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Estate Administration

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I. Overview

§10.1 The Estates and Protected Individuals Code became effective on April 1, 2000. This legislation did not make any significant change in the law pertaining to the compensation of attorneys who represent personal representatives. However, it does clarify the nature of the services that an attorney may render on behalf of a personal representative. A personal representative of an estate may retain "an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties." No court order is necessary. The attorney may be associated with the personal representative. MCL 700.3715(w).

The court rule governing the compensation of attorneys was amended in 2002 to make substantial changes procedurally. One of those changes was limiting the application of the rule to decedent estates. *See* MCR 5.313.

The attorney who files an appearance on behalf of a personal representative represents the personal representative and not the estate or the beneficiaries. MCR 5.117(A). This is of particular significance for purposes of service. If the fiduciary dies, resigns, or is removed, the attorney-client relationship ends, and the attorney is no longer eligible to receive service on behalf of the fiduciary. *Wright v Estate of Treichel*, 36 Mich App 33, 193 NW2d 394 (1971).

MCR 5.313 governs fee agreements in decedent estates. If a personal representative enters into a contingent fee agreement with an attorney (e.g., in connection with a personal injury claim or wrongful death claim), that fee agreement is governed by MCR 8.121 and MCR 5.313 (excluding subrules (C), (E), and (F)). MCR 5.313(G).

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II. Requirements of the Fee Agreement Under MCR 5.313

A. The Fee Must Be Reasonable

§10.2 The attorney who represents a personal representative is entitled to receive reasonable compensation for necessary legal services, advice, and assistance rendered to the personal representative. MCL 700.3715(w); MCR 5.313(A). The reasonableness requirement applies to both hourly and percentage fee arrangements, and the burden of proof is on the attorney seeking compensation. *In re Krueger Estate*, 176 Mich App 241, 249, 438 NW2d 898 (1989). Further, in order to be compensable, the services must benefit the estate by either increasing or preserving the estate's assets. *In re Sloan Estate*, 212 Mich App 357, 362, 538 NW2d 47 (1995). Special rules govern the reasonableness of contingent fees for wrongful death cases. MCR 8.121(A)–(B). For further discussion of what constitutes a reasonable fee and necessary legal services, see Richard J. Siriani, *Attorney Fees in Michigan,* Mich Prob & Est Plan J, Spring 2007, at 2, and James H. LoPrete, *Attorney Fees in Estate Settlement: What Is "Reasonable"?,* Mich Prob & Est Plan J, Fall 1987, at 9.

B. The Fee Agreement Must Be in Writing

§10.3 A written fee agreement between the attorney and the personal representative is mandatory and must be made at the beginning of the representation. A copy of the agreement must be provided to the personal representative. MCR 5.313(B).

While the rule mandates a written fee agreement, it does not specify the agreement's form or contents. The fee agreement may therefore take the form of a formal contract or be embodied in a letter. If the latter, both the attorney and the personal representative should sign the letter. The fee agreement may be signed before the personal representative's actual appointment because MCR 5.313(B) refers to the "proposed personal representative" and MCL 700.3701 provides that beneficial actions taken by a personal representative prior to appointment are given the same effect as those occurring after appointment.

C. Records Requirements

§10.4 The attorney who represents a personal representative is required to maintain time records even if the fee arrangement is not based on time. The records must (1) identify the person performing the services, (2) state the date the services were performed, (3) state the amount of time spent performing the services, and (4) briefly describe the services. MCR 5.313(C). In a formal proceeding (e.g., a petition for allowance of an accounting or a petition or motion to approve the payment of attorney fees), a statement containing the above information must be appended to the accounting, petition, or motion seeking approval of fees unless all of the parties affected consent to the compensation. MCR 5.313(F). In supervised administration, the court must approve attorney fees. MCR 5.310(G). In unsupervised administration, court approval of fees is not required; however, the attorney is still required to maintain the records required by MCR 5.313(C). Maintaining accurate records is important because the burden of proof is on the attorney seeking compensation and without such records the probate court lacks the means to determine whether the fees are reasonable. *In re Kiebler's Estate*, 131 Mich App 441, 444, 345 NW2d 713 (1984). The probate court has broad discretion regarding the allowance of fees and its decision is reviewed only for an abuse of discretion. *In re Eddy Estate*, 354 Mich 334, 347–348, 92 NW2d 458 (1958); *In re Humphrey's Estate*, 141 Mich App 412, 439, 367 NW2d 873 (1985).

D. Notice Requirement

§10.5 Within 14 days after the personal representative's appointment or within 14 days after the personal representative retains the attorney, whichever is later, the personal representative

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must mail a copy of SCAO form PC 576, Notice Regarding Attorney Fees, and a copy of the fee agreement to those interested persons who will be affected by the payment of the fees. MCR 5.313(D). Presumably the interested persons will be the residuary beneficiaries in a testate estate and the heirs in an intestate estate. There is no longer a requirement to file a copy of PC 576 and a proof of service with the probate court. *See* MCR 5.313 and .104(A)(3).

