

Attorney and Appointee Fees

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ABOUT THE AUTHOR

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Children: Donny, Abby, Thompson, Michael

MISSION

To serve families in times of crisis in a thoughtful, compassionate, and deliberate way, when that crisis involves the loss of a loved one, the need for a guardianship, or a mental health issue

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2011-present Judge, Harris County Probate Court No. 4
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1996-2004 Riddle & Brazil, LLP Associate Attorney

Probate and estate planning experience: estate tax disputes with the IRS, independent administrations, dependent administrations, heirships, modifications and terminations of trust, contests of wills, contested guardianships, 867 Management Trusts, muniments of title, and small estate administrations, mental health, estate planning, business planning, and charitable gift planning

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1993-1996 JD University of Houston Law Center
1989-1993 BBA University of Texas at Austin
1984-1989 Westfield High School, Houston, Texas

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- Board Certified in Estate Planning and Probate by the Texas Board of Legal Specialization (2003)
- Attorney Ad Litem appointed by the courts in probate, trust, and mental health matters
- Publishing Editor of the Houston Journal of International Law (1995-1996)

HONORS

- Texas Rising Star (2008, 2009, 2010) (as published in Texas Monthly Super Lawyer Magazine)
- Houston's Top Lawyers for the People (2007-2009) (As published in H Texas Magazine)
- Houston's Top Lawyers (2007-2009) (As published in H Texas Magazine)
- Five Star Wealth Manager in Charitable Giving, Estate Planning, Will Preparation (2009) (As published in Texas Monthly Magazine)

PUBLISHED WORKS

“Choice of Business Entity in Texas.” *Houston Business and Tax Law Journal*, Volume 4, 2004.

LECTURES

“Coordinating Beneficiary Designations—Has Your World Changed in the Last Five Years.” Presented at the 24th Annual Wills and Probate Institute, September 24-25, 2009, South Texas College of Law.

“Using Revocable Trusts as Estate Planning Tools.” Sponsored by Lorman Education Services, December 2, 2008.

“Intestacy and Closing the Estate.” Sponsored by National Business Institute, July 17, 2008.

“Tax Exempt Organizations in Texas.” Sponsored by Lorman Education Services, February 13, 2007.

“The Future of Family Limited Partnerships in Estate Planning.” Presented to the American Women's Society of CPA's, February 4, 2006.

“Choosing a Business Entity in Texas with an Eye Toward Succession Planning.” Presented to the Attorneys in Tax and Probate, May 4, 2004.

“Choice of Business Entity in Texas.” Presented at the 2003 Accounting Expo Sponsored by the TSCPA Foundation, April 22, 2003.

MEMBERSHIPS

Planned Giving Council of Houston, Board Member

Attorneys in Tax and Probate

Junior League of Houston, Active Member

Mensa

INTERESTS

Cycling, figure skating, cooking, sewing, and smocking

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I. Introduction

A. Attorney Fees in Historical Perspective

Before the advent of the billable hour, lawyers charged clients in other ways. The lawyers considered many factors including the expertise required, the novelty of the issues involved, the result or value to the client, the opportunity cost to the lawyer for taking the case, the time required to bring the matter to conclusion, and whether the fee was fixed or contingent. *See* ABA Commission on Billable Hours Report 2001-2002. Many times, the charges to the client were determined retrospectively at the conclusion of the matter; and as a result, there were fewer fee disputes. With this kind of fee arrangement, the lawyer's fee was tied to the results enjoyed by the client and the business risk of the relationship was more heavily borne by the attorney. *Id.* Though no one expects hourly billing to go away, it is valuable to recognize the historical concepts that once governed how lawyers charged clients.

The 1950s and 1960s saw the burgeoning of hourly billing. Lawyers increasingly began to take notes as cases progressed and keep better records. Hourly billing gained popularity as it enabled lawyers to gage their productivity and that of others. What's more, hourly billing added the transparency increasingly demanded by clients. *Id.* Importantly, in 1959, Xerox introduced the first photocopier, replacing less efficient

duplicating machines and methods, and increasing the ease with which frequent billing statements were produced and sent.

Though well over half of the attorneys surveyed by the American Bar Association Commission on Hourly Billing reported that more than 81% of their invoices are based upon the traditional hourly billing model, other lawyers base fees upon contingency fee contracts and still others upon a flat fee approach. *Id.*

B. Public Perception of Attorney Fees

Henry Brougham, a Victorian Age, British Statesman who practiced law for a short time, defined a lawyer as, "a learned gentleman who rescues your estate from your enemies and keeps it himself."

For some time, the Houston Chronicle has scrutinized the attorney fees awarded by the Harris County Probate Judges. In 2010, the paper published an article entitled, "Harris County Probate Fees Provide Bonanza for Some Lawyers," in which Lise Olsen

reported that Harris County Probate judges had awarded over \$8,000,000 in attorney fees in one year, far more as compared to any other county in Texas.

A good attorney's billing practice should reflect ethical and moral responsibility, common sense, and professionalism. Judge Mike Wood said it best when he described an attorney fee application as a "public relations document." It is the attorney's opportunity to establish in the public record the attorney's manner of practice and billing and his dedication to his client's case.

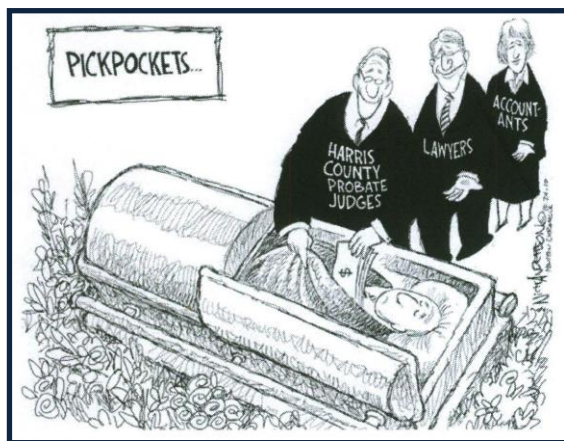


Figure 1 Houston Chronicle October 22, 2010

C. Attorney Fees in Other Jurisdictions

1. Outside the State of Texas

The California Probate Code sets the maximum statutory fees that attorneys can charge for a probate. The fees are calculated on the value of the gross probate estate and amount to 4% of the first \$100,000, 3% of the next \$100,000, 2% of the next \$800,000, 1% of the next \$9,000,000, and .5% of the next \$15,000,000. The court will determine the fee for the probate of an estate valued at \$25,000,000 or more. *See* CAL. PROB. CODE § 10810 (West 2010). In addition, in more complex probate cases, the attorneys may apply for and receive a higher fee than provided under such statute when the attorney has provided “extraordinary” services to the estate and personal representative of the estate. *Id.*

