fact that advertising and publicity in connection with inter vivos trust preparation is presented which sometimes do not provide the service and benefits which are promised. There is not a consensus that inter vivos trust transfer planning is inherently better and cheaper than testamentary transfers in the probate process. Members of the Committee can point to numerous examples of instances where one result or the other can be obtained based upon one's personal approach and bias.

Nevertheless, it is a fact that more and more substantial estates are being handled through the inter vivos trust method of transfer. Thus, the example of the "large simple estate" (assuming it ever existed in quantity) wherein large fees are earned is becoming more and more a matter of the past. There are less estates which would help to subsidize the economical estate in the range of \$60,000-\$150,000. These trends are readily apparent to members of the Committee even if they can't be quantified.

Statutory Fee Retention

The Committee feels that the retention of the statutory fee is justified for the simple reason that the consumer is protected by having a simple, understandable and nonadversary fee

system established by legislative act. To the limited extent that such statutory fee occasionally results in very generous charges for substantial estates and, thus, helps subsidize small estates, the Committee believes that such social policy is justified.

There are numerous examples in society today where the more affluent assist the less affluent. The exemption of numerous people from paying any federal income tax at all and the graduated income tax rate structure are examples. Medical reimbursements from Medicare and Medi-Cal result in very substantial discounts from the charges that hospitals and physicians normally receive as opposed to the standard charges that are paid by others. The present consideration that Social Security recipients who earn above a certain amount might be taxed on such amount or have their Social Security benefits phased out is another example. Thus, it is too simplistic to merely state that each estate should bear its own costs. We do not apologize for the fact that a modest-size estate may be subsidized in part by the large estate. Such results as a benefit to society is justified in its continuance. A number of attorneys have stated they continue to take all probate cases, including small ones, at the obviously losing rate of the statutory fee because of the benefit of handling larger matters which will provide the rate of return in an overall sense that the attorney is expected to receive.

A number of members of the Committee have commented that costs of operation of law firms have increased very substantially and the margin of profitability has been reduced significantly over the past several years. Probate matters on the statutory fee structure are not billed on a pay-as-you-go basis but rather at the completion of service. Many attorneys with larger firms indicated the increasing difficulty in such firms in dealing with both the image and fact that estate and probate services are not nearly as profitable to the law firm as services performed in several other areas of the law. If the statutory fee resulted in compensation at rates substantially in excess of hourly billing rates of the individuals involved, such analysis of the lack of profitability of probate services would not be as commonly perceived as it is. Attorneys simply are not receiving the high profits in estates as is commonly believed.

There is no question that the hourly rate charge commonly charged by attorneys has increased very substantially over the last several years. There has not been an increase in the statutory fee structure equivalent to that increase even with the statutory fee increase enacted in 1978, nor necessarily in the value of assets to which such structure applies. It is

believed that the statutory fee, if not already true, will soon prove to be a less costly method of dealing with estate administration than the hourly fee structure and other factors determining such fee. The statutory fee will protect the consumer because that rate is a legislatively controlled rate.

It is the experience of the Committee that standards in other states for services in probate administration are determined by a method largely akin to the statutory fee structure. The courts adopt schedules and the schedules, in general, often become the minimum fee for such matters in the usual case. The Committee is aware of numerous states which have state or local rules which provide for a standard schedule determining the fee. Fees become fixed based upon such standard even without a statutory schedule. Such appears to be applied irrespective of the skill and effort required or the amount of time required. Thus, even the reasonable fee standard becomes a matter which is, in fact, largely predetermined. By the statutory schedule, the Legislature retains control rather than local courts or private agreement.

A strong majority of the Executive Committee felt that they, individually, would earn more fees for themselves with their firm by having a reasonable fee standard rather than the statutory structure. The Committee feels that to be true even though it might be supposed that the strong support that the probate Bar shows for the statutory fee structure is based upon the probate Bar assuming that the statutory structure is more profitable. Even assuming that such Bar support is purely economic, the Committee feels that the reduced potential for abuse, certainty and equality among all practicing attorneys best protects the consumer.

