#L-1036/1055

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First Supplement to Memorandum 89-3

Subject: Study L-1036/1055 - Compensation of Estate Attorney and Personal Representative

The attached memorandum from Commissioner Vaughn R. Walker urges the Commission to withdraw the October 1988 Tentative Recommendation Relating to Compensation of Estate Attorney and Personal Representative.

Respectfully submitted,

John H. DeMoully
Executive Secretary

December 21, 1988

This memorandum urges that the Commission withdraw the October 1988 Tentative Recommendation relating to Compensation of Estate Attorney and Personal Representative ("T.R.").

INTRODUCTION

The "caldron of public dissatisfaction over probate fees, which many view as having been forged through an amalgam of lawyer self-interest and lawyer mistrust" (Matter of Estate of Effron (1981) 117 Cal.App.3d 915, 926), was the primary motivation for the Legislature's direction to the Commission to reform the California probate system (Staff Memo. 88-70, 3d Supp., p. 2). The Commission's decision to retain a system of statutory attorney and personal representative fees appears seriously at odds with the Legislature's direction, the prevailing public sentiment on the issue (id., p. 3) and the "trend nationwide * * * to abandon a system involving a fee schedule" (Staff Rpt., p. 87). This decision runs counter to the recommendations of the respected scholars and practitioners who, acting for the National Conference of Commissioners on Uniform State Law, produced the Uniform Probate Code. The Tentative Recommendation is also inconsistent with the considered views in the Commission staff's lengthy and excellent initial report on the subject ("California Probate Attorney Fees," Nov. 11, 1987 ["Staff Rpt."]) which, while not containing an explicit recommendation, clearly favors adoption of the Uniform Probate Code "reasonable fee" approach as the better course.

The probate law section of the American Bar Association recognized almost two decades ago that "[r]igid adherence to statutory * * * fee schedules is a frequent source of unfairness to beneficiaries of estates, to personal representatives and to lawyers settling estates" (Mem. 88-41, 1st Supp., attach. p. 592). Significantly, the ABA's position preceded the United States Supreme Court decision holding that attorney fee schedules recommended by private groups constitute restraints of trade impermissible under the antitrust laws (Goldfarb v. Virginia State Bar (1975) 421 U.S. 773).

The Tentative Recommendation identifies five grounds for retention of the statutory fee schedule: protection against excessive fees; benefitting people of modest means; simplicity and dispute avoidance; dispute reduction; and attorney time correlates with the size of the estate. But the arguments and data advanced to support these grounds are not only unconvincing and contrary to scholarly, judicial and professional thinking on the subject but also inconsistent with actions of the Commission and suggestions of staff. The case for retaining a statutory fee schedule advanced in the Tentative Recommendation is so flawed that submission in its present form to the Legislature risks a serious disservice to the Commission's credibility. Upon reflection, I believe that the Commission can meet the Legislature's mandate for meaningful reform only by complete rejection of the legislated price-fixing scheme embodied in the Tentative Recommendation.

I. THE COMMISSION'S JUSTIFICATIONS FOR RETAINING THE STATUTORY FEE SCHEDULE DO NOT SUPPORT THAT RECOMMENDATION.

The purported justifications for retaining the statutory fee schedule claimed in the Tentative

Recommendation (T.R., p. 10) do not withstand serious scrutiny. Consider each of them.

A. Protection against excessive fees.

One is struck that this argument is advanced most vigorously by representatives of the Bar (Comm.Minutes, Jan 14-15, 1988, pp. 25-29 [Collier: "The statutory fee is very much consumer-oriented, is very protective of the consumer"], p. 37 [Petrulis: "The statutory fee system provides a lot of protection for the consumer"], p. 40 [Lawson: "If I had a reasonable fee schedule, I would make a heck of a lot more money"]). The notion that the legal profession favors the statutory fee schedule because it generates lower lawyers' income and really benefits "consumers" cannot for one moment be made plausible even by the respected and distinguished lawyers who have pressed these statements on the Commission.

The Bar deserves no criticism for pursuing its professional self-interest, but the Bar diminishes its credibility by claiming that its motivations are otherwise. This is particularly true when "consumers"--the supposed objects of the Bar's solicitude--have strongly urged the Commission to abolish the vehicle by which the Bar purports to protect them (Comm.Mins., Jan. 14-15, 1988, pp. 11-21).

The Bar's "consumer protection" argument is also made ironic by its implicit assumption: unless prevented by the statutory fee schedule, the lawyers of California will charge excessive fees for probate work. The Bar representatives argue that the statutory fee schedule "minimizes opportunities to charge inappropriate fees" and point to states where no statutory fee schedule exists as providing examples of attorneys who "often inflate the fees, or use the pressure of the situation to get an advantage"

(Comm.Mins., Jan. 14-15, 1988, pp. 24, 37). Such statements were not supported by specifics but what makes these proclamations by leaders of the probate bar truly extraordinary is the premise that they and their colleagues must be restrained by act of the Legislature from mulcting their clients.