Like California, lawmakers in Florida have codified a schedule setting out reasonable attorney compensation for estate administration. Though the law provides that attorneys for personal representatives are entitled to reasonable compensation without court order, Section 733.6171(3) of the Florida Statutes, presumes that such fees are reasonable if they are no more than: \$1,500 for estates of less than \$40,000; \$2,250 for estates of less than \$70,000; \$3,000 for estates of less than \$100,000; 3% of the value of the estate from \$100,000 to \$1,000,000; and 2.5% of the estate value from \$1 million to \$3 million. *See* FLA. STAT. ANN. § 733.6171 (West 2010). The statutory fee schedule applies to routine probate administrations. If extraordinary services are required, Florida courts will allow reasonable attorney fees for such extraordinary services in addition to the fees received under the statutory formula. *Id.*

Of the states in the United States, the majority of states require by statute that

legal fees associated with probate matters be “reasonable.” Several states, including California, Florida, Wyoming, Virginia, Missouri, Montana, and Nebraska codify reasonable fees based upon the value of the assets under administration. A few states, including Louisiana, Massachusetts, and New Hampshire make no provisions regarding attorney fees in statutes relating to estate administration.

2. Within the State of Texas

Periodically, the State Bar of Texas, Department of Research & Analysis produces an Hourly Rate Report (“SBOT Hourly Rate Report”). The stated purpose of the Report is “to obtain information on hourly rates charged . . . by Texas attorneys” and provide attorneys with a “valuable competitive tool in today’s environment.” *See* State Bar of Texas Department of Research & Analysis’s Hourly Fact Sheet.

According to the SBOT Hourly Rate Report, the median hourly rate for attorneys practicing in the areas of wills, trusts, and probate is \$206. For probate attorneys practicing in Houston area, the median rate increases to \$223. The geographic area reporting the highest hourly rate for probate practitioners is Dallas-Fort Worth, with attorneys clocking in at \$239 an hour. Rural area Texas probate attorneys report the lowest hourly rate, at \$187. Probate attorneys outside the State of Texas command an average of \$230 an hour, relatively high according to Texas standards.

The Report added credibility to the notion that attorneys from larger law firms charge higher hourly rates. According to the SBOT Hourly Rate Report, the median rate for a solo practitioner is \$198, while the median rate for an attorney working for a large law firm with more than 200 attorneys is around \$370. *Id.*

Not surprisingly, the Report also analyzed the impact years of practice had on

the hourly fees sought by attorneys. While the Report failed to provide data specific to attorneys practicing in the areas of probate, wills, and trusts, the Report set out the median hourly rates being charged by attorneys in the Houston area according to years of practice. Attorneys practicing for two years or less had a median hourly rate of \$192. Attorneys having between eleven and fifteen years of practice experience charged a median hourly rate of \$275. The attorneys with the most experience, having been in practice over twenty-five years, enjoyed a median rate of \$283. *Id.*

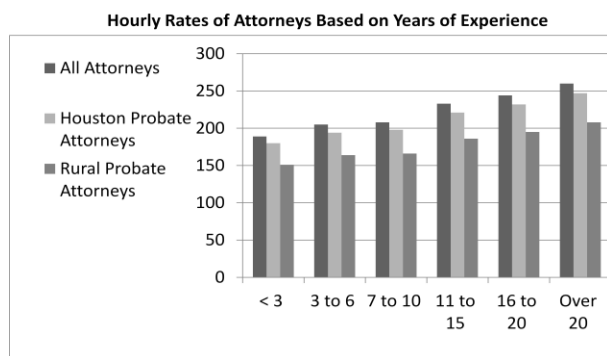


Figure 2 Data Extracted from SBOT 2009 Fact Sheet

II. Reasonable Attorney Fees

A. Defined

Rule 1.04 of the Texas Rules of Professional Conduct provides that attorney fees must be reasonable. In evaluating whether or not attorney fees are reasonable, the following factors are considered:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

See Texas Disciplinary R. Prof'l Conduct 1.04 *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

Reasonable fees are determined by multiplying the number of hours worked by the attorney's hourly rate. See *City of Houston v. Livingston*, 221 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2006, no pet). Both components of the calculation, the hours worked and the hourly rate charged, must be reasonable. *Guity v. C.C.I. Enter. Co.*, 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

B. Fee Sharing

Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct provide that division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

- the division is in proportion to the professional services performed by each lawyer, or made between lawyers who assume joint responsibility for the representation; and
- the client consents in writing to the terms of the arrangement prior to the time of the association or referral

proposed, including: the identity of all lawyers or law firms who will participate in the fee-sharing agreement; whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation; and the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

- the aggregate fee is not unconscionable.

Id.

If a part or all of the fees are subject to court approval, the attorneys should disclose as part of the application for fees the terms of the arrangement or provide a copy of fee agreement to the court. The court will require evidence to support a finding that the fee agreement comports with Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

C. Reasonable Fees in Context of Probate

1. Approved Hourly Rates

It is the court’s duty to ensure that estates of decedents pay only for “reasonable and necessary” attorney’s fees and expenses. *See* TEX. PROB. CODE ANN. §242 (Vernon 2010). Many courts, including the Harris County Probate Courts, have adopted a written policy regarding attorney fees. With regard to attorneys who represent fiduciaries in probate court, the probate courts in Harris County have developed a range within which attorney fees will be considered reasonable. Below is a table setting out the range of permissible rates for attorneys representing fiduciaries based

upon the attorney’s tenure in the practice of probate law:

Years Practicing Probate	Court Approved Rate
0-2	up to \$165/hour
3-5	\$165 to \$195
6-10	\$195 to \$250
11+	\$250 to \$350

See Harris County Probate Courts’ Standards for Court Approval of Attorney Fee Applications, attached as Appendix A. In addition to the length of time in which the attorney has been in the practice of probate law, the courts consider the extent of the attorney’s experience, including professional and board certifications.

2. Defending a Will

Section 243 of the Texas Probate Code provides that the reasonable attorney fees associated with the good faith efforts of a person interested in the will to defend or prosecute proceedings to seek the admission of the will to probate will be paid from the assets of the estate, irrespective of the success or failure of such efforts.

