# FEES: HOW TO CHARGE, COLLECT & DEFEND THEM

## Understanding the Legal and Emotional Aspects to Billing and Collecting for Legal Services

presented
at the

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## Introduction: Pre or Post Mortem Fee?

We practice law because it is interesting, challenging, we are good at it, and we are professionals. We also practice law because it is our business. As our business, we should rightly expect that fees charged should equal fees collected. And a certain amount of indignancy should accompany those fees that go uncollected. But also a certain amount of blame must remain with the practitioner as to uncollected fees. Did the practitioner follow a Best Practice approach in the fee presentation and collection process?

Little useful information has been written in this area as it pertains to estate planning. This paper is intended to be a starting point as to a Best Practices primer on the fee area as it relates to estate planning.

Fees in estate planning are quite a bit different than fees in estate administration. Recently, our partner, Emily Kuo, wrote a chapter for IICLE on fee collection in the estate administration process. That chapter, reprinted here, is also part of this presentation.

One should note that although many of the billing principles are the same in pre and post mortem matters, there are important differences. The most significant is that detailed billing, which may (as you will see) not be relevant in pre mortem matters, is significant and required in post mortem matters. But more on that later in the outline.

## Outline of Presentation

These materials are divided into five parts. Part One is a written summary of practical concerns with our billing practices and how to address those.

Part Two focuses on Value Billing.

Part Three is a summary of Best Practices in the Billing Area.

Part Four is a summary of survey results on current practices (not billing amounts or rates) of our fellows.

Part Five addresses billing concerns specific to large law firms.

Appendices one through five contain useful ancillary material relevant to assessing risk and providing a backdrop for developing billing protocol.

* * * * * * * * * * * *

The presentation discusses billing methodology and practice styles in an effort to solve the following equation -- *Imagine a good you purchased - car, TV, hockey stick, fishing pole, boat, plane -- that was so outstanding <u>that after the purchase</u>, you felt good about buying it, regardless of its cost. If we want a longstanding relationship with a client, we want the client to view payment for our services along these same lines. This segment focuses on how our billing protocols can be improved to achieve this level of satisfaction and appreciation.*

We practice law because it is interesting, challenging, we are good at it, and we are professionals. We also practice law because it is our business. As our business, we should rightly expect that fees charged should equal fees collected. And a certain amount of indignancy should accompany those fees that go uncollected. But also a certain amount of blame must remain with the practitioner as to uncollected fees. Did the practitioner follow a Best Practice approach in the fee presentation and collection process?

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## Part One: Improvements to Billing Protocol

### A. Understanding What is Needed to Improve Billing

Pre mortem estate planning refers to tax planning, Wills, living trusts, GRATs, education trusts, and all other matters that we do for clients while they are living. Bills are sent directly to those individuals who have requested our services, to deal with a topic that is very painful, albeit important -- Where does the Property that I have worked Hard for During My Life go when I Die?

It's not hard to understand why clients are reluctant to engage in estate planning. It is not a fun topic. Re-read the prior underlined sentence and ponder it a bit.

Therefore, even when we add significant value, say, saving $5 million in future estate taxes, a bill currently of $25,000 may seem repugnant. A bill currently for $10 may also seem repugnant. It's the process of what they are doing, not necessarily the value added, that is painful for clients to accept.

With that understanding in mind, what are the best billing practices? To understand the answer, one has to begin thinking out of the box as to practices. We should recognize (or agree) that current billing practices are subpar and done because (of what is known, as will be discussed in great detail below, as a status quo bias) they were done before.

Hypothesis 1: There is nothing rational about consumer behavior. As practitioners, we are often not thinking about our billing practices in the most strategic way.

Hypothesis 2: Practitioners spend about 10 % of the amount they should on billing, and disregard its importance to clients' happiness.

Hypothesis 3: Practitioners delay in billing because they know that clients will often perceive their charges as unpleasant and will be unhappy. Delay hurts further.

Hypothesis 4: The following paradigm is the fault of the practitioner, not the client:

*Example 1: Practitioner does an A-B estate plan for a client, and quotes the client an hourly billing rate of $250. The project is done efficiently and within the client's time expectations. The hours spent are less than the practitioner anticipated. The hourly rate is less than others in the area. And the overall bill seems less than what it has been in the past. The clients are still surprised at the amount and unhappy.*

Hypothesis 5: Which billing format, attachment 1 or attachment 2, is preferable from a client happiness perspective. Would it shock you if we said that in the vast majority of cases, attachment 2 would be preferable?

Hypothesis 6: Technology has increased the quality, efficiency, and lowered the cost of producing estate planning work product. But this is not reflected in the billable hour concept,

nor accepted by clients as an item to bill for. As practitioners, we have not developed a way to charge for technology.

### B. Rationality in Consumer Perception to Our Billing

We fail to understand that consumers are not rational when it comes to hourly billing for estate planning matters. Many of us think that if hours are correctly reported, the hourly rate is reasonable, and the project is done timely, the clients will accept the bill as "reasonable" or as "good value."

But fundamentally we are missing a tenet of finance law: that the rational consumer does not always make rational choices, but is influenced by his or her own mental accounting,[1] which often changes rational consumers into irrational ones.

For example, the following example illustrates this mental accounting concept.

*Example 2: You go to the store to buy your favorite movie on a DVD. It is priced at $14.99. While at the store, your best friend mentions that the same DVD is available for $4.99 at the Walgreen's about 15 minutes away. Will you go to the Walgreen's? Compare this to the situation where you are at the Stereo store and the salesperson says the stereo costs $499. Your best friend says the same stereo is available at $489 at the store 15 minutes away. Will you go to the other store? There's no difference financially, but the results have empirically been shown to be different. The consumer's perceptions are different in both situations, reflecting fairness issues. Conclusion: we cannot assume rationality for our client's economic decisions.*

### C. Translation to the Hourly Rate

A client may perceive an hourly rate of $350 to be "way too expensive" for someone spending an hour thinking about something. Is that rational (probably not, *see* below). In contrast, the client may perceive a bill for $5,000 for estate planning documents that achieve estate tax savings, creditor protection trusts, management of assets in the event of disability, and so on, as being reasonable.

Meaning, in estate planning (not estate administration or contested litigation), get away from emphasis on hourly billing, and get into the concept of either doing or demonstrating project/value billing as much as possible.

*Example 3: It's not rational: Attorney X recently spent about an hour coming up with an estate planning wrinkle for a client that saved him*

[1] In "Mental Accounting Matters," 12 J. Behav. Dec. Making 183-206 (1999), Richard Thaler, one of the leading behavioral economists in the Country, explores the concept of mental accounting. Unlike financial accounting, which consists of numerous rules and conventions that can be explored in a textbook, mental accounting rules – a description of the ways consumers perceive their economic choices—can only be observed by behavior and inferring the rules.

*about $500,000 on a strategy. If the Attorney quoted him an hourly rate of $2,000, and then sent him a bill for $2,000, the client would be upset. If the Attorney quoted him a flat fee of $5,000 to try to implement a strategy that would save $500,000, he may have been absolutely fine with this, depending on the framing of the project and resolution.*

## D. RELEVANT THEMES

A couple that are relevant to how we bill and charge clients:

### 1. Fairness: Value, Value, Value

Consumers like to perceive themselves as being treated fairly, even when the end result or product or cost is the exact same whether they are being treated fairly or unfairly. Think about an IRS examiner who has two identical cases, both capable of yielding either $300,000 or $500,000 for the government, depending on the level of effort the examiner puts in.

To the extent one taxpayer is perceived as "trying to pull a fast one" on the agent, and the other taxpayer is acting reasonably and perceived to be a straight up kind of person, the agent is more likely to audit the Fast Eddie-prepared return more ferociously than the other. Why? Perceptions of fairness.

*Example 4: You're sitting on the Beach at La Semana in St. Marteen's, hot as the dickens. And thirsty. You're buddy says he is going to buy a beer at the hotel and asks if you want one. You say yes; he asks if you care how much it costs, even if it costs $15? You say no because you know it will cost a lot. The place you are staying is expensive, and you expect that they will charge a lot for their stuff. Your buddy decides not to go. Instead, a bum on a push cart comes buy and asks if you would like ice cold Heinekan's…you think yes…until the bum says, "$15." Why should that guy make so much money from me?*[2]

There are many takeaways for us from the perception of fairness that consumers need to feel. First, the hourly rate at any amount will rarely be perceived as fair. Yet another strike in the hourly rate's coffin. But there are beauty marks that we can add to the hourly rate; some obvious, some not so.

I (Lou talking on this one) am a casual guy, but could never understand (and think lawyers are short sighted when it comes to trends) why our profession would want to be casual. A lawyer in a nice suit connotes value, thereby connoting a certain professionalism that carries with it the expectation that the charge for services will be great. Well groomed, manicured, well spoken; all go hand in hand. *Cf.* La Semana versus the bum example above.

Offices and how they look are another aspect of perceived value. As is the lawyer's professional affiliations, speeches, articles, reputation, other clients as references (careful to preserve confidentiality, very important for estate planners), and the substantial level of a typical client.

[2] Example adapted from *Thaler, infra.*

And, though price should never be a factor in trying to convince a client to use us – "we're cheaper" sounds bad as a marketing technique (ouch!) – letting a client know that the costs for your services will be in the range of what others at your level costs, will add to the client's perception of fairness.

## 2. Understanding The Consumer's Value Function: One Big Hurt Is Better Than A Series Of Small Hurts

The loss function is convex, meaning that the marginal pain felt by incremental losses is greater than the pain felt by a larger loss. Specifically, as to the losses, the pain associated with the sum of the parts is greater than the pain associated with the whole. Ponder how this applies to a bill:

1. Every day entry associated with a time is translated into an hourly charge, a loss.

2. A bill with 20 daily time entries results in 20 losses. "Death by a 1,000 Cuts." It is more painful to review than a bill with one entry.

> *Example5: "Consider the case of the pricing policies of the Club Med resorts. At these vacation spots consumers pay a fixed fee for a vacation that includes meals, lodging and recreation. This plan has two advantages. First, the extra cost of including the meals and reaction in the price will look relatively small when combined with the other cost of the vacation. Second, under the alternative plan each of the small expenditures looks large by itself, and is likely to be accompanied by a substantial dose of negative transaction utility given the prices found at most resorts."* Thaler, *infra, at 192.*

What does this mean for our billing? Flat fees are much more preferable because a consumer may get greater transaction utility out of powers of attorney than out of drafting a complicated trust, but when each are broken out, the consumer evaluates each action separately and determines whether each action translates into value equivalent to the cost.

Further, flat fees avoid the marginal pain associated with each hourly "loss."

Thaler notes, **not** in the context of law billing (interestingly):

> *"[C]onsumers don't like the experience of 'having the meter running'. This contributes to what has been called the 'flat rate bias' in telecommunications. Most telephone customers elect a flat rate service even though paying the call would cost them less."*

## 3. Decouple Having to Have the Consumer Assign a 'Value' to Each Hourly Charge

A decoupling device noted by Thaler is the credit card:

> *"We know that credit cards facilitate spending simply by the fact that stores are willing to pay 3 % or more of their revenues to the card*

*companies…A credit card decouples the purchase from the payment in several ways. First, it postpones the payment by a few weeks. This delay creates two distinct effects: (a) the payment is later than the purchase; (b) the payment is separate from the purchase. A second factor contributing to the attractiveness of credit card spending is that once the bill arrives, the purchase is mixed in with many others," Thaler, infra (emphasis added).*

Takeaways for us: credit cards can be used for a service business. If we decide to go this route, do we pass the cost along to our clients? If we take credit cards, beware of credit card fraud, of which there is no insurance. So perhaps the trade offs are not as positive as we think.

How else can we decouple our services? To the extent we can get clients on a flat retainer, or an annual charge, and include as many services as possible, this will decouple (as will a "project" fee). As a mental exercise, can you decouple one estate planning project into 20 distinct services provided by the documents?

Transfer Tax planning

Income tax planning

Creditor protection

Funeral plans

Protecting assets if child is a spendthrift

Planning for the children's education

Protecting assets in the event of disability

Planning for a child with a disability

Providing health care alternatives

Organ donation options

Guardians for the children

Planning for long term care

Planning for liquidity at a person's passing.

Doing beneficiary designations correctly

Reallocating assets

Planning for college funding

Preserving tax-free nature of retirement planning

Assessing insurance needs

Assistance in a plan to get rid of household stuff

Preserving peace in the barnyard

## 4. Give of Yourself

What else can we do? Is "discounting" off the hourly rates or bill effective? *See* attachment 1, what do you think? We couldn't find a discussion of evidence one way or the other that would have indicated that this is effective. From a fairness perspective, clients would certainly view a discount based on a true statement –e.g., Long Standing Client Who does Not Torment Me – in a positive fashion. All consumers like discounts provided the discount is not because the product is so overpriced to begin with that the discount brings the new price to what it should have been originally.

In addition to discounts, another item that is effective, and a bit more subtle than discounting, is that "luxurious gifts can be better than cash," which according to Thaler, is "well known to those who design sales compensation schemes."

What are we doing for clients above and beyond providing them services?

## 5. Framing

Because people are loss adverse, ponder whether we can achieve better fees by framing fees in the positive, e.g., contingent fees if there are tax savings. For example, if our billing practices were set up so that clients merely had to pay us if they succeeded in achieving tax savings, that would be easier to bill and many of us would now be retired.

> *Example 5: in 1984, for A-B plans, we would describe to clients that if we were able to achieve a tax savings greater than without estate plan, we would be paid 20 % of the tax savings, <u>but only at that point.</u> Most clients would be delighted with this option. Sound bad to you? It should not. Consider the average time to payoff for a client age 65 would be less than 20 years. What's the current value in 1984 of tax savings in 2004? In 2004, the credit was, say, 1.5 million. So the savings with an A-B plan could be $750,000. 20 % of this amount would be $150,000. Ignoring the friction associated with transaction costs to collect this amount, the discounted present value in 1984 of $150,000 to be received in 2004 at a 5 % discount rate is $56,533 ($150,000/(1+.05)^20). Yes, we would all be done at this point in our practice. Not only that, but those of us who are older could have monetized our practices and sold these fee arrangements in 2004, without having to work another day. (Importantly, now we have circular 230 constraints.)*

To the extent bills are detailed in their descriptions, or projects summarized in cover letters, we should not be afraid to frame in the positive versus the negative. E.g., which

sounds better: “Draft of trusts to address estate tax issues;” or “Incorporation of estate tax savings trusts.” Or, “Draft of generation skipping trusts” versus “structure of trusts to prevent the payment of estate tax as assets move from generation to generation.”

### 6. Formatting Bills

Attachments 1-3 provide sample billing formats, which all correctly report the time and effort on a matter. Attachment 3 is the most detailed, but also the least friendly and most offensive to most estate planning clients. In determining which format to use for individual clients, the question should be asked: which one provides the kind of information that would be useful to the client in addressing the value provided, and therefore the amount of the bill.

Attachment 1 provides an evolving format of what could be useful to the client. Attachment 1-a is an unedited day by day description of the work done, without too much thought of its impact on a client reading it. Attachment 1-b creates a better picture of what was done. Attachment 1-c is a narrative summary of the actions taken. Commentators believe that 1-c is preferable to 1-b, but it should be considered and tried only on a case by case basis.

## E. I Need a New Car but Cannot Afford It

Clients that should do sophisticated estate planning, such as GRATs, QPRTs, and other advanced techniques, often hesitate to complete such projects for two primary reasons: first, the clients may feel that their own wealth cannot be jeopardized by a current transfer; or second, clients may not want to incur the costs. There are myriad other reasons, some subtle, some not so, such as not wanting kids to have immediate access to funds, not wanting to deal with one’s mortality and focus on such advanced estate planning items, desiring to simplify, not complicate, one’s life; or feeling good about one’s wealth and defining oneself by it.

Practitioners should certainly docket a client’s decision for inaction, that is, the client’s decision not to proceed with a strategy. But the practitioner should also realize that inaction can be ameliorated, to an extent, by the principles discussed here with regard to billing.

Consider the following. First, for a client that is on the border as to whether to proceed with an advanced planning strategy, or even basic estate planning, a restructuring of the billing protocol can push that client to action. From the principles discussed in this article, we know that there are two basic principles that make billing more palatable to the client: (1) fairness and (2) one large loss is easier to handle than a series of smaller ones that do not add up the large one. In other words, eliminate the hourly rate in the fee quote, which satisfies neither the fairness equation, nor aggregating losses. Hourly rates are perceived as unfair, and each hourly entry inflicts pain. Further, a client does not know the extent of his potential losses with an hourly bill concept, and the client’s loss aversion tells her not to go ahead. As a result, instead of the hourly quote, quote the client on a flat fee basis.

