

## EXCESSIVE FEES IN PROBATE MATTERS

"The legal profession cannot remain a viable force in fulfilling its role in society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them."<sup>1</sup> As a result, the attorney must delicately balance his own interests with those of his client.<sup>2</sup> The attorney should be allowed to receive adequate compensation "to serve his client effectively and to preserve the integrity and independence of the profession."<sup>3</sup> At the same time, the attorney also has a responsibility to protect his client and to ensure that excessive fees do not discourage laymen from using the legal system.<sup>4</sup> To protect the client in probate matters, the Uniform Probate Code provides the court with the power to review the reasonableness of the compensation and to refund any excessive compensation.<sup>5</sup> Consequently, when dealing with matters of probate, the attorney must be aware of the circumstances which will lead a court to find that the fees charged are excessive.

As in fee matters in other areas, there is no formula on which an attorney can rely in determining the proper fee. Instead, it is well-established that the determination depends on the particular situation.<sup>6</sup> "There is no clear-cut rule to aid the court in ascertaining what a reasonable fee should be. Each determination must be based on the facts and circumstances of the particular case being considered."<sup>7</sup> In doing so, courts use the criteria established by the Code of Professional Responsibility or the Model Rules of Professional Conduct, depending upon which set of rules the state in which the court sits has adopted. Using these guidelines, a court weighs all the factors set forth to determine when a fee is excessive.<sup>8</sup>

Under the Model Code of Professional Responsibility, "a lawyer

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 (1982) [hereinafter cited as MODEL CODE].

2. MODEL CODE EC 2-17.

3. *Id.*

4. *Id.*

5. UNIFORM PROBATE CODE § 3-721 (1982).

6. *Succession of Williams*, 379 So. 2d 755, 756 (La. Ct. App. 1979); *Succession of Gilmore*, 239 So. 2d 462, 463 (La. Ct. App. 1970).

7. *Estate of Brown*, 58 Ill. App. 3d 697, \_\_\_\_\_, 374 N.E.2d 699, 706 (1978).

8. *See Matter of Estate of Newman*, 174 Ind. App. 537, 369 N.E.2d 427 (1977).

shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."<sup>9</sup> The Model Code defines a fee as excessive "when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."<sup>10</sup> In some states, the standard set forth in the Model Rules of Professional Conduct is one of reasonableness.<sup>11</sup> However, both the Code of Professional Responsibility and the Model Rules of Professional Conduct list the same factors which should be applied when determining the reasonableness of a fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent.<sup>12</sup>

As stated above, each factor is considered by the probate court to determine if a fee is reasonable. However, the list is not exclusive, and courts have examined other factors: the faithfulness and care of the attorney,<sup>13</sup> location of heirs,<sup>14</sup> cooperation of heirs,<sup>15</sup> negligence of the attorney,<sup>16</sup> prolonged litigation,<sup>17</sup> good faith, diligence, and reasonable

9. MODEL CODE DR 2-106(A).

10. MODEL CODE DR 2-106(B).

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983) [hereinafter cited as MODEL RULES]. "A lawyer's fee shall be reasonable."

12. MODEL CODE DR 2-106(B); MODEL RULES Rule 1.5. Contingency fees are generally allowed in probate matters and are subject to the same factors. See *Gilmore*, 239 So. 2d at 464. However, the contingency factor will not be weighed heavily when success is certain. *In re Bergeron Estate*, 117 N.H. 963, \_\_\_, 380 A.2d 678, 681 (1977).

13. *Newman*, 174 Ind. App. at \_\_\_, 369 N.E.2d at 433.

14. *Id.*

15. See *Williams*, 379 So. 2d at 757.

16. See *Matter of Estate of Kohlmetz*, 113 Wis. 2d 160, 336 N.W.2d 176 (Wis. Ct. App. 1983).

17. *Estate of Sabatino*, 66 A.D.2d 937, 938, 411 N.Y.S.2d 439, 441 (N.Y. App. Div. 1978).

prudence,<sup>18</sup> "whether the sale of real estate was involved,"<sup>19</sup> and whether the estate was handled efficiently.<sup>20</sup> In setting his fee, an attorney must be aware of each of these factors. Still, there are several circumstances in which an attorney must be particularly careful. A fee will be suspect when the attorney does work that is the executor's responsibility, duplicative, routine, or administrative.