When any person designated as executor in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings. When any person designated as a devisee, legatee, or beneficiary in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good

faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he may be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings.

TEX. PROB. CODE ANN. §243 (Vernon 2010).

In contrast, heirs who would take in the event of the decedent's intestacy are not entitled to attorney fees associated with the contest of a purported will. *Estate of Huff*, 15 S.W.3d 301 (Tex. App.—Texarkana 2000, no writ).

3. Declaratory Judgment Actions

Sometimes, probate matters involve declaratory judgment actions brought forward pursuant to Section 37 of the Texas Civil Practice and Remedies Code. Common examples include, among other things, petitions for judicial discharge, construction of wills and trusts, and partitions.

If a probate matter involves a declaratory judgment action, the trial court has more flexibility with regard to the apportionment of attorney fees, as reasonable and necessary attorney fees relating to declaratory judgments may be apportioned as equitable and just among the parties. *See* TEX. CIV. PRAC. & REM. CODE ANN. §37.009 (Vernon 1986).

Attorney fees in a declaratory judgment action must be reasonable and necessary. Though the court may not award unreasonable attorney fees which are just and equitable, the court may decline to award reasonable and necessary fees which are neither equitable nor just. *See Ridge Oil Company, Inc. v. Guinn Investments, Inc.*, 148 S.W.3d 143, 161 (Tex. 2004).

III. Fee Arrangements

A. Hourly Fees

1. Defined

The hourly fee is an objective, measurable method to calculate and explain the fees being charged to the client. If the rate is appropriate, it enables the attorney to gain a fair return on the project while providing the client with a transparent account of the work undertaken to pursue the client's objectives. It is simple to administer, especially with the advent of computer programs like Time Matters® and other timekeeping programs.

On the down side, the hourly fee does not necessarily reflect the value received by the client. Further, it requires the attorney and his or her staff to maintain copious time records.

2. Nonrefundable Retainers

Many lawyers require the deposit by a client of an advance fee sizable enough to secure the attorney for at least the first phase of the legal undertaking. In the past, some lawyers have asked that clients agree that such advance fee is “nonrefundable.”

The court in *Cluck v. Comm'n for Lawyer Discipline*, 214 S.W.3d 736, 739 (Tex. App.—Austin 2007, no pet.) distinguished the concept of “advance fee” from “nonrefundable retainer” noting that retainers are not payment for services rendered, rather retainers are designed to compensate the attorney being engaged for losing the opportunity to seek other engagement. *See* Tex. Comm. on Prof'l Ethics, Op. 431, 49 TEX. B.J. 1084 (1986). Consequently, so long as the retainer is reasonable and the attorney substantiates the claim that he must forego other employment if engaged by the client, the retainer is deemed earned when received. *Cluck* at 740.

The court in *Cluck* determined that the “nonrefundable retainer” collected by the attorney was not a retainer at all, rather it was an advance fee. The court explained that the funds advanced by a client as a prepayment of a fee belong to the client until the services are rendered and must be held in a trust account. Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 2 *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005). As a result, the attorney was required to return the unused portion of the advance fee to the client.

B. Contingency Fees

1. Defined

Section 35 of the Restatement (Third) of the Law Governing Lawyers provides that "when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment." Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct codifies and expands upon the Restatement's general concept of contingency fees, such rule providing as follows:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by . . . law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined. If there is to be a differentiation in the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, the percentage for each shall be stated. The agreement shall state the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall

provide the client with a written statement describing the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Tex. Disciplinary R. Prof'l Conduct 1.04 *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

2. Requirements and Limitations of Probate Court

a. Limitations on Contingency Percentage

When the personal representative of an estate seeks to recover assets on behalf of the estate and hires an attorney, on a contingency fee basis, for such purpose, the court must approve such contract and Section 233(b) of the Texas Probate Code governs the contract between the personal representative and the attorney:

[A] personal representative may enter into a contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of attorneys, subject only to approval of the court in which the estate is being administered.

See TEX. PROB. CODE ANN. §233 (Vernon 2010).

Subsection (c) of Section 233 of the Texas Probate Code provides that a contingency fee in excess of one-third may be allowed if the court approves of such increased fee. The courts consider the following factors when asked to approve such increased fee:

- time and labor involved;
- novelty and difficulty of issues to be resolved;
- skill required;
- fees customarily charged;
- value of property sought and benefits to the estate that the attorney seeks to secure; and

- experience and ability of attorney.

See Id.

b. No Reasonable Fees for Unsuccessful Litigant with Contingency Contract

If the non-prevailing party in a probate matter entered into a contingency fee agreement with their attorney, they are not entitled to reasonable attorney fees. In 1975, the Texas Supreme Court addressed the issue of whether the reasonable attorney's fees for an unsuccessful will proponent who had a contingency fee agreement with her attorneys should be paid. In *Russell v. Moeling*, 526 S.W.2d 533 (Tex. 1975), the Court concluded that, under Section 243 of the Texas Probate Code, the estate could not be held liable for such fees. The instant case involved an executrix named in a prior will which was not admitted who sought to collect attorney fees and expenses following her unsuccessful contest to the probate of decedent's later will. The unsuccessful contestant had a contingency fee agreement with her attorneys.

In determining whether the attorneys for the unsuccessful will proponent who acted in good faith were entitled to reasonable attorney fees, the Court carefully reviewed the language of Section 243 of the Probate Code. Citing *Thomas' Estate v. Fullen*, 172 S.W.2d 118 (Tex. Civ. App—Beaumont 1943, writ ref'd w.o.m.), the Court determined that the purpose of Section 243 is to pay the costs of attorney's fees that are owed by the executor or administrator, and the allowance is not to that attorney, but to the administrator. In *Russell*, the unsuccessful will proponent had an agreement with her attorneys that if the will she submitted was admitted to probate, the attorneys would receive a percentage of all moneys they recovered. Since the contestant was unsuccessful, she did not

incur any expenses associated with the legal work performed by the attorneys. Consequently, the Court determined that under Section 243, the estate could not be held liable for the attorney's fees.

c. Reasonable Fees, not Contingency Fees Awarded to Successful Litigant

In 1965, the Texas Supreme Court addressed the payment of attorney fees to a successful proponent of a will out of the assets of an estate pursuant to Section 243 of the Texas Probate Code in *Salmon v. Salmon*, 395 S.W.2d 29 (Tex. 1965). The Court concluded that the attorney fees of the successful proponent should be paid out of the assets of the estate.

