Compensation of Fiduciaries and Their Attorneys

By George M. Strander

One of the most common subjects of inquiry and litigation in probate court cases is the appropriateness of the fees charged against an estate by a fiduciary and his or her legal counsel. This article aims to clarify the legal standards governing this compensation.

Under the Estates and Protected Individuals Code (EPIC), fiduciaries are, in general, entitled to “reasonable compensation” for their activities. Additionally, as part of their duties, fiduciaries are authorized to employ attorneys, who are also entitled to reasonable compensation for “necessary” services; this compensation is also explained by the Michigan Rules of Professional Conduct at 1.5(g). Pre-EPIC statutes used similar concepts and, more recently, courts have found pre-EPIC caselaw relevant to current law.

Caselaw recognizes that fee rules applying to one fiduciary may apply to another. A kinship is also recognized between fiduciary fee standards and those applying to fiduciary attorneys. Accordingly, this article assumes that a single basic rule governs compensation for all fiduciaries and their attorneys, with the understanding that differences exist regarding the specific duties applying to any given type of fiduciary and with respect to an attorney’s status as a professional instrument of the fiduciary.
What is chargeable against an estate?

When faced with the question of whether a fiduciary or a fiduciary's attorney can have fees for services paid from the relevant estate, Michigan appellate courts have found that such services must be necessary in furtherance of the fiduciary's duties and not the product of a detrimental breach of duty.

Services must be necessary

Caselaw governing compensation of fiduciary attorney fees has reaffirmed the statutory requirement that these services be “necessary.” In its 1937 case, Becht v Miller, the Michigan Supreme Court found that when there are no complicated legal questions in a case, not all of an attorney’s 10 months of billed work in a decedent estate administration can be deemed necessary, and thus, cannot all be compensable.9

Becht also shows that the compensation of fiduciaries themselves must be for necessary services: when an executor’s invoice shows that the executor and attorney are billing for the same time, the executor cannot likewise be paid since the services have already been compensated.9

Actions undertaken must be beneficial

Michigan law has long held that the efforts of a fiduciary or his or her attorney in continuance of the fiduciary’s duties are generally beneficial and chargeable to the estate.10 However, not all actions undertaken by a fiduciary or an attorney further the fiduciary's duties, and such actions would not be compensable. Hence, participation of the personal representative and attorney in litigation concerning what is properly within the estate, who is an heir, and whether a trust is valid does not benefit the estate and is not a fiduciary function, and the fees for such are not compensable.11

Wrong and detrimental services are generally not recoverable

Efforts furthering fiduciary duties are not compensable if they are the product of wrongdoing—e.g., fraud, default, negligence—and detrimental to the fiduciary’s charge.12 A personal representative can be deprived of compensation and surcharged if a distribution is made early, thereby depriving the estate of a certain interest income.13 Likewise, if a corporate trustee enjoying substantial control over investments establishes what is tantamount to a commercial investment plan, the trustee will be held to a “higher standard of care,” and the loss of substantial funds can be seen as detrimental enough to preclude compensation.14

Actions that are the product of wrongdoing and detrimental to the fiduciary’s charge are not compensable. These types of actions involve more than a judgment error; they involve a breach of duty, the conditions for which can change with the sophistication and control of the fiduciary. More specifically, a fiduciary’s failed defense of his or her office due to mishandling of the estate is “not for the benefit directly or indirectly of the estate,” and
attorney fees expended on it are “not properly a charge against the estate,”15 in part because “the fiduciary was partially to blame for bringing about unnecessary litigation.”16 However, when an executor lost a breach of contract suit because, through error of judgment, he “unreasonably” terminated a first refusal right, compensation was not withheld since the executor was working to distribute property in accordance with the will.17 Conversely, even if an executor prevails in a fraud case, compensation can be denied if the fiduciary’s earlier actions unnecessarily prompted litigation in the first place.18

What is a proper level of compensation?

The general assumption in Michigan caselaw is that a fiduciary or attorney will receive compensation based on a rate of pay (usually hourly), time spent, and other possible relevant factors. One exception to this format, noted by the Court of Appeals in Comerica v Adrian,19 is when the calculation of time spent on relevant service is, in practice, impossible.20

Rates matter

Discounting Comerica-type situations, the Michigan Supreme Court made clear in its sweeping 2008 opinion, Smith v Khouri,21 that a trial court should begin its assessment of reasonable attorney compensation “by determining the fee customarily charged in the locality for similar legal services”—one factor of MRPC 1.5(a)—with the rate being based on “reliable surveys or other credible evidence of the legal market.”22 In a subsequent unpublished opinion, Buko v Munger,23 the Court of Appeals applied the Smith rule in a probate court context, albeit for attorney services provided to a respondent in a conservatorship matter.24

Reference to a local norm a la Smith has also been recognized as appropriate for assessing a reasonable compensation rate for fiduciaries. In a pre-Smith unpublished opinion, In re Winters Estate,25 the Court of Appeals found no abuse of discretion when the trial court relied on an expert’s determination of the “normal fee of a personal representative in the county” in ruling that the charged rate was excessive. It has also been long recognized in Michigan law that a fiduciary performing administrative duties cannot receive the same rate of compensation as an attorney for professional services.26

Not all time is recoverable

Smith directs that in any given case the “reasonable number of hours” employed by an attorney—another factor of MRPC 1.5(a)—is to be multiplied by the established rate; the resulting amount is the “starting point for calculating a reasonable attorney fee.”27 With the exception of Comerica, all caselaw discussing the calculation of reasonable compensation for a fiduciary or fiduciary’s attorney assumes the relevance of “time spent” in making the calculation.

