Statement of Principles - Fees in Estate Matters

A. Legal Fees Generally

1. A lawyer must not charge a fee or disbursement which is not fully disclosed, fair and reasonable.

2. The fee that a personal representative's lawyer may charge is governed by *Queen's Bench Rule 74.14*. The lawyer must serve a copy of Form 74AA on the personal representative and each residuary beneficiary within 60 days after letters probate or letters of administrators have been granted.

3. The basic fees under *Queen's Bench Rule 74.14 (4)* are calculated as a percentage of the value of the estate assets, and are intended to cover the work involved in estates of average complexity. A simple estate may not warrant a fee based solely on a percentage of the value of the estate.

Role of the Lawyer

4. In assessing whether a fee calculated under *Rule 74.14 (4)* is fully disclosed, fair and reasonable the Law Society would generally expect that in an estate of average complexity the following services would be provided to the personal representative:

   (a) Receiving instructions from the personal representative;

   (b) Giving the personal representative information and advice on all matters in connection with the administration of the estate;

   (c) Reviewing the will or the provisions of the *Intestate Succession Act* with the personal representative;

   (d) Receiving information from the personal representative about the following:

      i. The deceased;
      ii. The beneficiaries;
      iii. The estate property;
      iv. The deceased's debts;
      v. Minors;

   (e) Receiving details from the personal representative of all the property and debts of the deceased for the purposes of preparing an application for probate, including the following:

i. The full nature and value of the property of the deceased as at the date of death including the value of all land and buildings and a summary of outstanding mortgages, leases and any other encumbrances;
ii. Any pensions, annuities, death benefits and any other benefits payable to the estate;
iii. Any debts owed by the deceased as at the date of death;
iv. Preparing all required documents for grant applications;
v. Preparing notices to all beneficiaries;
vi. Arranging for surviving spouse or surviving adult interdependent partner to receive notices under the *Dependents Relief Act* and the *Family Property Act,* if necessary;
vii. Arranging for dependents to receive notices under the *Dependents Relief Act*, if necessary;
viii. Attending on signing of application for grant of probate and filing with the court;
ix. Advising the Public Trustee if necessary;
x. Receiving the Grant of Probate;

(f) Advising the personal representative to settle debts and advertise for creditors and arranging for advertising if instructed to do so;

(g) Preparing declarations of transmission and powers of attorney related documents for stocks and bonds transferable to the personal representative under the Grant of Probate;

(h) Preparing transmission and related documents for land transferable to the personal representative under the Grant of Probate;

(i) Advising the personal representative on any trusts required by the will;

(j) Advising the personal representative to prepare and file tax returns;

(k) Confirming receipt of clearance certificates from Revenue Canada;

(l) Advising personal representative to provide accounts to beneficiaries and a report to the beneficiaries on those accounts;

(m) Obtaining approval from the beneficiaries of the fees of the personal representative and of the lawyer over the tariff;

(n) Preparing and obtaining releases if so instructed by the personal representative;

(o) Advising the personal representative to distribute to beneficiaries;

Role of the Personal Representative

5. The following services would typically be considered by the Law Society as falling within the realm of the personal representative's responsibilities, and therefore are not typically the responsibility of the lawyer:

(a) Making arrangements for the funeral, memorial or other similar services;

(b) Determining the names and addresses of those beneficially entitled to the estate property and notifying them of their interests;

(c) Arranging with a bank, trust company or other financial institution for a list of the contents of a safety deposit box;

(d) Determining the full nature and value of property and debts of the deceased as of the date of death and compiling a list, including the value of all land and buildings and a summary of outstanding mortgages, leases and other encumbrances;

(e) Examining existing insurance policies, advising insurance companies of the death and placing additional insurance if necessary;

(f) Arranging for the proper management of the estate property, including continuous business operations, taking control of property and selling property;

(g) Retaining a lawyer to advise on the administration of the estate where appropriate, to apply for a grant of probate from the court, or bring any matter before the court;

(h) Applying for any pensions, annuities, death benefits, life insurance or other benefits payable to the estate;

(i) Advising any joint tenancy beneficiaries of the death of the deceased;

(j) Advising any designated beneficiaries of their interests under life insurance or other property passing outside the will;

(k) Arranging for the payment of debts and expenses owed by the deceased and the estate;

(l) Determining whether to advertise for claimants, checking all claims and making payments as funds become available;