Extraordinary Fees

There is considerable staff discussion of the subject of extraordinary attorneys' fees that are sought by attorneys for probate administration tasks beyond the scope of the statutory fee. Various local court rules have been adopted to relate to such issue and the requisites that attorneys must provide to substantiate such fees, etc. Such rules vary considerably.

The Committee agrees with the staff recommendation concerning clarification of the grounds for awarding statutory fees should be made. (See page 107.) Perhaps a more comprehensive listing of services which constitute extraordinary services akin to what Los Angeles County has provided, as itemized on pages 15 and 16, might be preferable to the currently itemized

grounds. It might also be useful to itemize certain services which do not, in the normal course of events, qualify for extraordinary services. The itemization listed for Fresno County on page 13, while rather self-evident in almost all instances, is an example of itemization of what services are normally deemed to be ordinary services. With two or three exceptions, the Fresno County rules merely recite the documents and petitions that must be presented in every estate proceeding in order to obtain distribution. The Committee believes that anything within the scope of such activities as defined would normally, but not always, constitute ordinary services for which no extraordinary compensation would properly be allowable.

Summary

In conclusion, retention of the statutory fee structure substantially as written today is endorsed and its retention is urged upon the Law Revision Commission. It's truly felt by the Committee that such statute, in fact, provides a substantial consumer benefit for all the reasons discussed herein.

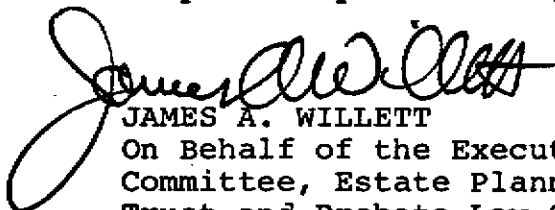
The Committee further endorses the retention of the statutory fee for the simple reason that any fee standard which involves a subjective standard, irrespective of how well articulated, would inevitably lead to significantly more disputes between attorneys and parties interested in the estate regarding such matters that will result in significantly increased court involvement resolving such conflicts.

Finally, the statutory structure allows the attorney to perform the services that are necessary to do all the appropriate things in dealing with the client and the transfer of property without being required to make a value judgment as to the time required for each individual task that would be inherent in any reasonable fee standard which is based upon time. It is a fact that some probate services required by attorneys are time consuming and important but do not involve substantial value or a significant legal problem. The standard of compensation on a time based system necessarily implies curtailment or elimination of the attorney for such services while the statutory fee structure allows such services to be performed as part of the overall legal services for the matter in question.

CALIFORNIA LAW REVISION COMMISSION
December 14, 1987
Page Thirteen

As always, we remain committed to serve and advise
further as appropriate.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "James A. Willett", is written over the typed name. The signature is fluid and cursive, with a large loop at the beginning.

JAMES A. WILLETT
On Behalf of the Executive
Committee, Estate Planning,
Trust and Probate Law Section

JAW:kt
Attachment

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

Chair
LLOYD W. HOMER, Campbell
Vice-Chair
D. KEITH BILTER, San Francisco

Advisors
HERMIONE K. BROWN, Los Angeles
THEODORE J. CRANSTON, La Jolla
JAMES D. DEVINE, Monterey
IRWIN D. GOLDRING, Beverly Hills
KENNETH M. KLUG, Fresno
JAMES C. OPEL, Los Angeles
LEONARD W. POLLARD II, San Diego
JAMES V. QUILLINAN, Mountain View
JAMES F. ROGERS, Los Angeles
HUGH NEAL WELLS III, Irvine

