

Standards for Court Approval of Attorney Fee Petitions

The Probate Court has formulated the following standards to assist attorneys with drafting fee petitions in probate and guardianship cases. By understanding how the Court evaluates fee petitions, attorneys will be better able to comply with Court standards, reducing the need for consultations between attorneys and Court personnel regarding problems with specific petitions. These standards are not absolute rules; the Court will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Court has considered not only the Texas Probate Code, the Texas Rules of Disciplinary Procedure, and applicable case law, but also comments from the Judicial Liaison Subcommittee of the Travis County Bar Association's Probate and Estate Planning Section. The Court appreciates opportunities like this one to work closely with the Bar to further the administration of justice in Travis County.

I. Attorney's Fees

It is the Court's duty to ensure that estates of decedents and wards pay only for "reasonable and necessary" attorney's fees and expenses. See Probate Code § 242 (decedent's estates) and § 665C (guardianship estates). The factors to be considered in determining the reasonableness of attorney's fees are set forth in Rule 1.04 of the Texas Rules of Professional Conduct. These include the time and labor involved in the case, the difficulty or novelty of the work performed, the customary hourly rate of the attorney requesting the approval of fees, and the customary hourly rates of attorneys with similar education and skills performing similar services.

A. Court-Approved Fees for a Fiduciary's Attorney

Below is a table setting forth what the Court believes are appropriate rates for court-appointed fiduciaries' attorney's fees, *for work performed after March 1, 2007*. Attorneys should be aware, however, that the Court may depart from these rates in certain circumstances. For example, a particularly difficult probate or guardianship matter may require special expertise that should be compensated at a rate higher than the attorney's standard rate under the Court's guidelines. Similarly, the Court will adjust an attorney's rate in situations in which the estate is so small that the requested fee would consume most of the estate. Moreover, the Court will reduce an attorney's fee when the time expended by the attorney on a particular matter far exceeds the amount normally expended by attorneys on similar matters or, in those rare instances, when it comes to the Court's attention that a lawyer is not performing up to the standards of those licensed for an equivalent length of time. Be advised that it is a particular lawyer's *experience in probate and guardianship law* that determines his or her rate, not the number of years that the lawyer has been licensed.

To assist the Court in determining a particular lawyer's rate, each attorney who is new to the practice of probate or guardianship law before the Court should submit his or her resume with that lawyer's first fee application. Similarly, an attorney who believes that his or her experience before the Court qualifies for a rate increase should submit a letter to the Court detailing the reasons that such an increase is appropriate.

| Years Practicing Probate and Guardianship Law | Court-Approved Rate |
|--|----------------------------|
| 0 – 2 years | up to \$135/hour |
| 3 – 5 years | \$135 – 165/hour |
| 6 – 10 years | \$165 – 225/hour |
| 11 + years | \$225 – 300/hour |

In determining how lawyers will be paid within the practice categories above, the Court will consider the extent of the lawyer's experience in the area of law involved as well as Board Certification in Probate and Estate Planning. In the 11 + category, the Court will pay the highest rate to those few lawyers whose experience and mastery of probate, estate planning, and guardianship law qualify them as experts in these areas.

B. Attorney Ad Litem and Guardian Ad Litem Fees

Formulating standards for the compensation of reasonable attorney's fees for an attorney ad litem or guardian ad litem is challenging not only because of the variety of factors set forth in Rule 1.04 of the Texas Rules of Professional Conduct, but also because of certain factors over which the Court has limited control.

In the case of court-appointed counsel for indigent parties, for example, the Court must heed Travis County budgetary considerations. Since an estate is unavailable or unable to pay fees, the Court approves fees under a budget approved and overseen by the Commissioners Court. Thus, attorneys who accept Court appointments in probate and guardianship cases with an indigent party should not expect to be reimbursed at their regular hourly rates because the Court's annual budget limits the amounts it can pay for such services. Ordinarily, the Court compensates attorneys ad litem involved in County-pay cases at an hourly rate of \$75 - \$100 depending on the experience of the ad litem and the complexity of the case. The hourly rate for guardians ad litem in indigent cases is similar to that paid to attorneys ad litem, although it is common for the total fees to be higher for guardians ad litem, especially when the guardian ad litem initiates the Court proceedings.