The *Salmon* case involved a decedent, Maria Hoben, who during her lifetime was a widow without descendants. She was survived by three brothers, three sisters, and the descendants of a brother who died after the execution of her will but before her death. Her estate was devised to her four brothers. After the decedent's death, one of her sisters applied for letters of administration alleging that the beneficiaries had entered into a family settlement agreement. One of the brothers filed the decedent's will. At the conclusion of trial, the will submitted by her brothers was admitted to probate. The successful proponent of the will had engaged his attorneys based upon a \$25,000 contingency fee agreement.

The Court in *Salmon* addressed the application of Section 243 in a contingency fee contract environment. The Court considered whether the successful proponent was entitled to a reasonable fee or the contingency fee bargained by him. After a review of Section 243, the Court determined that the proponent of a will, whether successful or not, was allowed reasonable attorney's fee only. The Court found that

the statute “does not authorize the allowance of an amount that might be reasonable for a fee contingent upon the successful prosecution of the litigation.” *Salmon* at 31.

C. Flat Fee

1. Defined

Increasingly, attorneys are agreeing to represent clients in probate matters for a flat fee. A typical flat fee engagement agreement will list the routine legal services associated with the probate matter and will provide that services performed by the attorney which are unusual or extraordinary will be billed at an hourly rate and in addition to the flat fee.

2. Limitations

If the attorney fees are subject to court approval, the courts require an itemized statement of attorney time and expense.

IV. Fees for Attorney Appointees

A. Heirship

1. The “Plain Jane”

Case

The long serving statutory probate judge in Tarrant County, Judge Steve King, aptly dubs the run-of-the-mill heirship a “Plain Jane.” An attorney appointed as an attorney ad litem in such cases should expect the court to find reasonable a fee falling within the range of \$400 to \$600.

The attorney ad litem in an heirship determination represents the interests of unknown heirs and must investigate the family affairs of the decedent in an effort to determine the rightful heirs of the estate. Sometimes, it requires unusual effort to verify findings. For example, it may be necessary to obtain birth certificates, divorce

decrees, adoption papers, and documents related to the termination of a parent child relationship. It is the duty of the attorney ad litem to defend the rights of his involuntary client(s) with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e.) (quoting *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.—San Antonio 1926, writ dism’d)). The courts recognize this duty and will allow reasonable compensation.

2. The “Mystery” Case

If you are serving as an attorney ad litem in an heirship and the witnesses start using words and phrases like “technically,” “common-law,” and “illegitimate” you have yourself what Judge King refers to as a “Mystery” case. Before launching into a full-blown, forensic inquiry, consider the benefits of a status conference with all known parties and the court. Once a list of questions or issues has been developed, it may be a good idea to inform the court and the parties regarding your concerns and request permission from the court to spend more time developing the facts of the case. This will increase the likelihood that your efforts will be rewarded and put all parties on notice that you will go the distance to uncover the true heirs of the decedent.

B. Guardianship

1. Private Pay

If the proposed ward’s estate contains assets, the attorney ad litem and guardian ad litem, if one is appointed, are entitled to reasonable fees to be paid out of the estate of a ward upon application to the court for such fees. In addition, the applicant may be reimbursed for attorney fees and expenses incurred in pursuing and maintaining the guardianship.

2. Indigent Ward

Often times, when guardianship of the person is sought without guardianship of the estate, the proposed ward is indigent. The courts will appoint an attorney ad litem, and perhaps a guardian ad litem as well, to represent the wishes and best interests, respectively, of the proposed ward.

In compensating the appointed attorney(s) in such cases, the local probate courts must work within Harris County budgetary considerations. If an estate is unavailable or unable to pay fees, the court approves fees under a budget approved and overseen by the Commissioners Court. Consequently, attorneys who accept court appointments in guardianship cases with an indigent ward should not expect to be reimbursed at their regular hourly rates, as the court's annual budget limits the amounts it can pay for such services.

Ordinarily, the courts compensate attorneys ad litem and guardians ad litem involved in county-pay cases at an hourly rate of \$100. *See* Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

3. Contested Matter

Attorney fees in contested guardianships tend to be extraordinary because: 1) the court often appoints three attorneys, an attorney ad litem, a guardian ad litem, and sometimes a temporary guardian pending contest; 2) multiple medical exams may be necessary; 3) there are frequently multiple applicants for guardianship; and 4) the attorneys for each party are likely to engage in discovery. If a guardian or temporary guardian of the estate is appointed, the attorneys will likely seek fees from the ward's estate.

In an effort to prevent the costs of a contested guardianship from getting out of hand and provide the court appointed advocates security that they will be

compensated, some courts look to Section 622(b) of the Texas Probate Code which provides that:

When a person other than the guardian, attorney ad litem, or guardian ad litem files an application, complaint, or opposition in relation to a guardianship proceeding, the clerk may require the person to give security for the probable costs of the proceeding before filing. A person interested in the guardianship or in the welfare of the ward, or an officer of the court, at any time before the trial of an application, complaint, or opposition in relation to a guardianship proceeding may obtain from the court, on written motion, an order requiring the person who filed the application, complaint, or opposition to give security for the probable costs of the proceeding . . .

See TEX. PROB. CODE ANN. §622(b) (Vernon 2010).

Some argue that a court may not require parties to deposit funds into the registry of the court pursuant to Section 662(b) because Section 665A of the Texas Probate Code requires either the estate of the proposed ward or the county to pay costs of court.

The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under this chapter, as applicable, to be taxed as costs in the case. If after examining the proposed ward's assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under this chapter, as applicable, the county is responsible for the costs of those services.

See TEX. PROB. CODE ANN. §665A (Vernon 2010).

However, Section 669 of the Texas Probate Code provides an exception to the general rule set out in Section 665A of the Texas Probate Code that costs of the case are taxed to the proposed ward or to the county if the proposed ward is indigent. Section 669 states that the applicant shall pay the costs of the proceeding in the event the court denies an application for guardianship on the recommendation of the court investigator. For more discussion on this topic see the El Paso Court of Appeals' decision in *In re Mitchell*, 342 S.W.3d 186 (Tex. App.—El Paso, 2011).