Second, break the overall estate planning project into smaller projects, and quote a fee for each project, thereby allowing the client to proceed on a landscaping sort of basis, doing the front estate planning yard this year, the side planning yard next year, and so forth.

Third, make sure you demonstrate to the client the tax and non tax value that will be obtained by the client by completing these projects (*e.g.*, dollars potentially saved, spousal protection for kids, family harmony, or philanthropic desires). As an iteration on the fairness concept, a client that perceives value to the end result of the planning will also perceive the bill as fair.

## F. Macro Takeaway

How interesting behavioral finance is to what we do on a day to day basis. We would theorize that focus on this area could be the single greatest untapped value to us as practitioners. But it does require thought and focus, and effort for which no hourly payment is immediately made. Creativity on bonus structures is perhaps our greatest missed opportunity. As the tired metaphor goes, "we can't catch any fish if our pole is not in the billing lake to begin with." We sometimes become so focused on short term results associated with hourly billing that we miss the retirement forest for the billing trees.

**Attachment 1-a**

**Day & Night,** 333 Aurora Borealis Way, Chicago, IL 60606-1218 www.dayandnight.com

Invoice submitted to:

Marc and Cleo Antony
Estate Planning
One Mag Mile
Chicago, IL 60610

Invoice Number: 4950

July 01, 2007

Professional Services

| | | Amount |
|---|---|---|
| 5/12/2006 CGW | Draft new wills, powers of attorney for property and health care and living trusts for Marc and Cleo Antony. | |
| 5/15/2006 CGW | Continue to draft new living trusts for Marc and Cleo Antony (dispositive provisions including subtrusts for children; tax and trustee provisions); draft letter to Marc and Cleo summarizing key terms of their new estate planning documents, tax consequences thereunder and asset reallocation issues. | |
| 5/10/2007 CGW | Review summary of proposed estate planning documents for Marc and Cleo Antony; work with Lou Harrison on fine tuning the Antonys' new plan. | |
| 5/30/2007 LSH | Review and analysis of drafts of documents; update to fiduciary provisions; update to generation skipping provisions; transmittal for review. | |
| 6/26/2007 CGW | Review file in preparation for meeting with the Antonys; meeting with Marc and Cleo to discuss drafts of their new estate planning documents and proposed revisions to documents. Begin revisions. | |

6/27/2007 CGW Revising and finalizing living trusts and wills for Marc and Cleo; conference with Cleo regarding fiduciary backups; having documents prepared for execution.

6/28/2007 CGW Meeting with Marc and Cleo to execute estate planning documents; prepare for meeting; post-meeting notes regarding issues for follow up.

6/29/2007 CGW Draft letters to the Antonys and J. Caesar and send them booklets of the Antonys' new estate planning documents.

| | |
|---|---|
| Subtotal of charges | $3,682.50 |
| Courtesy Discount | ($182.50) |
| For professional services rendered | $3,500.00 |

Timekeeper Summary

| Name | Hours | Rate |
|---|---|---|
| Constance G. Work (CGW) | 10.40 | 325.00 |
| Len S. Happenstance (LSH) | 0.92 | 330.00 |

**Attachment 1-b**

**Day & Night,** 333 Aurora Borealis Way, Chicago, IL 60606-1218 www.dayandnight.com

Invoice submitted to:

Marc and Cleo Antony
Estate Planning
One Mag Mile
Chicago, IL 60610

July 01, 2007 Invoice Number: 4950

Professional Services

| | | Amount |
|---|---|---|
| 5/12/2006 CGW | Initial outline of distribution provisions to be included in estate planning documents, and outlining terms of credit shelter and marital trusts, for Marc and Cleo Antony. Determination to use Will/living trust format for the estate plan. | |
| 5/15/2006 CGW | Draft distribution provisions for credit shelter and marital trust, to incorporate tax and creditor planning; work on terms consistent with decisions at meeting. | |
| 5/10/2007 CGW | Draft trusts for children, including spousal and creditor protection features; work on trustee provisions in documents, including successor trustees, and means to appoint successors when none are named. including subtrusts for children; tax and trustee provisions). Draft letter to Marc and Cleo summarizing key terms of their new estate planning documents, tax consequences thereunder and asset reallocation issues. | |
| 5/30/2007 LSH | Review and analysis of drafts of documents; update to fiduciary provisions; update to generation skipping provisions; transmittal for review. | |
| 6/26/2007 CGW | Meeting with Marc and Cleo to review and discuss drafts of their new estate planning documents and | |

proposed revisions to documents.

6/27/2007 CGW Following meeting, update and finalize living trusts and wills for Marc and Cleo to incorporate different distribution provisions, protective tax and creditor provisions for children. Follow up phone conference with Cleo regarding fiduciary backups; preparation of documents in final form.

6/28/2007 CGW Meeting with Marc and Cleo to execute estate planning documents; prepare for meeting; post-meeting notes regarding issues for follow up.

6/29/2007 CGW Calendaring key dates for review plan documents, to finish on funding and beneficiary designation update; Work and review of closing book to make sure no additional items needed. Work on document book to Cleo and Antony.

| | |
|---|---|
| Subtotal of charges | 3,682.50 |
| Courtesy Discount | (182.50) |
| For professional services rendered | $3,500.00 |

Timekeeper Summary

| Name | Hours | Rate |
|---|---|---|
| Constance G. Work (CGW) | 10.40 | 325.00 |
| Len S. Happenstance (LSH) | 0.92 | 330.00 |

**Attachment 1-c**

**Day & Night,** 333 Aurora Borealis Way, Chicago, IL 60606-1218 www.dayandnight.com

Invoice submitted to:

Marc and Cleo Antony
Estate Planning
One Mag Mile

Invoice Number: 4950

July 01, 2007

Professional Services

Amount

5/12/2006 CGW Initial outline of distribution provisions to be included in estate planning documents, and outlining terms of credit shelter and marital trusts, for Marc and Cleo Antony. Determination to use Will/living trust format for the estates plan; 5/15/2006 CGW Draft distribution provisions for credit shelter and marital trust, to incorporate tax and creditor planning; work on terms consistent with meeting; 5/10/2007 CGW Draft trusts for children, including spousal and creditor protection features; work on trustee provisions in documents, including successor trustees, and means to appoint successors when none are named. including subtrusts for children; tax and trustee provisions). Draft letter to Marc and Cleo summarizing key terms of their new estate planning documents, tax consequences thereunder and asset reallocation issues; 5/30/2007 LSH Review and analysis of drafts of documents; update to fiduciary provisions; update to generation skipping provisions; transmittal for review; 6/26/2007 CGW _ Meeting with Marc and Cleo to discuss drafts of their new estate planning documents and proposed revisions to documents; 6/27/2007 CGW Following meeting, update and finalize living trusts and wills for Marc and Cleo to incorporate different distribution provisions, protective tax and creditor provisions for children. Follow up phone conference with Cleo regarding fiduciary backups; preparation of documents in final form; 6/28/2007 CGW _ Meeting with Marc and Cleo to execute estate planning documents; prepare for meeting; post-meeting notes regarding issues for follow up; 6/29/2007 CGW Calendaring key dates for review plan documents, to finish on funding and beneficiary designation update; Work and review of closing book to make sure no additional items needed. Work on document book to Cleo and Antony.

| | |
|---|---|
| Subtotal of charges | $3,682.50 |
| Courtesy Discount | ($182.50) |
| For professional services rendered | $3,500.00 |

Timekeeper Summary

| Name | Hours | Rate |
|---|---|---|
| Constance G. Work (CGW) | 10.40 | 325.00 |
| Len S. Happenstance (LSH) | 0.92 | 330.00 |

**Attachment 2**

**Day & Night,** 333 Aurora Borealis Way, Chicago, IL 60606-1218 www.dayandnight.com

Invoice submitted to:

Marc and Cleo Antony
Estate Planning
One Mag Mile
Chicago, IL 60610

Tax ID

April 28,2008

| | |
|---|---|
| For professional services rendered | $3,500.00 |

## Attachment 3: Illustration of a Not so Good Bill and Consideration of Its Impact on Client

| Client_name | Folder_name | Initials | Effective date | Hours | Rate | Dollars | Comments |
|---|---|---|---|---|---|---|---|
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/19/2007 00:00:00 | 5.9 | $ 255.00 | $ 1,504.50 | Estate Planning - Section 6161 Analysis v Strangi Note, Cash Flow Projections |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 01/15/2008 00:00:00 | 0.5 | $ 268.00 | $ 134.00 | Estate Form 706 |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 01/11/2008 00:00:00 | 1.2 | $ 268.00 | $ 321.60 | Form 706 |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/21/2007 00:00:00 | 2.2 | $ 255.00 | $ 561.00 | Estate planning Analysis, prep for next weeks meeting |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/20/2007 00:00:00 | 1.9 | $ 255.00 | $ 484.50 | 6161 Analysis - meeting with Joe |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 12/24/2007 00:00:00 | 0.5 | $ 255.00 | $ 127.50 | Form 706 and valuation communications |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/28/ 2007 00:00: 00 | 0.7 | $ 255.00 | $ 178.50 | Client communications |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 11/20/ 2007 00:00: 00 | 0.3 | $ 255.00 | $ 76.50 | Estate Form 706 |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/24/ 2007 00:00: 00 | 7 | $ 255.00 | $ 1,785.00 | Estate Cash Flow Projections |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/26/ 2007 00:00: 00 | 6.6 | $ 255.00 | $ 1,683.00 | Cash Flow Projections and preparation and attendance of meeting |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 07/27/ 2007 00:00: 00 | 4.9 | $ 230.00 | $ 1,127.00 | Preparation for, attendance, and recap of Estate of AJ Smith meeting |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 09/27/ 2007 00:00: 00 | 1.1 | $ 255.00 | $ 280.50 | Cash Flow Projections and T/C with Harvey |
| Estate of Josey Smith | Tax Compliance | M. Stennett | 01/09/ 2008 00:00: 00 | 0.8 | $ 268.00 | $ 214.40 | Form 706 |
| | | **J. Koney Total** | | 17.4 | | $ 2,674.00 | |
| | | **Grand Total** | | 132.9 | | $ 45,196.40 | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Estate of Josey Smith | Tax Compliance | E. Tarzan | 11/23/2007 | 0 | $ | - | $ 7,700.00 | Progress Bill |
| Estate of Josey Smith | Tax Compliance | E. Tarzan | 10/3/2007 | 0 | $ | - | $ 14,630.00 | Progress Bill |
| Estate of Josey Smith | Tax Compliance | E. Tarzan | 9/11/2007 | 0 | $ | - | $ 13,265.00 | Progress Bill |
| Estate of Josey Smith | Tax Compliance | E. Tarzan | 1/22/2008 | 0 | $ | - | $ 9,620.00 | Progress Bill |
| | | | | | | | $ 62,312.00 | |

## Part Two: Premium Billing

### A. The Premium Method Illustrated

Generally, the hourly rate is an accepted – albeit not appreciated by the practitioner or client –method for billing by an attorney. Interestingly, hourly rates have not been called into question under ethical rules, but fees are always subject to a reasonableness structure.

In this section, we examine how and when a practitioner can impose a bonus or premium concept because the results obtained are so GOOD in light of expected outcomes due to the practitioner's unique solution to a difficult issue.

As with billing practices generally, there is a methodology as to how this is to be done.

> *Example of premium concept. The practitioner develops a financial model for pricing a stream of earnings on lottery winnings, to justify a liquidity discount based on lack of marketability and a synthetically arrived at comparable asset. The practitioner develops this methodology based on substantial capital investment into financial instruments over a period of months, and develops a strategy around certain Tax Court cases holding to the contrary. The practitioner indicates that the set fee for the strategy is $X, independent of the hourly effort and independent of the result achieved.*

The steps to impose such a premium or bonus payment is constrained by each state's ethical constraints and federally mandated guidelines under Circular 230.

### B. Ethical and Regulatory Considerations in Billing Practices

#### 1. Generally

MRPC 1.5(a) provides that a lawyer's fee must be reasonable considering an enumerated list of factors.

Reg. §10.27(a) of Circular 230 provides that a practitioner may not charge an unconscionable fee.

Reg. §10.30(b)(2) of Circular 230 provides that if a practitioner publishes a written fee schedule, then the practitioner may not charge more than the published rates for the 30 day period after the publication.

## 2. As Applied to Bonus or Contingent Fees

MRPC 1.5(c) provides that all contingent fee arrangements must be agreed to in a writing signed by the client.

For fee arrangements entered into after March 26, 2008, Reg. §10.27(b) [3] of Circular 230 provides that a practitioner may charge a contingent fee in any "matter before the IRS" *only in connection with*:

- The Service's examination of or challenge to: i) an original tax return; or ii) an amended tax return or claim for refund filed before the taxpayer received written notice of an examination of or challenge to the original return, or an amended return or claim for refund filed no later than 120 days after the taxpayer received written notice of an examination of or challenge to the taxpayer's original return.

- A claim for credit or refund filed solely to determine statutory interest or penalties assessed by the Service.

- A claim under IRC §7623 (the whistleblower statute).

- Any judicial proceeding arising under the Internal Revenue Code.

All other contingent fees for "matters before the IRS" are prohibited under §10.27(b)(1) of Circular 230.

Reg. §10.27(c)(1) defines a contingent fee as:

> "[A]ny fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect."

[3] As amended by Notice 2008-43, 2008-15 IRB 748.

As a result, any fee based on a specific tax result, regardless of how the fee is calculated, is included in the definition of "contingent fees." For example, the definition seems to include not only percentage based fees but also success premiums and bonuses for certain results.

Reg. §10.27(c)(2) provides that a "matter before the IRS" includes:

> "tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings."

Apparently, the policy behind the Circular 230 rules is that contingent fees should not be allowed in cases in which the audit lottery is played and won. Rather, contingent fees will be permitted only in those cases in which the government is directly involved.

### 3. Sanctions for Willful Violation of Circular 230 Regulations

After notice and an opportunity for a hearing, the Secretary of the Treasury may censure, suspend, or disbar a practitioner from practice before the IRS if the practitioner willfully violates the Circular 230 Regulations (Reg. §10.50(a) and Reg. §10.52(a)(1)).

In addition to the censure, suspension, or disbarment, after notice and an opportunity for a hearing, the Secretary of the Treasury may impose a monetary penalty on the practitioner or on his or her firm, if the firm knew or should have known about the conduct (Reg. §10.50(c)(1)(i) and Reg. §10.50(c)(1)(ii)). The amount of the penalty is limited to the gross income derived (or to be derived) from the prohibited conduct (Reg. §10.50(c)(2)).

Ironically, the impermissible contingent fee is not refunded to the taxpayer. The Service gets to recover a portion of the taxpayer's tax savings through the Treasury's imposition of a monetary penalty.

*Example of a monetary penalty. Assume an attorney enters into an agreement with the Personal Representative of the Estate that the attorney will receive 1/3 of any tax savings associated with an FLLC discount. Assume the FLLC discount results in $1 million in tax savings and the Estate is not selected for audit. The attorney is paid $333,333 as her fee. The Secretary of the*

*Treasury gives the attorney notice and an opportunity for a hearing. After the administrative proceeding occurs, the Secretary disbars the attorney from practice before the IRS and imposes a monetary penalty of $333,333.*

*The bottom line result is that the IRS recovered $333,333 of the tax it lost in this Estate. And since this is a before tax amount, the practitioner is substantially disadvantaged monetarily.*

## C. Planning Examples of the Bonus Fee as Impacted by Circular 230 Prohibitions on Contingent Fees

1. Client engages estate planning attorney to create an FLLC. The fee agreement is entered into in April, 2008, is in writing, and provides that the attorney will receive a fee of $x for the project. The FLLC is implemented and client dies in March, 2009. The PRs of the estate engage the same attorney to handle tax matters for the estate. The fee agreement is in writing and provides that for all services, except handling an estate tax audit or tax litigation, the lawyer will be paid on an hourly basis. The 706 is filed in December, 2009 and reflects a valuation discount on the FLLC units. The 706 is selected for audit. The PRs and the attorney enter into a separate written fee agreement whereby the attorney agrees to handle the estate tax audit on a contingent fee basis. Is the attorney in compliance with the MRPC and Circular 230?

2. Client engages an attorney to obtain a private letter ruling with respect to a transfer tax issue. May the attorney undertake the representation on a contingent fee basis?