When an ad litem can be compensated from a solvent estate, the Court's award of reasonable attorney's fees usually begins with the Court determining if the representation provided by—and *reasonably required of*—the ad litem is "typical" or "normal." In a "typical" or "normal" case, the Court ordinarily awards total fees of \$350 to \$400 to an attorney ad litem. In determining whether representation is "typical" or "normal," the Court considers matters such as the type of case, the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee. In general, attorneys ad litem and guardians ad litem should expect to receive a fee that is less than the fee of the applicant's attorney unless special factors are present.

C. Fees when an Attorney is also the Fiduciary

In those rare situations in which the Court appoints an attorney as a fiduciary in a guardianship or administration, the attorney normally must elect either to seek payment calculated on the statutory probate or guardianship commission formula or to obtain reimbursement for attorney's fees. If the guardianship or administration is particularly complex, the Court may approve dual compensation upon request of the attorney, preferably at the time of appointment. Dual compensation would include payment at the appropriate hourly rate for legal work done in the case and a separate commission for work done as a personal representative or as a guardian under § 241 or § 665 of the Probate Code, respectively. To be entitled to dual compensation, the attorney fiduciary must adhere to the following guidelines:

1. There must be full disclosure of the attorney-fiduciary's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made after appointment. If the request is after the time of appointment, notice of the

motion and hearing shall be given to all interested parties who have made an appearance in the case.

2. The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal and non-legal work.
3. Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian/personal representative services and may seek attorney's fees *only for legal services*. Applications for attorney's fees should give a detailed account of the legal services he or she rendered to the probate or guardianship estate. Attorney-fiduciaries will not be paid attorney's fees for *fiduciary services*. (For example, they will not be paid at their Court-approved attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the Court.) Should the attorney believe that the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low (*see* T.P.C. §§ 241 and 665), then he or she should submit, with the annual or final account, contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. Note that the hourly fee approved by the Court for attorney fiduciary services (between \$25-50 per hour) is significantly less than the Court-approved legal rates for attorneys.

II. Paralegal/Legal Assistant Charges

The Court recognizes that many attorneys rely on paralegals and legal assistants for gathering information and reviewing and preparing documents. The Court will reimburse an attorney for paralegal/legal assistant work at a rate between \$45 and \$85¹ depending upon the following factors:

- certification as a paralegal by the NALA, or recognition as a PACE-Registered Paralegal, or successful completion of a legal assistant program, or possession of a post-secondary degree (B.A. degree or higher);
- number of years experience in the probate, estate planning, and guardianship field;
- certification in Estate Planning and Probate Law from the Texas Board of Legal Specialization; and
- number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

To better evaluate these factors in determining the appropriate rate for each paralegal/legal assistant, the Court requests that attorneys submit to the Court the resumes of each paralegal/legal assistant for whose work they will seek reimbursement from the Court and a short statement of any relevant qualifications that do not appear on the resume. The Court will maintain these resumes and information sheets. If an attorney believes that the billing rate for a paralegal or legal assistant should increase because of newly acquired credentials, the attorney should submit a letter to the Court detailing the reasons that such an increase is appropriate.

Attorneys should understand that the Court does not pay for secretarial services at the paralegal rate *even if such services are performed by paralegals*. It is the Court's position that secretarial services are included in the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

¹ A Legal Assistant who is certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization is eligible for a \$25 per hour increase above the hourly rate the Court would otherwise approve.

III. Billing

The Court understands that the cash-flow situations at law firms differ, leading some firms to bill more frequently than others. The Court does not want to direct the timing of fee applications other than to suggest its preference that bills be submitted at least once a year. To ease its review of fee applications, the Court does request, however, that attorneys itemize each service billed by identifying the time spent on each service and the corresponding charge for each service.

