

Getting Paid the Right Way: Ethical Issues Related to Attorneys' Fees

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The Practice of Law: Profession or Business?

“Whether law be a business or profession the question of remuneration remains to the end a most perplexing and disagreeable one. But to the beginner in law, especially, who, when, how, and what to charge as a fee is a most difficult thing to determine.”

Champ Andrews, *The Law - A Business or Profession*, 17 Yale L.J. 602, 605 (1917)

The truth is it is both a profession and a business and we must simultaneously think of it from both aspects...

The Business of Law

- *Because it is a business, we must think about revenue*
- *And for lawyers, revenue comes from fees*

The Profession of Law

- *Because it is a profession, we must think about how we get paid*
- *We have duties to our clients to only charge what is fair*

The Ethical Basis for Fees - Rule 1.5

- A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

(see Model Rule 1.5(a)) [A0001]

- Eight “nonexclusive” factors are to be considered in deciding fairness, including the time required, typical fees, the amount involved, etc.

(see Model Rule 1.5(a)) [A0001]

- And those fees shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(see Model Rule 1.5(b)) [A0001]

- Fees for legal services in trusts and estates matters may be established in a variety of ways provided that the fee ultimately charged is a reasonable one taking into account the factors described in MRPC 1.5(a)

(see ACTEC Commentary on Rule 1.5) [A0019]



What Does That Mean for Us?

Consider Our Main Practice Areas:

- Fees in Estate Planning
- Fees in Probate & Trust Administration
- Fees in Probate & Trust Litigation

Estate Planning Fees

- *Flat Fees*
- *Fees Paid by Others*
- *Alternative Fee Arrangements*

Estate Planning Fees

Flat Fees

“There is nothing improper, in principle, with charging a flat fee for estate planning or estate administration if the fee is reasonable after considering all the factors enumerated in Rule 1.5(a).”

(see ACTEC Commentary on Rule 1.5) [A0019]

- The biggest issue with flat fees is what is (and is not) included*
- The work that is to be completed, as well as the fee, should be clearly communicated to the client in writing.*
- The client should be told any time work may need to be performed that is “outside” of the flat fee*



Estate Planning Fees

Fees Paid By Others

- *Fees must be reasonable under Rule 1.5*
- *Must comply with Rule 1.8 regarding relationship*
- *Must comply with Rule 1.6 regarding confidentiality*
- *Must comply with Rule 5.4 regarding independence*
- *Must not create a conflict of interest under Rule 1.7*



Estate Planning Fees

Fees Paid By Others

“One person, perhaps an employer, insurer, relative or friend, may pay the cost of providing legal services to another person. Notwithstanding the source of payment of the fee, the person for whom the services are performed is the client, whose confidences must be safeguarded and whose directions must prevail”

(see ACTEC Commentary on Rule 1.5) [A0020]

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;*
- (2) there is no interference with the lawyer’s independence of professional judgment or with the client- lawyer relationship; and*
- (3) information relating to representation of a client is protected as required by Rule 1.6*

(see Model Rule 1.8(f)) [A0008]



Estate Planning Fees

Fees Paid By Others

“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(see Model Rule 1.7(a)) [A0005]

“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services”

(see Model Rule 5.4(c)) [A0010]



Estate Planning Fees

Fees Paid By Others

It is our understanding that _____ will pay for the legal services performed pursuant to this engagement, including costs. Since you are our client and ultimately responsible for the payment of the legal fees and costs, we will send all billing statements to you. If you would like us to send a copy of the billing statements to _____, we will require a written direction authorizing us to do so at the end of this letter. Even though _____ will be paying for the legal services and costs associated with this engagement, _____ will not be entitled to any confidential information concerning the engagement (other than such information as may be disclosed in your billing statements if you expressly authorize us to send copies to _____), and we will not follow any direction or instruction from _____ with respect to this engagement. Anything you discuss remains subject to our duty of confidentiality to you unless you authorize us to disclose such confidential information to _____. By your signature below, you consent to this arrangement and indicate whether you wish for copies of billing statements to be sent to _____.

(see ACTEC Form Engagement Letter) [A0068]

- See also separate confirmation to be signed by payor [A0069]

Estate Planning Fees

Alternative Fee Arrangements

- *Engagement agreements are matters of contract, so alternative fees can be considered within the bounds of Rule 1.5 and the other ethical requirements*
- *By way of example, any fee arrangement that could be considered “a business transaction” with a client is subject to Rule 1.8(a)*
- *“A lawyer may require advance payment of a fee but is obliged to return any unearned portion.”*
(see ABA Comment to Rule 1.5) [A0013]
- *“A fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.”*
(see ABA Comment to Rule 1.5) [A0013]



Probate & Trust Administration Fees

- *Supervised Probate Administration*
- *Unsupervised Probate Administration*
- *Trust Administration*