3. The PRs of an estate engage an attorney to handle the estate. May the attorney structure his or her fee as a combination of hourly rates with a "success premium" for success in connection with the estate tax?

    a. Why would a client hire an attorney on this basis post mortem, versus the pre mortem structuring?

    b. 230 constraints?

4. Attorney has an estate planning strategy that he has developed, or a wrinkle to an existing strategy that he believes works in the current setting. The attorney is not willing to be engaged in the project on an hourly basis for the following reasons:

    a. The risk to the practitioner of the strategy not succeeding far outweighs the compensation to be attained on an hourly basis;

b. The practitioner has spent substantial time developing the concept for which he was not compensated;

c. The practitioner has a strategy not in the common domain for which she expects a premium for under the principles of supply and demand; and

d. The practitioner believes that the strategy will save substantial taxes not otherwise obtainable via any other strategy.

The attorney is cognizant of the following prohibition: "A contingent fee includes a fee that is based on a … percentage of the taxes saved, or that otherwise depends on the specific result attained." Accordingly, the practitioner indicates that the strategy could save up to $5,000,000, and offers to provide the strategy for a flat $Y, independent of whether the strategy is successful or not.

a. Is this a fee based on a percentage of the taxes saved, or that otherwise depends on the specific result attained.

b. Can the practitioner market the strategy to a client?

c. Is the fee reasonable?

d. What happens if the strategy is not successful? Clearly, a refund is prohibited by Circular 230, and practitioner knows that even permissible estate tax strategies are sometimes not allowed by the Service (to our dismay, but to one's hourly advantage sometimes).

## D. Construct Premium Billing Arrangements

First, the concept must be agreed to by the client at the beginning of the representation; e.g., merely asking for a bonus at the end because the result obtained was so good is not a prudent approach.

Second, the objective must be defined, but more importantly, what unique talent or recommendation is the practitioner bringing to the equation that justifies the bonus fee.

*Example: Structuring a 5 year GRAT transaction, for a 75 year old, with a 5 year SCIN hedge, structured along the same economic lines, and assuming reasonable rate of return objectives (are there any these days?) for the GRAT, can result in a risk free estate tax arbitrage. Structuring a SCIN, taking into account both section 2036 and income tax results, is*

*not generic and can be quite difficult. Achieving the arbitrage, and structuring the actuarial risk premium internally, require unique practitioner skills. This kind of transaction is one justifying a bonus fee.*

Third, the prohibitions in Circular 230 must be avoided. Merely describing the fee as a percentage of projected tax savings is now not allowed under C 230. A bonus of $Z dollars, independent of whether the strategy is successful, is one way to consider the bonus.

Fourth, the client needs to be satisfied with the arrangement. Creative structuring of the payment of the bill is one way to achieve client satisfaction. E.g., with the $Z dollar bonus, can it be structured so that the client's children pay it at the time of the filing of the estate tax return? Or from the property transferred during life if the strategy relates to a lifetime transfer?

Fifth, the bonus should be in writing, in an engagement letter signed by the client. However, is the language in the letter sufficient to justify the premium while at the same time not sabotaging the strategy if produced in audit on examination?

The above constraints and steps are important, and to the practitioner engaging in bonus billing for the first time, somewhat daunting. On the other hand, as practitioners we do not shy away from engagements just because they are difficult. Likewise, we should provide the same respect to the business side of our practices, and not shy away from the premium billing concept merely because it is difficult to implement.

The premise and answer must remain the same: if a practitioner is providing a unique strategy to solve a difficult legal equation, that practitioner should be rewarded on more than an hourly basis. Keep in mind that the hourly billing method assumes excellent work for every minute committed to a problem. It does not guarantee success, nor does it pay for work that is beyond excellence – that is, the unique solution to a difficult quandary.

## Part Three: The White Paper Techniques For Preferable Billing
## The Best Practice Summation (discussed in outline and power point presentation)

1. Discuss fees during the initial meeting
2. Time that discussion for the tail end of the meeting
3. Determine a fee quote at the first meeting
4. Deliver fee quote in a thought out manner and make sure you believe in and deliver the quote in a way conveying fairness
5. Have client provide down payment or retainer before engagement begins
6. Understand that Fairness matters to clients – clients want to pay for services that they perceive as Fair
7. Many estate planning projects will be perceived as Fair if quoted as a Flat Fee
8. To demonstrate Fairness, make sure that all the component parts, and accomplishments, with the estate planning project are demonstrated throughout the project; also, deliver excellent service; also, de-cliché clichés
9. Divide estate planning BIG PROJECT into sub projects so that value and accomplishments can be more easily understood
10. Value added billing can be considered but must be addressed in the engagement letter (see below)
11. Send bills frequently and timely
12. On a bill, do not exceed a quoted fee unless explained and discussed with the client during the project
13. Connote value in the bill itself and descriptions; spend time with each individual bill
14. Make sure to consider the format of the bill that will most easily connote value and which will avoid the Client's Loss Aversion function
15. Decouple services and bill, when possible
16. Discounting is appreciated by clients, in many situations
17. Demonstrate client care throughout the process by prompt service, attention, and non work communications
18. Know when you are proposing unique solutions to an estate planning or transfer tax issue that justifies a bonus or premium arrangement
19. Consider for unique solutions to difficult projects structuring the engagement as a combination hourly, accompanied with a bonus payment because of the uniqueness of the solution
20. Make sure the bonus avoids Circular 230 prohibitions
21. Determine how to properly discuss and market the bonus structure to a client

Part Five: Large Law Firm Focus

## A. Historical Perspective – Large Law Firm

Large law firms in the past had a significant trusts and estates practice comparable to their other practice areas. In the past (pre 1970s), large firms placed a premium on being full service to all clients, wanted to represent wealthy and influential individuals, were not focused on billable hours and leverage, and did not pay close attention to the conflicts of interest between corporate executives and the corporation.

The focus of large law firms changed beginning in the 1ate 1970's. Law became a serious economic business when the American Lawyer, which started publication in 1978, began publishing financial information about law firms. Large law firms compete for talent (law students, lateral partners, and other law firms as merger partners)) not only with other law firms but investment banking firms, for a limited talent pool and the talent now had a statistical guide to use in making career choices. This forced large law firms to change the management focus so the law firm could improve profits per partner and "move up" in the rankings so as to be more attractive to the talent pool.

In its annual listing of the "AmLaw 100," one of the statistics that the legal community pays close attention to is profits per partner. Two significant statistics in determining profits per partner are billable hours and leverage. (In general, leverage is the ability of an equity partner to produce work for non-equity timekeepers (primarily associates)). Lawyers in a traditional trusts and estates practice may find it difficult to generate significant billable hours and leverage. Thus, many large law firms allocated resources to areas of the law other than trusts and estates practice which led to the departure of many trusts and estates lawyers from large law firms to either smaller firms or boutique firms that specialize in trusts and estates.

In the past, when attorneys began the practice of law, lawyers stayed with one law firm during their entire legal career, clients wanted to use one law firm for all of the client's needs, clients rarely changed law firms, and the most significant factor in determining compensation in most firms was the seniority of the lawyer. Now, it is unusual for a lawyer to stay with the same firm during the lawyer's entire career, clients use many different law firms for the client's legal needs, and law firms reward productivity more than seniority. For these and other reasons, trusts and estate boutique law firms have become very popular.

## B. Issues in a Large Firm and a Trusts and Estates Practice

### 1. Billable Hours

Large firms want large amounts of billable hours from partners and associates. Large firms may expect an equity partner to generate enough billable work to at least keep the partner and one to three associates busy on a full-time basis. If an equity partner does not achieve this amount of legal work, the firm's standing in the AmLaw 100 may be diluted, and there is a perception that the firm may have difficulty retaining and attracting top talent.

### 2. Compared to Other Practice Groups

Generating this amount of revenue is generally easier to accomplish in a transaction or litigation practice than in a trusts and estates practice for many reasons. A trusts and estates practice involves representing individuals with individual legal problems. Individuals generally want to speak with the lawyer who will present solutions to the problem and not a subordinate who will take notes and discuss the problem with a more senior lawyer. After the initial consultation, there may be drafting work that can be accomplished by junior lawyers but not much research or other "leverageable" work.

### 3. Conflicts

In addition to revenue issues, a trusts and estates practice can create conflicts of interest issues preventing a law firm from representing other clients. This can create significant issues in a large firm. For example, a lawyer can be doing estate planning work for a key corporate executive when the corporation is sued on a matter where the actions of the corporate executive will be at issue. Because of the representation of the executive, the law firm is precluded from representing the corporation. Large law firms do not like losing the representation of large corporate clients. Conflicts of interests also prevent trusts and estates lawyers in a large law firm from representing corporate executives which can be a good source of clients.

## C. Bucking the Trend – Success of Trusts and Estate Practices in Large Firms

Although many large law firms have extremely talented lawyers who have a significant practice in the trusts and estates area, the trusts and estates department of most large firms is not large. Some large law firms have not followed the trend of not allocating resources to a trusts and estates practice. Although there are no readily available statistics and this list is based on perception, some firms ranked in the AmLaw 100 have a significant number of lawyers practicing in the trusts and estates area. Some possible reasons for the success of a trusts and estates practice in a large law firm include a law firm and group leadership with a long-term perspective, a strong clientele that allows leverage, a practice group that exports (versus imports) business to other areas in the firm, and lawyers who adapt to the requirements of a large firm.

Large law firms will continue to offer successful practices to talented lawyers. Unlike the smaller firm, there is not as much flexibility in billing practices; but large firms have and will continue to consider alternative arrangements in this area.

The Best Practices for billing set forth in this outline apply to all estate planning practitioners, whether they practice in law firms or small ones.

## Estate Tax Returns Filed in 2007
## by Tax Status and Size of Gross Estate

[All figures are estimates based on a sample--money amounts
are in thousands of dollars.]

| Tax status and size of gross estate | Gross estate for tax purposes | | Type of deductions | | | | | | Net estate tax | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Attorneys' fees | | Bequests to surviving spouse | | Charitable deduction | | | |
| | Number | Amount | Number | Amount | Number | Amount | Number | Amount | Number | Amount |
| | (1) | (2) | (53) | (54) | (59) | (60) | (61) | (62) | (83) | (84) |
| **All Returns** | **38,031** | **203,095,593** | **23,175** | **915,224** | **17,422** | **62,056,974** | **7,672** | **19,701,929** | **17,416** | **22,508,292** |
| Under $2.0 million | 3,945 | 6,307,809 | 2,406 | 52,808 | 1,519 | 1,060,534 | 579 | 246,314 | 1,409 | 136,472 |
| $2.0 million < $3.5 million | 19,806 | 51,481,033 | 11,804 | 266,221 | 8,688 | 9,850,992 | 3,521 | 1,982,948 | 8,483 | 2,352,847 |
| $3.5 million < $5.0 million | 5,943 | 24,484,232 | 3,482 | 128,279 | 3,013 | 6,903,932 | 1,295 | 1,187,054 | 2,860 | 2,371,313 |
| $5.0 million < $10.0 million | 5,429 | 36,774,179 | 3,492 | 188,047 | 2,678 | 11,982,078 | 1,294 | 2,214,199 | 2,906 | 5,173,865 |
| $10.0 million < $20.0 million | 1,892 | 25,673,363 | 1,286 | 114,373 | 971 | 9,542,151 | 550 | 1,675,366 | 1,104 | 4,445,947 |
| $20.0 million or more | 1,017 | 58,374,979 | 705 | 165,496 | 553 | 22,717,287 | 433 | 12,396,049 | 654 | 8,027,849 |
| **All Taxable Returns** | **17,416** | **112,164,528** | **14,880** | **703,937** | **1,585** | **11,175,806** | **4,254** | **12,229,881** | **17,416** | **22,508,292** |
| Under $2.0 million | 1,409 | 2,336,484 | 1,290 | 29,769 | * 57 | * 15,562 | 195 | 17,755 | 1,409 | 136,472 |
| $2.0 million < $3.5 million | 8,483 | 22,582,887 | 7,067 | 180,726 | 393 | 143,327 | 1,685 | 215,056 | 8,483 | 2,352,847 |
| $3.5 million < $5.0 million | 2,860 | 11,766,752 | 2,434 | 101,321 | 267 | 222,304 | 763 | 211,770 | 2,860 | 2,371,313 |
| $5.0 million < $10.0 million | 2,906 | 19,797,158 | 2,560 | 152,994 | 402 | 976,295 | 877 | 798,290 | 2,906 | 5,173,865 |
| $10.0 million < $20.0 million | 1,104 | 15,075,868 | 982 | 97,545 | 237 | 1,323,273 | 400 | 895,214 | 1,104 | 4,445,947 |
| $20.0 million or more | 654 | 40,605,379 | 547 | 141,581 | 229 | 8,495,045 | 335 | 10,091,796 | 654 | 8,027,849 |
| **All Nontaxable Returns** | **20,615** | **90,931,065** | **8,295** | **211,287** | **15,837** | **50,881,168** | **3,419** | **7,472,048** | **0** | **0** |
| Under $2.0 million | 2,536 | 3,971,325 | 1,116 | 23,039 | 1,462 | 1,044,972 | 384 | 228,559 | 0 | 0 |
| $2.0 million < $3.5 million | 11,323 | 28,898,146 | 4,737 | 85,495 | 8,295 | 9,707,665 | 1,836 | 1,767,891 | 0 | 0 |
| $3.5 million < $5.0 million | 3,083 | 12,717,479 | 1,048 | 26,958 | 2,746 | 6,681,627 | 532 | 975,284 | 0 | 0 |
| $5.0 million < $10.0 million | 2,522 | 16,977,020 | 932 | 35,053 | 2,276 | 11,005,783 | 417 | 1,415,909 | 0 | 0 |
| $10.0 million < $20.0 million | 789 | 10,597,495 | 304 | 16,827 | 734 | 8,218,878 | 150 | 780,152 | 0 | 0 |
| $20.0 million or more | 363 | 17,769,600 | 158 | 23,915 | 324 | 14,222,242 | 99 | 2,304,253 | 0 | 0 |

Source: IRS, Statistics of Income Division, October 2008.

**Fiduciary Income Tax Returns, Income Source, Deductions, and Tax Liability, by Type of Entity, Filing Year 2007**
[Money amounts in thousands of dollars]

| Type of entity | Number of returns | Gross income (less loss) | | Total deductions | | Deductions | | | | Taxable income [3] | | Total tax liability [4] | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Attorney, accountant, and return preparer fees | | Income distribution deduction | | | | | |
| | | Number [5] | Amount | Number | Amount | Number | Amount | Number | Amount | Number | Amount | Number | Amount |
| **All returns** | **3,708,873** | **2,324,970** | **162,823,503** | **2,406,428** | **78,457,407** | **1,268,656** | **3,252,036** | **1,236,469** | **48,671,385** | **1,111,804** | **93,341,027** | **1,108,685** | **19,460,652** |
| Complex trust | 1,276,666 | 1,215,544 | 98,431,103 | 1,260,905 | 36,708,942 | 634,829 | 1,119,732 | 496,437 | 20,090,343 | 725,333 | 65,753,535 | 719,323 | 14,351,394 |
| Grantor trust [1] | 1,266,080 | 15,085 | 934,329 | 13,952 | 570,177 | 6,666 | 11,152 | 8,767 | 386,761 | 10,111 | 402,435 | 10,119 | 90,279 |
| Simple trust | 745,383 | 715,415 | 44,034,120 | 735,560 | 25,798,585 | 388,243 | 486,758 | 611,642 | 20,741,952 | 262,063 | 19,999,589 | 263,467 | 3,456,625 |
| Decedent's estate | 389,118 | 357,549 | 16,799,707 | 375,204 | 13,578,479 | 227,379 | 1,613,522 | 114,524 | 7,251,919 | 104,005 | 6,064,711 | 103,878 | 1,372,453 |
| Bankruptcy estate | 9,633 | 432 | -6,557 | 105 | 8,919 | 47 | 3,363 | 10 | 137 | 248 | 4,253 | 1,874 | 23,087 |
| Qualified disability trust | 9,002 | 8,588 | 121,226 | 8,677 | 88,171 | 4,462 | 6,448 | 1,935 | 18,488 | 2,951 | 63,877 | 3,001 | 16,337 |
| Split-interest trust | 6,944 | 6,455 | 2,032,961 | 6,540 | 1,592,383 | 3,263 | 9,715 | 2,595 | 161,353 | 1,867 | 682,054 | 1,871 | 133,730 |
| Qualified funeral trust | 5,480 | 5,342 | 445,741 | 4,924 | 79,778 | 3,582 | 1,232 | 53 | 134 | 5,131 | 370,141 | 5,057 | 16,670 |
| Pooled income fund | 567 | 560 | 30,872 | 561 | 31,974 | 185 | 113 | 506 | 20,299 | 95 | 430 | 95 | 78 |

SOURCE: IRS, Statistics of Income Division, October 2008.