An attorney, while functioning as the attorney for the estate, must be sure that he has not done the work of the executor. Potential problems arise when the attorney performs and charges legal rates for work that is the executor's responsibility.<sup>21</sup> Obviously, a legal fee cannot be charged for duplicative work.<sup>22</sup> Additionally, an attorney cannot charge legal rates for doing the administrative work of an executor, or the "leg work."<sup>23</sup> To the extent that an attorney performs and charges for work that is the responsibility of the executor, his fees will be unreasonable.<sup>24</sup> Problems can also occur when the attorney is also the executor of the estate.<sup>25</sup> If he is, he must be certain that the legal fees he charges are not for work which he performs as the executor.<sup>26</sup>

In *In re Claus' Estate*,<sup>27</sup> the court reduced an attorney's fee because some of his work was not, in fact, legal.<sup>28</sup> The administrator had the power to hire an attorney for "legal advice and services."<sup>29</sup> However, the attorney apparently billed the estate for clerical work.<sup>30</sup> The testimony showed "that he spent much time at the home of the deceased, looking into a lot of old files and papers and tin boxes for money or property; that he interviewed neighbors, and that he secured

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18. *Matter of Estate of Grabow*, 74 Ill. App. 3d 336, \_\_\_\_, 392 N.E.2d 980, 984 (1979); *Estate of Parlier*, 40 Ill. App. 3d 840, \_\_\_\_, 354 N.E.2d 32, 35 (1976).

19. *Grabow*, 74 Ill. App. 3d at \_\_\_\_, 392 N.E.2d at 984.

20. *Id.*

21. See *Brown*, 58 Ill. App. 3d 697, 374 N.E.2d 699; *Matter of Estate of Perlberg*, 694 S.W.2d 304 (Tenn. Ct. App. 1984).

22. *Brown*, 58 Ill. App. 3d at \_\_\_\_, 374 N.E.2d at 708.

23. *Perlberg*, 694 S.W.2d at 309.

24. *Id.*

25. See *Succession of Benton*, 354 So. 2d 721, 723 (La. Ct. App. 1978).

26. See *id.*

27. 167 S.W.2d 372 (Mo. Ct. App. 1943).

28. *Id.* at 375.

29. *Id.* at 374.

30. *Id.* at 375.

the services of appraisers."<sup>31</sup> The court ruled that these actions did not constitute "legal advice and services," and should have been performed by the administrator.<sup>32</sup> "The administrator should, without legal advice, be able to perform the ordinary duties of an administrator and to draft the usual and ordinary papers, such as an inventory and appraisal."<sup>33</sup>

In another case, the court reduced the fee of the attorney because he received a fee for his services as executor and legal fees for the same work.<sup>34</sup> In *Succession of Benton*,<sup>35</sup> the decedent appointed Dudley Yoedicke as his executor and his attorney.<sup>36</sup> The court approved, stating that the attorney could receive an attorney's fee and an executor's fee.<sup>37</sup> However, the attorney collected the executor's fee and charged the estate for all his legal work.<sup>38</sup> The court reduced the legal fee since the functions of the two positions overlapped, and the estate could not be billed twice.<sup>39</sup> "[A]n individual serving in both capacities as executor and as attorney for the estate in many instances performs both functions at once and is not entitled to collect duplicate fees."<sup>40</sup> As a result, an attorney acting in both capacities must be aware of his responsibilities as an executor so he can distinguish between his functions as the executor and as the attorney for the estate.