V. Fiduciary and Attorney Compensation

A. Statutory Formula

Fiduciaries serving as representatives of an estate in a dependent administration are entitled to receive a commission equal to 5% of “all sums they may actually receive in cash, and the same percent on all sums they may actually pay out in cash, in the administration of the estate on a finding by the court that the executor or administrator has taken care of and managed the estate in compliance with the standards of this code.” TEX. PROB. CODE ANN. §241 (Vernon 2010). Commissions are not allowed for receiving funds belonging to the decedent which were being held with a brokerage firm or financial institution. *Id.*

As for fiduciaries serving as guardians of the person, the “court may set the compensation in an amount not exceeding five percent of the ward’s gross income.” See TEX. PROB. CODE ANN. §655 (Vernon 2010). If the ward is receiving Medicaid benefits, the statutes relating to Medicaid authorize the courts to set an amount. See TEX. ADMINISTRATIVE CODE §358.439.

Further, guardians of an estate are entitled to reasonable compensation, which is statutorily determined to mean “[a] fee of five percent of the gross income of the ward’s estate and five percent of all money paid out of the estate.” *Id.*

Important differences exist with regard to the calculation of commissions when comparing a fiduciary serving a decedent’s estate versus a fiduciary serving as a guardian. In a decedent’s estate, the fiduciary receives what is commonly referred to as “5% of ins and outs” while the fiduciary serving as a guardian receives 5% of the guardianship estate’s gross income and 5% of all money paid out of the estate. The distinction between the two methods of calculating the fiduciary commission is pronounced when considering the following examples:

Rosie the Guardian

Rosie was appointed as the guardian of her mother’s person and estate. Shortly before her mother’s death, Rosie decided to sell her mother’s home which was purchased by her mother for \$80,000. The home suffered storm damage and Rosie made \$10,000 of improvements to the home. The home sold for \$100,000. The income (or capital gain) from the sale of the home totaled \$10,000, or the difference between the sales price and the basis in the property (purchase price of \$80,000 plus \$10,000 in improvements). Rosie’s commission totaled \$1000 (5% multiplied by income of \$10,000 and expenses of \$10,000). See *Thorman v. Carr*, 408 S.W.2d 259 (Tex. Civ. App.—San Antonio 1966, writ ref’d n.r.e.)(*ruling* that capital gains could be allocated as income).

Billy the Administrator

Billy was Rosie's brother and he was appointed as the dependent administrator of their mother's estate after their mother's death. Before her death, their mother had inherited a tract of land having a fair market value of \$90,000 at the time it was inherited. Over time, the land increased in value and was sold by Billy for \$100,000 shortly after his mother's death without the help of a realtor. The estate reported no income and Billy commission was calculated to be \$5,000 (5% multiplied by cash collected from sale).

B. Statutory and Other Exceptions Limiting Commission

1. General Rule

The court must approve the compensation sought by the fiduciary; and if the court determines that the fiduciary has not adequately performed the duties required of the fiduciary or if the fiduciary has been removed for cause, the court may deny compensation. *See* TEX. PROB. CODE ANN. §§241, 665 (Vernon 2010).

2. Specific Exceptions Relating to Guardians

When calculating commissions for guardians, "gross income" does not include Department of Veterans Affairs or Social Security benefits received by a ward. *See* TEX. PROB. CODE ANN. §665(h) (Vernon 2010). In addition, "money paid out" does not include the following:

- money loaned;
- money invested;
- proceeds paid out on closing of guardianship; or
- tax motivated gifts.

Id. In addition, Texas courts have denied commissions in the following situations:

- sale of real estate;
- receipts of principal payments;
- recovery of insurance claims;
- payment of claims of ward against third parties when such claims existed at the time guardianship instituted; and
- receipts of pension benefits.

See Akers, Hon. Georgia, Guardianship Compensation, South Texas College of Law Guardian Ad Litem Certification, September 21, 2011 (*citing In re Guardianship of Rehberg*, 745 S.W.2d 435 (Tex. App.—Houston [1st Dist.] 1988, no writ); *Pemberton v. Leatherwood*, 218 S.W.2d 500 (Tex. Civ. App.—Eastland 1949, writ ref'd n.r.e.); *Bagwell v. McCombs*, 31 S.W.2d 835 (Tex. Civ. App.—Dallas 1930, no writ); *Gilbert v. Hines*, 32 S.W.2d 876 (Tex. Civ. App.—Dallas 1930, no writ); and *Anderson v. Steddum*, 194 S.W. 1132 (Tex. Civ. App.—Texarkana 1917), aff'd, 222 S.W. 1090 (Tex. Comm App. 1920, holding approved).

3. Specific Exceptions Relating to Dependent Executors and Administrators

Texas courts have disallowed commissions to personal representatives of estates serving with court supervision in the following transactions:

- payments to heirs or distributees;
- commission on payment of commission to personal representative;
- funds payable from ancillary administration in foreign jurisdiction;
- payments made by third party to taxing authority;
- receipts and payments associated with business operations; and

- payments made by personal representative to himself as creditor of estate.

See Akers, Hon. Georgia, Guardianship Compensation, South Texas College of Law Guardian Ad Litem Certification, September 21, 2011(citing *Walling v. Hubbard*, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *Brown v. Heirs of Walker*, 38 Tex. 109 (1873); *Trammel v. Philleo*, 33 Tex. 395 (1870); *Spoffard v. Minor*, 36 S.W.771 (Tex. Civ. App.—Houston 1896, writ ref'd).

C. Statutory Formula Unreasonably Low

Should the fiduciary believe that the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low, then he or she may submit, with the annual or final account, the total personal representative compensation time reported, or contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. See TEX. PROB. CODE ANN. §§241, 665 (Vernon 2010).

Note that the hourly fee approved by the courts for attorney-fiduciary services (between \$45-100 per hour) is significantly less than the court approved legal rates for attorneys. If an attorney-fiduciary is submitting an application for higher compensation because the statutory compensation formula is unreasonably low, it must be set for a hearing with the court. Examples of invoices detailing attorney time and fiduciary time are attached to the Harris County Probate Courts' Standards for Court Approval of Attorney Fees which is attached hereto as Appendix A.

D. Attorney Fiduciaries

Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian or personal representative services and may seek

attorney's fees only for legal services. See TEX. PROB. CODE ANN. §665D (Vernon 2010). Applications for attorney's fees should give a detailed account of the legal and fiduciary services he or she rendered to the probate or guardianship estate. Attorney-fiduciaries will not be paid attorney's fees for fiduciary services.