**Gift Tax Returns Filed in 2007: Total Gifts of Donor, Deductions, Credits, and Net Tax on Current Period Gifts**

[All figures are estimates based on a sample--
money amounts are in whole dollars.]

| Tax status and size of taxable gifts, current period | Total gifts | | Total annual exclusions | | Marital deduction | | Charitable deduction | | Net tax on current period gifts | | Generation-skipping transfer tax | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Number | Amount | Number | Amount | Number | Amount | Number | Amount | Number | Amount | Number | Amount |
| | (1) | (2) | (3) | (4) | (7) | (8) | (9) | (10) | (35) | (36) | (37) | (38) |
| **All returns** | **243,686** | **39,675,082,444** | **231,216** | **8,867,530,335** | **2,179** | **1,439,689,801** | **4,831** | **4,709,884,015** | **8,384** | **2,088,984,042** | **290** | **33,419,536** |
| Less than $2,500 | 98,829 | 6,649,108,139 | 97,088 | 3,888,165,839 | 1,596 | 835,580,433 | 2,118 | 1,913,779,358 | 396 | 179,524 | **8 | **1,202,785 |
| $2,500 under $5,000 | 8,339 | 539,779,492 | 7,903 | 247,241,234 | *9 | *113,043,612 | 183 | 148,835,302 | 212 | 280,026 | ** | ** |
| $5,000 under $10,000 | 13,032 | 633,481,098 | 12,792 | 375,908,790 | *134 | *33,200,191 | 396 | 129,320,143 | 320 | 929,351 | ** | ** |
| $10,000 under $25,000 | 22,925 | 1,503,230,122 | 21,493 | 789,923,839 | 132 | 53,586,718 | 419 | 284,519,637 | 674 | 4,665,867 | *218 | *732,093 |
| $25,000 under $50,000 | 19,955 | 1,790,920,352 | 19,179 | 724,553,664 | 24 | 32,426,384 | 321 | 310,837,729 | 751 | 10,447,880 | 0 | 0 |
| $50,000 under $75,000 | 12,824 | 1,510,945,251 | 11,938 | 495,327,340 | *9 | *6,670,055 | 151 | 211,590,601 | 572 | 13,564,717 | 0 | 0 |
| $75,000 under $100,000 | 10,795 | 1,274,902,009 | 9,588 | 302,227,083 | *20 | *5,279,215 | 104 | 33,250,427 | 481 | 16,444,056 | *5 | *212,058 |
| $100,000 under $250,000 | 29,679 | 6,100,986,861 | 26,947 | 960,060,526 | 104 | 118,522,303 | 402 | 290,994,733 | 1,476 | 85,494,512 | *18 | *37 |
| $250,000 under $500,000 | 16,189 | 6,592,787,572 | 14,518 | 569,218,072 | 72 | 41,810,251 | 360 | 318,429,268 | 1,205 | 124,297,309 | 0 | 0 |
| $500,000 under $1,000,000 | 9,474 | 8,196,797,804 | 8,315 | 378,061,498 | 59 | 115,961,065 | 258 | 838,996,547 | 1,025 | 204,947,539 | 13 | 456,898 |
| $1,000,000 or more | 1,646 | 4,882,143,745 | 1,455 | 136,842,449 | 20 | 83,609,574 | 119 | 229,330,271 | 1,273 | 1,627,733,263 | 28 | 30,815,656 |
| **All nontaxable returns** | **235,302** | **31,382,130,806** | **223,192** | **8,126,071,105** | **2,085** | **1,191,851,807** | **4,266** | **2,991,433,162** | **0** | **0** | ***244** | ***1,934,925** |
| Less than $2,500 | 98,433 | 6,521,577,752 | 96,699 | 3,850,370,597 | 1,585 | 812,937,739 | 2,067 | 1,847,133,937 | 0 | 0 | **8 | **1,202,795 |
| $2,500 under $5,000 | 8,127 | 415,306,277 | 7,691 | 230,446,537 | **138 | **45,754,070 | **556 | **228,758,206 | 0 | 0 | ** | ** |
| $5,000 under $10,000 | 12,712 | 562,100,402 | 12,494 | 349,876,207 | ** | ** | ** | ** | 0 | 0 | ** | ** |
| $10,000 under $25,000 | 22,251 | 1,322,602,476 | 20,833 | 727,497,941 | 125 | 51,729,903 | 378 | 179,822,467 | 0 | 0 | *218 | *732,093 |
| $25,000 under $50,000 | 19,204 | 1,651,740,980 | 18,442 | 654,606,426 | *10 | *27,673,503 | 259 | 273,628,724 | 0 | 0 | 0 | 0 |
| $50,000 under $75,000 | 12,252 | 1,268,397,045 | 11,381 | 445,163,054 | *3 | *5,647,869 | 133 | 56,018,638 | 0 | 0 | 0 | 0 |
| $75,000 under $100,000 | 10,314 | 1,172,252,279 | 9,114 | 261,826,364 | *20 | *5,279,215 | *74 | *13,251,196 | 0 | 0 | 0 | 0 |
| $100,000 under $250,000 | 28,203 | 5,649,894,871 | 25,531 | 827,997,173 | 89 | 109,209,861 | 324 | 214,764,470 | 0 | 0 | *18 | *37 |
| $250,000 under $500,000 | 14,984 | 5,820,820,288 | 13,371 | 466,483,613 | 58 | 30,943,753 | 283 | 95,722,764 | 0 | 0 | 0 | 0 |
| $500,000 under $1,000,000 | 8,449 | 6,593,674,838 | 7,370 | 295,773,672 | 50 | 94,649,962 | 184 | 76,633,581 | 0 | 0 | 0 | 0 |
| $1,000,000 or more | 373 | 403,763,600 | 266 | 16,029,521 | *6 | *8,025,932 | 9 | 5,699,177 | 0 | 0 | 0 | 0 |
| **All taxable returns** | **8,384** | **8,292,951,638** | **8,024** | **741,459,229** | **94** | **247,837,994** | **565** | **1,718,450,854** | **8,384** | **2,088,984,042** | **46** | **31,484,612** |
| Less than $2,500 | 396 | 127,530,388 | 389 | 37,795,242 | *11 | *22,642,694 | 51 | 66,645,421 | 396 | 179,524 | 0 | 0 |
| $2,500 under $5,000 | 212 | 124,473,214 | 212 | 16,794,697 | **5 | **100,489,733 | **23 | **49,397,238 | 212 | 280,026 | 0 | 0 |
| $5,000 under $10,000 | 320 | 71,380,696 | 298 | 26,032,582 | ** | ** | ** | ** | 320 | 929,351 | 0 | 0 |
| $10,000 under $25,000 | 674 | 180,627,646 | 660 | 62,425,898 | *7 | *1,856,815 | 41 | 104,697,170 | 674 | 4,665,867 | 0 | 0 |
| $25,000 under $50,000 | 751 | 139,179,372 | 737 | 69,947,237 | *14 | *4,752,881 | 62 | 37,209,004 | 751 | 10,447,880 | 0 | 0 |
| $50,000 under $75,000 | 572 | 242,548,206 | 558 | 50,164,287 | *6 | *1,022,186 | 19 | 155,571,964 | 572 | 13,564,717 | 0 | 0 |
| $75,000 under $100,000 | 481 | 102,649,731 | 474 | 40,400,719 | 0 | 0 | 30 | 19,999,231 | 481 | 16,444,056 | *5 | *212,058 |
| $100,000 under $250,000 | 1,476 | 451,091,991 | 1,416 | 132,063,353 | *15 | *9,312,443 | 78 | 76,230,263 | 1,476 | 85,494,512 | 0 | 0 |
| $250,000 under $500,000 | 1,205 | 771,967,284 | 1,147 | 102,734,459 | 14 | 10,866,498 | 77 | 222,706,503 | 1,205 | 124,297,309 | 0 | 0 |
| $500,000 under $1,000,000 | 1,025 | 1,603,122,966 | 945 | 82,287,826 | *9 | *21,311,103 | 74 | 762,362,966 | 1,025 | 204,947,539 | 13 | 456,898 |
| $1,000,000 or more | 1,273 | 4,478,380,145 | 1,189 | 120,812,928 | 14 | 75,583,642 | 110 | 223,631,094 | 1,273 | 1,627,733,263 | 28 | 30,815,656 |

Source: IRS, Statistics of Income Division, unpublished data, November 2008.

Appendix Four: Relevant Provisions of Circular 230:

**§ 10.27 Fees.**

"(a) *In general.* A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service."

"(b) *Contingent fees* —
(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.
(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to —
(i) An original tax return; or
(ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.
(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.
(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.
(c) *Definitions.* For purposes of this section —
(1) *Contingent fee* is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether

pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) *Matter before the Internal Revenue Service* includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

(d) *Effective/applicability date.* This section is applicable for fee arrangements entered into after March 26, 2008."

Appendix Five: ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT

MRPC 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service 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; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. 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, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

* * * * * * * * * * * * * *

ACTEC COMMENTARY ON MRPC 1.5

Basis of Fees for Trusts and Estates Services. 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). Fees in such matters frequently are primarily based on the hourly rates charged by the attorneys and legal assistants rendering the legal services or upon a mutually agreed upon fee determined in advance. Based on the revisions to MRPC 1.5 in 2002, unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. As revised in 2002, the rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representation, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel. Any changes in the basis or rate of the fee or expenses shall be communicated to the client. Basing a fee for legal services solely on any single factor set forth in MRPC 1.5 is generally inappropriate unless required or allowed by the law of the applicable jurisdiction. In recent years courts in several states have, in effect, prohibited or seriously limited the use of fees based upon a percentage of the value of the estate.

Most states allow a lawyer who serves as a fiduciary and as the lawyer for the fiduciary to be compensated for work done in both capacities. However, it is inappropriate for the lawyer to receive double compensation for the same work.

Fee Paid by Person Other than Client. 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. Under MRPC 1.8(f) (Conflict of Interest: Prohibited Transactions) the lawyer may accept compensation from a person other than a client only if the client consents after consultation, there is no interference with the lawyer's independence of judgment or with the lawyer-client relationship, and the client's confidences are maintained. See ACTEC Commentary on MRPC 1.8 (Conflict of Interest: Prohibited Transactions).

No Rebates, Discounts, Commissions or Referral Fees. The lawyer should not accept any rebate, discount, commission or referral fee from a nonlawyer or a lawyer not acting in a legal capacity in connection with the representation of a client. Even with full disclosure to and consent by the client, such an arrangement involves too great a risk of overreaching by the lawyer and the potential for actual or apparent abuse. The client is generally entitled to the benefit of any economies that are achieved by the lawyer in connection with the representation. The acceptance by the lawyer of a referral fee from a nonlawyer may involve an improper conflict of interest. See MRPC 1.7 (Conflict of Interest: General Rule) and MRPC 1.8 (Conflict of Interest: Current Clients: Specific Rules). In those jurisdictions that permit referral fees between lawyers, the lawyer should comply with the requirements of local law governing such matters, including full disclosure to the client. A lawyer is generally prohibited from sharing legal fees with nonlawyers. See MRPC 5.4 (Professional Independence).

ANNOTATIONS
See Caveat to Annotations
(Limiting the Scope and Purpose of the Annotations)

Percentage, Excessive and Reasonable Fees

Statute

Florida:

Florida has enacted a comprehensive statute governing compensation of the attorney for a personal representative. Attorneys for personal representatives are entitled to “reasonable compensation” without court order. If the compensation is calculated pursuant to a statutory percentage fee schedule set forth in the statute, it is presumed to be “reasonable.” Provision is made for payment for certain “extraordinary services,” examples of which are included in the statute. Upon the

petition of any interested person the court may increase or decrease the compensation for ordinary services or award compensation for extraordinary services (if the facts and circumstances of the particular administration warrant.) The statute also includes a list of factors for the court to use in determining what is "reasonable" and gives the court discretion to give such weight to each such factor as the court determines to be appropriate. Fla. Stats. § 733.6171 (eff. July 1, 1995).

Cases

California:

Estate of Trynin, 264 Cal. Rptr. 93 (1989). The Supreme Court of California, construing California's statute governing extraordinary compensation for attorneys, here held that in an appropriate case attorneys may be compensated for legal services rendered in preparing and prosecuting a claim for prior extraordinary legal services (so-called "fees on fees"). The Court observed that the trial court retains the discretion to reduce or deny additional compensation for fee-related services if the court finds that the fees otherwise awarded the attorneys for both ordinary and extraordinary services are adequate, given the value of the estate and the nature of its assets, to fully compensate the attorneys for all services rendered.

Colorado:

Estate of Painter, 567 P.2d 820 (Colo. Ct. App. 1977), appeal after remand, 628 P.2d 124 (Colo. App. 1980), appeal after remand, 671 P.2d 1331 (Colo. Ct. App. 1983). Fee awards for personal representative and counsel based on expert testimony applying percentage method of determining fees were reversed. The Colorado legislature had repealed authorization for percentage fees and adopted a reasonable fee standard.

People v. Woodford, 81 P.3d 370 (Colo. 2003). This case is discussed in the Annotations following the ACTEC Commentary on MRPC 1.1.

Florida:

Florida Bar v. DellaDonna, 583 So. 2d 307 (Fla. 1991). A lawyer acting as personal representative was disbarred for five years for gross mismanagement of estate, conflicts of interest, and excessive fees. The court rejected the argument that discipline could not be imposed on the lawyer since the lawyer was not acting as a lawyer.

In re Estate of Platt, 586 So. 2d 328 (Fla. 1991). The court here held that it was inappropriate to determine the fees of a fiduciary and the fiduciary's lawyer solely according to a percentage of the value of the estate when governing statutes

provide a number of factors to be considered in determining fees. (See discussion of Florida statute below.)

Teague v. Estate of Hoskins, 709 So. 2d 1373 (Fla. 1998). In this case of first impression, the Supreme Court of Florida held that the attorneys' fees awarded to a widow's guardian against an estate's personal representative in the guardian's successful litigation with the personal representative over the widow's homestead, and elective share rights constituted a claim of the highest priority against the estate's assets. Two dissenting judges argued that the majority's opinion "exacts no toll from the personal representative for initiating and pursuing a fruitless claim."

Illinois:

Cripe v. Leiter, 703 N.E.2d 100 (Ill. 1998). The court here concluded that the Illinois Consumer Fraud Act did not apply to regulate the conduct of lawyers in representing clients. The matter involved a fee dispute brought on behalf of a trust beneficiary challenging the fees of the lawyer for the trustee.

In re Estate of Pfoertner, 700 N.E.2d 438 (Ill. App. 1998). An attorney filed a successful will contest on behalf of some, but not all, of the intestate heirs of a decedent. The attorney moved for an order assessing his fees and costs against each heir's intestate share of the estate to the extent such heir's interest exceeded what the heir would have received under the challenged will. The appellate court affirmed the trial court's authority and broad discretion to award fees and costs pursuant to the common fund doctrine (described as an equitable exception to the "American Rule" that each party to litigation must bear its own attorneys' fees). The appellate court nevertheless remanded the case to the trial court to make a quantum meruit award.

Indiana:

In re Matter of Gerard, 634 N.E.2d 51 (Ind. 1994). A lawyer was here suspended for one year for enforcing contingent fee agreement under which the lawyer received over $150,000 with respect to largely administrative work in locating certificates of deposit that belonged to an elderly hospitalized client. The lawyer's conduct involved fraud and charging a clearly excessive fee.

Maine:

In re Estate of Davis, 509 A.2d 1175 (Me. 1986). The practice of basing a lawyer's fee on a percentage of the estate being handled should carry little or no weight in determining a reasonable fee.

Massachusetts:

In re Matter of Tobin, 628 N.E.2d 1273 (Mass. 1994). A lawyer was suspended for 18 months for fraudulently inducing a client unnecessarily to probate an estate, all of the assets of which passed to her as surviving joint tenant, for charging excessive fees based on bar association's former fee schedule, and misrepresenting facts to probate court.

Missouri:

Estate of Perry, 978 S.W.2d 28 (Mo. Ct. App. 1998). This was an action brought by the decedent's son by a prior marriage to remove the decedent's surviving husband as personal representative and for an accounting. The trial court declined to remove the husband as personal representative but entered a money judgment against him for certain claims made on jointly secured obligations. The court also adjudicated the husband's request for an allowance of exempt property. The appellate court, reversing the trial court on the issue of attorneys' fees, held that the son was entitled to a fee award since the estate had benefited from the judgment against the husband and the fact that the son was not successful in his removal action was not determinative on the attorneys' fees issue.

