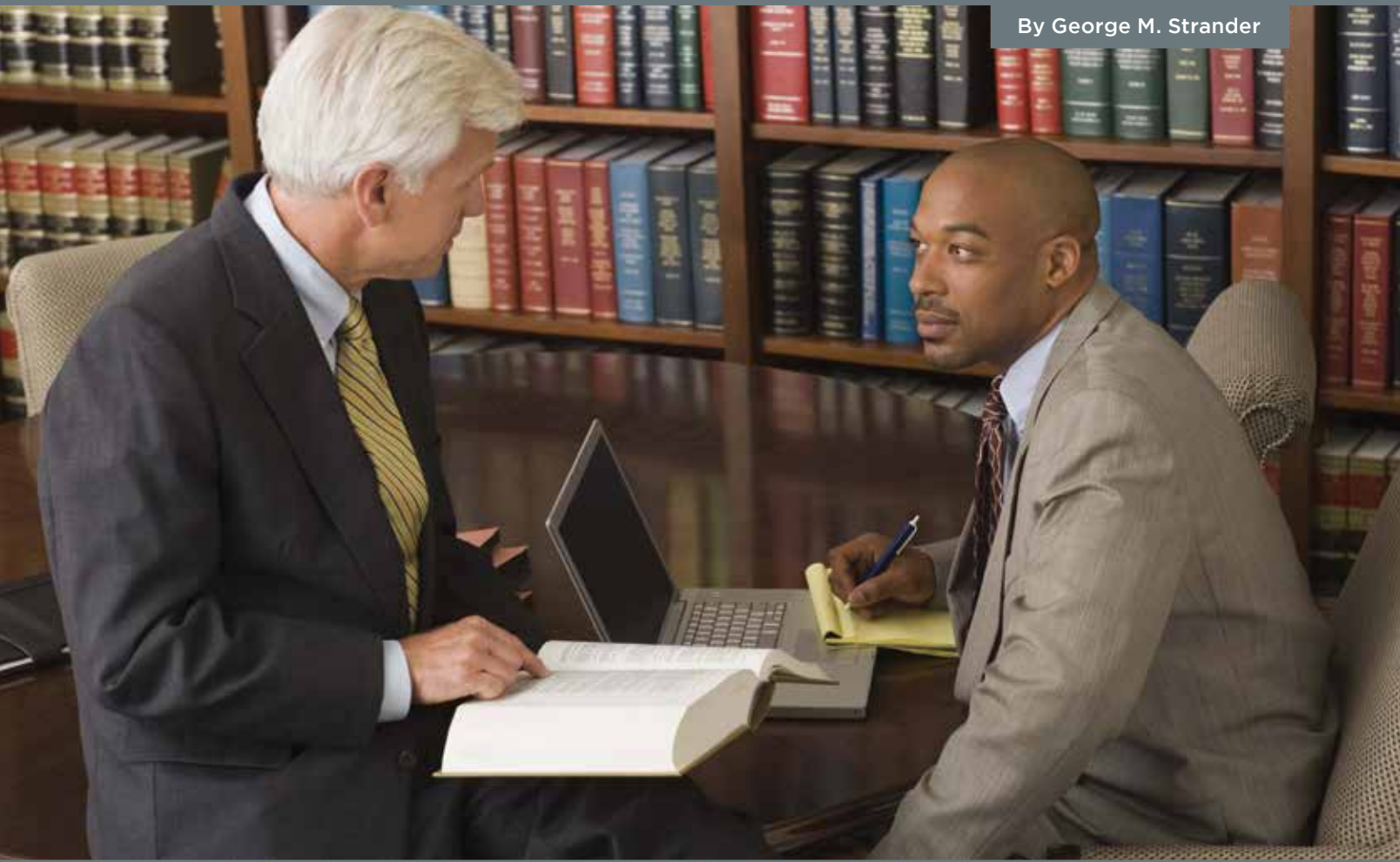


Compensation of Fiduciaries and Their Attorneys

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.¹ Additionally, as part of their duties, fiduciaries are authorized to employ attorneys, who are also entitled to reasonable compensation for “necessary” services;² this compensation is also explained by the Michigan Rules of Professional

Conduct at 1.5(a).³ Pre-EPIC statutes used similar concepts and, more recently, courts have found pre-EPIC caselaw relevant to current law.⁴

Caselaw recognizes that fee rules applying to one fiduciary may apply to another.⁵ A kinship is also recognized between *fiduciary* fee standards and those applying to fiduciary *attorneys*.⁶ 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*,⁷ 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.⁸

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

FAST FACTS

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A trial court should begin its assessment of reasonable attorney compensation by determining the fee customarily charged in the locality for similar legal services.



An estate-based fiduciary (personal representative, trustee, conservator) is charged with effectively managing the assets of his or her relevant estate—including marshaling assets or even petitioning for instruction—and actions following this charge are compensable. However, advocating a specific result regarding the makeup or distributees of the estate is not a fiduciary function and thus not compensable; an estate manager should be above such internal disputes. Similarly, an individual's guardian may be denied compensation for actions advocating for or against one of several care providers when all are expected to provide the same protection, since this type of controversy does not increase or provide for such care.