If lawyers must be paid to be ethical, there will be no limit to the price. But none of these probate bar leaders have come forward with evidence that probate lawyers are less scrupulous than other elements of the legal profession or that probate clients are more vulnerable to overreaching lawyers than accident victims, persons seeking marital dissolution, home buyers and the myriad others who routinely seek the services of lawyers.

The Bar attempts to conjure up the image that probate clients are unsophisticated and credulous (Comm. Mins., Jan 14-15, 1988, p. 38: "[W]hat's more you're dealing with a person who's under the pressure of a recent death, numerous bills, of funeral problems. This person really isn't in the best position to negotiate"). The instances where this image would most likely fit is the sole beneficiary spouse and estate under $60,000 situations. Yet, in these situations no formal probate is required at all (Prob.Code, §§ 13650-13660), or an affidavit or summary procedure is available (Prob.Code, §§ 13100, et seq., 13150, et seq.), and, in either event, attorney fees are not subject to the statutory fee schedule but wholly determined by private agreement (Staff Rpt., p. 21-22). Moreover, of course, the Bar's doleful imagery has no application to corporate fiduciaries serving as personal representative but in that case both the attorney and the corporate fiduciary receive fees set by statutory fee schedule.

We need not rely on any statutory schedule or the goodwill of the probate bar to guard against unreasonable probate fees. Fortunately, there is a far more effective force than either one to restrain any unfortunate proclivities of some probate lawyers to gouge their clients: namely, the self-interest of the clients themselves. The Bar to the contrary, if unleashed from the inevitable restraint of the statutory fee schedule, the clients' interests would work in a free market against the lawyers' self-interest in maximizing their fees. The self-interest of probate law "consumers" would afford infinitely more effective regulation of lawyers than any arbitrary fee schedule this Commission can recommend or the Legislature may enact.

One need not repose blind faith in free market economic theories to see that this is so. The statutory fee schedule deprives clients of the "'advantages which they derive from free competition'" (Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 775, quoting Apex Hosiery Co. v. Leader (1940) 310 U.S. 469, 501):

> "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce" (id. at 788).

The available empirical evidence supports what common sense suggests: abandonment of the restraining influence of a statutory fee schedule in favor of negotiable attorney fees reduces the costs to clients of probate legal services. In Idaho, the first state to replace a statutory fee schedule with the Uniform Probate Code procedure, one study found that four years later nearly 58 percent of the lawyers reported average and median attorney fees reductions of 33.5 and 30 percent, respectively, with reductions up to

60 percent (Crapo, "Uniform Probate Code - Does It Really Work" 1976 B.Y.U.L.Rev. 395, 404). These findings are consistent with an earlier study of Idaho inheritance tax returns which showed reductions in average and median attorney fees of 50 and 26 percent, respectively, two years after abandonment of the statutory fee schedule (Kinsey, A Contrast of Trends (1974) 50 N.D.L.Rev. 523, 526-527). The staff pointed out the Idaho experience to the Commission (Staff Rpt., pp. 30-31) and it is difficult to understand how the Commission can justifiably omit mention of this experience in the Tentative Recommendation.

But the Tentative Recommendation contains still other flaws. Although the Tentative Recommendation declares California probate attorney fees "not out of line," the fact is "California statutory fees are high compared to the statutory fees in other states" (Staff Rpt., p. 63). The staff has conceded that the table which the Tentative Recommendation uses to assert that California probate fees are "not out of line" with other states' statutory fixed fees not subject to court reduction omits Missouri on the ground its statute fixes a minimum fee rather than a non-reducible maximum fee (Mem. 88-70, 3d Supp., p. 6). The apparent rationale of Missouri's omission is that a non-reducible maximum is different from a minimum fee. The effect of excluding Missouri makes it appear that California attorney fees exceed those in the other states by only about 12 percent; including Missouri (a state more comparable to California than the other two: Wyoming and Hawaii) would show California probate fees to be 88 percent higher.

Moreover, the data used by the Tentative Recommendation for the proposition that California probate fees are "not out of line" are far from compelling. One source of these data is a "telephone survey of probate practitioners"

in various states conducted by the State Bar Estate Planning, Trust and Probate Section which admits that the survey produced only a "'very rough' approximation of probate attorney fees in the states surveyed" (T.R., p. 7, n. 12). It is disturbing that the State Bar's "'very rough' approximation" of California probate attorney fees is about one-half of estimates published elsewhere (Gottschalk, "Your Money Matters," Wall Street Journal, Feb. 4, 1987). But even if California probate attorney fees are "not out of line," one must ask if that justification is sufficient?