Section Administrator
PRES ZABLAN-SOBERON



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

Executive Committee
KATHRYN A. BAILEY, Los Angeles
D. KEITH BILTER, San Francisco
OWEN C. FIORE, San Jose
JOHN A. GRONIA, Escondido
ANNE K. HILKER, Los Angeles
WILLIAM HOISINGTON, San Francisco
LLOYD W. HOMER, Campbell
JAY ROSS MACMAHON, San Francisco
STERLING L. ROSSER, San Francisco
WILLIAM V. SCHMIDT, San Francisco
CLARE H. SPRINGS, San Francisco
ANNE STODDEN, Los Angeles
JAMES A. WILLETT, Sacramento
JANET L. WRIGHT, Fresno
DIANE C. YU, Los Angeles

Dear Section Member:

The California Law Revision Commission at its meeting on December 10, 1987, will consider various alternative proposals for determining attorney's fees in a probate estate. The Commission Staff has stated that the "most significant policy issue" in the Probate Code Study is whether the California statutory fee schedule should be abandoned in favor of a reasonable fee system.

Reasonable fees would be based on various elements, such as the complexity of the issues, the expertise of the attorney, the time expended, the amount involved, the results obtained, etc. If the Commission were to adopt a reasonable fee approach, statutory fees would be repealed.

To assist your Executive Committee in making a presentation to the Commission on statutory vs. reasonable attorney's fees for usual or ordinary legal services in a probate estate, please take a few minutes to answer the attached questionnaire. Please send your response, if at all possible, by December 4, 1987, to the address shown at the end of the questionnaire.

Thank you for your assistance on this matter.

Sincerely,

D. Keith Bilter
Chair

Attachment

Exhibit A

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

Chair
LLOYD W. HOMER, Campbell
Vice-Chair
D. KEITH BILTER, San Francisco

Advisors
HERMIONE K. BROWN, Los Angeles
THEODORE J. CRANSTON, La Jolla
JAMES D. DEVINE, Monterey
IRWIN D. GOLDRING, Beverly Hills
KENNETH M. KLUG, Fresno
JAMES C. OPEL, Los Angeles
LEONARD W. POLLARD II, San Diego
JAMES V. QUILLINAN, Mountain View
JAMES F. ROGERS, Los Angeles
HUGH NEAL WELLS III, Irvine

Section Administrator
PRES ZABLAN-SOBERON



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 361-8200

Executive Committee
KATHRYN A. BAILEY, San Francisco
D. KEITH BILTER, San Francisco
OWEN C. FLORE, San Francisco
JOHN A. GROMATA, Los Angeles
ANNE K. HILKER, Los Angeles
WILLIAM HOISINGTON, San Francisco
LLOYD W. HOMER, Campbell
JAY ROSS MCMATHON, San Francisco
STERLING L. ROSS, Irvine
WILLIAM SCHMIDT, Los Angeles
CLARE H. SPRINGS, San Francisco
ANNE STODOLIN, Los Angeles
JAMES A. WILFETT, San Francisco
JANET L. WRIGHT, Fresno
DIANE C. YU, Los Angeles

ATTORNEY'S FEES

Part I: The California Law Revision Commission at its December 10, 1987, meeting will consider the following alternative methods of determining attorney's fees in a probate estate. Please indicate your preferences by ranking the alternatives from 1 to 4, with alternative 1 being the most desirable and alternative 4 being the least desirable.

Alternative 1:

Rank

Statutory fees payable upon order of court and reasonable fees for extraordinary services as determined by the court (existing law)

Alternative 2:

Reasonable attorney's fees for all services a matter of private agreement between personal representative and attorney with no court involvement unless an interested party objects to fees, in which case the court would review the fees

Alternative 3:

Reasonable attorney's fees fixed by the court for all services (ordinary and extraordinary)

Alternative 4:

The personal representative under the Independent Administration of Estates Act could serve an Advice of Proposed Action on all interested persons of proposed reasonable attorney's fees to be paid and could pay such fees without court involvement absent an objection. If there was

an objection by an interested party (or if the Independent Administration of Estates Act was not utilized), the fees would be fixed by the court. _____

If you believe a different method of determining attorney's fees in a probate estate is preferable, please explain your proposal:

Part II: To assist the Commission in evaluating the alternative methods of determining attorney's fees, please answer the following questions, based upon your experience. The questions refer only to ordinary or usual services, that is, those now included in statutory services.

