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Fair and Reasonable Attorney Fees

Jack Griesmar*

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money getting trade.¹

WAGES, SALARIES, FEES, and commissions are the means by which most of us are paid for the work we do. We work at our jobs for compensation which is fair and reasonable for the services we provide for our employers. In most areas of endeavor there may be established a "going rate" for a particular kind of work to be done, by a particular individual, possessing particular skills. The rate which is paid for the work is set in advance of the employment, with both the employer and employee knowing, for the most part, exactly what is to be expected of each in the relationship. This rate, in the form of a salary, hourly rate, rate of commission, or fee is the amount paid to the employee for the service rendered. This sum of money is the employee's compensation.

"Reasonable compensation," or what each individual hopes to attain for the service he renders, is that amount which will fairly compensate the laborer, considering the character of the work and the effectiveness and ability entering into the service.²

The beginning of each attorney and client relationship places the attorney in a position of having to determine the worth of his service for the particular work required of him, in order that he may do the "job" for this particular client. The attorney has invested a great deal of time and expense in developing his skills in the area of the law. He is given the right to charge for the service which he can render by the state or states in which he is licensed to practice his trade.³ The question then presents itself: What is a fair and reasonable fee?

Each individual attorney approaching the question of what to charge a particular client undoubtedly has certain factors which he takes into consideration. My purpose here will not be to devise some magic formula through which a fee can be determined by application to each case. Rather, I will merely review those considerations which the courts have indicated are proper in determining a fair and reasonable fee. Each attorney hopes that his fee will never have to stand up to the test of the

* B.B.A., Ohio Univ.; Fourth-year student at Cleveland-Marshall Law School.

¹ ABA Canons of Professional Ethics No. 12.

² Black, *Law Dictionary* 354 (4th Ed. 1951); *Chapman v. A. H. Averill Machinery Co.*, 28 Idaho 121, 152 P. 573, 575.

³ *Prather v. First Presbyterian Society*, 13 Ohio N.P. (n.s.) 169, 183, 25 Ohio Dec. 613, 627 (C. P. 1912); 7 *Am. Jur. 2d* 180, *Attorneys at Law* § 203 (1963). Fees, including litigation expenses, are treated in, *Oleck, Cases on Damages*, c. 17 (1962).

courts. However, attorneys must deal with human beings, and human beings are prone to controversy. By a careful study of the criterion which a court will consider in establishing a fair and reasonable fee, the attorney can better approach his own particular situation. Ideally, in the end the attorney is justly compensated for his services and the client is charged a fair amount for the services received.

The attorney's most valuable asset is the goodwill he is able to create. The attorney is not allowed to advertise⁴ his services and must depend, for the most part, on his reputation to bring him his business. An excessive fee may not be such a flagrant abuse that it will result in disbarment, but it might well be subject to litigation in a civil action.⁵ The harm done the attorney's good will may be irreparable.

The controlling factor in the determination of the fee should be Canon 12 of the American Bar Association Canons of Professional Ethics. Set forth are those considerations which are proper in consideration of the amount of the fee. The canon begins with the admonishment that: "In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them."⁶ The canon goes on to discuss proper and improper considerations.

In a recent case, an attorney had worked on a partition of land over a period of five years, and spent some 100 hours in handling the case. The attorney succeeded in overturning a landmark decision against his clients. The court approved a fee of \$48,625 for the attorney stating:

The value of legal services will often times depend upon a variety of considerations, such as skill and standing of the person employed, the nature of the controversy, the character of the questions at issue, the amount or importance of the subject matter of the suit, the degree of responsibility involved in the management of the cause, the time and labor bestowed. For such services there can be no established market price.⁷

In its opinion in *Hofing v. Willis*⁸ the court pointed out most of those factors considered in Canon 12.

The ability and standing of the attorney has been often held to be a primary item to be considered in the determination of the fee.⁹ This

⁴ ABA Canons of Professional Ethics No. 27.