Montana:

Hauck v. Seright, 964 P.2d 749 (Mont. 1998). In this will contest action where the decedent had executed two wills within four days, counsel for the personal representative was unsuccessful in defending the validity of the second will. Nevertheless, in admitting the first will to probate, the trial court awarded attorneys' fees to the personal representative under the second will. On appeal by the contestant, the Supreme Court of Montana, construing Montana's statute, held that a personal representative is entitled to recover fees from an estate when he defends or prosecutes a proceeding in good faith, whether successful or not.

New York:

In re Estate of Freeman, 311 N.E.2d 480 (N.Y. 1974). This case lists the factors to be taken into account by a surrogate judge in determining the fees of counsel in estate matters, which include the amount involved, results obtained and the skill and time required.

North Carolina:

Estate of Smith v. Underwood, 487 S.E.2d 807 (N.C. Ct. App. 1997). The appellate court here upheld a trial court's award in favor of the beneficiaries of a trust who had sued the attorney/trustee (together with an accountant and the accountant's firm) for breach of fiduciary duty and professional negligence. The attorney had filed an initial trust accounting and obtained approval of his fees and commissions in 1955, the year after the decedent died, but from 1956 until 1991 filed no annual accountings and did not obtain the probate court's approval of the

fees and commissions that he collected. The award against the attorney included statutory double damages allowed under state law when an attorney has committed a fraudulent practice.

Ohio:

Estate of Haller, 689 N.E.2d 612 (Ohio Ct. App. 1996). An attorney/administrator sought fees for his firm's representation of himself in an estate administration. Introducing no expert testimony, the attorney did support his application with a 67-page itemization of his services. In affirming the trial court's approval of the entire fee requested (approximately $39,000), the court observed that, "[w]hile the better practice may be to introduce expert testimony as to the reasonableness of the fees, a probate court judge is nevertheless qualified to make a determination, upon evidence, of the reasonable attorney fees to be paid from the estate without the necessity of expert testimony." 689 N.E.2d at 615.

Oregon:

In re Stauffer, 956 P.2d 967 (Or. 1998). While representing the personal representative of an estate, lawyer took action to recover assets for the estate in order to collect an attorney fee the lawyer claimed was owed to him by the decedent, to the detriment of the personal representative (title to the asset was in the name of the personal representative). The lawyer failed to apprise the personal representative client of his conflict of interest and failed to obtain consent. The lawyer was suspended from practice for two years.

Pennsylvania:

In re Trust Estate of LaRocca, 246 A.2d 337 (Pa. 1968). Estate and trust counsel are provided guidance with respect to the setting of fees for their services. Factors include the amount of work, difficulty of the problems involved, amount of money or value of the property in question and degree of responsibility incurred.

In re Estate of Preston, 560 A.2d 160, 165 (Pa. Super. 1989). The compensation allowed by the lower court was reduced: "The lower court's use of the Attorney General's [percentage] schedule for calculating fees is clearly improper and must cease."

In re Estate of Sonovick, 541 A.2d 374, 376 (Pa. Super. 1988). In this case the compensation of the lawyer and the fiduciary were reduced. The court stated that: "Thus, the fiduciary's entitlement to compensation should be based upon actual services rendered and not upon some arbitrary formula."

South Dakota:

Estate of O'Keefe, 583 N.W.2d 138 (S.D. 1998). In this action decedent's two nephews, who had acted as fiduciaries in taking care of his property, were found liable for both compensatory and punitive damages for breach of their fiduciary duties, conversion, fraud and deceit. The plaintiff, who, with the nephews, was the only other beneficiary of the estate, sought an order to prevent the two nephews from receiving any part of the punitive damages as estate beneficiaries and requested the court to assess the estate's attorneys' fees incurred in the prior litigation against the nephews' distributive shares. After the trial court so ruled, the Supreme Court of South Dakota, interpreting that state's version of the Uniform Probate Code, upheld the trial court's order regarding the punitive damages but reversed the award of attorneys' fees, finding that such fees could only be awarded by contract or when explicitly authorized by statute.

Washington:

Bennett v. Ruegg, 949 P.2d 810 (Wash. Ct. App. 1999). In this case the court, interpreting statutory law, found that the state's broadly drawn statute permitting attorneys' fees to be awarded in a probate proceeding "as justice may require" applies to permit the personal representative's recovery of attorneys' fees from a beneficiary who has unsuccessfully sought removal of the personal representative.

Estate of Morris, 949 P.2d 401 (Wash. Ct. App. 1998). A corporate personal representative personally incurred attorneys' fees in successfully defending a suit for removal brought by the beneficiaries of two estates. Its request for reimbursement from the estates was disallowed. The appellate court affirmed the trial court's decision denying any fees on the grounds that the bank's conduct had conferred no "substantial benefit" on the estate as required by the applicable Washington statute.

Ethics Opinions

ABA:

ABA Formal Op. 93-379 (1993). This opinion articulates more particularly the duties of a lawyer to disclose the basis of fees and charges as provided in MRPC 1.5. In addition, in matters where the client has agreed to have the fee determined with reference to the time expended by the lawyer, a lawyer may not bill more time than she actually spends on a matter, except to the extent that she rounds up to minimum time periods (such as one-quarter or one-tenth of an hour). A lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing and equipping an office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services provided in house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered. A lawyer may not charge a client more than her disbursements for

services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct costs of the third-party services.

Arizona:

Ariz. Op. No. 94-09 (1994). (For a more detailed summary see the Annotations following the ACTEC Commentary on MRPC 1.6.) A lawyer who believes that the fees charged by another lawyer in connection with the administration of an estate are clearly excessive has a duty to report the other lawyer's violation of the rules to the state bar.

Connecticut:

Op. 00-22 (2000). Attorney had previously represented a corporate fiduciary on unrelated estate matters. No written fee agreement is required for lawyer's representation of same corporate executor of a new estate.

Oregon:

Op. No. 2003-177 (2003). A lawyer does not charge or collect an illegal fee in a probate case if the lawyer requests and receives an initial payment or interim payments from the personal representative's own funds. The personal representative client may later seek court approval for reimbursement from the estate assets of some or all of the money advanced for legal fees. Lawyer who is serving as a personal representative of an estate must obtain court approval before withdrawing any compensation for services.

Contingent Fee Agreements

Cases

Indiana:

In re Matter of Gerard, 634 N.E.2d 51 (Ind. 1994). This case, summarized above, involved a contingent fee agreement that resulted in an excessive fee. The "enormity of Respondent's fee in relation to the amount of service rendered is fraudulent." 634 N.E.2d at 53.

Oklahoma:

Estate of Hughes, 90 P.3d 1000 (Ok. 2004). The court has authority to examine a written contract between attorney and personal representative before approving attorney's fee as an expense. The contract here was found ambiguous because it was unclear what portion of a contingent fee was for representation of the

personal representative in estate matters and what portion was for representing her individually.

Ethics Opinions

Missouri:

Informal Advisory Op. 20000090 (2000). Attorney who represents the children of a decedent on a contingent fee basis in an attempt to secure their portion of an intestate estate may later represent them in a suit involving other family members under a representation contract with terms providing for a small retainer up front and a later contingency fee basis. The fee assessed at the conclusion of the representation must be assessed for its reasonableness.

New York:

New York City Bar Formal Op. 1993-2 (1993). This opinion concludes that a lawyer may enter into a contingent fee contract with a client in connection with a dispute involving a will. The lawyer may not enter into a joint fee agreement among the lawyer, clients and a private investigator under which the investigator would receive a contingent fee.

Payment of Fee by Person Other than Client

Ethics Opinion

ABA:

ABA Inf. Op. 86-1517 (1986). A lawyer may bill a corporation for personal services provided to the corporation's shareholder, director, officer or employee, if the corporation and the attorney's personal client agree and the bill identifies the services as personal services and the amount of the charge for the services.

Reduced Rates for Employees of Corporate Client

Ethics Opinion

Illinois:

Ill. Op. 92-8 (1993). This opinion approved an arrangement under which a law firm that represents a corporation would represent corporate employees at reduced rates in return for the corporate president's recommendation that the employees use the law firm's services. However, the opinion observes that the promise of "reduced" rates may be misleading unless the fees charged are less than the firm's normal and customary fees. The same may be true unless the fees charged are less than the fees generally charged in the locality for similar legal services. There is

also a substantial risk of a conflict of interest between the employees and the employer.

Rebates, Discounts, Commissions or Referral Fees

Cases

Kansas:

In re Matter of Farmer, 747 P.2d 97 (Kan. 1987). It is improper for a lawyer to negotiate discounts on a client's medical expenses that were payable from personal injury settlement, charge the client for the full amount of the claims without disclosure, and retain the difference as an additional fee.

New York:

In re Estate of Clarke, 188 N.E.2d 128 (N.Y. 1962). The lawyer for a personal representative who entered into an agreement with a real estate broker to split the broker's fee on the sale of real property belonging to the estate had a conflict of interest that required denial of all of the lawyer's fees.

Ethics Opinions

ABA:

ABA Formal Op. 93-379 (1993). This opinion covers a number of subjects relating to attorneys' fees and disbursements. It states, in part, that, "if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself. Clients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements."

California:

L.A. County Op. 443 (1987). A lawyer may not accept payments from a physician to whom the lawyer refers clients for medical treatment.

San Diego Op. 1989-2 (1989). A lawyer for the executor of a decedent's estate may not ethically demand payment of a referral fee by a real estate broker as a condition to retention of the broker. "Disclosure and consent by the client (per Rule 3-300) does not cure the abuse."

New Jersey:

N.J. Op. 514 (1983). This opinion is summarized in the Annotations following the ACTEC Commentary on MRPC 1.7.

New York:

N.Y. Formal Op. 610 (1990). This opinion is summarized in the Annotations following the ACTEC Commentary on MRPC 1.7.

North Carolina:

99 Formal Ethics Opinion 1 (1999). A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

Pennsylvania:

Op. 2003-16 (2003). Although it is conceivable that an estate planning attorney could be ethically permitted to sell life insurance, securities, or other financial products to his or her client as part of the estate planning process, it is highly unlikely that the lawyer could satisfy MRPCs 1.7(b), 1.8(a) and 1.8(f).

Op. 2000-100 (2000). Lawyers may accept referral fees from insurance agents, investment advisors, or other persons who provide products or services to the lawyer's client subject to MRPCs 1.7(b) and 1.8(f).

Texas:

Op. 536 (2001). A lawyer may not receive referral or solicitation fees for referring a client to an investment adviser while the lawyer's client continues to receive services from the investment adviser because the client would be adversely affected by the lawyer's own financial interests and his obligations to the investment adviser.

Utah:

Op. No. 01-04 (2001). Charging an annual fee for estate planning or asset protection services based on a percentage of the value of the client's assets would be ethical "only in extraordinary circumstances." The opinion does not suggest any circumstances where the arrangement would be appropriate.

Op. No. 99-07 (1999). It was not "per se unethical" for a lawyer to refer a client to a financial advisor and to receive a referral fee, but the lawyer "has a heavy burden to insure compliance with applicable ethical rules." The opinion noted that several states hold, as do the Commentaries, that the practice is "per se unethical."

Op. No. 146A (1995). This opinion held that a lawyer may sell life insurance products to an existing client if the lawyer complies with MRPC 1.8(a).

Virginia:

Op. 1754 (2001). It is not unethical for an attorney and an insurance agent to share the commission generated by the purchase of a survivorship life insurance policy to fund client's irrevocable life insurance trust provided full and adequate disclosure is made to the client.

## II. FEES IN ESTATE ADMINISTRATION

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# I. OVERVIEW

## A. [15.1] Introduction

The purpose of this chapter is to provide a clear, understandable evaluation of the current standards for awarding attorneys' fees in Illinois in estate administration and closely related matters, such as guardianship and will contest proceedings.

## B. [15.2] Erosion of Fees

The current standards for determining attorneys' fees in estate administration and contested proceedings are satisfactory in the sense that profit is being made in providing services for these tasks. Revenues still exceed cost. However, in comparison to the competitive theories of supply and demand, current standards are not satisfactory.

Intuition leads to the conclusion that the net amount of fees being received on a relative basis is substantially lower than for the same product ten years ago and that there is too much uncertainty in the current system for both practitioners and beneficiaries. The reasons are numerous:

1. Technology has led to efficiency.

2. Hourly rates have increased, although not substantially, on a relative basis.

3. Premium billing for estate administration (through the old fee schedule concept) has either been pragmatically rendered useless or deemed unacceptable in the area.

4. At times, courts review the reasonableness of fees based on standards that have minimal rational connections to the quality or result provided, preventing attorneys from obtaining premium billing on matters that deserve fee premiums.

5. The public, thanks in part to the media's discussion of the abuses on fringe areas, has been led to a general distrust of attorneys' fees. For the most part, when attorneys' fees are based on hours, the public tends to distrust and question those reported hours. Occasionally, this distrust is perpetrated by the legal profession itself. For example, a four-hour time entry that reads, "Worked on estate administration matters," does not instill confidence in an attorney's fee. Nor, for that matter, does a one-hour description that reads, "Worked on draft of letter explaining executor duties." However, that latter entry when expanded to read, "Drafted five-page memorandum describing tax deadlines, determining income tax filing deadlines, strategizing initially regarding income tax matters, explaining transfer requirements for securities and claims procedure for creditors, etc.," would lend more credibility to particular fees charged to an estate. Perhaps the pendulum has swung in the wrong direction given that it had been the custom to base fees on the size of the estate, meaning that a fee award of three percent of the estate could be quite out of proportion to the efforts and achievements in a given estate.

## C. Procedure for Payment of Fees

### 1. [15.3] Generally

An engagement letter between the attorney and the executor is recommended, though not required. The right to compensation "must rest on the terms of an express or implied contract of

employment," and when the agreement with the executor is not in writing, the terms of the attorney's compensation could be more susceptible to dispute at the hearing on the attorney's fee petition. *Estate of Healy*, 137 Ill.App.3d 406, 484 N.E.2d 890, 892, 92 Ill.Dec. 159 (2d Dist. 1985). The engagement letter should set forth the professionals who will work on the project, their hourly rates, and what is expected in terms of payments (but see discussion below for the ultimate veto power of the court over any agreed-on fee).

Because fees can be subject to scrutiny by the courts (*e.g.,* via the objection of a beneficiary), the attorney may wish to consider whether the executor would agree to pay, individually, the differential between fees allowed by the court and those incurred by the attorney. Most executors, however, would not agree to this type of arrangement. Further, this type of arrangement must be pursuant to an express written contract. *Rubinkam v. MacArthur*, 302 Ill.App. 71, 23 N.E.2d 348, 351 (1st Dist. 1939) ("where an attorney intends to hold an executor . . . personally responsible for his fee, good faith toward the client would seem to dictate that the attorney should so inform the client at the time the latter seeks his services").

Further, the executor and the attorney both have a fiduciary duty to the beneficiaries. *See, e.g., In re Estate of Halas*, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1280, 111 Ill.Dec. 639 (1st Dist. 1987). Accordingly, any agreement entered into between the attorney and the executor also needs to have the best interests of the beneficiaries in mind. This requirement would be satisfied by acknowledgments in the engagement letter that the attorney represents the beneficiaries, as well as the executor, and that the attorney will assist the executor only to the extent that his or her representation protects and enhances the beneficiaries in the administration process.

Note that in the guardianship context, court approval ex ante of an engagement letter could be difficult to obtain. However, the courts will sometimes preapprove a range of fees and attorney hours as reasonable for specific projects (such as estate planning) with the final fee amount still subject to court approval. The preapproval serves both to notify the court of the project being undertaken as well as to give the practitioner reassurances that the fees and hours expected to be incurred are not substantially outside the realm of what the court foresees approving for that project.

There is one tax concern with regard to the timing of attorneys' fees during the administration period. Fees may constitute a deduction for income tax purposes. Accordingly, to the extent that it is possible, fees should be paid only in a year in which they can be used as deductions. Fees emanating from administration expenses cannot be rolled over from one year to the next but can be carried out as deductions to beneficiaries in the tax year the estate terminates.

### 2. [15.4] Initiating Payment Process

In independent administration, the attorney may send the invoice directly to the executor. If the executor believes that the beneficiaries will agree to the fees, the executor can pay the invoice currently out of estate funds. Alternatively, the independent executor can wait until formal (*e.g.,* at the time of the filing of the annual account or final report) or informal (*e.g.*, upon receipt of the beneficiaries' consent) approval of the invoice to pay it. Although fees are at risk in both independent and supervised administration, the courts tend not to become involved in an analysis of the fee amount in independent administration if all parties are in agreement. If the independent executor opts to wait, the attorney may seek immediate payment by filing a fee petition.