E. Dual Compensation

1. Authority Allowing Dual Compensation

Sometimes, the probate court will appoint an attorney, either chosen by the parties or appointed by the court, to serve as a fiduciary in a guardianship or an 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 courts 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 Sections 241 and 665 of the Texas Probate Code, respectively. See Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

Texas courts have approved dual compensation where an attorney served as a fiduciary and as the attorney in the probate matter. *Burton v. Bean*, 549 S.W.2d 48 (Tex. Civ. App.—El Paso 1977, *no writ*)(reasoning that attorneys were entitled to attorney fees in addition to the compensation for serving as administrators and noting that the attorney was appointed by the probate court and agreed upon by the

parties and that the attorney fees would require court approval).

The court in *Neblett v. Butler*, 162 S.W.2d 458 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.) eloquently explained that:

A prudent executor will only agree to pay an attorney, whom he employs, reasonable attorney fees, for if the reasonableness of the fees is contested, the executor can only recover such fees as are reasonable. Whether an executor, who is a lawyer, performs the services himself, or employs another, the reasonableness of the fees charged must stand the same test. So what difference could it make whether a lawyer-executor employs another lawyer, or performs the services himself? A testator chooses his executor because he thinks him trustworthy, and we think it is unlikely the testator would not want the lawyer, to whom he entrusted the management of his estate, to be entrusted with the management of the law business incident thereto. And as already pointed out, he does not have to trust him to fix a fee that is not exorbitant, the law prevents that. We therefore question the soundness of a public policy which would tend to defeat a testator's desire to have his affairs, legal as well as business, attended to by his executor, by one he has learned to trust.

Neblett at 462-462.

In a more recent case, the Court of Appeals, sitting in San Antonio, endorsed dual compensation, reasoning that such an arrangement served the interests of the public because: 1) the attorney functioning as a fiduciary avoids duplicated efforts and makes administration more cost efficient; 2) the probate court protects the estate's interests and reviews and approves of the

expenses of the estate; 3) the probate court will more closely scrutinize the fee applications of attorneys serving in a dual capacity; and 4) it is to be presumed that a person serving in both capacities is acting in the best interest of the estate. *See Henderson v. Viesca*, 992 S.W.2d 553 (Tex. App.—San Antonio 1996, writ denied).

2. Making Application

Section 665D of the Texas Probate Code requires “an attorney who serves as guardian and who also provides legal services in connection with the guardianship is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services.” TEX. PROB. CODE ANN. §665D (Vernon 2010).

Applications for attorney's fees should provide 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. *See Id.* *See also* Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

To be entitled to dual compensation, the attorney fiduciary must seek dual compensation at the time of appointment or make a motion, provide full disclosure to all interested parties who have made an appearance in the case, and attend a hearing for the approval of such motion. If dual compensation is approved, the applications for fees as an attorney and as a fiduciary must carefully segregate legal and non-legal work. *See* Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

3. Commission vs. Hourly Compensation

If the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low, then the attorney may seek compensation based upon an hourly rate. *See* TEX. PROB. CODE ANN. §§241, 665 (Vernon 2010).

Upon submission of the annual or final account, the attorney may submit records detailing the time he or she spent as a personal representative and seek compensation based upon an hourly fiduciary rate which tends to be between \$40 and \$100 an hour, or much less as compared to the rates approved for legal work performed by an attorney. If an attorney-fiduciary is submitting an application for higher compensation because the statutory compensation formula is unreasonably low, this must be set for a hearing with the court. *See* Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

When seeking to be paid on an hourly basis for fiduciary services as opposed to payment pursuant to the statutory commission formula, the attorney should consider the fact that the court will likely frown upon and deny an attorney's later efforts to switch back to compensation based upon the statutory commission formula. In other words, flip flopping year to year between hourly and commission based compensation will not be allowed, as it frustrates the intent of Sections 241 and 665 of the Texas Probate Code which is to provide relief to a fiduciary whose statutory commission compensation is unreasonably low.

F. Accounting for Time and Invoices

When preparing fee applications, keep in mind that they are of public record and subject to scrutiny by the parties,

potential clients, the courts, watchdog groups, and the media. Preparing a fee application as if it was a "public relations document" as Judge Mike Wood suggests will enable you to follow the following guidelines:

- **Avoid Block Billing.** Itemize all unrelated activities separately, with their respective times and amounts.
- **Include Descriptions.** Describe the topic or purpose for each telephone or office conference.
- **Include Legend.** If it is not clear from the invoice for whom time is being billed, please include a legend to indicate the name of the timekeeper, initials of the timekeeper, whether the timekeeper is an attorney or paralegal, and the years of probate experience of the timekeeper.
- **Include All Time.** Include all the time you have spent on the file, even that time for which you are not charging, and indicate such fact with the following notations: "No Charge" or "N/C."
- **Justify Extraordinary Efforts.** If you believe that the time you have spent on an activity may be perceived as excessive, include a statement in brackets at the end of the entry as to why such extraordinary time was justified.
- **Travel.** The courts do not reimburse for an attorney's or staff member's travel mileage or expenses inside Harris County.
- **Research.** The courts will only 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.

- Preparation of Fee Petitions. The courts will not reimburse attorneys for the costs of preparing invoices and the standardized fee applications and orders that accompany them.
- Conversations with Court Staff. It is not appropriate to charge an estate for the time the courts spend providing the personal representative's attorney with assistance. Nor will the courts reimburse attorneys for time spent in discussions with an auditor aimed at correcting deficiencies in the client's accountings.
- Copies and Faxes. The courts will reimburse attorneys up to \$.15 per page for copies. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk. The courts 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.
- Deliveries. 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 \$25, regardless of whether an attorney, paralegal, secretary, or commercial courier service actually delivered the document.
- Costs Necessitated by Misfeasance or Malfeasance. Estates should not 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.

See Harris County Probate Courts' Standards for Court Approval of Attorney Fee Applications, attached as Appendix A.

VI. Conclusion

At the heart of service as a fiduciary, whether it is as an attorney, a guardian, or a personal representative of an estate, is the notion that you must step into the shoes of those whom you serve and conduct affairs on their behalf as carefully as you would your own affairs for the purpose of serving their best interests.

In collecting a fee for service as a fiduciary, the best interests of those being served are paramount. When preparing fee applications, consider your fees from the perspective of those you serve and consider the wisdom Atticus Finch shared with his daughter, Scout, in *To Kill a Mockingbird*. "If you just learn a single trick, Scout, you'll get along better with all kinds of folks. You never really understand a person until you consider things from his point of view, until you climb inside of his skin and walk around in it."



