

Louisiana State Bar Association
Public Opinion 21-RPCC-22¹
Lawyer’s Use of Percentage-Based Fees in Representing Succession Representatives

It is not per se unethical for a lawyer representing a succession representative to charge a fee that is calculated with reference to a percentage (customarily, in the range of 2.5 to 3%) of the value of the estate. While not a “contingency” fee, this percentage method in succession matters constitutes a form of “fixed” fee that is permitted by the Louisiana Rules of Professional Conduct. As with all types of fees, however, the agreed-upon percentage shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, and the amount of the fee yielded by application of the percentage must be reasonable pursuant to the factors outlined in Rule 1.5(a). Succession lawyers who use the percentage method in their practices, therefore, should exercise care to ensure that this type of fee arrangement is appropriately within ethical boundaries based on considerations such as the estate’s value and the amount and complexity of the work necessary to complete the succession.

The scenario is a common one: A client named as a succession representative (*e.g.*, an executor or executrix) appears at the office of his or her lawyer to request representation in that capacity. The lawyer is willing and able to undertake the representation, but what of the fee? Unlike other clients, succession representatives, who themselves are taking on duties and providing a service, may be less inclined to agree to pay by the hour. Historically, some lawyers confronted with this question have set aside hourly arrangements in favor of a fee expressed as a small percentage of the value of the estate that is the subject of the succession. On the surface, the percentage method sounds benign enough. With such succession fees usually ranging from 2.5 to 3% of estate value, typical “contingency” fees in personal injury cases can dwarf them by ten times or more. For estates of modest value, a fee calculated with reference to a low percentage may be

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sensible, and, more importantly for ethics purposes, reasonable. As the size of the estate increases and other considerations emerge, however, that calculus can change in a way that may render the amount of the fee excessive, possibly triggering court review or even a disciplinary investigation. The purpose of this opinion is to assist practitioners in understanding the nature of these fee arrangements and the dividing line that separates the permissible from the forbidden. In considering this fee practice, the Committee believes that the Louisiana Rules of Professional Conduct that are most implicated are Rules 1.5(a),² (b),³ (c),⁴ and (f)(2).⁵

What Kind of Fee is It?

Initially, charging a fee equal to a percentage of an estate's value for representing the succession representative is not automatically a *prohibited* fee, but it is not a *contingency* fee either. On a fundamental level, no citation is necessary for the point that a "contingency" fee contemplates

² Rule 1.5(a) states:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- and
- (8) whether the fee is fixed or contingent.

³ Rule 1.5(b) states:

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

⁴ Rule 1.5(c) states in relevant part:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered...

⁵ Rule 1.5(f)(2) states in relevant part:

(2) When the client pays the lawyer all or part of a fixed fee or a minimum fee for particular representation with services to be provided in the future...

that the representation involves a true “contingency,” *i.e.*, the occurrence of an uncertain event—most often, the prospect that a plaintiff in litigation may or may not recover on claims being handled by the lawyer and the corresponding risk that there may be no recovery at all and, to the lawyer’s disappointment, no fee at all. Representing a succession representative is different, in that the outcome is known and there is no “contingency.” In due course, the succession process will be completed, heirs and legatees will be placed into possession of the property to which they are entitled, the lawyer’s client will be discharged from his or her duties, and a fee payment to the lawyer is all but assured.

For these reasons, the Committee concludes that, despite the use of a percentage for purposes of determining the amount of the fee, these fees are not “contingency” fees governed by Rule 1.5(c). Rather, it is the opinion of the Committee that the percentage method for charging a fee for succession work is a species of “fixed” fee within the meaning of Rules such as 1.5(a) and (f)(2).⁶ Fixed fees (sometimes also referred to as flat fees) are generally permissible in Louisiana. Therefore, charging a fee expressed as a percentage of the value of an estate in undertaking to represent a succession representative should not be considered a *per se* violation of any of the Louisiana Rules of Professional Conduct. Rather, as discussed below, the potential danger lies elsewhere.

The Rule of Reasonableness

All Louisiana lawyers should bear in mind that—no matter the types of fee arrangements they utilize with their clients—*all legal fees* are subject to the standard of reasonableness set forth in Rule 1.5(a) because a lawyer cannot “make an agreement for, charge or collect an unreasonable

⁶ The Committee recognizes that, strictly speaking, Rule 1.5(f)(2) concerns the handling of fees paid in advance, which is not the focus of this opinion. That provision is cited as an example of an indicator that fixed fees are recognized and allowed in Louisiana.

fee.” Rule 1.5(a). The factors for assessing reasonableness appear in subparagraphs (1)-(8) of that rule and related jurisprudence. In short, in the succession context, if application of those factors to the dollar amount to be received by the lawyer under the percentage method yields a reasonable fee, the arrangement should raise no ethical concerns on that basis. On the other hand, regardless of the amount of the *percentage*, if the ultimate *dollar* amount of the fee to the lawyer is deemed unreasonable, serious consequences can follow, including review and reduction by the court presiding over the succession and the possibility of an inquiry in the disciplinary system.