In supervised administration, the court always becomes involved in determining the reasonableness of the attorneys' fees. Therefore, it is prudent, though not always followed in

practice, to procure payment of fees via the filing of a fee petition. *See, e.g., In re Estate of Thomson,* 139 Ill.App.3d 930, 487 N.E.2d 1193, 1200, 94 Ill.Dec. 316 (4th Dist. 1986) (remanding appellant's objections to accounting for reconsideration based in part on payment of attorneys' fees without fee petition when "the statute clearly contemplates that the representative will seek court approval," but implying that fees could still be approved on remand).

### 3. [15.5] Notice to Beneficiaries

In independent administration, the executor may pay fees without prior notice to the beneficiaries and without court approval. The beneficiaries receive ex post notice via the payment entry in the executor's accounting, of which the beneficiaries receive notice prior to the executor's discharge.

However, if a petition for attorneys' fees is filed in independent or supervised administration, the beneficiaries and all parties of record are entitled to notice of the petition.

### 4. [15.6] Interim Fees

Before the close of independent administration, the executor may pay interim attorneys' fees, and attorneys need not petition the court for prior approval. However, as with any fee payment, it is advisable to ascertain informally whether beneficiaries are likely to object since the Illinois Probate Act (Probate Act), 755 ILCS 5/1, *et seq.*, gives beneficiaries the right to petition for a hearing on any estate administration matter; no matter when the fees are paid, the beneficiaries eventually will see that payment. See Probate Act §28-5. Should the attorneys' fees be paid without beneficiary approval and later reduced upon hearing, the overpayment will have to be refunded to the estate.

In supervised administration, interim fees can be allowed upon petition. *See In re Estate of Marks,* 74 Ill.App.3d 599, 393 N.E.2d 538, 542, 30 Ill.Dec. 502 (1st Dist. 1979) (denying challenge to interim fees based solely on desire to save time and efficiency); *In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 429, 432 (1st Dist. 1965) (holding that attorney was entitled to reasonable compensation on petition for partial fees even though outcome of litigation was still in question).

### 5. [15.7] Burden of Proof

In actions for attorney fee approval, the burden of proof rests on the attorney to establish his or her case. *Estate of Healy,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985). The court is not bound by the petitioning attorney's own opinion of the reasonableness of his or her fee. When an interested party raises objections to the fee, the petition "require[s] proof like any other claim . . . similar to cases where attorney's fees are the subject of a court order against an opposing party." *Id.*

### 6. [15.8] Evidence

Current Illinois practice is that an attorney must submit "detailed time records . . . to support the hours claimed" on a fee petition. *Estate of Healy,* 137 Ill.App.3d 406, 484 N.E.2d 890, 893, 92 Ill.Dec. 159 (2d Dist. 1985).

The court also will review other evidence if submitted, such as

a. correspondence exhibits (*id.*);

b. summaries of the types of estate assets requiring valuation and collection and the difficulty of the tasks undertaken (*In re Estate of Enos*, 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979)); and

c. credentials of the attorneys whose time was incurred, results achieved by each project undertaken, and tax benefits to the estate from the work done (*In re Estate of Marks*, 74 Ill.App.3d 599, 393 N.E.2d 538, 542 – 543, 30 Ill.Dec. 502 (1st Dist. 1979)).

Typically, a practitioner will identify these areas in the body of the fee petition as part of the narrative. However, a better practice is to admit these items into evidence through both oral and written evidence at the actual fee petition hearing. Focusing the court's attention on the particularities and difficulties of each administration or litigation matter is the most strategic way to maximize payment.

Further, the courts are willing to review the evidence of experts in determining "the reasonable worth and value of the services rendered." *Healy*, *supra*, 484 N.E.2d at 893. However, the court is not governed entirely by the opinion of expert witnesses as to the value of services provided. *See In re Estate of Brown*, 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978).

## II. STATUTORY STANDARD FOR FEES

### A. [15.9] The Statute

The Probate Act provides that "[t]he attorney for a representative is entitled to *reasonable* compensation for his services." [Emphasis added.] Probate Act §27-2. Illinois courts have the ultimate discretion as to the amount, if any, of fees to be paid from the estate.

This rule was clearly enunciated by *In re Estate of James*, 10 Ill.App.2d 232, 134 N.E.2d 638, 641 – 642 (3d Dist. 1956), in which the court, answering the argument that it did not have the power to set the fee of the attorney, stated:

> **This is not the law. The right of the Probate Court to allow an executor or administrator credit in his account for reasonable attorney's fees . . . is undoubted, but the amount paid for attorney's fees is to be determined by the court in exercise of judicial discretion.** *See also In re Estate of Halas*, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987) (stating that "determination as to what constitutes reasonable compensation is a matter peculiarly within the discretion of the probate court").

Contractual provisions between an executor and the estate attorney that attempt to override the judicial authority to determine the appropriateness of attorneys' fees will be ignored, at least as to payment of attorneys' fees from the estate.

### B. [15.10] Factors Cited in Applying the Statute

Courts interpret the term "reasonable" with wide latitude; meaning they do fairly much what they want. The commonly cited factors impacting the size of attorneys' fees awarded include

1. the size of the estate;

2. the work done;

3. the skill evidenced by the work;

4. the time expended;

5. the success of the efforts involved;

6. the degree of good faith; and

7. the efficiency with which the work was done (*see, e.g., In re Estate of Coleman*, 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994); *In re Estate of Shull*, 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998); *Estate of Venturelli v. Granville National Bank*, 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977)).

The Court may also consider the existence of a contingent fee arrangement with the client in determining a reasonable level of fees, but the contingent fee will not necessarily act as a floor or ceiling on the award. *See Rath v. Carbondale Nursing & Rehabilitation Center, Inc.*, 374 Ill.App.3d 536, 871 N.E.2d 122, 129-30, 312 Ill.Dec. 722 (5th Dist. 2007).

A different analysis is evidenced by the Illinois Rules of Professional Conduct (RPC), which list the following eight criteria for 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 service 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; and**

**(8) whether the fee is fixed or contingent.** RPC 1.5(a).

The cases do not specify the weight to be accorded each of the factors, nor do they evince an understanding of how these variables interplay with one another. Nevertheless, a recitation of the factors in the petition for attorneys' fees accompanied by each factor's applicability in the particular case is a prudent approach.

These factors more likely would apply to enforcement by an attorney of fees pursuant to an expressed (oral or written) contract versus fee petition cases against an estate. *See, e.g., Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 251 Ill.Dec. 420 (1st Dist. 2000).

### C. [15.11] Interpretation of These Standards: Generally

An attorney should reference the above standards when completing the fee petition, as well as provide specific details, to prevail on a fee petition. Courts generally will delve into the substance and hear evidence as to what work was being performed. There is uncertainty as to prevailing in any fee petition, regardless of the facts.

Some pitfalls to avoid are illustrated by *In re Estate of Halas,* 159 Ill.App.3d 818, 512 N.E.2d 1276, 111 Ill.Dec. 639 (1st Dist. 1987). In *Halas,* the petitioner's fees were reduced from $957,099 to $535,000 based on several factors. First, the record demonstrated bad faith on the petitioner's part, including the failure to notify beneficiaries of a reorganization of estate stock that affected the estate's rights as was ordered by the probate court, the payment of the petitioner's fees out of estate funds without prior authorization from the executors, and delays in transferring files to a successor attorney upon the petitioner's termination. 512 N.E.2d at 1281 – 1282.

Second, the court reduced the fees based on inefficiencies arising out of having 41 different attorneys involved on the case, which the court found to result in "duplication of effort, over-conferencing, and extra review time of the work done by other individuals." 512 N.E.2d at 1284. For example, the petitioner sent multiple attorneys to court appearances that were routine enough to be handled by one or two attorneys. 512 N.E.2d at 1285.

Third, research that appeared to be unnecessary did not merit compensation. The court held that inexperienced associates had been educated at the expense of the estate. In particular, attorneys may not recover fees for researching "problems which should be within the general knowledge of experienced practitioners, and which [do] not involve complex or novel matters." 512 N.E.2d at 1284.

Fourth, the work done and the time expended were not adequately supported in the attorneys' time records. Narratives for hundreds of hours listing only "work on estate" did not provide enough detail to the court. Further, notations of conference time were missing details as to which persons attended, what topics were discussed, and what conclusions were reached. The court held that although records may be substantiated ex post, contemporaneous records are entitled to greater weight. 512 N.E.2d at 1285.

## III. RHETORIC ASIDE, WHAT ARE THE COURTS REALLY DOING?

### A. [15.12] Emphasis on Hours: Generally

The current practice in most localities in Illinois is to determine attorneys' fees based on time records. *See In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994) (stating that "[t]he amount of time expended by a party requesting a fee is the most important factor in determining reasonable compensation" and reducing fees for services as executor performed by attorney from $80,000 to $15,967); *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 571, 16 Ill.Dec. 696 (3d Dist. 1978) (noting time expended as

shown by detailed time record is greatest factor in determining attorneys' fees). A fee petition must therefore set forth the number of hours expended and the hourly rate claimed.

### B. [15.13] Descriptions in Time Records

The necessity of adequate time records cannot be overemphasized. *See Flynn v. Kucharski*, 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) (noting "the time expended in such a case is not to be relegated to a secondary or minor position; it is a highly significant factor in determining the fee" and attorneys' preference for contingent fee over hourly fee "does not excuse their failure to keep adequate records").

In examining an attorney's time records, a court will consider the lack of itemized time entries and the inconsistency of (untimed) attorney diary entries with the total hours claimed. *In re Estate of Coleman*, 262 Ill.App.3d 297, 634 N.E.2d 314, 316, 199 Ill.Dec. 475 (2d Dist. 1994); *Cf. In re Estate of Saperstein*, 24 Ill.App.3d 763, 321 N.E.2d 328, 336 – 337 (1st Dist. 1974) (upholding fee award despite absence of time records).

The widely cited case *Kaiser v. MEPC American Properties, Inc.*, 164 Ill.App.3d 978, 518 N.E.2d 424, 430, 115 Ill.Dec. 899 (1st Dist. 1987), endorses a line-by-line review of an attorney's time records. The court denied fees that it concluded were related to the "review and organization of file documents . . . office conferences and memoranda . . . redrafts, revisions and corrections." 518 N.E.2d at 430 – 431. Furthermore, although the lack of detail in time records did not forfeit fees, the court expressed disapproval of the aggregation of all time on a given day into a single time entry in lieu of the breakdown of each task performed by the attorney and noted that the lack of detail made review difficult. *Id.*

The practitioner may distinguish the *Kaiser* standards on the grounds that *Kaiser* involved the application of a fee clause in a lease against the party filing the action. In other words, perhaps a higher level of scrutiny and detail is appropriate when the attorney's incentives run against the payor's interests, but such a close examination is not necessary when the attorney's and the payor's interests run more in tandem. *See, e.g., Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill.App.3d 590, 740 N.E.2d 501, 508, 251 Ill.Dec. 420 (1st Dist. 2000) (noting in dicta, with regard to *Kaiser*, "[A]n additional policy consideration in cases involving 'fee-shifting' provisions is that the attorney for the successful litigant has no individual right to seek payment from the losing party. Stricter scrutiny by the trial court is warranted in these circumstances because the attorney submitting billing statements for approval by the trial court has no fiduciary relationship with the party ultimately liable for payment of the fees.").

A case decided around the same time as *Kaiser, In re Estate of Halas*, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1285, 111 Ill.Dec. 639 (1st Dist. 1987), held that a reduction in fees for inefficiency was proper in "the absence of sufficiently detailed descriptions in the time records." However, the court did not mention or insist on the high standard of task-by-task time entries within a single day. Rather, the court indicated that details of the following type would be useful in evaluating conference time, *e.g.*, "the identification of persons attending, topics discussed, or conclusions reached." *Id.*

### C. Necessity of Benefiting the Estate

#### 1. [15.14] Generally

Attorneys' fees will not be payable out of the estate if the work is not in the interest of or of benefit to the estate. *See In re Estate of Minsky,* 59 Ill.App.3d 974, 376 N.E.2d 647, 651, 17 Ill.Dec. 501 (1st Dist. 1978).

**2. [15.15] Representation of Fiduciary Individually vs. Representative**

No fees will be allowed for representation of a fiduciary's individual interest. Courts will compare what was accomplished against the time records to make sure that fees charged match the work an attorney puts into a particular estate. For example, in *Estate of Dyniewicz v. Freitag,* 271 Ill.App.3d 616, 648 N.E.2d 1076, 1083, 208 Ill.Dec. 154 (1st Dist. 1995), the court refused to allow fees when the attorneys initially maintained that they represented the co-guardians individually but later attempted to backtrack by claiming a benefit to the guardianship estate. The case showed how important it is that the representation structure be set up correctly ab initio to obtain attorneys' fees.

Further, the representative must provide the services anticipated in the correct capacity. A guardian of the person who provides estate-related guardianship services will not be allowed to have those fees reimbursed. *In re Estate of Goffinet,* 318 Ill.App.3d 152, 742 N.E.2d 874, 252 Ill.Dec. 336 (4th Dist. 2001).

Attorneys representing fiduciaries who are performing poorly, whether that malfeasance is tantamount to negligence or fraud, could have a problem with obtaining fees. *See In re Estate of Devoy,* 231 Ill.App.3d 883, 596 N.E.2d 1339, 1343, 173 Ill.Dec. 460 (5th Dist. 1992) (reversing award of attorneys' fees because attorney did not inform court of breaches of fiduciary duty). Moreover, an attorney may have a duty to take steps toward the removal of a negligent administrator. *Id*.

**D. [15.16] Hourly Rate**

Some courts will limit an attorney to the standard rate in the relevant jurisdiction. *In re Estate of Coleman,* 262 Ill.App.3d 297, 634 N.E.2d 314, 317, 199 Ill.Dec. 475 (2d Dist. 1994) (reducing hourly rate from $200 to $150, even though $200 rate requested was lower than petitioner's normal hourly fee, because $150 was standard rate in jurisdiction, while not reducing hourly fee further for petitioner's inexperience in probate matters). For the practitioner, determining this standard rate is not always feasible because it is often a moving target.

The reasonableness of the hourly rate tends to be determined independently of the value of the services rendered. An extraordinarily efficient attorney may still face a de facto ceiling on his or her hourly rate, even if the average attorney would have incurred more hours at a lower rate to accomplish the same result, thus yielding a higher overall fee. It is difficult to demonstrate that particular services were provided more efficiently than average and that an attorney deserves a premium for that efficiency, while it is relatively easy for objectors to show that an attorney's hourly rate is higher than the community average.

If an attorney's services have provided unique value to the estate, one argument that can be raised to obtain a premium rate is that "the hourly rate should be commensurate with the undertaking and should not be so low as to discourage participation in such cases by highly qualified counsel." *Leader v. Cullerton,* 62 Ill.2d 483, 343 N.E.2d 897, 901 – 902 (1976), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.,* 168 Ill.2d 235, 659 N.E.2d 909, 914, 213 Ill.Dec. 563 (1995). *Leader* held that an hourly rate of $100 was reasonable for work performed from approximately 1970 to 1972. *Leader, supra,* 343 N.E.2d at 902. At a growth rate of 6 percent, this hourly amount would be equivalent to $542 in 2000

terms, or $412 at a 5-percent cumulative growth rate. The hourly rate may be deemed to include certain costs, such as computer research, photocopying, phone, and delivery charges, unless the engagement letter explicitly lists them as reimbursable costs. Accordingly, a reasonable practice is to itemize in the engagement letter each cost that is not to be included in overhead but rather billed separately. *Guerrant v. Roth,* 334 Ill.App.3d 259, 777 N.E.2d 499, 267 Ill.Dec. 696 (1st Dist. 2002). *See also Kaiser v. MEPC American Properties, Inc.,* 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987) (describing certain costs that should be included in overhead).

Even with only cost-of-living adjustments from 1972 to 2000, using the U.S. Department of Labor Consumer Price Index for All Urban Consumers, a $100 hourly rate would be equivalent to a $312 hourly rate in 2000. Not all the jurisdictions are ready to approve hourly rates of $312, let alone $542.

### E. [15.17] Size of the Estate

The size of the estate often functions as a baseline for the reasonable level of fees and, all other factors being equal, it may serve as a ceiling on fees. This concept was demonstrated in the past by the courts' reliance on fee schedules, which are no longer accepted by the courts. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978) (approving use of fee schedule based on percentage of estate's gross value as starting point and reference point for appropriate level of fees).