E. Payment of Fees

§10.6 MCR 5.313(E) specifies the conditions that must be fulfilled before a personal representative can pay attorney fees without probate court approval. The following conditions must be fulfilled before payment:

1. There must be a written fee agreement.
2. A copy of the fee agreement and the notice required by MCR 5.313(D) must have been sent to each interested person who is affected by the payment.
3. A statement for services containing the information required by MCR 5.313(C) must have been sent to the personal representative and to each interested person who requested a copy.
4. No written, unresolved objection to the fees, current or past, has been served on the attorney and the personal representative.

If the above conditions are not fulfilled, the personal representative must obtain probate court approval before paying attorney fees. MCR 5.313(E) specifies the information that must be submitted to the probate court if probate court approval is requested or required. If attorney fees are paid without court approval, they remain subject to review by the court.

III. Drafting the Fee Agreement

§10.7 In addition to complying with the requirements of MCR 5.313 (see §§10.2–10.6), a probate fee agreement should address the following topics.

1. **The identity of the parties.** Identify the attorney or law firm and specify the fiduciary capacity of the fiduciary. If the nominated fiduciary is named as personal representative and as testamentary trustee, it would be best to specify whether the attorney will be representing the fiduciary in both capacities (even though MCR 5.313 does not apply to a testamentary trustee) or just in one capacity. Where the fiduciary is an individual, he or she may not appreciate the distinction in the two different positions. The fee agreement should be used to clarify this situation. For example, the fee agreement may state: "The attorney is representing Ms. Jones as personal representative only, and not as testamentary trustee." The attorney should also make it clear that the attorney is representing the personal representative only in the personal representative's official capacity and not in his, her, or its individual capacity.
2. **The scope of the engagement.** Define the scope of the engagement. If, for example, the attorney will be handling the estate administration but not the tax work, that should be specified. If there is a potential wrongful death or personal injury claim, indicate whether this claim is included or excluded from the attorney's work under the agreement. If the claim is included, both matters (administration of the estate and the wrongful death or personal injury claim) should be addressed, and the fee arrangements should be spelled out, either in one agreement or in separate agreements.
3. **The duties of the parties to the agreement.** At a minimum, the client (i.e., the personal representative) is expected to cooperate with the attorney and to furnish information in a timely fashion, and the attorney is expected to provide legal services and keep the client reasonably

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informed. With respect to the attorney's obligation to keep the client reasonably informed, see MRPC 1.4.

4. **Privacy notice.** Under the Gramm-Leach-Bliley Act, Pub L No 106-102, 113 Stat 1338 (1999), a "financial institution" may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information unless such financial institution provides or has provided to the consumer a notice that complies with §503. 15 USC 6802. The notice requirement only applies with respect to an individual. For a time, law firms that did a substantial amount of tax planning or tax preparation services were including privacy notices in their fee agreements to comply with the act. In a response to an inquiry from the ABA, the Federal Trade Commission (FTC) took the position that the privacy provisions applied to attorneys who provided legal services covered by the act. In *ABA v FTC*, 430 F3d 457 (DC Cir 2005), however, the court held that the act contained no evidence of Congressional intent to start regulating the practice of law, and that the FTC's interpretation of the act was unreasonable.
5. **The fee arrangement.** Spell out the specific fee arrangement (hourly, percentage, etc.). If the fee arrangement is on an hourly basis, include the following information: (a) the hourly rates for those persons who are likely to be working on the matter, (b) whether the hourly rates are adjusted periodically, (c) the increments of time used (e.g., tenths of an hour, quarters of an hour), and (d) whether travel time will be charged. If the fee arrangement is on a percentage basis, spell out the percentage or percentages. Define the amount against which the percentage will be applied. For example, the percentage may be applied against the value of the gross estate, as defined for federal estate tax purposes, or against the probate inventory only.

   The fee agreement does not have to indicate the total fee. If an estimate of the fees is included in the fee agreement, it should be made clear that the estimate is merely an estimate and that the final amount of the fees may be greater or less.

   If a retainer is paid, specify whether the retainer is a general retainer or an advance fee. A general retainer or engagement fee is a fee paid for the attorney's availability and is fully earned when paid; it is not payment for legal work. An advance fee remains the property of the client until the lawyer performs the services or expenses for which the fee was paid.

   Specify the costs that may be charged. These normally include out-of-pocket expenses (such as filing fees, fees for certified copies, recording fees, and travel expenses) as well as other services for which the attorney intends to charge (e.g., computerized legal research, courier services, word processing, photocopying (including photocopying the file for the client if the client requests a copy), postage, fax transmission, and long-distance telephone charges). Be sure to maintain records to support these charges. If other categories of costs may be added in the future, that should be indicated in the agreement.
6. **The frequency of billing and payment.** The fee agreement should indicate the frequency of billing (monthly, quarterly, etc.) and, under MCR 5.313(D)(1), it must indicate the expected frequency of payment.
7. **Time-price differential for late payment.** If a time-price differential will be charged for late payment, the grace period for payment and the percentage rate should be specified. Under the usury statute, MCL 438.31, interest rates may not exceed 5 percent per year, or 7 percent if the parties agree in writing. This statute does *not* apply, however, where the seller charges more for services purchased on credit rather than with cash. If an attorney intends to charge more than 7 percent, he or she should refer to the charge as a "time-price differential." See §2.12. For an informative article on the subject of time-price differential, see Kyle Riem & Marcia L. Proctor, *Charging Interest on Unpaid Client Accounts,* 90 Mich BJ 948 (1991).

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