1. In a probate estate of \$100,000, if you charged for your ordinary services on a straight hourly time charge basis, would your charges be higher ____, lower ____ or about the same ____ as statutory fees for those services?
2. In a probate estate of between \$100,000 and \$300,000, if you charged for your ordinary services on a straight hourly time charge basis, would your charges be higher ____, lower ____ or about the same ____ as statutory fees for those services?
3. In a probate estate of between \$300,000 and \$600,000, if you charged for your ordinary services on a straight hourly time charge basis, would your charges be higher ____, lower ____ or about the same ____ as statutory fees for those services?
4. In a probate estate of over \$600,000, if you charged for your ordinary services on a straight hourly time charge basis, would your charges be higher ____, lower ____ or about the same ____ as statutory fees for those services?

Name of county in which your office is located: _____

Please send your responses as soon as possible to:

CRABTREE & GOODWIN

ATTORNEYS AT LAW

SUITE 402, CRABTREE BUILDING

303 "A" STREET

SAN DIEGO, CALIFORNIA 92101

BROOKS CRABTREE
JAMES GOODWIN
DANIEL B. CRABTREE

AREA CODE 619
TELEPHONE 239-6161

December 8, 1987

Mr. John DeMouilly
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Re: Memorandum 87-100 - Probate Attorneys' Fees

Dear Mr. DeMouilly:

The San Diego County Bar Association Legislative Subcommittee on Estate Planning, Trust and Probate matters met December 7, 1987 to consider for the second time the study on Probate Attorneys Fees and the various recommendations therein. In addition, we were fortunate to have Barbara Curry, the Chief Probate Examiner of the Superior Court, County of San Diego attend our meeting to give the Probate Examiner perspective at our meeting.

It is certainly clear that the biggest problem facing the Probate Court on a regular basis is attorneys' fees and, therefore, the Subcommittee firmly supports the delineation in the Probate Code of services that are statutory in nature and services that are considered extraordinary services. There does not appear to be any good reason why the definition of extraordinary services should vary from county to county and the above delineation should be informative both for Probate practitioners as well as Probate Judges.

It is also the consensus of our Subcommittee that time is not the best indicator for the size of fees to be awarded for extraordinary services. Although most practitioners and judges centralize their thoughts on the amount of time spent in extraordinary services, it would appear such reasoning has a tendency to reward incompetent or uneducated attorneys where the more experienced practitioner can complete a given job in less time and should therefore not be penalized.

Our Subcommittee continues to be in favor of the present statutory fee system without Court discretion to reduce statutory fees for any reason other than those stated in Probate Code 1025.5. The Subcommittee also opposes a reasonable fee system found under the Uniform Probate Code. It is our Subcommittee's feelings that negotiating with an Executor as to the size of a reasonable fee may be inappropriate because an independent Executor frequently has no vested interest in the outcome of a fee negotiation and it is the beneficiaries who would eventually

-- December 8, 1987
To: Mr. John DeMouilly
From: James Goodwin
Page: Two

suffer by an unreasonable fee. Under reasonable fees, however, if an attorney does reach a fee agreement with an Executor that agreement should be published to each beneficiary and each beneficiary should be told that he, she or it has a right to object to that fee. This system would allow beneficiaries to be aware of their rights at the beginning rather than the end of a probate. A hybrid solution might be to retain statutory fees but let fees for extraordinary services be reasonable, subject to fee arrangements which should be published to all beneficiaries.

Our Subcommittee still feels that the valuation of an estate for fee purposes should be the gross estate and not the net estate. There are far too many problems in dealing with insolvent estates or estates that are highly mortgaged or leveraged. It is still clear that assets of an estate must be probated despite the existence of large mortgages.