The response--obviously negative--appears in other data put forward in the Tentative Recommendation: the so-called Stein Study published in the Minnesota Law Review. The survey underlying the Stein Study was based on data now almost 17 years old (1972) and collected before California's 1986 increase in its statutory fee schedule (T.R., p. 8, n. 16). Its outdated data base gives scant reason for us to rely on the Stein Study for the proposition that California probate fees are "not out of line." Moreover, California was the only community property state in the Stein Study survey further diminishing the study's reliability. Where the Stein Study may still be reliable is in its finding that California led all the other states surveyed in the percentage of personal representatives and beneficiaries expressing dissatisfaction about the probate system (Stein and Fierstein, The Estate Administration Attorney, 6 Minn.L.Rev. 1007, Table 9.4 at 1208).* At least that

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* Interestingly, the source of information about personal representative/beneficiary dissatisfaction in California were attorney interviews whereas in three of the five states surveyed personal representatives and beneficiaries, presumably a more reliable source of information about such dissatisfaction, were also interviewed (Stein and Fierstein,

(footnote continued)

finding of the Stein Study, unlike its other findings, is corroborated by the numerous nonlawyers who have appeared before us.

B. Benefiting people of modest means.

One prominent Los Angeles lawyer, Paul Gordon Hoffman, candidly admits that it is "absurd," as the Tentative Recommendation posits, that a statutory fee schedule shifts some costs of estate administration from smaller to larger estates (Hoffman Ltr., Nov. 16, 1988, p. 2). Mr. Hoffman's letter gives the complete answer to this assertion:

> "[T]he statutory fee schedule is such that most small estates are unprofitable for any attorney. An attorney has no obligation to take on unprofitable civil matters and most probate lawyers will refuse to handle small estates. Thus, the statutory fee schedule deprives many people of access to counsel" (ibid.).

Mr. Hoffman also questions whether there really is an "excess" profit from large estates (the premise of the Commission's purported justification) because of the reluctance of personal representatives handling such estates to pay unreasonable attorney fees in the first place.

If Mr. Hoffman is correct, small estates do not benefit from unreasonably high fees on larger estates, either because probate lawyers do not take on small estates or because probate lawyers cannot collect "excess profits" from large estates. On the other hand, if the Commission's cost shifting argument is correct, then the statutory fee

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(footnote continued)

supra, Tables 9.5, at 1209, 9.8 at 1213, 9.10 at 1216, 9.12-9.13 at 1218, 9.14-9.15 at 1219, 9.16 at 1220, 9117 at 1222-1223, 9.19 at 1224).

schedule is but a disguised tax on large, relatively easily probated estates--a tax that by statute is automatically appropriated to the probate lawyers of California.

We do not need to know who is right or if the reality lies somewhere between Mr. Hoffman's belief and the Commission's conjecture. Only by requiring that every California lawyer must take on and handle any estate offered can we ensure that the excess profits earned by lawyers on larger estates would effectively be remitted to benefit smaller estates. Such a requirement would raise serious constitutional issues, is obviously impractical and, of course, would provoke the vehement and understandable opposition of the Bar. Our legislative recommendations should not depend for their full implementation on dubious and unattainable enforcement mechanisms that we know will never be imposed, but that is precisely the situation here.

Even if Mr. Hoffman is correct that personal representatives of the larger estates bargain away most or a part of any excessive fees which the statutory fee schedule generates on larger estates, the vices of our legislative recommendation remain. First, the staff has labelled the Tentative Recommendation as a "maximum fee system" that "can be justified as a consumer protection measure, even though California is one of only four states that have a statutory fee that is not subject to being reduced by the court" (Staff Mem. 88-70, 3d Supp., p. 3). But this description of our recommendation would be false advertising. For one thing, the provisions governing attorney fees nowhere use the term "maximum" (Mins., Oct. 24, p. 8) and that word was eliminated from the proposed disclosure statement to be signed by the personal representative (ibid.).

Moreover, the executive committee of the State Bar probate section evidently disagrees that the recommended legislation creates a "maximum fee" system but insists that the recommended legislation authorizes, or at least should authorize, a "normal, standard and usual fee," (Mem. 88-70, 3d Supp., Collier Ltr., p. 1) and, at least one commissioner appears to agree with this interpretation (Mem. 88-70, 2d Supp., Stodden Ltr., p. 1);* the Bar even proposes that any deviation from the statutory fee schedule be deemed a "waiver" (Mins., Oct. 24, 1988, p. 7), implying that the statutory fee schedule creates a right to fees in the estate attorney. At its October 24 meeting, the Commission voted to delete "maximum" from the required attorney fee disclosure statement (Comm.Mins., Oct. 24, 1988, p. 8) and, although the Commission also rejected language expressly negating a personal representative's duty to negotiate for a lower fee, the minutes contain the contradictory statement that the Commission's approach "avoids the implication that the personal representative has the duty to negotiate for a lower fee and might be liable for failure to do so" (id., p. 10).

Our actions speak louder than our words. If we intend to recommend a system of maximum fees we should do so

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* The State Bar's attempted characterization of the statutory fee schedule as the "standard" fee is a thinly disguised "masquerade for an agreement to fix uniform prices" (Arizona v. Maricopa County Medical Society (1982) 457 U.S. 332, 348) and an effort to remove the pressure for lower fees by negating any duty of the personal representative to bargain for such fees. Because the Bar's suggestion is wholly inconsistent with lower probate fees, it should be vigorously resisted, as well as other variants of the idea (e.g., Mr. Hoffman's suggestion of a "rebuttable presumption" that the "statutory fee schedule provides for a reasonable fee" [Hoffman Ltr., p. 3]).

clearly and unequivocally. What we should not do is to sell the recommended legislation as a maximum fee system when it is not one. But, in truth, a maximum fee schedule would be no better than a minimum fee schedule.

