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Professional Ethics Committee

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INFORMAL OPINION 2014-01

**Opinion Regarding the Billing of Attorney's Fees in Matters
Subject to Probate Court Approval**

You are an attorney who regularly practices before the Probate Courts representing fiduciaries and beneficiaries. The recent adoption of Probate Rule Section 39.1 mandates that the Probate Court shall determine whether the fees of an attorney representing a fiduciary are reasonable. Although this Probate Rule is new, you also indicate that a probate attorney's fees have always been subject to the "reasonableness standard". See e.g. Hayward v. Plant, 98 Conn. 374 (1923). You also indicate it has long been the practice of attorneys representing fiduciaries in probate matters to bill their clients periodically for services rendered.

You request an opinion on whether an attorney who collects a fee before the reasonableness of those fees is adjudicated by the Probate Court at the time of the final accounting commits a *per se* violation of Rule 1.5(a) of the Rules of Professional Conduct. You also request that we opine on the responsibilities of a lawyer under Rule 1.6 of the Rules of Professional Conduct in submitting information to the Probate Court in connection with the court's determination of the reasonableness of the fee.

1. Is It a *per se* Violation of Professional Rule 1.5(a) for a Probate Attorney to Collect a Fee Before the Court's Final Approval of Probate Expenses?

Probate Courts have the duty to determine the reasonableness of an attorney's fees. Traditionally, the Probate Court reviews an attorney's fees pursuant to its review of the fiduciary's periodic or final account. Under a new Probate Court Rule, a fiduciary or attorney is permitted, but not required, to seek Probate Court approval of a proposed fee arrangement or fee for services rendered prior to the Probate Court's review of the complete accounting. See Probate Court Rules of Procedure, § 39-1. The new Probate Rules establish two avenues through which attorney's fees may be approved. The first avenue is to seek prior approval from the Probate Court of the proposed fee arrangement. The second is to collect fees without approval and subsequently have those fees approved by the Probate Court in connection with the review of the financial report covering the time period during which legal services were rendered.¹

Although this appears to place an additional layer of judicial oversight on an attorney's fees, substantively the provision does not alter any existing requirements. Rule 1.5(a) of the Rules of Professional Conduct requires that an attorney's fees be reasonable. Indeed, the factors the Probate Court is instructed to use in assessing the reasonableness of an attorney's fees mirror the factors laid out in Rule 1.5(a). And as in any other area of practice, a probate attorney's fee transactions should be should be consistent with the open and transparent nature of the attorney's fiduciary responsibility, and his or her fees must comply with the reasonableness requirement of Rule 1.5(a).

¹ This opinion addresses the situation in which the attorney represents the fiduciary and is paid out of estate funds, as that appears to be the scenario presented in your question. However, the committee notes that this is not always the case.

In order to best represent an estate, it may be prudent for a probate attorney to charge an interim fee for work performed to date, which would permit the estate to claim a tax deduction for such fees. However, under the new Probate Court rule, the Probate Court has the last word on whether an attorney's fees are reasonable. Accordingly, an attorney who collects a fee prior to obtaining Probate Court approval of the amount of the fee must keep in mind that he or she runs the risk of having the fee deemed unreasonable upon review.

There is, however, nothing in the Probate Rule that suggests that a Probate Court's determination of unreasonableness is tantamount to a finding of a violation of the Rules of Professional Conduct, or a substitute for the due process protections of the attorney disciplinary process, with its clear and convincing standard of proof. We are not aware of any authority that would make a Probate Court's determination of unreasonableness binding in any other context. The determination of a Probate Court that a probate attorney's fees are unreasonable is subject to challenge. Such a determination may be the result of inadequate facts or judicial error.

2. Is it a Violation of Professional Rule 1.6 to Provide a Probate Court a Detailed Billing Statement to Support the Reasonableness of an Attorney's Fees?

Probate Rule 39.2 explicitly provides that the Probate Court, in assessing the reasonableness of a fee, may require the submission of a task statement covering the following topics: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) skill required to properly perform the legal services; (4) likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the attorney; (5) fee customarily charged in the

locality for similar services; (6) value of the estate, results obtained, and time limitations imposed by the client or circumstances; (7) nature and length of the attorney's professional relationship with the person whose estate is being administered or with the fiduciary; (8) experience and reputation of the attorney providing the services; (9) whether the fee is fixed or contingent.

You ask for an opinion about the extent to which you may comply with this requirement without violation of Rule 1.6. You indicate that your general practice is to provide a "Task Statement" to assist a Probate Court in assessing the reasonableness of your fees.

There is nothing in the Probate Rules to suggest a Probate Court is entitled to a full billing statement, nor that it would need one in order to assess the reasonableness of your fees. Under Rule 1.6(a), so long as "the client gives informed consent" an attorney may disclose any information to the Probate Court that would be necessary to the court's analysis. Where the client does not consent, the attorney may provide information to the Probate Court only to the extent that such disclosure does not violate Rule 1.6, and alert the Probate Court to the fact that the disclosure is limited due to the attorney's Rule 1.6 obligation to maintain client confidences. Should the Probate Court determine that it requires additional information, the Probate Court may order disclosure of information concerning the fees. Because Subsection (c)(4) of Rule 1.6 permits disclosure of client information as "necessary" to "[c]omply with other law or court order, the attorney may comply with the court's order without violating Rule 1.6.

In addition, Subsection (d) of Rule 1.6 permits a lawyer to disclose client information as necessary "to respond to allegations in any proceeding concerning the

lawyer's representation of the client." Accordingly, a lawyer responding to a claim or a finding that he or she charged an unreasonable fee may disclose client information to the extent necessary to defend the reasonableness of the fee.

THE COMMITTEE ON PROFESSIONAL ETHICS

By _____

John R. Logan, Chair