Finally, I would close in saying that our Subcommittee favors the statutory fee system to lessen the wide variation of fees charged by attorneys and the wide variation of judges sitting on the Probate bench. A reasonable fee approach for extraordinary services might alleviate Court time in this area. On the other hand, a guideline system for extraordinary services not only gives the practitioner an idea of what type of fee is appropriate for a given service but also gives a probate judge who may or may not have ever done probate work an idea of what is established and appropriate for a given service.

I hope this synopsis of our Subcommittee's meeting is useful to the Law Revision Commission.

Very truly yours,



Daniel B. Crabtree
Chairman

DBC/tlm
cc: Barbara Curry
Chief, Probate Examining

LATHAM & WATKINS

ATTORNEYS AT LAW

555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071-2466
TELEPHONE (213) 485-1234
TELECOPIER (213) 614-8763

PAUL R. WATKINS (1899-1973)
DANA LATHAM (1898-1974)

CHICAGO OFFICE

BEARS TOWER, SUITE 5800
CHICAGO, ILLINOIS 60606
TELEPHONE (312) 876-7700
TELECOPIER (312) 993-9767

NEW YORK OFFICE

53RD AT THIRD, SUITE 1000
885 THIRD AVENUE
NEW YORK, NEW YORK 10022-4802
TELEPHONE (212) 906-1200
TELECOPIER (212) 751-4664

ORANGE COUNTY OFFICE

650 TOWN CENTER DRIVE
TWENTIETH FLOOR
COSTA MESA, CALIFORNIA 92626-1916
TELEPHONE (714) 540-1215
TELECOPIER (714) 755-8290

TLX 590773

ELN 62793268

CABLE ADDRESS LATHWAT

SAN DIEGO OFFICE

701 "B" STREET, SUITE 2100
SAN DIEGO, CALIFORNIA 92101-6197
TELEPHONE (619) 236-4234
TELECOPIER (619) 696-8281

WASHINGTON, D.C. OFFICE

1333 NEW HAMPSHIRE AVE., N.W., SUITE 1200
WASHINGTON, D.C. 20036-1594
TELEPHONE (202) 828-4400
TELECOPIER (202) 828-4415

December 17, 1987

CA LAW REV. COMM'N

DEC 21 1987

RECEIVED

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Study L-1036--Probate Attorney Fees

Dear Commissioners:

The Executive Committee of the Probate and Trust Section of the Los Angeles County Bar Association discussed the Commission Staff's memorandum on "California Probate Attorney Fees" at its last meeting. It is the view of the members of the Executive Committee that the arguments presented in favor of abandoning the present system are insufficient to support changing the system at this time. In addition, the members of the Executive Committee comprising its New Legislation Committee have reviewed the memorandum in detail, and submit the following comments.

Position of the New Legislation Committee

In accord with the view of the entire Executive Committee expressed above, the members of the New Legislation Committee disagree with most of the conclusions reached in the Staff's memorandum, and believe the present system works fairly well. The current system, in fact, combines the "percentage fee" and "reasonable fee" methods, and thereby protects clients, minimizes the opportunity for attorneys to charge inappropriate fees, produces a reasonable fee for attorneys in the majority of their cases, and as a percentage of the total cases, leads to relatively few disputes with clients.

We base our conclusions on our own experiences, as well as the experiences reflected in the responses received to the Staff's "Probate Practice Survey Questionnaire." The statistics derived from the questionnaire do not reflect a

California Law Revision Commission
December 17, 1987
Page 2

troubled system. Of those attorneys responding, about 75% considered themselves to be probate specialists, about 75% practiced alone or in firms with fewer than 10 lawyers, about 60% administered estates with insignificant assets in less than 30% of their probate matters, about 80% charged the full statutory fee in at least 90% of their estates, less than 70% charged extraordinary fees in more than 50% of their estates, and only about 20% charged additional fees outside probate in more than 30% of their estates. About 80% of those attorneys responding had complaints of any type in less than 20% of their estates, and less than half the complaints were fee related.