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 Kbouri*,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

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.

Reference to a local norm *à 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 Inter-Insurance Exchange*³⁰ 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. ■



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ENDNOTES

1. MCL 700.3719(1), personal representatives; MCL 700.5216(1), guardian of a minor; MCL 700.5315(1), guardian of an adult incapacitated individual; MCL 700.5413, conservator; MCL 700.7708(1), trustee (if compensation not specified in trust). The same can likely be said for guardians of the estate of the developmentally disabled (DD). See MCL 330.1632.
2. MCL 700.3715(w), attorneys for personal representatives; MCL 700.5423(2)(z), 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 a fee," including time/labor required, novelty/difficulty of questions involved, fee customarily charged in locality for similar legal services, and amount involved and results obtained. Additionally, the Michigan Court Rules (MCR) at Rule 5.313(a) require the consideration of the factors listed at MRPC 1.5(a) in determining the reasonableness of fees charged by the attorney for a personal representative.
4. See MCL 700.455(2), MCL 700.474, MCL 700.541, and MCL 700.543. See also *In re Temple Trust*, 278 Mich App 122, 135; 748 NW2d 265 (2008) (remarking on the similarity of the language in the two codes). Before the MRPC, fiduciary matters and other probate issues in Michigan were governed by the Probate Code of 1939, which employed, in part, a "reasonable compensation" standard for fiduciaries and for the attorneys they employed. The fundamental similarity of the 1939 code and the MRPC on compensation has been recognized by the Court of Appeals. *In re Brack Estate*, 121 Mich App 585, 590–591; 329 NW2d 432 (1982); *In re Baird Estate*, 137 Mich App 634, 637; 357 NW2d 912 (1984); *Comerica Bank v Adrian*, 179 Mich App 712, 723; 446 NW2d 553

(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).

5. See *Temple*, 278 Mich App at 135 (where a fee rule governing personal representative fees was seen to be "equally applicable to trustees").
6. *Krueger v Binder*, 176 Mich App 241, 251; 438 NW2d 898 (1989) (noting that "[t]he determination of reasonable compensation to the personal representative is, in general, the same as for the attorney").
7. *Becht v Miller*, 279 Mich 629; 273 NW 294 (1937).
8. *Id.* at 637–638. See also *In re Grover's Estate*, 233 Mich 467, 473; 206 NW 988 (1926).
9. *Id.* at 642. See also *In re Kiebler Estate*, 131 Mich App 441, 443–444; 345 NW2d 713 (1984).
10. See *Burnham v Kelley*, 299 Mich 452, 464; 300 NW 127 (1941) ("Compensation for [an executor's] services is based upon the theory that a service well performed should be paid for."); *In re Gerber Trust*, 117 Mich App 1, 15; 323 NW2d 567 (1982) (a trustee is allowed compensation for "administering the trust," but not other actions); *In re Horns Estate*, 295 Mich 193, 195; 294 NW 150 (1940) (a guardian for a minor's estate is entitled to reasonable compensation in relation to the circumstances of supervision required).
Attorney services "on behalf of and beneficial to" a conservator or decedent estate are compensable, as are any actions undertaken in furtherance of compensable fiduciary actions. Also, "[b]ecause the orderly administration of an estate requires that fiduciaries not be changed unnecessarily," attorney fees expended by a fiduciary in successful defense of his or her fiduciary office are compensable, assuming no other wrongdoing. *In re Valentino Estate*, 128 Mich App 87, 95; 339 NW2d 698 (1983).
11. See *Brack*, 121 Mich App at 591; *In re Humphrey Estate*, 141 Mich App 412, 441; 367 NW2d 873 (1985); *Noble v Mc Nerney*, 165 Mich App 586, 600–601; 419 NW2d 424 (1988).
12. *In re Baldwin's Estate*, 311 Mich 288, 307; 18 NW2d 827 (1945).
13. *In re Thacker Estate*, 137 Mich App 253, 264; 358 NW2d 342 (1984).
14. *Wagstaff v Mfr Nat'l Bank*, 588 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.
15. *Baldwin*, 311 Mich at 314.
16. *Valentino*, 128 Mich App at 95–96.
17. *In re Prichard Estate*, 164 Mich App 82, 87; 416 NW2d 331 (1987).
18. *In re Davis's Estate*, 312 Mich 258, 265–266; 20 NW2d 181 (1945).
19. *Comerica v Adrian*, 179 Mich App 712; 446 NW2d 553 (1989).
20. *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").
21. *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).
22. *Id.* at 530–531.
23. *Buko v Munger*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 290708).
24. 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).
25. *In re Winters Estate*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 265183).
26. *Wisner 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.").
27. *Smith*, 481 Mich at 531.
28. See *Krueger*, 176 Mich App at 251; *Humphrey*, 141 Mich App at 439–440.
29. *Smith*, 481 Mich at 531.
30. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).
31. *Becht*, 279 Mich at 640.