In the context of a county bar fee schedule not embraced by the state action antitrust exemption under Parker v. Brown (1943) 317 U.S. 341, the Supreme Court pointed out that "the desire of attorneys to comply with announced professional norms" reinforced by the exclusive franchise of lawyers to provide legal services preventing consumers from turning to "alternative sources for the necessary service" make attorney fee schedules "unusually damaging" (Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 781-782). The Supreme Court has condemned agreements to fix professional service maximum prices "'no less than those to fix minimum prices, because they cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment'" (Arizona v. Maricopa County Medical Society (1982) 457 U.S. 332, 346, quoting Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc. (1951) 340 U.S. 211). The crippling and unusually damaging effects of an attorney fee schedule are no less simply because it is enacted by the Legislature and, therefore, exempt under Parker v. Brown from direct antitrust attack.* In fact, immunity of the statutory fee schedule we propose from an otherwise inevitable antitrust attack if enacted by

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* Although the Legislature's enactment of a statutory fee schedule may be beyond attack under the Sherman Act (15 U.S.C. § 1, et seq.), concerted action by individual lawyers or private groups to enforce compliance with a legislatively enacted fee schedule may be subject to antitrust attack (Goldfarb v. Virginia State Bar, supra, at 791).

a private body* should make us more rather than less cautious about putting forward such a recommendation.

Second, and perhaps more importantly, the statutory fee schedule has a corrosive effect on the quality of legal services delivered to the public and discourages lawyers from performing the appropriate type of services. Because it sets an arbitrary fee free of competitive pressures, the statutory fee schedule encourages lawyers to practice probate law when they are not competent to do so (Staff Rpt., p. 67). Moreover, the fixed amount of the statutory fee may encourage the attorney to do the minimum amount and quality of services possible (Staff Rpt., p. 68). Mr. Hoffman's letter also points out that the "existence of a statutory fee schedule is a major selling point" of the proliferating living trust device. (See also Staff Rpt., p. 62.) While, as Mr. Hoffman states, that device may be appropriate for some individuals, to the extent it is used by those who would be better served by probate, but who seek to avoid statutory attorney fees, an inappropriate type of legal service has been encouraged.

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* On December 6, 1988, Assistant Attorney General Charles F. Rule announced "several grand jury investigations into allegations of anticompetitive behavior by members of the medical profession" (BNA Antitrust & Trade Reg. Rpt., Vol. 55, No. 1394 (Dec. 8, 1988), p. 965):

> "To avoid criminal prosecution, Rule suggested that competing independent doctors never agree:
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> "° On any term of price, quantity, or quality, including fee schedules and relative value scales * * *" (ibid.) (emphasis supplied).

This admonition should apply also to lawyers.

When a probate attorney turns away a small estate because the statutory fee does not justify the costs of that attorney's services, a personal representative who otherwise would have been willing to pay the attorney fees must settle for a less preferred alternative lawyer. This may adversely impact the client's perception of the legal services' quality which, however difficult to measure, stems in part from the client dealing with a professional of choice. In words fully applicable to the statutory fee schedule we recommend, the Supreme Court has noted that a fee schedule is:

> "* * * a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character" (Arizona v. Maricopa County Medical Society, supra, at 348).

Third, the statutory fee schedule creates an obvious conflict of interest between the attorney and estate beneficiaries. The higher the estate value, the higher the attorney fees, but the higher also the federal estate tax (Staff Rpt., p. 67).

It is profoundly unwise for us to recommend legislation that ignores the economic pressures which tempt, and may at times succeed in causing, lawyers to do less good work than they are capable, that builds in an inherent conflict of interest and disincentives against innovation and development of increased efficiencies in performing estate work. The danger of reinforcing inefficient practice is particularly great here because the statutory fee schedule applies to so-called "ordinary services," presumably

those most susceptible to increased efficiency and innovative procedures. The ability of probate lawyers to compete on the price of their services affords that incentive. The statutory fee schedule, by contrast, discourages innovation and routinization, which permit lawyers to generate more business by offering to share the benefits with clients through lower prices.

C. Simplicity and dispute avoidance.

It is mysterious that the Tentative Recommendation would assert simplicity as one of the grounds supporting its legislative recommendation, since the mistake in this statement is so easily shown. Far from being "simple and the courts can easily apply it" (T.R., p. 10), our legislative proposal contains elaborate and complex requirements for court review and approval of attorney fees. The Uniform Probate Code provides none.

For an attorney to get paid under our proposal requires extensive involvement of the court. Except upon court approval, an attorney cannot be paid at all until the final order of distribution (T.R., p. 36, § 10851) and before any such prefinal payment can be made the court must conduct the hearing provided for in proposed section 10850 (T.R., pp. 34-35). In that hearing, the court must determine the services rendered up to that date and the "proper" compensation for such services (T.R., p. 35, § 10850(c)). Final compensation also requires a court hearing (T.R., p. 36, § 10851(a)(2)). Under existing practice, most probate courts require the lawyer to provide the details on computation of the statutory fee so that the court can check the accuracy of the attorney's compensation before making an order approving the fee (Staff Rpt., p. 74), a practice which presumably would be carried forward under our recommendation.

