



# ISBA Professional Conduct Advisory Opinion

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**Opinion No. 13-01**  
**January 2013**

**Subject:** Fees and Expenses; Court Obligations

**Digest:** It is not ethically permissible for a lawyer for a representative of a decedent's estate to enter into a fee agreement, or to collect a fee, for an amount in excess of the amount of fees allowed by a probate court as reasonable.

**References:** Illinois Probate Act, 755 ILCS 5/27-2(a);  
  
*In re Estate of Elias*, 408 Ill. App. 3d 301, 946 N.E. 2d 1015, 349 Ill. Dec. 519 (1st Dist. 2011);  
  
*Roe v. Estate of Farrell*, 69 Ill. 2d 525, 372 N.E. 2d 662, 14 Ill. Dec. 466 (1978);  
  
Illinois Rule of Professional Conduct 1.5(a);  
  
*In re Estate of Bitoy*, 395 Ill. App. 3d 262, 917 N.E. 2d 74, 334 Ill. Dec. 477 (1st Dist. 2009);  
  
*In re Dvorak*, 554 N.W. 2d 399 (Minn. 1996);  
  
Kentucky Bar Association, Ethics Opinion KBA E-282 (January 1984);  
  
New York State Bar Association, Opinion #251 (May 24, 1972).

## **FACTS**

An attorney is hired by an individual ("client") to represent the client in client's role as executor of a decedent's estate. The attorney enters into an hourly-rate fee

agreement with the client, which provides that the attorney's fees shall be paid by the estate. The fee agreement also states that to the extent that the probate court disallows any part of the attorney's fees for any reason (hourly rate is too high, travel/waiting time in court is disallowed, etc.), the client shall pay the disallowed portion of the fees to the attorney from the client's separate and individual funds. The attorney prepares a fee petition for \$10,000 and the probate court allows a fee of \$7,500. The estate pays the \$7,500 and the attorney asks the client for the remaining \$2,500.

### **QUESTIONS PRESENTED**

Is it a violation of the rules of reasonableness of attorney's fees for an attorney to contract with a client to make the client individually responsible for fees in excess of the amount approved by the probate court? May the attorney enter into a fee agreement with a client that covers this situation?

### **OPINION**

The Illinois Probate Act provides as follows: "The attorney for a representative is entitled to reasonable compensation for his services." 755 ILCS 5/27-2(a). While such compensation normally is to be paid with estate assets, that is not always the case. "We note that although the Probate Act compels payment for the reasonable services of attorneys for executors, there is no provision in the Probate Act requiring that the executor's attorney's fees and costs be paid exclusively from the estate." *In re Estate of Elias*, 408 Ill. App. 3d 301, 323, 946 N.E. 2d 1015, 1035, 349 Ill. Dec. 519, 539 (1st Dist. 2011). "[T]here is long-standing precedent in Illinois for applying the doctrine of equitable contribution to apportion the payment of attorney fees in probate cases where appropriate." *Elias*, 408 Ill. App. 3d at 324, 946 N.E. 2d at 1036, 349 Ill. Dec. at 540. A probate court may disallow fees for services rendered to an executor with respect to non-probate assets, and such fees may be equitably apportioned among the recipients of such assets. *Roe v. Estate of Farrell*, 69 Ill. 2d 525, 533, 372 N.E. 2d 662, 666, 14 Ill. Dec. 466, 470 (1978). Thus, to the extent that a probate court disallows payment of legal fees by the estate and equitably apportions them to individuals, an executor may be required to pay such fees out of his own pocket.

The question posed, however, is whether a lawyer and executor can agree that the executor will personally pay fees that have been disallowed *for any reason*, with an emphasis on disallowance due to excessiveness. It is the opinion of the Committee that billings disallowed as being excessive (and therefore unreasonable) are not to be paid by anyone, and that it therefore is a violation of the Illinois Rules of Professional Conduct for a lawyer to enter into the agreement described above.

The rules and codes governing legal ethics have long required that attorney fees be reasonable. In its present formulation, Illinois RPC 1.5(a) begins as follows: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule contains a non-exclusive list of eight factors relevant to a determination of reasonableness, several of which likewise are

relevant to a determination of reasonableness by a probate court. *See In re Estate of Bitoy*, 395 Ill. App. 3d 262, 277, 917 N.E. 2d 74, 85-86, 334 Ill. Dec. 477, 488-89 (1st Dist. 2009) (retainer agreement between lawyer and representative irrelevant to determination of reasonable fee).

As Comment [9] of Rule 1.5 notes, a lawyer should follow the prescribed procedure when it is set forth by law, as in the case of the representation of an executor. In order for a lawyer to collect any fee at all for work done on behalf of an executor, the lawyer must apply to the probate court. It is evident that the required judicial scrutiny is designed to prevent overreaching, as is Rule 1.5.

Given the purpose of both the Rules and the Probate Act to prevent the charging and collection of excessive legal fees, it is the opinion of the Committee that if a legal fee is deemed excessive by a probate court, it likewise is excessive under the Rules of Professional Conduct. *See In re Dvorak*, 554 N.W. 2d 399, 403 (Minn. 1996) (“Our case law supports the proposition that a fee in excess of the amount authorized by statute or court order where authorization is required is an unreasonable fee.”). Prior ethics opinions, in other circumstances involving court-ordered fees, have concluded that it is not ethical for a lawyer to charge more than the amount approved by a court. Kentucky Bar Association, Ethics Opinion KBA E-282 (January 1984) (charging more than allowed by court is prejudicial to the administration of justice); New York State Bar Association, Opinion #251 (May 24, 1972) (“[W]here a court fixes a fee as reasonable it is improper to make an additional charge.”).

The Committee concludes, therefore, that an agreement that the client shall pay legal fees disallowed by a probate court, regardless of the reason for the disallowance, is violative of RPC 1.5. A lawyer may not enter into an agreement intended to provide fees to the lawyer in excess of the amount found reasonable by a probate court. This opinion is limited to circumstances involving excessive legal fees for probate work and is not addressed to other situations, such as those involving fee agreements for litigation in which a fee-shifting statute is applicable.

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