These statistics do not suggest or support that the current system is broken or needs fixing. Rather, they seem to show that experienced probate lawyers handling primarily "not insignificant" estates are able to charge only the statutory fee in most of their probates and handle their matters without disputes with their clients. It is little wonder, therefore, that about 75% of the attorneys responding oppose the proposed UPC scheme for determining fees.

In reaching our position, we also rely on our own experiences with non-California probates and discussions with lawyers practicing both within and outside California. The experience of members of our Executive Committee in states using the reasonable fee method is that the reasonable fee approach produces, in an average situation, a total attorney fee of around 5% of the value of the estate, a much higher fee than would be awarded in California under the current system.

It is our view, based on conversations with probate attorneys practicing in such states as New York and Illinois, that California probate fees are in fact low, in comparison to the fees charged in such comparable jurisdictions. Further, we know that California probate practitioners are not the wealthy members of the Bar. Rather, because of the marginal economic nature of the practice area, larger firms are committing fewer resources to this practice area. This is the reality of the situation, which is not at all reflected in the information presented in the Staff memorandum.

California Law Revision Commission
December 17, 1987
Page 3

Comments on the Staff Memorandum

The members of the Committee are extremely concerned that the Staff memorandum reflects a preconceived bias against the current system (and the use of a statutory fee schedule in any manner) and adopts a consistently negative attitude toward attorneys. This concern arises from our perception that many of the conclusions stated in the memorandum are unsupported by the information cited. For example, on page 63, the memorandum states that California statutory fees are high compared to the statutory fees in other states. However, the actual numbers and the obvious economic differences between the geographic locations compared make clear that the memorandum's conclusion is strained, and based on prejudice rather than analysis.

We are particularly troubled by comments such as this one (which appears on page 65): "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." It should not come as any surprise that the attorneys responding to the questionnaire serve their clients well, receive a fair fee, and confront little dissatisfaction.

Further, we note that the memorandum frequently uses charged words, such as "windfall" and "excessive" to describe the fees earned under the current system. Moreover, in its conclusion, the memorandum seems purposely to ignore and misstate the arguments favoring the current system.

In our view, the purported "study" is not really a study in any sense, but is, throughout, a memorandum arguing that probate attorneys are gouging the public and that adoption of the UPC scheme is the only way to stop them. The memorandum manipulates the statistics derived from the survey to present attorneys in a false light and to describe the present system in an unfavorable and negative way.

Recommendations

As stated above, the members of the Committee recommend that the statutory fee schedule be retained. This recommendation primarily reflects our awareness that many nonprobate specialists handle estate administrations, and

California Law Revision Commission
December 17, 1987
Page 4

they and their clients frequently need the protection or guidance of a statutory fee schedule that puts a cap on the cost of ordinary services and includes court review.

We are also concerned that absent some fee schedule on which clients may rely, they may shop for cut-rate hourly fees and suffer poorer services as a result. Relatively few attorneys or clients are really aware of the amount of work a well-run probate requires.

Thank you for considering our views.

Sincerely yours,



Michael S. Whalen
of LATHAM & WATKINS

cc: Richard L. Stack, Esq.
Susan T. House, Esq.
Gloria Pitzer, Esq.
Kenneth A. Feinfield, Esq.
Marshall A. Oldman, Esq.

ABBITT & BENNETT

A PROFESSIONAL CORPORATION

SUITE 1100

12121 WILSHIRE BOULEVARD

LOS ANGELES, CALIFORNIA 90025

AREA CODE 213
824-0471

FAX 213 820-5960

DIANE ABBITT
ROBERTA BENNETT*
MARK E. LEHMAN
MITCHELL A. JACOBS*
JEFFREY G. GIBSON
KARYN S. BRYSON
MARIELLEN YARC

OF COUNSEL
KENNETH G. PETRULIS

*CERTIFIED FAMILY LAW SPECIALIST

December 17, 1987

LEG. COMM'N
DEC 21 1987
RECEIVED

California Law Revision Commission
4000 Middlefield Road, No. D2
Palo Alto, CA 94303-4739

Re: Memorandum 87-49 - Study L-1036
Probate Attorneys Fees

Commissioners:

We have submitted the subject of probate attorney's fees to a review of our Legislative Committee and the Beverly Hills Bar Association Probate Section at its monthly meeting. The following is a consensus response of the members. Approximately 25% of those responding disagree with these views.