The comment to proposed section 10831 contains a recital of sixteen different tasks that are deemed to call for additional compensation for so-called "extraordinary services" (T.R., pp. 30-31). The whole issue of what constitutes "ordinary services" and "extraordinary services" is rife for conflict and disagreement and opens avenues for abuse since the classification of actual tasks is so arbitrary and largely within the lawyer's discretion. The Tentative Recommendation's legislative proposal requires the court to consider a laundry list of factors in determining extraordinary compensation (T.R., p. 39, § 10852). We even provide for court approval of "extraordinary services performed by a paralegal" and require the court to take into account "the extent to which the services were provided by the paralegal" (T.R., p. 40, § 10853). To implement the legislation we recommend, therefore, courts must not only determine what is fair, just and reasonable compensation for attorneys but also inform itself and determine what are principles of reasonable and efficient law office management ("[T]he court shall take into consideration the extent * * * of the direction, supervision, and responsibility of the attorney" (T.R., p. 40, § 10853)).

None of this is simple, of course, and the present very similar system of reviewing probate attorney fees "consumes a significant amount of our judicial resources" (Staff Rpt., p. 57). None of this is necessary. The Uniform Probate Code, for example, imposes none of these requirements upon courts which are simply not required to pass on attorney fees. The issue gets to court, if at all, only if a dispute arises. Limiting review to situations where there is a genuine dispute "saves judicial resources" (Staff Rpt., p. 60). Since the Tentative Recommendation's elaborate review of attorney fees is unnecessary, it serves no conceivable public interest. Court review and sanction

of attorney fees does, however, serve the self-interest of the Bar.

A court-approved attorney fees order insulates the attorney and personal representative from attack by a dissatisfied beneficiary. Once an attorney fee has received court approval it is essentially beyond attack save for proof of fraud on the court. The statutory fee schedule coupled with the required court order based thereon afford a safe harbor for the fees thus awarded, no matter how unreasonable given the work performed in an individual estate. The Tentative Recommendation, contrary to its claim, does not produce simplification of the system but attorney protection.

Our staff concluded that abandonment of the statutory fee schedule "probably would reduce the amount of court time devoted to the fixing of attorney fees" (Staff Rpt., p. 87) flatly contradicting this ground of the Tentative Recommendation. No evidence has been (and none can be) produced showing that abandonment of court-approved attorney compensation simplifies the probate system. Those who have been persuaded to this view evidently reach that conclusion indirectly, based on the hypothesis that abandonment of the statutory fee schedule would flood the courts with claims by estate beneficiaries that attorney fees are taking too big a bite out of the estate. It is the notion that the "caldron of public dissatisfaction over probate fees" will boil over into the courts, completely wiping out the manifest saving of court resources achieved by eliminating court review except where fees are challenged. Anyone who genuinely holds this view must anticipate a veritable deluge of challenges because otherwise the simplicity argument makes so very little sense.

Before considering the "boil over" hypothesis, a related matter should be addressed. Among its many vices, the Tentative Recommendation continues in force two of the more pernicious provisions of the present law. Proposed sections 10802(b) and 10833(b) would permit the personal representative and attorney to "renounce" their compensation provided in a will in favor of statutory fees.* A testator who bargains and agrees with a potential personal representative or attorney for compensation can then have that deal unilaterally undone by this "renunciation" process. This escape hatch for lawyers and personal representatives discourages careful estate planning and is wholly inconsistent with the fundamental purpose of probate to effectuate the testator's intentions (Prob.Code, § 660).

The evident rationale of the "renunciation" procedure is to prevent a testator from saddling unreasonably low compensation arrangements on the personal representative or attorney. Of course, if the personal representative or attorney agree on fees with the testator that agreement should prevail over any statutory fee schedule compensation. In the absence of agreement as to attorney fees, the personal representative should have the obligation to shop around for a lawyer willing to handle the estate on the compensation provided in the will before abrogating the testator's intent. In the absence of agreement on personal representative fees, some showing should be required before a personal representative can simply "renounce" what the testator provided and take more.

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* These provisions also undercut any claim that the Tentative Recommendation provides for a maximum fee system as section 10832(a) and section 10833(a) allow a <u>higher than statutory</u> fee if provided for in the will.

D. Dispute reduction.

The premise of the simplification and dispute reduction rationales is that freely negotiable attorney fees would produce so many disputes that they would require more time and effort of courts to resolve than now go into reviewing attorney fees requests under the present system. This "boil over" rationale is without support.