⁵ *Colorado Bar Assn. v. Robinson*, 32 Col. 241, 75 P. 922 (1904); *Grievance Committee v. Ennis*, 84 Conn. 594, 80 A. 767 (1911), Court said that though the attorney's fee was excessive, it was not grounds for disbarment unless the attorney refused to repay the amount in excess of what the court felt was a fair and reasonable fee; *People ex rel. Chicago Bar Assoc. v. Pio*, 308 Ill. 128, 139 N.E. 45 (1923), Court indicated that there would be grounds for disbarment, if the overcharge is made solely for the purpose of permitting the attorney to use the funds of his client under the guise of retaining them as fees.

⁶ *Supra* note 1.

⁷ *Hofing v. Willis*, 83 Ill. App. 2d 384, 227 N.E. 2d 797 (1967).

⁸ *Ibid.*

⁹ *Annot.*, 56 A.L.R. 2d 28 (1957); *Central Standard Life Ins. Co. v. Gardner*, 36 Ill. App. 2d 292, 304, 183 N.E. 2d 881 (1962).

consideration has also been expanded to take into account the ability and standing of the opposing counsel.¹⁰ These can be very important, especially with the ever increasing specialization of law practices today. One must be careful, however, that the expertise on which the attorney bases the application of a certain fee is relevant to the case in question. When he has special skills and standing in one area of the law, the attorney is not justified in charging for services in another area which does not call for the application of those qualifications.¹¹ The mere fact that an attorney is inexperienced is not, however, to be taken as an indication that he cannot obtain a fair compensation for his services. In a case handled by an attorney who had been at the bar for only seven years, the court in allowing him a fee of \$35,000 said: "The very economy of counsel's methods and his youth were perhaps the most significant hallmarks of an outstanding talent."¹²

The nature of the controversy involved embraces several considerations which the courts have deemed important in determining a fee. Courts have consistently held that the nature, extent, and difficulty of the service to be rendered are basic to the consideration of the amount of the fee.¹³ The fact that the attorney is involved in handling a particular matter may cause him to lose other employment, and this should very definitely be taken into consideration.¹⁴ This encompasses not only the loss of other employment due to the time taken by the case at hand, but also the fact that here may be involved in the case certain elements which might cause the attorney to lose future business because of his association with this case.¹⁵ Where the possibilities of collection are remote and depend to a great extent on the outcome of the cause,¹⁶ the contingency of the fee which is to be charged may work to increase the amount of the fee. On the other hand, where there is little doubt that the fee will be paid, there may be justification for a lesser fee.¹⁷ In *Hofing v. Willis*,¹⁸ the court points out that the attorney had overcome great odds in overturning a landmark decision which was adverse to his

¹⁰ *Ward v. Ward*, 114 N.W. 2d 273 (Minn. 1962).

¹¹ *Milwaukee Towne Corp. v. Lowe's Inc.*, 190 F. 2d 561 (7th Cir. 1951).

¹² *Cape Cod Food Products, Inc. v. National Cranberry Assn.*, 119 F. Supp. 242 (D. Mass. 1954).

¹³ Annot., 56 A.L.R. 2d 20 (1957).

¹⁴ *Fernandez v. Fernandez*, 194 Cal. App. 2d 782, 15 Cal. Rptr. 374 (1961); Annot., 56 A.L.R. 2d 27 (1957).

¹⁵ *Perrine v. Pennroad Corp.*, 29 Del. Ch. 423, 51 A. 2d 327 (1947), Court pointed out that it was obvious, because of the personalities involved in this corporate dissolution, that the attorney would suffer repercussions from being involved in this case.

¹⁶ *Buckley v. Surface Transportation Corp.*, 227 App. Div. 224, 98 N.Y.S. 2d 576 (1950).

¹⁷ *State v. DeKeyser*, 29 Wis. 2d 132, 138 N.W. 2d 129 (1965). Under a statute providing for compensation of a court appointed attorney, certainty of payment from public treasury is a factor justifying a lower fee than usually charged a private client.

¹⁸ *Hofing v. Willis*, *supra* note 7.

clients. This consideration clearly encompasses both the skill of the attorney and the amount of time and labor expended in order to do a proper job.

