

TO FIX AND DETERMINE: LEGAL FEES

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Staten Island Women's Bar Association

Powers and Authority

1. An attorney must provide a letter of engagement or written retainer for any services over \$3000.00 (NYCRR §§1215.1 & 1215.2). Failure to do so requires the attorney to establish that the oral retainer agreement was fair, understood, and accepted by the client (*Gary Friedman PC v. O'Neill*, 115 AD3d 792 [2 Dept. 2014]).
2. A fiduciary is authorized to pay reasonable legal fees without court approval (EPTL §11-1.1[22]).
3. The Surrogate has broad authority to determine legal fees in all cases (*Stortecky v Mazzone*, 85 NY2d 518 [1995]). The burden is on the attorney seeking compensation to establish reasonable legal fees (*In Re Talbot*, 134 AD3d 726, 727 [2d Dep't 2015]), and the Surrogate's determination of the reasonable legal fees will be upheld except for an abuse of discretion in fixing the legal fee (*Matter of Freeman*, 34 NY2d 1 [1974]). Abuse of discretion may be shown by the court's failure to show how the fee was determined (*Matter of Ury*, 108 AD2d 816 [2d Dept 1985]).

Petition to Fix and Determine Legal Compensation SCPA §2110

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding, the court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of their duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.
2. A separate proceeding may be instituted by the filing of a petition by a fiduciary of the estate, a person interested in the estate, or an attorney who has rendered services on behalf of the estate. The court may direct payment from the general estate or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested.
3. In the event that an attorney has already been paid an amount in excess of the fair value of legal services as determined by the court, the court is authorized to direct the attorney to refund the excess.
4. In any proceeding under this act or the estates, powers and trusts law in which the court determines the compensation of an attorney, the court shall consider the time and value of services performed by a person who is not an attorney, provided such services are performed under the supervision of an attorney and would, if performed by an attorney, be considered by the court in determining the attorney's compensation.

Affidavit of Legal Services NYCRR §207.45

1. In any proceeding in which the relief requested includes the determination of compensation of an attorney or the allowance of expenses of counsel, there shall be filed with the petition an affidavit of services which shall state when and by whom the attorney was retained; the terms of the retainer; the amount of compensation requested; whether the client has been consulted as to the fee requested; whether the client consents to the same or, if not, the extent of disagreement or nature of any controversy concerning the same; the period during which services were rendered; the services rendered, in detail; the time spent; and the method or basis by which the requested compensation was determined. The affidavit also shall state whether the fee includes all services rendered and to be rendered up to and including settlement of the decree and distribution, if any, and whether the attorney waives a formal hearing as to compensation.

2. Except when the SCPA otherwise provides or when compelling reasons exist for so doing, the court shall not fix attorneys' compensation or make allowances to parties for counsel expenses unless a proceeding is instituted under SCPA 2110 or unless, in an accounting, the petition and citation state that an application will be made for determination of compensation, the allowance of counsel expenses and the amount thereof.

3. Reports, affidavits and statements relating to fixation of fees and allowances shall be served upon the petitioner and upon all attorneys, guardians ad litem and parties appearing in person (other than those who have theretofore filed waivers). Proof of such service shall be filed with the court.

4. In any proceeding for the determination of kinship in which an attorney appears for any party not a resident of the United States, the attorney shall institute a proceeding pursuant to SCPA 2110 for the fixation of his or her compensation and shall comply with the provisions set forth in subdivisions (a) through (c) of this section.

Factors for Determining the Amount of Legal Fees

Matter of Potts, 213 AD59 (4th Dept 1925) and *Matter of Freeman*, 34 NY2d 1 (1974): Results, complexity, nature of services, amount of the estate, professional standing, time spent, contemporaneous time records.

Estate of Mergentime, 207 AD2d 453 (2nd Dept 1994): the absence of complex issues is a basis for reduction of fees. A computer-generated time sheet is not dispositive. The more skilled the attorney the less time is required to handle simple estates.

Matter of Bobeck, 196 AD2d 496 (2d Dept 1993): neither retainers nor an attorney's time records are dispositive. Complexity and the size of the estate bear upon the time claimed by the attorney. Moreover, executorial work is not compensable as legal fees and an attorney may be denied fees where her actions show an effort to unnecessarily protract litigation.

Estate of Rappaport, 150 AD2d 779 (2d Dept 1989): heavily litigated issues may justify legal fees.

Matter of Ury, 108 AD2d 816 (2d Dept 1985): the absence of the court's computation of legal fees may prevent review on appeal.

Matter of Lanyi, 147 AD2d 644 (2d Dept 1989): Surrogate can administratively require all attorney/fiduciaries to account yearly; attorney bears the burden of proving the reasonableness of both the retainer agreement and the fees requested. The court should consider customary fees charged by the Bar for similar services.

Matter of Smolley, 188 AD2d 535 (2d Dept 1992): An attorney who represents the nominated executor in defending the estate from “unjust attack” in attempting to have the nominated executor appointed, should be compensated from the estate corpus because such actions help realize intent and purpose of the testator.

Estate of Schaich, 55 AD2d 914 (2d Dept. 1977): the absence of contemporaneous time records may undercut an attorney’s request for compensation.

In re Brem, 27 AD2d 95 (2d Dept. 1971): time spent is not dispositive. Skilled professionals can handle complex matters in less time. “It is significant that no one has objected to the requested allowance.” The Surrogate, in exercising discretion, rejected the customary Bar fee.

Matter of Goldin, 104 AD2d 890 (2d Dept 1984): discharged attorneys are entitled to be compensated on a *quantum meruit* basis.

Matter of Phelan, 173 AD3 621 (2d Dept 1991): retainers and consent of distributees are not dispositive. Executorial functions are not compensable as legal fees. Contemporaneous time records are significant and of greater value than post-completion estimates.

Factors for Determining the Source of Attorney’s Fees

Matter of Hyde, 15 NY3d 179 [2010]:

1. Beneficiary act in their own interest or the estate’s interest.
2. Benefits to individual beneficiaries.
3. Extent of individual beneficiaries participation in the proceeding.
4. Good/bad faith in the proceeding.
5. Justifiable doubt in the fiduciaries conduct.
6. The portions of interest in the non-objecting beneficiaries.
7. Future interest affected of reallocation of fees to individual beneficiaries rather than the estate.