Our staff has found that "[t]here is no evidence that the substitution of the UPC fee scheme has increased litigation in other states" (Staff Rpt., p. 87). Experience in California since July 1, 1987 with freely negotiated attorney fees where a surviving spouse takes all the property (Prob.Code, §§ 13650-13660) or very small estates (Prob.Code, §§ 13100, et seq., 13150, et seq.) has failed to produce a "boil over" of attorney fee challenges even though the attorney fee is "determined by private agreement between the attorney and the client and is not subject to approval by the court" (Staff Rpt., pp. 58-59). While proving a negative is impossible, these findings probably should end our inquiry into the dispute reduction rationale, but for observing that it is, of course, counter-intuitive.

Parties who negotiate and strike a bargain based on their particular needs and knowledge are far more likely to be willing to live with the deal than those who must pay some governmental fixed price. Neither this Commission nor the Legislature, no matter how wise, can possibly determine what work is needed to settle estates and the conditions under which that work is to be performed and thus calculate what are fair and reasonable attorney fees. The statutory fee schedule produces purely and simply an arbitrary fee. If it is fair in the case of a particular estate, this is a random occurrence. Surely, the people deserve better from our legislative recommendations than random fairness.

The statutory fee schedule discourages lawyers from competing on the basis most readily appreciated by their clients: price. This is undoubtedly the schedule's attractive feature to the probate bar. Moreover, as noted, because the statutory fee schedule applies to ordinary probate services, it discourages price competition on presumably the more routine probate services which are most susceptible to efficiencies and price competition.

The statutory fee schedule engenders widespread dissatisfaction. The Staff Report notes that the Stein Study found that California's statutory fee schedule produced "a greater frequency of complaints" than in the other states surveyed (Staff Rpt., p. 42). These complaints appeared to correlate positively with the size of the estate (ibid.). Indeed, Professor Stein found that in estates of $60,000 or more having individual (as opposed to corporate) personal representatives, California produced a percentage of complaints about estate administration costs that was one-third more than the next highest state in the sample (Stein, The Estate Administration Attorney (1984) 68 Minn.L.Rev. 1107, Table 9.6 at 1211).*

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* Remarkably, the Stein Study found that in over $60,000 estates, 100 percent of corporate representatives complained that probate took too long but not a single corporate representative complained about probate costing too much (Stein, supra, Table 9.6 at 1211), a dichotomy which lends support to what one court described as beneficiaries' suspicions of "reciprocal back scratching between corporate fiduciaries and lawyers in which the lawyer drafting the will is always retained as counsel for the executor" (Matter of Estate of Effron (1981) 117 Cal.App.3d 915, 919-920). If attorney fees in probate were freely negotiable, personal representatives, corporate or otherwise, would have no choice but to negotiate for the best deal they could get from estate attorneys. It is surprising that corporate fiduciaries would resist freely negotiable attorney fees in

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Finally, one cannot help but remark on the irony that once again it is the Bar which most vigorously presses the contention that the statutory fee schedule is necessary to avoid disputes (see, e.g., Comm.Mins., Jan. 14-15, 1988, p. 46). This is made ironic not only because it is contrary to recent experience but also because lawyers, of all people, should not resist dispute resolution. Absence of statutory fee schedules for legal services other than estate administration do not, of course, produce vast numbers of fee disputes in legal work outside probate and it is only rank, unfounded conjecture to suppose that probate clients are more prone to engage in unwarranted attacks on lawyers than clients for other types of legal services.

E. Attorney time correlates to the size of the estate.

As its final rationalization for retaining the statutory fee schedule, the Tentative Recommendation asserts that the dollar value of the estate is a fair measure of the amount of attorney time needed to handle the estate. Such a claim is plainly specious and wholly inconsistent with law's purpose in affording extra compensation for so-called extraordinary services.

Our own Staff Report provides myriad testimonials from California practitioners that the work involved is not related to estate value (p. 43, n. 97). One court noted:

> "A multitude of factors determine the complexity and amount of work required of a decedent's personal representative and his counsel such as:

(footnote continued)

probate because these fiduciaries' large volume of probates should enable them to negotiate very favorable attorney fee rates and thus more effectively compete for estate business on that basis.

> location and form of assets; the existence and nature of encumbrances against these assets; claims against the estate, the number and age of heirs or devises, and whether or not they can be located; the presence of legal issues which invite, or necessitate, litigation; and the complexity of the litigation itself. Hence, the critical question in determining what constitutes a reasonable fee is not how large or small is the estate * * * but rather what actual services were required and rendered" (Matter of Estate of Painter (Colo.App. 1977) 567 P.2d 820, 822) (citations omitted).*

In an estate which consists solely of stock, the lawyer's time in disposing of the shares should not be greater when there is $1,000,000 in stock as opposed to when there is but $1,000 in stock. (See Statement of Charles Mosse, Jan. 14-15 minutes, p. 14.) In either case, a phoned in sell order liquidates the estate.

Furthermore, the statutory fee schedule penalizes the foresight of those who engage in estate planning. Under California's system, an estate which essentially requires no probate work still earns the same fee for an attorney as an estate which requires extensive attorney involvement. "Given the emphasis by lawyers these days on estate planning, writing wills and so on, the amount of time necessary to settle estates in the future should dwindle" ("$1,908 an Hour," The Washington Post, Mar. 9, 1981, Sec. A, p. 12).