Probate & Trust Administration Fees

Supervised Probate Administration

- *Very dependent on state law, but usually fees are only allowed with court order - this is also generally the case with guardianship and conservatorship matters*
- *Can be disciplined for taking improper fees*
(See [In re Gardner, 565 S.W.3d 670 \(Mo. 2019\)](#)) [A0084-92]
- *Taking on this type of work is a business decision - must understand that you are unlikely to be paid until completion*
- *Understand that your bills will be subjected to court review and approval*

Probate & Trust Administration Fees

Independent Probate Administration

- *Again, very dependent on state law*
- *Issues and concerns paid out of the estate each month*
- *Wat assurance do you have/want that your fee will be paid?*
What language should be included in the engagement letter?
(see ACTEC Form Engagement Letter) [A0047]
- *Can it create a conflict of interest between you and your client?*
- *Between you and others?*



Probate & Trust Administration Fees

Trust Administration

- *Likely the easiest way to pay the attorney*
- *Must review the document and governing law*
(See Trust Code Sections 709 and 816) [A0073-79]
- *Understand that it is still potentially subject to court review*
- *Understand the potential implications on privilege (more on that later)*

Probate & Trust Litigation Fees

- *Fiduciary Fees*
- *Trust Litigation and Section 1004*
- *Contingent Fees*

Probate & Trust Litigation Fees

Fiduciary Fees

- *Transition from administration to litigation*
- *Scope of representation (individual, fiduciary, or both)*
- *Define terms of payment in engagement agreement*
(See ACTEC Form Engagement Letter) [A0043]
(See Young, Language for Engagement Letters) [A0141-142]
- *Payment of fees without court approval*
(See Trust Code Sections 709 and 816) [A0073-79]
- *Court review and approval of fees*
(See Trust Code Section 1004) [A0081]

Probate & Trust Litigation Fees

Fiduciary Fees

Potential for impact on privilege

“[T]he payment to the law firm out of the trust assets is a significant factor, not only in weighing ultimately whether the beneficiaries ought to have access to the document, but also it is in itself a strong indication of precisely who the real clients were.”

(See Riggs v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)) [A0106-111]

“Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

(See S.C. Code Ann. 62-1-110) [A0112]



Probate & Trust Litigation Fees

Fiduciary Fees

Consideration of Drafting Language in Documents

- *Review of default and mandatory provisions of governing law*
(See Trust Code Section 104) [A0071-72]
- *Attorney compensation and reimbursement can be amended*
(See Trust Code Sections 104, 709, and 1004) [A071-73, 81]
- *But fiduciary must act in good faith and in accordance with the purposes of the trust*
(See Trust Code Section 104) [A071-72]
- *Review potential trust language for inclusion*
(See Falk & Godwin, Payment of Attorneys' Fees) [A0158-159]

Probate & Trust Litigation Fees

Trust Litigation and Section 1004

“In a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.”

(See Trust Code Section 1004) [A0081]

- (1) reasonableness of the parties’ claims, contentions, or defenses
- (2) unnecessarily prolonging the litigation
- (3) relative ability to bear the financial burden
- (4) result obtained by the litigation and prevailing party concepts
- (5) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation

(See Atwood v. Atwood, 25 P.3d 936, 947 (Ok. App. 2001) [A0093-105]

- Use of 1004 by beneficiaries and fiduciaries

(See Weitberg, Payment of Trustee Fees in Litigation) [A0113-130]

(See Marchetti, When can a Beneficiary Get Attorney Fees) [A0131-137]

- Inclusion of 1004 language in engagement letter

Probate & Trust Litigation Fees

Trust Litigation and Section 1004

Potential to “cut off the purse strings”

“Pending a final decision on a petition to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries”

(See Trust Code Sections 706(c)) [A0073]

“To remedy a breach of trust that has occurred or may occur, the court may . . . (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means . . . (7) reduce or deny compensation to the trustee . . . (9) order any other appropriate relief”

(See Trust Code Sections 1001(b)) [A0079-80]



Probate & Trust Litigation Fees

Contingent Fees

“A fee may be contingent on the outcome of the matter for which the service is rendered A contingent fee agreement shall be in a writing signed by the client and shall state:

- the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;*
- litigation and other expenses to be deducted from the recovery; and*
- whether such expenses are to be deducted before or after the contingent fee is calculated.*

The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery,²³ showing the remittance to the client and the method of its determination.”

(See Model Rule 1.5(c) [A0001]

Probate & Trust Litigation Fees

Contingent Fees

“Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.”

(See ABA Comment to Rule 1.5(c)) [A0012]

- Lawyers can be disciplined for improper contingent fees

(See ACTEC Comment to Rule 1.5 and cases therein) [A0022-25, and 29]

- Also be aware of when a fee can and cannot be split

(See Model Rule 1.5(e)) [A0001]

(See ABA Comment to Rule 1.5(e)) [A0013-14]

(See ACTEC Comment to Rule 1.5(e)) [A0021]

Questions?





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