

Ethics Opinion 2020-05

Issues Presented: Whether South Dakota substantive law providing that a personal representative or the PR's "agents" (which would include the PR's lawyer) may be compensated based upon a percentage of an estate's value eliminates any need to separately analyze whether the Rules of Professional Conduct regarding reasonableness of attorney fees permit such a fee to be assessed?

Answer: No; although it is possible that a fee calculated in this way would satisfy the Rules of Professional Conduct, it is also possible that such a fee would be excessive.

Rules Implicated: 1.5

FACTS

SDCL § 29A-3-719(a) states that PR's and their agents are entitled to reasonable compensation, and then lists seven factors considered when determining the compensation. SDCL § 29A-3-719(c) then further states:

When compensation is not provided by will, or in an intestate proceeding, the personal representative may be allowed commissions upon the amount of personal property accounted for by the personal representative, excluding personal property not ranked as assets, as follows:

- (1) On the first one thousand dollars at the rate of five percent;
- (2) On all sums in excess of one thousand dollars and not exceeding five thousand dollars at the rate of four percent;
- (3) On all sums in excess of five thousand dollars at the rate of two and one-half percent.

Lawyer inquires whether the Rules of Professional Conduct permit Lawyer to rely solely upon the percentages set forth above in calculating a reasonable fee for work on behalf of a PR.

DISCUSSION

Reasonableness of fees is governed by Rule 1.5(a) of the Rules of Professional Conduct:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for fees or 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 the 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.

Although not identical, these factors are very similar to those identified in SDCL § 29A-3-719(a) as bearing on how much a PR or a PR's agent should be compensated.

This Committee has stated in Ethics Opinion 2000-5a that “any fee agreement that would not, under any circumstances, allow for a review of the fee at the conclusion of the representation to ensure that it comports with the above factors would be in violation” of the Rules. It echoed this principle in Ethics Opinion 2019-1, stating that flat fees for representation are permissible, but they still must be reasonable under Rule 1.5, and that such a flat fee must be subject to a separate reasonableness review under these eight factors.

CONCLUSION

These principles lead to the conclusion that, regardless whether South Dakota law contemplates a PR or the PR's “agent” assessing a fee based on 2.5% of an estate's overall value, South Dakota's Rules of Professional Conduct impose an independent requirement on Lawyer to determine and then charge a fee that is reasonable in light of the eight factors listed above. It is *possible* a fee calculated using the identified formula would be reasonable, but use of the formula is not *per se* reasonable.