IV. Guidelines for Specific Types of Charges

A. *Travel*

In determining how to reimburse attorneys for travel time, the Court follows two general rules. First, travel time from an attorney's office to the courthouse to attend hearings is normally reimbursed at the attorney's approved rate. If, however, the attorney resides or has an office outside the Central Texas area, the attorney's travel time to the courthouse from his home or office will be reimbursed at half of the attorney's approved rate. That attorney will also be entitled to mileage reimbursement at the I.R.S. rate.

Second, the Court expects that most clients will ordinarily visit their attorney's offices for consultations and document execution. Therefore, the Court will reimburse attorney travel-time to visit clients only (1) if that client is a ward and the attorney is the Court-appointed guardian, guardian ad litem, or attorney ad litem or (2) if some emergency or other special circumstance requires the attorney to visit the client at home. Such special circumstances should be described in the fee petition to be reviewed by the Court. If the Court approves the visit, the Court will reimburse attorneys at their full, approved rate or at the appropriate County-pay rate in indigence cases.

B. *Legal Research*

The Court expects attorneys who practice in this Court to be familiar with general probate and guardianship matters; therefore, the Court will not reimburse attorneys for basic legal research in these areas. Thus, for example, the Court will not reimburse an attorney for research into the application requirements for the probate of a will as muniment of title, an independent or dependent administration, a determination of heirship, or a guardianship. However, the Court will reimburse attorneys for costs associated with necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.

The Court considers the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Court does not reimburse for those costs.

C. *Preparation of Fee Petitions*

It is the general practice of attorneys to include in their overhead the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompany the invoices. Even though the Court is cognizant that Court authority must be obtained for the approval of fee petitions in certain circumstances, the Court believes that the estate of a decedent or ward should not be taxed with the attorney's billing costs. Therefore, this Court, like the majority of statutory probate courts in the state, will not reimburse attorneys for the costs of preparing invoices and the fairly standardized fee applications and orders that accompany them.

D. Conversations with Court and Clerk Staff

The Court's staff is a vital source of information and assistance to the legal community. The Court is proud of its accessibility to the lawyers and the public that have questions about uncontested matters—procedural and substantive—in probate and guardianship law. The Court and its staff attempt to answer these questions and to provide guidance where appropriate. Bearing in mind that the Court requires all personal representatives to have counsel, the Court does not believe it appropriate for the Court to have discussions with personal representatives outside the presence of their counsel. Please do not suggest to a client that it is appropriate to call the Court for a consultation or an explanation of what is going on in the estate being administered by that client. Again, the Court and its staff have no problem discussing these matters with an attorney.

However, we do not think it is appropriate to charge an estate for the time the Court spent providing the personal representative's attorney with assistance. Nor will the Court reimburse attorneys for time spent in discussions with the Court Auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Court will reimburse the attorney for the time spent responding to that request. Or, if the fee petition reveals special circumstances requiring the attorney to seek guidance from the Court, the Court will award attorney's fees. For example, the Court will reimburse attorneys for communications with the Court regarding the need for corrective action when a guardian, administrator, or an attorney dies during an ongoing estate.

It continues to be the long-standing practice of this Court not to reimburse attorneys from probate and guardianship estates for calls to the Clerk's office. While the Court understands that problems arising in the Clerk's office may frustrate attorneys, the Court does not believe that estates should be required to pay for the attorney's time spent redressing these problems. The Court urges attorneys to communicate concerns directly to the Clerk's office so that systemic improvements can be made to prevent the recurrence of any such problems. Moreover, the Court urges adherence to the common practice of attaching to all applications a copy of the proposed order and a self-addressed, stamped envelope. This step, coupled with payment of the correct filing and posting fee, if required, will help ensure that attorneys receive conformed copies of all proposed orders and will reduce the necessity for calls to the Clerk's office to check on the status of a particular order.² Alternatively, the attorney can check Probate Court records on the Clerk's website (<http://deed.co.travis.tx.us>) using the case name or cause number, and can review and print copies of all scanned pleadings and orders.