In general, fiduciaries and their attorneys must document the hours they spend on relevant work in order to receive compensation, although such documentation may be in the form of a “written textual description” or even testimony.28

Additional factors

From the starting point generated by the multiplication of hours by the local rate, the Smith court indicated that adjustments up or down in attorney compensation should be made from considering the other factors from MRPC 1.5(a).29 Similar, less-extensive lists of relevant factors for determining the level of reasonable attorney compensation come from Wood v Detroit Automobile Insurance Exchange30 and Becht.31 These additional factors can be grouped in three distinct classifications: provider, task, and results. Provider-based factors include the attorney’s reputation, experience, and ability. Task-related factors involve the novelty and difficulty of questions posed, skill required, labor provided, amount of assets or other goods within the attorney’s care, the
character of the relationship with the client, and any time limitations imposed by the client or circumstances. The results the attorney obtains form the third class.

Conclusion

Fiduciaries and their attorneys can be compensated by estates for services that further the fiduciaries’ duties, including the management and distribution of income and assets for estate-based fiduciaries and the provision of care and custody for individual-based fiduciaries. Unnecessary actions, whether wasteful or already compensated, are not compensable. Neither are actions stemming from a fiduciary’s breach of duty—as opposed to a breach of judgment—with the level of that duty dependent on the fiduciary’s sophistication and control.

Unless practically impossible to compute, compensation for a fiduciary and an attorney should be initially set by combining the time spent with the rate customarily charged in the locality for those services. An attorney’s compensation can be further refined by a number of factors relevant to the attorney, the task, and the results obtained.

George M. Strander is court administrator and probate register for the Ingham County Probate Court. A graduate of the University of Michigan Law School, he is a frequent presenter on legal and court issues and has several legal publications to his credit. He serves on the governor’s Mental Health Diversion Council and the State Bar’s Civil Procedure and Courts Committee among other professional and community positions.

ENDNOTES

1. MCL 700.3719(l), personal representatives; MCL 700.5216(l), guardian of a minor; MCL 700.5315(l), guardian of an adult incapacitated individual; MCL 700.5413, conservator; MCL 700.7708(l), trustee [if compensation not specified in trust]. The same can likely be said for guardians of the estate of the developmentally disabled [DD]. See MCI 330.1632.

2. MCL 700.3715(w), attorneys for personal representatives; MCL 700.5423(2)[a], attorneys for conservators; MCL 700.7817(w), attorneys for trustees. Also see MCL 330.1632 regarding guardians of DD estates.

3. MRPC 1.5(a) specifies several “factors to be considered in determining the reasonableness of fees charged by the attorney in any proceeding in which the attorney is employed by and on behalf of the personal representative.” The factors include, but are not limited to: the nature and complexity of the matter; the results obtained; the time and labor required; the skill and ability of the attorney; any agreed-upon fee; compensation for other services rendered; the customary rate in the locality for similar legal services; and the reasonable value of the services. See also In re Baldwin’s Estate, 311 Mich App 288, 307; 18 NW2d 827 (1945).


8. Wagstaff v Mt. Nor’l Bank, 288 F Supp 1389 (ED Mich, 1984). An executor can also forfeit compensation by mismanaging the estate and its records to such an extent that it is impossible to determine the magnitude of any loss suffered by the fiduciary’s service. Burnham, 299 Mich at 464.


14. Id. at 717–718, 721, and 724–725 [it was not unreasonable for a corporate trustee to charge fiduciary fees for managing a charitable trust based on a formula “related to the size of the trust and the income generated” when the trustee managed thousands of trusts and “it was not practical [to keep time or expense records] given the number of employees having a direct or indirect contact with that trust.”].


16. Id. at 530–531.

17. Buko v Munger, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 290708).

18. The concept of comparing a requested compensation level with another past supposedly appropriate level has been employed in the context of a personal representative’s attorney’s compensation. See In re Weaver Estate, 119 Mich App 796, 799; 327 NW2d 366 (1983).


20. Winer v Mabley’s Estate, 70 Mich 271, 285; 38 NW 262 (1888) [An attorney selected as executor cannot and should not expect to receive compensation “gauged by the prices of professional men.”].


[1989]. Before the 1939 law, Michigan statutes allowed payment of “necessary expenses.” See, e.g., Temple, 278 Mich App at 135 (where the Court of Appeals approved the lower court’s use of past caselaw interpreting MRPC standards for direction on understanding EPIC statutes).