(m) Taking the steps necessary to finalize the amount payable if the legitimacy or amount of a debt is in issue;

(n) Determining the income tax or other tax liability of the deceased and of the estate, including retaining the services of an accountant where appropriate, filing the necessary returns, paying any tax owing and obtaining income tax or other tax clearance certificates before distributing the estate property;

(o) Instructing a lawyer in any litigation;

(p) Administering any continuing testamentary trusts or trusts for minors;

(q) Preparing the personal representative's financial statements, a proposed compensation schedule and a proposed final distribution schedule;

(r) Distributing the estate property in accordance with the will or intestate succession provisions.

Additional Fees Under Queen's Bench Rule 74.14(4)

6. Additional fees may be charged under *Queens's Bench Rule 74.14(4)* on the value of the estate in excess of $300,000.00, although the court will not always award such fees.

7. The amount will be determined on the basis of:

(a) The time spent;
(b) The complexity of the matter;
(c) The results achieved; and
(d) The value of the estate.

8. It is not appropriate to calculate fees on an estate by arbitrarily applying a percentage against the value of the estate over $300,000.00.

9. When reviewing fees payable to the lawyer on the excess over $300,000.00, *Rule 74.14(9)* provides that regard shall be had to:

(a) The nature of the estate assets relative to the value of the estate;
(b) The amount and nature of the services performed by the lawyer; and
(c) Other matters considered relevant by the court.

10. The courts have also provided some direction as to the factors that will be considered when assessing whether a fee calculated on a quantum meruit basis is "fair and reasonable." Those factors include:

(a) the time expended by the solicitor;
(b) the legal complexity of the matters dealt with;
(c) the degree of responsibility assumed by the solicitor;
(d) the monetary value of the matters in issue;
(e) the importance of the matters to the client;
(f) the degree of skill and competence demonstrated by the solicitor;
(g) the results achieved;
(h) the ability of the client to pay; and
(i) the reasonable expectation of the client as to the amount of the fee.

11. A lawyer who claims fees over tariff should be prepared to justify his legal bill with a detailed statement of account accurately setting out the time spent and the exact services rendered.

12. Where a lawyer has performed some or all of the responsibilities of the personal representative the lawyer is entitled to be compensated for those services. The lawyer should be aware, however, that it may not be appropriate to seek to be remunerated at legal rates for doing administrative tasks. It is important for the lawyer to discuss with the personal representative at the outset of the retainer the nature of the services to be provided, and the basis upon which the lawyer will charge for services that are otherwise the responsibility of the personal representative. In such circumstances the personal representative may themselves have to compensate the lawyer, or alternatively accept a reduced executor's fee.

13. In accordance with *Rule 74.14(3)* the aggregate value of an estate is determined by taking into account those assets under "probate," and specifically does not include a number of items, including "property held in joint tenancy." The services required to transfer a joint asset may be minimal.

14. Where an estate does not proceed to formal probate the fee that is charged to the client will not fall within the Queen's Bench tariff. The lawyer may bill his or her hourly rate subject to agreement with the client, and providing the fees are fully disclosed, fair and reasonable.

15. Where there is a change in the aggregate value of the estate that is more than nominal, an amended application for probate should be filed. In the absence of an amended application for probate, the lawyer's fees should not be calculated on the basis of the increased value of the estate.

Additional Fees Under Queen's Bench Rule 74.14(11)

16. In addition to the fees provided for in *Queen's Bench Rule 74.14(4)* a lawyer is entitled to receive payment for the following:

(a) appearances in court as allowed by the presiding judge;

(b) services with respect to a first passing of accounts of a personal representative where the lawyer retained by the personal representative has maintained the accounts of the estate and has prepared same for passing;

(c) services with respect to a first passing of accounts where the personal representative has maintained the accounts of the estate and prepared same for passing;

(d) acting on the sale of an estate asset; and

(e) finding a purchaser of an estate asset.

17. The lawyer may bill his or her hourly rate subject to agreement with the client, and providing the fees are fully disclosed, fair and reasonable.