² Often, the Court receives calls from an attorney's office wondering if it has signed a particular order. Many times these calls concern orders that have a time requirement regulating when the Court can address them. It is a waste of both the attorney's and the Court's resources to have an attorney call the Court for the status of orders for which a statutorily mandated time requirement has not run. Be assured, the Court makes every attempt to promptly sign orders when they are ripe for review. At least once or twice a day, the Court sends the signed orders and related pleadings to the Clerk's offices for filing. The Court knows that attorneys can have difficulties getting copies of some orders and that they are often told that the orders are "with the Court." However, it is not the practice of the Court to keep signed orders or to ignore pleadings needing court action. Far, far, more often than not, a signed order is in the Clerk's office despite a deputy's protestations to the contrary. The Court has no control over this problem. The Court can only sign orders and deliver them to the official record keeper. If an attorney has problems obtaining copies of orders, the Court suggests that the attorney deal with the appropriate authority at the Clerk's office.

E. Copies and Faxes

From its experience reviewing fee petitions and from consultation with commercial copying companies, the Court recognizes that attorneys pass through different costs to their clients and that significant variation exists in the price charged for copies, ranging from attorneys who include copies as overhead reimbursed as part of their hourly rate to those charging \$.30 per page. Cognizant of the need for uniformity in reimbursements for copy costs and mindful of the rates for commercial copying in Travis County, the Court has determined that it will reimburse attorneys up to \$.15 per page. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk if the fee petition indicates this fact. In no case, however, will the Court pay any copying costs not accompanied by a statement of the charge per page and the number of copies.

Fax charges have presented a unique problem for the Court. Some attorneys charge for faxes, others do not. Of those that do charge, some attorneys charge a set fee based on the fact that a fax was sent, others charge on a per-page basis for faxes sent. Some attorneys charge a set fee based on the fact that a fax was received, others charge on a per-page basis for faxes received. Some attorneys charge only for long distance faxes, others charge for both long distance and local faxes. Commercial entities that fax documents set their fees based on external market factors and a profit motive not usually associated with the recovery of expenses in the practice of law. Faced with these myriad and frustrating variations in pricing, the Court has determined that the best practice is to consider faxes as a part of attorney overhead and to include it as part of an attorney's hourly rate. Therefore, the Court will not pay for facsimile transmissions. It will, however, pay the long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls.

F. Deliveries

The Court has seen a dramatic rise in the number of fee petitions requesting reimbursement for the cost of hand-delivered documents and a wide range of rates billed for such delivery. With the availability of first-class mail, faxes, and e-mail, the Court believes that the routine use of such hand-delivery services is unnecessary and results in significant expense to a guardianship or probate estate. To minimize the costs to estates arising from excessive delivery charges, the Court encourages attorneys to file documents with the Clerk via first-class mail and to serve documents by certified mail or fax. In situations in which the Court deems hand delivery to be appropriate given the circumstances stated in the fee petition, the Court will approve the actual cost of hand delivery up to \$12, regardless of whether an attorney, paralegal, secretary, or commercial courier service actually delivered the document.

V. Costs Necessitated by Misfeasance or Malfeasance

The Court does not believe that guardianship or probate estates should be charged with any attorney time or mileage for resolving problems or attending hearings necessitated by the misfeasance or the malfeasance of the client or attorney. For instance, if a personal representative sells property without Court approval and there are attendant costs associated with rectifying the situation, the Court believes the personal representative should be personally responsible for any added expense. Likewise, show-cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing, including service and filing fees assessed by the Clerk.

VI. Court Action on Fee Applications

The Court holds all attorney-fee applications for 10 days to give other parties an opportunity to file objections to those applications. If no objections are filed, the Court will consider the applications on submission and without a hearing, unless the amount of fees requested is significant or the Court has questions about the propriety or reasonableness of the fees. In such cases, the Court will request that the application be set for a hearing.

Fee requests should be filed as applications for payment of fees or for reimbursement of fees (if paid already by the representative) ***and not as claims against the estate***. The Court has found that a representative is likely to rubber stamp his or her attorney's fee request without exercising independent judgment, resulting in an inherent unfairness to the estate. If the representative chooses to disregard the Court's policy and file the fee application as a claim, the Court will—in every case—require a hearing under Probate Code § 312(c) and § 799(c).