Initially, we are concerned that the Law Revision Commission Memorandum implies that the Uniform Probate Code System will be better for clients and that attorneys who support the statutory fee system do so for their own interests, and not for the interests of their client. This is not so.

The Statutory Fee System we support includes a required Court review of fees. Court review is still the surest way to prevent unreasonable fee practices. This protection is lost under the Uniform Probate Code System. We, therefore, believe clients would be benefitted by not adopting the Uniform Probate Code System.

The Uniform Probate Code System of a "reasonable fee," without Court review, has generally resulted in higher fees. For example, Massachusetts, which has a reasonable fee system, is noted by Martindale-Hubbell as having a general rule that a flat 5% is a reasonable fee. Anecdotal experiences of attorneys in the section confirm the flat 5% rule as being widespread in practice.

In our experience, the statutory fee results in a fee which is a reasonable approximation of the time and work expended. The most frequently noted occurrence of overcompensation involved attorneys representing institutional personal representatives. In our region, however, the use of institutions is a waning practice.

ABBITT & BENNETT
A PROFESSIONAL CORPORATION

For these reasons, we urge the retention of the Statutory Fee System and that the Commission merely undertake to review the structure of the Statutory Fee System to see that it meets the needs of the community under present circumstances.

Respectfully submitted,

BEVERLY HILLS BAR ASSOCIATION
PROBATE SECTION, LEGISLATIVE COMMITTEE



KENNETH G. PETRULIS
Chair

KGP/ar

cc: Beverly Hills Bar Association
Probate & Estate Planning Legislative Committee;
Ralph Palmieri
Jeffrey A. Altman
Kenneth A. Feinfeld
David Gutman
Marc B. Hankin
Linda D. Hess
Laura Kimche Horwitch
Janet A. McCoy
Bruce D. Sires
James J. Stewart
Melinda J. Tooch
Lance M. Weagant
David E. Lich
Linda Dmytryk
Phyllis Cardoza

ABBITT & BENNETT
A PROFESSIONAL CORPORATION

For the following reasons, we believe that clients would be benefitted by the retention of the Statutory Fee System:

A. It is a scaled fee system set at a reasonable level by persons knowledgeable in the field and is subject to revision when circumstances require it.

B. Fees are reviewed by the Court and requested extraordinary fees may be reduced or eliminated by the Court.

C. A lower fee can be negotiated by the client.

D. The client has confidence that the attorney is charging the prevailing rate in the community.

E. People who are under emotional distress and are often unsophisticated in business or legal matters are not forced into a negotiating situation with a lawyer. Such people, of course, would also be the least likely to complain, even if an unreasonable fee is being charged.

F. In many cases, the personal representative might have no interest in negotiating a lower fee and may have an interest in actually negotiating a higher fee, in order to either increase the personal representative's fees or promote an ongoing relationship with the attorney.

G. Small estates are protected and unethical practices, both in small and larger estates, are discouraged.

H. Most estates are served well by the present system.

I. The system has worked well in California for a number of years.

Most complaints deal not with attorney's fees, but, rather, with the duration and complications of the probate process itself.

We believe attorneys would manage well under a Uniform Probate Code System. In fact, they may well benefit from it. However, as leaders in the probate field, we are concerned that clients be protected, and that those clients who are least able to protect themselves, will continue to receive the benefit of the Statutory Fee System. We all seek for the legal community the highest ethical standard. But, we all know that under the Reasonable Fee System there will be cases where clients will be taken advantage of.