Just as the attorney must be sure he does not duplicate the work of the executor, he must also be sure that attorneys within his firm do not duplicate his effort.<sup>41</sup> If such efforts are duplicated, the client cannot be billed for that time.<sup>42</sup> Such a fee was disallowed in *Matter of Estate of Larson*,<sup>43</sup> where two members of the firm "worked together on the same project or attended the same *ex parte* court hearing."<sup>44</sup>

Another instance in which a court will reduce a fee occurs when a

31. *Id.*

32. *Id.*

33. *Id.*

34. *Benton*, 354 So. 2d at 723.

35. 354 So. 2d 721 (La. Ct. App. 1978).

36. *Id.* at 722.

37. *Id.* at 723.

38. *Id.*

39. *Id.*

40. *Id.*

41. See *Estate of Bradley*, 128 Misc. 2d 240, \_\_\_\_\_, 490 N.Y.S.2d 105, 106 (1985).

42. *Matter of Estate of Larson*, 103 Wash. 2d 517, \_\_\_\_\_, 694 P.2d 1051, 1059 (1985).

43. 103 Wash. 2d 517, 694 P.2d 1051 (1985).

44. *Id.* at \_\_\_\_\_, 694 P.2d at 1059.

substantial fee has been charged for work that is routine. Obviously, a certain amount of routine legal work is necessary to probate an estate, and courts will allow an attorney to bill for some routine work. At first, it might seem the attorney could simply bill the client for the number of hours he has worked. However, the courts will not allow this. Courts only permit an attorney to bill hours that are reasonable and necessary for the efficient probate of the estate.<sup>45</sup> Thus, even though the amount of time spent on the case is an extremely important factor,<sup>46</sup> it is not the determinative factor in determining the reasonableness of the fee.<sup>47</sup>

In determining if work is routine, the courts rely on whether the work requires expertise or experience. When the work requires a great deal of skill, the courts seem to generally allow the fee charged.<sup>48</sup> Estates which require litigation or tax reports are two excellent examples in which a high degree of skill is necessary.<sup>49</sup> In *Estate of Griffis*,<sup>50</sup> the attorneys acquired a \$500,000 bequest for their client and received a fee of \$125,000.<sup>51</sup> The case involved the extensive trial and appellate litigation of difficult issues by an attorney with "twenty-five years of legal experience."<sup>52</sup> Based on this fact, the court allowed the fee, although it computed out to a fee of \$167.00 per hour.<sup>53</sup>

However, courts are more suspicious when the work involves matters which are routine and simple to an attorney experienced in probate matters.<sup>54</sup> For cases in which the material is not complex and does not require any special expertise, the court will emphasize the amount of time which would have been necessary for an experienced attorney.<sup>55</sup> "When a probate attorney elects to base his fees primarily on the number of hours worked multiplied by an hourly rate, his fiduciary obligations dictate that he charge the estate only for those hours

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45. *Id.*

46. *In re Estate of Marks*, 74 Ill. App. 3d 599, \_\_\_\_, 393 N.E.2d 538, 542 (1979).

47. *Matter of Estate of Dudek*, 87 Ill. App. 3d 528, \_\_\_\_, 409 N.E.2d 418, 420 (1980).

48. *See Gilmore*, 239 So. 2d 462; *Succession of D'Antoni*, 342 So. 2d 1281 (La. Ct. App. 1977).

49. *See D'Antoni*, 342 So. 2d at 1282.

50. 399 So. 2d 1048 (Fla. Dist. Ct. App. 1981).

51. *Id.* at 1049.

52. *Id.*

53. *Id.* at 1050.

54. *See Matter of Estate of Gilmore*, 67 A.D. 2d 779, 780, 412 N.Y.S.2d 682, 684 (N.Y. App. Div. 1979).