Figure 3 Gregory Peck as Atticus Finch in *To Kill a Mockingbird* (1962)

Standards for Court Approval of Attorney Fee Petitions

The Probate Courts of Harris County are committed to maintaining and improving the image of the legal profession. Enforcing reasonable fees is one way Harris County Probate Courts can accomplish this goal. Exercise good ethical and moral responsibility, common sense, and professionalism in your billing. These standards are not absolute rules; the Courts will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Courts have given consideration to the Texas Probate Code, the Texas Rules of Disciplinary Procedure, and applicable case law.ⁱ

I. Attorney's Fees

It is the Courts' 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 § 665B (guardianship estates).ⁱⁱ

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

Below is a table setting forth what the Courts believe are appropriate rates for court-appointed fiduciaries' attorney's fees.ⁱⁱⁱ This fee schedule does not apply to court appointed counsel for indigent parties (*see* paragraph I.B.1 herein).

Years Practicing Probate and Guardianship Law	Court-Approved Rate
0 – 2 years	up to \$165/hour
3 – 5 years	\$165 – 195/hour
6 – 10 years	\$195 – 250/hour
11 + years	\$250 – 350/hour

In determining how lawyers will be paid within the practice categories above, the Courts 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 Courts 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.

- 1. Court Appointed Counsel for Indigent Parties.** The Courts must heed Harris County budgetary considerations. If 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 Courts compensate attorneys ad litem and guardians ad litem involved in county-pay cases at an hourly rate of \$100. If an attorney is willing to perform the duties of an attorney ad litem pro bono, he or she should notify each court of that willingness.
- 2. Court Appointed Counsel Involving 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 Courts ordinarily award total fees of \$300 to \$750 to an attorney ad litem.^{iv}
- 3. Compensation Regarding a Deceased Ward.** In those rare instances wherein a proposed ward dies before a guardianship estate is established, but an ad litem appointment has been made, the Courts normally would not expect a fee application to be made.

C. Fees when an Attorney is also the Fiduciary

In those rare situations in which a Court appoints an attorney as a fiduciary in a guardianship or an 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 Courts 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. Full Disclosure.** 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. Keep Records and Separate Legal and Non-Legal Work.** The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal and non-legal work. The attorney work should be submitted periodically just as an attorney would if representing a client. The non-legal work should be reflected on the regular bills for legal work, without a dollar extension, and with the notation "PRC" for "Personal Representative Compensation." An example invoice is attached as Appendix A.

3. **Compensation for Legal and Non-Legal Services.** Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian or 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. 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, the total personal representative compensation time reported, or 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 Courts for attorney-fiduciary services (between \$45-100 per hour) is significantly less than the Court approved legal rates for attorneys. If an attorney-fiduciary is submitting an application for higher compensation because the statutory compensation formula is unreasonably low, this must be set for a hearing with the court

4. **Quarterly Fiduciary Compensation.** Should the attorney-fiduciary find it a hardship to wait for the compensation as a fiduciary, a fee may be paid on a quarterly basis. The court must find that a hardship exists for the attorney-fiduciary to be paid quarterly.

II. Paralegal/Legal Assistant Charges

The Courts will reimburse an attorney for paralegal/legal assistant work at a rate between \$45 and \$100 depending upon the experience of the paralegal.^v The Courts do not pay for secretarial services at the paralegal rate even if such services are performed by paralegals. It is the Courts' position that secretarial services are included in the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

III. Billing in Ongoing Guardianship and Estate Matters

Please observe the following guidelines when preparing fee applications.

A. Form of Fee Applications

1. **Period of Accounting.** Indicate the period covered by the application in the title or prominently in the body.
2. **Include Total Accumulated Fees.** Each application for fees should contain a statement indicating the total amount of attorney fees and expenses approved since the inception of the guardianship or estate administration.
3. **Include Affidavit.** Attach an affidavit by the applicant attorney swearing to the reasonableness of the fees and the necessity of the services and indicating the number of years he or she has practiced probate and guardianship law.
4. **Signature of Client.** The fiduciary who hired the attorney should sign the application.

5. **Fees Sought Should not be Preprinted on Order.** Attach an Order approving the fees containing a blank for the fees, expenses, and total amount, so the Judge may fill in the approved amounts.

B. Invoice Accompanying Fee Application

1. **Avoid Block Billing.** Itemize all unrelated activities separately, with their respective times and amounts. Do not block bill for unrelated activities. Block billing is a practice whereby time entries contain several unrelated items with a single cumulative time and amount, rather than complete itemization.
2. **Include Descriptions.** Describe the topic or purpose for each telephone or office conference.
3. **Include Legend.** If it is not clear from the invoice for whom time is being billed, please include a Legend to indicate the name of the timekeeper, initials of the timekeeper, whether the timekeeper is an attorney or paralegal, and the years of probate experience of the timekeeper.
4. **Include All Time.** Include all the time you have spent on the file, even that time for which you are not charging, and indicate such fact with the following notations: "NO CHARGE" or "N/C."
5. **Justify Extraordinary Efforts.** If you believe that the time you have spent on an activity may be perceived as excessive, include a statement in brackets at the end of the entry as to why such extraordinary time was justified.
6. **Travel.** The Courts do not reimburse for an attorney's or staff member's travel mileage or expenses inside Harris County.
7. **Research.** The Courts will only 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.^{vi}
8. **Preparation of Fee Petitions.** The Courts will not reimburse attorneys for the costs of preparing invoices and the standardized fee applications and orders that accompany them.^{vii}
9. **Conversations with Court Staff.** It is not appropriate to charge an estate for the time the Courts spend providing the personal representative's attorney with assistance. Nor will the Courts reimburse attorneys for time spent in discussions with an auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court's staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Courts 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 Courts, the Courts will award attorney's fees. For example, the Courts will reimburse attorneys for communications with the Courts regarding the need for corrective action when a guardian, administrator, or an attorney dies during an ongoing estate. In addition, the Court will not reimburse attorneys from probate and guardianship estates for calls to the Clerk's office.^{viii}

- 10. Copies and Faxes.** The Courts will reimburse attorneys up to \$.15 per page for copies. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk. The Courts 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.
- 11. Deliveries.** 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 \$25, regardless of whether an attorney, paralegal, secretary, or commercial courier service actually delivered the document.
- 12. Costs Necessitated by Misfeasance or Malfeasance.** Estates should not 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 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.
- 13. Avoid Filing Fee Applications for Amounts Under \$1000.00.** The Courts will generally not consider an application for fees and expenses for amounts totalling less than \$1000.00.