The Legislatures in Maine and Colorado, to cite just two examples, recognized that the monetary value of the

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* Matter of Estate of Effron (1981) 117 Cal.App.3d 915 cited Painter with obvious approval and rejected the challenge there to California's probate system because to do so would "encroach upon the legislative prerogative" (117 Cal.App.3d at 927). But that limitation does not apply to the work of this Commission.

estate was not the proper way to determine attorney fees. See the discussions in Matter of Estate of Painter, supra, 567 P.2d at 820; and Estate of Davis (Me. 1986) 509 A.2d 1175, 1177. Rather these legislatures found that compensation should be based on the amount and value of the work done.*

The existence of special provisions providing fees for extraordinary work itself suggests that the value of an estate is an inadequate measure of the work required. If the value of the estate truly reflected the work involved, then there would be no need for extraordinary fees and a statutory fee schedule would provide adequate compensation in all cases. Extraordinary fees are implicit recognition that estates of equal value require varying amounts of work. Our proposal to continue awards of extraordinary fees is inconsistent with one of our claimed justifications for the statutory fee schedule. Retention of a statutory fee schedule on the ground that "attorney time * * * tends to correlate with estate size" calls for abolition of attorney compensation for so-called extraordinary services. That would certainly simplify the courts' task of passing on

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* It is frequently assumed that hourly charges would replace the statutory fee schedule under a Uniform Probate Code "reasonable fee" approach. Charging hourly fees for attorney work is by no means an altogether satisfactory approach (see, comment on In re Estate Halas (Ill.App. 1987) 512 N.E.2d 1276 by Honorable John F. Grady, reprinted in The Trial Lawyer's Guide (1988) Vol. 32, No. 1, p. 99, et seq.), nor an inevitable one. Abolition of the statutory fee schedules would encourage many innovative approaches including, for example, legal services providers rendering probate work on a pre-paid basis, membership organizations bargaining with lawyers for probate work on behalf of members on a competitive basis. The possibilities are many but discouraged by existence of a statutory fee schedule.

attorney fees requests. This, too, is the fair and logical result of the Tentative Recommendation's claimed justification of the statutory fee schedule.

Under California's ordinary/extraordinary system:

> "The purpose of the Legislature * * * was to allow extra compensation to be granted in proper cases, but only where extraordinary services are not adequately compensated by the statutory fees * * *" (Estate of Walker (1963) 221 Cal.App.2d 792, 795-796).

A State Bar representative told us that Estate of Walker provides "a check in the system" against unreasonable statutory fees by requiring that "the court is to review and reflect on whether the statutory fee is not adequate compensation for extraordinary services" (Comm.Mins., Jan. 14-15, 1988, p. 36). Evidently relying on the State Bar's statement, Commissioner Stodden then pointed out to a "consumer" representative that this review protected against unreasonable attorney compensation under the statutory fee schedule (id., p. 48).*

The holding of Estate of Walker simply does not bear out the State Bar's interpretation as the case only permits a court review of compensation for ordinary services but does not require it. In any event, an Estate of Walker review certainly does not simplify probate because it

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* In giving this assurance, Commissioner Stodden may also have relied on the staff's observation that "many courts will take the statutory compensation into account in determining whether the lawyer has been compensated adequately for all services rendered" (Staff Rpt., pp. 17-18). For the reason noted in the text, we have completely undercut any basis for this assurance to the "consumer" groups.

entails court review of ordinary services compensated by the statutory fee as well as review of extraordinary services compensation. The Commission, is in no position to determine how often an Estate of Walker review is made under the present system since the Commission's survey did not even determine the percentage of estates where extraordinary fees are requested and thus eligible for an Estate of Walker review (Staff Rpt., App. 1, Table D) and the State Bar representative asked for this information did not offer it to the Commission (Comm.Mins., Jan. 14-15, 1988, p. 42).

In any event, our recently added comment to section 10852 now ensures that an Estate of Walker review of the statutory fees for ordinary services will only be made where extraordinary fees are already under attack (T.R., p. 39). Obviously, that limits (probably, to very few) the estates where Estate of Walker affords the "check in the system" represented to us by the State Bar. More importantly, the situation illustrates the Bar talking at cross-purposes: claiming (incorrectly, it turns out) that an Estate of Walker review protects "consumers" under a statutory fee schedule system but not acknowledging that if so probate would be complicated, not simplified.

II. THE CREDIBILITY OF THE COMMISSION SUGGESTS THAT THE TENTATIVE RECOMMENDATION BE WITHDRAWN.

A. Personal representatives' compensation should also be subject to negotiation.

Most of what has been said here about the statutory fee schedule for lawyers also applies to the statutory fee schedule for personal representatives. Fixed prices for any service cripple competition and damage consumer welfare. The problem may be less severe in the case of personal representative fees than is the case with

estate attorneys because the personal representative is frequently a beneficiary of the estate and thus an object of the testator's bounty. But this is not always the case and, in the instance of corporate fiduciaries who are not intended beneficiaries, the personal representative statutory fee schedule is particularly unfair.