55. *See Larson*, 103 Wash. 2d at \_\_\_\_, 694 P.2d at 1058.

which are reasonably necessary in probating the estate."<sup>56</sup> As a result, an attorney who specializes in other areas must be aware that he may not charge the client for extra hours caused by his inexperience, nor may he bill for work that is unnecessary.<sup>57</sup> Moreover, this is true even if the attorney exhibits "diligence and industry" and does a "thorough and competent job."<sup>58</sup> In *Matter of Estate of Larson*,<sup>59</sup> the court stated, "Reason and fairness compel us to observe that clients should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, becomes matters of routine."<sup>60</sup>

An example of a routine estate is one that consists solely of cash. In *Schreiber v. Palmer*,<sup>61</sup> the estate consisted of \$77,500 in cash, and the name of the deceased's sole survivor was known.<sup>62</sup> Because the attorney had all the information to close the estate, the court noted that an experienced attorney could have probated the estate in one-half the 150 hours billed.<sup>63</sup> In *In re Fraiman's Estate*,<sup>64</sup> the court did not allow the attorney to bill his client for time spent on the phone to other attorneys seeking advice because this "would have been unnecessary for a more experienced attorney."<sup>65</sup> In addition, the court in *Estate of Bradley*<sup>66</sup> reduced the attorney's fee when the attorney charged \$8500 for his work on an estate which did not even require an attorney, and all but \$500 to \$750 of the \$144,567.28 passed directly to the surviving spouse.<sup>67</sup> The attorney prepared unnecessary letters of administration and documents to transfer real property which the spouse held as tenant by the entirety.<sup>68</sup> As a result of these actions and the fact that a new associate duplicated his services, the court ordered a refund of \$7,750 with interest.<sup>69</sup>

Courts will also reduce attorney fees when legal rates are charged

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56. *Id.* at \_\_\_\_\_, 694 P.2d at 1059.

57. *Id.*

58. *In re Fraiman's Estate*, 408 Pa. 442, 445, 184 A.2d 494, 496 (1962).

59. 103 Wash. 2d 517, 694 P.2d 1051 (1985).

60. *Id.* at \_\_\_\_\_, 694 P.2d at 1059.

61. 427 So. 2d 235 (Fla. Dist. Ct. App. 1983).

62. *Id.*

63. *Id.* at 236.

64. 408 Pa. 442, 184 A.2d 494 (1962).

65. *Id.* at 446, 184 A.2d at 496.

66. 128 Misc. 2d 240, 490 N.Y.S.2d 105 (1985).

67. *Id.* at \_\_\_\_\_, 490 N.Y.S.2d at 105.

68. *Id.* at \_\_\_\_\_, 490 N.Y.S.2d at 106.

69. *Id.*

for administrative work.<sup>70</sup> When such work is involved, the attorney is allowed to bill for all his work, but only at lower rates. While administrative work is obviously necessary, it is not reasonable to expect the client to pay professional rates for work that a non-lawyer could perform.<sup>71</sup> Certain tasks such as depositing checks in the bank should be delegated to an attorney's staff.<sup>72</sup>

The case of *In re Estate of Bacheller*<sup>73</sup> provides excellent examples of the types of problems an attorney may encounter in probate matters. In that case, the attorney charged legal rates for work that should have been done by his secretary, the executor, or a messenger boy.<sup>74</sup> The attorney spent time "carrying checks to the bank, in wrapping and mailing items of jewelry that was bequeathed in the will, and performing other routine and nonprofessional services."<sup>75</sup> Consequently, the court reduced his fee stating, "The attorney is not entitled to fees at professional legal rates for time spent in such menial endeavors."<sup>76</sup>

Thus, an attorney must be careful when he is involved in the probate of an estate. "The area of probate is particularly subject to attorney fee abuse when the estate involved is substantial and the lawyer is reasonably assured of favorable results and payments."<sup>77</sup> As a result, if the attorney is involved in matters that are the executor's responsibility, duplicative, routine, or administrative, he can be sure his fee will be closely scrutinized. To be certain his fee is not excessive, the attorney must take special precautions to be sure the fee he charges is both reasonable and necessary.

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70. See *Larson*, 103 Wash. 2d at \_\_\_\_, 694 P.2d at 1059.

71. See *id.*

72. *Id.*

73. 437 S.W.2d 132 (Mo. Ct. App. 1968).

74. *Id.* at 140.

75. *Id.*

76. *Id.*

77. *Larson*, 103 Wash. 2d at \_\_\_\_, 694 P.2d at 1060.