The amount of money or other property involved is another consideration to be weighed.¹⁹ Certainly this cannot be the sole factor considered; if the amount involved, even though large in denomination, does not measurably increase the work involved, or enlarge the principles of law involved, it cannot be a determining factor in charging a very high fee.²⁰

However, the benefit enuring to the client²¹ is an important factor to be considered in setting of the fee. Due to the fact that a fee depends, in large part, on the ultimate benefit to the client, to this extent many fees involve a contingent element.²² This is not to say the amount of the recovery alone will justify a fee. Such things as establishing a precedent,²³ overturning a landmark decision,²⁴ or obtaining a result which will benefit not only his clients but others who are similarly situated,²⁵ may be taken into consideration in determining the correctness of the fee. Thus, though lack of success does not ordinarily justify no fee being paid at all,²⁶ the lack of a favorable result may very well have a bearing on the amount of compensation for the services which were rendered.²⁷

The amount of money or property involved also has a direct effect on the amount of responsibility assumed by the attorney. This responsibility goes to the heart of the attorney-client relationship in many instances and has often been held to be an appropriate factor in the determination of the fee.²⁸ The fact that the attorney was able to recognize the importance of the issues involved,²⁹ and the fact that an attorney staked his reputation on the outcome of a particular case,³⁰ have been considerations relating to the responsibility assumed and have been deemed proper in the assessment of a large fee. A client's ability to pay may, in part, depend on the outcome of the action which the attorney is

¹⁹ Annot., 56 A.L.R. 2d 31 (1957).

²⁰ *Young v. Young*, 354 Mich. 254, 92 N.W. 2d 328 (1958).

²¹ Annot., 56 A.L.R. 2d 37 (1957); see also, *Central Standard Life Ins. Co. v. Gardner*, *supra* note 9, Court said, concerning attorney for defense, that the amount of savings made for the client is a proper consideration; 7 Am. Jur. 2d 185, *Attorneys at Law* § 242 (1963).

²² *Kenny v. McAllister*, 198 Md. 521, 84 A. 2d 897 (1951).

²³ *In re Bailey's Estate*, 354 P. 2d 920 (Wash. 1960).

²⁴ *Hofing v. Willis*, *supra* note 7.

²⁵ *In re Arkansas Fuel Oil Corp.*, 234 F. Supp. 31 (D. Del. 1964).

²⁶ Annot., 56 A.L.R. 2d 40 (1957).

²⁷ *Crary v. Goldsmith*, 322 Mich. 418, 34 N.W. 2d 28 (1948); *In re Atwood's Trust*, 227 Minn. 495, 35 N.W. 2d 736 (1949).

²⁸ Annot., 56 A.L.R. 2d 31 (1957); 7 Am. Jur. 2d 185, *Attorneys at Law* § 241 (1963).

²⁹ *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F. 2d 190 (9th Cir. 1964).

³⁰ *Golden v. Aldell Realty Corp.*, 70 N.Y.S. 2d 341 (1941).

handling for him; but more probably, will depend on the financial status of the individual.

I am sure a good many laymen feel that most professional men such as attorneys, doctors, and accountants, are out to exact as high a fee as his client can afford. This is not, however, a proper consideration in most instances.³¹ In *Prather v. First Presbyterian Society*,³² the court said: "Many attorneys act upon the principle of the French Minister, Colbert, who in the matter of taxation always endeavored to pluck as many feathers off the goose as he could possibly pluck, without making the goose squeal." The only area in which the courts have held the ability of the client to pay as a proper factor has been the area of divorce.³³ The guiding principle in this area is that stated in Canon 12. This expresses that the ability of the client to pay may only be a proper factor to consider in a negative sense in that "his poverty may require a less charge, or even none at all."³⁴ This proposition has been consistently upheld by the courts.³⁵ Attorneys are officers of the court, and the court must protect itself against any abuse of the privileges which these officers possess.³⁶

The time which the attorney spends in handling a matter for his client has sometimes been overemphasized, either from the point of view of the attorney seeking a high fee,³⁷ or from the point of view of the client who complains that the matter did not require a great deal of time on the part of the attorney.³⁸ The courts recognize that in certain areas attorneys have developed an expertise which allows them to handle a matter within their experience much more efficiently than a lawyer who has not had a great deal similar experience in that area, and that expertise should be rewarded.³⁹ Where the amount of time spent is considered, the courts must then look not only to the time spent, but also to many of the other factors which have been outlined above.⁴⁰ In one case

³¹ Annot., 56 A.L.R. 2d 40 (1957); 7 Am. Jur. 2d 185, *Attorneys at Law* § 243 (1963).

