ILLINOIS STATE BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-02
January 2012

Subject: Fees and Expenses

Digest: It is improper for an estate planning attorney to charge a fee calculated solely as a percentage of the value of the estate.

References: Illinois Rule of Professional Conduct 1.5(a);

In re Estate of Weeks, 409 Ill. App. 3d 1101, 950 N.E.2d 280 (4th Dist. 2011);

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975);

Estate of Painter, 567 P.2d 820 (Colo. 1977);

In re Estate of Platt, 586 So.2d 328 (Fl. 1991).

FACTS

An attorney handling a decedent's probate estate becomes aware that the attorney who prepared the decedent's estate planning based his fee solely on a percentage of the assets in the estate. The inquiring attorney believes the estate planning work to have been properly performed, but that the hourly charges for the estate planning services would have been far less than the percentage fee charged.

QUESTION

Is an estate planning attorney's charging of a percentage fee materially exceeding the hourly fee proper?

OPINIONS

Several court decisions, including one recently decided in Illinois, have concluded that a probate attorney's charging of a fee based solely on a percentage of an estate's value is improper, and does not satisfy the benchmark requirement that a fee be "reasonable."

To this effect, in *Estate of Painter,* 567 P.2d 820 (Colo. 1977), the court held that a fee to probate counsel based upon a percentage of the value of the estate being probated was improper when viewed against a rule requiring that a fee be reasonable.

Similarly, the Florida court in *In re Estate of Platt,* 586 So.2d 328 (Fl. 1991), held that it was improper to determine the fees of a probate attorney solely according to a percentage of the value of the estate when the relevant statute provided, as does ours, that a number of factors be considered in determining the reasonableness of a fee. The Court reflected that although the size of the probate estate is a factor which may be considered in determining reasonableness, it is not properly to be used as the sole controlling factor.

Most recently, the Illinois Appellate Court for the Fourth District reached a similar conclusion *In re Estate of Weeks,* 409 Ill. App. 3d 1101, 950 N.E.2d 280, (4th Dist 2011). There, the decedent's probate attorney sought to charge a fee in the amount of 3% of the value of the probate estate, claiming that such a percentage fee was his customary charge for an estate of the size involved and that it was also the customary charge in neighboring counties for probating an estate of that size.

The trial court held that the application of such a percentage fee was not "reasonable" under governing sections of the Probate Act which provide, as does our Rule 1.5 (a), various factors to be considered in determining the reasonableness of a fee. *Weeks,* 409 Ill. App. 3d at 1109. In so concluding, the trial court went so far as to compare the use of a percentage fee to an improper reliance on a fee schedule as was precluded in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

The Appellate Court in *Weeks* reached a similar conclusion, stating that reasonable fees must be determined on a case by case basis, and that the trial court properly applied the various factors set forth in the Probate Act, rather than a percentage fee based on the estate's assets, in determining a reasonable fee. Among the factors which the court stated are proper for consideration are the size of the estate, the work involved, the skill evidenced by the work, the time expended, the success of the effort involved, and the efficiency with which the estate was administered. The Court went on to the state that "the most important factor is the amount of time spent on the estate," and concluded its analysis by stating:

> "This court concluded almost three decades ago '[i]t is now well-established that fees may not be determined on the basis of fee schedules, and that "[c]learly, an award of fees in this case should have been based on the time spent by petitioners, the complexity of the work they performed, and their ability. We conclude that this is what the trial Court did."

As did the Probate Act discussed in *Weeks,* Rule 1.5 (a) recites no less than eight (8) factors to be considered in determining the reasonableness of a fee, several of which may be relevant to the rendering of estate planning services. Such factors include, in addition to the time and labor expended, the following considerations:

(1) the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(2) the fee customarily charged in the locality for similar legal services;
(3) the amount involved and the results obtained;
(4) the nature and length of the professional relationship with the client; and
(5) the experience, reputation and ability of the lawyer performing the service

Moreover, the Comment to Rule 1.5 recognizes that even the considerations listed in Rule 1.5(a) are not exclusive, and that such Rule requires that the lawyer's fees be reasonable 'under the circumstances." RPC 1.5, Comment [1].

Accordingly, under the precedent and pursuant to Rule 1.5(a), the estate planning attorney's having charged solely on the basis of a percentage of the size of the estate, without consideration of the time expended or the other factors recited by Rule 1.5(a), is unreasonable and improper. On the other hand, however, we are not wholly in accord with the Court's implication in *Weeks* that the time spent on the matter is in all instances the most important factor to be considered, to the exclusion of other factors which may be deserving of greater emphasis in any given instance. Rather, consideration of all of the factors recited in Rule 1.5(a), and giving to each of their proper weight on a case by case basis, is necessary to arrive at a determination of reasonableness consistent with the dictates of *Weeks.*

In so concluding, we are also cognizant of the fact that each of the cases which we have cited, including *Weeks,* involved the propriety of a percentage fee in the probate of an estate, not in the planning of an estate. It does not seem to us, however, that this distinction would warrant a result more favorable to an estate planner. To the contrary, if a probate attorney, whose task would seemingly involve more uncertainty and unpredictability than that of an estate planner, cannot charge on a percentage basis, we see no reason why an estate planner should be allowed to do so.

Accordingly, while our opinion is not based solely on the fact, as posited by the inquiring attorney, that the estate planner's percentage fee substantially exceeded what would have been an hourly fee, we are of the view that an estate planner's charging of a percentage fee based solely on the size of the estate without regard to the time expended and the other considerations recited in Rule 1.5(a), is in appropriate.