However, courts often still use the fee schedule concept implicitly by using a percentage of the estate as a ceiling. In this regard, attorneys' fees equal to 2 percent of the gross probate estate value have a superficial appearance of reasonableness, although a court may permit higher percentages based on other factors under consideration. *See, e.g., Estate of Brown, supra,* 374 N.E.2d at 708 – 710 (sustaining fees of $33,800 in $1.6 million estate, or approximately 2 percent); *In re Estate of Enos,* 69 Ill.App.3d 129, 386 N.E.2d 1147, 1149 – 1150, 25 Ill.Dec. 483 (5th Dist. 1979) (reducing requested fee from 6 percent to 2 percent when fee petition lacked itemized statement of services and when no extraordinary services were required); *In re Estate of Grabow,* 74 Ill.App.3d 336, 392 N.E.2d 980, 984 – 985, 30 Ill.Dec. 215 (3d Dist. 1979) (allowing 3.8-percent attorney fee when results obtained were particularly advantageous to estate).

In order to obtain substantial attorneys' fees in relation to the size of the estate, attorneys must show the economic value provided to the estate. For example, in *In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328 (1st Dist. 1974), the court upheld an award of attorneys' fees of approximately 13 percent based on the results obtained for the estate. 321 N.E.2d at 336 – 337. In that case, the attorney had incorporated, managed, and brokered the sale of a basketball team and demonstrated to the court that through the coordinated efforts of the attorney and coexecutors (one of whom was the attorney, who took no separate fee as coexecutor) the value of the estate's primary asset was almost doubled within one year of the date of death. The attorney introduced further evidence that earnings had increased tenfold. 321 N.E.2d at 336.

### F. [15.18] Estate Complexity

The courts also will consider the complexity of the estate. It is essential that the practitioner bring this complexity to the court's attention. For example, in *In re Estate of Marshall,* 167 Ill.App.3d 549, 521 N.E.2d 637, 639 – 640, 118 Ill.Dec. 355 (4th Dist. 1988), the court reduced the attorneys' fees from 2.8 percent to 1.7 percent because the estate was not complex enough to

justify the hours expended, based on the court's review of the attorney's time records. Similarly, in *In re Estate of Weber,* 59 Ill.App.3d 274, 375 N.E.2d 569, 572, 16 Ill.Dec. 696 (3d Dist. 1978), the court reversed a fee award approximating nearly 10 percent of the estate when the record did not reveal any complex transactions. *Cf. In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 380 – 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding fee of 4.6 percent of gross estate value when bankruptcy of tenant farmer on estate's real property and two years of will construction litigation complicated administrative duties).

## G. Work Covered and Not Covered

### 1. [15.19] Duplication

The current view is that to the extent the services rendered are duplicative, either no fees will be allowed, or fees will be adjusted to reflect the duplication of effort. *See Leader v. Cullerton*, 62 Ill.2d 483, 343 N.E.2d 897, 900 – 901 (1976) (reducing fee award for duplicative time incurred by three different law firms representing same class of plaintiffs, *e.g.*, multiple appearances at routine hearings), *abrogated on other grounds by Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 659 N.E.2d 909, 913 – 914, 213 Ill.Dec. 563 (1995); *Continental Illinois National Bank & Trust Co. v. Llewellyn*, 86 Ill.App.2d 1, 229 N.E.2d 334, 339 – 340 (1st Dist. 1967) (disallowing fees for attorneys of beneficiary's assignee when assigning beneficiary also had counsel in will construction litigation and interests were aligned, but allowing such fees on matters in which they were not duplicative because assigning beneficiary's interests were adverse to assignee's interests); *In re Estate of Brown*, 58 Ill.App.3d 697, 374 N.E.2d 699, 708, 15 Ill.Dec. 916 (1st Dist. 1978) (stating "a charge may not be made for duplicated work" as between executor and its attorney).

In *In re Estate of Halas*, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 111 Ill.Dec. 639 (1st Dist. 1987), the court reduced fees for "over-conferencing" caused by having 41 attorneys involved in the estate and noted that conference time should be accompanied by entries showing the persons attending, the topics discussed, and the conclusions reached. The court also reduced fees for unnecessary research time. 512 N.E.2d at 1285 (contrasting research time on matters of general knowledge to experienced attorneys, which cannot be billed, against research about complex or novel matters). Similarly, in *Kaiser v. MEPC American Properties, Inc.*, 164 Ill.App.3d 978, 518 N.E.2d 424, 115 Ill.Dec. 899 (1st Dist. 1987), the court reduced attorneys' fees by over 51 percent in part because the time records showed that 70 of the 330 total hours billed were for interoffice conferences and memoranda. 518 N.E.2d at 426 – 427.

Although these cases preclude fees for duplication, they do not prohibit all fees for attorney conferences or research. To prevail on this point, the practitioner will need to distinguish its research and interoffice conference time from abusive situations in cases like *Halas* and *Kaiser*. To a degree, duplication is going to occur if utilization of professional staff within the lawyer's office is properly handled. If a senior attorney does legal research, it may be too expensive for the client. However, if the lawyer employs a younger attorney to do it, the research can be done economically, but the younger attorney will require supervision and guidance. Overlap may occur, but the real result is savings to the client. A review of the economics often will demonstrate that overlap is efficient and value-added to the client. The petition to the court and, more importantly, the specific time entries that form the basis of the invoices must emphasize and demonstrate why interoffice conferences were necessary and how they saved fees for the estate.

### 2. [15.20] Multiple Capacities

Typically, an attorney is entitled to compensation for both legal and nonlegal services performed. *In re Estate of Hackett,* 51 Ill.App.3d 474, 366 N.E.2d 1103, 1106, 9 Ill.Dec. 592 (4th Dist. 1977) (permitting attorney-representative to take executor's fee on top of his attorney's fee already awarded). *See also In re Estate of Saperstein,* 24 Ill.App.3d 763, 321 N.E.2d 328, 337 (1st Dist. 1974) (considering value of attorney's nonlegal services in permitting high fee award). "The best practice [is] to include that [dual] compensation in a single fee." *Hackett, supra.*

## H. [15.21] Who Performs the Work

Fees are *not* limited to legal representatives and their counsel. *In re Estate of Freund,* 63 Ill.App.3d 1, 379 N.E.2d 935, 936 – 937, 20 Ill.Dec. 102 (2d Dist. 1978) (upholding payment of legal fees to attorneys for heir when they wound up matters that enabled estate to be closed). *Cf. Continental Illinois National Bank & Trust Co. of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees for counsel of beneficiaries when provisions in dispute were unambiguous and beneficiaries forced trustee to file petition for instructions).

However, if a petitioner other than the representative brings an action that involves the estate or trust but seeks only personal benefits, that party is not entitled to fees. *Boldenweck v. City National Bank & Trust Co. of Chicago,* 343 Ill.App. 569, 99 N.E.2d 692, 702 (1st Dist. 1951) (holding that lack of ambiguity in document reduces construction suit to standard adversarial proceeding, in which losing party may not recover fees out of trust funds; *i.e.*, petitioner represents personal interests rather than trust's interests when document is unambiguous).

## I. [15.22] Appellate Review

The general rule is that "[t]he trial court has broad discretion to determine the 'reasonable compensation' to be allowed an attorney." *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 492, 230 Ill.Dec. 360 (4th Dist. 1998). *See also In re Estate of Thorp,* 282 Ill.App.3d 612, 669 N.E.2d 359, 364, 218 Ill.Dec. 416 (4th Dist. 1996) (noting trial court's broad discretion is based on its possession of requisite skill and knowledge to determine fair and reasonable compensation). *Cf. Wildman, Harrold, Allen & Dixon v. Gaylord,* 317 Ill.App.3d 590, 740 N.E.2d 501, 506, 251 Ill.Dec. 420 (1st Dist. 2000), noting in dicta that in fee petition cases, "the trial court has broad discretionary powers in awarding the attorney fees sought and its discretion will not be reversed unless the court has abused its discretion."

Appellate courts are not likely to overturn the lower court's determination on fees. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 707, 15 Ill.Dec. 916 (1st Dist. 1978) (noting standard on appeal is manifest or palpable error in trial court's exercise of its discretion); *In re Estate of Dudek,* 87 Ill.App.3d 528, 409 N.E.2d 418, 420, 42 Ill.Dec. 803 (3d Dist. 1980) (upholding reduction of fees from $13,500 to $8,500 based on a finding that "the amount of time expended was not justified under the circumstances," despite lower court's contemporaneous findings that attorneys were skillful and acted in good faith and that petitioners actually expended all hours recorded in fee petition).

Although seeking appellate review of a lower court's seemingly unreasonable fee reduction may appear desirable, it likely will not be productive because of the deferential standard applied and noted above.

## IV. [15.23] FEES IN DISPUTED CASES

Contested proceedings can take a variety of forms, such as the construction of a will or trust, the determination of the validity of portions or all of a will or trust, formal proof of a will under Probate Act §6-21, the determination of who should act as administrator in intestacy situations, and citation proceedings.

### A. [15.24] Construction Cases

In *Orme v. Northern Trust Co.*, 25 Ill.2d 151, 183 N.E.2d 505, 513 (1962), the Illinois Supreme Court set forth the general rule for payment of attorneys' fees in contested estates as follows:

> **In will construction cases the costs of litigation are borne by the estate on the theory that the testator expressed his intention so ambiguously as to necessitate construction of the instrument in order to resolve adverse claims to the property. Legal fees are allowed to a party even though the construction adopted is adverse to his claim. However, such fees should not be authorized where such construction is unnecessary. [**Citations omitted.**]**

The determination of whether there is an ambiguity is based in part on "whether or not there is an honest difference of opinion." *Ingalsbe v. Gough*, 2 Ill.App.3d 681, 277 N.E.2d 149, 150 (4th Dist. 1971). When the representative "did not feel that he could safely proceed with the administration without a judicial construction of the will" and the heir presented an opposing interpretation in good faith, the heir's attorney could recover fees from the estate even though the heir's position did not prevail. *Id. Accord Northern Trust Co. v. Tarre*, 83 Ill.App.3d 684, 404 N.E.2d 882, 889, 39 Ill.Dec. 291 (1st Dist. 1980) (upholding award of all parties' attorneys' fees from estate when litigation was result of honest differences of opinion), *rev'd on other grounds*, 86 Ill.2d 441 (1981); *Strauss v. Strauss*, 293 Ill.App. 364, 12 N.E.2d 701, 703 (3d Dist. 1938) (accepting "the well-settled rule of law" that "where the will of a deceased testator must be judicially construed, reasonable solicitors' fees of necessary parties may be allowed by the court").

#### 1. [15.25] Winning

Being successful typically allows the attorney to recover fees. *See, e.g., In re Estate of Roberts*, 99 Ill.App.3d 993, 426 N.E.2d 269, 272 – 273, 55 Ill.Dec. 294 (5th Dist. 1981) (awarding attorneys' fees to counsel for guardian of estate when it prevailed in suit to require trustee to pay trust income to guardian following settlor-beneficiary's incompetency).

#### 2. [15.26] Losing

Provided the litigation emanated from the above standard — an honest attempt to resolve an ambiguity — all parties who have an interest and a reasonable involvement in the case are entitled to attorneys' fees.

The court considered the issue of whether a party has an "interest" in *Hinckley v. Beardsley*, 28 Ill.App.2d 379, 171 N.E.2d 401 (2d Dist. 1961), which involved the circuit court's allowance of attorneys' fees to unsuccessful litigants. The unsuccessful litigants were charities seeking distribution of estate funds under the cy pres doctrine. One of the charities was a residuary

legatee, while the other was a voluntary intervenor. The lower court allowed the petition to intervene but distributed the funds to a third charity; nevertheless, it awarded attorneys' fees to the two unsuccessful charities. 171 N.E.2d at 402 – 403. The appellate court upheld the fee award to the residuary legatee but reversed the fee award to the intervenor, reasoning that the residuary legatee had no choice about becoming involved in the construction suit and had a sufficient interest in the funds to justify its claim. By contrast, the court found no authority "which authorizes the payment of attorney fees and expenses to an unsuccessful voluntary intervenor." 171 N.E.2d at 404 – 405.

When a suit is groundless, legal fees and trustee expenses in defense of the suit "are to be paid out of the share of the complainant in the trust estate, and not charged against the estate generally nor a general fund by which cobeneficiaries would have to contribute." *Patterson v. Northern Trust Co.,* 286 Ill. 564, 122 N.E. 55, 56 (1919). *Accord Webbe v. First National Bank & Trust Company of Barrington,* 139 Ill.App.3d 806, 487 N.E.2d 711, 715, 93 Ill.Dec 886 (2d Dist. 1985) (holding that legal fees and costs incurred by trustee and other beneficiaries in defending suit were fully chargeable to unsuccessful plaintiff-beneficiary's share of trust but, in absence of statutory authority, not to such person individually).

Attorneys' fees can be awarded to both sides in a construction suit if the litigation is the result of an honest difference of opinion between the parties that results in a deadlock. *Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976) (holding individual cotrustees were entitled to litigation expenses and fees because of irreconcilable conflict between corporate and individual trustees). *See also In re Estate of Hall,* 127 Ill.App.3d 1031, 469 N.E.2d 378, 381, 82 Ill.Dec. 844 (4th Dist. 1984) (upholding attorneys' fees for remainder beneficiary's separate counsel when construction of will was primary issue underlying theory of litigation).

### 3. [15.27] Ambiguity

If there is little or no dispute, ambiguity, or question, no fees will be granted to the party creating the disagreement, whether it was the petitioner or respondent. *See McCabe v. Hebner,* 410 Ill. 557, 102 N.E.2d 794, 799 (1951); *Continental Illinois National Bank & Trust Company of Chicago v. Bailey,* 104 Ill.App.3d 1131, 433 N.E.2d 1098, 1104, 60 Ill.Dec. 860 (1st Dist. 1982) (disallowing fees to counsel for beneficiaries-respondents, even though trustee was party bringing construction suit, when trustee was forced to bring suit by reason of beneficiaries' claims against trust funds in case when trust was unambiguous).

Courts will pay attention to whether the ambiguity is genuine or fallacious. Veiled attempts to generate an ambiguity for the sole purpose of instituting a construction suit will result in nonpayment of attorneys' fees to the unsuccessful litigant. For example, *Ingalsbe v. Gough,* 2 Ill.App.3d 681, 277 N.E.2d 149 (4th Dist. 1971), involved an heir of the decedent asserting the lapse of bequests under the will in order to take an interest by intestacy. The court noted that the will was not ambiguous on its face but found that a latent ambiguity arose from the prior deaths of five of the nine residuary legatees with no contingent gift provision. The court then applied an anti-lapse statute to the disposition rather than allowing partial intestacy. 277 N.E.2d at 149 – 150.

The court applied a two-part test: (a) whether an ambiguity exists in the document; and (b) whether there is an honest difference of opinion between the parties as to the application of the statutes to this ambiguity. In awarding fees to the heir's attorney, the court seemed to be persuaded on the sincerity prong by the fact that the heir became a party to the executor's construction suit involuntarily. 277 N.E.2d at 149.

### 4. [15.28] Neutrality

When the fiduciaries pick sides, they may not be entitled to have their attorneys' fees reimbursed from the estate. A representative may properly seek construction of an ambiguous provision, but if it supports an interpretation that favors one group of beneficiaries over another, it breaches its duty of impartiality. *Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 560 N.E.2d 961, 965, 148 Ill.Dec. 364 (1st Dist. 1990). In such a case, fees will be denied if they are "in excess of those incurred in preparing and filing the complaint for construction . . . and in gathering and presenting the information necessary to interpret the [document]." *Id.*

### 5. [15.29] Appeals

Similarly, courts will not allow fees for the appeals of construction cases to be borne by the estate as to the unsuccessful appellant. *See Rosenthal v. First National Bank of Chicago,* 127 Ill.App.2d 371, 262 N.E.2d 262, 264 – 265 (1st Dist. 1970) (reversing fee award to counsel for party prosecuting unsuccessful appeals from both trial court and appellate court rulings as to hours incurred in preparation of appeals); *Cf. Estate of Knight v. Knight,* 202 Ill.App.3d 258, 559 N.E.2d 891, 894, 147 Ill.Dec. 551 (1st Dist. 1990) (denying attorneys' fees for unsuccessful appeal from trial court's finding that will was unambiguous and holding that "[e]ven where construction of a will is necessary, . . . the losing party who decides to appeal litigates at his or her own risk and is not entitled to attorney fees and costs"). *See also NC Illinois Trust Co. v. Madigan,* 351 Ill.App.3d 311, 812 N.E.2d 1038, 1042, 286 Ill.Dec. 23 (4th Dist. 2004) (trustee bringing "a reasonable but unsuccessful appeal" is not allowed reimbursement for attorneys' fees).