³² *Prather v. First Presbyterian Society*, 13 Ohio N.P. (n.s.) 169, 181, 25 Ohio Dec. 613, 625.

³³ *Hodson v. Hodson*, 276 Ala. 227, 160 So. 2d 637 (1964); *Ryan v. Ryan*, 267 Ala. 677, 104 So. 2d 700 (1958); *Hempel v. Hempel*, 225 Minn. 287, 30 N.W. 2d 594 (1948); the Court indicated that in a situation where the husband was of considerable means and could afford competent counsel, the wife should be allowed to do so also to equalize the contest.

³⁴ ABA Canons of Professional Ethics No. 12.

³⁵ Annot., 56 A.L.R. 2d 41 (1957).

³⁶ *Prather v. First Presbyterian Society*, *supra* note 32 at 626.

³⁷ *In re General Stores Corp.*, 164 F. Supp. 130 (S.D. N.Y. 1960).

³⁸ *Pacific Mut. Life Ins. Co. v. Schlakzug*, 180 S.W. 2d 980 (Tex. Civ. App. 1944); *Derdiarian v. Futterman Corp.*, 254 F. Supp. 617 (S.D. N.Y. 1966).

³⁹ *Ibid.*

⁴⁰ *In re General Stores Corp.*, *supra* note 37, Court recognized the experience and standing of certain attorneys within a law firm in noting that about one half of the time spent on the case was spent by junior members of the firm.

where much of the time spent was devoted to obtaining a change of venue, the court would not allow the attorney a fee based solely on the time involved. The court felt the attorney had filed the action in the wrong court in the first place; and thus, it was his own fault that the case required as much time as it did.⁴¹ In a second case, where one attorney was substituted for another in course of the action, at the request of the attorney chosen by the client, the court said that the combined fee of both attorneys could not exceed the full value of services performed if they had been rendered by a single attorney.⁴²

The attorney must be careful that he does not allow himself to rely solely on the minimum schedule of fees promulgated by the bar association to which he belongs. The courts have indicated that these minimum fee schedules may be considered as persuasive evidence but are by no means conclusive.⁴³ Custom and prevailing rates are also taken into consideration but again are not conclusive.⁴⁴

There are several other considerations which may be used, such as current price trends and differences in the cost of living from one area to another.⁴⁵ One court went so far as to take judicial notice of the fact that attorneys' fees had not kept pace with the economic spiral.⁴⁶ In addition, overhead costs may be a factor in setting of the fee.⁴⁷ A court in Michigan indicated that an efficiently operated law office had to allocate about thirty-five per cent of its gross income to office expenses.⁴⁸ Furthermore, there may be a contract between the client and attorney which, through no fault of the attorney, has been discharged before its completion. In such cases this contract may be regarded as a guide to the intent of the parties concerning the fee.⁴⁹ The courts, too, have looked to the nature of the employment, to determine whether it is of a permanent and continuing nature or whether it is just temporary.⁵⁰

⁴¹ *Cirimele v. Shinazy*, 134 Cal. App. 2d 50, 285 P.2d 311 (1955).

⁴² *In re Lieberman's Estate*, 151 N.Y.S. 2d 166 (Sur. Ct. 1956); *In re Folker*, 47 F. Supp. 522 (E.D. Mich. 1942); *E. V. Prentice Co. v. Associated Plywood Mills, Inc.*, 113 F. Supp. 182 (D. Oreg. 1953).

⁴³ *Perlman v. Feldman*, 160 F. Supp. 310 (D. Conn. 1958); Annot. 56 A.L.R. 2d 45; 7 Am. Jur. 2d, *Attorneys at Law* § 246 (1963). *Hunker v. Melugin*, 74 N.M. 116, 391 P. 2d 407 (1964).

⁴⁴ *Angoff v. Goldfine*, 270 F. 2d 185 (1st Cir. 1959); *A. & S. Air Conditioning v. John J. Moore Co.*, 184 Cal. App. 2d 617, 7 Cal. Rptr. 592 (1960).