Determining the reasonableness of a fee can be difficult and imprecise. Nevertheless, there are guideposts that may be helpful to succession practitioners in the fee assessment process. Initially, and for the reasons discussed above, lawyers engaged in succession work cannot assume that their “fixed” fees must be considered reasonable merely because the percentage used to calculate them is lower than a typical “contingency” fee, as often is charged by a plaintiff’s lawyer in a personal injury matter. Similarly, lawyers should look beyond the amount of the percentage to the ultimate amount of the fee that the percentage is anticipated to generate.

Consistent with the principle that one size does *not* fit all, the lawyer should also consider that a particular percentage that results in a reasonable fee in one succession may produce an unreasonable fee in a different succession. This is more likely to occur as the value of the estate increases and/or the amount of work necessary to complete the succession decreases. In other words, for relatively small to mid-range estates that require only a commensurate level of service by the lawyer, the percentage method often will result in a fee to the lawyer that is plainly reasonable. A number of circumstances, however, either alone or in combination, may upset the usual analysis, including without limitation:

- Estates that are large and known to be valued at a very high level;

- Estates where the values are uncertain, and which present incentives to maximize values to achieve a “step up” in tax basis; and/or
- Estates for which the amount of work required by the lawyer is limited or where the work performed is routine and uncomplicated.

Accordingly, at the outset of a representation, a lawyer using the percentage method should evaluate whether, under the circumstances, implementation of a given percentage based on the value of the estate will lead to the lawyer collecting an unreasonably high fee, such as in a case involving a large estate with an otherwise routine succession. If that evaluation suggests the dollar amount of the fee may rise to unreasonable levels, the lawyer should either lower the percentage commensurately or explore an alternative fee arrangement with the succession representative.

Communication and Clarity

Rule 1.5(b) is clear that the lawyer “shall” communicate to the client the basis or rate of the fee and expenses for which the client will be responsible. Although the value of the estate may not be certain at the outset of the representation, the amount of the percentage should be communicated to the client to comply with this provision. Depending on the circumstances, best practices may include: (1) providing a rough estimate of the value of the estate for the client on the front-end of the representation (if possible); and/or (2) using examples and demonstrative calculations the client can understand to help establish a meeting of the minds as to the dollar amount of the fee that will be charged for the representation.

Checking and Protecting

Whether in the field of successions or other areas of practice, lawyers who charge fixed fees are not required by the Louisiana Rules of Professional Conduct to keep records of the time spent in representation of their clients. The absence of time records thus should not preclude a

succession lawyer from defending the reasonableness of a fee calculated pursuant to the percentage method. Maintaining time records, however, even if not required by the Rules, provides the means of *checking* fee reasonableness at the conclusion of a representation and arming the lawyer with defensive materials in the event of a fee dispute in court or a disciplinary complaint. The former involves the exercise of comparing the amount of the fee calculated with reference to the percentage against the amount of the total fee that would have been charged in the event that the lawyer had undertaken the representation on an hourly basis at a reasonable hourly rate.

This is not to say that the amount of a fee in a succession representation using the percentage method must be the same as or less than the fee that would have been due had the lawyer taken the matter by the hour. It is rather to say that, as the lawyer's "effective" hourly rate for the services performed climbs higher, the odds of the succession fee being deemed reasonable will decrease.⁷ If the resulting "effective" hourly rate becomes objectively unreasonable, the lawyer should voluntarily reduce the percentage of the fixed fee in the succession to a reasonable amount that comports with Rule 1.5(a).

Conclusion

It is not per se unethical for a lawyer representing a succession representative to charge a fee that is calculated with reference to a percentage (customarily, in the range of 2.5 to 3%) of the value of the estate. While not a "contingency" fee, this percentage method in succession matters constitutes a form of "fixed" fee that is permitted by the Louisiana Rules of Professional Conduct. As with all types of fees, however, the agreed-upon percentage shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, and

⁷ To avoid confusion, by "effective" hourly rate, the Committee is referring to the total amount of the fee divided by the total amount of time expended in the representation. For instance, a lawyer who spends 10 hours handling the succession of an estate valued at \$100,000 in exchange for a fixed fee of 2.5% of the estate's value would be deemed to have an "effective" hourly rate of \$250 for purposes of this cross-checking exercise.

the amount of the fee yielded by application of the percentage must be reasonable pursuant to the factors outlined in Rule 1.5(a). Succession lawyers who use the percentage method in their practices, therefore, should exercise care to ensure that this type of fee arrangement as implemented in a particular case is appropriately within ethical boundaries based on considerations such as the estate's value and the amount and complexity of the work necessary to complete the succession.