IV. Court Action on Fee Applications

A. When Hearing on Fee Application is Required

The Courts hold 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 Courts 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. As explained in Paragraphs I.C.1 and I.C.3 herein, a hearing is required if an attorney-fiduciary is seeking dual compensation after appointment or more than the statutory formula for compensation as a fiduciary.

B. Hearing Required if Fee Request Filed as Claim

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. 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).

Effective June 1, 2011.

Judge Loyd Wright, Probate Court No. 1

Judge Mike Wood, Probate Court No. 2

Judge Rory Olsen, Probate Court No. 3

Judge Christine Butts, Probate Court No. 4

**Appendix A
Sample Invoice**

Law Office of Jackie Chiles
123 Main Street
Houston, Texas 77002
(713) 867-5309
(713) 867-5308 Fax

May 1, 2011

Invoice submitted to:

Estate of Jacopo Peterman, an Incapacitated Person

Legal Related Activities

Date	Time Keeper	Description	Hours	Rate	Amount
4/9/2011	JAC	Reviewed contract with nursing home.	1.0	250	250
4/14/2011	JAC	Telephone call to the Ward's CPA to ask for another draft of the Ward's income tax return, as the first draft was accidentally shredded.	.15	250	N/C
4/15/2011	JAC	Reviewed and signed Ward's income tax return.	2.25	250	562.5
4/27/2011	JAC	Reviewed listing agreement prepared with realtor.	.5	250	125
4/27/2011	JW	Telephone call to realtor to discuss changes to listing agreement. Followed up with e-mail.	.25	90	22.5
4/27/2011	JAC	Telephone call to the Court to find out whether or not the listing agreement can be signed without first obtaining Court approval.	.25	250	N/C
4/28/2011	JAC	Opened bank account for guardianship estate. [The reason it took so long to open the bank account was because the Ward's caregiver who had a durable power of attorney was at a different bank branch demanding to make a withdrawal from the Ward's existing account. The bank's legal department had to review the durable power of attorney, the Letters of Guardianship, and the Order creating the guardianship in order to establish who rightfully had authority over the Ward's account.]	2.5	250	625
4/28/2011	JAC	Obtained copies of and reviewed Ward's joint tenant with rights of survivorship agreement relating to his savings account.	.75	250	187.5
4/28/2011	JW	Researched real property records to obtain legal description of the Ward's real property in effort to begin Inventory.	1.25	90	112.5
For professional services rendered			6.75		\$1885

Non-Legal Fiduciary Activities

Date	Timekeeper	Description	Hours
4/1/2011	JAC	Visited Ward in hospital.	.75
4/1/2011	JAC	Telephone call to the Ward's daughter to let her know Ward was asking for the family photo albums.	.25
4/1/2011	JAC	Telephone call to Dr. Mactavish to schedule podiatry appointment.	.10
4/1/2011	JAC	Called hospital to let them know that Dr. Mactavish would be coming by on Tuesday to visit with and care for Ward.	.10
4/5/2011	JAC	Worked with Ward's daughter to pack and store all of the Ward's household goods and prepare the Ward's home for sale.	6.0
4/8/2011	JAC	Visited two nursing homes and interviewed some of the staff members at each facility to determine which home would be the best fit for the Ward.	2.0
4/9/2011	JAC	Reviewed Ward's mail.	.5
4/20/2011	JAC	Deposited Ward's royalty check and IRS refund check.	.25
4/20/2011	JAC	Changed the Ward's address with the post office.	.5
4/20/2011	JAC	Visited Social Security office to change the payee.	1.0
4/20/2011	JAC	Met locksmith at the Ward's home so that the locks could be changed.	1.5
4/25/2011	JAC	Called Ward's creditors (Visa, Mastercard, Macy's, Exxon) to verify debts.	.5
4/25/2011	JAC	Met with nursing home administrators regarding paperwork necessary to enable the Ward to be admitted once the Ward is discharged from hospital.	1.0
4/26/2011	JAC	Paid invoices from AT&T, Centerpoint, and Reliant.	.25
4/26/2011	JAC	Reconciled bank statement.	.5
4/27/2011	JAC	Met with realtor to discuss sale of home and walk through home.	2.0
Total hours in non-legal service as fiduciary			17.2

The Legend set out below is not required by very helpful to the Courts:

Legend			
Initials	Name	Position	Experience in Probate
JAC	Jackie Chiles	Attorney	9 years
JW	John Watson	Paralegal	12 years

End Notes

ⁱ The Probate Courts of Harris County have promulgated guidelines concerning attorney fees for their respective courts. These guidelines essentially mirrored one another with some exceptions. The Probate Courts have now unanimously formulated the following standards to assist attorneys with drafting fee petitions in probate and guardianship cases. By understanding how the Courts evaluate 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.

ⁱⁱ 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.

ⁱⁱⁱ Attorneys should be aware, however, that the Courts 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 Courts' guidelines. Similarly, the Courts 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 Courts 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 Courts' 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.

^{iv} In determining whether representation is "typical" or "normal," the Courts consider 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.

^v In determining the appropriate billing rate for a paralegal, the Courts consider the following factors: 1) 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 (Associates degree or higher); 2) number of years experience in the probate, estate planning, and guardianship field; 3) certification in Estate Planning and Probate Law from the Texas Board of Legal Specialization; and 4) number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

^{vi} The Courts expect attorneys who practice in Probate Court to be familiar with general probate and guardianship matters; therefore, the Courts will not reimburse attorneys for basic legal research in these areas. The Courts consider 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 Courts do not reimburse for those costs.

^{vii} 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 Courts are cognizant that Court authority must be obtained for the approval of fee petitions in certain circumstances, the Courts believe that the estate of a decedent or ward should not be taxed with the attorney's billing costs.

^{viii} The Courts' staff is a vital source of information and assistance to the legal community. The Courts attempt to answer questions and to provide guidance where appropriate. However, please attempt to resolve estate issues with your client, i.e. the personal representative, to minimize or obviate unnecessary use of court personnel. While the Courts understand that problems arising in the Clerk's office may frustrate attorneys, the Courts do not believe that estates should be required to pay for the attorney's time spent addressing these problems. The Courts urge 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 Courts urge 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. Alternatively, the attorney can check Probate Court records on the Clerk's website at <http://www.cclerk.hctx.net/applications/websearch/>.