⁴⁵ *Re Dole Co.*, 244 F. Supp. 751 (D. Me. 1965); Annot., 56 A.L.R. 2d 46 (1957).

⁴⁶ *In re Felton's Estate*, 199 Misc. 507, 99 N.Y.S. 2d 351 (1950).

⁴⁷ 7 Am. Jur. 2d, *Attorneys at Law* § 247 (1963); Annot., 56 A.L.R. 2d 47 (1957).

⁴⁸ *Babcock v. Public Bank*, 366 Mich. 124, 114 N.W. 2d 159 (1962).

⁴⁹ Annot. 56 A.L.R. 2d 48 (1957); 7 Am. Jur. 2d, *Attorneys at Law* § 249 (1963).

⁵⁰ *Wilhoit v. Brown*, 295 Ky. 732, 175 S.W. 2d 529 (1943); *American Jewish Joint Distribution Committee v. Eisenberg*, 194 Md. 193, 70 A. 2d 40 (1949).

Conclusion

With proper consideration to all of these factors, the reasonableness of the fee is to be determined at the place where the attorney resides and practices;⁵¹ and, as far as the law is applicable in the determination, the law at the time of the determination will be controlling.⁵² Though some courts have held that evidence regarding amounts of fees in similar cases is in-admissible as evidence of the amount of a fee,⁵³ the prevailing view is that a court may consider specific amounts paid or allowed in other cases involving similar circumstances.⁵⁴ The great danger to be avoided by both courts and the individual, in attempting to establish a fair and reasonable fee, is the rise in the cost of living.⁵⁵ This factor, of course, affects the value of precedent of earlier decisions.

The considerations which go into establishing a fair and reasonable attorney fee are many. No single consideration or combination of them would be satisfactory for all situations.⁵⁶ Each fee, if tested, must be based on competent evidence that it was established with regard for those considerations which are proper in the particular situations involved.⁵⁷

A 1950 study of the increases in income for the period from 1929 to 1949 indicates that in that period doctor's income increased one hundred twenty-five percent and incomes of all earners increased one hundred nine percent, while the incomes of attorneys had increased only forty-six percent.⁵⁸ In order that the attorney may make a wage commensurate with the efforts put forth in the practice of law, while not antagonizing either his clientele or the courts, great care must be taken in establishing the fee. The considerations set out here, which for the most part are elaborations on Canon 12, must be kept in mind at all times. They are, however, only guides,⁵⁹ and in the last analysis cannot dictate the amount of a fee or indicate whether an established fee is fair and reasonable. In the end, this is for the attorney to decide on the basis of all the factors involved in the matter, with a view towards promulgating the administration of justice.⁶⁰

⁵¹ 7 C.J.S., *Attorney and Client* § 191 at note 95 (1937).

⁵² *Id.* at note 95.5.

⁵³ *Stringer v. Breen*, 7 Ind. App. 557, 34 N.E. 1015 (1893); *Davis v. Walker*, 131 Ala. 204, 31 So. 554 (1901).

⁵⁴ *Haley v. Horwitz*, 290 S.W. 2d 414 (Mo. App. 1956); *Stechel v. Lurie*, 185 F. 2d 921 (6th Cir. 1950); *Cape Cod Food Products, Inc. v. National Cranberry Assn.*, 119 F. Supp. 242 (D. Mass. 1954).

⁵⁵ *Annot.*, 56 A.L.R. 2d 46 (1957).

⁵⁶ *Hofing v. Willis*, 83 Ill. App. 2d 384, 227 N.E.2d 797 (1967).

⁵⁷ *Lyle v. Lyle*, 167 So. 2d 256 (Fla. App. 1964); *Sullivan v. Fawver*, 58 Ill. App. 2d 37, 206 N.E. 492 (1965).

⁵⁸ *Cantrall, Economic Inventory of the Legal Profession: Lawyers Can Take a Lesson From Doctors*, 38 A.B.A.J. 196 (March, 1952).

⁵⁹ ABA Canons of Professional Ethics No. 12.

⁶⁰ *Ibid.*