Like the attorney statutory fee schedule, the fee schedule for personal representatives similarly discourages quality services, efficiency and innovation. Moreover, the present system of two statutory fee schedules--one for the attorney, one for the personal representative--invites collusion between the attorney and personal representative to maximize the total fees generated out of the state (see, e.g., "Public Guardian Accused of 'Double Dipping,'" S.F. Recorder, Dec. 15, 1988, p. 1), another vice that abolition of both statutory fee schedules would eliminate.

Finally, we have heard from many Bar spokespersons that the attorney frequently ends up doing all or a part of the person representative's job (Staff Rpt., pp. 92-95). This most certainly is not an argument for keeping a statutory fee schedule for lawyers, much less one also for personal representatives. If anything, these comments suggest that the dual statutory fee schedules overcompensate both the lawyer and personal representative.

B. Statutory fee schedules are unfair and unwarranted anachronisms and should be abolished.

The weakness of the case for continuation of the statutory fee schedule is reason enough for its abandonment. But even if the case for the attorney fee schedule were strong we should be particularly wary of putting forward the proposal. As lawyers all, we on the Commission are not without self-interest, or the appearance of self-interest,

in the proposal. We should, therefore, scrutinize the importuning by members of our profession no less vigorously than we have that of the probate referees, corporate fiduciaries, heir tracing firms, and all the rest who have appeared before us. It is not wrong for interested parties to press their positions on the Commission and, in the case of the probate bar, they have worked hard and made many constructive suggestions. To the extent our legislative recommendations effect improvement in the law, the probate bar representatives deserve part of the credit.

The vices of the statutory fee schedule, however, are so clear that preserving its basics but tinkering with only its most egregious flaws (e.g., lowering the rates, requiring the disclosure statement in the proposed Business & Professions Code provisions) will likely produce worse results, by further entrenching a basically defective system. Except to some in the probate bar, abandonment of the statutory fee schedule in favor of freely negotiable fee arrangements is not radical reform. It is a trail blazed by the Uniform Probate Code and almost a score of states (Staff Rpt., pp. 28-29). By abandoning the statutory fee schedule, we would be bringing California into line with the clear and broad trend now followed with apparent good results in many states.

In criticizing the statutory fee schedule, I do not suggest that the motives of the probate bar representatives who have advocated its retention are other than well meaning.* What we see is a confusion by some in the probate

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* The belief of some California lawyers that probate fees here are among the lowest in the nation is held despite contrary evidence (Staff Rpt., p. 63).

bar of its particular interest with the general public interest. It is natural for the fine probate practitioners who have participated in our deliberations and who are thoroughly familiar with all the technicalities of probate practice to perceive the need for a compensation system which will ensure lawyer income that these practitioners believe is commensurate with the effort for full delivery of all technical aspects of probate practice. The statutory fee schedule is scaled to that comforting rationale and therein lies part of its vice. It allows the producers of the services to substitute the "erroneous judgment of a seller for the forces of the competitive market" (Albrecht v. Herald Co. (1968) 390 U.S. 145, 152).

This interest of the probate bar in retention of the statutory fee schedule is not necessarily consistent with the interest of the majority of California lawyers. The State Bar and the legal profession seem seriously out of political and popular favor (Staff Rpt., p. 64). It risks further inflaming public opinion against the whole profession for the Bar's probate section, merely one of the Bar's constituent elements, to push narrow special interest legislation benefitting only probate practitioners.

Moreover, we have received correspondence from many probate lawyers acknowledging that the statutory fee schedule is unfair and provides overly generous compensation. These lawyers seem willing to work in a more competitive environment, and I believe the public interest requires us to give those forward looking members of the bar the opportunity to do so. If the other lawyers we have heard from in support of the statutory fee schedule are unwilling or unable to face competition, then it is precisely they who should be doing some other kind of work.

Against these pleas of obvious self-interest by the probate bar leadership, we have the arguments of the "consumer" groups. They have asked not for special favor or consideration. They do not seek to impose another layer of regulation on a society already burdened by the dead hand of bureaucracy. The "consumer" groups seek the benefits and responsibilities of competition. This is their due in a free society.

It is more fitting, more consistent with basic notions of individual freedom and responsibility, that the probate bar should have to justify their fees to clients rather than to us to or the Legislature. Let the clients decide what is the appropriate amount and quality of probate services to be delivered and, importantly, the reasonable price for those services. It is no reason to support a statutory fee schedule that some clients might not do as well in the outcome of the bargaining as the Legislature would do for them. There are larger issues at stake.

What the Supreme Court long ago said of a price-fixing agreement applies as well to the proposed statutory fee schedules:

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. * * * [W]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable--a determination which can be satisfactorily made only after a complete survey of our

> economic organization and a choice between rival philosophies" (United States v. Trenton Potteries (1927) 273 U.S. 392, 397-398).

The Court might also have said that the people--not the Legislature, not the courts and not a law revision commission--are the best judges of what prices are for the people fair and reasonable.

CONCLUSION

For the foregoing reasons, I urge the Commission to withdraw the Tentative Recommendation.

Vaughn R. Walker

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