B. Statements of Account and Consent of Beneficiaries

In order for a fee to be considered fully disclosed, fair and reasonable the Law Society will expect members to act in accordance with the following principles:

Where the lawyer's fee is within tariff:

1. The lawyer must prepare a detailed statement of account outlining the time spent and the services provided and provide it to the personal representative;

2. The personal representative will pay the account from the estate, or payment may be made by transferring funds from trust held to the credit of the estate;

3. The lawyer may pay his or her fees without prior approval from the residuary beneficiaries;

4. The lawyer must direct the personal representative to provide the residuary beneficiaries with:

   (a) a statement showing the assets, income, disbursements and funds undistributed;

   (b) a copy of Form 74AA; and

   (c) a copy of the statement of account including reference to the fact that the fee has been charged in accordance with tariff;

5. Where the personal representative has prepared an accounting for the period of administration the lawyer should advise the personal representative to:

(a) obtain from the residuary beneficiaries a release for the payment to be made to them as residuary beneficiaries; and

(b) to obtain from the residuary beneficiaries a written consent to the personal representative's fee;

6. Where the lawyer has prepared an accounting for the period of administration the lawyer must:

(a) obtain from the residuary beneficiaries a release of the personal representative for the payment to be made to them as residuary beneficiaries; and

(b) The lawyer must obtain from the residuary beneficiaries a written consent to the personal representative's fee;

Where the lawyer's fee exceeds tariff:

1. The lawyer must provide the residuary beneficiaries and the personal representative with:

(a) a detailed statement of account outlining the time spent and the services provided;

(b) a statement showing the assets, income, disbursements and funds undistributed;

(c) a copy of Form 74AA;

(d) a specific statement that the lawyer's fees exceed the amount allowed by *Rule 74.14 (4)*;

(e) a statement of account calculating the amount of fees permitted by *Rule 74.14 (4)* and the amount of the excess fees; and

(f) an explanation of the services provided with respect to those additional fees.

2. The lawyer must obtain the written consent of the personal representative and the residuary beneficiaries for payment of such additional fee.

3. It is not acceptable to obtain from residuary beneficiaries at the time of initial distribution a consent to additional fees, for example at an agreed upon hourly rate. Fees must be clearly determined prior to obtaining a consent to the fee from the personal representative and from the residual beneficiaries.

4. Payment of the additional fee cannot be made until all consents have been received or until an order is granted on application for the passing of accounts.

5. Where the personal representative has prepared an accounting for the period of administration the lawyer should advise the personal representative to:

   (a) obtain from the residuary beneficiaries a release of the personal representative for the payment to be made to them as residuary beneficiaries; and

   (b) obtain from the residuary beneficiaries a written consent to the personal representative's fee;

6. Where the lawyer has prepared an accounting for the period of administration the lawyer must:

   (a) obtain from the residuary beneficiaries a release of the personal representative for the payment to be made to them as residuary beneficiaries; and

   (b) obtain from the residuary beneficiaries a written consent to the personal representative's fee;

C. <u>Legal Fees where Lawyer acts as Personal Representative</u>

1. Where a lawyer acts as personal representative, his or her legal fees will be reduced by virtue of Rule 74.14(5):

   > *Where the personal representative is a lawyer, a trust company, or the public trustee, the fee payable to the lawyer retained by the personal representative is 40% of the fee provided under subrule (5).*

2. It is permissible for a lawyer to agree with residuary beneficiaries to be compensated at an hourly rate for services provided as both personal representative and lawyer.

3. Where the lawyer acts as both lawyer and personal representative, he or she ought to record in detail the time spent and the services provided, distinguishing between those services provided as a lawyer and those provided as personal representative.

4. Where a lawyer acts as personal representative, copies of statements of account for legal fees ought to be provided to the residuary beneficiaries of the estate.

D. **Fees of Personal Representatives**

Calculation of Fees

1. Where compensation is not set out in the will, a lawyer may take executor's compensation if all the residual beneficiaries are legally competent adults and they consent to the claim for compensation. Otherwise, an application to pass accounts for any executor's compensation should be made.

2. Where a lawyer acts as the personal representative, he or she is entitled to be paid a fair and reasonable allowance for his "care, pains, trouble and time" as provided for under Section 90(1) of *The Trustee Act*. The courts have set out the generally accepted principles with respect to executors' fees, and the following matters have been considered when fixing the remuneration of an executor:

   (a) The magnitude of the trust;
   (b) The care and responsibility springing therefrom;
   (c) The time occupied in performing the duties;
   (d) The skill and ability displayed; and
   (e) The success which has attained its administration.