The general rule as to appeals is implied by the Illinois Supreme Court's holding in *Glaser v. Chicago Title & Trust Co.,* 401 Ill. 387, 82 N.E.2d 446, 448 – 449 (1948), as follows:

> **When the will has been construed by a court having jurisdiction of the subject matter and the parties, its decree affords authority to all interested persons for the administration thereunder according to its terms unless it be modified or set aside by a court of superior jurisdiction. The construction placed upon a will by the lower court may not be satisfactory to some of the parties and they may be able to have it changed on appeal, but, should they feel disposed to litigate beyond the court of original jurisdiction, this they must do at their own risk and costs.**

However, a successful appellant may generally recover fees. *See Landmark Trust Co. v. Aitken,* 224 Ill.App.3d 843, 587 N.E.2d 1076, 1086, 167 Ill.Dec. 461. Likewise, if the fiduciary is obligated to defend an appeal, fees may be awarded even if the challenger is successful on appeal. *See id.*

## B. [15.30] Contested Guardianships

In the case of guardianships, the well-accepted general rule is that "an attorney for a person seeking a conservatorship is entitled to attorney fees whether the petition is successful or not." *In re Estate of Johnson,* 219 Ill.App.3d 962, 579 N.E.2d 1206, 1210, 162 Ill.Dec. 392 (5th Dist. 1991). This allowance is crucial, given the number of contested guardianships and the importance of giving the court the opportunity to hear evidence from opposing parties.

A typical fact pattern is provided by *In re Estate of Shull,* 295 Ill.App.3d 687, 693 N.E.2d 489, 230 Ill.Dec. 360 (4th Dist. 1998). There, the ward's grandnephew hired an attorney to file a petition for temporary guardianship and plenary guardianship of the ward's person and estate. When the grandnephew discovered that the ward's grandson also desired to serve as guardian of the person, the attorney negotiated a stipulation between the parties specifying the terms of visitation, medical treatments, and a selection of a corporate estate guardian. Under the stipulation, the grandnephew would not serve as guardian of the person or estate. 693 N.E.2d at 490 – 491. The court held:

> **As a result of [**the grandnephew**]'s petitioning for temporary and plenary guardianship in this case, [**the ward**]'s personal welfare and her estate were ultimately protected and benefited by the appointment of [**the grandson**] as the guardian of her person and Magna Bank as the guardian of her estate. In addition, the fact that [**the grandnephew**] and [**the grandson**] negotiated and agreed to a stipulation of guardianship minimized both the time and expense involved in the guardianship proceeding.** 693 N.E.2d at 492.

Accordingly, the court reversed and remanded the lower court's allowance of only $500 on the $3,365.25 fee petition of the grandnephew's attorney. 693 N.E.2d at 493 – 494.

In *In re Estate of Byrd,* 227 Ill.App.3d 632, 592 N.E.2d 259, 169 Ill.Dec. 772 (1st Dist. 1992), two parties petitioned to be appointed as guardian of the estate for a disabled person, and the attorney for the unsuccessful petitioner was awarded fees. The guardian appealed on the grounds that the attorney's services did not benefit the estate. 592 N.E.2d at 261 – 262. The court upheld the lower court's determination that the mere filing of the petition for guardianship by the unsuccessful litigant benefited the estate. 592 N.E.2d at 264. The court was willing to adhere to the benefit-to-the-estate standard, but interpreted it literally. The benefit to the estate included the freezing of the alleged disabled person's assets during the pendency of the litigation and, according to the trial court (whose finding was upheld in dicta), the presentation of evidence that permitted the trial court to evaluate more fully who would best serve as guardian. 592 N.E.2d at 264 – 265.

### C. [15.31] Fees for Different Attorneys Representing Different Fiduciaries

Multiple representatives may or may not recover fees if they retain separate counsel. The general rule appears to be that "co-executors and co-trustees must act as an entity in matters pertaining to the administration of the estate; any other rule would lead to confusion and chaos and create unnecessary charges against estate funds." *In re Estate of Greenberg,* 15 Ill.App.2d 414, 146 N.E.2d 404, 408 (1st Dist. 1957). *Greenberg* further noted that the fees of lawyers retained by individual coexecutors should not be awarded out of the estate unless their employment was necessary to protect the estate. 146 N.E.2d at 409.

Such fees may be awarded, however, if the employment of separate counsel is necessary to the administration of the estate. *See Northern Trust Co. v. Continental Illinois National Bank & Trust Company of Chicago,* 43 Ill.App.3d 169, 356 N.E.2d 1049, 1072, 1 Ill.Dec. 767 (1st Dist. 1976), *rev'd in part on other grounds sub nom. Stuart v. Continental Illinois National Bank & Trust Company of Chicago,* 68 Ill.2d 502 (1977). In *Northern Trust,* the trust required a majority of the trustees to make a determination on charitable distributions by a date certain. 356 N.E.2d at 1054. The two individual trustees were in a deadlock against the corporate trustee, and the trust instrument, as interpreted by the court, required the corporate trustee to be one of the members of the majority if fewer than all trustees consented to a decision. 356 N.E.2d at 1065.

The court held that "irreconcilable conflict between the corporate and individual trustees necessitated a final judicial resolution" and that this honest difference of opinion justified the retention of separate counsel at the expense of the trust. 356 N.E.2d at 1071.

### D. [15.32] Fees for Defending Challenges to Documents

The general rule is that a fiduciary's defense of a will or trust document, absent undue influence by the fiduciary in the first place to procure the document, entitles the fiduciary to recover attorneys' fees from the estate. "It is the duty of the representative to defend a proceeding to contest the validity of the will." Probate Act §8-1(e). Moreover, because "the employment of counsel is considered indispensable to the reasonable discharge of [a fiduciary's] duty . . . the court may authorize attorney's fees to be paid from the assets of the estate." [Citations omitted.] *In re Estate of Lipchik,* 27 Ill.App.3d 331, 326 N.E.2d 464, 468 (1st Dist. 1975). *See also In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 430 – 431 (1st Dist. 1965) (noting in absence of executor's bad faith, attorneys' fees for defense of will are recoverable regardless of outcome).

However, the executor may be excused from defending a document when he or she "has reasonable grounds to believe the will is invalid." *Lipchik, supra. Accord In re Estate of Minsky*, 59 Ill.App.3d 974, 376 N.E.2d 647, 650, 17 Ill.Dec. 501 (1st Dist. 1978).

### E. [15.33] Appointment of Representative

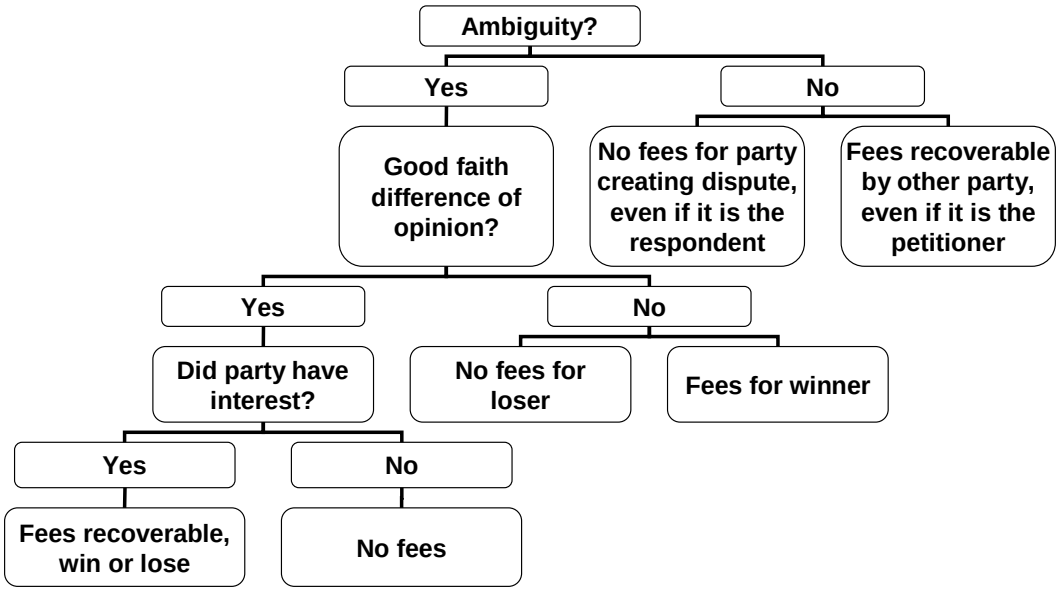
In *Estate of Roselli,* 70 Ill.App.3d 116, 388 N.E.2d 87, 89, 26 Ill.Dec. 463 (1st Dist. 1979), two nephews having equal preference petitioned to be appointed as administrator of a decedent's estate, and the court appointed one nephew based solely on the preferences of a group of coheirs of the estate. The court then awarded attorneys' fees to the unsuccessful petitioner under the provision now codified at Probate Act §27-2, despite his non-appointment as administrator. The court applied a broad definition of "representative" as "simply one who represents," rather than limiting "representative" to those persons legally appointed to act for the estate, per the definition used in Probate Act §1-2.15. 388 N.E.2d at 92.

*Roselli* goes one step further in expanding the scope of recoverable fees. It has been the practice of many probate courts not even to consider fees for attorney hours incurred prior to the attorney's first appearance on behalf of a party, whether the appearance be in person or in writing. In effect, the services required to prepare the petition for appointment and obtain information for the supporting filings are treated as voluntary. *Roselli,* however, upheld a fee award for time incurred by the attorney from the first contact by the unsuccessful litigant on August 27, 1976, even though the first round of fees related to advice on a guardianship proceeding that was not initiated prior to the decedent's death. 388 N.E.2d at 89 – 90. The court specifically held that arrangements to petition for the appointment of a guardian are services that benefit the estate, even if the petition, *i.e.,* the official court appearance, is never filed. 388 N.E.2d at 93.

### F. [15.34] Decision Tree

The following decision tree may be helpful in determining the right to recover fees in construction cases:

# Construction Cases




## V. [15.35] IS PREMIUM BILLING AVAILABLE TO OFFSET RISK OF FEE REDUCTION?

At one time, Illinois had legislatively set fees in probate matters. *Ill.Rev.Stat*. (1937), c. 3, ¶135 (providing cap on representatives' fees of six percent of personal estate and three percent of proceeds from real estate, plus costs). Many states still use this system as to both probate and trust matters (especially in states subjecting trusts to court review, similar to supervised administration in Illinois). From a competitive standpoint, percentages are probably permissible and likely result in a more thorough product.

*Goldfarb vs. Virginia State Bar*, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004, 2008, 2009 (1975) (holding that publication of fee schedules constituted price-fixing in violation of Sherman Act when ethics opinions exhorted practitioners not to charge fees lower than scheduled rates and when practitioners' behavior resulted in price floor in area), together with the Illinois Supreme Court decisions in *Flynn v. Kucharski*, 59 Ill.2d 61, 319 N.E.2d 1, 4 (1974) (reducing fee award of $750,000 to $560,000 based on time actually expended by attorneys), *Leader v. Cullerton*, 62 Ill.2d 483, 343 N.E.2d 897, 899 – 902 (1976) (applying lodestar method to calculate fee award based on starting point of time expended multiplied by reasonable hourly rate with adjustments for benefits obtained and contingent nature of undertaking, rather than based on percentage of recovery), and *Fiorito v. Jones*, 72 Ill.2d 73, 377 N.E.2d 1019, 1025 – 1027, 18 Ill.Dec. 383 (1978) (applying lodestar method), have led to much confusion in the probate area. *Cf. Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 659 N.E.2d 909, 914, 213 Ill.Dec. 563 (1995) (abrogating *Flynn, Leader*, and *Fiorito* in holding that trial court

has discretion to apply either lodestar method or percentage-of-recovery method in determining appropriate award of attorneys' fees).

Some courts will interpret this precedent as a blanket prohibition on fee schedules. *See, e.g., Estate of Venturelli v. Granville National Bank,* 54 Ill.App.3d 997, 370 N.E.2d 290, 295, 12 Ill.Dec. 667 (3d Dist. 1977) (stating that U.S. Supreme Court mandated discontinuance of bar association fee schedules). A closer examination of the facts of each case should provide the practitioner avenues for distinguishing the precedent. Moreover, provided that an executor or attorney does not rely solely on any such schedule in determination of fees, it is acceptable to use a fee schedule as a starting point. *See In re Estate of Brown,* 58 Ill.App.3d 697, 374 N.E.2d 699, 709, 15 Ill.Dec. 916 (1st Dist. 1978).

The risk of fee reduction due to the Court's disallowance of particular time entries or its reduction of the petitioner's hourly rate makes it tempting to build a risk premium into the invoice, from a business standpoint. However, this argument may fail in the fee petition. *See, e.g., Ruiz v. City of Chicago,* 366 Ill.App.3d 947, 852 N.E.2d 424, 432-33, 304 Ill.Dec. 174 (1st Dist. 2006)(holding that premium fees beyond statutory schedule are not allowable under statutory exception for "extraordinary services" in medical malpractice actions, in part because attorneys are expected to understand inherent risks in taking on medical malpractice cases and to be "aware of insurance policy limits and the risk of being unable to attain compensation beyond those limits").

## VI. [15.36] RECOVERY FROM NON-PROBATE ASSETS

Often the attorney is called on to render services with reference to assets not included in the probate estate, such as assets owned partly by the decedent and partly by another in joint tenancy or assets deemed owned by the decedent in a revocable trust or under a power of appointment.

When services are rendered with reference to assets not included in the probate estate, the attorney should present charges for his or her services to the persons receiving the benefit of those non-probate assets, rather than to the estate. *See In re Estate of Breault,* 63 Ill.App.2d 246, 211 N.E.2d 424, 436 (1st Dist. 1965) (holding that "fees incurred on behalf of the probate estate can never be assessed to the non-probate assets if there is no benefit to such assets, and where the services are of benefit to both the probate and non-probate assets, the fees would have to be apportioned").

Note, however, that in *Breault,* the court allowed the attorneys' fees incurred by the executor to be charged against the non-probate property because the decedent exercised a power of appointment over that non-probate property. 211 N.E.2d at 428, 430, 435. The court held that the executor was under a duty to perform certain acts that benefited the non-probate property and accordingly allowed the attorneys' fees to be charged against trust property that was not part of the probate estate. 211 N.E.2d at 433.

## VII. [15.37] SAMPLE FEE PETITION

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT - PROBATE DIVISION**

| | | |
|---|---|---|
| **ESTATE OF** | ) | **Case No. _____** |
| **_____,** | ) | |
| **A DISABLED PERSON** | ) | |

**PETITION FOR ATTORNEY'S FEES**

NOW COMES _____ ("Petitioner"), attorney for _____, as Guardian of the Estate of _____, a Disabled Person ("Estate"), and hereby submits its Petition for Attorney's Fees in the amount of $_____ for services rendered to the Estate from _____ through _____.

In support of this Petition, Petitioner has described its services in the following paragraphs and in greater detail in Exhibit 1, attached hereto.

Petitioner appeared before this Court on _____ dates, on motions and matters relating to the administration of this Estate, including hearings on _____, _____, and _____.

In conjunction with these hearings, Petitioner expended time in preparing motions and proposed orders and in preparing and sending all notices required by law. The motions included the Estate's Petition for _____, Petition for Approval of _____Current Account, and Petition for Authorization of Expenditure for _____.

Petitioner further expended time in responding to telephone inquiries and written correspondence from the Guardian of the Estate, the Guardian of the Person, the Guardian Ad Litem, and the Court-appointed social workers.

In performing the legal services described in Exhibit 1, attached hereto, the attorneys at _____ have recorded _____ hours of time at a rate of **$_____** per hour.

Petitioner expended **$25.00** in Court fees to file the _____ Current Account.

All services rendered by Petitioner were reasonable and necessary for the proper administration of this guardianship estate. Accordingly, Petitioner respectfully submits that it is entitled to payment of the fees requested herein.

WHEREFORE, Petitioner, _____, prays that an Order be entered authorizing the Guardian of the Estate to pay Petitioner's attorney's fees and costs in the amount of $_____, consisting of $_____ in fees and $25 in costs, for services rendered to the Estate from _____ through _____.

Respectfully submitted,

_____

Dated: _____ BY:_____

**[Attorney Info]**